

C.A. No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

THE HOLY ORDER OF MOTHER EARTH
Appellant

-and-

TRANSNATIONAL GAS PIPELINES, LLC
Appellant

v.

UNITED STATES FEDERAL ENERGY REGULATORY COMMISSION
Appellee

On Appeal from the Federal Energy Regulatory Commission Docket No. TG21-616-000

Brief of *Appellant*, THE HOLY ORDER OF MOTHER EARTH

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STATEMENT OF JURISDICTION

On May 19, 2023, the Federal Energy Regulatory Commission (“FERC”) issued an Order denying petitions from the Holy Order of Mother Earth (“HOME”) and Transnational Gas Pipelines, LLC (“TGP”) for rehearing on certain issues in the Certificate of Public Convenience and Necessity (“CPCN”). FERC had subject-matter jurisdiction pursuant to 15 U.S.C. § 717, which gives the Commission jurisdiction over the transportation of natural gas in interstate commerce. 15 U.S.C.A. § 717 (West). HOME, TGP, and FERC filed timely Notices of Appeal pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 15 U.S.C. § 717r. The provision provides that the United States Court of Appeals for the circuit in which a facility is subject to Section 717f will have original and exclusive jurisdiction over the review of an order from a Federal Agency so long as the party first sought rehearing with the Commission. 15 U.S.C.A. § 717r (a)-(b) (West).

STATEMENT OF ISSUES PRESENTED

1. Was FERC’s finding of public convenience and necessity for the AFP arbitrary and capricious or not supported by substantial evidence insofar as FERC found a project need where ninety percent of the gas transported by that pipeline was for export?
2. Was FERC’s finding that the benefits from the AFP outweighed the environmental and social harms arbitrary and capricious?
3. Was FERC’s decision to route the AFP over HOME property despite HOME’s religious objections in violation of RFRA?
4. Were the GHG Conditions imposed by FERC beyond FERC’s authority under the NGA?
5. Was FERC’s decision not to impose any GHG Conditions addressing downstream and upstream GHG impacts arbitrary and capricious?

STATEMENT OF THE CASE

I. The Holy Order of Mother Earth (“HOME”) Worships and Protects the Planet.

The Holy Order of Mother Earth (“HOME”) is a religious order that considers the natural world to be sacred. Order at ¶ 46. HOME is organized around the principle that nature itself is a deity that should be worshiped and respected. *Id.* It was founded in 1903, largely in response to the industrial revolution and the harmful effects of industrialization and capitalism on the environment. *Id.* A fundamental tenet of HOME’s belief system is that humans should “do everything in their power to promote natural preservation over all other interests, especially economic interests.” Order at ¶ 47.

HOME owns property in a beautiful part of the country, bordering the Misty Top Mountains and Lake Williams. Exhibit A. There, members of HOME live in harmony with the land and are free to practice their religion. One of the most important religious ceremonies that HOME celebrates is their Solstice Sojourn. Order at ¶ 48. Twice a year, during the summer and winter solstices, members of HOME make a ceremonial journey, walking from a temple on their property to the foothills of the Misty Top Mountains and back along a different path. *Id.* This journey, the Solstice Sojourn, is integral to their religious practice and integrally connected to the land. *Id.* Once children of HOME reach the age of 15 or older, they participate in a sacred religious ceremony at the top of the hill. *Id.* HOME followers have practiced the Solstice Sojourn for almost a century, since 1935. *Id.*

II. Transnational Gas Pipelines, LLC (“TGP”) Proposed to Build a Gas Pipeline on HOME’s Sacred Land.

In June 2022, Transnational Gas Pipelines, LLC (“TGP”) filed an application with the Federal Energy Regulatory Commission (“FERC”) for authorization to construct and operate a

new natural gas pipeline. Order at ¶ 1. The pipeline, called the American Freedom Pipeline (“AFP”) would be constructed with a thirty-inch diameter, and along with its related facilities, would span approximately ninety-nine miles, crossing through multiple states. *Id.* The AFP and its facilities would extend from a receipt point in Jordan County, Old Union, to a proposed interconnection with an existing TGP gas transmission facility in Burden County, New Union. *Id.* The proposed pipeline is designed to provide up to 500,000 dekatherms (“Dth”) per day of firm transportation service. *Id.*

The natural gas to be transported by the AFP is produced in the Hayes Fracking Field (“HFF”) in Old Union. Order at ¶ 12. The gas is liquified into liquified natural gas (“LNG”) at HFF then transported via pipeline. *Id.* Currently, the full production of natural gas at HFF is transported by the Southway Pipeline to states to the east of Old Union. *Id.* TGP does not anticipate that the AFP will result in additional LNG production at Hayes. *Id.* Instead, TGP contends that the AFP would merely reroute existing supply as approximately thirty-five percent of the production at HFF would be transported through the AFP rather than the Southway Pipeline. *Id.* Although a change in demand is not expected, the rise of renewable energy and energy-efficient, electric technology that could impact demand for LNG. Order at ¶ 13.

The TGP project will involve the construction of more than just the AFP. Order at ¶ 10. In addition to the pipeline, the company plans to build extensive infrastructure to support it. *Id.* TGP’s proposal accounts for the construction of the following: a receipt meter station located in Jordan County, Old Union (“Main Road M&R Station”); a receipt tap located in Jordan County, Old Union; a meter, regulation, and delivery station located at Burden County, New Union (“Broadway Road M&R Station”); mainline valve assemblies at eight locations along the TGP Pipeline; pig launcher and receiver facilities and pig trap valves at the Main Road M&R Station

and the Broadway Road M&R Station; and cathodic protection and other related facilities. *Id.*

Overall, TGP estimates that the proposed project will cost approximately 599 million dollars. *Id.*

III. The Pipeline Would Directly Harm HOME.

The AFP would cut directly through HOME's property. Order at ¶ 9. In fact, it would cross directly through the path journeyed for the Solstice Sojourn. Order at ¶ 48. Additionally, in order to build the AFP, around 2,200 trees and other forms of vegetation will be removed on HOME's property alone. Order at ¶ 38. For safety reasons, the vast majority of these trees cannot be replaced by new trees along the route of the AFP. *Id.* Not only would the AFP harm HOME and its property, it would also directly infringe on HOME's religious beliefs and practices. Order at ¶ 49. The dispute is exacerbated by the fact that TGP has been unable to reach easement agreements with over forty percent of landowners along the proposed path of the AFP. Order at ¶ 42.

HOME proposed an Alternative Route to protect their sacred land. Order at ¶ 39. However, TGP opposed the Alternate Route because it would add three miles to the pipeline's route and cost an additional fifty-one million dollars to the cost of the project. Order at ¶ 44. While HOME would oppose the project overall, TGP ignores how small of an impact the Alternate Route would have on the total path of the pipeline. *Id.* The additional three miles is only about three percent of the total mileage of the ninety-nine-mile project.

IV. The Pipeline Would Adversely Impact the Environment.

The AFP would cause environmental impacts beyond just those on HOME's property. FERC itself identified that building the AFP may result in at least "some adverse environmental impacts." Order at ¶ 3. TGP conducted an Environment Impact Statement ("EIS") that offers a baseline estimate of the environmental impacts of the AFP. Order at ¶ 72. This is only a starting

point because the company only considered downstream and construction impacts, leaving out upstream impacts. *Id.* It did not consider the upstream impacts of the project because it found them to be irrelevant and difficult to quantify. Order at ¶ 74.

According to their EIS, TGP found that if the maximum amount of LNG is transported through the AFP every day, downstream end-use could result in about 9.7 million metric tons of carbon dioxide per year. Order at ¶ 72. Additionally, the construction of the AFP would result in an average of just over 100,000 metric tons per year of carbon dioxide emissions without any mitigation. Order at ¶ 73. In total, not counting upstream impacts, that is a potential 9.8 million metric tons of carbon dioxide that would be added to the atmosphere every year as a result of this project. This massive release of greenhouse gasses into the atmosphere could contribute to climate change and endanger the planet. Order at ¶ 69.

Further, completing this project would lock our country into decades more of fossil fuel use even though demand for gas in the area is waning. As stated above, the gas produced in the HFF is already fully transmitted by an existing pipeline. Order at ¶ 32. That pipeline is facing diminishing demands for gas, so the LNG transmitted by the AFP may or may not be purchased in the future. Order at ¶ 34. The demands for LNG are “steadily declining due to a population shift, efficiency improvements, and increasing electrification of heating.” Order at ¶ 13.

V. Despite These Costs, the Vast Majority of the Gas Carried by the Pipeline Will Not Be Used by Americans.

Even though the pipeline will exact heavy financial, environmental, and social costs, the large majority of the LNG that it would transport would never be used by Americans. Order at ¶ 24. Approximately ninety percent of the LNG carried by the AFP would be diverted to the Port of Union City for export by International. *Id.* HOME has submitted records evidencing that

International's parent company is Brazilian and nearly all (if not all) of the LNG International natural gas will be exported to Brazil. *Id.* TGP has not disputed this fact. *Id.* Additionally, Brazil does not have a free trade agreement with the United States, although FERC did not find this distinction to be meaningful. Order at ¶ 33.

Even though a vast majority of the LNG carried by the AFP will be transported out of the country, TGP contended in its application to FERC that the AFP serves multiple domestic needs. Order at ¶ 27. The company claimed that the AFP would deliver up to 500,000 Dth per day of natural gas to the interconnection with the NUG terminal and the NorthWay Pipeline, provide natural gas service to areas currently without access to natural gas within New Union, and expand access to sources of natural gas supply in the United States. *Id.* TGP also alleges that the pipeline would optimize the existing systems for the benefit of both current and new customers by creating a more competitive market and fulfilling capacity in the undersubscribed NorthWay Pipeline. *Id.* Finally, TGP states that the AFP would provide opportunities to improve regional air quality by using what the company classifies as “cleaner-burning natural gas in lieu of dirtier fossil fuels.” *Id.*

VI. FERC Approved the Pipeline On the Condition That TGP Mitigate Its Environmental Impact.

On April 1, 2023, FERC granted TGP a Certificate of Public Convenience and Necessity (“CPCN”), authorizing TGP to construct and operate the AFP. Order at ¶ 2. The CPCN subjected TGP to four conditions that would mitigate the GHG emission impacts of the construction. Order at ¶ 67. The Commission concluded that, if constructed and operated in accordance with applicable laws, the pipeline would have some adverse environmental impacts. Order at ¶ 3. However, those impacts would be reduced to “less-than-significant” levels with the attached

GHG conditions. *Id.* First, TGP would have to plant—or get someone else to plant—an equal number of trees as those removed during construction. *Id.* Second, wherever practical, TGP would have to use electrical-powered equipment to construct the pipeline, including electric vehicles and chainsaws. *Id.* Third, TGP would only be allowed to purchase and use “green” steel pipelines produced by net-zero manufacturers. *Id.* Finally, to the extent that renewable sources are available, the electricity used for construction would have to come from renewable sources. *Id.*

While the GHG conditions in question are specifically geared at mitigating environmental impacts, they ultimately set parameters for the types of materials and equipment to be used in construction of this one specific project. Still, these conditions only address the construction impacts of the pipeline project. FERC failed to also mitigate upstream and downstream GHG impacts. Order at ¶ 93. The Commission claims that it chose not to classify upstream or downstream impacts as significant or insignificant given that it does not have a consistent policy on how to address such impacts. Order at ¶ 81.

SUMMARY OF THE ARGUMENT

The Federal Energy Regulatory Commission (“FERC”) improperly affirmed the Order granting a Certificate of Public Convenience and Necessity (“CPCN”) to Transnational Gas Pipelines, LLC (“TGP”) for the construction of the American Freedom Pipeline (“AFP”) and improperly denied the Holy Order of Mother Earth’s (“HOME”) Petition for Rehearing on certain issues related to the CPCN. Section 3 of the National Gas Act (“NGA”) allows FERC to authorize construction of a new natural gas pipeline or facility by granting a CPCN. 15 U.S.C.A. § 717f (West). However, FERC can only assess liquid natural gas precedent agreements for export and domestic use under Section 7 if “a substantial amount of the capacity subscribed

under the precedent agreements was for firm transportation to primary delivery points in the United States.” *NEXUS Gas Transmission, LLC Texas E. Transmission, LP DTE Gas Co. Vector Pipeline, L.P.*, 172 FERC ¶ 61,199, 62,296 (2020) (on remand from the United States Court of Appeals for the District of Columbia Circuit). The Commission does not have the authority to approve or disapprove the import or export of liquid natural gas under Section 3 of the Natural Gas Act and cannot decide if its import or export is consistent with the public interest. *Rover Pipeline LLC Panhandle E. Pipe Line Co., LP Trunkline Gas Co., LLC*, 158 FERC ¶ 61,109 (2017). TGP is exporting ninety percent of the liquid natural gas to Brazil and only ten percent will be used domestically. Ten percent is not a “substantial amount of the capacity subscribed under the precedent agreements,” and, therefore, cannot be granted a CPCN by FERC. *Nexus Gas Transmission*, 172 FERC at 62,296.

The AFP's remaining ten percent of the liquid natural gas to be utilized domestically does not demonstrate public necessity, does not indicate market need, and does not amount to substantial evidence. A CPCN can only be granted by showing the “public benefits that would be achieved by the project that are proportional to the project's adverse impacts . . . a record that will enable the Commission to find that the benefits to be achieved by the project will outweigh the potential adverse effects.” *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,748 (1999). Additionally, the project cannot be overbuilt. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1312 (D.C. Cir. 2015) (being “overbuilt” means to “build capacity for which there is not a demonstrated market need.”).

There is not a sufficient showing of public convenience and necessity with the liquid natural gas pipeline, because the harm created from using eminent domain outweighs expanding access and optimizing the existing system for a mere ten percent of the liquid natural gas being

transported. Because only ten percent of the liquid natural gas is being used domestically, building a pipeline with an additional ninety percent capacity would result in an overbuilt pipeline contrary to the public's interest.

Additionally, FERC did not properly weigh the environmental and social harms of the AFP when favoring the proposed benefits. FERC was arbitrary and capricious in their balancing as the environmental harms of the AFP were not given the requisite "hard look." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). FERC did not consider all of the factors bearing on the public interest, like the decreasing interest in LNG. FERC's improper balancing resulted in a determination in favor of a single pipeline rather than the public interest.

FERC's decision to route the AFP over HOME's property violates RFRA. First, the proposed path substantially burdens the religious exercise of HOME, an environmentally-conscious religious organization that has a twice-yearly Solstice Sojourn that crosses the proposed pipeline path. Second, FERC has not demonstrated a compelling government interest that would justify the routing of the AFP over HOME's land. Third, FERC did not properly consider the proposed alternate route that would take the AFP on a path that would not interrupt HOME's Solstice Sojourn, nor compel them to support the pipeline.

Further, the GHG conditions imposed by FERC were within its authority under the NGA. Section 7 of the NGA authorizes FERC to set specific conditions when authorizing construction or export of natural gas. 15 U.S.C.A. § 717f(e) (West). 15 U.S.C.A. § 717b(a) (West). The Commission has long exercised that power, and it has used this authority to mitigate environmental impacts in the past. Additionally, the greenhouse gas ("GHG") conditions do not pose a major question because the Commission is not exercising "unheralded power" to make a decision of significant political and economic significance. *W. Va. v. U.S. Env't Prot. Agency*, 142

S. Ct. 2587, 2595 (2021). Rather, these conditions set parameters for the types of materials and equipment to be used during construction and mandate easy-to-implement mitigation measures. Thus, the Commission acted within its authority under the NGA when it imposed the GHG conditions on TGP.

Finally, it was arbitrary and capricious for FERC to fail to mitigate upstream and downstream GHG impacts. FERC is authorized to consider upstream and downstream GHG impacts in its consideration of the public convenience and necessity under the NGA. Its failure to do so here was arbitrary and capricious for two reasons. First, TGP's EIS was deficient because it failed to consider reasonably foreseeable upstream GHG impacts. This deficiency in TGP's EIS undermined public comment and informed-decision making and thus resulted in arbitrary and capricious agency action. Second, FERC's failure to mitigate downstream GHG impacts was arbitrary and capricious because it did not demonstrate reasoned decision-making when it chose to only mitigate less-impactful construction GHG impacts.

STANDARD OF REVIEW

FERC's decision to grant a CPCN and to dismiss a petition for rehearing is reviewed according to the arbitrary and capricious standard. 5 U.S.C.A. § 706 (West). "Although this standard of review is highly deferential, a precondition to judicial deference is that the agency's interpretation be consistent with those rendered by the agency in other cases." *EP Operating Co. v. Fed. Energy Regul. Comm'n*, 876 F.2d 46, 48 (5th Cir. 1989). Under the arbitrary and capricious standard, "[t]he Commission's factual findings are conclusive 'if supported by substantial evidence.'" *Freeport-McMoRan Corp. v. Fed. Energy Regul. Comm'n*, 669 F.3d 302, 308 (D.C. Cir. 2012); *City of Oberlin, Ohio v. Fed. Energy Regul. Comm'n*, 937 F.3d 599, 605

(D.C. Cir. 2019) (quoting 15 U.S.C. 717r(b)). “A passing reference to relevant factors. . . is not sufficient to satisfy the Commission's obligation to carry out reasoned and principled decision making.” *Am. Gas Ass’n v. Fed. Energy Regul. Comm’n*, 593 F.3d 14, 19 (D.C. Cir. 2010) (internal quotations removed).

ARGUMENT

A. FERC’s finding of public convenience and necessity for the AFP was not supported by substantial evidence of public benefit or market demand and is arbitrary and capricious.

FERC’s issuance of a Certificate of Public Convenience and Necessity (“CPCN”) to TGP for their pipeline was not based on substantial evidence and therefore is arbitrary and capricious. Natural gas companies are regulated by the Natural Gas Act (“NGA”). 15 U.S.C.A. § 717. A natural gas company needs a CPCN, issued by FERC, for authorization of construction of new facilities or extensions of facilities for transportation or sale of natural gas. 15 U.S.C.A. § 717f (West). “FERC grants a certificate only if the proposed facility is or will be required by the present or future public convenience and necessity.” *City of Oberlin, Ohio v. Fed. Energy Regul. Comm’n*, 39 F.4th 719, 722 (D.C. Cir. 2022) (internal quotations removed). Once a company has a CPCN, if the company cannot come to an agreement for the land with the landowner, then the company may acquire the land by “exercis[ing] the right of eminent domain.” 15 U.S.C.A. § 717f (West). The landowner can challenge a CPCN under the arbitrary and capricious standard of review. *Sacramento Mun. Util. Dist. v. Fed. Energy Regul. Comm’n*, 616 F.3d 520, 528 (D.C. Cir. 2010). Pursuant to the arbitrary and capricious standard of review, the landowner must be able to show FERC’s factual findings were not supported by substantial evidence of public benefit or market demand. *Id.*

The NGA has made clear that FERC must be able to demonstrate that their decision to grant TGP a CPCN for their proposed pipeline was based on substantial evidence. *Id.* However, the evidence FERC relies on here is insufficient to support the CPCN for three reasons. First, FERC should not be able to give substantial weight to the ninety percent of liquid gas TGP will be exporting from the AFP to Brazil. Second, rationalizing the authorization to construct a ninety-nine mile-long pipeline, that delivers up to 500,000 dekatherms (Dth) of liquid gas and interferes with numerous communities based on the remaining ten percent of the liquid natural gas being rerouted through the AFP from Hayes Fracking Field is insufficient evidence to support building a pipeline of that size and will result in an overbuilt pipeline. Finally, setting such a low threshold for the issuance of a CPCN will permit FERC to abuse the use of eminent domain takings of land for unnecessary projects. Order at ¶ 12, 24.

1. The indirect benefits arising from the export of liquid natural gas to a foreign country do not amount to substantial evidence of market demand to support the issuance of a CPCN.

A pipeline that exports ninety percent of the liquid gas it transports to a foreign nation cannot be analyzed under Section 7 for public convenience and necessity, and, therefore, it cannot be considered as substantial evidence for issuance of a CPCN by FERC. Section 3 of the Natural Gas Act explains that no entity shall import or export natural gas “without first having secured an order of the Commission authorizing it to do so.” 15 U.S.C.A. § 717b (West).

“Moreover, the Secretary of Energy has not delegated to the Commission any authority to approve or disapprove the import or export of the commodity itself, or to consider whether the exportation or importation of natural gas is consistent with the public interest.” *Rover Pipeline LLC Panhandle E. Pipe Line Co., LP Trunkline Gas Co., LLC*, 158 FERC ¶ 61,109 (2017).

Additionally, the Commission can only analyze a project that includes liquid natural gas precedent agreements for export and domestic use under Section 7 if “a substantial amount of the

capacity subscribed under the precedent agreements was for firm transportation to primary delivery points in the United States.” *NEXUS Gas Transmission, LLC Texas E. Transmission, LP DTE Gas Co. Vector Pipeline, L.P.*, 172 FERC ¶ 61,199, 62,296 (2020). The exportation of natural gas to a country “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.A. § 717b (West).

FERC cannot consider the liquid natural gas being exported to Brazil as part of their evidence to support granting a CPCN. Ninety percent of the precedent agreements for the AFP are for Brazil. Order at ¶ 24, 33. The Commission says “while exported gas may not directly benefit domestic needs for gas supply, the precedent agreements are nonetheless sufficient to demonstrate a public necessity here LNG that is produced in the United States and exported serves the ‘public interest.’” Order at ¶ 33. This statement goes directly against FERC precedent established in *Rover Pipeline LLC Panhandle E. Pipe Line Co.* FERC cannot consider whether the “exportation or importation of natural gas is consistent with the public interest.” *Rover Pipeline LLC Panhandle E. Pipe Line Co., LP Trunkline Gas Co., LLC*, 158 FERC ¶ 61,109 (2017).

Further, FERC cannot conduct an assessment for an issuance of a CPCN under Section 7 of the Natural Gas Act. The current circumstances are unlike *City of Oberlin* where the Commission had the authority to grant a CPCN under Section 7 because “a substantial amount of the capacity subscribed under the precedent agreements was for firm transportation to primary delivery points in the United States” and a mere seventeen percent of the precedent agreements were for export of liquid natural gas to Canada, with some portion of the exported liquid natural gas returning to the United States. *NEXUS Gas Transmission*, 172 FERC at 62,296 (rehearing by

FERC after order to remand in *City of Oberlin*). Furthermore, “unlike [S]ection 7, [S]ection 3 does not provide for the acquisition of lands through eminent domain[.]” *Id.* Finally, in *City of Oberlin*, the Commission also determined that even if one discounted the export precedent agreements, the FERC reasonably found under the Natural Gas Act that the proposed construction and operation of the pipeline was in the public convenience and necessity. *City of Oberlin*, 39 F.4th at 719.

FERC’s analysis for issuance of a CPCN under Section 7 was improper. Here, ninety percent—well over the majority—of precedent agreements are for export outside of the United States. In fact, only a mere ten percent of the liquid natural gas transported through the AFP is intended for domestic use. Additionally, unlike the circumstances in *City of Oberlin*, none of the exported liquid natural gas will be imported back into the United States. Additionally, Canada has a free trade agreement with the United States, while Brazil does not—further distinguishing the two very different circumstances of the present case and *City of Oberlin*. Order at ¶ 24, 33. FERC cannot consider the liquid natural gas for export to Brazil as substantial evidence in their decision to issue a CPCN. When a significant portion of the liquid natural gas is to be exported to a foreign destination, it cannot be used as justification to use eminent domain. Finally, even if FERC discounts the precedent agreements for export, the remaining ten percent of domestic precedent agreements do not demonstrate sufficient market need and substantial evidence in favor of the project.

2. AFP's remaining ten percent of liquid natural gas for domestic use does not demonstrate public necessity, indicate market need, or amount to substantial evidence of public benefit or market need.

FERC cannot issue a CPCN for TGP, because only ten percent of AFP’s liquid natural gas is serving domestic need, and it does not demonstrate substantial evidence of public benefit and

market need. FERC has established a natural gas company must demonstrate its proposal is in the public convenience and necessity by showing the “public benefits that would be achieved by the project that are proportional to the project's adverse impacts. . . . a record that will enable the Commission to find that the benefits to be achieved by the project will outweigh the potential adverse effects.” *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,748 (1999). FERC has explained the types of public benefits that might be shown are diverse and can include “meeting unserved demand,” “access to new supplies,” “meeting unserved demand,” and any other “relevant evidence could be presented to support any public benefit the applicant may identify.” *Id.*

There is not a sufficient showing of public convenience and necessity with the liquid natural gas being used for domestic use to justify using eminent domain to build such a large pipeline. Even though TGP has shown the AFP would provide natural gas service to areas currently without access to natural gas within New Union, optimize the existing system, and create a more competitive market, this only represents the use of ten percent of the gas being transported and is insufficient evidence to show market need for a pipeline of such capacity. Order at ¶ 27, 28. These benefits are insubstantial in comparison to the overall harm that will be inflicted as a result of constructing such a large pipeline. For example, it is estimated that construction of the AFP will result in an average of 88,340 metric tons per year of carbon dioxide. Order at ¶ 73. Additionally, although ten percent of the liquid natural gas transported by the AFP represents minimal public need and benefit, it does not outweigh the harm that will result from the eminent domain takings of land and the additional environmental harms that will arise from TGP’s AFP proposal.

Finally, this case is different from *Myersville for a Rural Community v. FERC* where the court reasoned that (1) the “Petitioners have no clear evidence that the Project is overbuilt,” and (2) there was insufficient evidence to show the natural gas company was planning on overbuilding the pipeline to export the excess liquid natural gas. *Myersville Citizens for a Rural Cmty., Inc. v. Fed. Energy Regul. Comm’n*, 783 F.3d 1301, 1312 (D.C. Cir. 2015). *Myersville Citizens for a Rural Community* defined the term overbuild to mean “build[ing] capacity for which there is not a demonstrated market need.” *Myersville Citizens for a Rural Cmty., Inc.*, 783 F.3d at 1312. Here, TGP does not deny ninety percent of the liquid natural gas is for export to Brazil. Order at ¶ 24. TGP’s plan is to build a pipeline that exceeds domestic market needs by ninety percent and to export the excess liquid natural gas. *Id.* The project is grossly overbuilt and does not justify utilizing the authority granted in Section 3 to take land from landowners.

3. A pipeline expansion that only utilizes ten percent of the gas it transports for domestic use does not justify an eminent domain taking.

Allowing FERC to use the precedent agreements for international export as substantial evidence of public benefit and market need in their decision to grant a CPCN would be an abuse of their eminent domain power. Although, historically, eminent domain authority was used for turnpikes, bridges, railroads, and telecommunications, Section 7 of The Natural Gas Act gives holders of a CPCN the ability to exercise eminent domain to build a liquid natural gas pipeline. *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2247 (2021) (holding the NGA authorized FERC certificate holders to condemn all necessary rights-of-way, whether owned by private parties or States); 15 U.S.C.A. § 717f (West). However, “unlike [S]ection 7, [S]ection 3 does not provide for the acquisition of lands through eminent domain[,]” unless “a substantial amount of the capacity subscribed under the precedent agreements was for firm transportation to

primary delivery points in the United States.” 85 FR 40113, 40113; *NEXUS Gas Transmission*, 172 FERC at 62,296 (2020).

Congress has made clear through the Natural Gas Act that eminent domain can be used when FERC finds substantial evidence of public convenience and necessity under Section 7, but not when the justification for the pipeline is export, unless a substantial amount of the precedent agreements are for domestic use. Here, only a small percentage of the liquid natural gas is for domestic use. Order at ¶ 1, 10. If the court finds for TGP and FERC and allows the use of eminent domain to construct the AFP based on the insubstantial evidence presented, then the high showing of public need required to utilize the great power of eminent domain will be lowered. FERC cannot find substantial evidence of public necessity in the ten percent of gas being used domestically. *Id.* Additionally, FERC cannot find substantial evidence in the overstated general environmental benefits that result from using cleaner energy sources like natural gas, because if they did, that reasoning would presumably permit the use of eminent domain takings for every project they are presented with. *Id.* The court should draw a line that a liquid natural gas project using a mere ten percent of gas domestically and ninety percent for export is an insufficient showing of market need to grant a CPCN permitting the condemnation of a property owner’s land rights and giving another entity the ability to profit off the taken land.

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

The National Environmental Policy Act (“NEPA”), 42 USC §§ 4321 et seq, requires that agencies assess the environmental effects of their proposed actions prior to making decisions. NEPA challenges are reviewed under the standards of the Administrative Procedure Act (“APA”), 5 U.S.C.A. § 706(2)(A) (West). *Sierra Club v. Fed. Energy Regul. Comm’n*, 867 F.3d

1357, 1367 (D.C. Cir. 2017). While an agency decision is granted a certain amount of deference, *Id.*, that does not excuse a finding that is arbitrary and capricious. *City of Oberlin v. Fed. Energy Regul. Comm’n*, 39 F.4th 719, 725 (D.C. Cir. 2022). Under NEPA, agencies must take a “hard look” at environmental consequences before a major action. *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). An agency must have “adequately considered and disclosed the environmental impact of its actions.” *Sierra Club v. FERC*, 867 F.3d at 1367. The Environmental Impact Statement (“EIS”) must consider (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. 42 U.S.C.A. § 4332(2)(C) (West). FERC must also comply with the Natural Gas Act (“NGA”), 15 U.S.C. § 717., which restricts the authorization of a facility if it is not “consistent with the public interest.” 15 U.S.C.A. § 717b(a) (West). NGA Section 7(e) requires FERC to evaluate “all factors bearing on the public interest.” *Atl. Ref. Co. v. Pub. Serv. Comm’n of State of N.Y.*, 360 U.S. 378, 391 (1959). The agency should consider “the interests of the landowners and the surrounding community” as “synonymous with the environmental impacts of a project.” *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,748 (1999). Here, FERC was arbitrary and capricious in finding that the benefits of the AFP outweighed the environmental and social harms.

1. FERC did not give the environmental harms of the AFP the requisite “hard look”

FERC identifies that the building of the AFP may result in “some adverse environmental impacts.” Order at ¶ 3. In order to build the AFP, around 2,200 trees and other forms of vegetation will be removed on HOME’s property alone. Order at ¶ 38. For safety reasons, the vast majority of these trees cannot be replaced by new trees along the route of the AFP. *Id.* While TGP would have to plant an equal number of trees as those removed in the construction of the AFP as part of the mitigation plan for GHG, discussed more below, there are no such promises for the vegetation that will have to be removed. Vegetation is crucial to a healthy environment by producing oxygen, improving water quality, and helping to avoid flooding and land erosion. *See* National Park Service, *Vegetation Community Monitoring*, <https://www.nps.gov/im/secn/vegetation.htm#:~:text=Vegetation%20is%20important%20to%20the,can%20even%20affect%20our%20climate!>. Additionally, while TGP’s offer to plant new trees is admirable, protecting mature forests is an invaluable tool to mitigate and adapt to climate change. *See* Norm Christenson & Jerry Franklin, *New Trees Are No Substitute for Old Trees*, Politico (June 11, 2023, 7:00 AM), <https://www.politico.com/news/magazine/2023/06/11/to-fight-wildfire-our-forests-need-to-grow-old-00101360>.

While FERC may reject HOME’s implication to ascribe “extra” weight to the environmental harms of the AFP, Order at ¶ 52, it must still give a hard look to the environmental harms, only some of which occur on HOME’s property.

2. FERC did not evaluate all factors bearing on the public interest, specifically the social harms of approving the AFP.

The AFP is not in the public interest. FERC did not evaluate all the factors which bear on the public interest, especially the social harms of approving the AFP. First, as mentioned above, the economic and energy production benefits of the AFP are not felt by domestic customers, particularly not the landowners who will bear the brunt of the adverse impacts of the AFP. The natural gas produced in the HFF is already fully transmitted by an existing pipeline. Order at ¶ 32. That pipeline is facing diminishing demands for gas, so the LNG transmitted by the AFP may or may not be purchased in the future. Order at ¶ 34. The demands for LNG are “steadily declining due to a population shift, efficiency improvements, and increasing electrification of heating.” Order at ¶ 13. To place the harms and disruptions on landowners for a product that already has diminishing demand suggests a disconnect between the intentions of a company seeing its market diminish and the interests of the public. This is exacerbated by the fact that TGP has been unable to reach easement agreements with over forty percent of landowners along the proposed path of the AFP. Order at ¶ 42.

C. FERC’s decision to route the AFP over HOME property, despite HOME’s religious objections, was in violation of RFRA.

Under the Religious Freedom Restoration Act (“RFRA”), strict scrutiny is applied when a law substantially burdens a sincere religious exercise. 42 U.S.C.A. § 2000bb-1 (West). If the law would substantially burden religious exercise, the government may justify the imposition on exercise of religion if it proves that the burden is the least restrictive means of pursuing a government interest. 42 U.S.C.A. § 2000bb-1(b) (West). Here, FERC’s decision to route the AFP through the private property of an established religious order violates RFRA, as FERC has not

demonstrated the burden is the least restrictive means of pursuing a compelling government interest.

Not only does the proposed AFP directly oppose HOME's religious beliefs and practices, Order at ¶ 49, but the pipeline's path crosses the path journeyed for the Solstice Sojourn, Order at ¶ 48.

1. The current proposed path of TGP's pipeline substantially burdens the religious exercise of HOME.

RFRA does not define "substantial burden," *see* 42 U.S.C.A. § 2000bb-2 (West), but precedent has found a substantial burden in two circumstances: first, when the government forces a choice between following the tenets of a religion and receiving a government benefit and second, when the government forces an individual to act contrary to their religious beliefs by the threat of civil or criminal sanctions. *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1070 (9th Cir. 2008) (finding the use of recycled wastewater as an artificial snow on land spiritually sacred to Native tribes was not a "substantial burden" because while diminishing of "spiritual fulfillment," the recycled wastewater did not prevent access to the sacred ground for religious use). The second circumstance applies here.

HOME is being compelled to act in opposition to their religious beliefs. One of the core tenets of HOME's religious beliefs is that the natural world is sacred and nature itself is a deity to be worshiped and respected. Order at ¶ 46. While neither FERC nor TGP dispute the sincerity of HOME's religious beliefs, Order at ¶ 51, an understanding of HOME's religious beliefs and practices is crucial to understand the burden placed on HOME by FERC's decision and the imposition of the pipeline through HOME's property. HOME believes that humans should "do everything in their power to promote natural preservation over all other interests, especially

economic interests.” Order at ¶ 47. As part of that spiritual practice, twice a year, members of HOME make a ceremonial journey through their property, which marks a sacred religious ceremony for children of the practice. Order at ¶ 48. This journey, the Solstice Sojourn, is integral to their religious practice and integrally connected to the land in question here. This is not a new religious practice either—members have participated in the Solstice Sojourn since 1935. *Id.*

Additionally FERC argues that a condition in the CPCN resolves HOME’s concerns. Order at ¶ 56. FERC instructed TGP to bury the pipeline under HOME’s land, including the intersections where the Solstice Sojourn would cross the AFP. *Id.* FERC believes that this “solution” would result in any impacts on HOME being “not substantial or significant.” *Id.* Because there is no “physical barrier” because of the placement of the AFP, FERC argues HOME faces no substantial burden. Order at ¶ 59. The Solstice Sojourn would be impacted by the pipeline, even buried, as walking over the pipeline would “destroy the meaning of the Solstice Sojourn.” Order at ¶ 57. Unlike in *Navajo Nation*, where the recycled wastewater might be spiritually diminishing but would not impede access to the sacred land for religious use, refusing an easement for the pipeline would result in a taking by eminent domain. Order at ¶ 43. HOME is being forced to choose between acting contrary to their religious beliefs by allowing a pipeline to be built and maintained on their property or face the possibility of the pipeline being built on their property through an eminent domain taking of their land.

2. FERC has not demonstrated a compelling government interest to justify the route of the AFP over HOME’s property.

As mentioned above, FERC’s finding of public convenience and necessity failed to reach the level of a compelling government interest that would justify routing the AFP over HOME’s

property. A compelling government interest must be “of the highest order.” *The Ave Maria Foundation v. Sebelius*, 991 F.Supp.2d 257, 966 (E.D.Mich. 2014). Generally, broadly formulated interests do not justify the general applicability of government mandates. *Id.* As cited above, FERC may grant a certificate only if the proposed facility “is or will be required by the present or future public convenience and necessity.” *City of Oberlin, Ohio v. Fed. Energy Regul. Comm’n*, 39 F.4th 719, 722 (D.C. Cir. 2022). Exporting the majority of the gas transported by the AFP for foreign use does not demonstrate the requisite market demand to support a government interest compelling enough to justify the imposition on HOME’s religious freedoms.

3. FERC did not properly consider the proposed alternate path as a less restrictive means of implementing the potential government interest.

Should the government interest be compelling enough to justify the imposition on religious freedom, the government must still consider the least restrictive means to meet the compelling government interest. To analyze the least restrictive means, the government must compare “the cost to the government of altering its activity to continue unimpeded versus the cost to the religious interest imposed by the government activity.” *S. Ridge Baptist Church v. Indus. Comm’n of Ohio*, 911 F.2d 1203, 1206 (6th Cir. 1990).

FERC and TGP both prefer that the proposed pipeline route through HOME’s property must be used as it is the most direct path. Order at ¶ 44. However, HOME has proposed an alternative route which would not impact the path of the Solstice Sojourn, nor would it impede on HOME’s property and compel HOME to feel they are forced to support actions in opposition to their religious beliefs. The Alternate Route, Exhibit A, would reroute the AFP through the Misty Top Mountains. While preferring that no pipeline be built, HOME believes the Alternate

Route would be a less restrictive means for FERC and TGP to meet their objectives while not imposing on HOME's religious freedoms.

TGP opposed the Alternate Route because it would add three miles to the pipeline's route and would add an additional 51 million dollars to the cost of the project. Order at ¶ 44. While HOME would oppose the project in total, TGP ignores how small of an impact the Alternate Route would have on the total path of the pipeline. The AFP will run for approximately ninety-nine miles. Order at ¶ 10 and the total cost of the proposed project is about 599 million dollars. *Id.* The additional three miles is only approximately three percent of the total mileage of this project. Additionally, the cost of the Alternate Route would only be around eight percent of the total cost.

While HOME would prefer no pipeline be built, its request for an alternate route that would not directly intersect an important religious ceremonial journey was not fully considered by FERC.

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

The GHG conditions imposed by FERC were within its authority under the Natural Gas Act ("NGA"). Section 7 of the NGA authorizes FERC to set specific conditions when authorizing construction or export of natural gas. 15 U.S.C.A. § 717f(e) (West). 15 U.S.C.A. § 717b(a) (West). The Commission has long exercised that power, and it has used this authority to mitigate environmental impacts in the past. Additionally, the GHG conditions do not pose a major question because the Commission is not exercising "unheralded power" to make a decision of significant political and economic significance. *W. Va. v. U.S. Env't Prot. Agency*, 142 S. Ct. 2587, 2595 (2021). Rather, these conditions set parameters for the types of materials and equipment to be used during construction and mandate easy-to-implement mitigation measures.

Thus, the Commission acted within its authority under the NGA when it imposed the GHG conditions on TGP.

I. The NGA explicitly authorizes FERC to conditionally approve gas projects.

Both the NGA and the courts have recognized FERC's ability to attach terms and conditions to the projects that it authorizes. Section 7 of the NGA clearly empowers the Commission to set specific terms and conditions when authorizing the construction of natural gas facilities or the exportation of natural gas. 15 U.S.C.A. § 717f(e) (West). 15 U.S.C.A. § 717b(a) (West). When the Commission authorizes a company to construct or extend natural gas facilities, it may issue a Certificate of Public Convenience and Necessity ("CPCN") to that company. 15 U.S.C.A. § 717f(e) (West). The Commission has the power to "attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C.A. § 717f(e) (West). Further, the Commission may grant an application to export natural gas in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate." 15 U.S.C.A. § 717b(a) (West). Thus, the NGA is explicit in that the Commission may conditionally approve certain gas projects.

Further, the Commission's imposition of conditions in a CPCN to protect the environment is not new. FERC may condition certificates upon receipt of necessary federal or state permits. *Del. Riverkeeper Network v. Fed. Energy Regul. Comm'n*, 857 F.3d 388, 397-99 (D.C. Cir. 2017). FERC's authority to enforce any required remediation is also supported by the NGA. *Twp. of Bordentown v. Fed. Energy Regul. Comm'n*, 903 F.3d 234, 261 n.15 (3d Cir. 2018). As recently as 2020, the Commission authorized a natural gas project subject to 165 environmental conditions meant to mitigate the environmental impacts of the pipeline. *Center for*

Biological Diversity v. Fed. Energy Regul. Comm’n, 67 F.4th 1176, 1180 (D.C. Cir. 2023).

Although the court in that case did not consider the conditions specifically, it found that FERC reasonably analyzed alternative plans and its decision to authorize the project comported with the NGA. *Id.* at 1181-83.

Here, FERC acted within its statutory authority under the NGA when it imposed the GHG conditions. All of the terms are aimed at mitigating the environmental impacts of the AFP. The CPCN requires that TGP plant replacements for—or have someone else plant replacements for—the approximately 2,200 trees that will be removed during construction. Order at ¶ 38, 67. Further, the CPCN set guidelines for the types of equipment and materials to be used when constructing the pipeline. Order at ¶ 67. These requirements comport with the agency’s authority to require environmental mitigation. Thus, FERC acted within the bounds of its authority under the NGA.

II. The GHG Conditions do not implicate the major questions doctrine.

The GHG conditions do not implicate the major questions doctrine because FERC has the authority to impose conditions on LNG projects, and the terms are narrowly limited to one specific pipeline. The major questions doctrine is implicated in “extraordinary cases” where “‘the history and breadth of the authority that [the agency] has asserted’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.’” *W. Va. v. U.S. Env’t Prot. Agency*, 142 S. Ct. 2587, 2595 (2021) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–160). A case may pose a major question when an agency’s action would give it significant control over a portion of the American economy. *N. Carolina Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291, 299 (4th Cir. 2023). In evaluating whether a major question doctrine issue

exists, the Supreme Court has considered whether the action is outside of the agency's expertise, whether it intrudes on state law, and whether Congress has already expressly rejected such an action. *Miller v. Garland*, 2023 WL 3692841 at *9 (E.D. Va. 2023) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 150–160).

In *West Virginia v. EPA*, the court found a major question after the EPA issued the Clean Power Plan, which would have permitted the agency to restructure the nation's overall electricity generation via its generation shifting provisions. *W. Va. v. U.S. Env't Prot. Agency*, 142 S. Ct. 2595. It determined that the agency claimed to discover an “unheralded power representing a transformative expansion of its regulatory authority in the vague language of long-extant, but rarely used, statute designed as gap filler.” *Id.* It went on to list similar extraordinary cases of economic and political significance, including when the Food and Drug Administration wanted to regulate, and even ban, tobacco products and when the Department of Health and Human Services attempted to institute a nationwide eviction moratorium in response to COVID-19. *Id.* at 2608 ((citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 126–27; *Ala. Ass'n of Realtors v. Dep't of Health & Human Serv.*, 141 S. Ct. 2485, 2489 (2021)). Likewise, a major question was found in *N. Carolina Coastal Fisheries Reform Grp. v. Capt. Gaston LLC* when the petitioner argued that the Clean Water Act regulated fishing bycatch as a water pollutant. *N. Carolina Coastal Fisheries Reform Grp.*, 76 F.4th at 294–97. That interpretation would have had significant political or economic consequences by bringing almost every commercial or recreational fisherman under the EPA's new regulatory control. *Id.* at 299.

In contrast, no major question was found when an agency's decision would not fundamentally transform a domestic industry. *Sweet v. Cardona*, 641 F.Supp.3d 814, 824 (N.D. Cal. 2022). In *Sweet v. Cardona*, the U.S. Secretary of Education had reached a large settlement

with a class of student loan borrowers. *Id.* at 819. Although the settlement would have discharged over six billion dollars in loans, a major question inquiry requires more than just “checking the bottom line.” *Id.* at 824. Instead, it considers “unusual” and “unheralded” exercises of power. *Id.* The court found that nothing was unusual about the Secretary using his authority to discharge student debt, and that the scale of relief was limited to the class members in the lawsuit. *Id.*

Here, the Commission’s use of the NGA to impose the GHG conditions does not pose a major question. The Commission has conditionally approved the AFP, contingent on TGP planting the same number of trees that are removed during construction and, where practical, using electric-powered equipment during construction. Order at ¶ 67. The GHG conditions also require TGP to use green steel pipeline segments and purchase electricity from renewable sources. *Id.*

First, these conditions do not constitute an “unusual” or “unheralded” exercise of power. The Commission has long exercised its power to conditionally approve pipeline projects. Order at ¶ 90. Although the GHG conditions in question are specifically geared at mitigating environmental impacts, they ultimately set parameters for the types of materials and equipment to be used in construction of this specific project. It is hardly unusual for the Commission, which governs the transmission of gas across the country, to regulate the infrastructure of a new pipeline and the impacts resulting from its construction.

Further, the GHG conditions are not so politically and economically significant as to pose a major question. Unlike the EPA’s Clean Power Plan in *West Virginia v. EPA*, the Commission does not seek to broadly mandate industry wide mitigation. Instead, the Commission imposes mitigating conditions on one pipeline project, the AFP. Such a narrow impact cannot be of major

economic and political significance. Instead, as in *Sweet v. Cardona*, these conditions would not fundamentally transform a domestic industry. They are limited in scale to the AFP.

E. It was arbitrary and capricious for FERC to fail to mitigate upstream and downstream GHG impacts.

FERC is authorized to consider upstream and downstream GHG impacts in its consideration of the public convenience and necessity under the NGA. Its failure to do so here was arbitrary and capricious for two reasons. First, TGP’s EIS was deficient because it failed to consider reasonably foreseeable upstream GHG impacts. This deficiency in TGP’s EIS undermined public comment and informed-decision making and thus resulted in arbitrary and capricious agency action. Second, FERC’s failure to mitigate downstream GHG impacts was arbitrary and capricious because it did not demonstrate reasoned decision-making when it chose to only mitigate less-impactful construction GHG impacts.

1. FERC has the authority to mitigate upstream and downstream GHG impacts.

The NGA grants FERC the authority to mitigate upstream and downstream GHG impacts, and such mitigation is consistent with FERC’s policies. Section 7 of the NGA broadly instructs the Commission to consider “the public convenience and necessity” when evaluating applications to construct and operate interstate pipelines. *Sierra Club v. Fed. Energy Regul. Comm’n*, 867 F.3d 1357, 1373 (D.C. Cir. 2017). Section 7 requires the Commission to evaluate all factors bearing on the public interest. *Atl. Ref. Co. v. Pub. Serv. Comm’n*, 360 U.S. 378, 391(1959). This includes environmental factors. *Birckhead v. Fed. Energy Regul. Comm’n*, 925 F.3d 510, 519 (D.C. Cir. 2019); *Sierra Club v. FERC*, 867 F.3d at 1373. The D.C. Circuit Court has held that “a proposed interstate natural gas pipeline’s reasonably foreseeable GHG emissions are relevant to whether the pipeline is required by the public convenience and necessity.” 174

FERC ¶ 61,189 (citing to *Birckhead*, 925 F.3d at 519). The same court has held that FERC can deny a pipeline certificate on the ground that a pipeline would be too harmful to the environment. *Sierra Club v. FERC*, 867 F.3d at 1373.

Further, although FERC’s recent Interim GHG Policy Statement is non-binding, it demonstrates the Commission’s own considerations as to how it will assess the impacts of natural gas projects on climate change in its reviews under the NEPA and the NGA. FERC, *Interim Policy Statement: Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews* (2022) (“Interim Policy Statement”). FERC’s GHG Interim Policy Statement states that in quantifying GHG emissions, FERC will consider “emissions that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action.” *Interim Policy Statement*. It will also include GHG emissions from construction and operation of the project and “may include GHG emissions resulting from the upstream production and downstream combustion of transported gas.” *Interim Policy Statement*. After consideration of these impacts, Section 7 of the NGA grants FERC the power to condition certification on “such reasonable terms and conditions as the public convenience and necessity may require.” 15 U.S.C.A. § 717f(e) (West). Thus, FERC has the authority to mitigate upstream and downstream GHG impacts of the AFP under the NGA.

2. It was arbitrary and capricious to exclude upstream impacts from analysis because they are reasonably foreseeable.

TGP’s EIS was deficient because it failed to consider reasonably foreseeable upstream GHG impacts, and it thus resulted in arbitrary and capricious agency action. An EIS is deficient, and the agency action it supports is arbitrary and capricious, if the EIS does not contain “sufficient discussion of the relevant issues and opposing viewpoints or if it does not

demonstrate ‘reasoned decision-making[.]’” *Sierra Club v. FERC*, 867 F.3d at 1368 (D.C. Cir. 2017). The relevant inquiry is whether an EIS’s deficiencies are “significant enough to undermine informed public comment and informed decision-making.” *Id.*

Under NEPA, an agency is required to take a “hard look” at the issues. *Id.* NEPA requires that agencies consider both the direct and indirect environmental impacts of proposed actions. *Food & Water Watch v. Fed. Energy Regul. Comm’n*, 28 F.4th 277, 285 (D.C. Cir. 2022). Indirect effects are those that may be caused by the action and will occur later in time but are still reasonably foreseeable. *Id.* Effects are reasonably foreseeable if they are “sufficiently likely to occur that a person of ordinary prudence would take them into account in reaching a decision.” *Id.* GHG emissions can qualify as an indirect effect of a project which FERC could see and have the legal authority to mitigate. *Sierra Club v. FERC*, 867 F.3d at 1374. In FERC’s recent non-binding GHG Policy Statement, it stated that upstream effects may be reasonably foreseeable. *Interim Policy Statement*.

Here, based on the EIS, the Commission concluded that, if constructed and operated in accordance with applicable laws, the pipeline would have some adverse environmental impacts. Order at ¶ 3. However, those impacts could be reduced to “less-than-significant” levels with the attached GHG conditions. *Id.* When conducting its EIS, TGP considered the construction impacts of the AFP as well as the downstream impacts of the AFP. Order at ¶ 72. It did not consider the upstream impacts of the project, finding them to be irrelevant and difficult to quantify. Order at ¶ 74.

However, when evaluating the environmental impact of a pipeline, an ordinary person would likely consider the actual impacts of producing and extracting LNG. Pipelines are not just pipelines—they are a symbol of our fossil fuel-powered society. It is thus reasonably foreseeable

that building a pipeline means resource extraction. LNG extraction and production could certainly result in a change in GHG emissions. In this case, upstream effects can be more easily measured because all production occurs at HFF and the AFP is only diverting supply. Order at ¶ 12. As a result, there is already baseline information that the Commission can use to measure upstream effects. This can be used to model multiple scenarios that demonstrate the emissions impact of changes in demand once the pipeline is put into place. Although a change in demand is not expected, the Commission acknowledges the rise of renewable energy and energy-efficient, electric technology that could impact demand for LNG. In contrast, it would be more difficult to measure downstream effects when a large portion of the LNG will be exported to Brazil. Order at ¶ 24, 33. Thus, the EIS does not demonstrate reasoned decision-making in its choice to analyze downstream impacts without taking into account upstream impacts.

3. It was arbitrary and capricious to choose to mitigate emissions from construction but not to mitigate downstream effects.

Finally, FERC's failure to mitigate downstream GHG impacts was arbitrary and capricious because it did not demonstrate reasoned decision-making when it chose to only mitigate less impactful construction GHG impacts. In FERC's recent GHG Interim Policy Statement, the agency set an interim threshold of 100,000 metric tons per year of GHG emissions. *Interim Policy Statement*. Projects under consideration with emissions above that level would require an EIS. *Id.* The Commission would then consider proposals to mitigate all or part of their projects' climate change impacts and may condition its approval on further mitigation of those impacts. *Id.*

In its EIS, TGP found that if the maximum amount of LNG would be transported through the AFP every day, downstream end-use could result in the release of about 9.7 million metric

tons of carbon dioxide per year. Order at ¶ 72. Meanwhile, the construction of the AFP could result in an average of over 88,000 metric tons per year of carbon dioxide emissions with the GHG conditions or just over 100,000 metric tons per year of carbon dioxide emissions without the GHG conditions. Order at ¶ 73. Even taking into account that 9.7 million metric tons of carbon dioxide represents the upper bound for downstream effects, that number is significantly higher than the 100,000 that could come from construction without mitigation. Still, FERC opted only to address the construction impacts and not the downstream impacts. The agency stated that construction impacts were significant yet did not categorize downstream impacts as significant or not. Order at ¶ 81, 82. The numbers tell a different story. If construction impacts of 100,000 metric tons are significant, then downstream impacts of 9.7 million metric tons also seem to be significant. FERC does not offer a reasoned explanation for drawing one conclusion and not the other. It states that it lacks a clear policy on downstream impacts and does not see a clear connection between the AFP and any significant increase in downstream emissions. Order at ¶ 99-100. Thus, FERC's failure to mitigate downstream GHG impacts was arbitrary and capricious because it did not demonstrate reasoned decision-making when it chose to only mitigate less impactful construction GHG impacts.

CONCLUSION

For the foregoing reasons, the petition for review should be granted in favor of HOME.