

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

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

FEDERAL ENERGY REGULATORY COMMISSION,
Defendant-Appellee,

v.

HOLY ORDER OF MOTHER EARTH,
Plaintiff-Appellant,

and

TRANSNATIONAL GAS PIPELINES, LLC,
Plaintiff-Appellant,

On Appeal from the Federal Energy Regulatory Commission in agency docket number TG21-
616-000, commissioners Jane D. Clark, Chairwoman;
Scott P. Williams, Timothy S. Child,
and Wendy L. Bankman

Brief of Appellee, FEDERAL ENERGY REGULATORY COMMISSION

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii
Statement of Jurisdiction	1
Statement of Issues Presented	1
Statement of the Case	2
Summary of the Argument	5
Standard of Review	7
Argument	8
I. FERC’s finding of a public need for the AFP was supported by substantial evidence and was not arbitrary and capricious	8
II. FERC’s finding that the benefits outweighed the environmental and social harms was not arbitrary and capricious	11
A. <u>FERC correctly determined that the economic benefits outweighed the residual adverse effects on affected landowners and communities</u>	11
B. <u>FERC’s determination that the TGP Project’s benefits outweighed the environmental harms was reasonable and proper</u>	12
III. FERC’s decision to route the AFP over HOME’s property despite HOME’s religious objections was not in violation of RFRA	14
A. <u>HOME does not face a substantial burden</u>	15
1. <i>HOME’s claim does not raise a substantial burden under the Navajo test</i>	15
2. <i>HOME’s claim does not raise a substantial burden under the Thiry test</i>	16
B. <u>There is a compelling government interest with no alternative means available</u>	17
IV. The GHG Conditions imposed were within FERC’s authority under the NGA	18

V.	FERC’s did not act arbitrarily and capriciously when it did not impose conditions addressing the upstream and downstream GHG impacts	20
Conclusion	22

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Statutes and Rules</u>	
15 U.S.C. § 717.....	2, 6, 8, 9, 21
42 U.S.C. § 2000.....	14, 15, 17
42 U.S.C. § 4332.....	21
 <u>Cases</u>	
<i>Am. Gas Ass'n v. FERC</i> , 593 F.3d 14 (D.C. Cir. 2010).....	7
<i>Birckhead v. FERC</i> , 925 F.3d 510 (D.C. Cir. 2019).....	9
<i>Calvary Christian Center v. City of Fredericksburg</i> , 800 F. Supp. 2d 760 (E.D. Va. 2011)	17
<i>City of Oberlin v. FERC</i> , 39 F.4th 719 (D.C. Cir. 2022)	9
<i>Grosz v. City of Miami Beach, Fla.</i> , 721 F.2d 729 (11th Cir. 1983)	18
<i>Midcoast Interstate Transmission, Inc v. FERC</i> , 198 F.3d 960 (D.C. Cir. 2000).....	13
<i>Minisink Residents for Env't Pres. & Safety v. FERC</i> , 762 F.3d 97 (D.C. Cir. 2014).....	8, 13
<i>Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 103 S. Ct 2856 (1983).....	7, 8
<i>Nat'l Fed'n of Indep. Bus. v. DOL, OSHA</i> , 142 S. Ct. 661 (2022).....	19, 20
<i>Navajo Nation v. U.S. Forest Serv.</i> , 535 F.3d 1058 (9th Cir. 2008)	15, 16
<i>Okla. Nat. Gas Co. v. Fed. Power Comm'n</i> , 257 F.2d 634 (D.C. Cir. 1958).....	11

<i>Sierra Club v. FERC</i> , 867 F.3d 1357 (D.C. Cir. 2017).....	6, 9, 18, 21
<i>Thiry v. Carlson</i> , 78 F. 3d 1491 (10th Cir. 1996).....	16, 17
<i>West Virginia v. EPA</i> , 142 S. Ct. 2587 (2022).....	7, 19

Other Authorities

<i>Certification of New Interstate Natural Gas Pipeline Facilities</i> , 88 FERC ¶ 61,227 (1999), <i>clarified</i> , 90 FERC ¶ 61,128, <i>further certified</i> , 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement). On March 24, 2022, the Commission issued an order converting the policy statements issued in February 2022 to draft policy statements. <i>See</i> <i>Certification of New Interstate Nat. Gas Facilities</i> , 178 FERC ¶ 61,197 (2022) (Order on Draft Policy Statements).....	9, 11, 12
<i>Transcon. Gas Pipe Line Co., LLC</i> , 161 F.E.R.C. P61,250 (F.E.R.C. December 6, 2017).....	9

STATEMENT OF JURISDICTION

The Federal Energy Regulatory Commission (“FERC”) granted a Certificate of Public Convenience and Necessity (“CPCN”) to Transnational Gas Pipelines, LLC (“TGP”) for the construction of the American Freedom Pipeline (“AFP”) on April 1, 2023. The Holy Order of Mother Earth (“HOME”) and TGP filed timely requests for rehearing on the issuance of the CPCN and conditions imposed in the CPCN respectively. *See* 15 U.S. Code § 717r(a). FERC denied rehearing for issues raised by all parties and reaffirmed the CPCN on May 19, 2023. HOME and TGP both filed notices of appeal on June 1, 2023. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 15 U.S. Code § 717r(d). This section provides that the appeals circuit in which the facility is proposed to be constructed shall have original and exclusive jurisdiction to civil actions seeking review of orders or actions pertaining to that facility.

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 needed where 90% 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 (Greenhouse Gas) Conditions imposed by FERC (Federal energy regulatory commission) beyond FERC’s authority under the NGA (Natural Gas Act)?
5. Was FERC’s decision not to impose any GHG Conditions addressing downstream and upstream GHG impacts arbitrary and capricious?

STATEMENT OF THE CASE

On June 13, 2022, TGP, as required by the Natural Gas Act (“NGA”) 15 U.S.C. § 717f(c) and FERC’s regulations 18 C.F.R. § 157, applied to get the authorization to construct and operate its proposed natural gas pipeline, the AFP. R. at 4 ¶1.¹ The proposed interstate pipeline is about 99 miles long, 30 inches in diameter, and designed to provide up to 500,000 dekatherms (Dth) per day of firm transportation service. *Id.* The pipeline and related facilities would extend from Jordan county, Old Union to a connection point located within an existing TGP gas transmission facility in Burden County, New Union. *Id.* A little under a year later, on April 1, 2023, FERC approved the authorization of the project (“TGP Project”) and issued TGP a CPCN Order with conditions. R. at 4 ¶2.

The TGP Project is estimated to cost about \$599 million to construct. R. at 6 ¶10. It is undisputed that TGP can financially support its proposed project without subsidization from its existing customers. R. at 7 ¶21. Once TGP starts to operate the AFP, it will become a natural gas company and will be within FERC’s jurisdiction. R. at 5 ¶8. Under the NGA, a natural gas company is “a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.” 15 U.S.C. § 717a(6).

The natural gas that will be transported by the AFP will be produced in the Hayes Fracking Field (“HFF”). R. at 6 ¶12. Before the natural gas can be transported by the AFP, it must be produced and liquified into liquified natural gas (“LNG”) at the HFF. *Id.* TGP is not increasing production of natural gas, but rather rerouting 35% of the natural gas production at HFF from the Southway Pipeline to the AFP. R. at 6 ¶12. It is undisputed that the reduction in LNG going through the Southway Pipeline will not lead to any gas shortages since demand in that area has been steadily declining. R. at 6 ¶13.

In 2020, from the end of February to the middle of March, TGP held an open season on the TGP project and executed binding precedent agreements with International Oil & Gas Corporation (“International”) for 450,000 Dth per day and New Union Gas and Energy Services Company (“NUG”) for 50,000 Dth per day. R. at 6 ¶11. Added together, the agreements equal 100% of the design capacity of the proposed project. *Id.* HOME claims that 90% of the LNG transported by the AFP will be exported to Brazil by International. R. at 8 ¶24. Nevertheless, the AFP would serve numerous domestic needs, including, but not limited to, expanding access to natural gas within the New Union state and also in the United States, “optimizing the existing systems for the benefit of both current and new customers by creating a more competitive market, ...and providing opportunities to improve a regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels.” R. at 8 ¶27.

HOME is a not-for-profit religious organization. R. at 5 ¶9. Similar to many indigenous tribes, HOME’s members treat nature as a deity. R. at 11 ¶46. The organization’s fundamental core tenet is that nature preservation should be held above everything else, especially economic interests, and that “humans should do everything in their power” to encourage conservation and sustainability. R. at 11 ¶47. Since at least 1935, HOME has performed a biannual ceremonial journey, the “Solstice Sojourn,” from the west end of their property to the foothills on the east end. R. at 11 ¶48.

The AFP will pass through two miles of HOME’s property. R. at 10 ¶38. As HOME makes its way to and from the Solstice Sojourn, its members would cross over the proposed pipeline. *Id.* TGP and FERC are respectful towards HOME’s practices and have agreed to bury the proposed pipeline in its entirety through HOME’s property and complete construction in a short four-month period to minimize disruption. R. at 10 ¶41. TGP has also already made

changes to over 30% of the pipeline to negotiate mutually acceptable easement agreements with landowners. R. at 10 ¶41. If TGP were to reroute the AFP through the Misty Top Mountains, it would add over \$51 million in construction costs and cause more objective environmental harm by travelling three miles through a more sensitive ecosystem. R. at 11 ¶44.

As TGP concedes, it is common for FERC to attach environmental conditions to CPCN Orders and has done so in the past. R. at 16 ¶83. The construction of the AFP requires the removal of about 2,200 trees. R. at 10 ¶38. Due to safety concerns, the trees cannot be replaced along the route. *Id.* Fortunately, one of the greenhouse gas (GHG) conditions requires TGP to plant an equal number of trees in other locations. *Id.* Additionally, TGP must use electric tools where available. R. at 16 ¶67.

These GHG environmental conditions did not get pulled from thin air. TGP completed an extensive analysis of the GHG impacts of the proposed AFP project in its Environmental Impact Statement (“EIS”). R. at 15 ¶72. One of the things typically analyzed in an EIS are the upstream and downstream impacts of the proposed pipeline project. The upstream GHG emissions are difficult to ascertain or even estimate; therefore, TGP did not include the upstream emissions in its EIS. R. at 15 ¶72. However, TGP did include the downstream GHG estimates. *Id.*

TGP and HOME filed timely requests for rehearing on different aspects of FERC’s CPCN Order authorizing TGP to construct and operate the AFP. R. at 4 ¶4. On May 19, 2023, FERC denied TGP’s and HOME’s requests for rehearing. R. at 5 ¶7. On June 1, 2023, TGP and HOME filed a petition for review of the CPCN Order and Rehearing Order with this Court. FERC asks this Court to affirm its denial of rehearing for all issues.

SUMMARY OF THE ARGUMENT

This Court should affirm FERC's order denying rehearing because FERC did not act arbitrarily or capriciously. FERC correctly found public convenience and necessity for the AFP, weighed the benefits and the harms, and correctly approved the AFP without imposing GHG conditions on upstream or downstream emissions. Furthermore, FERC did not violate the Religious Freedom Restoration Act ("RFRA") when routing the AFP over HOME's land nor exceed its statutory authority by imposing GHG conditions on the construction of the AFP via the CPCN issued for the project.

FERC's finding of public convenience and necessity for the AFP was supported by substantial evidence and was not arbitrary and capricious. TGP had executed binding precedent agreements for firm service using 100% of the design capacity of the TGP Project. Binding precedent agreements are valid evidence of public need. Although 90% of the natural gas transported by the AFP will be exported internationally, that does not preclude a finding of public convenience and necessity. TGP considered all factors that might impact public interest. The AFP serves numerous domestic needs. TGP also concluded that the benefits of the project outweigh any possible adverse effects. Additionally, Section 3 of the NGA authorizes applications for proposed pipeline projects without modification. FERC granted the CPCN by drawing a rational connection between the facts found and the choice made. Additionally, there is more than a scintilla of evidence to show there is a market need for the AFP project. Accordingly, FERC's finding of public convenience and necessity for the AFP was supported by substantial evidence and was not arbitrary and capricious.

FERC's finding that the benefits of the AFP outweigh the environmental and social harms was also reasonable and proper. FERC's finding was backed by evidence as TGP has

changed 30% of the pipeline to reach mutually agreeable easements with landowners, has reached such agreements with about 60% of landowners, and has shown that there is a public necessity that outweighs the impact on the remaining 40% of landowners subject to eminent domain. As far as the environmental impacts, FERC has adequately taken a “hard look” and HOME’s challenges amount to “flyspecking”. In these instances deference is given to the expertise of the agency. Additionally, HOME’s proposed alternative route is unreasonable as it would be more environmentally and economically harmful.

FERC did not violate HOME’s religious rights under RFRA in certifying the TGP Project. RFRA asks whether there is a substantial burden placed on an individual or group, whether there is a compelling government interest, and whether there is an alternative means available. HOME is not substantially burdened because they are not being forced to choose between following tenets of their religion and receiving a government benefit, nor are they being denied reasonable opportunities to engage in fundamental activities of their religion. There is a compelling governmental interest, as evidenced by the passing of the NGA by Congress, showing a demand for natural gas pipelines. Lastly, the alternative route available is not practicable as it has greater environmental impacts and would add over \$51 million in construction costs.

FERC acted within its authority when it imposed GHG conditions on the construction of the AFP through the CPCN issued for the TGP Project. Pursuant to the NGA, FERC can impose reasonable conditions on issuances of a CPCN as required by public convenience and necessity. 15 U.S.C. § 717f(e). TGP contends that FERC cannot impose GHG conditions under this statute. Other courts have held that as a matter of simple statutory interpretation, FERC can impose conditions on GHG emissions. *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017).

However, TGP asserts that the modern major questions doctrine applies and thus FERC is precluded from imposing these conditions because they go beyond the authority granted to it by Congress. This argument fails because FERC's action in this case does not carry such political and economic significance that it should give the court pause before holding that Congress intended to give the agency these powers. *West Virginia v. EPA*, 142 S. Ct. 2587, 2608.

Finally, FERC's decision to not impose conditions on the upstream and downstream emissions that would result from the TGP Project in the CPCN was not arbitrary and capricious. Neither the NGA nor the National Environmental Policy Act ("NEPA") require FERC to impose these conditions based on their statutory language. Furthermore, when courts have evaluated FERC decisions related to GHG estimates in EIS before, they have only held that FERC acted arbitrarily and capriciously when FERC failed to include reasonably foreseeable environmental impacts from projects. It has never been held that failure to act on these estimates is arbitrary and capricious, and to hold this now would represent a radical departure from previous jurisprudence and statutory language.

STANDARD OF REVIEW

In reviewing an agency decision, the arbitrary and capricious standard should be applied. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 103 S. Ct 2856, 2861 (1983). The scope of review under the arbitrary and capricious standard is narrow, and the court cannot substitute their own judgment for that of the commission. *Id.* at 2860. The court's role is limited to assuring FERC's decision-making was reasoned, principled, and based upon the record. *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010). FERC's decision would be arbitrary and capricious only if FERC "relied on factors which congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation

for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *State Farm*, 103 S. Ct at 2866. The court must affirm FERC’s decision so long as FERC offers a rational connection between the facts found and the choice made. *Id.*

ARGUMENT

This Court should affirm FERC’s denial of rehearing on all issues. The reasoning for this is, first, that FERC’s finding of public convenience and necessity for the AFP was reasonable and proper. FERC correctly found a public need for the AFP. Second, FERC’s finding that the benefits of the AFP outweigh the environmental and social harms was not arbitrary and capricious. Third, FERC’s decision to route the AFP over HOME property was not in violation of RFRA. Fourth, FERC acted within its statutory authority when it imposed GHG conditions on the construction of the AFP via the CPCN issued for the project. Finally, FERC did not act arbitrarily and capriciously when it declined to impose conditions on the upstream and downstream emissions from the TGP Project. Accordingly, this Court should affirm FERC’s denial of rehearing on all issues.

I. FERC’s finding of a public need for the AFP was supported by substantial evidence and was not arbitrary and capricious.

FERC’s finding that the AFP is required by public convenience and necessity was supported by substantial evidence and was not arbitrary and capricious. Even though 90% of the gas transported by the proposed pipeline will be for export, TGP successfully demonstrated a public need for the project. FERC has wide discretion to determine whether a proposed pipeline project “is or will be required by the present or future public convenience and necessity.” 15 U.S.C. §717f(e); *Minisink Residents for Env’t Pres. & Safety v. FERC*, 762 F.3d 97, 111 (D.C.

Cir. 2014). When FERC considers whether a project is required by public convenience and necessity, according to Section 7 of the NGA, it must consider “all the factors that might bear on the public interest.” *City of Oberlin v. FERC*, 39 F.4th 719, 726 (D.C. Cir. 2022).

Multiple courts have repeatedly affirmed that binding precedent agreements are valid evidence of public need. *Transcon. Gas Pipe Line Co., LLC*, 161 F.E.R.C. P61,250, 62391 (F.E.R.C. December 6, 2017) (“It is well-established...that long-term commitments serve as significant evidence of demand for the project”); *Birckhead v. FERC*, 925 F.3d 510, 517-18 (D.C. Cir. 2019) (The Court has “repeatedly held that a project applicant may demonstrate market need ‘by presenting evidence of preconstruction contracts for gas transportation service.’” *Sierra Club*, 867 F.3d at 1379 (internal quotation marks omitted).”); *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 F.E.R.C. ¶61,227, 61748 (1999) (precedent agreements “constitute [as] significant evidence of demand for the project.”).

Even export precedent agreements are valid evidence of public need because they are one of the factors that could bear on the public interest. *City of Oberlin*, 39 F.4th at 726. “Nothing in Section 7 [of the NGA] prohibits considering export precedent agreements in the public convenience and necessity analysis.” *Id.* Additionally, Section 3 of the NGA states, in part, that “the exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest and applications for...exportation shall be granted without modification or delay.” 15 U.S.C. § 717b(c).

TGP has executed binding precedent agreements for firm service using 100% of the design capacity of the AFP. Precedent agreements are not only sufficient, but significant evidence of public need. Even though TGP executed a binding precedent agreement to export the

majority of the natural gas, the export precedent agreement is valid evidence of need for the project. Additionally, even though Brazil does not have a free trade agreement with the United States, FERC finds this fact immaterial and the Court should defer to FERC's decision. Additionally, the natural gas is still being produced and transported to customers within the United States. The end use of the natural gas is only a minor consideration.

In addition to executing binding precedent agreements, TGP asserts that the AFP serves several domestic needs. The AFP transports domestically produced gas. It is expanding access to natural gas within the New Union state and provides gas to domestic customers. Since the gas demands served by the Southway Pipeline are diminishing and some of that gas will be diverted to the AFP, that means the AFP would transport gas that could have possibly not been purchased if it were transported by the Southway Pipeline. Therefore, the AFP is turning the gas that might have been wasted into a profitable product. Additionally, the AFP would improve the regional air quality since natural gas is a cleaner-burning gas compared to fossil fuels. These are only some of the domestic benefits the AFP provides.

The domestic benefits of the AFP are additional factors FERC considered when determining the public convenience and necessity of the project. These benefits are sufficient to justify the AFP. TGP has demonstrated a public necessity for the AFP through its binding precedent agreements and domestic benefits. FERC granted the public convenience and necessity certificate by drawing a rational connection between the facts found and the choice made. Additionally, there is more than a scintilla of evidence to show there is a public need for the AFP project. Accordingly, FERC's finding of a public need for the AFP was supported by substantial evidence and was not arbitrary and capricious.

II. FERC's findings that the benefits of the AFP outweigh the environmental and social harms was reasonable and proper.

FERC's finding that the benefits of the AFP outweigh the environmental and social harms was reasonable and proper. In evaluating a project, FERC must determine whether TGP has made efforts to eliminate or minimize any adverse effects of the Project on existing customers, existing pipelines in the market and their captive customers, landowners and communities affected by the route, and the environment. 88 FERC at 61,745. If any adverse effects remain, FERC must balance the benefits of the TGP Project against the harms. *Id.* This determination and subsequent grant of a CPCN is a matter peculiarly within the discretion of FERC, and FERC's determination should be given deference unless proven to be arbitrary and capricious. *Okla. Nat. Gas Co. v. Fed. Power Comm'n*, 257 F.2d 634, 639 (D.C. Cir. 1958).

It is undisputed that there are no adverse effects on existing customers nor on existing pipelines serving the market and their captive customers, so no analysis is needed for those issues. However, there are residual adverse effects that remain on affected landowners and communities and on the environment, warranting a balancing of the public benefits and the harms. FERC's determination that the economic benefits outweighed the residual adverse effects on affected landowners and communities was reasonably supported by evidence. Additionally, FERC's determination that the project benefits outweigh the environmental harms was also reasonably supported by evidence. Therefore, FERC's approval of the CPCN was reasonable and proper.

A. FERC correctly determined that the economic benefits outweighed the residual adverse effects on affected landowners and communities.

FERC correctly determined that the economic benefits outweighed the residual adverse effects on affected landowners and communities. Before considering any environmental factors,

FERC must first determine whether the public benefits outweigh the residual adverse effects on affected landowners and communities. 88 FERC at 61,745. This is essentially an economic test. *Id.*

FERC is directed to consider the percentage of easement agreements in their weighing of the harms and the benefits. Successfully acquiring as much of the right-of-way as possible by negotiation supports FERC's assessment of public benefits. *Id.* at 61,749. The use of eminent domain is often reasonable and necessary to achieve a public convenience. *Id.* A few holdout landowners cannot veto a project if the applicant provides support for the benefits of its proposal that justifies the issuance of a CPCN and the exercise of eminent domain rights. *Id.* A project to attach new gas supplies to the interstate grid would have benefits that may outweigh the lack of some right of way agreements. *Id.*

TGP has successfully negotiated easement agreements with about 60% of affected landowners. TGP has changed 30% of the TGP Project in order to reach these agreements. The successful acquisition of easement agreements from the majority of affected landowners is evidence of a public convenience that outweighs the economic harms on affected landowners. Further, the TGP Project would be providing needed gas to New Union. Accordingly, FERC's determination that the economic benefits outweigh the residual adverse effects on affected landowners is reasonable.

B. FERC's determination that the TGP Project's benefits outweighed the environmental harms was reasonable and proper.

FERC's determination that the TGP Project's benefits outweighed the environmental harms was reasonable and proper. In conjunction with the certification process, FERC must also conduct an environmental review as mandated by the National Environmental Policy Act

(“NEPA”). *Minisink*, 762 F.3d at 102. NEPA requires FERC to look hard at the environmental effects of its decision and identify reasonable alternatives to the contemplated action. *Midcoast Interstate Transmission, Inc v. FERC*, 198 F.3d 960, 967 (D.C. Cir. 2000). The “hard look” doctrine is meant to ensure that FERC has adequately considered the environmental impacts of its decision and that its decision is not arbitrary or capricious. *Minisink*, 762 F.3d at 111. The court must determine whether FERC satisfied NEPA’s “hard look” doctrine and whether they considered reasonable alternatives to the contemplated action. If both of these are satisfied, then there can be no finding that FERC’s determination was arbitrary and capricious.

NEPA is a procedural statute that does not mandate particular results. *Midcoast*, 198 F.3d at 967. Rather, NEPA’s “hard look” doctrine prescribes the necessary process by which an agency should evaluate environmental impacts. *Id.* When a court reviews agency compliance with NEPA’s “hard look” doctrine, the “rule of reason” applies, meaning the court must uphold an agency’s findings so long as they are reasonable. *Minisink*, 762 F.3d at 112. Courts should avoid a “flyspecking” approach, but rather should defer to FERC’s expertise. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015). A court’s review amounts to flyspecking when it reviews the agency’s findings in search of “any deficiency no matter how minor.” *Id.*

Here, HOME’s request errs on the side of a flyspecking approach, asking the court to require FERC to consider more than what has already been included in their EIS. The court should defer to FERC’s expertise in weighing the environmental harms and ascribing the necessary conditions on the TGP Project. Because FERC complied with NEPA’s “hard look” requirement in the EIS, FERC satisfactorily considered the environmental harms.

Aside from the “hard look” doctrine, FERC must also consider reasonable alternatives to the project proposed. HOME presents only one alternative, which FERC concludes is not reasonable. This conclusion is based on facts that HOME does not contend. HOME’s presented alternative through the Misty Top Mountains would cost TGP an extra \$51 million in construction costs. Additionally, the alternate route would pass through more fragile ecosystems and thus be more environmentally harmful than the proposed AFP route. Therefore, FERC’s finding that HOME’s alternative route was unreasonable was supported by evidence.

Because FERC took a “hard look” at the environmental impacts and considered reasonable alternatives, they are in compliance with NEPA and their finding that the public benefits outweigh the environmental harms is not arbitrary and capricious.

III. FERC’s decision to route the AFP over HOME’s property despite HOME’s religious objections was not in violation of RFRA.

FERC’s decision to route the AFP over HOME’s property despite HOME’s religious objections was not in violation of RFRA. RFRA states that the government “shall not substantially burden a person’s exercise of religion.” 42 U.S.C. § 2000bb-1(a). As an exception, the government may “substantially burden a person’s exercise of religion only if it demonstrates that the application of the burden to the person is in furtherance of a compelling government interest and is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1(b). HOME’s RFRA claim fails because there is no substantial burden. Even if the court finds that there is a substantial burden, there is an overriding compelling governmental interest and there is no reasonable alternative means to achieve the governmental interest. There is therefore no RFRA violation, and the court should affirm FERC’s approval of the TGP Project.

A. HOME does not face a substantial burden.

HOME does not face a substantial burden. Under RFRA a government cannot place a substantial burden on a person or group. 42 U.S.C. § 2000bb-1(a). RFRA, however, does not define what a substantial burden is. The supreme court has not heard a FERC case concerning RFRA, so a substantial burden analysis must turn to circuit courts. Currently there are two substantial burden tests accepted by the majority of jurisdictions: the *Navajo* test and the *Thiry* test. Both present different definitions of what constitutes a substantial burden. HOME's claim fails under both.

1. *HOME's claim does not raise a substantial burden under the Navajo test.*

HOME's claim does not raise a substantial burden under the *Navajo* test. The Ninth Circuit's *Navajo* test is the test used by the majority of jurisdictions and should hold more weight in this Court's analysis. In defining what a substantial burden is, the *Navajo* Court states, "[a] substantial burden is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008). This test requires that an individual must choose between modifying their behavior or being deprived of a benefit for a substantial burden to exist. *Id.* Alternatively, a substantial burden exists where an individual is coerced by threat of sanctions to act contrary to their beliefs. *Id.*

The *Navajo* court found that proposed use of recycled wastewater to make artificial snow on a mountain considered sacred by some Indian tribes would not substantially burden their free exercise of religion. *Id.* at 1071 The court offered guidance for future cases that is not precedential but can further inform this Court's analysis. The *Navajo* court asked whether plants

will be destroyed or stunted, whether springs will be polluted, whether places of worship will be made inaccessible, and whether liturgy will be modified. *Id.* at 1063. Relevant to this case are the first, third and fourth factors.

First, in considering whether plants will be destroyed by the government's actions, the *Navajo* court gave special weight to plants that are part of religious practices, and not to all plants in general. *Id.* Second, whether a place of worship is made inaccessible has to do with actual accessibility, and not just mere inconvenience. *Id.* Lastly, the modification of liturgy requires a more substantial burden to religious ceremonies than just a slight inconvenience. *Id.*

The AFP will pass through HOME's property and destroy the trees in its path. However, the same number of trees will be replanted elsewhere. Further, the trees being destroyed play no significant role in HOME's religious practices. The destruction of trees should therefore have minimal impact on HOME. As far as the inaccessibility of places of worship, TGP has agreed to bury the AFP underground and expedite the construction process. The AFP will not render HOME's places of worship inaccessible. Considering the modification of liturgy, HOME's Solstice Sojourn takes place in the Misty Top Mountains, which are unaffected by the TGP Project. HOME will have to pass over the buried AFP on their trek to the Misty Top Mountains, but this amounts to no more than a mere inconvenience. For these reasons, HOME does not face a substantial burden under the *Navajo* test.

2. *HOME's claim does not raise a substantial burden under the Thiry test.*

Even if this Court applies the Tenth Circuit's less strict *Thiry* test, HOME cannot claim a substantial burden sufficient to satisfy a RFRA claim. The *Thiry* test states that a substantial burden exists if the government has denied the plaintiffs "reasonable opportunities to engage in the fundamental activities of their religion." *Thiry v. Carlson*, 78 F. 3d 1491, 1495 (10th Cir.

1996). Relevant to HOME's claim is the relationship of a fundamental activity of a religion with real property. RFRA states, "the use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. § 2000cc-5(7)(B). Therefore, in order to deny HOME reasonable opportunities to engage in fundamental activities of their religion, FERC must interfere with their use of property in a religious exercise.

This analysis in practice requires actual active use of the land for a nonsecular purpose. *Calvary Christian Center v. City of Fredericksburg*, 800 F. Supp. 2d 760, 772 (E.D. Va. 2011). The court in *Thiry* found that the land was used for religious exercise because the plaintiff was using the land as a burial ground and praying at that site regularly. *Thiry*, 78 F.3d at 1495. However, the court ultimately found against the plaintiff because of a reasonable alternative. *Id.* at 1496.

In HOME's contention, the property in question is not actively used for any religious ceremonies. HOME's rituals are done in the Misty Top Mountains at the east end of their property. Their only contact with the TGP Project is in passing on their way to the Misty Top Mountains. Because the AFP does not affect any land in the Misty Top Mountains, HOME is still able to practice their rituals in accordance with the Solstice Sojourn. There is therefore no substantial burden placed on HOME under the *Thiry* test.

B. There is a compelling government interest with no alternative means available.

Even if the court were to find a substantial burden, the RFRA analysis requires us to consider whether there is a compelling government interest, and whether there is an alternative means available to achieve that interest. 42 U.S.C. § 2000bb-1(b).

Here, the public necessity addressed by the AFP is a compelling government interest. Additionally, by the passing of the NGA, the Government demonstrates a compelling interest in providing populations with clean energy via natural gas pipelines.

In determining whether the Project is the least restrictive means available, the court must weigh “the cost to the government of altering its activity to allow the religious practice to continue unimpeded versus the cost to the religious interest imposed by the government activity.” *Grosz v. City of Miami Beach, Fla.*, 721 F.2d 729, 733 (11th Cir. 1983).

The government interest can be achieved either through TGP’s proposed project, or through HOME’s alternative, which would cost an additional \$51 million and have greater environmental impact. Additionally, the burden placed on HOME is quite low, as the pipeline would be buried and would not be near any places of worship. Because the alternative route’s cost is so high, and the burden on HOME is minimal, HOME’s proposed alternative is not practicable. Therefore, there is no alternative means available to achieve the government’s compelling interest. FERC’s decision to route the AFP through HOME’s property was not a violation of RFRA.

IV. The GHG Conditions imposed were within FERC’s authority under the NGA.

FERC’s imposition of GHG conditions on the construction of the AFP is supported by basic statutory interpretation and is not invalidated by the major questions doctrine. The NGA grants FERC the authority to impose GHG conditions via CPCN orders on the constructions of pipelines. *Sierra Club*, 867 F.3d at 1374. FERC’s decision to regulate the GHG emissions from the construction of the AFP is therefore supported by past interpretations of its powers under the NGA. Accordingly, this court should adopt this interpretation of the NGA and allow FERC to do its congressionally delegated duty to the public.

This statutory interpretation alone grants FERC the authority to impose these conditions. Thus, the major questions doctrine does not need to be applied in this case. However, if the court were to apply the doctrine, FERC's decision regarding GHG emissions would still not be rendered invalid. The modern major questions doctrine arises when agencies try to exert authority that is not expressly given through statute and carries such economic and political significance that it gives the court pause before concluding that Congress meant to give the agency this power. *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022). In *West Virginia*, the court applied the major questions doctrine to the EPA's Clean Power Plan ("CPP"). *Id.* at 2600. The CPP granted the EPA the authority to regulate existing sources of air pollutants to bring them in line with regulations on new sources, including forcing the plants to shut down and producers to transition entirely to renewable energy sources. *Id.* at 2600-03. The court held that the sheer economic impact of the CPP and the fact that the authority asserted was based on ancillary and vague statutory language meant the plan fit under the major questions doctrine and could not stand. *Id.* at 2610. Further, the court emphasized that the pros and cons of the CPP were of such magnitude that it's likely Congress would want to weigh them itself instead of relegating them to a statutory "backwater." *Id.* at 2613.

In further major questions doctrine cases, the court has emphasized that the authority asserted must be within the purview of the agency that is asserting it. *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 665 (2022). The court in *Nat'l Fed'n* was tasked with determining whether OSHA operated in its authority when it issued an emergency rule mandating that all employers with over 100 employees show either their workers were vaccinated against COVID-19 or presented negative tests every week. *Id.* at 663. The court held that this rule was beyond the scope of the authority delegated to OSHA and, because of that, it

was invalid. *Id.* at 665. The majority emphasized that the act at issue in this case had only a tenuous connection to workplace safety, OSHA's traditional regulatory domain, and thus was not within the agency's authority. *Id.*

This case is distinct from the previous major questions doctrine cases because FERC does not seek to affect a profound economic or political change using vague statutory language. Rather, FERC seeks to do what it has always done using the statutory authority explicitly conveyed to it under the NGA to regulate the construction of new natural gas pipelines. In both *West Virginia* and *Nat'l Fed'n*, the court emphasized the unprecedented and sweeping authority sought by the EPA and OSHA, respectively. In this case, FERC seeks only to ensure that TGP uses the best practices to reduce the GHG impact from constructing the AFP, including planting a number of trees equal to those removed during construction and using electric tools where available. This is a much narrower exertion of authority than the ones in *West Virginia* and *NFIB*. Further, TGP concedes that FERC has issued CPCNs containing environmental conditions in the past. For these reasons, FERC did not overstep its authority in imposing GHG conditions on the CPCN for the TGP Project.

V. FERC did not act arbitrarily and capriciously when it did not impose conditions addressing the upstream and downstream GHG impacts.

FERC did not act arbitrarily and capriciously when it declined to impose GHG conditions on the upstream and downstream emissions of the AFP. HOME's argument that it did is based on an incorrect understanding of statutory language and case law. While FERC can impose GHG related conditions on the issuances of CPCNs, they are by no means obligated to do so under the NGA or NEPA.

The NGA itself states that when issuing CPCNs, FERC “shall have the power to attach... such reasonable terms and conditions as the public convenience and necessity may require”. 15 U.S.C. § 717f(e). Beyond this, the statute does not demand that FERC impose any additional conditions on a CPCN once FERC has found that it can be issued. Furthermore, NEPA only requires that an agency prepare an EIS when it finds a federal action is likely to have significant environmental impacts. 42 U.S.C. § 4332.

Previously, courts have held this provision to include downstream emissions of a natural gas pipeline project. *Sierra Club*, 867 F.3d at 1371-72. In *Sierra Club*, the D.C. circuit held that it was arbitrary and capricious for FERC to issue an EIS which failed to include the downstream GHG effects of the project. *Id.* at 1371. In deciding this, the court emphasized that it was well within FERC’s ability to estimate downstream GHG emissions based on the information it had at the time the EIS was written. *Id.* at 1373-74.

The current case is distinguished from *Sierra Club* because HOME is not alleging the EIS lacked sufficient consideration of GHG emissions, but that FERC failed to impose conditions on those emissions. FERC, in issuing the EIS for the AFP, specifically avoided the agency’s mistake in *Sierra Club* and included estimates of downstream GHG emissions. Upstream GHG emissions are not included in the statement only because those are much more difficult to estimate and not expected to be significant. And at any rate, HOME’s argument is not that the lack of this information is arbitrary and capricious, but rather that FERC failed to impose conditions on these emissions.

The language of NEPA and NGA does not demand this of the agency in any way. In the past, courts have held that NEPA only requires agencies to catalog environmental impacts of actions in the EIS that are reasonably foreseeable, even when some estimation is necessary to

determine them. To find that not imposing conditions based on these estimates would be arbitrary and capricious would be a radical departure from both the statutory language and existing jurisprudence of NEPA. For the reasons above the court should reject HOME's argument that not imposing conditions on upstream and downstream GHG was arbitrary and capricious.

CONCLUSION

For the foregoing reasons, this Court should affirm FERC's denial of rehearing on all issues.