

C.A. No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

THE HOLY ORDER OF MOTHER EARTH
Petitioner

FEDERAL ENERGY REGULATORY COMMISSION
Respondent

-and-

TRANSNATIONAL GAS PIPELINES, LLC
Petitioner

On Consolidated Petitions for Review of the Order Denying Rehearing, Docket No. 23-01109,
consolidated case no. 23-01110, Judge Delilah Dolman

Brief of Petitioner, HOLY ORDER OF MOTHER EARTH

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STATEMENT OF JURISDICTION

On June 1, 2023, the Federal Energy Regulatory Commission (“FERC”) issued a final order denying rehearing of two separate requests submitted by the Holy Order of Mother Earth (“HOME”) and Transnational Gas Pipelines, LLC (“TGP”). FERC had jurisdiction over the rehearing regarding the Certificate of Public Convenience and Necessity Order (“CPCN”) under Section 7(r)(a) of the National Gas Act (“NGA”). 15 U.S.C. § 717r(a). Both parties timely appealed this decision within 60 days after the order denying rehearing to this Court of Appeals as required by Section 717r(b). 15 U.S.C. § 717r(b). Hence, the parties have exhausted administrative procedures before appealing.

This Court has subject matter jurisdiction over FERC’s order denying rehearing under Section 717r(b) of the NGA. 15 U.S.C. § 717r(b). This Court is the correct court for these parties because TGP will manage a pipeline in the New Union State and operate under its laws and because HOME is headquartered and organized under New Union’s state laws. Federal Courts of Appeals can review and modify a part of or the entire order denying rehearing from FERC under Section 7r(b). 15 U.S.C. § 717r(b).

NGA claims arise under the jurisdiction granted by the Administrative Procedures Act (“APA”), which requires the agency action aggrieves the petitioner. 15 U.S.C. § 717r(a)-(b); *See also, Sabal Trail*, 867 F.3d at 1365; *See* 5 U.S.C. § 702. HOME was aggrieved by the approval of the AFP and Order Denying rehearing under the NGA.

Under the Religious Freedom Restoration Act (“RFRA”), HOME need only meet Article 3 standing. 42 U.S.C. § 2000bb-1; *See* U.S. Const. Art. III § 2 cl. 1. HOME’s injury from the AFP approval for the primary route and issuance of CPCN is redressable because the court can vacate and remand FERC’s order denying rehearing to avoid the AFP’s climate impact and other

social harms germane to HOME's religious interests in the sanctity of the environment. *Sierra Club v. FERC (Sabal Trail)*, 867 F.3d 1357, 1365 (D.C. Cir. 2017).

STATEMENT OF ISSUES PRESENTED

1. Whether FERC's finding of public convenience and necessity for the AFP was arbitrary and capricious and not supported by substantial evidence where FERC determined a pipeline domestically transporting only 10% of its gas was a public necessity.
2. Whether FERC's failure to consider negative impacts on 40% of landowners along a pipeline's route, effects from permanently removing trees and vegetation on the ecosystem, and new greenhouse gas emissions when balancing its benefits and adverse impacts is arbitrary and capricious.
3. Whether a pipeline route which prevents a religious group from enjoying a sacred journey violates the Religious Freedom Restoration Act when there is an alternate route that does not destroy religious property or prevents this religious exercise.
4. Whether the GHG Conditions were within FERC's authority to impose under the NGA where they are supported by FERC's policy statements and in alignment with Congress's grant of authority to set conditions to ensure public benefits outweigh detriments.
5. Whether FERC's failure to set GHG Conditions addressing the full indirect impact of the Project's GHG emissions was arbitrary and capricious where FERC actually quantified the direct and indirect downstream emissions but only imposed conditions for a fragment of the construction impact.

STATEMENT OF THE CASE

I. HOME's Background and Religious Practices

HOME was founded in 1903 as a not-for-profit religious organization, headquartered on 15,500 privately owned acres in Burden County, New Union. *Transnational Gas Pipelines, LLC*, FERC ¶¶72,201, 44, 46, 9 (2023) (“Rehearing Order”). HOME worships and respects nature as a deity and believes the natural world is sacred. *Id.* at ¶ 46. HOME prioritizes preserving nature over economic interests and reducing the harmful impacts of industrialization and capitalism. *Id.* at ¶¶ 46, 47. FERC and TGP recognize the sincerity of HOME's religious beliefs. *Id.* at 51.

HOME's beliefs and practices center around the natural world, and their spiritually connected land. *Id.* at ¶¶ 46, 49. For the past 88 years HOME has walked the Solstice Sojourn on their property twice each year during the summer and winter solstices. *Id.* at ¶ 48. During the Sojourn, members journey from their temple to a sacred hill at the foothills of the Misty Top Mountains, and return via the Solstice Sojourn path. *Id.* At the hill, specific members perform a sacred coming of age religious ceremony. *Id.*

II. Project Background

TGP proposes to build a pipeline and associated facilities, including a 30-inch-diameter pipeline referred to as the American Freedom Pipeline (“AFP”) to transport liquified natural gas (“LNG”). *Id.* at ¶ 10. The pipeline would be 99 miles long starting from Jordan County, Old Union, to Burden County, New Union. *Id.* The entire TGP Project (“Project”) includes: 1) eight valve assemblies along the AFP; 2) a receipt tap; 3) a receipt meter station, the Main Road M&R Station; 4) “a meter, regulation and delivery station,” Broadway Road M&R Station; 5) and “pig launcher/receiver facilities and pig trap valves at the Main Road M&R Station and the Broadway

Road M&R Station; and 6) “cathodic protection and other related appurtenant facilities.” *Id.* The Project is self-funded and will cost \$599 million. *Id.* at ¶¶ 10, 19.

Before FERC’s approval, TGP executed an export agreement AFP with International Oil & Gas Corporation (“International”) for 90% of the LNG rerouted by AFP. *Id.* at ¶¶ 11, 24. New Union Gas and Energy Services Company (“NUG”) has reserved 10% of the LNG transported by AFP for domestic use. *Id.* International is owned by a Brazilian parent company and will export a majority or all their LNG to Brazil. *Id.* The United States and Brazil do not have a free trade agreement (“FTA”). *Id.* at ¶ 33.

The AFP would reroute 35% of LNG produced from the Hayes Fracking Field (“HFF”), currently transported to eastern states by the Southway Pipeline. *Id.* at ¶ 12; *See id.* at Exhibit A. The AFP would then connect to the newly proposed Broadway Road M&R Station and to the Northway Pipeline, passing through HOME’s property. *See id.* The Northway Pipeline is not at full capacity. *Id.* at ¶ 14. The LNG would then be transported to International New Union City M&R Station, owned by International, to travel along the White Industrial Canal for export. *See id.* Currently, HFF’s full LNG production is transported by the Southway Pipeline. *Id.* at ¶ 12.

HOME disputes statements in FERC’s Order Denying Rehearing that the Project would: 1) transport a maximum of “500,000 [dekatherth (“Dth”)] per day via the NUG terminal and the NorthWay Pipeline; 2) provide natural gas service to new areas; 3) expand access to domestic natural gas supply; 4) create a more competitive market; 5) fulfill North Way Pipeline capacity; and 6) improve regional air quality. *Id.* at ¶ 27. LNG demand fulfilled by the Southway pipeline has been steadily declining east of Old Union due to energy efficiency, increased electrification, and decreased population. *Id.* at ¶¶ 13, 34. All parties agree that the AFP will harm the current LNG pipelines and TGP’s current customers. *Id.* at ¶ 21.

III. Approval of the AFP and Choosing a Harmful Route

Over 40% of affected landowners along the route have not agreed to any easements to allow AFP through their property. *Id.* at ¶ 41. TGP has drafted and completed an Environmental Impact Statement (“EIS”) for FERC. *Id.* at ¶ 72. TGP has altered about 30% of AFP’s primary route and agreed to bury the AFP on HOME’s property. *Id.* at ¶ 41. TGP claims it can complete construction over HOME’s Solstice Sojourn route within four months. *Id.*

TGP considered an alternate route to circumvent two miles of sacred property. *Id.* at ¶¶ 38, 39. TGP estimated that routing the Project through HOME’s property instead of the alternate route through the Misty Top Mountains will save \$51 million in construction costs. *Id.* at ¶¶ 39, 44. The proposed alternate route would be three miles longer and traverse sensitive ecosystems in the Misty Top Mountain range. *Id.* This route would go south around HOME’s property, through the mountains, connecting back to Main Road M&R station and the HFF. (*See id.* at Exhibit A.) The approved AFP route intersects HOME’s sacred Solstice Sojourn twice. *Id.* at ¶¶ 56, 59.

IV. Environmental Impacts

The AFP’s adverse environmental impacts include environmental damage inherent in the LNG hydraulic fracturing process (fracturing), harm to the land from building the pipeline route, and the climate impact from burning fossil fuels such as LNG. *Id.* at ¶ 49. About 2,200 trees and other plants along two miles of HOME’s property would be removed and not replanted along the pipeline route, leaving the land bare. *Id.* at ¶¶ 59, 38. The alternate pipeline route would disturb sensitive mountain ecosystems. *Id.* at ¶ 44.

Without mitigation, the Project would contribute about 104,100 metric tons of CO₂e (“MTCO₂e,” a standard unit to measure greenhouse gas) annually or a total of 416,400

MTCO₂e. *Id.* at ¶ 73. The CPCN imposed the following four conditions to mitigate the GHG impacts of the AFP’s construction (“GHG Construction Conditions”): 1) plant an equivalent number of removed trees; 2) use electric powered construction equipment and vehicles; 3) use net-zero steel manufacturers; and 4) purchase renewable electricity sources. *Id.* at ¶ 67. Even with the GHG Construction Conditions, the AFP’s construction alone would emit 88,340 MTCO₂e per year or approximately 353,360 MTCO₂e over the four. *Id.* at ¶ 73.

TGP claims the Project would improve regional air quality because LNG is more efficient than other fossil fuels but does not indicate how the current energy demand is being met in the Project area. *Id.* at ¶¶ 27, 49. In the Order Denying Rehearing, FERC cited the Council on Environmental Quality (“CEQ”) that encouraged mitigation to the “greatest extent possible” due to the catastrophic climate trajectory. *Id.* at ¶ 69. AFP contributes to the climate crisis by promoting the production, transportation, and burning of fossil fuels. *Id.* at ¶¶ 50, 69.

V. Procedural

On April 1st, 2023, pursuant to Section 7 of the NGA, FERC issued an order authorizing the Project subject to the conditions in the CPCN order. HOME and TGP filed timely requests for rehearing of the CPCN Order. *Id.* at ¶ 1. HOME challenged the CPCN on three grounds: (1) the project need in the CPCN Order was unjustified and unsupported; (2) the negative impacts of the AFP outweigh the benefits; and (3) the route violated the RFRA. *Id.* at ¶ 2. TGP challenged the CPCN, claiming FERC did not have authority to mitigate GHG emissions under the NGA. *Id.* at ¶ 3. FERC issued an Order denying the petitions for rehearing and affirmed the CPCN. *Id.* at ¶ 1.

SUMMARY OF THE ARGUMENT

In the 45 years since FERC was established and the NGA was enacted, there have been innovations in energy technology to address pressing environmental concerns, alongside increased protections for religious groups. HOME requests this Court reverse FERC's Rehearing Order for the following reasons: 1) the AFP does not fulfil domestic need where 90% of the transported LNG will be exported; 2) the AFP's impact on the local community and environment outweighs its marginal benefits; 3) FERC's primary route substantially burdens HOME's exercise of religion under the RFRA; and 4) FERC should have mitigated both upstream and downstream GHG emissions. HOME also requests this Court affirm, if at all, only as to the authority for FERC had authority to impose conditions for construction impacts.

There was no domestic necessity where an overwhelming majority of re-routed LNG would be exported. FERC's own policy mandates full consideration of all public interest factors. Yet, FERC failed to consider the public interest, including the social and environmental impacts of the AFP, especially because over 40% of landowners along the primary route do not have easement agreements with FERC.

The AFP installation would remove about 2,200 trees on HOME's property and would directly contribute to climate change by emitting over 400,000 MTCO₂e. The Project would produce downstream emissions up to 9.7 million MTCO₂e each year. Considering these factors, FERC should have found that social and environmental impacts greatly outweigh any public necessity for the AFP.

Moreover, FERC's approval of the AFP primary route violates federal law which protects religious practices burdened by government actions. The route FERC approved through HOME's property prevents HOME from enjoying the Solstice Sojourn and is not the least restrictive

action that fulfils FERC's interest. Thus, to comply with RFRA, FERC must adopt the alternative to construct the Project at all.

Lastly, FERC not only has the authority to impose GHG conditions but is required to do so because of the large harm GHG emissions have on the climate and the environment. FERC failed to evaluate the full lifecycle impact of the Project and ignored its responsibility to mitigate quantifiable upstream and downstream GHG impacts. Due to these inadequacies in the review and decision-making process, the CPCN was adopted by unreasonable and arbitrary conclusions and is antithetical to the public interest. Accordingly, HOME respectfully requests this Court vacate or alternatively remand FERC's approval of the CPCN, because it was not reasonably supported.

STANDARD OF REVIEW

Courts determine whether agency actions are "rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). The court cannot justify its decision by different reasoning than the agency originally asserted. *Del. Riverkeeper Network v. FERC*, 753 F.3d 1310, 1313 (D.C. Cir 2014). An agency's factual determinations are valid when supported by substantial evidence. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015).

Courts review CPCN issuances under the APA's arbitrary and capricious standard. 5 U.S.C. § 706(2)(A); see *Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 97, 105-06 (D.C. Cir. 2014). Courts examine whether FERC's explanation relied on factors not intended by Congress, lacked consideration of an important aspect, provided an explanation contrary to the evidence, or provided an implausible explanation for something of which experts could not

reasonably disagree. *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 44. Courts apply a “rule of reason” to determine whether there are any deficiencies in the NEPA process hindering informed decision making, and whether it follows CEQ recommendations. *Dep't. of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004).

An agency’s legal interpretations of its authority under statutory law, including RFRA, are reviewed under a *de novo* standard where courts do not defer to an agency’s adjudicative legal conclusions. *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212-1213 (9th Cir. 2008).

Courts will only defer to permissible and reasonable agency interpretations when a statute is silent or ambiguous on the issue. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000), citing *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984).

ARGUMENT

The NGA gave the Federal Power Commission (“FPC”), now FERC, authority to regulate interstate natural gas to be consistent with the public interest. 15 U.S.C. § 717. Regulatory oversight for the export of LNG and supporting facilities is split between FERC and the Department of Energy (“DOE”). *EarthReports, Inc. v. FERC*, 828 F.3d 949, 952 (D.C. Cir. 2016). Congress has delegated approval of imports and exports of LNG to the DOE. 42 U.S.C. § 7151. In turn, DOE delegated FERC authority to approve or deny construction of facilities or pipelines—not exports, which are governed by Section 3 of the NGA. 15 U.S.C. § 717b.

Section 7(c) of the NGA mandates that individuals or entities planning to operate a facility for the interstate transportation of natural gas secure a CPCN from FERC. 15 U.S.C. § 717f(c)(1)(A). To issue a CPCN, FERC must find the pipeline or liquefaction facilities are “required by the present or future public convenience and necessity.” 15 U.S.C. § 717f(e). Furthermore, FERC set forth two analytical steps to consider: “whether the project can proceed

without subsidies” from existing customers, and, if so, FERC then balances the “public benefits against the potential adverse consequences.” *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC P61,227, 745 (1999) (“1999 Certificate Policy Statement”).

FERC must consider “all factors bearing on the public interest.” *Atl. Refin. Co. v. Pubc. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959). If FERC finds a public need for the proposed project, FERC then balances the project’s negative environmental impacts against the project’s overall benefits. *Myersville*, 783 F.3d at 1309. FERC can grant a CPCN with reasonable conditions. 15 U.S.C. § 717f(e).

Landscapes have changed drastically in the last twenty years since FERC’s 1999 Certificate Policy Statement and the projects under the NGA have expanded to more populated areas. Alexandra B. Klass, *Evaluating Project Need for Natural Gas Pipelines in an Age of Climate Change*, 39 Yale J. on Reg. 658 (2022). In an updated draft of the Certification of New Interstate Natural Gas Facilities, FERC indicated a shift to “balance all impacts, including economic and environmental impacts, together in its public interest determinations under the NGA [and weigh] the potential adverse impacts . . . against the evidence of need and other potential benefits of a proposal” when considering issuing a CPCN. *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,107, 689 (2022) (“2022 Certificate Policy Statement”). This policy statement was later reverted to a draft. *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,197 (2022).

I. FERC’S FINDING OF PUBLIC CONVENIENCE AND NECESSITY FOR THE AFP WAS ARBITRARY AND CAPRICIOUS AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE BECAUSE THE PROJECT’S EXPORTS DO NOT FULFILL AN AUTHORIZED NOR DOMESTIC NEED.

FERC should have conducted an export review under Section 3, which requires DOE approval for Non-FTA export agreements with demonstrable public benefit. *Sierra Club v. U.S. Dep’t of Energy* (“DOE”), 867 F.3d 189, 193 (D.C. Cir. 2017). When the DOE finds an inconsistency with the public interest, it must reject export agreements with Non-Free Trade Agreement (“Non-FTA”) countries. *See id.* at 193. Here, the Project is demonstrably inconsistent with the public interest, and therefore even if the exports agreements had been properly presented to the DOE, they would have been rejected. FERC also failed to adequately account for the domestic public interest in its application to construct an LNG pipeline under Section 7 of the NGA. *See* 15 U.S.C. § 717c; *see* 15 U.S.C. § 717f(e). Accordingly, FERC did not have the authority to issue a CPCN because it did not receive DOE approval of its exports and arbitrarily disregarded the lack of public necessity when issuing the CPCN.

- a. A project where 90% of the natural gas transported by a pipeline for export should have been governed by Section 3 of the NGA.

The AFP was required to get DOE approval for LNG exports independent from FERC’s duty to consider public interest in the issuance of a CPCN. LNG pipelines exporting to Non-FTA countries must apply for export approval under Section 3, while interstate pipelines must be separately authorized to construct and operate under Section 7. *EarthReports* 828 F.3d at 952. Accordingly, the Project should have been analyzed under both procedures because it is both an interstate pipeline and exports LNG.

FERC ignored that Section 3 prohibits the exportation of any natural gas without authorization from DOE. Export applications are designated as either Free Trade or Non-Free Trade. *Sierra Club* (“DOE”), 867 F.3d at 205. DOE has the sole authority to approve LNG export to Non-FTA countries. 15 U.S.C. § 717b; *see also Sierra Club* (“DOE”), 867 F.3d at 193.

Here, FERC merely acknowledged that Section 3 relates to exports of LNG, neglecting to pursue the required DOE authorization for exports through a Brazilian Company, International, which does not have a FTA with the United States and has entered into precedent agreements with TGP to export 90% of the Project’s LNG. Rehearing Order at ¶ 33. Issuing a CPCN with Brazilian exports was beyond FERC’s authority because the DOE did not approve exports to a Non-FTA country.

- b. FERC failed to demonstrate domestic public interest under Section 7 requirements for issuance of a CPCN.

Section 7 approval of pipeline construction and operation requires an analysis of “all factors bearing on the public interest,” to demonstrate the project would serve present or future public needs. *Atl. Refin. Co.*, 360 U.S. at 391. FERC relied on precedent agreements to justify its CPCN finding. The export precedent agreement is not enforceable absent DOE authorization, invalidating FERC’s assumption of public need. Only 10% of the Project’s LNG should be considered under a Section 7 analysis for construction and operation approval.

FERC recognized project need is inherently domestic need, by adopting TGP’s estimate that 500,000 Dth per day would provide domestic benefit by transporting LNG to new areas in New Union and in the United States. Rehearing Order at ¶ 27. However, only 50,000 Dth goes towards a United States company and domestic benefit. The Court should recharacterize the amount of “need” to include only the 50,000 Dth which will be provided domestically because

FERC's factual finding is contrary to the evidentiary record and therefore not supported by substantial evidence.

- i. The AFP is not aligned with public interest because it does not serve domestic need.*

The Supreme Court has recognized that “public interest” is served by the NGA’s purpose to encourage the orderly development of plentiful supplies of natural gas at a reasonable price. *NAACP v. FPC*, 425 U.S. 662, 668. In *NAACP*, the supply of natural gas was for domestic use. *Id.* at 669-70. Accordingly, FERC should view unserved demand and expansion of access to LNG in terms of domestic benefit. FERC previously found a public benefit where 625,000 Dth per day (42% of the project capacity and 60% of the deliveries) fulfilled domestic need. *Nexus PGs Transmission, LLC*, 172 FERC ¶ 61,199, ¶ 27. Here, FERC declares 500,000 Dth per day goes towards domestic needs, but only 50,000 Dth is retained domestically United States. Rehearing Order at ¶¶ 27, 11. Thus the AFP achieves neither domestic need nor substantially expands access.

- ii. Non-Free Trade Export Precedent Agreements do not demonstrate domestic need required for a CPCN.*

Under Section 7, export precedent agreements are just one factor FERC can consider in its “flexible inquiry” of a project’s public benefit. *City of Oberlin v. FERC (Oberlin II)*, 39 F.4th 719, 726-27 (D.C. Cir. 2022). FERC has previously considered other public interest factors, like job creation and avoiding construction on undeveloped land. *Nexus Gas Transmission, LLC*, 160 FERC ¶ 61,1140. Here, FERC is constructing on undeveloped land and fails to provide public justification for doing so.

In one instance, long-term domestic contracts demonstrated that the project need aligned with the public interest. *Myersville*, 783 F.3d at 1309-1311. The contracts in *Myersville* refer to “two local distribution companies” serving the needs of people residing in the continental United States. *Id.* at 1309. FERC misconstrues *Myersville* to claim precedent agreements are always significant evidence of market demand for a project. However, these long-term contracts in *Myersville* served a *domestic* need and were not exported. In contrast, because the Project relies on a Brazilian export precedent agreement accounting for 90% of the LNG as the only factor, FERC should have separately demonstrated a domestic benefit. Rehearing Order at ¶ 33.

In the D.C. circuit case *Oberlin II*, FERC considered export precedent agreements with shippers by associating them with a domestic benefit, establishing a “rational connection” between their decision and the facts. 39 F.4th at 725. Unlike *Oberlin II*, neither FERC nor TGP specify how these agreements yield specific domestic benefits. Instead, both consider the domestic benefits separately from exportation and precedent agreements. Rehearing Order at ¶ 27. Furthermore, the benefits here are strictly international and unconnected to domestic benefits.

Further, in *Oberlin II*, the court determined the precedent agreements with foreign shippers for transportation facilitated and increased the Dawn Hub’s ability to store gas, thus benefiting the domestic gas market by ensuring adequate domestic gas supplies when there was high demand. *NEXUS Gas Transmission, LLC*, 172 FERC P61,1999, ¶ 18. Thus, in *Oberlin II*, the gas would be stored in a major natural gas storage site. *Id.* In contrast, the Project’s LNG will not be stored in a hub. Instead, the gas will flow through the transmission facility in New Union, where 10% will be distributed domestically and 90% will be exported. Rehearing Order at ¶ 14. The Project’s LNG does not significantly contribute to increasing natural gas storage for the

United States, thus not properly addressing the project need. Accordingly, FERC had no basis for determining the export precedent agreements demonstrate project needs.

- c. Outside of the export precedent agreements, the domestic needs the Project serves are not large enough to fulfill future or present need.

After confirming the project can exist without subsidies from existing pipeline customers, FERC balances the public benefits against the project's adverse effects to issue a CPCN. 1999 Certificate Policy Statement at 745. FERC examines whether the project: 1) meets unserved demand, 2) eliminates bottlenecks, 3) provides access to new supplies, 4) improves the interstate grid, 5) advances clean air objectives, or 6) increases electric grid reliability. *Certification of New Interstate Natural Gas Pipeline Facilities*, 90 FERC ¶61,128, 396 (2000) ("2000 Certificate Policy Statement").

Regarding unserved demand, only 10% of the capacity, or 50,000 Dth per day, goes to a domestic supply or company. Rehearing Order at ¶ 33. FERC asserts that the Project would meet some needs of domestic customers, fill additional capacity at the International New Union City M&R Station, and transport gas that might not otherwise be purchased if routed through the Southway Pipeline. *Id.* at ¶ 34. TGP asserts with no evidentiary support, that the full 500,000 Dth of project capacity advances clean air objectives, however neither FERC nor TGP demonstrate how switching to LNG advances clean air objectives—as it does not provide evidence that regional energy needs are currently being met through less efficient options. TGP also claims that bottle necks will be eliminated, but there is no evidence to suggest so. TGP further asserts the project will expand access to sources of natural gas supplies, but the LNG will still come from HFF. *Id.* at ¶ 27. Lastly, TGPs claim that the LNG is a competitive alternative is not true as it is not a new competitive alternative as it is already being utilized in the Southway pipelines.

Even if there was evidence to support such contentions, this Court must rely only on FERC's reasoning in the Rehearing Order when assessing the validity of FERC's discretion. *See BP Energy Co. v. FERC*, 828 F.3d 959, 964–65 (D.C. Cir. 2016) (remanding due to an inadequate explanation of agency's decision.) As such, the approval should be remanded to FERC to do a more comprehensive analysis on whether to issue a CPCN for the Project.

II. FERC'S PROJECT APPROVAL WAS ARBITRARY AND CAPRICIOUS BECAUSE IT IGNORED THE NEGATIVE SOCIAL AND ENVIRONMENTAL IMPACTS.

This Court need only consider the economic balancing test of project benefits and detriments if the Project need is met. Because FERC has considered the social and environmental impacts in its Rehearing Order, this Court can consider AFP's negative impacts. *See Adorers of the Blood of Christ U.S. Province v. Transcon. Gas Pipe Line Co.*, 53 F.4th 56, 61 (3d Cir. 2022).

After project need, FERC must balance the project's benefits and negative impacts to determine whether a project meets the "public convenience and necessity." *Sabal Trail*, 867 F.3d at 1373. FERC's 1999 Certificate Policy Statement suggests three considerations: 1) existing customers, 2) captive customers of existing pipelines, and 3) surrounding communities and landowners. 1999 Certificate Policy statement at 747. TGP and FERC concede the pipeline harms "TGP's existing customers, existing pipelines in the market and their captive customers." Rehearing Order at ¶ 21.

FERC did not take a "hard look" at the environmental impacts of the Project in accordance with NEPA. *Myersville*, 783 F.3d at 1322. Although FERC integrated TGP's EIS findings and data into its assessment, it did so arbitrarily by not accounting for upstream impacts, evading its duty under the NGA to thoroughly consider a project's impact. Overall, FERC

incorrectly granted the CPCN because it undervalued the Project's negative social impacts on landowners and environment and failed to analyze upstream impact.

- a. FERC did not appropriately weigh the negative social impacts of AFP on the surrounding communities and landowners.

FERC's longstanding policy recognizes affected landowners and communities' interests to avoid unnecessary property impacts like a permanent right-of-way or damage from construction. *See* 1999 Certificate Policy Statement at 748. Because CPCN holders have the authority to exercise federal eminent domain for approved projects, FERC's Draft Policy encourages CPCN applicants to negotiate respectfully and in good faith to minimize using eminent domain. 15 U.S.C. § 717f(h); *Columbia Gas Transmission Corp. v. Exclusive Gas Storage Easement*, 776 F.2d 125, 128 (6th Cir. 1985); 2022 Certificate Policy Statement at 691. FERC has recognized adverse impact where eminent domain does not benefit landowners. 2000 Certificate Policy Statement at 398.

Although CPCN holders generally have eminent domain authority under Section 7, Section 3 does not authorize eminent domain and must be independently supported by public interest. *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2263 (2021); *see City of Oberlin v. FERC* ("*Oberlin I*"), 937 F.3d 599, 607 n.2 (D.C. Cir. 2019). Here, TGP changed only 30% of the route during pre-filing and agreed to build an underground pipeline within four months on HOME's religious property. Rehearing Order at ¶¶ 41-43.

Significantly, TGP does not have easement agreements with over 40% of the affected landowners. *Id.* at 42. FERC and TGP failed to disclose how much of the route these agreements cover. Despite this, FERC dismissed the lack of easement agreements as insignificant. *Id.* at 43. Given the overwhelming amount of exported gas, 90% here as compared to 17% in *Oberlin I* and

II, and FERC's assumption that the export agreements will be authorized by the DOE, this case presents a takings and constitutional issue.

Additionally, the AFP harms HOME and its religious practices on its land. Section 7 does not limit public interest factors, and the Supreme Court has held that FERC is required to consider all factors affecting public interest. *Atl. Ref. Co.*, 360 U.S. at 391. FERC must consider the route and its impacts on the community, including the religious impacts and the Project's effects on landowner's use of property when it approves Section 7 projects. HOME has not agreed to an easement and would lose the sacred use of their land. Compensation from eminent domain does not cover the loss of religious use of HOME's property.

It is undisputed that AFP will harm existing customers, existing pipelines in the market and TGP's captive customers. Rehearing Order at ¶ 21. If FERC assessed AFP's impacts on landowners, further harm would be found. Thus, FERC's dismissal of negative impacts on landowners is arbitrary and capricious as it is implausible that such extreme negative impacts could be outweighed by the Project's dubious contribution to the domestic public necessity.

b. FERC did not adequately consider the Project's environmental impacts because it ignored impacts along the route and GHG emissions.

The Supreme Court has recognized that FERC can consider environmental effects when analyzing public interest factors. *See NAACP v. FPC*, 425 U.S. at 670 n.6. Similarly, appellate courts recognize that FERC's role in approving or denying a CPCN partially based on environmental impacts makes FERC a "legally relevant cause" of the pipeline's indirect and direct environmental impacts. *Sabal Trail*, 867 F.3d at 1373. AFP's environmental impacts include removing trees and vegetation from the area, increased GHG emissions from construction, and additional upstream and downstream GHG emissions. FERC's failure to

account for a reasonably foreseeable causal chain of quantifiable increased GHG emissions fails to meet its responsibility to conduct a reasoned environmental review of foreseeable impacts.

i. The direct environmental impact outweighs the Project benefits.

In the updated draft policies, FERC changed the structure of how it will assess environmental impacts and clarified its responsibility to analyze environmental factors under the NGA. FERC proposes that it will consider climate impacts of new projects among other environmental effects. Certification of New Interstate Nat. Gas Facilities, 178 FERC ¶ 61,107, 61690 (FERC February 18, 2022).

Here, FERC engages in cursory analysis below its own standards by ignoring potential environmental harms and generally concluding that identified environmental impacts do not outweigh the project's benefits. Notably, the construction of the AFP also causes regional environmental harm from a total of 416,400 MTCO₂e of additional GHG emissions without mitigation efforts and 353,360 MTCO₂e after mitigation. Rehearing Order at ¶ 73. Adverse environmental impacts also include the removal of at least 2,200 trees and other vegetation from two miles of the AFP's route which will not be replanted on HOME's property. Rehearing Order at ¶ 38. FERC does not consider the adverse impacts to the local ecosystem from permanently removing plants from AFP's route. It will take years to achieve full environmental benefits from mature trees that are replanted elsewhere. FERC fails to independently assess the total affected acres, long-term impacts of areas cleared for four years of construction., and the permanent harm to the surrounding land and ecosystems.

- ii. *FERC should have considered upstream and downstream GHG emissions as adverse environmental impacts.*

FERC should have considered the reasonably foreseeable upstream and downstream emissions when it weighed the environmental harms of the Project. FERC must consider all environmental effects during NEPA review, whether direct or indirect. 40 C.F.R. § 1502.16 (b). FERC has traditionally used NEPA review alongside its CPCN findings to meet the NGA requirement to assess the public interest. Alexandra B. Klass, *Evaluating Project Need for Natural Gas Pipelines in an Age of Climate Change: A Spotlight on FERC and the Courts*, 39 Yale Journal on Regulation 658, 666 (2022); *see also* 18 C.F.R. § 380.6(a)(3) (2021). A project's cumulative impacts must be considered over time alongside other foreseeable actions. *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 303 (D.C. Cir. 2013).

Indirect impacts require a “reasonably close causal relationship,” borrowed from tort law’s proximate causation. *Sierra Club v. FERC (Freeport)*, 827 F.3d 36, 47 (D.C. Cir. 2016) (quoting *Pub. Citizen*, 541 U.S. at 767). Proximate causation is established when the project is the “sole, efficient, producing cause” of the impact. *See Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506, (1957). Even geographically or temporally distanced impacts must be considered through “reasonable forecasting and speculation.” *Del. Riverkeeper Network*, 753 F.3d at 1310. Courts will deem an impact foreseeable when the agency has any potentially useful information to analyze it. *See Pub. Citizen*, 541 U.S. at 767.

Cumulatively, the Project would cause an upstream impact from LNG production. It is foreseeable that the AFP will induce LNG production by rerouting 35% of the Southway Pipeline LNG which would otherwise decrease in distribution due to declining demand. Even though HFF, the proposed LNG source for the AFP, is at full production, it would be foreseeable the

production would decrease if the Project is never built. Accordingly, FERC should account for upstream impact to the extent that LNG demand is declining in Southway pipeline's service area. Thus, FERC's conclusion that there will be no upstream impact is not a reasonable analysis because it fails to consider the project's cumulative context.

Through reasonable forecasting, FERC could have estimated the project's upstream impact. FERC asserted that it has insufficient information to assess upstream impact, but the fact that FERC estimated the Project would involve 500,000 Dth per day is sufficient to estimate upstream emissions. Existing modeling technologies can be used to determine indirect impact. *See Sabal Trail*, 867 F.3d at 1374 (noting that FERC's estimation of gas transport at 1 million Dth could have been used to estimate GHG emissions). From this information, there is no reason why FERC could not quantify upstream GHG emissions produced by the LNG, just as FERC was able to quantify downstream impact from the same information.

FERC dismissed the importance of downstream emissions that it quantified at 9.7 million MTCO₂e. Rehearing Order at ¶ 72. Likewise, FERC declined to even acknowledge the upstream emissions, claiming that the Project's existing LNG source means that it would not have upstream emissions. *Id.* at ¶ 74. Thus, FERC arbitrarily declined to modify the environmental analysis to reflect an adequate NEPA review, and therefore based its CPCN determination on incomplete information.

c. FERC's approval of the Project is arbitrary and capricious because the social and environmental harms outweigh the benefits.

The NGA mandates that FERC only adopt a CPCN when it determines that the public benefits outweigh the harms and grants FERC the authority to reject issuing a CPCN or adopt conditions necessary to meet this requirement. 15 U.S.C. § 717(f). Thus, once FERC identifies

negative impacts that outweigh the benefits, FERC is required to reject the CPCN unless it voluntarily adopts conditions to mitigate any and all of a project's estimated harms.

Additionally, under Section 7, FERC should consider logical alternatives which may better serve the public interest than the proposed project. *See Minisink Residents for Env'tl. Pres. & Safety*, 762 F.3d 97 at 107. Instead, FERC inappropriately compared the Project's environmental impact to a worse alternative, without addressing any of the shared environmental impacts, like GHG emissions, or considering other alternatives which could be better for the public interest. Rehearing Order at ¶ 74. The Court should ignore FERC's analysis of the alternate route because FERC did not demonstrate public necessity for the primary route and Section 7 does not permit the comparison of worse alternatives to justify an environmentally damaging pipeline. The Court should vacate this decision for lack of reasoned decision-making in approving the CPCN when the adverse impacts outweighed the project's benefits. *See Env't Def. Fund v. FERC*, 2 F.4th at 975.

III. THE PRIMARY AFP ROUTE IS UNLAWFUL BECAUSE FERC VIOLATED STATUTORY PROTECTIONS OF RELIGIOUS PRACTICES.

Regardless of the Court's determination on the issuance of the CPCN under Section 7, FERC's approval of the primary route violates RFRA. RFRA broadly protects religious exercises and requires courts to ensure that less invasive alternatives are pursued. *Holt v. Hobbs*, 574 U.S. 352, 357 (2015). Congress passed RFRA to expand religious protections for seemingly neutral laws which substantially burden religious practices. *See Burwell v. Hobby Lobby Stores, Inc. (Hobby Lobby)*, 573 U.S. 682, 694 (2014). Once the government substantially burdens a sincere religious belief, the government must prove it serves a compelling government interest and is the least restrictive means. *Id.* at 737; 42 U.S.C. § 2000bb-1(b). Congress later enacted the "sister

statute” Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), altering RFRA’s definition of religious practices. *Id.* at 695-96.

FERC is a governmental actor that must not substantially burden HOME’s religious exercises. FERC and TGP acknowledge that HOME’s religious beliefs are sincere. Rehearing Order at ¶ 51. HOME’s religious exercise is the biannual use of the Solstice Sojourn route during a coming-of-age ceremony. *Id.* at ¶ 48. As such, RFRA applies to this Project approval which burdens HOME’s religious practices. FERC’s approval of the route through HOME’s sacred Solstice Sojourn path substantially burdens HOME’s religious practices without the justification of a compelling government interest. Even if the Court finds that FERC demonstrated a compelling interest, the alternate route would be less restrictive than the primary route.

- a. FERC used its governmental authority to substantially burden HOME’s religious practices.

RFRA prohibits the government from “substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability.” 42 U.S.C. § 2000bb-1. RFRA, as amended by RLUIPA, defines a general religious exercise as “any exercise of religion,” and includes the religious use of property. 42 U.S.C. § 2000bb-2(4); 42 U.S.C. § 2000cc-5(7)(A). While the term “substantially burdens” lacks a precise statutory definition, the Supreme Court emphasized that RFRA broadly protects religious exercises. *Hobby Lobby*, 573 U.S. at 695, 720 (holding that the government substantially burdened the corporation’s religious beliefs when the government-mandated insurance “demands that [Hobby Lobby] engage in conduct that seriously violates their religious beliefs” or pay extra for alternative insurance). The Supreme Court found a substantial burden where the government limited one religious practice, even though someone could practice other aspects of their religion. *Holt*, 574 U.S. at 361-62.

Before RLUIPA was enacted and “substantially modified and relaxed” definitions of religious exercise, the Tenth Circuit applied a broad definition of substantially burdens which included whether government regulation “meaningfully curtail[ed]” someone’s ability to adhere to their faith or denied someone “reasonable opportunities” to practice fundamental religious exercises. *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 662-63 (10th Cir. 2006); *Thiry v. Carlson*, 78 F.3d 1491, 1495-96 (10th Cir. 1996).

FERC’s approval of the AFP through HOME’s Solstice Sojourn path disrupts the sacred route and destroys its purpose for HOME’s members, substantially burdening the biannual religious ceremony. Furthermore, the route requires removing plants and trees, leaving the ground irreparably bare. Rehearing Order at ¶ 57. The primary route burdens HOME’s religious exercise because HOME members must cross over a pipeline inherently contradictory to their religious beliefs twice during each ceremonial journey from their temple to a sacred hill. *Id.* Additionally, the route compels HOME to be complicit in FERC’s action which uses fossil fuels, contrary to HOME’s religious beliefs and devotion to Mother Earth. *Id.* at ¶ 58; *Hobby Lobby*, 573 U.S. at 720. As a result, the pipeline negatively impacts HOME’s anti-industrial beliefs and practices of respecting Mother Earth as a deity. *Id.* at ¶ 46. FERC ignores how both the underground route and newly barren path above the AFP will constantly burden HOME’s religious exercise. *See id.* at ¶¶ 59, 48.

Here, the primary route deprives HOME of the ceremonial journey’s spiritual significance and ability to appreciate nature as a deity. Moreover, FERC’s approval of the CPCN and eminent domain over HOME’s private property is an even greater burden than a law requiring a corporation to pay more or decline to provide employee’s health care because FERC is compelling more than financial inconvenience. Here, HOME has no choice but to suffer harm

to the religious ceremonial path of the Solstice Sojourn; HOME may either agree to an easement or TGP may exercise federal eminent domain. *See* Rehearing Order at ¶¶ 42-43. This Court should recognize situations where there is an intense burden on religious exercise, especially when religious organizations have no alternative to the offending rules.

In the Rehearing Order, FERC mischaracterized “substantial burden” to apply only when governmental action pressures HOME members to change their behavior or violate beliefs where HOME is physically prevented from practicing their religion. *Id.* at ¶ 55, 59. The Ninth Circuit interpreted “substantially burden” based on pre-RFRA caselaw. *Navajo Nation v. U. S. Forest Serv.*, 535 F.3d 1058, 1069-70 (9th Cir. 2008). In a recent dissent, Judge Berzon argued this interpretation improperly relies on cases not included in RFRA’s definition of “substantially burdens,” despite being explicitly incorporated into the compelling interest test. *Apache Stronghold v. United States*, 38 F.4th 742, 774 (9th Cir. 2022) (Berzon, J., dissenting), *reh’g en banc granted, opinion vacated*, 56 F.4th 636 (9th Cir. 2022).

This Court should adhere to 10th Circuit precedent and statutory interpretation of “substantial burden” to include government action which “meaningfully curtails” HOME’s religious exercise. FERC’s forced underground pipeline imposes a higher burden than physical prevention, as it permanently alters the natural world of HOME’s sacred ceremonial route and hinders the meaning behind HOME’s religious practices. This Court should find the AFP route substantially burdens HOME’s religious exercises. Under this standard, FERC proves that FERC has substantially burdened HOME’s religious exercise. *See Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1210 (9th Cir. 2008) (finding that a “more generous” standard was harmless error because the parties failed to prove a lower standard of substantial burden to their religious practices. Thus, this Court should find FERC’s higher standard of “substantial burden” it applied

in the Rehearing Order is prejudicial to HOME and remand it to FERC review the compelling interest test.

- b. Maintaining a coherent permitting system is not a compelling governmental interest.

RFRA applies the prior compelling interest tests to “*all* cases where free exercise of religion is substantially burdened.” 42 U.S.C. § 2000bb (emphasis added). Courts must examine “the marginal interest” to enforce the government’s compelling interest. *Hobby Lobby*, 573 U.S. at 726-27 (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)). Essentially, “only the gravest abuses, endangering paramount interests, give occasion for permissible limitation,” on the fundamental right. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

FERC must ensure its permitting system complies with legal standards and respects American citizens’ legal rights. Like in *Hobby Lobby*, this Court must look beyond FERC’s broad interest and analyze FERC’s “marginal interest in enforcing” AFP’s permit here. 573 U.S. at 726-27. Here, FERC’s specific interest is not a compelling governmental need and RFRA compliance does not necessitate preference for HOME’s religion. TGP contends that FERC’s compelling interest is to “maintai[n] a coherent natural gas pipeline permitting system” and that building under HOME’s ceremonial route is the least restrictive way to do so but fails to consider that this permitting system must also adhere to FERC’s legal responsibilities. Rehearing Order at ¶ 63.

- c. Alternatively, FERC did not choose the least restrictive means for the AFP.

Even if this Court finds a compelling interest, this route is not the least restrictive means to accomplish the interest. The least restrictive means requires that the government “lacks other

means of achieving its” compelling interest. *Hobby Lobby*, 573 U.S. at 728. In *Hobby Lobby*, the Court found that there were alternatives to the government’s restrictive solution and did not consider how expensive these alternatives were for the government. *See id.* at 692. Cost is not determinative in this “exceptionally demanding” standard, particularly because RFRA can require additional expenditures to accommodate religious protections. *Id.* at 728, 730 (citing 42 U.C.S. § 2000cc-3(c)).

Here, TGP has already suggested an alternative route. While the alternate route may be expensive *for TGP* and have other impacts, this does not mean the primary pipeline route is the least restrictive means for FERC because *Hobby Lobby* does not contemplate costs to other third parties. Additionally, FERC claimed that re-routing the AFP would be impractical and “overly burdensome,” and only proposes one alternative. Rehearing Order at ¶ 62. The religious Solstice Sojourn route cannot be moved; the route itself is sacred. FERC claims that a more environmentally damaging alternative route will burden HOME’s religious practices without addressing that the Sojourn is a particular religious exercise to the land the primary route is built on. The alternate route would not affect the Sojourn route and would only increase TGP’s costs by less than 9%. (51 million dollars to the 599 million dollar project is less than 9% of the Project’s cost). Compared to the complete destruction of HOME’s religious exercises, this minor cost increase to TGP is less restrictive than the primary route. Because this is not the least restrictive means to achieve a permitting system that complies with FERC’s legal obligations, this Court should reverse FERC’s approval of the AFP route as violative of RFRA.

IV. THE GHG CONDITIONS WERE WITHIN FERC’S AUTHORITY BECAUSE THE NGA GRANTS THE AUTHORITY TO IMPOSE CONDITIONS NECESSARY TO ACHIEVE PUBLIC BENEFIT.

FERC acted within its authority by imposing environmental conditions to reduce GHG emissions from Project construction because it can deny a project lacking a net public benefit. Thus, the Project approval, and corresponding CPCN, is a legally relevant cause of GHG emissions; and FERC should have adopted necessary environmental conditions, consistent with past practices. Additionally, project-level mitigation of GHG emissions is too narrow of an act to constitute the sweeping policy concerns of a major question. Regardless, Congress has empowered FERC with broad authority as the expert agency to make determinations and adopt appropriate project-level environmental conditions.

To reduce the adverse environmental impact of the AFP, FERC identified the following GHG Construction Conditions: 1) replant the removed trees in a different location; 2) use electric construction equipment “where available; and 3) use “green,” net-zero steel pipeline segments. Rehearing Order at ¶ 67.

- a. FERC has the authority to impose environmental conditions based on the requirements of the NGA.

To balance public benefit against the harms, FERC may impose conditions on a project with environmental concerns rather than denying the CPCN. 15 U.S.C. § 717f(e). As part of determining whether a project application is of “public convenience and necessity,” the NGA requires FERC to include “reasonable terms and conditions as the public convenience and necessity may require” in the CPCN. 15 U.S.C. § 717f(e). Courts have also recognized that

FERC's ability to set remedial conditions is supported by federal regulations. *See Twp. of Bordentown v. FERC*, 903 F.3d 234, 261 (3d Cir. 2018).

In one case where FERC denied petitioner's request for rehearing, the court determined that FERC has an affirmative duty to investigate GHG emissions and has the legal authority to mitigate effects which it can "reasonably foresee." *Sabal Trail*, 867 F.3d at 1374. Here, FERC has asserted its authority to mitigate the estimated construction impact.

FERC typically considers GHG impacts in its environmental reviews. *See, e.g., Environmental Assessment for the Philadelphia Lateral Expansion Project*, Docket No. CP11-508-000, at 24 (Jan. 18, 2012) (construction emissions); *Environmental Assessment for the Minisink Compressor Project*, Docket No. CP11-515000, at 29 (Feb. 29, 2012) (operation emissions). Rehearing Order at ¶ 71. Thus, GHG conditions are justified because FERC has historically imposed them to avoid environmental harms, such as the quantified construction related GHG Construction Conditions here.

FERC supported the GHG Construction Conditions with scientific and policy information from the CEQ published interim climate guidance which acknowledged the climate crisis in the context of NEPA and emphasized that agencies should mitigate GHG emissions "to the greatest extent possible" to avoid the worst climate impacts. Rehearing Order at ¶ 69; 88 C.F.R. § 1196 (Jan. 9, 2023). FERC was acting on substantial evidence in alignment with CEQ guidance when adopting the GHG Construction Conditions.

- b. The Project is a legal cause of GHG emissions which FERC has the authority to control.

FERC may only issue a CPCN when it finds that the project's benefits outweigh all the impacts, including the environmental impact of GHG emissions. *Minisink Residents for Env't Pres. & Safety*, 762 F.3d at 102-03 n.1. Here, the CPCN is therefore a legal cause of the downstream impact, which FERC not only has the authority to control, but must adopt conditions to the extent that it is able to balance the harms against the benefits. *See Ctr. for Biological Diversity v. U.S. Army Corps of Engin'rs*, 941 F.3d 1288, 1213, 1216-17, (11th Cir. 2019). The GHG Construction Conditions would effectively reduce the GHG emissions, lessening the Project's contribution to climate change. Thus, the GHG Construction Conditions are within FERC's Congressional grant of authority because they reasonably limit the Project's adverse effects.

- c. The Major Questions Doctrine does not limit FERC's ability to set conditions on specific construction measures taken to reduce environmental impact for this single project.

The GHG Construction Conditions are outside the restrictive framework of the Major Questions Doctrine because Congress expressly granted FERC the authority to adopt project-level environmental conditions to ensure that pipeline approvals achieve public benefit. 15 U.S.C. § 717f(e). The Supreme Court clarified that the Major Questions Doctrine, a new principle of statutory interpretation limiting regulatory administrative agency authority, only applies in extraordinary instances where the "history and breadth" of an agency action of "economic and political significance" creates hesitation on whether Congress intended such authority. *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston, LLC*, 76 F.4th 291, 296 (4th Cir.

2023). For example, the Supreme Court found a violation of the Major Questions Doctrine where the EPA attempted to expand its regulatory authority by adopting a major regulatory program, that Congress did not explicitly authorize, through a rarely used gap-filler statute. *West Virginia v. EPA*, 142 S. Ct. 2587 at 2610.

Here, this Court need not interpret beyond the plain meaning of the NGA to determine FERC's authority to mitigate GHG emissions. The plain language indicates that Congress granted FERC the statutory authority to mitigate adverse impacts through reasonable conditions. 15 U.S.C. § 717f(e); *see ANR Pipeline Co. v. FERC*, 876 F.2d 124, 129 (D.C. Cir. 1989) (recognizing FERC's conditioning authority as “extremely broad”). FERC was acting under the precise grant of Congress by attaching reasonable GHG conditions—not even to the full extent of the GHG impact—for public necessity.

While climate change's impacts are of vast economic and political significance, the action of adopting conditions for a single project is not. As noted in its order, FERC's GHG Construction Conditions pertain to a single project and, therefore, cannot reasonably be seen to address a “major question” of such significance. Rehearing Order at ¶ 86.

Unlike in *West Virginia*, FERC is not attempting to adopt any regulatory program, nor is it attempting to bypass Congressional authority. Accordingly, even though climate change is a global issue, the conditions that FERC adopts do not require specific authorization from Congress because the GHG Construction Conditions are not a broad regulatory action. Therefore, this Court should affirm FERC's authority to mitigate the Project's adverse impacts like GHG emissions.

V. FERC SHOULD HAVE SET GHG CONDITIONS FOR UPSTREAM AND
DOWNSTREAM IMPACT AS REASONABLY FORESEEABLE HARMS.

FERC was required to create conditions to mitigate the environmental harms to the extent that the public benefits would outweigh them. *See* 15 U.S.C. § 717f(e). Therefore, because FERC found a quantifiably considerable downstream GHG impact from TGP's environmental review, FERC should have adopted conditions to address those harms. Furthermore, FERC should have similarly assessed upstream impact but failed to do so. Here, mitigating 63,040 MTCO₂e appears negligible in comparison to the 9.7 million MTCO₂e downstream impact that TGP estimated in the EIS. Rehearing Order ¶¶ 72, 73 (subtracting the annual mitigated construction emissions from the total projected construction emissions and multiplying by four years of construction to get the total amount of GHG mitigation). The GHG Construction Conditions only reduced up to 15% of the construction emissions and were not sufficient to outweigh the project's overall GHG emissions, let alone the full negative impacts.

- a. FERC does not have the discretion to arbitrarily refuse to mitigate some quantifiable impact and not others.

FERC's decision to impose conditions on the direct construction emissions of the Project, while refusing to create conditions to mitigate the downstream impact, is an arbitrary distinction. By adopting conditions for the construction impacts, FERC acknowledged that the Project's climate impact from GHG emissions was significant enough to require mitigation. Although FERC approved some mitigation through its GHG Conditions, 63,040 MTCO₂e of construction mitigation appears negligible in comparison to the remaining 9.7 million MTCO₂e downstream impact, leaving excessive environmental harms in need of mitigating conditions.

By rejecting a pipeline where the harms outweigh the Project's benefits, FERC was avoiding its responsibility granted by Congress. Quantified LNG combustion emissions and production emissions are just as tangible and predictable as the construction emissions that FERC mitigated. Thus, it is arbitrary and capricious that FERC contrives an otherwise nonexistent line between GHG emissions produced at a power plant by electricity production used in powering construction equipment (which FERC adopted GHG Conditions for) and those produced at HFF by LNG production—which FERC has declined to account for entirely. Thus, FERC's discretionary authority does not extend to approving a project where it arbitrarily adopted some conditions but failed to address all impacts to achieve a net public benefit.

FERC should mitigate the Project's environmental harms to the point where they are outweighed by the benefits to justify a CPCN. *See Minisink Residents for Env't Pres. & Safety*, 762 F.3d at 101. Here, this would include the indirect harm from GHG emissions. FERC has estimated downstream emissions totaling 9.7 million MTCO₂e annually—even without considering the upstream impact that they should have quantified. Rehearing Order at ¶ 72. Even though FERC asserts it is a conservative estimate, the quantified downstream impact alone outweighs the direct impacts over 100 times over. *Id.* at 72,73. (9.7 Million MTCO₂e divided by 88,340 MTCO₂e is 109.8) Thus, FERC's discretionary authority does not extend to arbitrary adopting some conditions and not others while still failing to achieve an appropriate balance of public interest.

- b. FERC need not wait for updated guidance to act on impacts which it can reasonably foresee in the instant matter.

FERC claims that its refusal to mitigate the quantified indirect emissions was within its discretionary authority. Rehearing Order at ¶ 97. But there are reasonable limits to this

discretion. In particular, FERC cannot approve a project where the decision underlying the adoption of the CPCN is arbitrary and capricious. *Env't Def. Fund v. FERC*, 2 F.4th at 967–68, *cert. denied sub nom. Spire Missouri Inc. v. Env't Def. Fund*, 142 S. Ct. 1668 (2022) (noting that a decision is arbitrary and capricious if it is “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”).

Yet, FERC declined to condition the upstream impact, claiming there is a lack of “clear guidance” for addressing upstream and downstream impacts. Rehearing Order at ¶ 96-97. Nonetheless, FERC relies on its Draft Guidance, claiming that upstream impacts in this case are irrelevant because FERC considers upstream impacts on a case-by-case basis, and incorrectly deeming this case as not involving upstream impact. *Id.* at 74. FERC must consider upstream impacts, and FERC’s failure to do so was arbitrary.

Here, Congress did not intend for FERC to consider whether it would adopt future regulations on GHG emissions to avoid mitigating known environmental harms affecting the Project’s public convenience and necessity. FERC already has an abundance of information regarding the impact of GHG emissions on climate change, whether the emissions occur on-site or anywhere in the world, so it’s refusal to address the impact has an implausible basis and cannot be attributed to differences in expert opinion. *Env't Def. Fund v. FERC*, 2 F.4th at 967–68. Accordingly, the decision to issue a CPCN without downstream GHG conditions was arbitrary and capricious.

- c. Adopting conditions for the downstream GHG impact is not a major question because Congress has specifically granted FERC the authority to impose reasonable conditions.

FERC claimed that it was within its discretion to ignore the importance of the downstream emissions quantification, reject the existence of upstream impact, and decline to create conditions for both downstream and upstream emissions. Accordingly, there is no way to analyze the appropriateness of the specific upstream or downstream mitigation measures under the Major Questions Doctrine because FERC failed to impose them.

Regardless, FERC can implement mitigation conditions for upstream and downstream impacts for the same reasons that it has the authority to mitigate the direct construction impacts. As with construction emissions, indirect GHG emissions do not implicate any sweeping regulatory authority—merely the application of Congress’s explicit grant of administrative-adjudicatory authority. Accordingly, this Court should hold that any reasonable GHG condition adopted to mitigate the Project’s foreseeable impacts is within FERC’s capacity and authority to take and does not implicate the Major Questions Doctrine.

CONCLUSION

FERC’s decision to issue a CPCN for the pipeline was arbitrary and capricious given the failure to weigh the environmental harms. Therefore, pursuant to the APA, 5 U.S.C. Section 706 (2) (A), HOME respectfully requests the court to vacate the CPCN and remand the decision to FERC to support its findings by substantial evidence.