

**THIRTY-SIXTH ANNUAL JEFFREY G. MILLER NATIONAL ENVIRONMENTAL
LAW MOOT COURT COMPETITION**

2024 Competition Problem

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

**DELILAH DOLMAN
CHIEF JUDGE**

**JAMES OLDFELD
CLERK OF COURT**

Date: June 1, 2023

Docket #: 23-01109

Short Title: *The Holy Order of Mother Earth v. Federal
Energy Regulatory Commission*

Agency #: TG21-616-000

Agency: Federal Energy
Regulatory Commission

DOCKETING NOTICE

Petition for review filed by Holy Order of Mother Earth in the above referenced case and was docketed as 23-01109. Petition for review filed by Transnational Gas Pipelines, LLC in the above referenced case and was docketed as 23-01110, and was consolidated with Docket 23-01109. The parties are instructed to brief and argue the issues together under Docket 23-01109. This number must appear on all documents related to this case that are filed in this Court.

ORDER

On April 1, 2023, the Federal Energy Regulatory Commission (“FERC”) issued an Order granting a Certificate of Public Convenience and Necessity (the “CPCN”) to Transnational Gas Pipelines, LLC (“TGP”) for construction of the American Freedom Pipeline (“AFP”), which included certain conditions on the approval. On April 20, 2023, a religious organization owning land along the proposed route of the pipeline, the Holy Order of Mother Earth (“HOME”), sought rehearing from FERC on certain issues in the CPCN. On April 22, 2023, TGP also sought rehearing from FERC on certain conditions imposed in the CPCN. On May 19, 2023, FERC issued an Order denying the petitions for rehearing and affirming the CPCN as originally issued (the “Rehearing Order”). On June 1, 2023, both HOME and TGP filed Petitions for Review of the CPCN Order and Rehearing Order (the “FERC Orders”) with this Court.

HOME petitions for review of the FERC Orders insofar as: (1) FERC’s determination that TGP has demonstrated a public need for the AFP despite the fact that approximately 90% of the gas carried by the pipeline will undisputedly be exported to Brazil; (2) FERC’s determination that routing the pipeline across HOME land, despite HOME’s religious objections, does not violate the Religious Freedom Restoration Act (“RFRA”); (3) FERC’s determination does not require mitigation of upstream and downstream greenhouse gas impacts of the AFP.

TGP petitions for review of the FERC Orders insofar as: (1) the conditions in the CPCN Order addressing mitigation of greenhouse gas impacts (the “GHG Conditions”) are beyond FERC’s authority under the Natural Gas Act (“NGA”).

Therefore, it is hereby ordered that the parties brief the following issues:

- 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. *HOME argues it was not supported by substantial evidence and was arbitrary and capricious; FERC and TGP argue it was supported by substantial evidence and was not arbitrary and capricious.*
- 2) Was FERC’s finding that the benefits from the AFP outweighed the environmental and social harms arbitrary and capricious? *HOME argues it was; FERC and TGP argue it was not.*
- 3) Was FERC’s decision to route the AFP over HOME property despite HOME’s religious objections in violation of RFRA? *HOME argues it was; FERC and TGP argue it was not.*

- 4) Were the GHG Conditions imposed by FERC beyond FERC's authority under the NGA?
FERC and HOME argue they were not; TGP argues they were.
- 5) Was FERC's decision not to impose any GHG Conditions addressing downstream and upstream GHG impacts arbitrary and capricious?
HOME argues it was; FERC and TGP argue it was not.

SO ORDERED.

Entered 15th day of June 2023 [*NOTE: No cases or proceedings decided or documents dated after June 15, 2023 may be cited in the briefs or in oral argument. In addition, all relevant facts are included in the Rehearing Order; assume no relevant additional or different facts or conclusions exist in the CPCN Order or the Environmental Impact Statement.*]

199 FERC ¶ 72,201
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jane D. Clark, Chairwoman;
Scott P. Williams, Timothy S. Child,
and Wendy L. Bankman.

Transnational Gas Pipelines, LLC

Docket No. TG21-616-000

ORDER DENYING REHEARING

(Issued June 1, 2023)

1. On June 13, 2022, Transnational Gas Pipelines, LLC (TGP) filed an application in Docket No. TG21-616-000, pursuant to section 7(c) of the Natural Gas Act¹ (NGA) and Part 157 of the Commission's regulations,² for authorization to construct and operate an approximately 99-mile-long, 30-inch diameter interstate pipeline (the American Freedom Pipeline or AFP) and related facilities 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 (the TGP Project). The proposed pipeline is designed to provide up to 500,000 dekatherms (Dth) per day of firm transportation service.
2. On April 1, 2023, the Commission issued an order in Docket No. TG21-616-000 authorizing the TGP Project, under section 7 of the NGA, to construct and operate the American Freedom Pipeline, subject to the conditions in the Order (the CPCN Order).
3. In the CPCN Order, we found that the benefits the TGP Project will provide to the market outweigh any adverse effects on existing shippers, other pipelines and their captive customers, and on landowners and surrounding communities. Further, based on the Environmental Impact Statement (EIS), we concluded that, if constructed and operated in accordance with applicable laws and regulations, the project will result in some adverse environmental impacts, but that these impacts will be reduced to less-than-significant levels with the implementation of staff's recommendations (adopted as conditions in the CPCN Order). Therefore, we granted the requested authorizations, subject to the conditions in the CPCN Order.
4. One of the commenters, Holy Order of Mother Earth (HOME), and TGP each filed a timely request for rehearing of different aspects of the CPCN Order.
5. HOME sought rehearing on three aspects of the CPCN Order. First, HOME contends that the project need finding in the CPCN Order was unjustified and unsupported,

¹ 15 U.S.C. § 717f(c).

² 18 C.F.R. § 157 (2023).

arguing that, because 90% of the gas transported by the pipeline will be exported, there is insufficient “public necessity” within the United States to approve the pipeline or to exercise eminent domain over the pipeline’s planned route. Second, HOME takes issue with our approval of the AFP in the CPCN Order, arguing that, even if there were a public necessity, the negative impacts of the AFP outweigh the benefits, and the decision to route the AFP over HOME’s property violated the Religious Freedom and Restoration Act (RFRA). Third, HOME argues that our failure to require mitigation measures for upstream and downstream greenhouse gas (GHG) impacts was arbitrary.

6. TGP sought rehearing on certain conditions imposed in the CPCN Order, which required TGP to take mitigation measures designed to mitigate GHG impacts in construction of the AFP (the GHG Conditions). TGP argues that the GHG Conditions addressed “major questions” beyond our ability to regulate under the NGA.
7. For the reasons discussed below, we will deny the requests for rehearing.

I. Background

8. TGP is a limited liability company organized and existing under the laws of the State of New Union. Upon the commencement of operations proposed in its application, TGP will become a natural gas company within the meaning of section 2(6) of the NGA³ and, as such, will be subject to the jurisdiction of the Commission. TGP states that it will be the operator of the new proposed pipeline.
9. HOME is a not-for-profit religious organization, organized under the laws of the State of New Union. The headquarters is situated toward the western end of a 15,500-acre property in Burden County, New Union, that HOME directly owns. The proposed AFP route crosses over the HOME property east of the headquarters. The HOME property lies just north of the proposed end point of the AFP. See Exhibit A (Map of proposed AFP route and interconnections).

II. TGP Project

10. The TGP Project will involve the construction of the following facilities:

- Approximately 99 miles of 30-inch-diameter pipeline 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;
- A receipt meter station located in Jordan County, Old Union (Main Road M&R Station);
- A receipt tap located in Jordan County, Old Union;
- A meter, regulation, and delivery station located at Burden County, New Union (Broadway Road M&R Station);

³ 15 U.S.C. § 717a(6).

- Mainline valve assemblies at 8 locations along the TGP Pipeline;
- Pig launcher/receiver facilities and pig trap valves at the Main Road M&R Station and the Broadway Road M&R Station; and
- Cathodic protection and other related appurtenant facilities.

TGP estimates that the proposed project will cost approximately \$599 million.

11. TGP states that it held an open season for service on the TGP Project from February 21 through March 12, 2020. As a result of the open season, TGP executed binding precedent agreements with: (1) International Oil & Gas Corporation (International) for 450,000 dekatherms (Dth) per day of firm transportation service and (2) New Union Gas and Energy Services Company (NUG) for 50,000 Dth per day of firm transportation service, which together equal to the full design capacity of the TGP Project.
12. The natural gas to be transported by the AFP is produced in the Hayes Fracking Field (HFF) in Old Union. The gas is liquified into liquified natural gas (LNG) at HFF then transported by pipeline. TGP concedes that the full production of natural gas at HFF is currently transported by the Southway Pipeline to states to the east of Old Union. Accordingly, we recognize that the precedent agreements do not contemplate additional production at Hayes, but rather would reroute approximately 35% of the production at HFF through the AFP rather than the Southway Pipeline.
13. TGP has presented evidence that the LNG demands in regions east of Old Union have been steadily declining due to a population shift, efficiency improvements, and increasing electrification of heating in those states, such that the market needs are better served by routing the LNG through the AFP. Due to these declining demands, TGP asserts that the reduction in transport on the Southway Pipeline would not lead to gas shortages. While HOME takes issue with the project need in other regards (discussed below), no commenter disputed these assertions as a general matter.
14. International operates an M&R Station on the shore of Lake Williams in New Union City (the New Union City M&R Station). The LNG purchased by International will be diverted at the Burden Road M&R Station to the existing NorthWay Pipeline, which is not currently at full capacity. The NorthWay Pipeline will carry the LNG into the New Union City M&R Station, which is located at the Port of New Union on Lake Williams. Lake Williams connects via the White Industrial Canal to the Atlantic Ocean, and the LNG is to be loaded onto LNG tankers at the Port of New Union for export to Brazil by International.

III. Discussion

15. HOME seeks rehearing on three aspects of the CPCN Order: (1) the “project need” finding, (2) the approval of the AFP route over HOME property, and (3) our decision not to require mitigation for upstream and downstream GHG impacts. We deny rehearing as to all these issues.
16. Section 7(e) instructs us to grant a certificate to construct a new pipeline where the pipeline “is or will be required by the present or future public convenience and

necessity.”⁴ This language “requires the Commission to evaluate all factors bearing on the public interest.”⁵

17. Our review of applications is guided by the Certificate Policy Statement. The Certificate Policy Statement provides guidance for evaluating proposals to certify new construction.⁶ The Certificate Policy Statement establishes criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest.
18. The Certificate Policy Statement explains that, in deciding whether to authorize the construction of major new facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission’s goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant’s responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.
19. Under this policy, the threshold requirement for new projects is that the pipeline company must be prepared to financially support the project without relying on subsidization from its existing customers. This issue is not in dispute on rehearing.
20. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant’s existing customers, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to complete the environmental analysis where other interests are considered.
21. In the instant matter, no party disputes that TGP can financially support the project without subsidization from its existing customers or that there are no adverse impacts on TGP’s existing customers, existing pipelines in the market and their captive customers. The only issues on rehearing are the need for the project, the impacts on landowners and communities affected by the route, and the environmental impacts.
22. HOME contends that our finding of public convenience and necessity is arbitrary and capricious because it is not supported by substantial evidence nor any meaningful comparative analysis of public benefits and adverse effects. Further, HOME argues that the CPCN Order was arbitrary and capricious in determining that the benefits of the AFP

⁴ 15 U.S.C. § 717f(e).

⁵ *Atl. Refin. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959).

⁶ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further certified*, 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. *See Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,197 (2022) (Order on Draft Policy Statements).

outweighed the environmental and social harms, especially in light of the export-driven use of gas transported by pipeline.

A. Project Need

23. HOME first claims that the Commission failed to provide substantial evidence for its conclusion under section 7(e) of the NGA that the proposed projects are required by the public convenience and necessity.
24. Specifically, HOME contends that TGP failed to demonstrate the need for the projects given the fact that approximately 90% of the LNG carried by the AFP will be diverted to the Port of Union City for export by International. HOME has submitted records evidencing that International's parent company is Brazilian and nearly all (if not all) of the LNG International natural gas will be exported to Brazil. TGP has not disputed this fact.
25. Consequently, HOME argues that, at most, the AFP would primarily serve a *Brazilian* "need" for LNG, which does not constitute a "project need" under the NGA and should not constitute substantial evidence for project need.
26. Here, we found a strong showing of public benefit based on the fact that TGP had executed binding precedent agreements for firm service using 100% of the design capacity of the pipeline project. HOME's various claims that these contracts are insufficient to establish market need under the Certificate Policy Statement are without merit. The Certificate Policy Statement explains that precedent agreements will always be important, significant evidence of demand for a project.⁷
27. Moreover, as TGP contended in its application, the AFP serves multiple domestic needs:
 - (1) delivering up to 500,000 Dth per day of natural gas to the interconnection with the NUG terminal and the NorthWay Pipeline;
 - (2) providing natural gas service to areas currently without access to natural gas within New Union; (3) expanding access to sources of natural gas supply in the United States; (4) optimizing the existing systems for the benefit of both current and new customers by creating a more competitive market; (5) fulfilling capacity in the undersubscribed NorthWay Pipeline; and (6) providing opportunities to improve regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels.
28. On rehearing, HOME claims that the contracts do not demonstrate any significant project need, as 90% of the capacity is solely for export, not for meeting domestic needs. HOME argues that, while perhaps minimally relevant, such exports cannot alone sufficiently demonstrate "project need" for the pipeline *in the United States* and should not be given substantial weight, if any weight, by the Commission. HOME bases this contention on the premise that the NGA is a domestic statute and the "project need" must be interpreted as a domestic need, not foreign needs.

⁷ *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015); *Minisink Residents for Env't Pres. and Safety v. FERC*, 762 F.3d 97, 111 n.10 (D.C. Cir. 2014).

29. HOME further argues that the minimal domestic benefits suggested by TGP are insufficient, standing alone, to justify the AFP where the gas otherwise serves virtually no domestic needs. HOME reasons that, at most, the purported domestic advanced by TGP amount to reshuffling of existing assets with only a small portion of the LNG actually “benefiting” any domestic consumers.
30. We disagree. We have previously determined in the context of the Nexus pipeline that precedent agreements for gas that is to be exported are a valid consideration in determining the need for a project. The Court of Appeals has affirmed this consideration, holding that “export precedent agreements are simply one input into the assessment of present and future public convenience and necessity.”⁸
31. HOME argues that the Nexus pipeline at issue in *Oberlin* is distinguishable. Specifically, HOME points out that only 17% of the precedent agreements for the Nexus pipeline were for gas to be exported, that some portion of the exported gas in the Nexus pipeline was expected to be imported back into the United States, and that Nexus increased domestic production, but the AFP does not.
32. We recognize these distinctions, and are particularly cognizant that, here, the natural gas produced in the HFF is already fully transmitted by the existing Southway Pipeline.
33. Nonetheless, while exported gas may not directly benefit domestic needs for gas supply, the precedent agreements are nonetheless sufficient to demonstrate a public necessity here. It cannot be disputed that LNG that is produced in the United States and exported serves the “public interest,” and, indeed, Section 3 of the NGA expressly states as much where the gas is to be exported to a country with which the United States has a free trade agreement.⁹ To be sure, the LNG at issue here is intended to ultimately be exported to Brazil, which does not have a free trade agreement with the United States, but we do not find this distinction to be meaningful. We do not put any significant weight on the end use of the LNG.
34. Moreover, 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. Finally, the gas demands served by the Southway Pipeline are diminishing, so the AFP will transmit gas that may or may not otherwise be purchased in the future.
35. For these reasons, we affirm our finding in the CPCN Order that TGP has demonstrated a public necessity for the AFP.

B. Approval of the AFP and its Route

36. HOME next argues on rehearing that, even if TGP has demonstrated a project need, the adverse impacts of the AFP outweigh that public necessity, especially on the approved route, and we should have denied the CPCN on that basis. HOME first focuses on impacts from construction and operation of the pipeline on HOME’s property, arguing that our

⁸ *City of Oberlin, Ohio v. FERC*, 39 F.4th 719, 727 (D.C. Cir. 2022).

⁹ 15 U.S.C. § 717b(c).

decision in the CPCN Order did not properly weigh the impacts of the route of the AFP and was contrary to the Religious Freedom Restoration Act (RFRA).

37. We deny rehearing on both of these arguments.

1) Balance of benefits vs. harms

38. The AFP will pass through approximately two miles of HOME property, which will require the removal of, *inter alia*, approximately 2,200 trees and many other forms of vegetation from HOME property. For safety reasons, the vast majority of these trees cannot be replaced with new trees along the route (but, as discussed below, an equal number of new trees will be planted in other locations as one of the GHG Conditions).

39. HOME argues that the impacts of this route on HOME and the environment far outweigh the benefits of the pipeline, and the CPCN Order should not have approved the TGP Project. At a minimum, HOME contends, we should have adopted the proposed alternate route that circumvents HOME property by routing through the Misty Top Mountain range.¹⁰ See Exhibit A (Map).

40. In evaluating a project, we must determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, or, relevant here, landowners and communities affected by the route of the new pipeline. HOME contends that significant adverse effects on HOME and the environment remain despite TGP's efforts to minimize them, and the Commission improperly balanced the evidence of public benefits to be achieved against the residual adverse effects.

41. In evaluating the impacts on landowners and communities along the route of the project, TGP participated in the Commission's pre-filing process and has been working to address landowners' concerns and questions. TGP has made changes to over 30% of the proposed pipeline route in order to address concerns from landowners and to negotiate mutually acceptable easement agreements. As it relates to HOME specifically, TGP argues that it has agreed to bury the AFP through the entirety of its passage through HOME property and has agreed to expedite construction "to the extent feasible" across HOME property to minimize disruption. TGP contends that it can complete the two-mile stretch over HOME property within a four-month period.

42. HOME argues on rehearing that TGP has not signed an easement agreement with over 40% of landowners along the route (including HOME) and, in light of the religious impacts described below, the benefits of the project do not outweigh harm to HOME and its religious beliefs. We disagree.

43. While we are mindful that TGP has been unable to reach easement agreements with HOME and many other landowners, for purposes of our consideration under the Certificate Policy Statement, we find that TGP has taken sufficient steps to minimize adverse economic impacts on landowners and surrounding communities. Use of eminent

¹⁰ HOME cites *Adorers of the Blood of Christ United States Province v. Transcontinental Gas Pipe Line Co.*, 53 F.4th 56, 61 (3d Cir. 2022) ("Had the Adorers 'participated in the administrative process, FERC may have denied or modified the conditions of Transco's certificate . . . [and] [u]nder these circumstances, the Adorers would have, at the very least, had the opportunity to seek the [injunctive] relief they so desire.'").

domain is common in construction of pipelines, so the lack of easement agreements is not significant to our consideration.

44. With respect to the HOME property, we do not find that HOME has demonstrated significant impacts. HOME owns 15,500 acres of land immediately north of the Broadway Road M&R Station. Significantly, the Misty Top Mountain range is directly to the east of the Broadway Road M&R Station and the eastern border of HOME's property. In its application, TGP provided an estimate, which HOME does not contest, that re-routing the AFP to avoid HOME property through the Misty Top Mountains (see Exhibit A, "Alternate Route") would add over \$51 million in construction costs. In addition, TGP contends (and HOME does not seem to dispute) that 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.
45. On rehearing, HOME does not contest the impacts of the alternate route. Rather, it first argues that the impacts described below should have resulted in a denial of the CPCN, and only if we reject that position should the alternate route be utilized. HOME asserts that in approving the CPCN, the Commission failed to properly take into consideration the strong religious views of HOME and its members.
46. HOME is a religious order that considers the natural world to be sacred. HOME was organized in 1903 around the principle that nature itself is a deity that should be worshiped and respected. The religion was formed largely in response to the industrial revolution and the harmful effects HOME's founders saw that industrialization and capitalism were causing to the environment.
47. HOME argues that its fundamental core tenet is that humans should do everything in their power to promote natural preservation over all other interests, especially economic interests.
48. HOME further presented sworn testimony about its religious practices. In particular, every summer and winter solstice, members of HOME make a ceremonial journey from a temple at the western border of the property to a sacred hill on the eastern border of the property in the foothills of the Misty Top Mountains, then a journey back along a different path (the Solstice Sojourn). At the hill, all children in the Order that have reached the age of 15 in the prior six months undergo a sacred religious ceremony. HOME has performed the Solstice Sojourn since at least 1935, and the path would cross the proposed pipeline route in both directions.
49. Accordingly, HOME asserts, and we do not contest, that it is anathema to HOME's religious beliefs and practices to allow its land to be used for the transport of LNG given the harmful environmental effects of the fracking process to obtain the LNG, the environmental harm resulting from creating the route for the pipeline, and the detrimental climate effects of burning any fossil fuels, including LNG.
50. HOME argues that the CPCN Order essentially is compelling HOME to support—in a real, physical way—the production, transportation, and burning of fossil fuels. It describes the impacts of this as "invaluable" and outweighing any benefits of the AFP. In this

context, HOME also raises the fact that much of the LNG transported by the AFP will be exported, so the “benefits” of the AFP, in HOME’s view, carry less weight.

51. Neither we nor TGP dispute the sincerity of HOME’s religious beliefs. But these beliefs alone are insufficient to require rerouting of the AFP. TGP’s agreement to expeditiously complete the AFP completely below ground may cause some disruption and lasting harm, but the benefits described above significantly outweigh these harms.
52. We reject HOME’s implication that we ascribe “extra” weight to the environmental harms or uses on HOME’s property, as seen through the religious beliefs of HOME’s members. We cannot treat every landowner in this subjective manner, as it would be unjust and may well show a preference to certain religions.
53. Consequently, we deny rehearing as to the balance of harms versus benefits in the CPCN Order.

2) Contrary to RFRA

54. HOME further argues that, even if it does not tip the “balance” of harms versus benefits, the CPCN nonetheless is contrary to law as it violates RFRA.
55. RFRA applies to government actions that “substantially burden a person's exercise of religion.”¹¹ Under that standard, a substantial burden exists when government action puts “substantial pressure on an adherent to modify his behavior and to violate his beliefs.”¹² TGP asserts, and we agree, that HOME will not be prevented from practicing their religious beliefs.¹³
56. Indeed, we included a condition in the CPCN to address this issue. In comments, HOME brought its religious practices to our attention, and, as noted above, we inserted the condition in the CPCN that TGP bury the pipeline over the entire span where it would cross HOME’s property, including the two intersections with the path of the Solstice Sojourn. With the condition in place, any impacts on HOME are not substantial or significant.
57. HOME asserts that the AFP, though it would be buried, would significantly impact—if not prevent entirely—the Solstice Sojourn. HOME’s members testified that walking over the pipeline (and the clear-cut path above it) on their own land on this sacred journey, though perhaps not physically prevented, would be “unimaginable” and would destroy the meaning of the Solstice Sojourn.
58. Moreover, as noted above, HOME argues that the CPCN Order essentially is compelling HOME to support the production, transportation, and burning of fossil fuels. Its property, which HOME contends is fully devoted to Mother Earth, would now be used to transport LNG.

¹¹ 42 U.S.C. § 2000bb–1(a).

¹² See, e.g., *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069 n.11 (9th Cir. 2008) (citing *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 708 (1981)).

¹³ *Id.* (finding that artificial snow for a commercial ski resort located in a national park on a mountain considered sacred would not “substantially burden” free exercise of religion by tribal members).

59. While HOME correctly points out that the trees along the route of the AFP over its property would be removed and trees could not be replanted along the AFP Route, we find that this “bare spot” along the Solstice Sojourn does not sufficiently impact HOME’s free exercise rights so as to be in violation of RFRA. The AFP will create no physical barrier to HOME’s religious practices, and therefore creates no substantial burden.
60. Nor are we convinced that the mere existence of the underground pipeline itself significantly impairs the practice. The efforts taken by TGP to minimize impacts on HOME and its practices, and the conditions imposed in the CPCN, are sufficient. With the pipeline underground and the construction expedited, there will be no long-term impediments to HOME’s practices. The short-term impact of construction can be minimized by timing the construction to occur entirely between solstices. Accordingly, the impacts on HOME’s religious practices are not substantial.
61. Because we conclude that the impacts on the religious practices of HOME are not substantial, we reject that we must review our CPCN Order under the strict scrutiny standard, as claimed by HOME.¹⁴ As such, the CPCN Order is not violative of RFRA.
62. We further conclude that additional re-routing of the AFP to avoid HOME property entirely is impractical and overly burdensome, in light of the minimal impacts on HOME. We note in this regard that it is undisputed that the Alternate Route would result in even more environmental harm, which would also be a “burden” to HOME’s religious beliefs.
63. TGP argues, alternatively, that even if we were to find the impacts on HOME’s religious practices substantial and apply strict scrutiny, we nonetheless should uphold the CPCN Order as drafted. TGP contends that the Alternate Route is excessively expensive, and, as noted, would cause *more* overall environmental harm than the route approved in the CPCN Order. TGP reasons that, as we noted above, HOME’s environmental concerns on its own property should not be given greater consideration in our analysis of narrowly tailoring the CPCN Order, so the proposed route is still the appropriate route under a strict scrutiny standard, notwithstanding the burdens on HOME.¹⁵ TGP contends that maintaining a coherent natural gas pipeline permitting system, not one that would bend unreasonably to the desired exceptions of any religion, is the least restrictive means of furthering the government interest.¹⁶
64. We need not reach that issue unless subsequent judicial review determines that strict scrutiny is the appropriate standard. Under the appropriate review, as noted above, the CPCN Order is not violative of RFRA.
65. Accordingly, we deny HOME’s request for rehearing on these issues.

¹⁴ *Thiry v. Carlson*, 78 F.3d 1491 (10th Cir. 1996) (finding that plaintiffs’ religious beliefs would not be substantially burdened by the relocation of grave sites).

¹⁵ The least restrictive means inquiry under RFRA involves comparing the cost to the government of altering its activity to continue unimpeded versus the cost to the religious interest imposed by the government activity. *E.g.*, *Ave Maria Found. v. Sebelius*, 991 F. Supp. 2d 957 (E.D. Mich. 2014).

¹⁶ *E.g.*, *United States v. Indianapolis Baptist Temple*, 224 F.3d 627 (7th Cir. 2000) (holding that RFRA was not violated by application of federal employment tax laws to church; maintaining a sound and efficient tax system was a compelling government interest, and uniformly applicable tax system was the least restrictive means of furthering that interest).

C. Environmental Conditions

66. TGP and HOME each seek rehearing on certain conditions imposed in the CPCN Order.

67. TGP challenges the condition that it take certain steps to mitigate the GHG emission impacts of the construction of the AFP (the “GHG Conditions”), including that:

(1) TGP shall plant or cause to be planted an equal number of trees as those removed in the construction of the TGP Project;

(2) TGP shall utilize, wherever practical, electric-powered equipment in the construction of the TGP Project, including, without limitation:

(a) Electric chainsaws and other removal equipment, where available;
and

(b) Electric powered vehicles, where available;

(3) TGP shall purchase only “green” steel pipeline segments produced by net-zero steel manufacturers; and

(4) TGP shall purchase all electricity used in construction from renewable sources where such sources are available.

68. TGP challenges the GHG Conditions, contending that they are beyond our authority. We disagree.

69. On January 9, 2023, the Council on Environmental Quality (CEQ) published interim guidance (the CEQ Climate Guidance) addressing climate change in the context of the National Environmental Policy Act (NEPA).¹⁷ The CEQ Climate Guidance expressly recognizes that the “United States faces a profound climate crisis and there is little time left to avoid a dangerous—potentially catastrophic—climate trajectory.”¹⁸ In the Climate Guidance, CEQ “encourages agencies to mitigate GHG emissions associated with their proposed actions to the greatest extent possible, consistent with national, science-based GHG reduction policies established to avoid the worst impacts of climate change.”¹⁹

70. While we are an independent agency not required to follow CEQ rules and regulations, we generally do so and are in the process of developing GHG rules for our review of pipeline applications. We have not yet published final guidance on mitigating GHG impacts, but the GHG Conditions at issue here are nonetheless based on existing statutory and regulatory requirements.

71. Initially, the NGA instructs us to consider “the public convenience and necessity” when evaluating applications to construct and operate interstate pipelines and 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.”²⁰

¹⁷ National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023).

¹⁸ *Id.* at 1197.

¹⁹ *Id.*

²⁰ 15 U.S.C. § 717f(e).

Based on this, we have long considered GHG impacts in our environmental analyses.²¹ Consistent with this legal framework, we imposed the GHG Conditions in the CPCN Order.

72. The GHG Conditions are the result of extensive analysis in the EIS completed by TGP. TGP included a lengthy evaluation of GHG impacts of the TGP Project in the EIS. This analysis of downstream impacts (the use of the LNG transported by the AFP) showed that if all 500,000 Dth per day were sent to combustion end uses, downstream end-use could result in about 9.7 million metric tons of CO₂e per year. We note that this CO₂e estimate represents an upper bound for CO₂e emissions that could result from the end-use combustion of gas transported by this project. This estimate assumes the maximum capacity of gas is transported 365 days per year, which is rarely the case because projects are designed for shippers' peak day use. In addition, some of the gas may displace other fuels, which could lower total CO₂e emissions. It may also displace gas that otherwise would be transported via different means, resulting in no change in CO₂e emissions. As such, it is unlikely that this total amount of CO₂e emissions would occur, and emissions are likely to be lower than the above estimate.
73. Further, we estimate that the construction of the AFP may result in an average of 88,340 metric tons per year of CO₂e over the four-year duration of construction. This estimate assumes adherence to the GHG Conditions cited above. Absent those GHG Conditions, the construction estimate would be 104,100 metric tons per year of CO₂e, on average.
74. As to upstream emissions (those from production of the gas), we do not find those to be relevant here. As noted in our Draft GHG guidance, in prior section 7 proceedings we have considered upstream emissions on a case-by-case basis. It can often be difficult to quantify upstream emissions due to unknown factors, including the location of the supply source and whether transported gas will come from new or existing production. Here, the HFF gas is already in production, but just being transported, in part, to different destinations. As such, we conclude that there is no reasonably foreseeable significant upstream consequence of our approval of the TGP Project.
75. TGP nor HOME takes issue with the numerical analysis itself. Rather, TGP takes issue with the specific requirements of the GHG Conditions.
76. Specifically, TGP contends that the conditions all address "major questions," and therefore require more precise statutory authorization. Without such authorization, TGP argues it is beyond the authority of FERC to require the GHG Conditions.
77. HOME argues that we erred in failing to require any mitigation measures for the upstream or downstream GHG impacts.
78. We deny rehearing as to both issues.

1) FERC Authority to impose the GHG Conditions

²¹ See, e.g., Environmental Assessment for the Philadelphia Lateral Expansion Project, Docket No. CP11-508-000, at 24 (Jan. 18, 2012) (construction emissions); Environmental Assessment for the Minisink Compressor Project, Docket No. CP11-515000, at 29 (Feb. 29, 2012) (operation emissions).

79. We reject the contention that we lack statutory authority to impose the GHG Conditions. The issue of imposing conditions in a CPCN to mitigate GHG impacts is not a new one. Indeed, the United States Court of Appeals for the District of Columbia has previously suggested similar mitigation measures that may be appropriate.²²
80. As described above, the EIS provided estimates of GHG emissions resulting from the project, including upstream and downstream GHG impacts as well as GHG emissions from the construction of the pipeline itself. TGP did not recommend any mitigation measures associated with GHG impacts in the EIS.
81. We did not impose any conditions addressing the upstream and downstream GHG impacts because we are conducting a generic proceeding to determine whether and how the Commission will conduct significance determinations for GHG emissions going forward. While this proceeding is ongoing, the Commission does not characterize upstream or downstream impacts as significant or insignificant. The guidance originally proposed in February 2022 has been designated only as a “draft,” and until some guidance is finalized we are hesitant to make a determination as to the significance of upstream and downstream GHG impacts.
82. Nevertheless, the GHG impacts resulting from the construction of the AFP are more directly related to our authority under the NGA and the issues relevant to the CPCN, so they can be more readily addressed through mitigation. For that reason, we imposed the GHG Conditions in the CPCN solely focused on mitigating construction impacts.
83. TGP argues that the GHG Conditions nonetheless address “major questions” and no clear statutory authority for their imposition exists. TGP concedes that we have long had discretion to impose conditions to mitigate “traditional” environmental harms such as felling of trees; rather, it takes issue with the additional measures in the GHG Conditions that are specific to mitigating GHG impacts.
84. In support, TGP asserts that this CPCN Order evidences an unstated change in agency practice overall. On rehearing, TGP points out that, since the CPCN Order issued here, we have imposed GHG Conditions in four of five subsequent section 7 CPCN orders in other matters. TGP accordingly argues that, after this CPCN Order, no project sponsor will believe that mitigation is optional, and that submitting an application or EIS without a mitigation proposal would be anything other than a waste of time and money.
85. TGP argues that, under the Supreme Court’s clarified major-questions doctrine (MQD), the GHG Conditions require interpretation of the NGA to venture beyond plain meaning.²³ The MQD may apply “in ‘extraordinary cases’ when the ‘history and breadth’ and ‘economic and political significance’ of the action at issue gives us ‘reason to hesitate before concluding that Congress’ meant to confer such authority to act on the agency.’”²⁴

²² *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (“As we have noted, greenhouse-gas emissions are an indirect effect of authorizing this project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate.”). *See also Twp. of Bordentown v. FERC*, 903 F.3d 234, 261 n.15 (3d Cir. 2018) (noting the Commission’s authority to enforce any required remediation is supported by the NGA).

²³ *W. Virginia v. EPA*, 142 S. Ct. 2587 (2022).

²⁴ *N. Carolina Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291, 296 (4th Cir. 2023) (citations omitted).

86. We conclude that the GHG Conditions, which are specific and individual measures focused on one proposed project, cannot be seen as addressing a “major question.” As is plain from the Supreme Court’s lengthy analysis, the MQD addresses larger scale measures taken by agencies through regulation; measures that address nationwide issues that require specific authorization from Congress.²⁵
87. Section 7 of the NGA unambiguously empowers the Commission to set specific terms and conditions when granting authorization.²⁶ Congress awarded, and courts have supported, our discretion in determining the types of mitigation to require.²⁷ This latitude is partly due to the recognition that FERC has specialized expertise in the natural gas sector and is best positioned to assess what measures are necessary to protect the public interest. Indeed, this is not the first time that we have included conditions designed to mitigate or prevent environmental harm.²⁸
88. While the issue of how to address climate change as a whole is undoubtedly a major question, the climate implications of the construction of pipelines is not. It is essential to differentiate between addressing the global issue of climate change and the narrower scope of ensuring that pipeline projects mitigate their GHG emission impacts. As we have noted, the conditions imposed are specific to the GHG emission impacts of the construction of the AFP, distinct from upstream and downstream GHG emissions, which we agree with TGP pose a broader, more significant, question.
89. Unlike the EPA with the Clean Power Plan, we do not seek to broadly mandate industry-wide mitigation, therefore our action is not of significant economic and political consequence.²⁹ The conditions imposed here are project-specific, targeting the GHG emissions of the construction of the AFP. They do not address or regulate broader GHG emission concerns across the entire natural gas sector or beyond. By focusing on a specific project, the economic and political ripple effects are minimized. The conditions are grounded in our mandate to protect the public interest and are based on factual and scientific considerations about GHG emissions and their environmental impact.
90. As we previously mentioned, FERC has a long-standing history of imposing conditions to mitigate environmental harms in its authorizations. The conditions pertaining to GHG

²⁵ *E.g.*, *W. Virginia*, 142 S. Ct. at 2595 (“This is a major questions case. EPA claimed to discover an unheralded power representing a transformative expansion of its regulatory authority in the vague language of a long-extant, but rarely used, statute designed as a gap filler. That discovery allowed it to adopt a regulatory program that Congress had conspicuously declined to enact itself.”).

²⁶ 15 U.S.C. § 717f(e) (“The 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.”); *see also id.* § 717b(a) (stating that the Commission may “grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate”).

²⁷ *See Twp. of Bordentown*, 903 F.3d at 261 n.15 (concluding that the Commission’s authority to enforce any required remediation is amply supported by provisions of the NGA); *see Sierra Club*, 867 F.3d at 1374 (holding that the Commission has legal authority to mitigate reasonably foreseeable indirect effects).

²⁸ *See, e.g., Atl. Coast Pipeline, LLC*, 161 FERC ¶ 61,042, at app. A (2017), *on reh’g*, 164 FERC ¶ 61,100 (2018) (noting that we ensured unnecessary environmental impacts by including a certificate condition providing that authorization for the commencement of construction would not be granted until Atlantic successfully executed contracts for volumes and service terms equivalent to those in their precedent agreements).

²⁹ *W. Virginia*, 142 S. Ct. at 2604 (applying the major-questions doctrine when an agency plan would have worked an “aggressive transformation in the domestic energy industry”).

emissions would be an extension of this tradition to address modern environmental concerns, not an example of “new-found powers in old statutes.”³⁰ It is not an “expansive construction”³¹ of the NGA grant that would reflect an “[e]xtraordinary grant[] of regulatory authority,”³² but rather a continuation of existing practice. As such, the GHG Conditions are not addressing a major question, and nothing more than a general grant of authority over environmental mitigation, which the NGA undoubtedly provides, is required.

91. Alternatively, even if we were to treat the GHG Conditions as addressing a major question, as TGP contends, we find that we have sufficient authority under the NGA. As noted above, Section 7 of the NGA empowers the Commission to set specific terms and conditions when granting authorization, and that includes environmental mitigation measures.³³ Unlike the Clean Power Plan at issue in *West Virginia*, the GHG Conditions are precisely directed at the core of our authority—the construction of LNG pipelines. Crafting these types of environmental mitigation measures is well within the scope of our powers under the NGA;³⁴ and even if we were to look for specific authorization in the statute, we have it.

92. Accordingly, we deny TGP’s request for rehearing regarding the scope of our authority to require the GHG Conditions.

2) *Our decision to not impose mitigation measures for upstream and downstream GHG impacts*

93. HOME next argues on rehearing that, in light of our determination that mitigation measures were appropriate for construction GHG impacts, it was arbitrary for us to fail to also mitigate upstream and downstream GHG impacts.

94. TGP argues that, even assuming we are correct that construction mitigation measures do not address a major question, there can be no doubt that mitigation measures designed to address downstream and upstream GHG impacts would be outside our authority, and we were correct not to include them.

95. We reject HOME’s argument, though not on the basis that TGP suggests.

96. As noted above, we are in the process of developing guidance for addressing GHG impacts, including upstream and downstream impacts.³⁵ Although commenters and some members of this committee have contended that such measures would be addressing major questions, we do not agree. We believe that these issues are properly addressed by guidance, and that we have the authority to do so.

³⁰ See *W. Virginia*, 142 S. Ct. at 2610.

³¹ *Id.* at 2608 (citations omitted).

³² *Id.* at 2609.

³³ 15 U.S.C. § 717f(e) (“The 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.”); see also *id.* § 717b(a) (stating that the Commission may “grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate”).

³⁴ See *supra* note 22.

³⁵ *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,197 (2022).

97. Nevertheless, we do not agree with HOME that we are *required* to do so. Determining mitigation measures is well within our discretionary authority. Absent clear guidance on addressing the significant upstream and downstream GHG impacts, we decline to exercise that discretion here. NEPA requires that we take a “hard look” at potential impacts, and we have done so through the EIS. NEPA does not mandate any specific outcome or mitigation measures,³⁶ and we have concluded that the upstream and downstream impacts—at least absent clear guidance—cannot be considered “significant” under NEPA.
98. HOME argues that our discretion cannot be exercised in an arbitrary manner. HOME contends that, once we conclude that the construction impacts are “significant” and require mitigation, there is no rational reason to then exclude upstream and downstream GHG impacts.
99. We disagree. The construction impacts are a more direct result of the TGP Project, and thus require mitigation. As noted above, we have elected not to impose conditions addressing the upstream and downstream GHG impacts until we have drafted guidance to create a consistent policy. In the interim, we do not characterize upstream or downstream impacts as significant or insignificant. Absent such a finding of significance, no mitigation is warranted.
100. Moreover, whether the TGP Project will cause any significant *increase* in emissions upstream or downstream is not clear to us. Given the weak connection between the TGP Project and any increased upstream or downstream GHG impacts, we see no need for mitigation.
101. As such, we reject that we have an obligation to mitigate upstream or downstream GHG impacts, or that our decision not to do so is arbitrary.
102. For these reasons, we deny HOME’s petition for rehearing on this issue.

2) The Commission orders:

The requests for rehearing are denied, as discussed in the body of this order.

(S E A L)

³⁶ *Sierra Club*, 867 F.3d at 1376.

Exhibit A

