

NON-MEASURING BRIEF

TEAM 35

C.A. No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

HOLY ORDER OF MOTHER EARTH, et. al
Petitioner-Intervenor

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

No. 23-01109

-and-

TRANSNATIONAL GAS PIPELINES, LLC,
Petitioner-Intervenor,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

No. 21-CV-1776

CONSOLIDATED CASES

On Appeal from the Federal Energy Regulatory Commission

Brief of Petitioner, HOLY ORDER OF MOTHER EARTH

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INTRODUCTION

The Holy Order of Mother Earth (“HOME”) is a religious organization that views nature itself as a deity. HOME’s religious tenets require that members worship and respect the natural world. Transnational Gas Pipelines, LLC (“TGP”) seeks to construct the American Freedom Pipeline (“AFP”), a 99-mile-long interstate liquefied natural gas (LNG) pipeline across property owned by HOME. The AFP would reroute natural gas from Jordan County, Old Union to Burden County, New Union, at which point 90% of its LNG would be exported to Brazil. Despite Congressional mandates to protect the public interest—and over HOME’s religious objections—the Federal Energy Regulatory Commission (“FERC”) issued TNG a Certificate of Public Convenience and Necessity (“CPCN”), rubber stamping TNG’s proposal.

FERC administers the Natural Gas Act of 1938 (NGA). The purpose of the NGA is to protect landowners and consumers against exploitation by gas companies. *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 610 (1944). Under the NGA, FERC is responsible for issuing CPCNs to natural gas companies for proposed construction, operation, or expansion of natural gas facilities. FERC is empowered to approve, deny, and attach reasonable terms and conditions to CPCNs. Under this statutory authority, FERC reviewed TGP’s project proposal and Environmental Impact Statement (EIS) for the AFP.

FERC’s power to approve or deny CPCNs is not without limits. FERC’s orders are reviewable in the United States Courts of Appeals under the Administrative Procedures Act’s arbitrary and capricious standard. *Env’t Def. Fund v. FERC*, 2 F.4th 953, 967–68 (D.C. Cir. 2021), *cert. denied sub nom. Spire Missouri Inc. v. Env’t Def. Fund*, 142 S. Ct. 1668, 212 L. Ed. 2d 578 (2022). In issuing a CPCN for the AFP, FERC made multiple errors of law and

repeatedly applied law to fact in an arbitrary and capricious manner. Resultingly, we urge this Court to vacate the order granting the CPCN.

JURISDICTIONAL STATEMENT

On May 19, 2023, FERC issued the Rehearing Order, denying HOME's petition for rehearing and affirming the CPCN. R. at 4. On June 1, 2023, HOME filed a Petition for review of the CPCN and Rehearing Order to this Court which was consolidated with a petition for review of same filed by TGP. *Id.* HOME petitions for review for three issues decided by FERC in the Rehearing Order: (1) the determination TPG has demonstrated a public need despite the fact 90% of the gas carried by the AFP is destined for export to Brazil; (2) the determination that routing the pipeline across HOME's property despite religious objections does not violate the RFRA; and (3) the determination that mitigation of upstream and downstream greenhouse gas impacts of the AFP is not required. *Id.* As a timely petition was submitted within 60 days, this Court has jurisdiction over this matter pursuant to the Natural Gas Act. 15 U.S.C. § 717r.

STATEMENT OF THE ISSUES PRESENTED

1. Whether FERC's finding of public convenience and necessity for the AFP was arbitrary, capricious, and not supported by substantial evidence under the Natural Gas Act where 90% of the gas was destined for export to Brazil, a country with which the United States does not have a free trade agreement.
2. Whether FERC's departure from agency policy in determining that the benefits of the AFP outweighed the harms was arbitrary and capricious.
3. Whether FERC violated RFRA by compelling HOME to violate its sincerely held religious beliefs.

4. Whether the GHG Conditions imposed by FERC were beyond FERC's authority under the NGA.
5. Whether FERC's decision not to impose any GHG Conditions addressing downstream and upstream GHG impacts were arbitrary and capricious.

STATEMENT OF THE CASE

A. Statutory Background.

Issues I, II, IV, and V have their basis in the Natural Gas Act. The NGA regulates “the transportation of natural gas and the sale thereof in interstate and foreign commerce.” 15 U.S.C. § 717(a). Through the NGA, Congress delegates the permitting of new interstate gas pipeline facilities to FERC. § 717f. FERC is responsible for issuing CPCNs to natural gas companies for the construction, operation, or expansion of natural gas facilities for the import and export of natural gas. § 717f(c)(1)(A); § 717(a). Unless FERC finds that a pipeline “is or will be required by the present or future public convenience and necessity,” a certificate application “shall be denied.” § 717f(e).

FERC has authority to and regularly approves, denies, and attaches conditions to CPCNs. § 717f (e). FERC “has jurisdiction to approve or deny the construction of interstate natural-gas pipelines.” *Sierra Club v. FERC*, 867 F.3d 1357, 1364 (D.C. Cir. 2017); *see also* § 717f. Additionally, the NGA expressly empowers FERC 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.” § 717f(e).

The NGA expressly empowers FERC 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.” § 717f(e). In doing so, FERC is instructed to balance

public benefits and adverse impacts, including adverse environmental impacts. *See, e.g., Ctr. for Biological Diversity v. FERC*, 67 F.4th 1176, 1181 (D.C. Cir. 2023) (where FERC attached 165 environmental conditions to a pipeline proposal).

Issue III challenges FERC’s actions under the Religious Freedom Restoration Act. RFRA provides “very broad protection for religious liberty.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). Congress enacted RFRA in 1993 to reinstate the strict scrutiny test for government infringement on religious exercise following the Supreme Court’s decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), which had abandoned the strict scrutiny test for this purpose. 42 U.S.C. § 2000bb. Under RFRA, the government “shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless the act falls under a narrow exception based on the strict scrutiny analysis. § 2000bb-1(a). The government’s action is within the exception “if application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” § 2000bb-1(b). The Supreme Court has repeatedly construed the substantial burden requirement broadly and the exception narrowly. *See generally Hobby Lobby*, 573 U.S. 682 (2014); *Holt v. Hobbs*, 574 U.S. 352 (2015); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

B. FERC’s Improper Approval of the AFP.

FERC is the gatekeeper charged with protecting the American public from profit-hungry natural gas corporations. FERC has been delegated to grant Certificates of Public Convenience and Necessity (“CPCN”) only to projects that meet certain conditions so that they may transport Liquid Natural Gas (“LNG”) to communities across the country. TPG seeks to construct and operate the AFP, a pipeline designed to pump 500,000 dekatherms (“Dth”) of LNG per day. R. at

5. 90% of the LNG that would travel in the AFP would be destined for export to Brazil, over 4,000 miles away from most Americans. *Id.* Only 10% of the capacity of the AFP would actually be used by the American public. R. at 6. Construction of the AFP would require constructing seven major facilities and the seizure of HOME and numerous other landowner's private property. *Id.* Throughout this process, TPG has failed to come to easement agreements with many of the private property owners who would face the brunt of the impact, such as HOME. R. at 10.

HOME is a religious organization located just north of the proposed end point for the AFP, on land which it owns directly, in the State of New Union. R. at 5. Particularly for HOME, not only will construction have a negative impact on local ecosystems located on the property, but this interference would also render religious ceremonies traditionally conducted on HOME'S land impossible, even after the months of construction permanently destroyed numerous trees on HOME's property. R. at 12. Doing everything in your power to promote natural preservation over economic interests is a religious tenant for HOME. R. at 11. It was organized around the idea that nature is a deity and should be worshiped and respected. R. at 11. Not only would such a pipeline traversing the land of HOME be anathema to the fundamentals of their religion, but it would interfere with a biannual, sacred ceremony that all members of the religion take part in when they reach the age of 15. R. at 11. The AFP would cross the route of the Solstice Sojourn in two areas, and members have explained that walking over the pipeline and clear-cut path the construction would leave behind would be "unimaginable," destroying the very meaning of the ceremony. R. at 12. Regardless of the preferred route, it is undeniable that the AFP would emit Green House Gas which is detrimental to the environment. In the words of the Council on Environmental Quality, "the United States faces a profound climate crisis and there is little time

left to avoid a dangerous–potentially catastrophic–climate trajectory.” R. at 14 (quoting National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023)).

An alternative route which does not cut through HOME’s property has been proposed. R. at 11. However, the alternative route would run the pipeline through a more environmentally sensitive ecosystem. R. at 11. This alternative would objectively cause even more harm to the environment than the route that runs through HOME’s property. *Id.* Despite the negative effects for either option, FERC did not deny TGP the CPCN. *Id.* at 2. HOME petitioned for rehearing seeking the CPCN to be vacated, but the petition was denied by FERC. *Id.* at 11.

As is common practice with CPCNs, FERC attached certain GHG conditions to the CPCN. However, FERC limited these conditions to the construction of the AFP, leaving out upstream and downstream mitigation. R. at 16. As part of the permitting process, TGP has completed Environmental Impact Statements (“EIS”) to fulfill NEPA requirements. R. at 15. The EIS reveals estimates of upstream and downstream GHG effects. *Id.* HOME and TGP petitioned FERC for rehearing as to the GHG conditions, and the petitions were both denied. *Id.* HOME and TGP both filed for review in this Court based on FERC’s Order of Rehearing. R. at 1.

SUMMARY OF THE ARGUMENT

FERC arbitrarily granted TGP a CPCN because it extended national treatment, which is mandated for FTA countries, to Brazil, a country that does not have a free trade agreement with the United States. FERC is prohibited from authorizing unnecessary pipelines. Under the NGA, FERC can only grant a CPCN when it is or will be required by present or future public convenience and necessity. In deciding whether to issue Certificates under this standard, the Commission must evaluate all relevant factors that deal with public interest. HOME, in response

to FERC granting TGP the CPCN, argued that a pipeline that will almost exclusively transport LNG to Brazil, a non-FTA country somehow constitutes a project need. In the Rehearing Order, FERC relied on the irrelevant factor of end use and inappropriately ignored the distinction between FTA and non-FTA countries to reject HOME's contention. No relevant evidence was used to support ignoring this distinction. FERC's finding of project need is therefore arbitrary and capricious and should be set aside.

FERC's finding that the benefits from the AFP outweighed the social and environmental harms was also arbitrary and capricious. FERC's *Certification of New Interstate Nat. Gas Facilities*, updated in 2022, provides standards for performing a cost-benefit analysis when determining whether to grant a CPCN. These factors include a desire to minimize the use of eminent domain and adverse harms to landowners. In its approval of the AFP, FERC did not follow its own policy for evaluating these factors, nor did it explain why it was departing from typical agency practice. An analysis consistent with the policy could not reasonably result in a finding that the benefits of the AFP outweigh the costs because of the high use of eminent domain, the irreparable harm to HOME's property, and the minimal domestic benefits. Thus, FERC's finding that the AFP's benefits outweigh the harms should be set aside.

FERC's actions in approving the AFP are prohibited by RFRA. RFRA was enacted to protect citizens' exercise of religion from interference by the federal government. Under RFRA, the government may not substantially burden the exercise of religion unless the government identifies a compelling government interest for infringing on the exercise of religion and proves that the activity is the least restrictive means of furthering the compelling interest. Here, FERC substantially burdens HOME's religious practices by compelling HOME to allow its land to be used for activity HOME finds morally repugnant or face serious consequences via eminent

domain. In denying rehearing, FERC failed to meet its burden to show a compelling government interest or prove that the planned AFP route is the least restrictive means of achieving a government interest. The CPCN should be vacated as inconsistent with federal law.

Should this Court determine that FERC's issuance of the CPCN *was* conducted in a non-arbitrary manner, then the imposition of GHG conditions falls well within FERC's scope of regulatory authority. FERC was mandated to consider impacts from GHG emissions, and it appropriately exercised its discretion to mitigate the impact. The narrow mitigation measures for the GHG emissions from the AFP's construction were sufficiently tailored to the AFP, such that it avoids limitation from the major questions doctrine. This Court should uphold FERC's exercise of authority on this issue.

FERC's authority to require mitigation of GHG impacts does not allow it to do so arbitrarily. The inclusion of construction impact measures at the exclusion of downstream and upstream mitigation measures was arbitrary. First, FERC failed to review reasonably foreseeable upstream impacts, despite the record providing sufficient information to make preliminary assessments. This failure represents a significant oversight of FERC's obligations under NEPA to comprehensively evaluate environmental impacts. Second, FERC abused its discretion when it failed to uniformly apply its "significance threshold", as detailed in the *Certification of New Interstate Nat. Gas Facilities*. Again, FERC did not follow its own policy for measuring emissions, and its explanation for doing so was unsatisfactory. Both downstream and upstream impacts meet this agency-imposed statement and should have been afforded mitigation. FERC should mitigate downstream and upstream impacts in accordance with its agency initiatives to safeguard environmental interests, and its contrary decision was arbitrary and capricious.

STANDARD OF REVIEW

FERC's actions are reviewed under the arbitrary and capricious standard of the Administrative Procedures Act. *Env't Def. Fund*, 2 F.4th at 967–68. Under this standard, this Court must vacate the Rehearing Order if FERC has failed to examine any relevant considerations or articulate “a satisfactory explanation for its action.” *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.* 463 U.S. 29, 43 (1983). While the grant or denial of the CPCN is within FERC's discretion, failure to consider relevant factors and clear errors of judgment cannot be tolerated. *Myersville v. Citizens for a Rural Community, Inc. v. FERC*, 738 F.3d 1301, 1308 (D.C. Cir. 2015).

Under the Natural Gas Act, factual determinations made by FERC must be supported by substantial evidence. 15 U.S.C. § 717r(b). Under the substantial evidence standard of review, FERC must “treat fully ‘each of the pertinent factors’ and issues before them.” *Tenneco Gas v. FERC*, 969 F.2d 1187, 1214 (D.C. Cir. 1992) (quoting *Public Serv. Comm'n of New York v. FPC*, 511 F.2d 338, 345 (D.C. Cir. 1975)). If FERC failed to “come to grips with” pertinent facts on the record, the Rehearing Order cannot be sustained. *Tenneco Gas v. FERC* at 1214.

STANDING

HOME as an organization can show injury-in-fact in its own right, causation and redressability as required to satisfy the Supreme Court's test for standing to sue. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). The proposed route of the AFP would directly injure both HOME's physical property and its ability to carry out core religious practices. The AFP would run directly below the traditional land where members regularly perform a sacred religious ceremony, the Solstice Sojourn, rendering this important journey impossible. Harm caused by the imminent construction of the AFP to HOME may be redressed by vacating the CPCN.

ARGUMENT

I. FERC’s finding of public convenience and necessity for the AFP was arbitrary, capricious, and not supported by substantial evidence where 90% of the LNG was destined for export to a non-FTA country.

FERC’s finding of public convenience and necessity was arbitrary and capricious and not supported by substantial evidence. The Court may find an agency’s decision is arbitrary and capricious and not supported by substantial evidence by considering “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002). The relevant inquiry for the court is to determine whether FERC “examined the relevant data and articulated a rational connection between the facts found and the choice made.” *Eastern Ky. Power Co-op, Inc. v. FERC*, 489 F.3d 1299, 1306 (D.C. Cir. 2007) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

According to FERC, the “policy for determining whether there is a need for a specific project” turns on whether “the project will serve the public interest.” Certification of New Interstate Natural Gas Pipeline Facilities, 88 F.E.R.C. ¶ 61,227, 61,737 (1999) (Hereinafter “1999 Policy Statement”). FERC determines whether a project will serve the public interest by weighing public benefits against adverse effects. *Id.* “The more interests adversely affected or the more adverse impact a project would have on a particular interest, the greater the showing of public benefits from the project required to balance the adverse impact.” *Id.* at ¶ 61,749. FERC gives examples of types of public benefits that could be shown such as, “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.

Here, FERC's decision was not based on a consideration of relevant factors and the finding of public convenience and necessity was not supported by any relevant evidence. Of the two precedent agreements, 90% of the LNG will be exported to Brazil, a country with which the United States does not have a Free Trade Agreement, or a non-FTA country. FERC put emphasis on irrelevant factors in coming to this determination confusing the Department of Energy's position on the relevance of the end-use of LNG. FERC's finding of public convenience and necessity put forward no evidence as to how export to a non-FTA country constitutes public convenience and necessity. Though FERC cited precedent where a majority of the LNG was destined for export, no cases cited below dealt with agreements to export to non-FTA countries. Therefore, this court should find FERC's decision arbitrary and capricious and not supported by substantial evidence.

A. FERC's finding that export to Brazil met public convenience and necessity was not based on consideration of relevant factors.

FERC's finding for public convenience and necessity placed undue emphasis on a misguided "end use" factor and did not consider relevant factors such as the implications of exporting LNG to a non-FTA country. According to the Natural Gas Act, "the exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest." 15 U.S.C. § 717b.

End use is an irrelevant factor when considering whether plans to export to a non-FTA country constitutes public convenience and necessity. FERC supported its decision to treat Brazil as it is mandated to treat FTA countries with one sentence, stating, "we do not put any significant weight on the end use of the LNG." R. at 9. While FERC does not have any regulations referring to "end use," looking to the NGA and relevant regulations, "end use" as used here, was recently

the subject of a regulation promulgated by the Department of Energy (DOE). 83 C.F.R. 65078. DOE is the agency responsible for determining whether export to non-FTA countries will ultimately be approved or not. *Id.* FERC’s consideration of “end use” in the rehearing order was misguided, and likely resulted in a misunderstanding of the regulation. Up until 2016, DOE had a policy which required the disclosure of the final destination, or “end use” of LNG exported from the United States. *Id.* According to the regulation, DOE “was concerned about the potential for U.S.-sourced natural gas to be exported to a neighboring FTA country (Canada or Mexico), then re-exported as LNG from those countries to non-FTA countries without DOE/FE having knowledge of the final destination country.” *Id.* at 65079.

In 2016, DOE’s policy changed. *Id.* Because re-exports of LNG represented a very small percentage of LNG and other reasons, DOE decided to no longer require the end use of the LNG to be reported. *Id.* This change in policy did not mean, as FERC has construed it in the order denying rehearing, that export of LNG to non-FTA countries is a free for all. Rather, this change in regulation had to do with minimizing roadblocks in transactions with FTA countries, who, by statute, “require national treatment.” 15 U.S.C. § 717b.

The situation here is totally distinct from that which DOE tried to avoid by rolling back its end use policy. The LNG here will indisputably go to Brazil, a non-FTA country. The court in *Sierra Club v. United States DOE* clarifies this point. In that case, the court wrote, “[r]ather than assign[ing] LNG export applications to particular end-user destinations, the applications are designated for export to either Free Trade or non-Free Trade countries, generally.” 867 F.3d 189, 192–93 (2017). FERC misconstrued the meaning of DOE’s change in policy and extended national treatment to Brazil, a non-FTA country. FERC focused on irrelevant factors in coming to its finding of public convenience and necessity for the AFP.

B. FERC failed to provide any evidence as to why export to Brazil would serve public convenience.

FERC provided no evidence to support its finding of public convenience and necessity to Brazil, a non-FTA country. The substantial evidence standard “requires more than a scintilla but can be satisfied by something less than a preponderance of the evidence.” *Minisink Residents for Env'tl. Pres. & Safety v. FERC*, 762 F.3d 97, 108 (D.C. Cir. 2014) (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160, (D.C. Cir. 2002)). NGA is silent on how non-FTA countries should be regarded while it requires FTA countries to receive national treatment. 15 U.S.C. § 717b(c). The Supreme Court has long held that statutory language “cannot be regarded as mere surplusage; it means something.” *Potter v. United States*, 155 U.S. 438, 446 (1894).

Below, FERC relied on the D.C. Circuit Court’s decision *Oberlin* to stand for the proposition that “gas that is to be exported are a valid consideration in determining the need for a project.” R. at 9. In *Oberlin*, 17% of the LNG was destined to export, and the court found that although the LNG would not be used locally, the economic benefits provided public convenience and necessity. *City of Oberlin v. FERC*, 39 F.4th 719, 727 (D.C. Cir. 2022). However, *Oberlin* is distinct from the facts of the case at hand in a key way. The precedent agreements in that case contemplated export to Canada, an FTA country. *Id.* By statute, FERC was required to give Canada national treatment, and the court highlighted this obligation in its reasoning. *Id.* As a non-FTA country, Brazil is not subject to the same treatment. Due to this material distinction, *Oberlin* should not be viewed as even a mere scintilla of evidence to support a finding of public and convenience and necessity in this case.

While the relevant language of the NGA specifies export to countries “with which there is in effect a free trade agreement. . . shall be deemed to be consistent with the public interest[.]” in the Rehearing Order, FERC reads this section of the NGA into oblivion. 15 U.S.C. § 717b(c). By

failing to distinguish treatment of FTA and non-FTA countries FERC's decision below sets the standard that export to *any* country, whether they have a Free Trade Agreement with the United States, shall be deemed to be consistent with the public interest. If there is to be no distinction between how FTA and non-FTA countries are regarded by FERC, this section of the NGA becomes mere surplusage.

FERC was silent as to why export to Brazil, the destination for 90% of the LNG for the AFP, served public convenience and necessity, disregarding the plain language of the NGA. Such a finding was arbitrary, capricious, and not supported by substantial evidence.

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

FERC's approval of the AFP must be vacated because the environmental and social harms of the pipeline outweigh any alleged domestic benefit. FERC is required to follow its own policy in adjudications or "display awareness it *is* changing position." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Salazar v. King*, 822 F.3d 61, 76 (2d Cir. 2016) ("if [an agency] announces and follows... a general policy by which its exercise of discretion will be governed, an irrational departure from that policy... could constitute action that must be overturned as 'arbitrary, capricious, or an abuse of discretion.'). The NGA and FERC policy require FERC to "evaluate all factors bearing on the public interest" when granting a CPCN. *Atl. Ref. Co. v. Pub. Serv. Comm'n of State of N.Y.*, 360 U.S. 378, 391 (1959); *See also* 15 U.S.C. §§ 717f(c)(1)(A), 717f(e); *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,107, 61,693 (2022) (hereinafter "Updated Policy Statement"). These interests include avoidance of eminent domain, impact to individual landowners, and environmental impacts. *See* Updated Policy Statement at 61,107. FERC policy requires a greater showing of public benefit "[t]he

more interests adversely affected or the more adverse impact a project would have on a particular interest.” *Id.* at 61,694.

FERC’s approval of the AFP route was arbitrary and capricious because FERC’s conclusion that the minimal domestic benefit from the AFP’s construction outweighed the many social and environmental harms was contrary to the evidence. FERC failed to follow its own policy when weighing the harms and benefits of the AFP and did not provide a rational basis for deviating from this policy. One, FERC failed to adequately consider the harmful impacts of a high rate of eminent domain proceedings. Two, FERC entirely failed to consider that the impact of the AFP on HOME as an individual landowner could not be mitigated. Three, the construction of the AFP poses a high risk of environmental damage. Finally, FERC summarily dismissed these harms on the grounds of minimal domestic benefits. In total, it was arbitrary and capricious for FERC to hold that the benefits of the AFP outweigh its risk.

A. FERC’s intention to exercise eminent domain against 40% of landowners along the AFP route is arbitrary and capricious.

FERC’s decision to disregard its own policy on avoiding eminent domain is evidence that the approval of the AFP route is arbitrary and capricious. FERC has a long-held preference for minimizing the use of eminent domain. *Birckhead v. FERC*, 925 F.3d 510, 516 (D.C. Cir. 2019); Updated Policy Statement at 61,691; 1999 Policy Statement at 61,749. FERC’s policy recognizes the significant adverse impact of eminent domain on landowners and “expect pipeline applicants to take all appropriate steps to minimize the future need to use eminent domain.” Updated Policy Statement at 61,691.

FERC does not make a “bright line” rule for how much eminent domain is too much, but the “strength of the benefit showing will need to be proportional to the applicant’s proposed exercise of eminent domain procedures.” 1999 Policy Statement at 61,749. Examples from the

1999 Policy Statement illustrate that “significant public benefit would outweigh the modest use of federal eminent domain authority,” but FERC does not provide a counterexample. At 61,749.

Under the policy of minimizing the use of eminent domain, the significant use of eminent domain required to build the AFP should weigh heavily against approval of the project. TGP has failed to reach easement agreements with over 40% of the landowners along the proposed AFP route. R. at 10. In its Order Denying Rehearing, FERC dismisses this fact by stating that the “use of eminent domain is common in construction of pipelines, so the lack of easement agreements is not significant to our consideration.” R. at 10–11. This position is directly at odds with the Updated Policy Statement and the 1999 Policy Statement for two reasons. One, lack of easement agreements should be a significant factor in the decision given FERC’s strong policy statements to that effect. Two, the exercise of eminent domain against over 40% of affected landowners cannot be reasonably described as modest or minimal. Thus, the heavy use of eminent domain weighs against approval of the AFP and the proposed AFP route.

B. FERC failed to consider that the adverse effects that the AFP would inflict on HOME could not be mitigated.

FERC failed to reasonably account for the fact that the negative impacts of the AFP on HOME’s property could not be mitigated. FERC announced in 2022 that “going forward... our analysis of impacts to landowners will be more expansive.” Updated Policy Statement at 61,690. Under the Updated Policy Statement, FERC committed to “assess a wider range of landowner impacts.” *Id.* at 61,691. This analysis includes “intangible impacts” that “may never be fully remedied” even with fair market compensation. *Id.* FERC commonly considers impacts to landowners. *See e.g., City of Oberlin, Ohio v. FERC*, 39 F.4th 719, 724 (D.C. Cir. 2022) (describing FERC’s analysis of a larger or smaller pipelines on landowners).

FERC's assessment of the impact to HOME was inconsistent with FERC's own policies. In denying rehearing, FERC stated, "We cannot treat every landowner in this subjective manner, as it would be unjust." R. at 12. Once again, this statement stands in direct conflict with FERC's policy. By committing itself to considering a wider range of landowner impacts, FERC must seriously consider HOME's religious objections. Notably, the harms HOME would face if forced to have the AFP on its property could not be mitigated. The clear-cut path above the AFP would be a permanent, physical scar that would shatter the meaning of HOME's solstice sojourn. No number of off-site trees or amount of monetary compensation could replace the deep loss the AFP would cause HOME and its members. Therefore, this factor also weighs against approval of the AFP.

C. FERC placed an outsized emphasis on the minimal domestic benefits of the AFP.

When determining project need, FERC relies on factors such as increased natural gas demand, future markets, predicted price decreases for consumers, or a need to update infrastructure. Updated Policy Statement at 61,687. Precedent agreements may be evidence of need, but they are not always sufficient to show need. *Env't Def. Fund*, 2 F.4th at 972. Following an assessment of need, "the Commission will weigh the public benefits of a proposal, the most important of which is the need that will be served by the project, against its adverse impacts." Updated Policy Statement at 61,686.

In the present matter, FERC makes conclusory statements about the benefits of the AFP but fails to adequately explain its reasoning for why it feels the 10% of LNG intended for domestic use outweighs the benefits. FERC does not describe increased demand, price decreases, or a need for updated infrastructure. Rather, FERC relies on TGP's single domestic precedent agreement and broad interests R. at 8. FERC provides no further analysis as to whether the domestic benefits suggested by TGP could be accomplished by other means or are even

necessary. While FERC lists “providing natural gas service to areas currently without access to natural gas within New Union” and “providing opportunities to improve regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels” as domestic benefits, it fails to provide any analysis as to the extent of the benefit. R. at 8. FERC says that demand for LNG has dropped in regions east of Old Union but does not present any evidence that there is a demand for LNG in the areas without access to LNG in New Union. Nor does FERC describe whether an LNG pipeline is an efficient way to reduce air pollution. Without reasoning, it is arbitrary and capricious of FERC to conclude that the benefits outweigh the significant harms posed by the AFP.

D. The Court should set aside the CPCN as arbitrary and capricious.

In sum, FERC’s repeated failure to apply its own policy to the adjudication is arbitrary and capricious; Despite FERC’s characterization, R. at 12, HOME is not asking for special treatment. Rather, HOME seeks a result consistent with FERCs policies. HOME urges this Court to vacate FERC’s issuance of the CPCN. In the alternative, HOME asks this Court to set aside FERC’s approval of the AFP route as arbitrary and capricious and remand for further proceedings on the harms and benefits of the alternative route.

III. FERC’s decision to route the AFP over HOME property despite HOME’s religious objections violates RFRA.

The Religious Freedom Restoration Act (RFRA) prohibits the federal government from placing substantial burdens on the exercise of religion unless the government can pass a strict scrutiny test. *O Centro*, 546 U.S. at 419. RFRA’s strict scrutiny test is exacting, requiring that the government provide a compelling interest and show that it will achieve that interest by the least restrictive means. *Hobby Lobby*, 573 U.S. at 728.

FERC's decision to route the AFP over HOME's property violates RFRA. One, the exercise of eminent domain would be a substantial burden because it would compel HOME to accede to a use of its property which violates HOME's religious beliefs. Two, FERC cannot survive strict scrutiny because FERC failed to provide a compelling governmental interest or prove that routing the AFP over HOME's property is the least restrictive means of furthering that interest.

A. RFRA provides broad protections for religious freedom.

RFRA requires that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" the strict scrutiny test is met. 42 U.S.C. § 2000bb-1(a). The strict scrutiny test requires that the burden to the person is (1) in furtherance of a compelling government interest and (2) the least restrictive means of furthering that interest. § 2000bb-1(b).

1. The government substantially burdens religious exercise when it compels individuals to engage in behavior that violates their religious beliefs.

A government action is substantial burden on religious beliefs if the action requires an individual¹ to engage in conduct that "seriously violates their religious beliefs." *Hobby Lobby*, 573 U.S. at 720. The first step in determining whether there is a substantial burden on religious exercise is to establish the sincere exercise of religion. *Holt*, 574 U.S. at 361.² Religious exercise goes beyond profession and belief and extends to physical acts of worship. *Cutter v. Wilkinson*, 544 U.S. 709, 710 (2005). An action creates a burden on the exercise of religion if the party acted

¹ RFRA applies to individuals, nonprofit organizations, and closely held corporations. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719, 134 S. Ct. 2751, 2775, 189 L. Ed. 2d 675 (2014). For simplicity, this brief will refer to all entities to whom RFRA applies as "individuals."

² Though *Holt* concerns the Religious Land Use and Institutionalized Persons Act (RIULPA), RIULPA and RFRA are "sister statutes" and can be interpreted as requiring the same test. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 730, 134 S. Ct. 2751, 2781, 189 L. Ed. 2d 675 (2014).

upon sincerely believes that they will be required to engage in an act that they find morally objectionable due to their religious beliefs, *see, e.g., Hobby Lobby*, 573 U.S. at 724, or are prevented from taking an action consistent with their religious beliefs. *See, e.g., O Centro*, 546 U.S. at 418. The federal courts have “no business addressing” whether a sincerely held religious belief is “reasonable.” *Hobby Lobby*, 573 U.S. at 724.

A burden is *substantial* where a government action requires an individual to violate a sincerely held religious belief or accept serious consequences. *Hobby Lobby*, 573 U.S. at 721-23 *see also New Doe Child #1 v. Cong. of United States*, 891 F.3d 578, 589 (6th Cir. 2018); *Jones v. Carter*, 915 F.3d 1147, 1149 (7th Cir. 2019). The consequences must be significant enough to be coercive. *See, e.g., Hobby Lobby*, 573 U.S. at 722 (finding that hefty civil fines were a substantial burden); *O Centro*, 546 U.S. at 425 (finding that criminal prosecution constituted a substantial burden); *Holt*, 574 U.S. at 361 (finding that disciplinary action against an inmate was a substantial burden). However, given the Supreme Court’s broad approach in *Hobby Lobby* and *Holt*, Circuit Courts have declined to establish a “floor” for finding a substantial burden. *Jones v. Carter*, 915 F.3d at 1150 (“After these recent cases, there can be no doubt that when the state forces a prisoner to give away his last dime so that his daily meals will not violate his religious practice, it is imposing a substantial burden.”); *Sabir v. Williams*, 52 F.4th 51, 60 (2d Cir. 2022), *cert. dismissed*, 143 S. Ct. 2694 (2023) (finding that fear of discipline was sufficient to establish a substantial burden).³ Finally, the availability of a modified religious practice does not imply that the burden is not substantial. *Holt*, 574 U.S. at 362 (holding that it was error for the Second

³ In its Order Denying Rehearing, FERC cites to *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008) and *Thiry v. Carlson*, 78 F.3d 1491 (10th Cir. 1996). R. at 12 n12, 13 n15. These opinions were issued before the Supreme Court clarified the substantial burden test in *Hobby Lobby* and *Holt*.

Circuit to suggest that “the burden on petitioner's religious exercise was slight because... his religion would “credit” him for attempting to follow his religious beliefs”).

2. Government action that substantially burdens religious freedom is reviewed with strict scrutiny.

If a government action substantially burdens the exercise of religion, the government bears the burden of proving the action is in furtherance of a compelling government interest and takes the least restrictive means of furthering that interest. *Hobby Lobby*, 573 U.S. at 726. The compelling interest prong requires a focused inquiry that is not satisfied by broad policy interests. *Id.*; *O Centro*, 546 U.S. at 430-31 (“the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened”). Inconsistency in the government's pursuit of the allegedly compelling interest may imply that the interest is not sufficiently compelling. *See Hobby Lobby*, 573 U.S. at 727 (arguing that because the Affordable Care Act allowed grandfathered health care plans to forgo contraception coverage, the government's stance that the government has a compelling interest in requiring plans to cover contraception is more tenuous than the government suggested); *O Centro*, 546 U.S. at 434 (finding that the well-established peyote exception “fatally undermined” the government's contention that there can be no RFRA exception to the Controlled Substances Act).

If the government can establish a compelling interest, it must then show that it “lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases.” *Hobby Lobby*, 573 U.S. at 682. This prong of the strict scrutiny test is “exceptionally demanding.” The government must provide actual evidence that the challenged action is the least restrictive means of furthering its interest. *Holt*, 574 U.S. at 352; *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 476 (5th Cir. 2014)

(citing *Hobby Lobby*, 573 U.S. at 728-29). Cost may be a factor in the least restrictive means analysis, but RFRA may require that the government incur additional costs to protect religious exercise. *Hobby Lobby*, 573 U.S. at 730.⁴ As with the compelling interest prong, the government's actions in other circumstances may provide proof of a less restrictive alternative. *See, e.g., Hobby Lobby*, 573 U.S. at 730 (noting that the government had established an accommodation for faith-based organizations); *Sabir*, 52 F.4th at 62 (finding that exceptions to inmates gathering in groups of more than two were made for prison-organized activities, showing that exceptions could be made for group prayer).

B. FERC's Order is Inconsistent with RFRA.

Under the framework developed by the Supreme Court in *Hobby Lobby*, FERC's grant of a CPCN to TGP is a violation of RFRA because it substantially burdens HOME's exercise of religion and FERC has not met its evidentiary burden in a strict scrutiny analysis. The approval of the AFP substantially burdens HOME's exercise of religion because it compels HOME to acquiesce to violations of its religion under threat of condemnation proceedings. FERC also fails a strict scrutiny analysis because FERC did not prove a specific governmental interest nor that its actions were the least restrictive means of furthering such interest.

1. The AFP substantially burdens HOME's religious practices.

FERC's approval of the AFP substantially burdens HOME's exercise of religion because it would compel HOME to accede to actions that gravely contradict HOME's sincerely held religious beliefs. HOME and its members believe that nature is divine and should be worshiped and respected as a deity. R. at 11. A particularly important exercise of their religious beliefs is the Solstice Sojourn, an annual journey to a sacred hill, which includes a coming-of-age ceremony.

⁴ On the issue of the least restrictive means, the Order Denying Rehearing once again cites to outdated and non-binding case law. R. at 13 n15.

Id. No party doubts the sincerity of HOME's beliefs. HOME's beliefs that nature is a deity and the physical act of the Solstice Sojourn fall within the protections of RFRA. HOME has testified before FERC its sincerely held belief that the AFP would burden its exercise of religion by forcing HOME to allow the pipeline on its property and tarnishing the sacred Solstice Sojourn. R. at 11-12.

The burden posed by the AFP is legally substantial because HOME is being forced to choose between their religious practices (maintaining the land as befitting a deity and embarking on the Solstice Sojourn) and a severe consequence (condemnation proceedings). FERC's suggestion that there is no substantial burden because the Solstice Sojourn will not be physically prevented is a red herring. R. at 13. The correct inquiry under RFRA is whether a government action compels an individual to act against their religious beliefs, not whether the individual can adjust their religious beliefs to suit the government. In FERC's Updated Policy Statement, it admits the serious consequences of eminent domain. *See* discussion *supra* Section II.A. It is the threat of eminent domain, and the threat of condemnation proceedings, that creates a coercive effect on HOME. Such proceedings would not only be costly, but HOME's loss of the land would be morally devastating for its members who view the land as a deity. Under *Hobby Lobby*, it is unreasonable for FERC to suggest that forcing HOME to violate their religious principles or face condemnation proceedings is not a substantial burden. Resultingly, this court should find that FERC's approval of the AFP substantially burdens HOME's religious beliefs.

2. FERC cannot justify the AFP under RFRA's strict scrutiny test.

Having established that FERC's actions substantially burdened HOME's religious practices, FERC's order granting a CPCN must be vacated because it cannot survive strict scrutiny. In the Order Denying Rehearing, FERC failed to provide an analysis as to a compelling government interest. R. at 13 (declining to engage in a strict scrutiny analysis). Even assuming

arguendo that FERC's interest involves the interests it described as domestic benefits, R. at 8, those interests are broad categories that do not describe the government's interest in taking the against the burdened party. Further, FERC does not approve all applications and it required to deny permits that are not in the public interest. *See* discussion *supra* Section II. Through RFRA, Congress was clear that protection of religious freedom is a significant public interest. Thus, FERC has not identified a compelling government interest.

Even if this Court were to find that FERC had a compelling government interest, FERC has not proven that the AFP's current route is the least restrictive means of achieving that illusory interest. FERC states that the alternative route through the Misty Top Mountains would be more costly, financially and environmentally. However, this is not proof that there are no other means of promoting interests such as energy security or air quality improvements. HOME cannot be forced to violate its religious beliefs merely because FERC created a false choice between two bad options. Thus, FERC has failed to meet its burden under the strict scrutiny test because it failed to prove a compelling government interest or that the proposed action is the least restrictive means of furthering such an interest.

3. Under RFRA, the CPCN Order must be vacated or otherwise remanded.

FERC's granting of the CPCN is a clear violation of RFRA. The AFP presents a substantial burden to HOME's religious practices and FERC has not met its burden to justify this substantial burden. Therefore, HOME urges this Court to vacate the CPCN. However, since FERC made several errors of law in its RFRA inquiry, HOME argues in the alternative that this Court remand the issue for proceedings consistent with *Hobby Lobby* and *Holt*.

IV. The GHG Conditions imposed by FERC were within its authority under the NGA.

Assuming *arguendo* that the CPCN is valid, the GHG conditions are a valid exercise of FERC's authority. the NGA authorizes FERC to attach "reasonable terms and conditions" to CPCNs. 15 U.S.C. § 717f(e). Through an interplay of the NGA and NEPA, FERC *must* consider GHG impacts and *may* then mitigate the impacts through conditions. Here, the GHG conditions were an exercise of express authorization under the NGA. Contrary to TGP's contentions, the GHG conditions do not exceed the parameters of the major questions doctrine. Accordingly, the GHG were not an overstep of FERC's authority.

A. The NGA expressly authorizes FERC to condition issuances of Certificates of Public Convenience and Necessity.

The NGA's broad mandate permits FERC to attach conditions related to climate change mitigation measures. *Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108, 61,719 (F.E.R.C. 2022). FERC's authority has extended so far as to even reject proposals due to potential environmental impacts. *Id.* at 61,727.

In reviewing pipeline proposals, FERC must simultaneously comply with NEPA's comprehensive environmental assessment requirements. NEPA mandates a thorough environmental review of major federal actions, including the issuance of certificates to export natural gases. 42 U.S.C. § 4332(2)(C). Under NEPA, FERC is required to take a "hard look" at adverse direct, indirect, and cumulative environmental impacts. NEPA's "hard look doctrine is designed to ensure that an agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Id.* The doctrine ensures that FERC, while not bound to select the least environmentally impactful alternative, still incorporates environmental considerations like GHG emissions, into its final decision. NEPA requires that FERC, at minimum, considers GHG emissions. FERC's authority to mitigate GHG emissions derives from the NGA, and GHG conditions to pipeline proposals are not a novel

phenomenon. FERC has previously recommended mitigation measures to reduce GHG emissions from construction impacts. *See, e.g., Sierra Club v. FERC*, 867 F.3d 1357; *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128.

B. GHG conditions were well within the scope of authority delineated by the Natural Gas Act and do not violate the major questions doctrine.

TGP contends that FERC’s GHG conditions are limited by the major questions doctrine. Under the major questions doctrine, “courts ‘expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.’” *W. Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022). If an agency claims power to address a decision of vast economic and political significance, and the agency’s actions reflect a “transformative” change in the agency’s authority, “[t]he agency must point to ‘clear congressional authorization’ for the authority it claims.” *Id.* at 2595. The major questions doctrine sets parameters on agency discretion, but the doctrine does not apply here, as the GHG conditions fail the first prong of the test established in *W. Virginia v. EPA*.

The major questions doctrine scrutinizes instances where an agency’s action marks a significant shift in its regulatory scope or impacts national policy broadly. The EPA’s Clean Power Plan, challenged in *West Virginia v. EPA*, established a GHG emissions rule that would have targeted both new and existing coal-fired power plants, directing the plants towards electricity and other renewable resources. The plan’s GHG standards would have had a “vast economic and political impact,” with a projected impact of over a billion dollars. If accepted, the new standards would have also bestowed overwhelming power to the EPA onto the energy sector. The plan represented “a shift in the energy generation mix at the grid level,” rather than localized and site-specific “application of equipment and practices at the level of an individual facility.” The Court found that because the EPA failed to point to “clear congressional

authorization” in the Clean Air Act, the emission caps were beyond the EPA’s authority. Likewise, in *Util. Air Reg. Group v. EPA*, the court found EPA’s interpretation “unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.” 573 U.S. 302, 324 (2014) (where the EPA applied GHG regulation standards from motor vehicles to stationary sources, like buildings.) The Court ultimately rejected the EPA’s rule because first, the EPA’s adoption of GHG standards “represented claim to extravagant statutory power over the national economy” and second, it exceeds the statutory powers bestowed by Congress in the Clean Air Act. *Id.*

Both *West Virginia v. EPA* and *Util. Air Reg. Group v. EPA* indicate that GHG regulations can and have had “vast economic and political significance.” But TGP appears to conflate the broad issue of GHG regulation with the specific GHG conditions here. Merely addressing GHG emissions does not trigger the major questions doctrine. While the conditions could potentially be replicated in other projects, they do not on their face, establish or imply broader policy implications. Contrast to the EPA’s Clean Power Plan or CAA permits, FERC’s conditions instruct TGP to plant an equal number of trees for those removed during construction and use of electric-powered equipment and “green” pipelines. R. at 67. These measures are specifically tailored to the TGP’s project. Accordingly, the GHG conditions are a valid exercise of FERC’s regulatory authority and do not constitute a substantial policy shift that would invoke the major questions doctrine.

Moreover, as stated, FERC has a history of implementing GHG conditions in past pipeline certifications. Should this Court choose to invalidate the GHG conditions on the AFP proposal, such a decision could have far-reaching implications. It risks undermining the precedent set by decades of FERC’s regulatory actions and calls into question the legitimacy of

similar GHG conditions previously imposed by FERC. This potential retroactive effect could unsettle established regulatory practices. Therefore, upholding FERC’s GHG conditions in the AFP proposal is not only consistent with past practices but also crucial for maintaining regulatory consistency and reliability.

V. FERC’s failure to impose GHG Conditions addressing downstream and upstream GHG impacts was arbitrary and capricious.

FERC has agency discretion to mitigate environmental impacts. 40 C.F.R. § 1508.1. FERC mitigated construction impacts but neglected to mitigate downstream and upstream impacts, as they were not “significant”. FERC’s action was arbitrary for two main reasons. First, FERC’s reason for omitting upstream impacts from their environmental review was unsatisfactory, as they were likely sufficiently “reasonably foreseeable “to require review under NEPA.” Second, FERC arbitrarily applied its agency standard of a “significance threshold”. Above all, FERC wields great power to make a “green” statement in the energy sector, and it should make that statement.

A. FERC arbitrarily omitted review of upstream GHG impacts.

FERC’s reason for excluding upstream impacts was not satisfactory, as upstream impacts were reasonably foreseeable. NEPA requires an Environmental Impact Statement (EIS) for all major federal actions, assessing significant direct, indirect, and cumulative environmental impacts; the assessment must also propose reasonable alternatives. 40 C.F.R § 1502.14. Pipeline projects create two kinds of indirect emissions: 1) upstream emissions, which result from the process of extracting natural gas, and 2) downstream emissions, which are released when end users burn natural gas. *Ctr. for Biological Diversity v. FERC*, 67 F.4th 1176, 1185 (D.C. Cir. 2023). NEPA imposes two obligations on FERC when assessing the indirect effects of a proposed pipeline project: “First, the Commission must attempt to gather the information

necessary to assess the project’s potential indirect effects. Second, on the record before it—as supplemented by its own efforts to gather information—the agency must consider the reasonably foreseeable effects of the proposed project.” *Food & Water Watch v. FERC*, 28 F.4th 277, 286 (D.C. Cir. 2022). FERC must take reasonable measures to assess reasonably foreseeable effects but may review downstream and upstream impacts on a case-by-case basis.

Even if downstream and upstream emissions are beyond NEPA’s requirements, FERC has proclaimed that it would “continue to analyze upstream and downstream environmental effects when those effects are sufficiently causally connected to and are reasonably foreseeable effects of the proposed action.” *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 (F.E.R.C. 2018). The record before FERC indicates that FERC has substantial information to project both upstream and downstream effects. Here, FERC appropriately reviewed downstream effects⁵ but arbitrarily ignored upstream effects. FERC argues that upstream emissions are difficult to measure “due to unknown factors, including the location of the supply source and whether transported gas will come from new or existing production.” R. at 74. FERC has information about the AFP’s source, destination, and additional detailed information about the pipeline to project at least a preliminary calculation. In *Dominion Transmission, Inc.*, the proposed pipeline still had uncertain variables; the project was still deciding to transport gas from two pipeline transmission systems, and each traversed across other states. Upon review, FERC was not

⁵ FERC appropriately reviewed downstream effects, which are reasonably foreseeable, as TGP does not contest its intents to export to the Port of Union City by LNG International in Brazil. R. at 24. *See also Sierra Club v. FERC* at 1364. where the court held that downstream greenhouse-gas emissions *were* a reasonably foreseeable indirect effect of a pipeline project when two Florida utilities had been identified and committed to buying nearly all the gas anticipated for transport via the project transport; distinguish from *Birckhead*, where the FERC need not review downstream impacts when it could only establish that “the gas [was] headed somewhere in the Southeast.” *Birckhead*, 925 F.3d at 518.

required to review upstream impacts and include the impacts in its EA because it did not have information “regarding the number, location, and timing of wells, roads, gathering lines, and other appurtenant facilities, as well as details about production methods.” *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 (F.E.R.C. 2018). By contrast, FERC has enough information about the AFP to project upstream impacts. FERC is aware that the gas is already in production from Hayres Fracking Field in Old Union and the AFP will reroute a predetermined percentage of production (35% of existing production) and is also aware of the number, location, roads, and production methods. R. at 12.

Not only did FERC fail to measure the significant impact of reasonably foreseeable indirect emissions, but FERC misinterpreted its obligations under NEPA altogether. FERC claimed that because the gas from Hayes Fracking Field was *already* in production, it concluded that there was “no reasonably foreseeable significant upstream consequence” of FERC’s approval. R. at 74. In evaluating environmental impacts pursuant to NEPA, the objective of an EIS is to assess the presence of significant impacts; EIS’s are not limited to only net-positive impacts. Even if a pipeline proposal reroutes natural gas, its impact must be accounted for in an EIS if it is reasonably foreseeable. Simply because a proposal does not produce “new” natural gas does not remove itself from its obligations under NEPA. NEPA mandates review of indirect impacts, which are caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable. This includes “growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” 40 CFR § 1508.8. EIS requirements do not statutorily limit assessments of indirect effects to only “new” effects, but rather, any effect that is “growth inducing or ... related to induced changes.” *Id.* By omitting

review of upstream emissions, FERC overlooks a major aspect of the proposal’s environmental impact, which is a factor that supports a finding of unsatisfactory reasoning. *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

B. FERC arbitrarily omitted mitigation measures for upstream and downstream impacts.

Historically, FERC has refrained from assessing the significance of GHG emissions because there has not been an accepted methodology nor standard. *N. Nat. Gas Co.*, 174 FERC ¶ 61,189, 61,734 (F.E.R.C. 2021). “To date, no federal agency, including the Commission, has established a threshold for determining what level of project-induced GHG emissions is significant.” *Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108, 61,731 (F.E.R.C. 2022). Absent a statutory “significance” standard, FERC solicited comments regarding the metrics and models that the agency should consider in determining significance.⁶ When an agency-administered statute is ambiguous, Congress has empowered the agency to resolve the ambiguity. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). FERC has adopted a “significance threshold,” a uniform standard to assess upstream and downstream impacts. Although FERC’s policies are binding, FERC may not deviate from its policies and practices without providing “a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.” *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

⁶ e.g. “Climate Test” which measures based on the viability of the project in a scenario where the climate goals of the Paris agreement are met and “Social Cost of Greenhouse Gas Test” which compares the climate damages to the monetized project benefits.

In the Updated Policy Statement, FERC announced that projects with estimated emissions of 100,000 metric tons per year of CO₂e or greater will be presumed to have a significant effect. The rationale “consists of little more than piggybacking on EPA's approach to regulating stationary sources.” Updated Policy Statement at 61,713. Here, FERC claims to that no mitigation measures were warranted for downstream and upstream impacts because FERC does not characterize either effect as significant or insignificant. R. at 99. Contrarily, FERC found the construction impacts sufficiently significant to attach GHG conditions, where the direct construction impacts were projected to emit an average of 104,100 metric tons per year of CO₂e. R. at 73. In accordance with the new FERC’s standards, the downstream impacts would also be deemed significant, as TGP’s EIS report estimated downstream emissions of potentially 9.7 million metric tons of CO₂e per year, which exceeds FERC’s significance threshold tenfold. R. at 72. Thus, it was arbitrary and capricious for FERC to depart from its previous decisions and exclude downstream and upstream impacts under its significance standard.

C. FERC should nevertheless use its discretionary authority to mitigate upstream and downstream impacts, in the name of the public’s interest.

FERC has recognized the significant role of GHG emissions on climate change. In its Interim Policy Statement, FERC stated, “Climate change poses a severe threat to the nation's security, economy, environment, and to the health of individual citizens. Human-made greenhouse gas (GHG) emissions, including carbon dioxide and methane, are the primary cause of climate change.” *Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108, 61,719 (F.E.R.C. 2022). Not only are the GHG conditions emissions within the authority bestowed by the NGA, but the GHG conditions also align with FERC’s commitments to combating climate change.

FERC has demonstrated a longstanding commitment to environmental protection, and it should continue to do so by mitigating upstream and downstream impacts. This precautionary approach aligns with FERC's historical practice of incorporating comprehensive environmental considerations into its regulatory oversight, especially in instances where direct causation may not be conclusively established. Even if AFP does not directly lead to new gas production, its contribution to the natural gas sector could be seen as facilitating fossil fuel reliance. A broader systemic impact necessitates a forward-looking and environmentally conscious approach from FERC.

FERC has the discretion to impose conditions and which conditions to impose, but its discretion must have limits. Currently, the imposed GHG conditions merely mitigate the direct construction impacts by an average of 15,760 metric tons of CO₂e per year. R. at 73. However, this beneficial mitigation is essentially nullified if FERC overlooks the broad impacts from natural gas development and from natural gas consumption in the AFP proposal, which FERC has estimated will result in at least 9.7 million metric tons in downstream impacts. R. at 97. In the context of increasing public awareness about climate change, FERC's role extends beyond mere compliance with statutory mandates: FERC embodies environmental stewardship. By proactively addressing upstream and downstream GHG impacts, FERC can set a precedent that underscores the importance of environmental responsibility in the *global* energy infrastructure development. The inclusion of such mitigation measures, while discretionary, are vital in ensuring that energy infrastructure development is congruent with broader environmental objectives and public welfare, echoing Ernest Hemingway's sentiment, "The world is a fine place and worth fighting for."

CONCLUSION

For the foregoing reasons, FERC's issuance of the CPCN was arbitrary, capricious, and otherwise contrary to the law. One, FERC's finding of public convenience and necessity was not supported by substantial evidence where 90% of the LNG was to be exported to Brazil. Two, FERC's finding that the benefits from the AFP outweighed the social and environmental harms was similarly not supported by evidence and departed—without explanation—from agency policy. Three, the CPCN violates RFRA in that it substantially burdens HOME's exercise of religion without meeting its evidentiary burden under strict scrutiny. However, if this Court declines to vacate the CPCN, this Court should find that FERC has the authority to attach GHG conditions to CPCNs and set aside FERC's decision not to impose GHG Conditions addressing downstream and upstream GHG impacts.