Team No. 33
NON-MEASURING BRIEF

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

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,

On Petitions for Review of Orders of the
Federal Energy Regulatory Commission

BRIEF FOR PETITIONER, HOLY ORDER OF MOTHER EARTH

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT

ADMINISTRATIVE DECISIONS

FEDERAL STATUTES

FEDERAL ADMINISTRATIVE & EXECUTIVE MATERIAL

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

This case comes before this Court on appeal from a final order of the Federal Energy Regulatory Commission (FERC). This Court has jurisdiction over this appeal under 15 U.S.C. § 717r(b), which grants to the court of appeals of the United States jurisdiction over an "order issued by [FERC]" in the circuit "wherein the natural-gas company to which the order relates is located." Transnational Gas Pipelines, LLC, is located within the Twelfth Circuit Court of Appeals. The notices of appeal were filed in a timely manner. *Id.*; Record at 2.

STATEMENT OF THE ISSUES

I. Did FERC act arbitrarily and capriciously when it made a finding of public convenience and necessity for the AFP despite also finding that 90 percent of the transported gas will be sent to a country that does not have a free-trade agreement with the United States?

II. Did FERC act arbitrarily and capriciously when it found that the benefits of the AFP outweighed its adverse effects to HOME as a landowner and the adverse effects to HOME's environmental and cultural use of its land?

III. Does the approved route of the AFP violate RFRA because it substantially burdens HOME's religious use of its land without achieving a compelling state interest in the least restrictive means?

IV. Does the NGA provide FERC the authority to impose conditions to a certificate of public convenience and necessity (CPCN) that mitigate about fifteen percent of the project's construction related GHG emissions?

V. Did FERC act arbitrarily and capriciously when it did not consider upstream emissions in its Order and did not impose conditions in the CPCN mitigating downstream or upstream GHG emissions?

STATEMENT OF THE CASE

Holy Order of Mother Earth (HOME) is a religious order that believes "nature itself is a deity." Record at ¶ 46. The fundamental tenet of HOME's belief system is that "humans should do everything in their power to promote natural preservation over all other interests." *Id*. at ¶ 48. HOME owns land in New Union extending from the shores of Lake Williams on the west to the foothills of the Misty Top Mountains on the east. *Id*. at Ex. A. The east side of their property contains a sacred hill, to which HOME's members make a semi-annual pilgrimage, the "Solstice Sojourn." *Id*. at ¶ 48. The Sojourn has both religious and cultural value—children who have turned fifteen since the last Sojourn undergo a special religious ceremony at the sacred hill. *Id*. The AFP will run between the Misty Top Mountains and Lake Williams, cutting across two miles of HOME's property. *Id*. at ¶ 41, Ex. A. TGP will clear-cut HOME's property along the AFP's path, creating a permanent bare spot above the buried pipeline. *Id*. at ¶ 57, 59. HOME's members will have to cross the bare spot twice during every Solstice Sojourn. *Id.* at ¶ 48.

Transnational Gas Pipelines, LLC (TGP) is a limited liability company pursuing the construction of the American Freedom Pipeline (AFP). *Id*. at ¶ 1. The AFP will carry 500,000 dekatherms (Dth) per day of liquified natural gas (LNG) from the Hayes Fracking Field (HFF) in Old Union across state lines to an existing TGP transmission facility in New Union. *Id*. at ¶ 10-12. Pursuant to two precedent agreements, 450,000 Dth will be sold to International Oil & Gas Co. for export to Brazil and 50,000 Dth will be sold to New Union Gas and Energy Services Co. for domestic use. *Id.* at ¶ 11, 14. The HFF will not increase production to meet the AFP's carrying capacity, but instead will reroute gas currently delivered to the Southern Pipeline, which services states east of Old Union that expect lower demand in the coming years. *Id*. at ¶ 12. Fracking to obtain LNG, constructing the AFP, and burning the LNG will all have harmful environmental effects. *Id*. at ¶ 49. Constructing the AFP will emit 104,100 metric tons of CO2e

and the end use of the transported LNG will emit 9.7 million metric tons of CO2e per year. *Id*. at ¶ 72, 73.

In June 2022, TGP applied to FERC for a certificate of public convenience and necessity (CPCN) under Section 7(c) of the Natural Gas Act (NGA). *Id*. at ¶ 1. Over HOME's objections, FERC granted the CPCN with conditions designed to mitigate the Greenhouse Gas (GHG) impacts of constructing the AFP. *Id*. at ¶ 66. TGP will need to plant an equal number of trees as those removed for construction, utilize electric-powered equipment wherever practical, purchase "green" steel for the pipeline segments, and purchase electricity from green sources when available (collectively, the "GHG Conditions"). *Id*. at ¶ 67. FERC did not impose conditions mitigating the upstream or downstream GHG impacts of the AFP. *Id*. at ¶ 99.

Both HOME and TGP sought rehearing under the NGA's review provision. 15 U.S.C. § 717r(a). FERC denied both HOME's and TGP's requests. *Id*. at 19. On June 1, 2023, both parties appealed FERC's denial to this Court, which consolidated the cases. *Id*. at 1, 2.

STANDARD OF REVIEW

Courts review FERC's award of a certificate of public convenience and necessity under the Administrative Procedure Act's arbitrary and capricious standard. *Environmental Defense Fund v. FERC*, 2 F.4th 953, 967 (D.C. Cir. 2021); 5 U.S.C. § 706(2)(A). FERC's actions may be set aside if FERC "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation . . . so implausible that it could not be . . . the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 44 (1983). FERCs factual findings are upheld if it relied on substantial evidence in the record. 16 U.S.C. § 825l(b). When FERC's explanation for a determination is inadequate or lacking, it will be returned to FERC. *Environmental Defense Fund,* 2 F.4th at 968.

SUMMARY OF THE ARGUMENT

The Court should vacate FERC's issuance of the Certificate of Public Convenience and Necessity (CPCN) for the AFP. FERC's decision was arbitrary and capricious because FERC wrongly extended Section 3(c)(b) of the Natural Gas Act to cover the exportation of natural gas to a country that does not have a free-trade agreement with the United States and did not support its decision with any, let alone substantial, evidence. FERC's issuance was also not supported by substantial evidence because FERC incorrectly treated precedent agreements as per se substantial evidence, rather than one factor in a balance of interests.

FERC also arbitrarily and capriciously balanced the benefits of the AFP against the adverse impacts of the AFP to affected landowners. FERC's showing of public benefits must be proportional to the considerable use of eminent domain to complete the project. FERC thus failed to consider a crucial factor in its balancing of the benefits and harms of the AFP. Even if FERC did balance correctly, it then denied the use of a preferred alternative route that would not have the same environmental and social harms as the AFP's approved route. FERC did so substantial evidence because it relied entirely on TGP's estimates, rather than the Environmental Impact Statement, for the costs and environmental harms of the alternative route.

The approved AFP route would violate the Religious Freedom Restoration Act (RFRA) because it would substantially burden HOME's religious exercise without achieving a compelling state interest in the least restrictive means. HOME's main religious beliefs center on the worship and protection of nature as a deity. The use of one's property for religious practice is definitionally an "exercise of religion" covered under RFRA. The AFP would substantially burden HOME's exercise both by converting HOME's land to transport environmentally damaging natural gas and by interfering with the Solstice Sojourn. FERC has not established that the AFP is the least restrictive means of achieving a compelling state interest because the

proposed alternate route offers a viable means of transporting the natural gas without burdening HOME's religious exercise.

If the CPCN is affirmed, the Court should also affirm FERC's imposition of the GHG Conditions. The NGA explicitly grants FERC the authority to impose reasonable conditions in CPCNs to ensure a project furthers the public convenience and necessity. The GHG Conditions do not implicate the major questions doctrine because the conditions are project-specific, derived from a central provision of the NGA, and not an expansion of FERC's existing authority. Applying *Chevron*, the NGA unambiguously grants FERC the authority to impose GHG related conditions in CPCNs. Alternatively, the GHG Conditions are a reasonable interpretation of the NGA's grant of authority to impose conditions in CPCNs.

Finally, the Court should remand to FERC its arbitrary and capricious decision to not impose further conditions in the CPCN that would mitigate the downstream and upstream GHG impacts of the AFP. Contrary to recent case law in the D.C. Circuit, FERC failed to analyze the significance of the downstream GHG impacts of the AFP. Furthermore, FERC failed to support with substantial evidence its decision to not impose conditions mitigating those downstream impacts. FERC also failed to analyze the upstream GHG impacts of the AFP without substantial evidence supporting its decision not to do so.

ARGUMENT

I. FERC'S FINDING OF PUBLIC CONVENIENCE AND NECESSITY FOR THE AFP WAS ARBITRARY AND CAPRICIOUS AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE BECAUSE 90 PERCENT OF THE GAS WILL BE EXPORTED TO BRAZIL AND THE REMAINING 10 PERCENT DOES NOT JUSTIFY THE CONSTRUCTION OF THE PIPELINE.

FERC should not have found public convenience and necessity for the AFP because the Natural Gas Act (NGA) implicitly devalues the public interest in international sales of natural gas to countries with which the United States does not have a free-trade agreement. FERC's

assumption, made without analysis, that the NGA supports the public need for such arrangements was arbitrary and capricious. Furthermore, FERC's treatment of the precedent agreements as per se substantial also was arbitrary and capricious.

a. FERC's finding of public convenience and necessity was arbitrary and capricious because international sales of natural gas to countries without a free-trade agreement with the United States do not support a finding of public need.

The AFP will not serve the public because 90 percent of the liquefied natural gas (LNG) transported from the AFP will be exported to Brazil, which does not have a free-trade agreement with the United States. FERC erred in finding the exportation to Brazil was substantial evidence worthy of granting the project and incorrectly refused to "put any significant weight on the end use of the LNG." Record at ¶ 9. FERC's findings contradict the plain language of the NGA.

NGA Section 7(e) requires FERC to grant a Certificate of Public Convenience and Necessity (CPCN) for a new pipeline if it "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(b). FERC is required to evaluate all factors bearing on the public interest to determine if there is a need for the project. *Atl. Refin. Co. v. Pub. Serv. Comm'n of N.Y.,* 360 U.S. 378, 391 (1959). To further clarify FERC's protocol, FERC issued a policy statement in 1999. Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (1999) (Certificate Policy Statement), *clarified,* 90 FERC ¶ 61,128 (2000), *further certified,* 92 FERC ¶ 61,094 (2000). Agency policy statements are issued "to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *PG&E v. Fed. Power Comm'n*, 506 F.2d 33, 38 n.17 (D.C. Cir 1976).

For example, the Certificate Policy Statement guides parties on how FERC interprets "all relevant factors reflecting on the need for the project." Certificate Policy Statement, at ¶ 61747. Factors demonstrating a project furthers the public interest could include "precedent agreements,

demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market." Policy Statement, at ¶ 61747. Alternatively, "the interests of landowners and surrounding communities" could demonstrate there is not a need for the project. *Id.*

Section 3(c)(b) of the NGA states, "the exportation of natural gas to a nation with which there is in effect a free trade agreement…shall be deemed to be consistent with the public interest." 15 U.S.C. § 717b(c)(b). The United States does not have a free trade agreement with Brazil. Office of the United States Trade Representative, *Free Trade Agreements,* https://ustr.gov/issue-areas/industry-manufacturing/industrial-tariffs/free-trade-agreements (last visited Nov. 6, 2023). Despite this explicit language in the NGA, FERC did "not find this distinction to be meaningful" and did "not put any significant weight on the end use of the LNG." Record at ¶ 33. Those two statements make up the entirety of FERC's reasoning for why exportation to non-free-trade and free-trade countries should be treated the same. *See id.*

FERC's decision, if upheld, would make Section 3(c)(b) superfluous. When interpreting statutes, "all of the words used in a legislative act [should] be given force and meaning, otherwise they would be superfluous." Supreme Court of the United States, *Rules of Statutory Construction and Interpretation,* Appendix A, ¶ 22 (citations omitted); *See Freytag v. C.I.R.*, 501 U.S. 868, 877 (1991) ("Our cases consistently have expressed a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."). When Congress explicitly includes a limited definition within a statute, it has implicitly excluded more general alternatives. *TRW Inc., v. Andrews,* 534 U.S. 19, 28 (2001). By explicitly declaring that exportation of LNG to countries with free trade agreements is in the public interest, Section

3(c)(b) implicitly mandates that exportation to countries without free-trade agreements requires some additional evidence to be in the public interest.

FERC acted arbitrarily and capriciously because it assumed that the sales of LNG to Brazil, accounting for 90 percent of the AFP's transportation capacity, were consistent with the public interest. Under arbitrary and capricious review, although a court is "not to substitute its judgment for that of the agency . . . the agency nevertheless must examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of U.S*, 463 U.S. at 43. FERC's explanation was not satisfactory because it reads Section 3(c)(b) out of the NGA on the basis that the distinction between free-trade and non-free-trade countries is not "meaningful." Congress, however, indicated the meaningfulness by only including the distinction for exportation; importation of natural gas has no such distinction. *Compare* 15 U.S.C. § 717b(c)(a) *with* 15 U.S.C. § 717(b)(c)(b). Thus, FERC needed to analyze whether exportation to Brazil would be in the public interest. Because FERC "relied on [a] factor[] which Congress has not intended" it acted arbitrarily and capriciously. *Motor Vehicle Mfrs. Ass'n of U.S*, 463 U.S. at 43.

b. FERC acted arbitrarily and capriciously when it treated the two precedent agreements as per se substantial evidence of public convenience and necessity.

In addition to misapplying Section 3(c)(b), FERC also put too much weight on the precedent agreements. FERC relied on *Myersville Citizens for a Rural Cmty., Inc v. FERC* and *Minisink Residents for Env't Pres. and Safety v. FERC* for the proposition that "precedent agreements will always be important, significant, evidence of demand for a project." Record at ¶ 26; *Myersville,* 783 F.3d 1301 (D.C. Cir. 2015); *Minisink,* 762 F.3d 97 (D.C. Cir 2014). Contrary to FERC's application, neither *Myersville* nor *Minisink* deemed precedent agreements to be per se substantial evidence supporting a finding of public convenience and necessity.

In *Myersville*, the D.C. Circuit did not hold precedent agreements to be substantial evidence in and of themselves. Instead, the court determined that an "affidavit and motions to intervene constituted substantial evidence to conclude the Project was fully subscribed pursuant to precedent agreements." *Myersville* 783 F.3d at 1311. The issue in *Myersville* was not whether precedent agreements are substantial evidence of public convenience and necessity, but whether affidavits and motions are substantial evidence supporting the validity of precedent agreements. In *Minisink*, the D.C. Circuit, referencing the Certificate Policy Statement, stated that precedent agreements "always will be *important* evidence of demand for a project." *Minisink,* 762 F.3d at 111 n.10 (emphasis added). Certainly, precedent agreements are important; but that is altogether different from whether they are, without more, substantial evidence supporting a finding of public convenience and necessity.

The Certificate Policy Statement supports the nature of precedent agreements as an important but non-determinative factor, stating that although precedent agreements may be useful in considering an application, the focus of FERC's consideration "will be on the impact of the project on the relevant interest balanced against the benefits to be gained." Certificate Policy Statement, at ¶ 61748. Not all sets of precedent agreements are treated equally; precedent agreements with many, varied parties are more indicative of market need than precedent agreements with a single party. *Id.* Thus, precedent agreements are to be viewed on a spectrum, requiring some analysis of their evidentiary value. Because TGP signed precedent agreements with only two parties, the facts here are much closer to the Certificate Policy Statement's less indicative, single-party-agreement scenario. Therefore, the precedent agreements are not just non-determinative, but relatively non-indicative of the demand or need for the project.

Indeed, FERC acknowledged that "export precedent agreements are simply one input into the assessment of present and future public convenience and necessity." Record at ¶ 30. Nevertheless, FERC did not treat the precedent agreements as "one input" in the assessment, instead relying on the agreements as the only requirement to grant the application. Record at ¶ 33. FERC cited *City of Oberlin, Ohio v. FERC* to support its analysis, but that case is distinguishable on multiple fronts. 39 F.4th 719 (D.C. Cir. 2022). In *City of Oberlin*, a CPCN applicant had secured eight precedent agreements, two of which, accounting for 17 percent of the pipeline's capacity, were with Canadian companies. *Id.* at 723. The D.C. Circuit affirmed FERC's CPCN issuance, finding first that the precedent agreements with the Canadian companies were in the public interest because the United States and Canada have a free trade agreement. *Id.* at 726; 15 U.S.C. § 717b(c)(b). The court then affirmed FERC's finding that there would be substantial domestic benefits from the remaining 83 percent of the capacity. *Id.* at 727. Finally, the court emphasized that the Unite States market might still benefit from the gas sold to Canada because some of it would likely be transported back into the United States. *Id.* at 727-28. Thus, the number of precedent agreements, the fact that the United States has a free trade agreement with Canada, and the fact that the United States might receive derivative benefits from the Canadian sales all distinguish *City of Oberlin* from this case. Here, there are only two precedent agreements, no free-trade agreement, and the United States would not receive the same derivative benefits from Brazilian sales.

TGP lists six domestic needs[1] for the AFP, none of which justify the project's completion. As to the first, the AFP is not adding additional capacity, but simply rerouting the

[1] Those needs are: "(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

gas from the Southway Pipeline. FERC provides no evidence supporting TGP's second claim—in fact, the AFP will connect to a pre-existing pipeline, making it unclear how access is being improved. TGP's third and fourth claims are vague and lack supportive evidence—in particular, FERC cites no evidence of why selling gas to a single domestic user will make the market more competitive. TGP's fifth claim is also unpersuasive. While it claims the AFP would "fulfill capacity in [an] undersubscribed" pipeline, it is unclear if there is any actual market need to support that claim. Finally, neither FERC nor TGP cite a scintilla of evidence that the gas transported domestically or internationally will be used to replace dirtier fossil fuels.

FERC's finding of public convenience and necessity for the AFP was not supported by substantial evidence and, therefore, was arbitrary and capricious. FERC's interpretation of the precedent agreements makes Section 3(b) of the NGA superfluous in contravention of the basic tenets of statutory interpretation. Moreover, FERC's decision placed too much weight on precedent agreements that, standing alone, do not constitute "substantial evidence" of public need for the AFP. The Court should vacate the CPCN and remand for further proceedings.

II. FERC'S FINDING THAT THE BENEFITS FROM THE AFP OUTWEIGH THE ENVIRONMENTAL AND SOCIAL HARMS WAS ARBITRARY AND CAPRICIOUS.

The benefits from the AFP do not outweigh its adverse effects. The need for and benefits of the AFP "must be balanced against the adverse impacts on landowners" like HOME. *PennEast Pipeline Co. LLC,* 164 FERC ¶ 61,098, at P. 25 (2018); Certificate Policy Statement, at ¶ 61745. This balancing test is economic in nature. *National Fuel Gas Supply Co.*, 139 FERC

---

natural gas supply in the United States; (4) optimizing the existing systems for the benefit of both current and new customers by creating a more competitive market; (5) fulfilling capacity in the undersubscribed NorthWay Pipeline; and (6) providing opportunities to improve regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels." Record at ¶ 27.

¶ 61,037, at P. 12 (2012). "Only when the benefits outweigh the adverse effects on economic interests will the Commission then proceed to complete the environmental analysis where other interests are considered." Certificate Policy Statement, at ¶ 61745. The showing of benefits must also be "proportional to the applicant's exercise of eminent domain." Certificate Policy Statement, at ¶ 61749; *see* Certification of New Interstate Natural Gas Pipeline Facilities, 90 FERC ¶ 61,128, at 61,398 (reaffirming an applicant's use of eminent domain as "a valid factor to consider in balancing" the benefits and adverse effects of a project). Because FERC did not adequately address the adverse impacts on HOME's landownership and failed to properly weigh the considerable use of eminent domain necessary to complete the AFP, its balancing of benefits and harms was arbitrary and capricious.

a. HOME's land will suffer irreparable adverse economic effects from the construction of the AFP.

The benefits from the AFP do not outweigh the pipeline's adverse effects to HOME's landowner-interest and TGP's reliance on eminent domain to complete the project. Landowners whose land will be taken via eminent domain to build a pipeline have an interest in "avoid[ing] unnecessary construction, and any adverse effects on their property associated with a permanent right-of-way." Certificate Policy Statement, at ¶ 61748. These interests are traditionally "considered synonymous with environmental impacts of a project" but nevertheless are limited to the economic nature of those environmental impacts. *Id.*

The AFP project will harm HOME's landowning interest in avoiding unnecessary construction and will permanently harm the environmental value of HOME's land. In particular, the AFP will pass through two miles of HOME's property and will require the removal of 2,200 trees and other vegetation. Record at ¶ 38. HOME's land will therefore be scarred with a two-mile long clear-cut path, under which the pipeline will lie. Record at ¶ 57. Although TGP will

plant an equal number of trees to compensate for the environmental harm of the clear-cutting, those replacements will not be at the same location as the trees that are removed. Record at ¶ 38. Therefore, HOME's land will suffer a permanent "bare spot" across the entire width of its property. Record at ¶ 59. Because the AFP will still have adverse effects on HOME's land interest even after TGP's mitigation efforts, the benefits from the AFP must be shown to outweigh the harms to HOME's land. Certificate Policy Statement, at ¶ 61745; *see Gas Transmission Northwest, LLC*, 180 FERC ¶ 61056, at P. 26-27 (2022).

b. The AFP's benefits to the market do not outweigh the adverse impact to landowners because TGP will need to exercise a considerable amount of eminent domain power.

FERC acted arbitrarily and capriciously in determining the AFP's benefits outweigh the adverse effects to HOME as a landowner because the AFP offers only minimal economic benefits once the required use of eminent domain is considered. The burden on a project applicant to show that the project's benefits outweigh its adverse effects is greater when the applicant has failed to acquire the necessary rights-of-way by negotiation. Certificate Policy Statement, at ¶ 61749; *see Turtle Bayou Gas Storage Co., LLC*, 135 FERC ¶ 61,233, at P. 30 (2011) ("[T]he applicant needs to make a showing of public benefits proportional to the exercise of eminent domain."). Generalized statements about project need are insufficient evidence to overcome the adversity to landowners from the widespread use of eminent domain. *Id.* at P 33-34; *Jordan Cover Energy Project, L.P. Pacific Connector Gas Pipeline, LP*, 154 FERC ¶ 61,190, at P. 39 (2016).

TGP may need to use a considerable amount of its eminent domain power to build the AFP, accounting for as much as forty percent of the land required for the pipeline. FERC stated that this use of eminent domain "is not significant to [its] consideration." Record at ¶ 43. That statement indicates arbitrary and capricious decision making because FERC "failed to consider

an important part of the problem." *Lands Council v. McNair,* 629 F.3d 1070, 1074 (9th Cir. 2010). At a minimum, the statement is indicative of FERC's failure to apply a proportional balancing test of benefits and adverse impacts, and the inability of the project to pass that balancing test were it applied. According to FERC's own guidelines, a "showing of *significant* public benefit would outweigh the *modest* use of federal eminent domain authority." Certificate Policy Statement at ¶ 61,749 (emphasis added). In *Jordan Cover*, FERC denied a CPCN application because the applicant presented "little or no evidence of need" for the project and "at least some portion" of the necessary property rights would be obtained via eminent domain. 154 FERC ¶ 61,190, at P. 38, 39. In that case, the pipeline would transport LNG mostly for international sales, with any additional capacity serving potential need in Oregon. *Id.* at P. 39-40. Although the government approved the applicant for international sales, FERC denied the application because the applicant did not have precedent agreements in place that indicated need.

Although TGP has precedent agreements in place, those two agreements do not show an adequate level of need for the AFP. As noted above, the Brazilian sales do not indicate a stable, long-term need for much of the AFP's capacity. Additionally, the record does not indicate a need for the transfer of LNG from its current market in the states east of Old Union to New Union. Many of the same downward pressures on demand in Old Union, like efficiency improvements and increased electrification, will likely be present in New Union as well, and neither TGP nor FERC have presented evidence to the contrary. Indeed, the NorthWay Pipeline, which will carry the domestic-use gas from the AFP, is already not operating at full capacity. Record at ¶ 14. Because FERC failed to engage in a balancing test, it arbitrarily and capaciously weighed the economic benefits of the AFP over the adverse impacts to landowners like HOME.

c. FERC acted arbitrarily and capriciously in denying HOME's proposed alternative route because the environmental analysis indicated the approved

AFP route would significantly harm the human environment and FERC did not support its decision with substantial evidence.

FERC failed to adequately consider HOME's religious views and the environmental impacts of the project when denying HOME's alternate route. FERC utilized an Environmental Impact Statement (EIS) that must have discussed "any adverse environmental effects that cannot be avoided." 40 C.F.R. § 1502.6(a)(2). Environmental effects include "cultural" effects to the "human environment," defined as "the natural and physical environment and the relationship of present and future generations of Americans with that environment." 40 C.F.R. § 1508.1(g)(4), (m). HOME presented a viable alternate route that would not have significantly impacted its cultural use of and relationship to the physical environment, thus requiring FERC to address whether the route was preferable or not. *Cf. Adorers of the Blood of Christ United States Province v. Transcontinental Gas Pipe Line Co.,* 53 F.4th 56, 67 (3rd Cir. 2022) (entertaining the notion that a religious group can challenge a CPCN issuance on the grounds that the pipeline will violate their religious beliefs while denying their claim on procedural grounds). FERC then acted arbitrarily and capriciously in denying the use of the alternate route.

The AFP will disrupt HOME's sacred appreciation for, and religious use of, their land. Every summer and winter solstice since 1935, HOME's members have made a ceremonial journey, the Solstice Sojourn, across their property to a sacred hill on the eastern side of the Misty Top Mountains. *Id.* at ¶ 48. Children who recently turned fifteen undergo a special religious ceremony during the Sojourn. *Id.* The Sojourn's path will "cross the proposed pipeline route in both directions." *Id.* The AFP is antithetical to everything HOME believes 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." *Id.* at ¶ 49.

Given the significant effects to the human environment present in the approved path for the AFP, FERC should have adopted the alternate route or provided reasoning for why the alternate route was not preferable. FERC adopted the reasoning of TGP that the alternate route would have higher construction costs and "cause more objective environmental harm" than the approved route. *Id.* at ¶ 44. FERC's error is rooted in its use of TGP's own contention about the costs and environmental harms of the alternate route. FERC was required in its EIS to evaluate the effects of the proposed action as well as "reasonable alternatives." 40 C.F.R. § 1502.16(a)(1). Because it used TGP's own contention about the environmental effects of the alternate route, rather than the EIS, FERC relied on factors "not intend[ed] for it to consider." *Lands Council v. McNair,* 537 F.3d 981, 987 (9th Cir. 2008). This reliance indicates a "clear error in judgment." *Delaware Riverkeeper Network v. FERC*, 45 F.4th 104, 108 (D.C. Cir 2022). FERC acted arbitrarily and capriciously in denying the use of the alternate route that would have negated the significant impact to human environment of HOME's land.

III. FERC'S DECISION TO ROUTE THE AFP OVER HOME'S LAND VIOLATES RFRA BECAUSE THE ROUTE WILL SUBSTANTIALLY BURDEN HOME'S RELIGIOUS EXPRESSION AND IS NOT THE LEAST RESTRICTIVE MEANS OF ACHIEVING A COMPELLING GOVERNMENT INTEREST.

FERC's decision allowing TGP to build the AFP across HOME's land violates the Religious Freedom Restoration Act (RFRA) because the pipeline route will substantially burden HOME's religious exercise without achieving a compelling state interest in the least restrictive means. The federal government may not "substantially burden a person's exercise of religion" even when the burden is incidental to the government action unless the government can show that the action furthers a compelling governmental interest and is the least restrictive means of achieving that interest. 42 U.S.C.§ 2000bb-1(a); 42 U.S.C. § 2000bb-1(b). Religious exercise, for the purpose of RFRA, means "any exercise of religion, whether or not compelled by, or central

to, a system of religious belief," as well as "[t]he use, building, or conversion of real property for the purpose of religious exercise." 42 U.S.C. § 2000cc-5(7). The substantial burden inquiry asks "whether the [government action] imposes a substantial burden on the ability of the objecting party to [act] in in accordance with *their religious beliefs*." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (emphasis in original). Under RFRA, the government must "demonstrate that the compelling interest test is satisfied through application of the challenged law" to the "particular claimant." *Holt v. Hobbs*, 574 U.S. 352, 363 (2015) (quoting *Hobby Lobby*, 573 U.S. at 726). FERC's decision to route the AFP over HOME's land directly interferes with HOME's use of its own land for its religious practice, imposing a substantial burden on HOME's exercise of religion. The AFP route is not the least restrictive means of achieving a compelling state interest as applied to HOME because an alternate, non-burdensome route exists. Therefore, FERC's decision to route the AFP over HOME's land violates RFRA.

a. The AFP will substantially burden HOME's use of its own land for its religious exercise.

FERC's approved route for the AFP will substantially burden HOME's religious exercise because it will force HOME to use its land in direct contravention of its core religious beliefs and will severely disrupt HOME's core religious ceremony. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) amended RFRA's definition of religious exercise to be more expansive, such that any exercise of religion, including the use of one's land for religious purposes, constitutes an exercise of religion. 42 U.S.C. § 2000cc-5(7); 42 U.S.C. § 2000bb-2(4) (defining "exercise of religion" in RFRA by reference to RLUIPA's definition) *see also Hobby Lobby*, 573 U.S. at 696 n.5 (stating that the argument that RLUIPA's definition should not attach to RFRA cases is "plainly wrong"). A substantial burden exists when a government action "requires the plaintiff to participate in an activity prohibited by a sincerely

held religious belief" or "prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief." *Yellowbear v. Lambert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.); *see also Davila v. Gladden*, 777 F.3d 1198, 1205 (11th Cir. 2015).

A natural gas pipeline cutting across HOME's land is entirely incongruous with HOME's belief that nature is itself "a deity that should be worshipped and respected." Record at ¶ 46. When the holder of a CPCN is unable to come to an agreement securing the land rights along the chosen path of its pipeline, the NGA allows the holder to "acquire [the land rights] by the exercise of the right of eminent domain." 15 U.S.C. § 717f(h). Thus, FERC's action does not just "put [HOME] to the choice" between compliance with a government mandate and religious doctrine. *Holt v. Hobbs*, 574 U.S. at 361 (finding a substantial burden when a party is put to such a choice); *see e.g. Hobby Lobby*, 573 U.S. at 726; *Wisconsin v. Yoder*, 406 U.S. 205, 207-08 (1972); *Sherbert v. Verner,* 374 U.S. 398, 404 (1963). Instead, because TGP can use eminent domain to take HOME's land for the AFP, FERC's decision will both require HOME to participate in an activity contrary to its religious tenets and prevent HOME from participating in an activity motivated by its religious beliefs.

Using HOME's land for a gas pipeline would be "anathema to HOME's religious beliefs and practices." Record at ¶ 49. HOME's central religious tenet is that "humans should do everything in their power to promote natural preservation over all other interests." *Id.* at ¶ 46. Every aspect of the AFP generates environmental degradation, from the "harmful environmental effects" of fracking to the "detrimental climate effects" of burning fossil fuels. *Id.* at 49. Building the AFP on HOME's property will require HOME to use its land for "an activity prohibited by a sincerely held religious belief." *Yellowbear*, 741 F.3d at 55; *See e.g. Yoder*, 406 U.S. at 218 (a substantial burden exists when government compels a group to "perform acts undeniably at odds

with fundamental tenets of their religious beliefs"). Additionally, the AFP will interfere with the Solstice Sojourn because traversing the clear-cut portion of HOME's land will disrupt HOME's ability to "worship[] and respect[]" nature. Record at ¶ 46. Thus, the AFP will prevent HOME from "participating in an activity motivated by a sincerely held religious belief." *Yellowbear,* 741 F.3d at 55 (citing *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010)).

In denying that the AFP will substantially burden HOME, FERC relied on inapplicable caselaw, most notably *Navajo Nation v. United States Forest Service.* 535 F.3d 1058 (9th Cir. 2008) (en banc). In *Navajo Nation*, the Ninth Circuit rejected a RFRA claim alleging the Forest Service's approval of using artificial snow on public land— land that was also a religiously significant area for Indian tribes—amounted to a substantial burden on the tribes' religious practices. *Id.* at 1070. In doing so, the court relied heavily on *Lyng v. Northwest Indian Cemetery Protective Ass'n*, where the Supreme Court held that the government approval of a road that, if built, could disrupt the cite-specific religious rituals of certain tribes did not constitute a substantial burden on those tribes' religious exercise. 485 U.S. 439, 447 (1988). In describing what types of actions garnered strict scrutiny in the pre-RFRA context (what we now call substantial burdens) the Court in *Lyng* stated:

> The crucial word in the constitutional text is 'prohibit': For the Free Exercise Clause is written *in terms of what the government cannot do to the individual*, not in terms of what the individual can exact from the government . . . The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not *prohibit* the free exercise of religion.

Id. at 451 (emphasis added). The Ninth Circuit relied heavily on *Lyng* in its own decision, quoting it extensively and stating that it could not rule in favor of "the Plaintiff's . . . and, at the same time, remain faithful to *Lyng's* dictates." *Navajo Nation,* 535 F.3d at 1072.

Two central premises underlying *Lyng* and extended in *Navajo Nation* are inapplicable here. First, the language of the First Amendment, specifically the First Amendment's use of

"prohibit," no longer controls RFRA jurisprudence. In *Hobby Lobby,* the Supreme Court held that RLUIPA's amendment to RFRA's definition of "exercise of religion," was "an obvious effort to effect a complete separation from First Amendment case law." 573 U.S. at 696. After *Hobby Lobby*, a substantial burden does not require a complete prohibition, because "it is not for [a court] to say that [the claimant's] religious beliefs are mistaken or insubstantial." *Id.* at 725.

Second, this case involves HOME's own land, rather than government land, a point central to the analysis in both *Lyng* and *Navajo Nation*. *Lyng*, 485 U.S. at 453 ("Whatever rights the Indians may have to the use of the area . . . those rights do not divest the Government of its right to use what is, after all, *its* land" (emphasis in original)); *Navajo Nation*, 535 F.3d at 1072, 1073 (quoting the preceding line from *Lyng* twice). HOME is not asking FERC to alter its plan for public lands. Rather, HOME seeks protection of its ability to use *its land* in accordance with its religious beliefs, a practice that is definitionally subject to RFRA's scope. 42 U.S.C. § 2000cc-5(7); 42 U.S.C. § 2000bb-2(4). Because FERC's approval of the CPCN effectively requires HOME to allow its own land to be used in manner antithetical to HOME's religious practices, FERC is imposing a substantial burden on HOME's exercise of religion.

b. The proposed route for the AFP is not the least restrictive means of achieving a compelling government interest because an alternate route that will not burden HOME's use of its land for religious purposes is available.

FERC cannot justify its decision to substantially burden HOME's religious exercise because another viable route exists for the AFP that will not substantially burden HOME's religious exercise. Once a person shows that a government action has substantially burdened their religious exercise, the government must show that the action is the least restrictive means of achieving a compelling government interest. 42 U.S.C. § 2000bb-1(b). Although RFRA's stated purpose was, in part, to "restore the compelling interest test as set forth in [*Sherbert*] and [*Yoder*]," the true nature of RFRA goes further. 42 U.S.C. § 2000bb(b). The Supreme Court,

discussing section 2000bb-1(b)'s inclusion of a "least restrictive means" prong to the compelling government interest test, stated that "RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions." *Hobby Lobby*, 573 U.S. at 695 n.3. This standard is not just "exceptionally demanding" *id.* at 728, but "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997).

FERC's compelling interest must be in burdening the specific religious practice at issue; the test is satisfied "through application of the challenged law 'to the person'—the particular claimant . . . being substantially burdened." *Gonzalez v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 430 (2006) (citation omitted). The government's interest in the pipeline (presumably the same as the basis for FERC's finding of public convenience and necessity) does not extend when applied to HOME. 90 percent of the gas will be transported internationally and there is no evidence showing HOME is with the service range of New Union Gas and Energy Company, the purchaser of the remaining 10 percent of AFP's service. Record at ¶ 11.

Even if FERC has a compelling interest, the current AFP route is not the least restrictive means of achieving that interest. The least restrictive means test[2] "requires the government 'to show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party.'" *Holt*, 574 U.S. at 364-65 (quoting *Hobby Lobby*, 573 U.S. at 728). FERC noted briefly that the alternate route would itself burden HOME because it might cause more environmental harm that the approved route. When a

[2] FERC misstated the relevant legal standard as applied to RFRA here when it stated that RFRA's least restrictive means inquiry "involves comparing the cost to the government of altering its activity to continue unimpeded versus the cost to the religious interest imposed by government activities." Record at ¶ 63 n. 15.

claimant draws a line between what constitutes a burden on their religious practice and what does not, "it is not [for the court] to say the line [they] drew was an unreasonable one' . . . Instead, [the court's] 'narrow function . . . is to determine' whether the line drawn reflects 'an honest conviction.'" *Hobby Lobby*, 573 U.S. at 725 (quoting *Thomas v. Review Bd. Of Indiana Employment Security Div.*, 450 U.S. 707, 715, 716 (1981)). HOME reasonably differentiates between the two routes because the alternate route will not disrupt the Solstice Sojourn and will not present the level of complicity in the environmental harm present by having the pipeline run through HOME's property. FERC has failed to meet its burden to show the approved route is the least restrictive means of furthering a compelling state interest in substantially burdening HOME's religious exercise. Thus, FERCs action runs afoul of RFRA's strong stance in favor of protecting religious exercise from government intrusion.

IV. FERC MAY IMPOSE GREENHOUSE GAS RELATED CONDITIONS IN CPCNS UNDER THE NGA.

FERC has the authority to impose the GHG Conditions in the CPCN because the NGA unambiguously authorizes such conditions and, alternatively, because FERC's interpretation of the NGA is reasonable. The major questions doctrine (MQD) does not apply here. The court should instead apply the familiar two-step deference formula under *Chevron U.S.A. Inc. v. NRDC,* 467 U.S. 837 (1984). The Court should affirm the imposition of the GHG Conditions because the NGA unambiguously grants FERC the authority to impose reasonable conditions in CPCNs. If the statute is ambiguous, the Court should affirm the GHG Conditions because they are a reasonable interpretation of FERC's authority to impose conditions in CPCNs.

a. The major questions doctrine should not apply because the GHG Conditions do not counsel skepticism about FERC's asserted authority.

FERC's inclusion of the GHG Conditions in the CPCN does not implicate the MQD. Under certain, "extraordinary" circumstances, when an agency asserts an "economic[ally] and

political[ly] significan[t]" breadth of authority, a court may require the agency to point to "clear congressional authorization" supporting its assertion of authority. *West Virginia v. EPA,* 142 S.Ct. 2587, 2608, 2609 (2022). The MQD is invoked sparingly and is designed to address a particular concern: "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *West Virginia,* 142 S.Ct. at 2609 (2022). The Supreme Court has laid out a number of circumstances[3] that "counsel[] skepticism" as to the power claimed by an agency. *West Virginia*, 142 S.Ct. at 2614. This case is far from extraordinary; indeed, none of the circumstances counselling skepticism are present here.

1. FERC's power to impose the GHG-related conditions does not affect a significant portion of the American economy, nor is it derived from an ancillary provision of the NGA.

FERC's claimed authority is minor when compared to actual "major questions." In *West Virginia*, the EPA sought to "substantially restructure the American energy market" based on a provision that "was designed to function as a gap filler" and was used "only a handful of times since the enactment of the [Clean Air Act]." *West Virginia,* 142 S.Ct. at 2610. In *Alabama Association of Realtors v. Department of Health and Human Services*, the Centers for Disease Control and Prevention (CDC) interpreted a provision of the Public Health and Service Act that had "rarely been invoked" to impose an eviction moratorium on all residential properties nationwide. 141 S.Ct. 2485, 2486 (2021). The Court characterized this power as "breathtaking," noting that "[i]t is hard to see what measures this interpretation would place outside the CDC's

[3] These circumstances include: An agency "claim[ing] to discover in a long-extant statute an unheralded power" that represents a "transformative expansion in [its] regulatory authority;" locating this newfound power in an "ancillary provision" of a statute; and the fact that the agency's newfound power allows it to enact a program that "Congress considered and rejected" multiple times. *West Virginia.* 142 S.Ct. at 2610-2614.

reach." *Id.* at 2489. In *Utility Air Regul. Grp. v. EPA*, the Court struck down an interpretation of the Clean Air Act that would "extend[] EPA jurisdiction over millions of previously unregulated entities," resulting in "calamitous consequences." 573 U.S. 302, 322 (2014). And in *NFIB v. Dep't of Lab., Occupational Safety & Health Admin.,* the Court rejected a mandate that "ordered 84 million Americans to either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense" based solely on the Secretary of Labor's ability to set "occupational safety and health standards." 595 U.S. 109, 117 (2022). The MQD guards against this type of "exploit[ation]" of a statute based on the principle that "Congress does not usually 'hide elephants in mouseholes.'" *Id.* at 125 (Gorsuch J., concurring).

FERC's authority here involves neither elephant nor mousehole. Requiring a single company to comply with a handful of specific conditions to reduce its GHG emissions during construction is not an "expansive" or "breathtaking," assertion of regulatory authority. Contrary to true "major questions," the GHG Conditions are project-specific and do not seek to broadly regulate an entire industry. *See FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 159 (2000) (declining to defer to FDA's novel "assert[ion] [of] jurisdiction to regulate an industry constituting a significant portion of the American economy"); *West Virginia,* 142 S.Ct. at 2604 (applying MQD where EPA's plan constituted an "aggressive transformation in the domestic energy industry"). Far from exerting control over the total GHG emissions of the entire natural gas sector, FERC is exercising its statutorily assigned duty to impose conditions on new projects to minimize adverse impacts of those specific projects. 15 U.S.C. § 717f(e); *see* Certificate Policy Statement, at ¶ 61745 (FERC should "impose whatever conditions are necessary" to ensure the public benefits outweigh the adverse effects of the project). The present conditions are easily achievable and require only a modest reduction in emissions. Record at ¶ 73.

Even if this court were to deem FERC's use of GHG-related conditions "highly consequential," their use falls within "what Congress could reasonably be understood to have granted." *West Virginia,* 142 S.Ct. at 2609. In the provision governing the issuance of CPCNs, the NGA states: "The Commission shall have the power to attach to the issuance of [CPCNs] . . . such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e). Contrary to the "ancillary" provisions at issue in other MQD cases, FERC's authority to impose GHG-related conditions is based on a central provision of the NGA which directly provides FERC with the ability to attach these types of conditions to CPCNs. The MQD does not serve to prevent Congress from granting significant power to executive agencies to "work out the details of implementation" of "important policy questions." *NFIB,* 595 U.S. at 125 (Gorsuch J. concurring). Rather, it guards against an agency assuming such power where it is far beyond a "practical understanding of legislative intent." *West Virginia,* 142 S. Ct. at 2609. Section 7(e), however, evinces Congress' intent to grant FERC authority to include reasonable conditions in CPCNs that are in the public interest.

2. FERC has long possessed the power to mitigate environmental harms, including GHG emissions, in CPCN orders.

FERC's authority to impose GHG related conditions is not an "unheralded power" representing a "transformative expansion in [its] regulatory authority." *West Virginia,* 142 S.Ct. at 2610 (*quoting Utility Air*, 573 U.S. at 324). FERC regularly imposes conditions designed to mitigate or prevent environmental harm in CPCNs.[4] Record at ¶ 71. TGP contends that environmental harms associated with GHG emissions are categorically different from

[4] Courts have previously upheld this practice, *see, e.g., Twp. of Bordentown, New Jersey v. FERC*, 903 F.3d 234, 259 (3d Cir. 2018) (noting FERC's ability to impose "mandatory" mitigation conditions to reduce environmental impacts); *Sierra Club v. FERC,* 867 F.3d 1357 (D.C. Cir. 2017) (same).

"traditional" harms garnering CPCN conditions. *Id.* at ¶ 83. But FERC has a long-standing practice of considering GHG-related harms in assessing the significance of a project's environmental impact and, ultimately, whether it is required by public convenience and necessity.[5] Indeed, Section 7 of the NGA "requires the Commission to evaluate all factors bearing on the public interest." *Atl. Ref. Co. v. Pub. Serv. Comm'n of State of N.Y.,* 360 U.S. 378, 391 (1959). GHG emissions, and resulting climate change, pertain to the public interest.[6] FERC is not just permitted to consider GHG emissions but required to do so where GHG emissions are a "reasonably foreseeable" effect of a project. *See Sierra Club v. FERC,* 867 F.3d 1357, 1375 (D.C. Cir. 2017) (holding that "FERC needed to include a discussion of the significance of [GHG emissions]" in its EIS and vacating a CPCN where FERC failed to do so).

Because FERC is obligated to evaluate the impact of "reasonably foreseeable" GHG emissions on all proposed projects, it necessarily may impose conditions to mitigate those impacts. *See id.* at 1374 ("[GHG] emissions are an indirect effect of authorizing this project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate.") (*citing* section 7(e)). In *Department of Transportation v. Public Citizen*, the Supreme Court explained that the entire point of conducting an environmental analysis under the National Environmental Policy Act (NEPA) is to allow an agency to "act on whatever information might be contained [therein]." 541 U.S. 752, 768 (2004); *see also Baltimore Gas & Elec. Co. v. Nat.*

---

[5] *See, e.g., Northern Natural Gas Company,* 174 FERC ¶ 61,189, at P 14 (2021) ("should we determine that a project's reasonably foreseeable GHG emissions are significant," those impacts would be included in the factors determining the public convenience and necessity); *see also Birckhead v. FERC,* 925 F.3d 510, 516 (D.C. Cir. 2019) (reasonably foreseeable GHG emissions are relevant to whether a pipeline is required by the public convenience and necessity).

[6] *See National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change,* 88 Fed. Reg. 1196 (Jan. 9, 2023) ("The United States faces a profound climate crisis and there is little time left to avoid a dangerous—potentially catastrophic—climate trajectory.").

Res. Def. Council, Inc., 462 U.S. 87, 100 (1983) ("Congress did not enact NEPA… so that an agency would contemplate the environmental impact of an action as an abstract exercise."). Subsequently, an agency is not required to investigate specific environmental impacts if it does not possess the authority to mitigate those impacts. *Id*; *see also Sierra Club,* 867 F.3d at 1372 ("An agency has no obligation to gather or consider environmental information if it has no statutory authority to *act on that information*.") (emphasis in original). Therefore, where an agency must collect information on specific environmental impacts, they must be able to "act on" that information, otherwise there would be no reason to collect it in the first place.

FERC's imposition of GHG-related conditions is not a "transformative expansion in [its] regulatory authority," but merely an extension of its long-standing authority to impose conditions in CPCNs to mitigate environmental harms. Because FERC's power to include GHG-related conditions in CPCNs does not involve any of the circumstances which "counsel[ ] skepticism," this is merely an "ordinary case" in which "context has no great effect on the appropriate analysis." *West Virginia,* 142 S. Ct. at 2608, 2614 (2022).

b. Congress used intentionally broad language in the NGA to unambiguously grant FERC authority to set GHG related conditions.

Judicial review of an agency's construction of a statute it administers is governed by the two-step process outlined in *Chevron*. First, applying the ordinary tools of statutory construction, the court must determine:

> whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter… [i]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842-43. Section 7(e) of the NGA states that FERC "shall have the power to attach to the issuance of the [CPCN]... such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e). This grant of authority is

intentionally broad. *See City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 296 (2013) ("Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion"); *Pennsylvania Dep't of Corr. v. Yeskey,* 524 U.S. 206, 212 (1998) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.").

In the NGA, Congress repeatedly indicated its goal to ensure the construction of LNG pipelines coincides with public convenience and necessity. *See* 15 U.S.C. § 717f (mentioning public convenience and necessity in the context of CPCNs twelve times). Congress frequently grants agencies "regulatory flexibility" to account for "changing circumstances and scientific developments" that may otherwise render a statute "obsolete." *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007). Rather than enumerating specific types of conditions FERC may include in CPCNs, Congress explicitly allowed FERC to impose any conditions it deems necessary to achieve this goal, provided they are reasonable. Congress placed no other restrictions on the conditions FERC may impose in an "intentional effort to confer the flexibility necessary to forestall such obsolescence." *Mass. v. E.P.A.,* 549 U.S. at 532. Because FERC is obligated to consider the GHG emissions of a proposed project, restricting FERC's ability to mitigate these emissions would prevent it from issuing a CPCN in cases where, in the absence of such conditions, a project runs afoul of public convenience and necessity. *See Minisink Residents for Env't Pres. & Safety v. FERC,* 762 F.3d 97, 102 (D.C. Cir. 2014). Because Section 7(e) unambiguously grants FERC the authority to impose reasonable conditions in CPCNs, "that is the end of the matter." *Chevron*, 467 U.S. at 842. The GHG Conditions should be upheld.

c. If section 7(e) is ambiguous, FERC's interpretation is reasonable and must not be disturbed.

If the Court proceeds to step two of the *Chevron* analysis, it should uphold FERC's interpretation of Section 7(e) because the GHG Conditions are reasonable to TGP and advance the public convenience and necessity of the AFP project. An agency's interpretation of an ambiguous statute may not be disturbed unless it is "arbitrary or capricious in substance, or manifestly contrary to the statute." *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 53 (2011). A court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron,* 467 U.S. at 844.

FERC's construction of Section 7(e) is reasonable. Again, Congress placed just two limiting factors on FERCs ability to impose conditions on CPCNs: the conditions must be 1) reasonable, and 2) further the public convenience and necessity of the project. 15 U.S.C. § 717f(e). The GHG Conditions are themselves reasonable because they do not impose strict mandates on TGP. Rather, most of the conditions contain a "where available" qualifier, Record at ¶ 67, and when implemented, the GHG Conditions expect to limit the constructed-related GHG emissions by just 15 percent. *Id.* at ¶ 73 (reducing from 104,100 to 88,340 metric tons of CO2e). The GHG Conditions align with the broad government policy "encourag[ing] government agencies to mitigate GHG emissions from their proposed actions." National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196, 1197 (Jan. 9, 2023).

FERC's interpretation that the GHG Conditions further the public convenience and necessity of the project is also consistent with the NGA. "FERC has the authority to develop its own methods of ensuring public convenience and necessity." *Pacific Gas & Elec. Co. v. FERC*, 106 F.3d 1190, 1197 (5th Cir. 1997) (citing *Consolidated Edison Co. v. FERC*, 823 F.2d 630, 636 (D.C. Cir. 1987)). Climate change, driven by GHG emissions, is "the most pressing

environmental challenge of our time." *Mass. v. E.P.A*, 549 U.S. at 505. Here, FERC determined the project would be in the public convenience and necessity if the construction-related GHG emissions were reduced. Because that determination is not "manifestly contrary" to the NGA, the court should uphold the GHG Conditions.

V. FERC'S DECISION NOT TO IMPOSE MITIGATION MEASURES ADDRESSING THE UPSTREAM AND DOWNSTREAM GHG IMPACTS OF THE AFP IS ARBITRARY AND CAPRICIOUS.

FERC arbitrarily and capriciously decided not to impose conditions in the CPCN that mitigate the upstream and downstream GHG emissions of the CPCN. FERC has repeatedly considered indirect GHG emissions in its CPCN determinations.[7] The D.C. Circuit has not only upheld, but required this practice, holding that FERC acts arbitrarily and capriciously when it fails to consider the impacts of all reasonably foreseeable GHG emissions. *See e.g. Delaware Riverkeeper Network v. FERC*, 45 F.4th 104, 109 (D.C. Cir. 2022); *see also Sierra Club,* 867 F.3d at 1371. Upstream and downstream GHG emissions are "indirect effects" of a pipeline project, which FERC "must consider" under NEPA. *Sierra Club,* 867 F.3d at 1371 (citing 40 C.F.R. § 1502.16(b)); *see also* 40 C.F.R. § 1508.1(g)(2).

a. FERC acted contrary to NEPA because it failed to properly consider the significance of downstream GHG emissions.

FERC's decision is based on an inadequate EIS under NEPA and is therefore arbitrary and capricious. *See Sierra Club*, 867 F.3d at 1368 (holding that agency actions based on a deficient EIS are arbitrary and capricious). An EIS must analyze the environmental consequences of a proposed action. 42 U.S.C. § 4332. An agency's obligation to analyze the

[7] *See, e.g., N. Nat. Gas Co.,* 174 FERC ¶ 61,189, at P 32 (2020) (considering impacts of operation emissions in issuing CPCN); *DTE Midstream Appalachia,* LLC*,* 162 FERC ¶ 61,238, at P 56 (2018) (same); *Tennessee Gas Pipeline Co.,* L.L.C., 158 FERC ¶ 61,110, at P 104 (2017) (same); *Columbia Gas Transmission, LLC,* 158 FERC ¶ 61,046, at PP 116-120 (2017) (same).

significance of a project's environmental impacts is non-discretionary. 40 C.F.R. § 1502.16 (an EIS "shall include…[t]he environmental impacts of the proposed action… and the significance of those impacts"). This non-discretionary obligation extends to the significance of GHG emissions. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.,* 538 F.3d 1172, 1217 (9th Cir. 2008) ("The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct."); *Sierra Club,* 867 F.3d at 1374 (holding that an EIS must include a discussion of the significance of indirect GHG emissions). FERC now claims that it cannot make a significance determination for downstream emissions "absent clear guidance." Record at ¶ 97. FERC itself, however, has recently stated that "there is nothing about GHG emissions or their resulting contribution to climate change that prevents us from making [a] significance determination." *N. Nat. Gas Co.,* 174 FERC ¶ 61,189, at P 32 (2020).

Allowing FERC to skirt its responsibility to analyze the environmental consequences of a proposed project merely because it is in the process of developing future guidelines would disrupt the purpose of NEPA, which is "to provide for informed decision making and foster excellent action." 40 C.F.R. § 1500.1. To serve this overall goal, an EIS "shall provide full and fair discussion of significant environmental impacts." 40 C.F.R. § 1502.1. A discussion which states the overall emissions of a project, but entirely fails to consider the resulting consequences of those emissions, is not "full and fair," nor does it provide for informed decision making. To be fair, NEPA does not constrain an agency from "deciding that other values outweigh the environmental costs of a proposed action," however, an agency still must "adequately identif[y] and evaluate[ ]" the significance of these costs. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). If an agency could decline to evaluate the significance of a particular

impact, an agency could ignore certain environmental impacts that do not support the ends it would like to achieve. FERC's failure to analyze the significance downstream GHG emissions from the AFP is antithetical to NEPA's requirement that agencies take a "hard look" at the environmental consequences of a proposed action. *Id.* at 356. Because of this deficiency, FERCs failure to implement measures mitigating downstream GHG impacts from the AFP is arbitrary and capricious.

b. The evidence in the record is unsupportive of, and contradictory, to FERC's decision not to mitigate downstream GHG emissions.

Even if FERC had determined that downstream GHG emissions of the AFP are not significant and that conditions targeting these emissions are not required by public convenience and necessity, this determination would "run[ ] counter to the evidence." *Motor Vehicle Mfrs. Ass'n of U.S.,* 463 U.S. at 43. FERC's decisions to exercise (or not exercise) its authority must "articulate a satisfactory explanation" for the decision that includes a "rational connection between the facts found and the choice made." *See id.* FERC has articulated no such explanation here and the court "should not attempt itself to make up for such deficiencies." *Id.*; *see also SEC v. Chenery Corp.,* 332 U.S. 194, 196 (1947) ("We may not supply a reasoned basis for the agency's action that the agency itself has not given.").

FERC's decision not to mitigate indirect GHG emissions rests on the false pretense that indirect effects of a proposed project do not require mitigation to the same extent as "more direct" adverse effects. Record at ¶ 99. As discussed above, both direct and indirect effects are equally relevant to the determination of a project's public convenience and necessity. *Sierra Club*, 867 F.3d at 1374. Section 7 of the NGA similarly does not distinguish between direct and indirect effects in prescribing FERC's duty to attach conditions to CPCN orders. *See* 15 U.S.C. § 717f(e). FERC is obligated to mitigate the resulting harms of a project if required by public

convenience and necessity, without regard to whether those harms are the result of direct or indirect effects.

Based on the EIS and FERC's own estimates, the GHG emissions from construction could result in 104,100 metric tons of CO2e per year, while emissions from downstream end-uses could result in 9.7 *million* metric tons of CO2e per year. Record at ¶ 72. FERC's conclusion that emissions from construction require mitigation, while downstream emissions, which are projected to be over 9,000 percent higher, do not is "so implausible that it could not be ascribed to . . . the product of agency expertise." *Lands Council,* 537 F.3d at 987. FERC discounted the downstream GHG emissions because of the possibility that gas transported by the pipeline may "displace" other fuels or gas that otherwise would be transported via different means. Record at ¶ 72. The D.C. Circuit already found that position to be a "total non-sequitur" in determining whether FERC must analyze downstream emissions in the first place. *Birckhead,* 925 F.3d at 518. Far from providing "substantial evidence" for its conclusion that downstream GHG emissions will not be as large as estimated, FERC has provided only general speculation that gas from the pipeline "may" result in emissions reductions in other areas.

c. The EIS is inadequate, and thus FERC's reliance on it was arbitrary and capricious, because the EIS failed to consider upstream GHG emissions.

While NEPA does not require an agency to "forsee[ ] the unforeseeable," "an agency must use its best efforts to find out all that it reasonably can." *Barnes v. U.S. Dep't of Transp.,* 655 F.3d 1124, 1136 (9th Cir. 2011); *see also Birckhead,* 925 F.3d at 520 ("It should go without saying that NEPA…requires the Commission to at least attempt to obtain the information necessary to fulfill its statutory responsibilities."). As the D.C. Circuit articulated:

> Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry.

Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1092 (D.C. Cir. 1973) (citation omitted). Here, FERC has not attempted to gather the information necessary to determine whether upstream emissions are significant. Instead, FERC declined to consider upstream emissions because they "can often be difficult to quantify." Record at ¶ 74. FERC thus wrongly engaged in the "crystal ball" labelling that the D.C. Circuit denounced.

FERC wrongly implied that it did not need to analyze the upstream GHG emissions from the AFP because the Hayes Fracking Field (HFF) will not increase production. Record at ¶ 74. FERC's conclusion ignores that "LNG demands in regions east of Old Union," where the HFF gas will be diverted from, "have been steadily declining." Record at ¶ 13. The decline in demand will naturally result in a decline in production of gas at the HFF site, and subsequently a decrease in GHG emissions. While the AFP may not increase current gas production, it does cause gas production to remain at its current level where it would otherwise decrease, which is a "significant upstream consequence" of the project that FERC has ignored. *See* Record at ¶ 74. Even a decrease in GHG emissions caused by an agency action may be a significant environmental impact, when compared to a greater decrease absent the proposed action. *Ctr. for Biological Diversity.,* 538 F.3d at 1223 ("[I]t is hardly 'self-evident' that a 0.2 percent decrease in carbon emissions (as opposed to a greater decrease) is not significant.") ("NHTSA"). In *NHTSA*, the Ninth Circuit rejected the agency's conclusion of no significant impact because it was not accompanied "by any analysis or supporting data." *Id.* The court should do the same here.

FERC may impose CPCN conditions addressing indirect GHG emissions. Its decision not to do so here is arbitrary and capricious. FERC failed to evaluate the significance of downstream emissions and entirely failed to consider upstream emissions of the AFP in violation of NEPA.

Even if FERC were to conclude that downstream emissions of the AFP are not significant, this conclusion would run contrary to the evidence in the record.

CONCLUSION

For the foregoing reasons, HOME respectfully requests that this Court remand with vacatur FERC's Order granting the Certificate of Public Convenience and Necessity to TGP. This Court should also hold that the currently approved AFP route would violate RFRA. Alternatively, this Court should affirm FERC's imposition of the GHG Conditions in the CPCN, but remand to FERC to impose conditions mitigating the upstream and downstream GHG impacts from the AFP.