

CASE NO. 23-01109

UNITED STATES COURT OF APPEALS  
FOR THE TWELFTH CIRCUIT

HOLY ORDER OF MOTHER EARTH  
*Plaintiff-Appellant-Cross Appellee*

v.

FEDERAL ENERGY REGULATORY COMMISSION  
*Defendant-Appellee-Cross Appellant*

-and-

TRANSNATIONAL GAS PIPELINES, LLC  
*Intervenor-Defendant-Appellee-Cross Appellant*

On Appeal from the United States of America Federal Energy Regulatory Commission in case no. TG21-616-000, Chairwoman Jane D. Clark; Scott P. Williams, Timothy S. Child, and Wendy L. Bankman.

Brief of Appellee, FEDERAL ENERGY REGULATORY COMMISSION

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## **STATEMENT OF JURISDICTION**

This appeal is from a final order issued by The Federal Energy Regulatory Commission (“FERC”) denying petitions for rehearing and affirming the Certificate of Public Convenience and Necessity (the “CPCN”). This matter pertains to the application for authorization of construction and operation of an interstate pipeline, and accordingly warranted FERC’s review. R. at 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction pursuant to 5 USC 702, which establishes right of review for agency action, and pursuant to 15 U.S.C. § 717r, which creates the right of review in the United States Court of Appeals for the Twelfth Circuit of a FERC order by a party to the proceeding. On April 20, 2023, pursuant to 15 U.S.C. § 717r(a), the petitioners, Transnational Gas Pipelines, LLC, and Holy Order of Mother Earth, brought an application for rehearing within 30 days of the CPCN Order issued on April 1, 2023. 15 U.S.C. § 717r(a). On June 1, pursuant to 15 U.S.C. § 717r(b), TGP and HOME filed a written petition for modification/review of the May 19 Order denying petitions for rehearing. 15 U.S.C. § 717r(b).

## **STATEMENT OF ISSUES PRESENTED**

- I. 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?
- II. Was FERC’s finding that the benefits from the APF outweighed the environmental and social harms arbitrary and capricious?
- III. Was FERC’s decision to route AFP over HOME property despite HOME’s religious objections in violation of RFRA?
- IV. Were the GHG Conditions imposed by FERC beyond FERC’s authority under the NGA?

- V. Was FERC's decision not to impose any GHG Conditions addressing downstream and upstream GHG impacts arbitrary and capricious?

## **STATEMENT OF THE CASE**

### **I. Issuance of Certificate of Public Convenience and Necessity**

On June 13, 2022, Transnational Gas Pipelines, LLC (TGP) filed an application, pursuant to the Natural Gas Act ("NGA"), 15 U.S.C. § 717f(c), and Part 157 of the Commission's regulations, 18 C.F.R. § 157 (2023), for permission to build and operate an approximately 99-mile-long interstate pipeline ("American Freedom Pipeline", or "AFP") and related facilities. (R. at 4). TGP is organized and exists under the laws of New Union (R. at 5). TGP will be subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC") when it becomes a natural gas company under section 2(6) of the NGA when construction of the AFP. (R. at 5). The AFP and facilities would extend from a receipt point in Old Union to an existing TGP gas transmission facility in New Union. (R. at 21). FERC authorized the project on April 1, 2023 and issued an Order granting a CPCN to TGP with conditions. The AFP would pass through the eastern edge of a 15,500-acre property in Burden County, New Union owned by Holy Order of Mother Earth ("HOME"). HOME is a religious organization with an emphasis on environmental justice. (R. at 11). FERC found that the market benefits from TGP's AFP project will outweigh any adverse impacts on landowners and surrounding communities. (R. at 1). FERC also concluded from its Environmental Impact Statement ("EIS") that the AFP construction will result in some adverse environmental impacts, but that the conditions in the CPCN will significantly mitigate the impacts if they are exacted. (R. at 1).

### **II. TGP's Pipeline Project**

TGP's project will involve the construction of 99 miles of 30-inch-diameter pipeline, the AFP, extending 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. (R. at 5). TGP estimates the project will cost approximately \$599 million. (R. at 6). TGP states that it held an open season for service on the project from February 21 through March 12, 2020. TGP then issued two binding precedent agreements with two unaffiliated shippers for firm transportation service, which together equal the full design capacity of the AFP. (R. at 6). The gas to be transported through the AFP is produced in the Hayes Fracking Field ("HFF") in Old Union, and then liquified into liquified natural gas ("LNG") and transported by pipeline. (R. at 6). Full production of natural gas at HFF is currently transported to states east of Old Union. TGP has presented evidence that LNG demands in these states have been steadily declining, and therefore market needs are better served by instead routing the LNG through the AFP. There will be no new production at HFF. (R. at 6). International Oil & Gas Corporation ("International"), one of the unaffiliated shippers with whom TGP had issued a binding precedent agreement, operates the NorthWay Pipeline, which will simultaneously transport LNG to the Port of New Union for export to Brazil, while bringing the NorthWay Pipeline closer to full capacity. (R. at 6).

### **III. Public Convenience and Necessity of the AFP**

90% of the AFP will be diverted along the NorthWay Pipeline by International for exportation to Brazil. (R. at 8). However, TGP has executed binding precedent agreements for firm service using 100% of the design capacity of the AFP process. The Certificate Policy Statement explains that precedent agreements will always be important evidence of project demand. (R. at 8). Further, the AFP services multiple domestic needs: delivering up to 500,000 Dth per day of natural gas to the interconnection with the NorthWay Pipeline; providing natural

gas service to areas currently without access to natural gas within New Union; expanding access to natural gas in the United States; creating a more competitive natural gas market; fulfilling capacity in the previously underutilized NorthWay Pipeline; and improving regional air quality by using cleaner-burning natural gas rather than dirtier fossil fuels. (R. at 8). FERC held that the above rationale proved project need for the AFP, and disregarded the exportation to Brazil, as precedent agreements for gas to be exported are important in assessing project need.

#### **IV. Approval of AFP and Route**

The AFP will pass through two miles of the eastern edge of HOME's property. (R. at 10, 21). This will require the removal of approximately 2,200 trees and other vegetation from HOME property. Most of the trees cannot be directly replaced, but an equal number will be planted along the AFP's route. (R. at 10). HOME suggested an alternative route that circumvents its property by routing through the Misty Top Mountain range. (R. at 10, 21). The alternative route would add \$51 million in construction costs and would cause more environmental harm as the AFP would run three extra miles and pass through more environmentally sensitive ecosystems in the mountains. (R. at 11). In an attempt to mitigate adverse effects to landowners and communities caused by the AFP construction, TGP has made changes to over 30% of the proposed pipeline route and has negotiated mutually acceptable easement agreements. (R. at 10). TGP has agreed to bury the AFP beneath the entirety of its passage through HOME property and has agreed to expedite construction across HOME property. TGP has signed a mutually acceptable easement agreement with around 60% of the landowners on the AFP path. (R. a 10).

#### **V. HOME's Religious Convictions and Concerns**

HOME's devotees make a ceremonial journey every summer and winter solstice from a temple at the western border of the property to a sacred hill on the eastern border in the foothills

of the Misty Top Mountains; they then journey back along a different route, known as the Solstice Sojourn. (R. at 11). The AFP will pass beneath the path in both directions. At the hill, all children who turned 15 in the past six months undergo a sacred religious ceremony. HOME has performed the Solstice Sojourn since 1935. (R. at 11). HOME claims that walking over the AFP and through the treeless “bare spot” during the Solstice Sojourn would destroy the meaning of the ceremony. (R. at 12). HOME claims that the use of its land would be anathema to its religious beliefs and practices given the harmful effects of fracking to obtain LNG, the environmental harm from construction, and the climate effects from fossil fuel burning. (R. at 11).

## **VI. Environmental Conditions of CPCN Order**

TGP and HOME requested rehearing for review of mitigation measures in the CPCN designed to lessen greenhouse gas (“GHG”) impacts in construction of the AFP (“GHG conditions”). The GHG conditions require that TGP will replace an equal number of trees as were removed during the AFP’s construction, TGP will use electric-powered equipment during construction of the AFP when possible, TGP will only purchase environmentally friendly steel pipeline segments produced by net-zero steel manufacturers, and that TGP will purchase all electricity used in construction from renewable sources when possible. (R. at 13). FERC has the authority and responsibility to set GHG conditions, per the NGA and National Environmental Policy Act (“NEPA”). The GHG conditions are the result of findings from the Environmental Impact Statement (“EIS”) conducted by TGP. (R. at 15). During analysis, GHG impact estimates were quantified if possible. (R. at 15). The investigation determined that end-use potentially could result in 9.7 million metric tons of CO<sub>2</sub>e per year. This was an upper bound estimate, assuming the maximum capacity of gas transported, and could potentially displace other fuels

which would result in no change in CO<sub>2</sub>e emissions. (R. at 15). FERC’s assessment of upstream impacts was influenced by the EIS’s inferential nature because the extent of production of LNG at HFF was not transported towards the AFP during the EIS, therefore leaving FERC unsure of the supply source. (R. at 6, 15). The EIS data for downstream GHG consequences was hypothetical. (R. at 15). Upstream and downstream GHG impacts were hard to estimate, and therefore FERC refrained from imposing GHG conditions for resulting emissions until further guidance is assured. (R. at 16).

## **VII. Petitions for Review of CPCN Order, Rehearing Orders, and Current Litigation**

On April 20, 2023 HOME sought rehearing from FERC on certain issues of the CPCN. HOME argues that the project need supporting the CPCN was unsatisfactory, because 90% of the natural gas transported by the AFP will be exported to Brazil, meaning there is insufficient public necessity within the United States to approve it or to exercise eminent domain over the AFP’s planned route. Brazil does not have a free trade agreement with the United States, but FERC still found the production and exportation to serve the public interest. (R. at 9). HOME also argues that even if a public necessity for the AFP exists, the negative impacts of the AFP outweigh the benefits, and routing the AFP through HOME’s land violates the Religious Freedom and Restoration Act (“RFRA”). HOME finally argues that FERC’s failure to require mitigation measures for upstream and downstream GHG impacts was arbitrary. (R. at 4–5). On April 22, 2023, TGP sought rehearing from FERC on the environmental conditions included within the CPCN. TGP also argues that the GHG conditions addressed “major questions” beyond FERC’s ability to regulate under the NGA. (R. at 6, 16). On May 19, 2023, FERC denied the petitions for rehearing and affirmed the CPCN as originally issued. (R. at 1). On June 1, 2023 both HOME and TGP filed a request for rehearing of aspects of the CPCN Order. (R. at 1).

## SUMMARY OF ARGUMENT

The Commission properly denied rehearing of HOME's issues. An agency's decision is not arbitrary and capricious if "the Commission's decision making [wa]s reasoned, principled, and based upon the record." *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015). A court's narrow review should be "based on a consideration of the relevant factors and whether there has been a clear error of judgment[.]" *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

FERC's finding of public convenience and necessity was supported by substantial evidence, which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of New York v. NLRB*, 305 U.S. 197 (1938). A CPCN may be issued if it "is or will be required by the present or future public convenience and necessity." U.S.C. § 717f(c)(1)(A). FERC is not required to look beyond market need to consider a project's benefits, and existing precedent agreements strongly indicate market need. *Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 101, 121 (D.C. Cir. 2014). Here, TGP issued two precedent agreements which would use 100% of the AFP's capacity. (R. at 6, 8). FERC correctly issued the CPCN, even though 90% of the gas would be exported. Natural gas shipped to a foreign country is consistent with public interest, unless the Department of Energy specifically states otherwise. *Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016). Issuance of a CPCN is not arbitrary and capricious in an export situation because "benefits stem from increasing transportation services for gas shippers regardless of where the gas is ultimately consumed." *City of Oberlin v. FERC*, 39 F.4th 719, 727 (D.C. Cir. 2022). In the present case, the AFP transports gas, provides gas to domestic customers, and fills capacity at the International

New Union City M&R Station. (R. at 9). FERC's finding of public convenience and necessity was not arbitrary and capricious.

FERC's finding that the AFP's benefits outweighed the environmental and social harms was not arbitrary and capricious. The balancing is an economic test, and "only when the benefits outweigh the adverse effects on the economic interest will the Commission proceed to consider the environmental analysis where other interests are addressed." *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 649 (D.C. Cir. 2010). Here, FERC properly balanced the economic benefits with the potential adverse impacts. The AFP will expand access to natural gas across New Union and the United States and will increase market competition. (R. at 8). HOME emphasizes the fact that 90% of the product of the AFP will be exported, but because international trade and economies will be bolstered by the AFP, the exportation remains an economic benefit relevant to FERC's consideration. (R. at 9).

When issuing a CPCN, FERC must balance environmental and social impacts, and therefore must not only "determine which of the submitted applications is the most in the public interest" but also must "give proper consideration logical alternatives which might serve the public interest better than any of the projects outlined in the applications." *Minisink Residents for Env't Pres. and Safety v. FERC*, 762 F.3d 97, 107 (D.C. Cir. 2014) (quoting *N. Nat. Gas Co. v. Fed. Power Comm'n*, 399 F.2d 953, 973 (D.C. Cir. 1968)). FERC's previous decisions involving consideration of alternative routes were found adequate when an alternative route was not selected because of increased environmental harm. *Minisink Residents for Env't Pres. & Safety*, 762 F.3d at 103. As the proposed alternative route has a greater environmental impact (R. at 11), FERC's denial was not arbitrary and capricious.

FERC also properly considered social harms to HOME. HOME's religious beliefs are not directly harmed through the installation of the AFP. (R. at 11). A substantial burden on religious practice is established when "the effect of a government action is to prevent . . . perform[ance of] required religious sacraments[.]" *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 239 F.Supp.3d 77, 91 (D.D.C. 2017), or where a government decision forces a group to "act contrary to their religion under threat of civil or criminal sanction[.]" *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1070 (9th Cir. 2008). AFP will not prevent HOME from carrying out their religious ceremonies—it does not hinder use of HOME's sacred paths, nor will HOME face sanction for exercise. (R. at 11–12). A potential lessening of their spiritual fulfillment does not establish a substantial burden. *Navajo Nation*, 535 F.3d at 1070. If government action substantially burdens religious practices, the court must apply strict scrutiny under the Religious Freedom Restoration Act ("RFRA"). *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). The installation of the AFP will not substantially burden HOME's religious practice.

The AFP would pass strict scrutiny under RFRA: the government "may substantially burden . . . [religious exercise] only if it demonstrates that application of the burden to the person— (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000bb–1. Domestic gas production and transportation is a compelling government interest. *Exxon Mobil Corp. v. FERC*, 501 F.3d 204, 208 (D.C. Cir. 2007). RFRA, "require[s] only a reasonable 'fit' between the government's ends and the means chosen to accomplish those ends." *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469 (1989). The alternative route through the Misty Top Mountains would add \$51 million in construction costs and would cause significantly more environmental harm to the area. (R. at 11). Declining the alternative route saves funding and

protects the environment, while still bolstering domestic gas production and transportation. FERC's decision to maintain the current route is reasonably related to their interest and passes strict scrutiny.

FERC had authority to establish the GHG conditions under the NGA. The NGA and NEPA authorize FERC to condition pipeline certification on mitigation of adverse effects of individual projects. The individualized conditions targeted towards mitigation of GHG emissions deriving from pipeline construction are a discrete measure exercised under and entirely consistent with existing regulatory power from the Natural Gas Act ("NGA") that does not center on a question of major economic or political importance. Addressing emissions directly resulting from a project within FERC's authority to license is not a major question.

FERC's conditions also lack vastness in impact, which is a common thread among major questions. *West Virginia v. EPA*, 142 S. Ct. 2587, 2621 (2022) (citing *Solid Waste Agency of Northern Cook County*, 531 U.S. 159, 161 (2001)). FERC's action is discrete and limited in area, scope, and time. (R. at 4); 199 FERC ¶ 72,201 (2023). Because the AFP conditions are at an individual level for a discrete and limited project, they cannot represent FERC's wielding of vast power, and therefore no major question exists. FERC can "attach . . . reasonable terms and conditions as the public convenience and necessity may require" to the certification. 15 U.S.C. § 717f. GHG impacts are a matter of public convenience and necessity, and therefore FERC's inclusion of conditions is within its authority. FERC's use of individualized, reasonable conditions is a necessary corollary of considering adverse effects and public benefits. *S. Nat. Gas Co.*, 100 FERC ¶ 61,281, 62,218 (2002). Through the EIS, FERC must "take a 'hard look' at the environmental consequences of its actions[.]" *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017) (citing *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983)).

FERC's certificate conditions align with the obligation under the NEPA to give a "hard look" to environmental impacts and respond accordingly. Under NGA and NEPA, FERC has authority to address GHG emissions through establishing conditions.

FERC's decision to not impose GHG conditions for indirect upstream and downstream emissions was not arbitrary and capricious, as they considered necessary factors and gave a satisfactory explanation for its finding of no significance. An arbitrary and capricious Environmental Impact Statement lacks "sufficient discussion of the relevant issues" or "does not demonstrate 'reasoned decision making.'" *Sierra Club v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017) (quoting *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006)); *Id.* (quoting *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014)). In creating the conditions, FERC discussed relevant factors and had estimates, indicating informed public comment and decision making. FERC elected not to impose downstream GHG conditions because the EIS data yielded a tenuous estimate. (R. at 15). FERC did not impose upstream GHG conditions because upstream emissions are hard to quantify and do not present reasonably foreseeable consequences. (R. at 15). Therefore, FERC's decision to withhold GHG conditions was not arbitrary and capricious.

### **STANDARD OF REVIEW**

An agency's action is not arbitrary and capricious if "the Commission's decision making [wa]s reasoned, principled, and based upon the record." *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015) (quoting *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010)). The Supreme Court has stated that under this narrow standard of review "a court is not to substitute its judgment for that of the agency," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co. (State Farm)*, 103 S.Ct. 2856, 2860 (1983), but that

their holding should be “based on a consideration of the relevant factors and whether there has been a clear error of judgment[.]” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 824 (1971).

## ARGUMENT

### **I. FERC’S FINDING OF PUBLIC CONVENIENCE AND NECESSITY FOR THE AFP WAS NOT ARBITRARY AND CAPRICIOUS AND SUPPORTED BY SUBSTANTIAL EVIDENCE DUE TO THE PROJECT’S BINDING PRECEDENT AGREEMENTS AND THE PUBLIC BENEFITS RESULTING FROM THE PROJECT.**

#### **A. FERC’s finding of public convenience and necessity was supported by substantial evidence.**

The Supreme Court has determined that substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consol. Edison Co. of New York v. NLRB*, 305 U.S. 197, 229 (1938). They qualify that “[t]he test ‘requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.’” *Butler v. Barnhart*, 353 F.3d 992, 999 (D.C. Cir. 2004) (quoting *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 365–66 (D.C. Cir. 2003)).

A CPCN may only be issued for a new pipeline if it “is or will be required by the present or future public convenience and necessity.” The Natural Gas Act, 15 U.S.C. § 717f(c)(1)(A). The Federal Energy Regulatory Committee (“FERC”) decides to issue a CPCN by “balanc[ing] the evidence of public benefits to be achieved against the residual adverse effects.” *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61, 61737 (Sept. 15, 1999). Public benefits include “meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives.” *Id.* at 61744. Residual adverse effects include “increased rates for preexisting customers, degradation

in service, unfair competition, or negative impact on the environment or landowners' property.”  
*Id.* at 61748.

In the present case, the AFP would provide natural gas service to underserved areas within New Union, thus meeting an unserved demand. (R. at 8). The SouthWay Pipeline is currently transporting full production of natural gas at HFF. However, LNG demands in regions east of Old Union are steadily declining, indicating that market needs are better served by routing the LNG through the AFP. (R. at 6). The AFP would additionally expand access to sources of natural gas supply in the United States; optimize the existing systems for the benefit of both current and new customers by creating a more competitive market; fulfill capacity in the undersubscribed NorthWay Pipeline; and provide opportunities to improve regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels. (R. at 8). These benefits are thus easily distinguishable from *Environmental Defense Fund v. FERC*, 2 F.4th 953, 960 (D.C. Cir. 2021), where the court rejected a CPCN due to no evidence of public benefits and a stagnant market demand.

**B. Precedent Agreements are Probative of Market Need in an Analysis of Public Convenience and Necessity.**

FERC is not required to “assess a project's benefits by looking beyond the market need reflected by the applicant's existing contracts with shippers.” *Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 101, 116 (D.C. Cir. 2014). Precedent agreements are not always probative of present or future public convenience and necessity, they are strongly indicative of demand for a project. *Id.* While in *Environmental Defense Fund* a singular precedent agreement was not accepted as definitive proof of public necessity, *Delaware Riverkeeper Network v. FERC*, 45 F.4th 345 (D.C. Cir. 2022) qualified that *Environmental Defense Fund* did not diminish the analysis that “concrete obligations to purchase natural gas (as demonstrated by the

precedent agreements) were better evidence of market need than the more speculative reports.”  
*Del. Riverkeeper Network*, 45 F.4th at 355.

In *Environmental Defense Fund* a natural gas company held an open season and did not receive any offers for precedent agreements. *Environmental Defense Fund*, 2 F.4th at 959. The company entered a singular precedent agreement with an affiliated shipper that the court determined had a strong indication of self-dealing. *Id.* at 964. In *Del. Riverkeeper Network*, the natural gas company in that case held an open season and received four bids for precedent agreements for a “large majority of the pipeline’s capacity.” *Del. Riverkeeper Network*, 45 F.4th at 355. The court did not find the CPCN issuance arbitrary and capricious, as the court “could reasonably conclude that precedent agreements were especially good evidence of demand for the pipeline's capacity.” *Id.* at 355. In the present case, TGP held an open season and as a result executed two binding precedent agreements with unaffiliated shippers. (R. at 6). Furthermore, these precedent agreements would use 100% of the design capacity of the pipeline project. (R. at 8). These factors establish a market need for the AFP.

C. FERC Was Correct in Finding Public Convenience and Necessity Where 90% of the Gas to be Shipped Was for Export

Under 15 U.S.C. § 717b, exported gas to a foreign country that is in a free trade agreement with the United States is aligned with the public interest, and exported gas to a country without a free trade agreement is assumed to be consistent with the public interest, unless the Department of Energy specifically determines that it is not. *Sierra Club v. Federal Energy Regul. Comm’n*, 827 F.3d 59, 420 (D.C. Cir. 2016). In *City of Oberlin v. FERC*, 39 F.4th 719, 727 (D.C. Cir. 2022), the court found that FERC’s issuance of a CPCN order where two of the precedent agreements were for export was not arbitrary and capricious, in part because “benefits stem from increasing transportation services for gas shippers regardless of where the gas is ultimately

consumed.” The D.C. Circuit cited to the facts that the new pipeline would add “additional capacity to transport gas out of the Appalachian Basin,” and “‘production and sale of domestic gas,’ which ‘contributes to the growth of the economy and supports domestic jobs’ irrespective of whether the gas ended up here or in Canada.” *Id.* (quoting *NEXUS Gas Transmission, LLC Texas E. Transmission, LP DTE Gas Co. Vector Pipeline, L.P.*, 172 FERC ¶ 61,199 (2020)).

While a majority of gas from the AFP would be for export, the AFP provides transportation for domestically produced gas, provides gas to some domestic customers, and fills additional capacity at the International New Union City M&R Station. R. at 9.

**II. FERC WAS CORRECT IN FINDING THAT THE BENEFITS FROM THE AFP OUTWEIGHED THE ENVIRONMENTAL AND SOCIAL HARMS, WHEN THE AFP WOULD PROVIDE SIGNIFICANT ECONOMIC BENEFITS WHILE CAUSING MINOR ENVIRONMENTAL IMPACT AND LIMITED INFRINGEMENT ON RELIGIOUS PRACTICE AND PROPERTY RIGHTS.**

**A. FERC Balanced Economic Benefits with Environmental and Social Harms Under the Correct Standard.**

FERC correctly decided that HOME did not show that the economic benefits of the AFP do not outweigh the environmental and social harms, and therefore the court should uphold the motion to deny rehearing. In determining if an EIS was arbitrary and capricious, the court seeks “to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.” *Nat’l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004).

**B. FERC Properly Weighed Extensive Economic Benefits of AFP.**

When approving a project, FERC balances public benefits against adverse effects, and approves the project only “where the public benefits of the project outweigh the project’s adverse impacts.” *Minisink Residents for Env’t Pres. & Safety v. F.E.R.C.*, 762 F.3d 97, 102 (D.C. Cir.

2014) (quoting *Certification of New Interstate Natural Gas Pipeline Facilities*, 90 FERC ¶ 61,128, 61,396 (Feb. 9, 2000)). The balancing of adverse impacts and public benefits is an economic test, not an environmental analysis, and “only when the benefits outweigh the adverse effects on the economic interest will the Commission proceed to consider the environmental analysis[.]” *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 649 (D.C. Cir. 2010).

In the case at hand, FERC properly decided that the economic public benefits outweighed potential adverse impacts. The AFP will expand access to natural gas to previously underserved areas in New Union and the United States, create competition in the market, improve production in the NorthWay Pipeline, and improve air quality previously sullied by fossil fuel burning. R. at 8. 90% of the AFP products will be exported, but the AFP will contribute to the development of the gas industry in the newly served areas, boost New Union and the United States’ economies through exportation, support international trade, and create jobs domestically. R. at 9. Therefore, regardless of the fact that 90% of the product will be exported, the economic benefits of the AFP remain significant.

C. FERC Properly Considered Alternative Routes for the AFP.

FERC must additionally complete an environmental review of the proposed project, as per the National Environmental Policy Act (NEPA). 42 U.S.C. §§ 4321–4370h. FERC is obligated to consider reasonable alternatives to a project as part of its certification process under the NGA, including balancing both environmental and social impacts to a location and community under review. The onus “is not merely to determine which of the submitted applications is the most in the public interest, but also to give proper consideration to logical alternatives which might serve the public interest better than any of the projects outlined in the

applications.” *Minisink Residents for Env’t Pres. and Safety*, 762 F.3d at 107 (quoting *N. Natural Gas Co. v. Fed. Power Comm’n*, 399 F.2d 953, 973 (D.C. Cir. 1968)).

In the case at hand, FERC “must determine whether the applicant has made efforts to eliminate or minimize any adverse effects” of the project. R. at 10. The court’s role in these situations is to determine whether FERC “has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.” *Del. Riverkeeper Network v. FERC*, 45 F.4th 104, 113 (D.C. Cir. 2022) (quoting *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97–98 (1983)). In *Minisink Residents for Environmental Preservation & Safety*, FERC approved a pipeline project after considering alternative locations that were less environmentally invasive. The approved project would have no adverse environmental impacts, so long as mitigation measures were implemented. *Minisink Residents for Env’t Pres & Safety*, 762 F.3d at 103. The court found that FERC thoroughly investigated alternative possibilities for a project; because the alternative plan had more significant environmental impacts, FERC was justified in remaining with its choice. *Id.* at 107.

In this case, the AFP will pass through two miles of HOME property, resulting in the removal of approximately 2,200 trees that cannot be replaced along the route. R. at 10. This is the extent of the environmental impacts of the AFP claimed by HOME. TGP has agreed to bury the AFP through the entirety of its passage through HOME property and has agreed to expedite construction on HOME property. HOME suggests that the pipeline be rerouted through the Misty Top Mountain range. *Id.* HOME concedes that the alternative route through the Misty Top Mountains would cause more environmental harm by running an additional three more miles and traveling through more environmentally sensitive ecosystems in the mountains. R. at 11. As in *Minisink Residents for Environmental Preservation & Safety*, FERC’s refusal to approve the

alternative path over the Misty Top Mountains is environmentally advantageous to HOME. Based on FERC's thorough environmental review of the alternative route and their assessment that the environmental impacts do not outweigh the costs, this requirement of their review of the CPCN was not arbitrary and capricious, and the court should affirm.

D. FERC Properly Weighed Religious Infringements in Balancing Test.

HOME also contends that the social costs of the AFP outweigh the benefits, and therefore the approval of the route was arbitrary and capricious. R. at 11. The AFP's route passes through HOME's sacred religious grounds. HOME has ritualistically used these lands since at least 1935 and follows the same path to a sacred hill to perform a religious ceremony, and then retreats along a different path, the Solstice Sojourn, twice per year. R. at 11. The AFP runs under HOME's Solstice Sojourn path in both directions. FERC does not contest that it is contrary to HOME's religious beliefs for LNG to be transported by the AFP across its land, given the fracking process used to obtain it, the environmental harm resulting from the pipeline's installation, and the detrimental climate effects of burning fossil fuels. R. at 11.

Government action substantially burdens religious practices when it "puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." 42 U.S.C.A. § 2000bb-1(a). In *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), a Native American group challenged government construction of a logging road through the group's sacred land. *Lyng*, 485 U.S. at 442–43. The Supreme Court ruled that the impact was not actionable, because the harms were "incidental effects of government programs, which may make it more difficult to practice certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs." *Id.* at 450. In the case at hand, the construction of the AFP will similarly fail to prevent HOME's adherents from continuing with

their religious practices. The AFP will pass underneath HOME's sacred pathways, which will not impede their ability to practice their ceremonies. R. at 11.

Regarding HOME's claim that allowing the AFP is violative of their religious beliefs against environmental harms, the situation is analogous to *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008), where a Native American tribe opposed the use of artificial snow on mountain sacred to their religion. The government action did not impose a substantial burden, because it did not force the tribe to "act contrary to their religion under threat of civil or criminal sanction" and the only effect was on their "subjective spiritual experience." *Navajo Nation*, 535 F.3d at 1063. The court held that "the diminishment of spiritual fulfillment . . . is not a 'substantial burden'." *Id.* at 1070. In the current case, construction of the AFP will not require HOME to act contrary to their religious belief of environmental sanctity out of fear of civil or criminal sanction. The only impact on HOME from the AFP is the lessening of their spiritual fulfillment of environmentally protecting their land. R. at 11–12. There is no impact on HOME's practice of their religion, just on their subjective belief. This is not a substantial burden, as there is only an impact on their subjective experience, and therefore does not outweigh the economic benefits of the AFP. FERC's decision was not arbitrary and capricious regarding social harms.

E. FERC Properly Weighed Concerns with Property Rights and Eminent Domain

Against Economic Benefits of AFP.

HOME also asserts that FERC failed to adequately balance the AFP's social costs with its economic benefits, particularly regarding the impact of eminent domain. HOME contends that TGP has not signed an easement agreement with over 40% of landowners along the route, including HOME. R. at 10. In determining whether to authorize construction of a natural gas facility, FERC must consider "the unneeded exercise of eminent domain in evaluating new

pipeline construction.” *NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022, 9 (2017). Courts have determined that “a large portion of [a] project route [having] been acquired without the use of eminent domain strongly supports a finding that . . . efforts have minimized the potential for adverse impacts on landowners and surrounding communities.” *Id.* at 19.

In the case at hand, a large portion, around 60% of the landowners to be impacted by the AFP have signed easement agreements. R. at 10. Similar to the case above, this indicates an effort by TGP to minimize the social and community impact of the AGP by lessening the probability of the use of eminent domain, even though HOME has expressly refused to reach an easement agreement with TGP. R. at 10. TGP has taken sufficient steps to minimize adverse economic impacts on landowners and surrounding communities by negotiating easement agreements with landowners along the AFP’s route. R. at 10–11. As a result, the social cost is diminished, meaning that it does not outweigh the significant economic benefits of approving the AFP. Therefore, FERC adequately balanced the minimal probability of eminent domain against the economic benefits.

### **III. FERC’s Decision to Route AFP over HOME Property Despite the Plaintiff’s Religious Objections Was not in Violation of RFRA.**

If it is determined that government action substantially burdens religious practices, a court must apply the strict scrutiny standard under the Religious Freedom Restoration Act (“RFRA”). See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Government action substantially burdens religious practices when it “puts substantial pressure on an adherent to modify his behavior and to violate his beliefs.” 42 U.S.C.A. § 2000bb-1(a).

#### **A. The plaintiff’s claim does not constitute a substantial burden on their religious practices under RFRA.**

In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 239 F.Supp.3d 86, 120 (D.D.C. 2017), the plaintiff attempted to bring a RFRA claim against the defendant for a proposed pipeline that would be buried underneath a lake used in religious ceremonies. They claimed that installing the pipeline “[would] contaminate the lake's waters and render them unsuitable for use in their religious practices[.]” *Id.* Although the plaintiff’s RFRA claim was barred by laches, the court stated that if it had been brought in a timely manner, it likely would have failed because they were “unlikely to establish that government's grant of easement to operate [an] oil pipeline under tribe's federally regulated lake constituted a substantial burden on tribe members' ability to perform required religious sacraments[.]” *Id.* at 91. The court observed that the “government's actions did not force [the] tribe to choose between exercising their religion and receiving a government benefit, nor did it coerce tribe to act contrary to tribe's religion under threat of civil or criminal sanction, but rather sole effect was on tribe members' subjective spiritual experience[.]” *Id.* at 94 (quoting *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008)).

Similarly, in *Navajo Nation v. United States Forest Service*, the court held there was not a substantial burden placed on the plaintiff’s religious practices by “use of recycled wastewater to make artificial snow for commercial ski resort located in national park on mountain considered sacred by tribes.” *Navajo Nation*, 535 F.3d at 155. The plaintiffs claimed that this decision would “spiritually contaminate the entire mountain and devalue their religious exercises.” *Id.* at 1063. The court stated that the plaintiffs could “continue to pray, conduct their religious ceremonies, and collect plants for religious use. Thus, the sole effect of the artificial snow is on the Plaintiffs' subjective spiritual experience.” *Id.* The court reasoned that “a government action that decreases

the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a ‘substantial burden[.]’” *Id.*

In the present case, the construction of the pipeline under the ground would not substantially burden the plaintiff’s religious practices. The plaintiff’s religious ceremony, journeying across their property would not be impeded by the pipeline that would exist underground. R. at 11. The plaintiffs would still have access to the land used in their religious ceremonies, the pipeline would not force the plaintiffs to “choose between exercising their religion and receiving a government benefit,” and the pipeline would not “coerce [the plaintiff] to act contrary to tribe’s religion under threat of civil or criminal sanction.” *Standing Rock Sioux Tribe*, 239 F.Supp.3d at 94 (D.D.C. 2017) (quoting *Lying v. Northwest Indian Cemetery Protective Association*, 108 S. Ct. 1319, 1321 (1988)).

B. Regardless of the substantial burden test, the AFP would nonetheless pass the strict scrutiny standard under RFRA.

Regardless of the substantial burden test, the AFP would nonetheless pass strict scrutiny. RFRA dictates that the “[g]overnment may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb–1.

**1. The production and transport of domestic fossil fuels is a substantial government interest.**

The Department of Energy asserts that “[t]he oil and gas industry supports millions of American jobs, provides lower energy costs for consumers, and ensures our energy security[.]” and that “[t]he U.S. trade deficit in 2019 was \$305 billion lower than it would have been without domestic oil and natural gas production.” *Department of Energy*, “The Economic Benefits of Oil

and Gas” (2020). In 1976 Congress determined that “a natural gas supply shortage exists in the contiguous States of the United States” and “delivery of Alaska natural gas to United States markets is in the national interest[.]” 15 U.S.C. § 719. Then, in 2004 Congress granted loan guarantees to expedite the Alaskan pipeline project. *Exxon Mobil Corp. v. FERC*, 501 F.3d 204 (D.C. Cir. 2007). Congress has stated unambiguously that domestic gas production and transportation is a compelling government interest. *Id.* at 208.

**2. TGP’s route of the AFP through the plaintiff’s property was the least restrictive means to achieve the government interest of domestic oil production.**

Under RFRA, the government must employ the least restrictive means in furthering their compelling interest. The least restrictive means test has “never required that the restriction be absolutely the least severe that will achieve the desired end. Rather, the decisions require only a reasonable “fit” between the government’s ends and the means chosen to accomplish those ends.” *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 109 S.Ct. 3028, 3029 (1989). The alternative to the AFP routed through the plaintiff’s property would be to route the pipeline around their property. R. at 11. Re-routing the AFP to avoid the plaintiff’s property through the Misty Top Mountains would add over \$51 million in construction costs. *Id.* In addition, this alternate route would necessarily cause more objective environmental harm by traveling an additional three miles and running through more environmentally sensitive ecosystems in the mountains. *Id.*

**IV. THE CONDITIONS ARE A DISCRETE MEASURE EXERCISED UNDER AND ENTIRELY CONSISTENT WITH EXISTING REGULATORY POWER THAT DOES NOT CENTER ON A QUESTION OF MAJOR ECONOMIC OR POLITICAL IMPORTANCE.**

FERC conditioned certification of the AFP project on TGP following four measures that would mitigate emissions directly stemming from construction. (R. at 14). These conditions derive from a statutory scheme which creates and empowers FERC to “attach ... reasonable

terms and conditions as the public convenience and necessity may require” to the certification. 15 U.S.C. § 717f(e). FERC assesses the “adverse effects” of the project, and whether the applicant has minimized them. *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,745 (1999). Requiring the replanting of trees, use of electric-powered equipment, “green” steel pipeline segments, and electricity sourced from renewable sources is not an unorthodox use of FERC’s authority. 15 U.S.C. § 717f(e). Rather, it is required under both NEPA and NGA to respond to the challenges of individual projects.

A. Addressing emissions directly resulting from a project within FERC’s authority to license is not a major question. FERC addresses challenges unique to a particular project, dispelling the idea that this is a major question.

Where “the ‘history and the breadth of the authority that [the agency] has asserted’ is ‘extraordinary[.]’” *West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)), the Major Questions Doctrine requires a “clear congressional authorization[.]” *Id.* (citing *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)). A major question arises when an agency asserts “highly consequential power[.]” *Id.* at 2609 (citing *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)), over a matter of “vast economic and political significance[.]” *Id.* at 2605 (quoting 84 Fed. Reg. 32529 (2019)). The exercise of power over these matters is so extraordinary that it causes one to “hesitate before concluding that ... such authority” was ever conferred. *Id.* at 2595 (2022) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

**1. FERC’s conditions lack a key underpinning of a major question — vastness in impact.**

The common thread among major questions is an agency wielding vast power. *Id.* at 2621 (citing *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 161 (2001)). Regulation of “a significant portion of the American economy” is a major question of

vast significance. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (citing *FDA v. Brown & Williamson*, 529 U.S. 120, 159 (2000)). The Supreme Court in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 128–29 (2000) (citing 61 Fed. Reg. 44418, 44617–44618 (1996)) invoked the Major Questions Doctrine when the FDA overhauled the tobacco industry, reaching so far as to “prohibit the distribution of any promotional items, such as T-shirts or hats, bearing the [tobacco] manufacturer's brand name[.]” Similarly, a major question to existed where the IRS “require[d] ‘billions of dollars in spending’ by private persons or entities[.]” *W. Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2621 (2022) (citing *King v. Burwell*, 576 U.S. 473, 485 (2015)).

Unlike *Brown & Williamson* or *King*, this agency action is discrete and limited—both in area, as AFP is a 99-mile-long pipeline, scope, as the conditions encompass four practices particular to this project, and time, as the conditions only apply for the limited timeline of this construction project. (R. at 4, 14). The AFP conditions are for a discrete and limited project, and therefore they cannot realistically be regarded as wielding vast power. As applied here, utilizing equipment with certain capacities or sourcing energy from specific origins does not constitute a major question.

B. The NGA and NEPA provide clear congressional authorization for FERC to condition pipeline certification on mitigating the adverse effects of individual projects.

FERC’s conditioning of AFP certification on the implementation of limited construction practices does not present a colorable major question. Even if it did, there is clear congressional authorization for FERC to make such stipulations. Clear congressional authorization is indicated through consideration of: (1) the “overall statutory scheme” of the authorizing statute; (2) “the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address[.]”; (3) agency “past interpretations of the relevant statute[.]”; and (4) whether “there is a

mismatch between an agency's challenged action and its congressionally assigned mission and expertise.” *West Virginia* at 2622 (citing *Brown & Williamson* at 133); *West Virginia* at 2623.

**1. In imposing these discrete conditions pursuant to its longstanding role as gatekeeper to pipeline construction with broad discretion, FERC acts within a directly relevant statutory scheme.**

The NGA provides: “[t]he Commission *shall have 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. § 717f(e) (emphasis added). FERC’s inclusion of reasonable conditions, in consideration of the public necessity, is consistent with this overall statutory scheme. Congress placed the authority to issue certificates in FERC, contingent on FERC’s finding “that the applicant is *able and willing ... to conform to ... the requirements, rules, and regulations of the Commission ... otherwise such application shall be denied*.” 15 U.S.C. § 717f(e) (emphasis added). The Commission has broad authority to stipulate what conditions an applicant must conform to in the public necessity.

A consideration of public convenience and necessity “requires the Commission to elevate 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). This includes “respecting ‘conservation, environmental, and antitrust’ limitations[.]” *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015) (citing *NAACP v. Fed. Power Comm’n*, 425 U.S. 662, 670 (1976)). Since 1958, this Circuit has recognized that FERC’s issuance of a CPCN “is a matter ‘peculiarly within the discretion of the Commission[.]’” *Myersville Citizens for a Rural Cmty., Inc.*, 783 F.3d at 1308 (citing *Okla. Natural Gas Co. v. Fed. Power Comm’n*, 257 F.2d 634, 639 (D.C. Cir. 1958)).

FERC has “exclusive jurisdiction” over gas transportation, *Myersville Citizens for a Rural Cmty., Inc.* at 1315, including broad discretion to construct terms and conditions that are

“reasonable” in light of the above factors and limitations. 15 U.S.C. § 717f(e). In *Associated Gas Distributors v. FERC*, 824 F.2d 981, 993 (D.C. Cir. 1987), the D.C. Circuit likened FERC action to “a complete restructuring of the natural gas industry” in the interest of squelching unfair practices among gas merchants. Yet, the Court characterized any “negative restriction on” FERC’s power to issue “reasonable terms and conditions” as “at best ambiguous, if indeed it [the negative restriction] exists at all.” *Associated Gas Distributors*, 824 F.2d at 1001. In the present conditions, FERC continues to exercise such discretion. By recognizing GHG impacts as a matter within “the public convenience and necessity” framework, FERC accordingly included a relevant condition to minimize GHG resulting from construction. R. at 14. As the Supreme Court recognized in *Atl. Ref. Co.* and this Circuit echoed in *Myersville*, FERC’s ‘elevation of the public interest’ includes constructing reasonable conditions that respond to environmental challenges.

## **2. The AFP conditions are consistent with FERC’s past conditions.**

In light of these public interest factors and its history of exclusive jurisdiction, FERC has conditioned project authorization on compliance with particular conditions. FERC’s use of individualized, reasonable conditions is a necessary corollary of considering adverse effects and public benefits. See *S. Nat. Gas Co.*, 100 FERC ¶ 61,281, 62,218 (2002) (prescribing conditions related to construction practices, drilling, noise levels). In creating conditions for authorization, FERC reacts to a project’s adverse effects with “site-specific mitigation measures[.]”, such as in *Atl. Coast Pipeline, LLC*, where FERC focused on “the mitigation of construction impacts ... on a nearby inn[.]” *Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Revs.*, 178 FERC ¶ 61,108, 61,770 (2022) FN 68 (citing *Columbia Gas Transmission, LLC*, 170 FERC ¶ 61,045, at P 66, app. (2020)); *Consideration of Greenhouse Gas Emissions in Nat. Gas*

*Infrastructure Project Revs.*, 178 FERC ¶ 61,108, 61,770 (2022) FN 68 (citing *Atl. Coast Pipeline, LLC*, 161 FERC ¶ 61,042 at app. A)).

Where conditions are not complied with, a responsive agency's "discretion is ... at zenith" in "the fashioning of policies, remedies and sanctions ... in order to arrive at maximum effectuation of Congressional objectives." *Niagara Mohawk Power Corp. v. Fed. Power Comm'n*, 379 F.2d 153, 159 (D.C. Cir. 1967). FERC has consistently served as sole gatekeeper to CPCN issuance under the NGA, acting at the 'zenith of discretion' to craft individualized conditions tailored to environmental considerations. These considerations include electric reliability, clean air, and "avoidance of unnecessary disruption of the environment[.]" *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,748; 61,737 (1999). Nowhere is FERC's discretionary authority more proper than in fashioning solutions in the construction process itself. See *Columbia Gas Transmission, LLC*, 170 FERC ¶ 61,045, 61,297 (2020)

**3. The subject matter of the AFP conditions are commensurate with FERC's expertise.**

FERC's present action is integral to its nature and role, in contrast to circumstances where the absence of clear congressional authorization is indicated by a "mismatch between an agency's challenged action and its congressionally assigned mission and expertise[.]" *West Virginia* at 2623. FERC's issuance of particularized certificate conditions dovetails with the obligation under NEPA to give a "hard look" to environmental impacts and respond accordingly. Similarly, FERC's authority is recognized to include weighing "conservation, environmental, and antitrust questions." *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 670 (1976). This Circuit accordingly "afford[s] FERC 'an extreme degree of deference'" to its "evaluation of 'scientific data within its technical expertise[.]'" *Myersville Citizens for a Rural Cmty., Inc.* at 1308 (D.C.

Cir. 2015) (quoting *Washington Gas Light Co. v. FERC*, 532 F.3d 928, 930 (D.C. Cir. 2008)). The NGA framework includes consideration of conservation and environmental factors unique to a given project and shows a cohesive and clear congressional authorization for FERC to incorporate environmental factors in its decision making. FERC is unambiguously authorized to address GHG emissions of the AFP project by crafting individualized solutions.

#### **IV. THE EIS SUFFICIENTLY COMPLIED WITH STATUTORY OBLIGATION IN REFRAINING FROM IMPOSING CONDITIONS FOR UPSTREAM AND DOWNSTREAM GHG EMISSIONS, BECAUSE IT PROPERLY EXAMINED THE RELEVANT FACTORS AND JUSTIFIED ITS DECISION ON THE BASIS OF BINDING PRECEDENT AND PRUDENT DECISIONMAKING**

NEPA requires an Environmental Impact Statement (“EIS”) for any “proposed agency action ... that has a reasonably foreseeable significant effect on the quality of the human environment.” National Environmental Policy Act of 1969 § 106, 42 U.S.C. § 4336(b)(1). Through the EIS, FERC must “take a ‘hard look’ at the environmental consequences of its actions[.]” *Sierra Club v. FERC (Sabal Trail)*, 867 F.3d 1357, 1367 (D.C. Cir. 2017) (citing *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983)). However, FERC need not take any specific action under the EIS. *Sabal Trail*, 867 F.3d at 1367 (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 194 (D.C. Cir. 1991)).

##### **A. FERC took the requisite hard look.**

Judicial review of “agency compliance with NEPA is accordingly limited” by an EIS’s nature. *Sabal Trail*, 867 F.3d at 1367. An arbitrary and capricious EIS lacks “sufficient discussion of the relevant issues[.]” *Id.* at 1368 (quoting *Nevada v. Dep’t of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006)), or “does not demonstrate ‘reasoned decision making’” *Id.* (quoting *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014)).

NEPA’s “rule of reason,” inquires “whether an EIS’s deficiencies are significant enough to undermine informed public comment and informed decision making.” *Id.* (citing *Nevada v. Dep’t of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006)). In its review, the court may “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *State Farm*, 463 U.S. at 43 (1983) (quoting *Bowman Transp. Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)). Findings from the EIS inform FERC’s discretion to impose conditions in the public interest, as required by 15 U.S.C. § 717(a). FERC discussed the relevant factors and gave estimates where possible, thus serving informed public comment and decision making. Its decision to withhold a judgment on the estimates’ significance is a reasonable course of action in light of its experience.

**1. FERC centered the EIS on AFP’s significant, reasonably foreseeable impacts, thereby duly considering the relevant factors under a hard look analysis.**

A sufficient discussion of the relevant issues firstly includes examining “impacts,” also known as “effects,” which are “changes to the human environment from the proposed action ... that are reasonably foreseeable[.]” 40 C.F.R. § 1508.1(g) (2022). These include direct effects, “which are caused by the action and occur[ing] at the same time and place.” 40 C.F.R. § 1508.1(g)(1) (2022). Indirect effects, which occur upstream or downstream of the pipeline project, “are ... farther removed in distance, but are still reasonably foreseeable[.]” 40 C.F.R. § 1508.1(g)(2) (2022). Cumulative effects may be considered as they “result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions[.]” 40 C.F.R. § 1508.1(g) (2022). Given that AFP is a single project, and cumulative effects analysis considers “actions ... [that] are pending concurrently before an agency,” *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976), cumulative effects analysis is not relevant here. A

reasonably foreseeable impact is “sufficiently likely to occur such that a person of ordinary prudence would take it into account[.]” 40 C.F.R. § 1508.1(aa) (2022). A sufficient EIS must also include discussion of mitigation steps that may be taken, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989), for those “actions *significantly* affecting the quality of the human environment[.]” 42 U.S.C.A. § 4332(C) (emphasis added).

***i. FERC accounted for factors necessary to assess the significance of downstream impacts.***

An EIS requires collection of the data “necessary to assess the project’s potential indirect effects” as well as consideration of “the reasonably foreseeable effects [that are available on the record] of the proposed project.” *Food & Water Watch v. FERC*, 28 F.4th 277, 286 (D.C. Cir. 2022). Downstream GHG emissions are not “categorical[ly] ... a reasonably foreseeable indirect effect of a pipeline project[.]” meaning that they are assessed on a “case-by-case” basis. *Birckhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir. 2019) (quoting *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1122 (D.C. Cir. 1971)). FERC must provide *estimates* for indirect downstream effects, where feasible. *Sabal Trail*, 867 F.3d at 1374 (emphasis added). In an extensive analysis GHG impact estimates were quantified where possible. (R. at 15). FERC determined that “downstream end-use could result in about 9.7 million metric tons of CO<sub>2</sub>e per year[.]” R. at 15. This was an upper bound estimate, “assum[ing] the maximum capacity of gas ... transported[.]” which could potentially “displace other fuels ... resulting in no change in CO<sub>2</sub>e emissions.” R. at 15. These determinations indicate a proper collection of what courts consider the necessary data for EIS purposes.

***ii. FERC accounted for the factors necessary to assess the significance of upstream impacts.***

Reasonably foreseeable effects are an underpinning of the necessary factors in a hard look analysis. *Food & Water Watch*, 28 F.4th at 286. For instance, the foreseeability of upstream

impacts is predicated on whether the project will stimulate increased production upstream. See *Birckhead*, 925 F.3d at 517. Quantifying upstream impacts is inherently speculative. As demonstrated in *Delaware Riverkeeper Network v. FERC*, 45 F.4th 104, 109 (D.C. Cir. 2022), a court would have to infer “that *more* [natural gas] wells will be needed [to serve an increased demand caused by the pipeline][.]” which exceeds the scope of determining what is reasonably foreseeable. Due to this, courts do not require that FERC consider upstream effects with every EIS. *Birckhead* at 518. In *Birckhead*, the record did not show factors of foreseeable upstream demand increases, such as new wells to be drilled, pre-construction contracts, or reliance by upstream agents on the completed pipeline. *Id.* at 517-18. As in *Birckhead*, FERC’s assessment of upstream impacts here was limited by the inquiry’s inferential nature since the full production of LNG at HFF was being transported away from the AFP at that time and FERC was uncertain about the supply source. (R. at 6, 15).

**2. FERC provided a satisfactory explanation for its decision to refrain from imposing GHG conditions for the mitigation of upstream and downstream impacts.**

In determining whether there was reasoned decision making, courts ask whether the agency “articulate[d] a satisfactory explanation for its action[.]” *Birckhead* at 515 (quoting *State Farm* at 43). This means that an agency must avoid “[s]imple, conclusory statements[.]” *Del. Riverkeeper Network*, 753 F.3d at 1313 (quoting *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985)). FERC offered a satisfactory explanation for declining to impose upstream or downstream conditions. The EIS data for downstream GHG consequences yielded a tenuous estimate. R. at 15. The upstream GHG consequences were difficult to quantify and did not present a reasonably foreseeable significant impact, making them less relevant under the case-by-case assessment of upstream emissions. R. at 15. For both upstream and downstream,

FERC prudently refrained from deciding the significance until a requisite consensus on methodology for determining significance should be reached. R. at 16.

***i. FERC fulfilled the requirement for a mitigation discussion by ensuring that significant consequences have been fairly evaluated.***

As illustrated in *Birckhead*, if GHG impacts need not be considered in every case, then mitigation conditions are not required in every case. Mitigation measures “avoid, minimize, or compensate for effects[:]” however, neither their “form [n]or adoption” is required. 40 C.F.R. § 1508.1(s) (2022). Instead, the focus is to *consider* “the extent to which adverse effects can be avoided.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989) (citing D. Mandelker, *NEPA Law and Litigation* § 10:38 (1984)). The EIS, which is mandated in response to actions “likely to significantly impact the environment,” *Sierra Club v. FERC*, 38 F.4th 220, 226 (D.C. Cir. 2022) (citing 40 C.F.R. § 1502.14 (2020)), should simply “discuss mitigation ‘in sufficient detail to ensure that [those significant] environmental consequences have been fairly evaluated.’” *Sierra Club*, 38 F.4th at 233 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989)). Non-reasoned decision-making occurs where significant impacts are disregarded. See *Nat’l Fuel Gas Supply Corp. Transcon. Gas Pipe Line Co., LLC*, 172 FERC ¶ 61039, 61159 (2020). Under current policy, “the Commission *may* condition its authorization on . . . mitigating those impacts.” *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61108, 61719 (2022) (emphasis added).

In a project impacting over 13,000 acres, the D.C. Circuit looked beyond the primary mitigation plan to an ongoing set of measures, some of which were still in formation, and found “NEPA’s mandate [fulfilled].” *Theodore Roosevelt Conservation P’ship v. Salazar*, 616 F.3d 497, 515-20 (D.C. Cir. 2010). On the other hand, the Circuit found “failure to engage with . . . evidence [of self-dealing]” as unreasonable. *Env’t Def. Fund v. FERC*, 2 F.4th 953, 975 (D.C.

Cir. 2021). In a case applying NEPA principles, an insufficient discussion had “no plan of actual mitigation[,]” instead using cash as mitigation. *Branhaven Plaza, L.L.C. v. Inland Wetlands Comm'n of Town of Branford*, 740 A.2d 847, 855 (Conn. 1999). Insufficient mitigation lies in actions that are patent abuses of discretion, while sufficient mitigation need not be set in stone.

*a. FERC’s explanation of its discretionary choice to not impose downstream conditions was reasonable and should receive due deference.*

In light of the case-by-case assessment of reasonably foreseeable indirect effects, and courts’ permissive interpretation of mitigation discussions, FERC’s discussion should be given deference here. FERC must seek out the information relevant to determining whether the project is a reasonably foreseeable indirect effect of a downstream emission. *Birckhead*, 925 F.3d at 520. Further, FERC is not absolutely obligated to consider the export of gas in this analysis, due to Department of Energy jurisdiction over licensure of exports. *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016) (citing *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004)).

FERC satisfactorily explained its assessment of the AFP project. The downstream emissions were quantified, but also qualified as tenuous estimates that may displace other emissions. (R. at 15). Further, some of this gas will be exported, further attenuating FERC obligations. (R. at 8). FERC’s determination prudently discussed the relevant issues, including general direction and the potential displacement of other energy uses. (R. at 15). Primarily, it qualified the indirect downstream effects “sufficiently likely to occur[,]” and clarifying their risk in a manner “such that a person of ordinary prudence would take it into account in reaching a decision.” 40 C.F.R. § 1508.1(aa) (2022). In doing so, FERC sufficiently explained its decision and ‘fulfilled NEPA’s mandate’ of informed decision making. *Salazar*, 616 F.3d at 517.

*b. FERC’s explanation of its discretionary choice to not impose upstream conditions was reasonable and should receive due deference.*

The requirement of GHG conditions for mitigation of upstream consequences here is tenuous. FERC's practices and policies consistently reflect this "case-by-case" approach to assessing upstream impacts. *Double E Pipeline, L.L.C.*, 173 FERC ¶ 61074, 61545-46 (2020). The AFP does not raise indicia of upstream demand increases, much like in *Birckhead*, where the level of speculation indicated attenuated impact. *Birckhead*, 925 F.3d at 517-18. There will not be new production at the HFF, and demand east of the HFF has been decreasing. (R. at 6). Because the HFF serves another pipeline, the exact impact and direction of the LNG is not absolutely certain. (R. at 6, 15). FERC made this conclusion and sufficiently explained that since upstream conditions are difficult to quantify, FERC cannot determine whether they would yield a reasonably foreseeable significant consequence.

### **CONCLUSION**

For the foregoing reasons, this Court should deny HOME and TGP's Petitions for Review of the CPCN Order and Rehearing Order and rule in favor of FERC's decision making and authority.