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Sent via Electronic Mail

Dear Ms. Dorka and Ms. Goodwill:

We write to follow up on our complaint and previous correspondence to make clear that for the New York State Department of Environmental Conservation (DEC) to comply with Title VI, as well as state law, it must rescind the negative declaration **and** undertake a full environmental assessment of the North Brooklyn Pipeline (pipeline) with National Grid's Liquified Natural Gas (LNG) facility in Greenpoint before it makes any decision about whether to issue an air permit to National Grid.

As we outline below, it is unequivocally clear that DEC violated state law by failing to evaluate the pipeline with the LNG expansion before issuing its negative declaration. National Grid has made clear that the pipeline is inextricably linked to the LNG facility upgrade because of the massive increase in gas the pipeline will transport to and from the facility. It is a fundamental principle of SEQRA that interconnected projects must be reviewed together, and by failing to do so DEC has not just violated SEQRA, but Title VI by disregarding the rights and disproportionately impacting the health and safety of the Black and Latinx residents that live along the pipeline route.

Further, as outlined below, DEC violated CP-29 and the Climate Leadership Community Protection Act (CLCPA) by failing to consider the environmental impact on communities of color surrounding the unified project. Under these state laws and Title VI, DEC must conduct a full environmental analysis of the pipeline with the LNG facility and cannot simply ignore the significant adverse environmental impacts of this project, particularly on environmental justice communities. To comply with Title VI, as well as SEQRA and CP-29, DEC must immediately rescind its negative declaration based on a short, summary assessment form and use a Full Environmental Assessment Form to determine whether the Greenpoint LNG expansion and pipeline together may have a significant environmental impact. Further, if DEC applies the CLCPA in a non-discriminatory manner as required under Title VI, in evaluating the long-term environmental impact of the project, particularly on disadvantaged communities, DEC must immediately both deny the permit and shut down the pipeline to comply with Title VI.

1. Background: National Grid's MRI Project and DEC Review

As described in the complaint, National Grid's Metropolitan Gas Reliability Project is a single infrastructure project that includes the North Brooklyn Pipeline, expansion of LNG processing capacity at the Greenpoint facility through the addition of two new LNG vaporizers, and a proposed LNG trucking operation. The North Brooklyn Pipeline is a 7 mile, 30-inch gas transmission pipeline built in secret under the predominantly Black and Latinx neighborhoods of Brownsville, Ocean Hill, Bedford Stuyvesant, Bushwick, and East

Williamsburg, "ending at the National Grid depot facility in Maspeth, Queens near Newtown Creek," or the Greenpoint Energy Center.[1] National Grid intended the North Brooklyn Pipeline to bring millions of gallons of fracked gas each day to the Greenpoint facility. The North Brooklyn Pipeline was designed to augment or replace a smaller pipeline currently attached to the Greenpoint facility.[2] **Increasing potential gas flow by more than 1.8 million cubic feet per hour, the North Brooklyn Pipeline would allow National Grid to deliver gas to more than 18,979 new customers –making the LNG upgrade a necessity in order to process the additional gas and sell it to customers.[3]** Thus, the North Brooklyn Pipeline is integrally linked to the expansion of LNG vaporizers in Greenpoint.

National Grid sought recovery for multiple phases of the MRI Project (including the pipeline, LNG vaporizers, and trucking operations) in the same rate case.[4] As National Grid explained in rate case filings, Greenpoint LNG and CNG expansion is limited by the existing takeaway capability of the 16-inch steel Greenpoint spur and Brooklyn Backbone.[5]

On May 21, 2020, National Grid applied to the New York State Department of Environmental Conservation for an Air Facility Permit to add two new LNG vaporizers to the Greenpoint facility—an expansion needed to process the significantly increased gas that the new pipeline would bring. On November 20, 2020, and again on March 2, 2021, the DEC issued a "negative declaration" finding no significant environmental impact to warrant further review.[6] In assessing the project in March, DEC limited its consideration to the two LNG vaporizers and failed to review the project's interconnected proposed pipeline or trucking station. DEC also found without explanation that its Commissioner Policy 29 ("CP-29"), which requires a more complete environmental analysis when a project impacts an environmental justice community, did not apply.

2. DEC Violated the State Environmental Quality Review Act ("SEQRA"), CP-29, and Title VI by Failing to Assess the Environmental Impact of the North Brooklyn Pipeline When It Reviewed National Grid's Application for an Air Facility Permit

A. SEQRA requires a full Environmental Impact Statement whenever an action *may* have a significant effect on the environment.

New York's SEQRA ensures that "a suitable balance of social, economic and environmental factors be incorporated into the planning and decision-making processes of state, regional and local agencies."[7] SEQRA

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[1]NYSDPS, Matter Master: 19-01092/19-G-0309, Dkt. No 238. Public Service Commission Order Approving Joint Proposal, as Modified, and Imposing Additional Requirements, at 43 n 76 (Aug. 12, 2021).

[2] *See, e.g.*, NYSDPS, Matter Master: 19-01092/19-G-0309, Dkt. No 131, Exhibit 735, National Grid Response to Request No. DPS-1091 (April 17, 2020), http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=19-G-0309&submit=Search. ("Once MRI is in service, the new flow path will allow gas to flow south from Greenpoint into the heart of KEDNY's system without reducing the flow from Con Edison, thereby enhancing the effectiveness of the additional LNG vaporization output or CNG injections in supporting KEDNY customer additions.").

[3] *Id*. at 12,

[4] 2020 NY PSC Op No. 19-G-0309 and 19-G-0310, http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo =19-G-0309 .

[5] *Id.*; *see also* National Grid, *Natural Gas Long-Term Capacity Supplemental Report for Brooklyn, Queens, Staten Island and Long Island*, at 48 (May 2020), https://www.nationalgridus.com/media/pdfs/other/ltng-supplementalreport.pdf

[6] *Sane Energy Project et al v. New York State Dept. of Environmental Conservation et al*, Case No. 706273/2021, Dkt. No. 3 Article 78 Petition, Exhibit A at 6 (March 18, 2021), https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=fDqEaI3p9/G6h41izJZlRA== [hereinafter Negative Declaration].

[7] ECL § 1-0101 (Consol. 2021); Environmental Quality Review Act (SEQRA) N.Y. COMP. CODES R. & REGS. tit. 6, § 617.1(d) (hereinafter 6 NYCCR); see also *Matter of Coca-Cola Bottling Co. v. Board of Estimate*, 72 N.Y.2d 674, 679 ((1988)).

therefore requires any action funded or approved by a state agency to be initially assessed for potential environmental impact and then mandates the preparation of an Environmental Impact Statement (EIS) for any action that may have a significant effect on the environment.[8] Under SEQRA, "environment" extends beyond an area's natural resources or physical environment and incorporates an area's socioeconomics, neighborhood character, open space, and public health.[9] Agencies may not undertake or approve any action until they have complied with the provisions of SEQRA. 6 NYCCR § 617.3.

When an agency reviews an action under SEQRA, the first step is to assess whether the action *may* have a "significant effect" on the environment.[10] This initial inquiry requires the project sponsor and DEC to complete either a short or long Environmental Assessment Form (EAF), which provides project data, purpose, and potential impacts on the environment to guide the evaluation and prevent the agency from erroneously determining that there is no environmental impact.[11] When determining environmental significance through the review of an EAF, the agency must consider the "short- and long-term and primary and secondary effects of a proposed action,"[12] including the creation of hazards to human health, adverse changes in air quality or ground water, impairment of historical resources, as well as the geographic scope and number of people affected. [13]

After review of the EAF, the agency makes either a negative or positive declaration as to whether there is potential for at least one significant adverse environmental impact that requires a full Environmental Impact Statement. An EIS is an intensive review that "systematically consider[s] significant adverse environmental impacts, alternatives and mitigation," and weighs social and environmental factors.[14] The threshold requiring an EIS is relatively low; any indicator that the action may have significant impact on the environment triggers an EIS.[15] The agency must issue a positive declaration, mandating an EIS, when the agency determines that the action may include the potential for at least one significant environmental effect.[16] The agency may only issue a negative declaration, meaning no EIS is required, if it identifies no environmental effects at all, or if the identified environmental effects will not be significant.[17]

The purpose of an EIS is to ensure that agency decision makers, with the support of public comment and expertise, will "identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices."[18] In completing an EIS, the agency must "identif[y] the relevant areas of environmental concern, t[ake] a 'hard look'

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[8] Environmental Quality Review Act (SEQRA). 6 NYCRR Part 617; ECL § 8-0109.
[9] ECL §8-0105(6); 6 NYCRR 617.2(b)(1); CEQR Tech. Manual, Ch. I(B), §222; see also *Chinese Staff & Workers Assn. v. City of New York*, 68 N.Y.2d 359, 365-66 (1986).
[10] *Westbury v. Dep't of Transp.*, 75 N.Y.2d 62, 68 (1989).
[11] 6 NYCRR §§ 617.6; 617.2 (m). All actions require an EAF unless the action is expressly defined as a "Type II" action, which are actions that have been categorically found to have no environmental impact and are exempt from environmental review under SEQRA. 6 NYCRR §§ 617.3(a); 617.5 Type II Actions. Because National's Grid's Air Facility Permit is not a Type II action, SEQRA applies.
[12] *Chinese Staff & Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 361-62 (N.Y. 1986). 6 NYCRR § 617.7
[13] 6 NYCRR § 617.7
[14] 6 NYCRR § 617.2.
[15] *Chinese Staff & Workers Assn. v. City of New York*, 68 N.Y.2d 359, 365 (1986) (see also, *Oak Beach Inn Corp. v Harris*, 108 A.D.2d 796, 797; *H.O.M.E.S. v New York State Urban Dev. Corp.*, 69 A.D.2d 222, 232). The term "environment" is broadly defined to include "the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character," ECL 8-0105(6); *Id.*
[16] 6 NYCRR 617.6 (g) (1) (i).
[17] 6 NYCRR 617.2 (y).
[18] *Westbury v. Dep't of Transp.*, 75 N.Y.2d 62, 68 (1989) (quoting *Jackson v NY State Urban Dev. Corp.* , 67 N.Y.2d 400, 414-415 (1986)).

at them and ma[ke] a 'reasoned elaboration' of the basis for its determination."[19]

The State mandates literal compliance with SEQRA procedural requirements; substantial compliance is insufficient.[20] When SEQRA procedures are violated, the proper remedy is to find any negative declaration null and void to further SEQRA's "objectives and enforcement of [its] provisions" in accordance with the legislative direction to administer SEQRA to "the fullest extent possible."[21]

B. SEQRA Requires Review of "Whole Actions," Not Segmented Parts.

SEQRA expressly prohibits segmenting connected actions into discrete parts and requires review of "whole actions."[22] Article 617.3(g)(1) of SEQRA provides that "considering only a part or segment of an action is contrary to the intent of SEQR[A]," and "[r]elated actions should be identified and discussed to the fullest extent possible."[23] The agency must consider the "entire set of activities or steps,"[24] and, even where actions subject to SEQRA review may occur in stages, they must be considered and reviewed as part of the "whole action."[25] The agency must also consider the cumulative effects of related actions to "insure[] against stratagems to avoid the required environmental review by breaking up a proposed development into component parts which, individually, do not have sufficient environmental significance."[26]

An agency may segment review only if it clearly demonstrates its reasons *and* that such segmented review is no less protective of the environment.[27] The prohibition against segmentation guards against "distortion of the approval process by preventing a project with potentially significant environmental effects from being split into two or more smaller projects, each falling below the threshold requiring full-blown review."[28] Therefore, "a project developer is not permitted to exclude certain activities from the definition of a project" to minimize the potential environmental impacts and an agency must review a whole action to satisfy SEQRA.[29]

In applying these rules, the Court of Appeals and New York courts have repeatedly invalidated negative

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[19] *King v Saratoga County Bd. of Supervisors* , 89 N.Y.2d 341, 349-50 (1996) (*quoting Jackson v NY State Urban Dev. Corp.* , 67 N.Y.2d 400, 417 (1986)).
[20] *Matter of E. End Prop. Co. #1, LLC v Kessel* , 46 AD3d 817 (2d Dept 2007)); *Group for S. Fork, Inc. v Wines* , 190 A.D.2d 794 (2d Dept 1993)); *Rye Town/King Civic Asso. v Rye* , 82 A.D.2d 474, 481 (2d Dept 1981).
[21] *Tri-County Taxpayers Asso. v Town Bd. of Queensbury*, 55 N.Y.2d 41, 43 (1982). A disposition that eliminates consideration of the required environmental effects at the time of initial authorization would relegate SEQRA's mandates for environmental protection to an afterthought in contravention of the express legislative purposes. *Id.*; Daniel Ruzow, SEQRA IN THE COURTS, 46 Alb L Rev 1177, 1181-1182 (1982).
[22] 6 NYCRR §§ 617.3(g); 617.2(ah).
[23] 6 NYCRR 617.3 (g)(1). *Matter of Farrington Close Condominium Bd. of Mgrs. v Incorporated Vil. of Southampton*, 205 A.D.2d 623, 626 (1994) (quoting SEQRA 6 NYCRR 617.3 (g)(1)).
[24] 6 NYCRR § 617.7(c)(2)(i).
[25] 6 NYCCR 617.3(k)
[26] *City of Buffalo v. New York State Dep't of Env't Conservation*, 184 Misc. 2d 243, 254–55, 707 N.Y.S.2d 606, 615 (Sup. Ct. 2000) (internal citation omitted).*See also* SEQR Handbook, 53 (To determine whether there has been illegal segmentation, an agency and courts consider: (1) the purpose or goal for each segment; (2) if there is a common reason for the timing of goals/are they occurring at the same time; (3) if there is a common geographic location involved; (4) if any of the activities share a common impact; and (5) whether the segments under the same or common ownership or control). *See also Vill. of Westbury v. Dep't of Transp*., 75 N.Y.2d 62, 70-71 (1989) (In determining whether an action may have a significant effect on the environment, "the agency must ... consider reasonably related effects 'including other simultaneous or subsequent actions which are: (1) included in any long-range plan of which the action under consideration is a part; (2) likely to be undertaken as a result thereof; or (3) dependent thereon' "); 6 NYCRR § 617.7(c)(2).
[27] 6 NYCRR 617.3 (k) (1); *Matter of Farrington Close Condominium Bd. of Mgrs. v Incorporated Vil. of Southampton*, 205 A.D.2d 623, 626 (1994).
[28] *Long Is. Pine Barrens Socy. v Planning Bd.*, 204 A.D.2d. 548, 550 (2d Dept 1994).
[29] *Id.*

declarations where the agency failed to identify or consider related actions to the fullest extent possible.[30] For example, in *Sun Co. v. City of Syracuse Indus Dev. Agency*, 625 N.Y.S.2d 371 (1995), the Court found that the agency's SEQRA review of a proposed strip mall should also have considered the effects of the City's larger development plans initially conceptualized with the project, including rebuilding and relocating pipelines.[31] The court found that the "site-specific SEQRA review resulted in improper segmentation" because "[s]uch a narrow review improperly separated the impact of one phase from the impact of other phases included in the long-range plan, as if they were 'independent, unrelated activities, needing individual determinations of significance.'"[32] The Court also expressly rejected the agency's contention that the pipeline reconstruction was "speculative" and not an action that "fall[s] within the defined scope of the Carousel Landing project." *Id.* The court reasoned that the pipeline relocation, even if only a possibility, would be a direct consequence of the project, and must be considered.[33]

Even when a project is not part of a single formalized plan, if the utility of each project is dependent on the same long-range plan, SEQRA requires consideration of their combined effects.[34] For example, in *Vill. of Westbury v. Dep't of Transp*., 75 N.Y.2d 62, 70-71 (1989), the Court of Appeals invalidated a negative declaration on a highway interchange reconstruction because it found that action to be closely linked to the widening of the Northern State Parkway, also in the long-term planning process.[35] The court reasoned that the two projects worked together to address the same issue of traffic congestion, making the actions "complementary components," the impact of which must be assessed together.[36] Many New York courts have followed suit and required strict adherence to this principle in order to prevent project sponsors from deceptively hiding negative impacts of related components from review.[37]

Further, the fact that a segment of the project is classified as mandatory "improvements" does not excuse the agency from reviewing the whole project, especially where the project increases the customer base.[38] For example, in *Segal v. Town of Thompson*, 182 A.D.2d 1043, 1046 (1992), the court invalidated a negative declaration as "patently inadequate"[39] when the agency reviewed a public utility company's proposed improvements to water and sewer facilities to serve existing utility customers, but did not evaluate the company's

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[30] *Matter of Farrington Close Condominium Bd. of Mgrs. v Incorporated Vil. of Southampton*, 205 A.D.2d 623, 626 (1994); *Segal v Thompson*, 182 A.D.2d 1043 (3d Dept 1992); *Westbury v. Dep't of Transp*., 75 N. Y.2d 62, 68 (1989).
[31] *Sun Co. v City of Syracuse Indus. Dev. Agency*, 209 A.D.2d. 34, 49 (4th Dept 1995).
[32] *Id*. at 48; (*citing* 6 NYCRR 617.2(gg); *Matter of Schultz v Jorling*, 164 A.D.2d 252, 255-256, *lv denied* 77 N.Y.2d 810).
[33] *Id*..("[R]espondent's SEQRA review failed to account for the acute environmental impacts associated with the relocation and reconstruction of petitioners' oil storage tanks and pipelines (see, 6 NYCRR 617.14 [c]). Furthermore, respondent failed to consider all the environmental ramifications of the shopping center project and failed to analyze reasonable alternatives to the project.").
[34] *Vill. of Westbury v. Dep't of Transp*., 75 N.Y.2d 62, 69-71 (1989).
[35] *Id*..; *see also Matter of Town of Blooming Grove v County of Orange*, 103 A.D.3d 655 (2d Dept. 2013) (finding improper segmentation when the agency considered the extension of a sewer line and issued a negative declaration separately from the development project that had previously been issued a positive declaration).
[36] *Id*. at 69.
[37] *See also Teich v. Buchheit*, 221 A.D.2d 452, 453–54 (1995) (annulling Planning Board's improper segmented review of Hospital's proposed action to build a parking lot because it was an integral part of Hospital's long-range plan for expansion of Hospital services); *City of Buffalo v. New York State Dep't of Env't Conservation*, 184 Misc. 2d 243, 250–53 (Sup. Ct. 2000) (holding that DEC improperly issued a negative declaration for proposed new bridge between U.S. and Canada because it improperly segmented the review of bridge by not analyzing the environmental impact of the proposed toll plaza); Town of Blooming Grove v. Cty. of Orange, 103 AD3d 655, 657 (2013) (finding improper segmentation where development project and sewer "are part of an integrated and cumulative development plan sharing a common purpose"); *Save Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 206–07 (1987) (finding segmentation where "the project at issue... is only a part of a larger plan designed to resolve conflicting specific environmental concerns in a subsection of a municipality with special environmental significance").
[38] *Segal v Town of Thompson* , 182 A.D.2d 1043, 1045-46 (3d Dept 1992).
[39] *Id*.

secondary plans to expand its utility services to more homes and districts.[40] The Court admonished the agency's classification of the project as a mere upgrade, finding it to be an "overly simplistic and inaccurate characterization," and found a piecemeal approach to review was inappropriate as the agency failed to consider the long-range plans and the potential environmental impacts of the future service expansion.[41]

Both federal and other state courts have prohibited segmentation under analogous laws, including those dealing with pipeline construction. For example, in *Hammond v. Norton*, 370 F. Supp. 2d 226, 244 (D.D.C. 2005), the court found impermissible segmentation under analogous federal law when the agency, in reviewing the plan for a proposed pipeline, failed to consider the environmental impact of another pipeline to which the proposed pipeline would be connected. Similarly, in *Whitman v. Bd. of Supervisors*, a California appellate court invalidated an environmental review when the agency failed to consider the construction of a future pipeline in conjunction with the proposal for an oil well.[42]

In line with these decisions, the DEC itself has refused to issue permits when the environmental impact review failed to consider a pipeline and power plant together. In 2018, the DEC denied a permit for a new 7.8-mile section of the Millennial pipeline to supply a power plant in the 92% white town of Wawayanda, arguing that the Federal Energy Regulatory Commission (FERC)'s review of the pipeline failed to analyze the environmental impact of both the pipeline and the power plant together.[43] The DEC based its denial on FERC's "inadequate and deficient" approval and environmental review of the pipeline without evaluating the power station for "fail[ing] to consider or quantify the indirect effects of downstream [greenhouse gas] emissions in its environmental review of the [pipeline] that will result from burning the natural gas that the [pipeline] will transport to the" facility.[44]

C. DEC's "Negative Declaration" Violated SEQRA and CP-29

When issuing a negative declaration on National Grid's application for an Air Facility Permit at its Greenpoint facility, DEC violated SEQRA by (1) conducting an illegal segmented review of the project, and (2) failing to consider the cumulative impacts of the project. DEC violated SEQRA and DEC Commissioner Policy-29 ("CP-29") by failing to perform an environmental assessment of the North Brooklyn Pipeline and LNG facility.

1. Illegal Segmentation

When it issued its negative declaration with respect to National Grid's application for an Air Permit, DEC considered only the impact of the two new vaporizers. DEC failed to consider the environmental impact of the North Brooklyn Pipeline, even though the pipeline and vaporizers are part of the same project. This constitutes illegal segmentation.

Any contention that the pipeline does not "fall[] within the defined scope" of the project is meritless. *Sun Co.*, 209 A.D.2d. at 49. National Grid has frequently discussed these components together as part of the Metropolitan Reliability Infrastructure Project in its rate recovery case before the Public Service Commission and in its annual report and public documents. [45] The need for the vaporizers is a direct consequence of the increased

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[40] *Id.*
[41] *Id.*
[42] *Whitman v. Bd. of Supervisors*, 88 Cal. App. 3d 397, 151 Cal. Rptr. 866 (1979).
[43] James Nani, *DEC Denies Permits for CPV Power Plant Pipeline*, RECORD ONLINE (Aug. 31, 2017), https://www.recordonline.com/news/20170831/dec-denies-permits-for-cpv-power-plant-pipeline; Letter and attachment from Thomas Berkman, Deputy Commissioner and General Counsel of the Department of Environmental Conservation to Georgia Carter, Vice President and General Counsel of Millenium Pipeline Company, (Aug. 30, 2017) (attached as Exhibit A).
[44] *Id.*
[45] *See, e.g.*, NYSDPS, Matter Master: 19-01092/19-G-0309, Dkt. No 131, Exhibit 735, National Grid Response to Request No. DPS-1091 (April 17, 2020),

gas the facility is processing and transporting as a direct result of the North Brooklyn pipeline, at a rate of 1.8 million additional cubic feet of gas per hour.[46] The two must be considered as one action.

Further, any argument that the vaporizers are simply an infrastructure upgrade to provide adequate gas service would be an "overly simplistic and inaccurate characterization" of the project and would not excuse the DEC's obligation to review the project as a whole. *Segal*, 182 A.D.2d at 1045-46. A central purpose of the Greenpoint expansion was to increase gas storage and production and to accommodate the additional gas the new pipeline would bring to the facility. Before the construction of the North-Brooklyn pipeline, the only way to bring gas into or take gas out of the Greenpoint Energy Center was through a 16-inch transmission main that runs from the Brooklyn backbone line and cannot flow to "to eastern Brooklyn and Queens where it is needed to support customer growth," which "significantly reduces the efficacy of injecting CNG in Greenpoint."[47] Connecting the 30-inch, high pressure North Brooklyn Pipeline would allow National Grid to import significantly higher levels of gas into the Greenpoint LNG facility and support growth in gas production and almost 19,000 new customers.[48] DEC improperly segmented review and failed to identify relevant areas of environmental concern by overlooking the National Grid's plans for expansion, making the negative declaration "patently inadequate." *Id*. This "piecemeal approach" to review unlawfully failed to consider the long-range plans and the potential environmental impacts of the pipeline and facility service expansion together. *Id*.; *Vill. of Westbury*., 75 N.Y.2d at 70-71.

Even if the project is somehow argued to not be a formalized plan, despite being presented by National Grid as such, the LNG vaporizer design is nonetheless dependent on the creation of the pipeline. National Grid's Greenpoint depot is the destination point for the North Brooklyn Pipeline, and National Grid has explicitly discussed these projects as interdependent. National Grid has made clear that the utility of the Greenpoint LNG and CNG expansion would be limited if the pipeline was not approved.[49] Without the new LNG vaporizers, the Greenpoint facility would have limited ability to process the increased gas flow from the pipeline and transport it to new customers. The two actions are "complementary components" the impact of which must be assessed together. *Vill. of Westbury*., 75 N.Y.2d at 70-71.

Further, the DEC's failure to consider the impact of the pipeline and the expansion of the Greenpoint facility as a whole action before issuing its negative declaration contradicts positions it has previously taken in disproportionately white communities, including in Wawayanda, New York. There, the DEC found an environmental review inadequate for failing to consider Millennial pipeline and the power plant together in the 92% white town. Yet here, the DEC refused to consider the joint impact of the pipeline and the expansion of the LNG facility on low-income environmental justice communities of color in Brooklyn. By failing to consider the impact of the "whole action," the DEC violated state law and Title VI, leaving the communities of color surrounding the pipeline bereft of any environmental protection.

2. Failure to consider cumulative impact

Under SEQRA, even when a project does not suffer from improper segmentation, a negative declaration is invalid if the agency failed to consider cumulative impacts of a project. Though the prohibition on segmentation

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http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=19-G-0309&submit=Search; National Grid, *Natural Gas Long-Term Capacity Supplemental Report for Brooklyn, Queens, Staten Island and Long Island*, at 48 (May 2020), https://www.nationalgridus.com/media/pdfs/other/ltng-supplementalreport.pdf .

[46] *Id*.

[47] *Id*. at 11.

[48] *Id.* ("Without the North Brooklyn pipeline, the flow of gas will be reduced from Con Edison at Newtown Creek, so to support growth in NYC using CNG injected in Greenpoint, MRI Phase 5 is needed to utilize CNG for growth instead of compensating for pressure losses. .. Because MRI improves flow efficiency in Brooklyn and Queens and enables the incremental LNG/CNG gas supplies from Greenpoint to reach new customers, all prospective customers would benefit from the system pressure improvements of additional LNG/CNG and MRI.").

[49] *Id*., Responses 10 & 11

and the mandate to review the cumulative impact of projects are interrelated, they are separate requirements under SEQRA. The agency must consider the "reasonably related long-term, short-term and cumulative effects, including other simultaneous or subsequent actions which are .. included in any long range plan."[50] To make this determination, the agency considers factors including the creation of hazards to human health, adverse changes in air quality or ground water, impairment of historical resources, as well as the geographic scope and number of people affected. 6 NYCCR § 617.7.

For example, in *Friedman v Adirondack Park Agency*, the Court upheld an agency's decision to deny a project permit when the agency determined that even if the present project alone could perhaps be safe, the over-all effect when taken together with other existing developments and possible future projects, could cumulatively produce the contamination of a nearby brook.[51] The court found that the agency's analysis of cumulative impact was proper and the agency was correct in examining all factors of this project as well as others proximately located to evaluate the cumulative impacts.[52]

Here, the LNG expansion is part of a cumulative and related plan that includes the pipeline, which will transport significantly more gas to the Greenpoint facility. DEC violated SEQRA by failing to consider the cumulative impact of the project in issuing its negative declaration.

3. Failure to Complete a Full Environmental Assessment Form

Further, by improperly segmenting the pipeline from the LNG facility, DEC improperly classified the project as an unlisted action, rather than a Type I action, and failed to complete a full Environmental Assessment Form. Under SEQRA, a Type I action consists of non-residential construction that physically alters land.[53] SEQRA provides thresholds for just how much land may be altered before classifying an action as Type I.[54] While the initial threshold is 10 acres, that is reduced to 2.5 acres if the physical land is near a national or state registered historic place.[55] Here, the North Brooklyn Pipeline route is near more than twenty national historic places.[56] The 7-mile North Brooklyn Pipeline alone exceeds the 2.5 acre threshold.[57] Had DEC not improperly segmented the project, DEC would have considered the pipeline and LNG facility together as a Type I action.

Type I actions are presumed to carry a significant environmental impact and typically warrant preparation of a full Environmental Impact Statement ("EIS").[58] While in limited circumstances, Type I actions may be exempted from an EIS, they always require the preparation of a full Environmental Assessment Form (EAF) to determine whether an EIS is, in fact, needed.[59] DEC was therefore required to complete a full EAF on the pipeline and Greenpoint expansion. DEC failed to do so.

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[50] 17 NYCRR § 15.11(b). *See also* 6 NYCCR § 617.7; *Vill. of Westbury v. Dep't of Transp.*, 75 N.Y.2d 62, 68, 549 N.E.2d 1175 (1989); *Chinese Staff & Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 361-62 (1986)).
[51] *Friedman v Adirondack Park Agency*, 165 A.D.2d 33, 36 (3d Dept 1991).
[52] *Friedman v Adirondack Park Agency*, 165 A.D.2d 33, 36 (3d Dept 1991).
[53] 6 NYCRR 617.4 (b)(6)(i).
[54] 6 NYCRR 617.4 (b)(6)(i).
[55] 6 NYCRR 617.4 (b)(10).
[56] Thomas Warren Field School, Saratoga Brand of the Brooklyn Public Library, Engine Company No. 237, Firehouse Engine Co. 231, PS 73 Brooklyn, PS 137, Bushwick Avenue Historic District, P.S. 298 (1958, Michael Radoslovich), The State Bank (1903; 1921 add'n), Saratoga Square HD, Brownsville Children's Library (aka Stone Ave. Library), Brownstone tenement, 829 Halsey Street, P.S. 150 Christopher School, Brownsville Houses (NYCHA, 1948), Saint Barbara's RC Church, South Bushwick Reformed Protestant Dutch Church Complex, Bushwick Avenue Central Methodist Episcopal Church, Industrial Complex at 221 McKibbin Street amongst others. *See* Brownsville Green Justice Title VI Complaint at 191, Ex N (Aug. 31, 2021).
[57] The length of the pipeline is 7 miles/36,960 feet. The length of the pipeline times the diameter is 110,880 sq ft and 2.545 acres. This does not include the land that would be disrupted to build/install the pipeline.
[58] 6 NYCRR § 617.2 (aj).
[59] 6 NYCRR 617.5; 617.6 (a)(2).

4. Failure to Comply with CP-29

Under CP-29, which is based on the long history of unchecked environmental degradation of communities of color, DEC must consider whether the projects it sanctions will have a "disproportionately high and adverse" impact on low-income and predominantly minority communities.[60] Projects subject to CP-29 require completion of a full Environmental Assessment Form, coordinated review with all involved agencies, as well as an enhanced participation plan to ensure meaningful and effective public participation.[61] DEC erroneously found that DEC CP-29 did not apply to the project, thereby evading CP-29's mandate for a full environmental review and public hearings when a permit issuance affects a potential environmental justice community.[62]

DEC failed the preliminary requirement of CP-29, which mandates that DEC staff identify potential adverse environmental impacts and whether they are likely to affect a potential environmental justice area.[63] Although New York City has designated Brownsville, Ocean Hill, Bushwick, and East Williamsburg as Potential Environmental Justice Areas, DEC found that CP-29 did not apply without providing any justification for its decision.[64] Thus, DEC neither required nor conducted a full EAF for this project nor conducted a coordinated review with the Fire Department of New York, New York City Department of Environmental Protection, and the Department of Buildings, which were involved in approving other aspects of the pipeline.

Nor did DEC mandate compliance with requirements for meaningful public participation. CP-29 requires an enhanced public participation plan to ensure meaningful and effective participation.[65] As part of this requirement, National Grid would have had to identify and distribute key materials to stakeholders, including local residents, community based organizations, elected officials; to hold public meetings throughout the environmental justice areas; to issue periodic reports; and to make all project documents accessible. As laid out in our complaint, National Grid did not engage in any of these measures.

Further, DEC flouted its obligation under CP-29 to "provide enhanced accessibility to public permit information held by the DEC" and "use enhanced public participation notification mechanisms, including those which are most effective in potential environmental justice areas."[66] As detailed in our complaint, DEC did not contact any of the residents and community-based organizations we represent, including Brownsville Green Justice, the Ocean Hill-Brownsville Coalition of Young Professionals, Mi Casa Resiste, and the Indigenous Kinship Collective about the LNG vaporizer and pipeline expansion. Nor did it post these materials on its website. As detailed in the complaint, the community did not learn of the pipeline until years into its construction, and had absolutely no say in the construction.

D. By Violating SEQRA and CP-29, DEC also Violated Title VI

DEC's failure to comply with SEQRA and CP-29 also violated Title VI because it had an adverse, disparate impact on the Brownsville, Ocean Hill, Bushwick, and East Williamsburg communities based on the race, color, or national origin of the residents of these communities.

Title VI prohibits agencies that receive federal funds from engaging in practices that have an unjustified

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[60] Commissioner Policy 29, Environmental Justice and Permitting, New York State Department of Environmental Conservation, DEC Policy (2003), https://www.dec.ny.gov/docs/permits_ej_operations_pdf/cp29a.pdf ,
[61] CP-29, Part V, Sect. E-F (2003).
[62] *Id.*
[63] CP-29(V)(B).
[64] *Environmental Justice Areas*, NYCDOH, https://nycdohmh.maps.arcgis.com/apps/instant/lookup/index.html?appid=fc9a0dc8b7564148b4079d294498a3cf (last visited Jan. 18, 2022).
[65] CP-29, Part V, Section (D).
[66] CP-29, Parts III, B; V, Sect.D (2003).

disparate impact on the basis of race and national origin.[67] Even when a recipient has a substantial legitimate justification, employing a neutral policy that leads to adverse disparate impacts may still constitute a violation of Title VI if there are less discriminatory alternatives that would achieve the same purpose.[68] The EPA and courts have specifically made clear that air emissions constitute "adverse effects" under Title VI, and state environmental agencies are to consider racially disparate adverse impacts of air pollution when determining whether to issue an air pollution permit.[69] Further, the EPA has made clear that it "use[s] environmental laws, regulations, policy and science as touchstones for determining thresholds for what is adverse."[70] A showing of potential health effects, depending on their nature and severity (e.g., cancer risk), provides an adequate basis for a finding of adversity under EPA's disparate impact regulation.[71] Causation may be established through scientific proof, prediction of potentially significant exposures and risks resulting from stressors created by the permitted activities or other sources, and other methodologies. [72]

First, DEC's failure to evaluate the joint environmental impact of the pipeline and LNG facility had an unjustified adverse disparate impact on the basis of race because it prevented DEC from considering the potential adverse environmental impact on air quality and health of the part of the project that is located underneath a community that is disproportionately (70%) Black and Latinx. The EPA has made clear that for recipients who issue air pollution emission permits to facilities that permitting that may cause negative effects constitute "adverse effects" for purposes of Title VI; causation can be established through scientific proof.[73] As described in detail in the complaint, like the LNG vaporizers, pipelines are constantly emitting hazardous air pollutants and greenhouse gases into the air, soil, and water.[74] Multiple studies and even the EPA have found that methane emissions are highly toxic and can have serious health consequences for the surrounding community.[75] Methane, a greenhouse gas that contributes to ground level ozone, decreases the lungs' working ability and cause coughing and chest

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[67] 42 U.S.C. § 2000d; *Alexander v. Choate*, 469 U.S. 287, 293–94 (1985); 40 C.F.R. § 7.35(b) (EPA); 49 C.F.R. § 21.5(b)(2) (DOT); 28 C.F.R. § 42.104(b)(2) (DOJ). A violation is still established if the record shows the justification offered by the recipient was pretextual. *See Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993)

[68] Dep't of Justice, TITLE VI LEGAL MANUAL, Section VII, https://www.justice.gov/crt/book/file/1364106/download (last visited Aug. 28, 2021).

[69] *South Camden Citizens in Action v. New Jersey Dept. of Environmental Protection*, 145 F. Supp. 2d 446, 52 (D.N.J. 2001), opinion modified and supplemented, 145 F. Supp.3d. 2d 505 (D.N.J. 2001), order rev'd on other grounds, 274 F.3d 771, (3d Cir. 2001).

[70] EPA Investigations Guidance, 65 Fed. Reg. at 39,654, 39,698; Department of Justice Title VI Legal Manual, Section VII(C)(1)(e).

[71] EPA Investigative Report, For Title VI Admin. Complaint File No. 16R-99-R9, at 26–28 (Aug. 25, 2011);[EPA Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39,650, 39,679–81 (June 27, 2000).

[72] EPA Investigations Guidance, 65 Fed. Reg. at 39,679; Angelita C. v. California Department of Pesticides Regulation, No. 16R–99–R9. EPA Office of Civil Rights, Investigative Report for Title VI Administrative Complaint File No. 16R–99–R9 at 32–33 (Aug. 25, 2011).

[73] EPA Investigations Guidance, 65 Fed. Reg. at 39,654, 39,698; Department of Justice Title VI Legal Manual, Section VII(C)(1)(e).

[74] NCLEJ and NYLS Title VI Opening Complaint, at 25-32. U.S. CONGRESSIONAL RESEARCH SERVICE, METHANE AND OTHER AIR POLLUTION ISSUES IN NATURAL GAS SYSTEMS 3 (2020), https://fas.org/sgp/crs/misc/R42986.pdf (last visited Aug. 26, 2021); *see also* David A. Kirchgessner, et al., U.S. ENVIRONMENTAL PROTECTION AGENCY, ESTIMATE OF METHANE EMISSIONS FROM THE U.S. NATURAL GAS INDUSTRY 12, , https://www3.epa.gov/ttnchie1/ap42/ch14/related/methane.pdf (last visited Aug. 26, 2021); Jiaxin Fu et al, *Identifying and Regulating the Environmental Risks in the Development and Utilization of Natural Gas as a Low-Carbon Energy Source*, FRONTIERS IN ENERGY RSCH, March 2021, at 2, https://www.frontiersin.org/article/10.3389/fenrg.2021.638105;

[75] CONG. RSCH. SERV., R42986, *supra* note 138, at 5-6; Audrey Carleton, '*They're Liars': Activists Say Brooklyn Residents Were Not Informed Of Fracked Gas Pipeline*, GUARDIAN (Dec. 21, 2020), https://www.theguardian.com/environment/2020/dec/21/brooklyn-natural-gas-pipeline-fracking-bushwick. Methane has been found to leak from fracking wells, equipment, and pipelines at rates that make it worse for the environment than coal. Physicians for Social Responsibility, *Too Dirty, Too Dangerous: Why Health Professionals Reject Natural Gas*, 10 (Feb. 2017), https://www.psr.org/wp-content/uploads/2018/05/too-dirty-too-dangerous.pdf

pain, eye and throat irritation and breathing difficulties even for healthy individuals,[76] and exacerbate cardiovascular disease.[77] According to EPA's 2013 Integrated Science Assessment for Ozone, ozone exposures have been linked to increase risks of hospitalization for acute myocardial infarction, coronary atherosclerosis, stroke, and heart disease, even at ambient ozone levels well-below current air quality standards.[78] These issues are especially acute for children and individuals with respiratory problems such as allergies, asthma, bronchitis and emphysema.[79] The impact of air emissions is particularly severe for the Brownsville, Ocean Hill, and Bushwick residents, because the air quality impacts from fugitive methane could especially impact those with asthma. All three areas have twice the child and adult asthma rate compared to the rest of the city; Brownsville and Ocean Hill have the highest rate for adult asthma in New York City (14%), with almost twice the amount of hospitalizations for both child and adult asthma.[80]

Scientific studies have also found that gas pipelines increase methane levels in the surrounding soil and water, negatively impact plant health, groundwater quality, and human health. Although methane is not directly toxic to plant matter, methane-rich soil can induce anaerobic soil conditions that are harmful for tree root systems.[81] Brooklyn residents also face potential adverse impacts to their water from the pipeline,[82] as the North Brooklyn Pipeline runs in close proximity to the Brooklyn-Queens Sole Source Aquifer, which is the sole or principal drinking water source for 650,000 people,[83] and crosses three Department of Environmental Protection water pipelines.[84] Contamination of this aquifer could create a significant hazard to public health.

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[76] Pasquale Russo et al., *Air Emissions from Natural Gas Facilities in New York State*, INT'L J. ENV'T RES. PUB. HEALTH, May 2019; WASHINGTON COUNCIL OF GOV'T, STATE IMPLEMENTATION PLAN TO IMPROVE AIR QUALITY IN THE WASHINGTON, DC-MD-VA REGION 30 (2007), https://www.mwcog.org/uploads/pub-documents/9FhcXg20070525084306.pdf.

[77] *Id.*; Michelle C. Turner et. al., *Long-Term Ozone Exposure and Mortality in a Large Prospective Study*, *American Journal of Respiratory and Critical Care Medicine*, 193 AM. J. RESPIRATORY AND CRITICAL CARE MED. 1134, 1135 (May 2016), https://www.atsjournals.org/doi/pdf/10.1164/rccm.201508-1633OC.

[78] U.S. ENV'T PROT. AGENCY, INTEGRATED SCIENCE ASSESSMENT FOR OZONE AND RELATED PHOTOCHEMICAL OXIDANTS 6-168 - 6-185(Feb. 2013), https://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=247492.

[79] Tim Keyes et al., AN ENHANCED PROCEDURE FOR URBAN MOBILE METHANE LEAK DETECTION 2 (October 2020), https://www.cell.com/action/showPdf?pii=S2405-8440%2820%2931719-9; David Shindell, *Reducing Methane is Crucial for Protecting Climate and Health, and It Can Pay For Itself – So Why Aren't More Companies Doing It?*, CONVERSATION (May 6, 2021), https://theconversation.com/reducing-methane-is-crucial-for-protecting-climate-and-health-and-it-can-pay-for-itself-so-why-arent-more-companies-doing-it-160423.

[80] Brownsville Community Health Profiles 2018, *supra* note 11, at 12; Ian Kumamoto, *A Fracked Gas Pipeline is Coming to Brooklyn. Residents Are Invoking BLM to Fight It*, VICE (Oct. 15, 2020), https://www.vice.com/en/article/v7m444/fracking-pipeline-brownsville-brooklyn-black-lives-matter-blm; *Is Your Home Bad for Your Health? Know if Mold, Roaches and Rodents Are a Problem Before Moving In*, LOCALIZE (Jan. 21, 2019), https://www.localize.city/blog/is-your-home-bad-for-your-health-know-if-mold-roaches-and-rodents-are-a-problem-before-moving-in/. In addition, Brownsville has one of "the highest rates of premature mortality and chronic disease in New York City, with cancer, heart disease, HIV, and drug-related conditions being among the leading causes of premature mortality." JENNIFER PIERRE ET AL., BUILDING A CULTURE OF HEALTH AT THE NEIGHBORHOOD LEVEL THROUGH GOVERNANCE COUNCILS 872 (March 2020), https://link.springer.com/content/pdf/10.1007/s10900-020-00804-0.pdf.*Bushwick Community Health Profile 2018*, supra note at 12.

[81] Claire Schollaert et al, *Natural Gas Leaks and Tree Death: A First-Look Case-Control Study Of Urban Trees in Chelsea, MA*, ENV'T POLLUTION, Aug. 2020, at 2, https://www.sciencedirect.com/science/article/pii/S0269749119376717. ; ; M.D. Steven, et. al, *Oxygen and methane depletion in soil affected by leakage of natural gas*, EUR. J. SOIL SCI., 57 (6) (2006), at 800-807, 10.1111/j.1365-2389.2005.00770.x .

[82] Meghan Betcher et al., PIPELINE IMPACTS TO WATER QUALITY DOCUMENTED IMPACTS AND RECOMMENDATIONS FOR IMPROVEMENTS iv (August 2019), https://www.tu.org/wp-content/uploads/2019/10/Pipeline-Water-Quality-Impacts-FINAL-8-21-2019.pdf

[83] Draft DEC EAF North Brooklyn Pipeline, Ex. N supra note 33; *How May I Be Exposed by Contaminated Surface Water and Groundwater?*, N.Y.S. OFF. ATT'Y GEN., https://ag.ny.gov/environmental/oil-spill/how-may-i-be-exposed-contaminated-surface-water-and-groundwater (last visited Aug. 26, 2021).

[84] Exhibit 735, *supra* note 101, at 3.

By failing to consider the full environmental impact to the air and community surrounding the pipeline as required by SEQRA and CP-29 before issuing a negative declaration, DEC has allowed the pipeline to pose serious, unchecked risks to the disproportionately Black and Latinx residents surrounding the pipeline. By unlawfully limiting its analysis to the LNG facility, located in a predominantly white area, DEC has violated Title VI by using "criteria and methods that have the effect of discriminating on the basis of race" and treated communities of color differently than white communities.[85] Further, DEC has taken a contrary position and mandated review of a pipeline and power plant project in the white community, consistent with DEC's troubling pattern of disparate treatment of enforcing environmental laws in white communities, while ignoring environmental harms in communities of color.[86]

Had DEC conducted a full environmental review as required by SEQRA and CP-29, it may very well have found the project impermissible.[87] Multiple areas of potentially significant environmental impacts in connection with the pipeline would have triggered DEC to undertake a full Environmental Impact Statement and deny the full project. These include the risk of gas methane emissions and other toxins, use of hazardous materials, impact on historical sites, proximity to more than two dozen remediation sites, soil contamination, and potential water contamination – as well as the combined impact of the LNG expansion and vaporization of the 1.8 million cubic tons per hour of fracked gas that the pipeline will deliver to the Greenpoint facility.[88] Moreover, DEC would have had to inform residents and stakeholders about the permit and would have required National Grid to hold public meetings, allowing the communities affected by the pipeline to ask important questions and present evidence about the existing environmental and public health burdens already borne by the community to which the pipeline would add. Instead, DEC issued a negative declaration without analyzing the whole project or its racially disproportionate impact, ignoring community needs and subjecting individuals to unjustified disparate treatment because of their race in violation of Title VI.

Any decision on the air permit without consideration of the environmental impact on these communities violates Title VI, and as such, DEC must immediately rescind its negative declaration and must undertake a full review of the joint environmental impact of the pipeline and LNG facility before making any decision on the air

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[85] 40 C.F.R. § 7.35(a)(2);(b).

[86] *See* Brownsville Green Justice Title VI Complaint at 36, n 102.

[87] The pipeline itself is a Type 1 action subject to SEQRA review: the seven-mile massive high-pressure pipeline is a physical alteration of 4,480 feet of land, well over the 10 feet listed in the definition for a Type I action. 6 NYCCR § 617.4(b)(2). In addition, according to the DEC's own Environmental Assessment tool, the pipeline route is within 2000 feet of 28 DEC Environmental Remediation sites and in close proximity to a major water source. Further, the pipeline is substantially contiguous to 26 different National or State Register of Historic Places or State Eligible Sites, which also triggers a full environmental review. *See* Draft DEC EAF North Brooklyn Pipeline, Ex. N *supra* note 33; NYCRR § 617.7. *See, e.g., Sun Co., Inc. (R & M) v City of Syracuse Indus. Dev. Agency*, 209 A.D.2d 34 (4th Dept 1995); *Green Earth Farms Rockland, L.L.C. v Town of Haverstraw Planning Bd.*, 153 A.D.3d 823 (2d Dept 2017); *County of Orange v Vill. of Kiryas Joe*l, 11 Misc. 3d 1056(A) (2d Dept. 2007**);** *Fleck v. Town of Colden*, 792 N.Y.S.2d 281 (4th Dept. 2005); *Chenango Valley Cent. Sch. Dist. v. Town of Fenton Planning Bd.*, No. 31820(U) (N.Y. Sup. Ct. 2017); *Cty. of Orange v. Vill. of Kiryas Joel*, 44 A.D.3d 765 (2nd Dept. 2007). Contrary to National Grid's assertion, it would not have been exempted from review. *Town of Goshen v Serdarevic*, 17 AD3d 576, 579 (2d Dept 2005) (addition of drainage pipe, replacement of another pipe with a larger one, and extension of ditches were not matters of routine maintenance and subject to SEQRA review). In addition, contrary to National Grid's misrepresentation, it had to apply for multiple discretionary permits that should have triggered SEQRA review.

[88] Draft DEC EAF North Brooklyn Pipeline, Ex. N supra note 195; Environmental Protection Agency, *EJSCREEN: Environmental Justice Screening and Mapping Tool*, https://www.epa.gov/ejscreen (last visited Aug. 29, 2021); New York State Department of Environmental Conservation, *DEC Mapping tools, Maps & Geospatial Information System* (GIS) Tools for Environmental Justice, https://www.arcgis.com/home/webmap/viewer.html?url=https://services6.arcgis.com/DZHaqZm9cxOD4CWM/ArcGIS/rest/services/Potential_Environmental_Justice_Area__PEJA__Communities/FeatureServer&source=sd

permit.[89] The proper remedy is to void DEC's negative declaration and require a full Environmental Assessment Form and Environmental Impact Statement of the LNG expansion and the pipeline before DEC makes any decision about whether to issue National Grid's air permit.

3. National Grid's LNG Expansion and North Brooklyn Pipeline Construction Violates the Climate Leadership and Community Protection Act (CLPCA)

The New York State Climate Leadership and Community Protection Act, which went into effect on January 1, 2020, includes economy-wide requirements to reduce greenhouse gas (GHG) emissions in New York State by 40% below 1990 levels by 2030, and 85% below 1990 levels by 2050,[90] and that by 2040 the electricity generation sector will have zero emissions.[91] Additionally, CLCPA acknowledges the heightened impact of climate change on disadvantaged communities and mandates the prioritization of safety and health of these communities.[92]

Therefore, when issuing permits, the CLCPA requires that DEC ensure that approved actions "do not result in a net increase in co-pollutant emissions or otherwise disproportionately burden disadvantaged communities."[93] DEC's approval of National Grid's air permit would violate the CLCPA because it (1) results in a net increase in emissions and the creation of new gas infrastructure, and (2) disproportionately burdens disadvantaged communities.

A. National Grid's project frustrates the purpose of and is inconsistent with the CLCPA by massively increasing gas usage and creating new gas infrastructure.

The National Grid LNG facility and pipeline is fundamentally inconsistent with the very purpose of the CLCPA. The CLCPA mandates that agencies deny projects that are inconsistent with or would interfere with the Statewide GHG emission unless the DEC can provide a detailed statement of justification for the project notwithstanding the inconsistency.[94] When evaluating a "a fossil fuel-fired electric generating facility.., this includes the upstream GHG emissions associated **with the production and transmission** of the natural gas or other fossil fuel to be combusted at the facility."[95] In the event a sufficient justification is available, the DEC must identify alternatives or require GHG mitigation measures for the project to be approved.[96] None of this was done, and National Grid has openly admitted that the pipeline will add more than 1.8 million cubic feet of gas per hour to the Greenpoint Facility, and the LNG expansion will allow National Grid to deliver gas to more than 18,979

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[89]Because DEC failed to abide by SEQRA in a manner that disproportionately impacts communities of color in violation of Title VI, DEC's negative declaration is null and void and must be rescinded. The State mandates literal compliance with SEQRA's procedures; substantial compliance is insufficient to discharge the responsibility of the agency under the act. NY ECL art. 8; *Matter of E. End Prop. Co. #1, LLC v Kessel*, 46 AD3d 817 (2d Dept 2007); *Matter of Group for S. Fork v Wines*, 190 A.D.2d 794, 795, 593 NYS2d 557 (1993); *Matter of Rye Town/King Civic Assn. v Town of Rye*, 82 A.D.2d 474, 481, 442 NYS2d 67 (1981).

[90] Environmental Conservation Law (ECL) § 75-0107.

[91] 2019 N.Y. ALS 106, 2019 N.Y. Laws 106, 2019 N.Y. Ch. 106, 2019 N.Y. SB 6599, Public Service Law (PSL) amendment § 66-p. Section 4(2) [hereinafter CLCPA].

[92] CLCPA Section (1)(7) ("Climate change especially heightens the vulnerability of disadvantaged communities, which bear environmental and socioeconomic burdens as well as legacies of racial and ethnic discrimination. Actions undertaken by New York state to mitigate greenhouse gas emissions should prioritize the safety and health of disadvantaged communities, control potential regressive impacts of future climate change mitigation and adaptation policies on these communities, and prioritize the allocation of public investments in these areas."), https://www.nyassembly.gov/leg/?default_fld=&leg_video=&bn=A08429&term=2019&Summary=Y&Memo=Y&Text=Y ..

[93] ECL § 75-01099(3)(c).

[94] CLCPA Section 7(2).

[95] Notice of Denial of Title V Air Permit DEC ID: 2-6301-00191/00014 Astoria Gas Turbine Power - Astoria, Queens County Title V Air Permit Application, at.7, https://www.dec.ny.gov/docs/administration_pdf/nrgastoriadecision10272021.pdf

[96] CLCPA Section 7(3).

new customers.[97]

The DEC recently denied two air permits based on the projects' fundamental incompatibility with achieving the greenhouse gas (GHG) emissions reductions required by the Climate Leadership and Community Protection Act (CLCPA). First, in denying Astoria Gas Turbine Power's "Replacement Project"[98] request for a Clean Air Act Title V air permit, the DEC found that the project was inconsistent with the attainment of GHG emission limits, because not only did it increase emissions, but also because the project created a new and long-term plan to utilize fossil fuels without creating any plan as to lower the dependence on fossil fuels.[99] Similarly, the DEC denied Danskammer Energy, LLC's Clean Air Act Title V air permit request to replace its current facility with a new natural gas-fired combined-cycle power generation facility on the same grounds.[100]

In both denials, the DEC notes that the projects themselves would result in substantial direct and upstream GHG emissions due to the production, transmission, and combustion of fossil fuels, and that this cannot be mitigated by projected reductions that could occur at other GHG emission sources across the State. More importantly, DEC found that the projects would delay and frustrate the statutorily mandated transition away from the use of natural gas, as the construction of new fossil-fuel infrastructure is fundamentally inconsistent with the CLCPA's requirement for emission-free electricity generation by 2040.[101]

National Grid's MRI project is fundamentally incompatible with achieving the greenhouse gas emissions reductions required by the CLCPA. National Grid's Project would result in substantial direct and upstream GHG emissions due to the production, transmission, and combustion of natural gas, and this cannot be mitigated by projected reductions that could occur at other GHG emission sources across the State. Furthermore, the upstream GHG emissions associated with the extraction and transmission of millions of gallons of fracked gas through the Brooklyn pipeline increase the project's emissions considerably. And critically, National Grid's expanded infrastructure frustrates the CLCPA's mandated transition away from the use of natural gas, as the construction of new natural-gas infrastructure is fundamentally inconsistent with the CLCPA's requirement for emission-free electricity generation by 2040.[102]

B. The project disproportionately burdens disadvantaged communities in violation of the CLCPA.

The CLCPA makes clear that DEC permit approvals "shall not disproportionately burden disadvantaged communities," and requires the DEC to "[p]rioritize measures to maximize net reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities."[103] The CLCPA defines a community as disadvantaged if it is burdened by cumulative environmental pollution, is an area with concentrations of people

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[97] NYSDPS, Matter Master: 19-01092/19-G-0309, Dkt. No 131, Exhibit 735, National Grid Response to Request No. DPS-1091 (April 17, 2020), http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=19-G-0309&submit=Search

[98] Astoria proposed to construct the Astoria Replacement Project, which would consist of a new simple cycle dual fuel fossil fuel-fired peaking combustion turbine generator (CTG) with a nominal generator output of approximately 437 megawatts (MW) (the Project).

[99] Notice of Denial of Title V Air Permit DEC ID: 2-6301-00191/00014 Astoria Gas Turbine Power - Astoria, Queens County Title V Air Permit Application, at.7, https://www.dec.ny.gov/docs/administration_pdf/nrgastoriadecision10272021.pdf

[100] Notice of Denial of Title V Air Permit DEC ID: 3-3346-00011/00017 Danskammer Energy Center – Town of Newburgh, Orange County Title V Air Permit Application, at 1, https://www.dec.ny.gov/docs/administration_pdf/danskammer10272021.pdf .

[101] Notice of Denial of Title V Air Permit DEC ID: 2-6301-00191/00014 Astoria Gas Turbine Power - Astoria, Queens County Title V Air Permit Application, at 12.

[102] Notice of Denial of Title V Air Permit DEC ID: 2-6301-00191/00014 Astoria Gas Turbine Power - Astoria, Queens County Title V Air Permit Application, pg.12.

[103] CLCPA Sec. 1(7); ECL § 75-0109(3)(c), (d).

that are low income, or is an area vulnerable to adverse climate change impacts such as an urban heat island.[104] National Grid's Greenpoint expansion and pipeline construction impacts the communities of disproportionately Black and Latinx communities of Brownsville, Ocean Hill, Bushwick, East Williamsburg and Greenpoint, each of which meet the definition of "disadvantaged communities" as articulated in the CLCPA.

Brownsville and Ocean Hill: The Brownsville and Ocean Hill community is 76% Black[105] in sharp contrast to New York City as a whole, which is 22% Black[106] In Brownsville and Ocean Hill, the median household income hovers below $33,000—49% lower than the citywide median.[107] Twenty eight percent of residents live in poverty, compared to 20% of all New York City residents.[108] Brownsville is designated an Environmental Justice Area,[109] and, among other challenges, has the highest rate for adult asthma in New York City (14%),[110] the second-highest concentration of public housing in the city, and has the highest score of the city's Heat Vulnerability Index, a measure of the risk of heat-related illness or death.[111] Any one of these factors alone is enough to classify Brownsville as a disadvantaged community.

Bushwick: Bushwick is also an Environmental Justice Area and overburdened with health inequities stemming from decades of racist public policies.[112] The Bushwick community is 65% Latinx,[113] in contrast to New York City as a whole at 29% Latinx.[114] Bushwick has the second highest score of the city's Heat Vulnerability Index,[115] and 25% of Bushwick residents live in poverty, compared to 20% of all New York City residents.[116] Likewise to Brownsville, any one of these factors alone is enough to classify Bushwick as a disadvantaged community.

East Williamsburg, Williamsburg, and Greenpoint: East Williamsburg is a designated Environmental

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[104] ECL § 75-0111(1)(c): Disadvantaged communities shall be identified based on geographic, public health, environmental hazard, and socioeconomic criteria, which shall include but are not limited to:

i. areas burdened by cumulative environmental pollution and other hazards that can lead to negative public health effects;

ii. areas with concentrations of people that are of low income, high unemployment, high rent burden, low levels of home ownership, low levels of educational attainment, or members of groups that have historically experienced discrimination on the basis of race or ethnicity; and

iii. areas vulnerable to the impacts of climate change such as flooding, storm surges, and urban heat island effects.

[105] Brownsville Community Health Profiles 2018, *supra* note 14, at 2.

[106] *Id*.

[107] NYU Furman Center, *State of the City 2019: Brownsville*, https://furmancenter.org/neighborhoods/view/brownsville (last visited Aug. 26, 2021).

[108] Brownsville Community Health Profiles 2018, *supra* note 14, at 7.

[109] *See Environmental Justice Areas*, NYCDOH, https://nycdohmh.maps.arcgis.com/apps/instant/lookup/index.html?appid=fc9a0dc8b7564148b4079d294498a3cf (designating Brownsville, Ocean Hill, Bushwick, and East Williamsburg Environmental Justice Areas) (last visited Aug. 26, 2021).

[110] Ian Kumamoto, *A Fracked Gas Pipeline Is Coming to Brooklyn. Residents Are Invoking BLM to Fight It*," VICE (Oct. 15, 2020, 10:36 am), https://www.vice.com/en/article/v7m444/fracking-pipeline-brownsville-brooklyn-black-lives-matter-blm (last visited Aug. 26, 2021); "Is Your Home Bad for Your Health? Know if Mold, Roaches and Rodents Are a Problem Before Moving In," LOCALIZE (Jan. 21, 2019), https://www.localize.city/blog/is-your-home-bad-for-your-health-know-if-mold-roaches-and-rodents-are-a-problem-before-moving-in/.

[111] NEW YORK CITY DEP'T OF HEALTH, "Environment & Health Data Portal: Heat Vulnerability Index," https://a816-dohbesp.nyc.gov/IndicatorPublic/HeatHub/hvi.html#:~:text=The%20Heat%20Vulnerability%20Index%20(HVI,contribute%20to%20neighborhood%20heat%20risk.

[112] *See* NEW YORK CITY DEP'T OF HEALTH, "Environmental Justice Areas,"https://nycdohmh.maps.arcgis.com/apps/instant/lookup/index.html?appid=fc9a0dc8b7564148b4079d294498a3cf (designating Brownsville and Bushwick Environmental Justice Areas) (last visited Aug. 28, 2021).

[113] Bushwick Community Health Profiles 2018, *supra* note 14, at 2.

[114] *Id*.

[115] NEW YORK CITY DEP'T OF HEALTH, *supra* note 34.

[116] Bushwick Community Health Profiles 2018, *supra* note 14, at 7.

Justice Area and Williamsburg is a Potential Environmental Justice Area.[117] In Greenpoint, the only neighborhood on the pipeline route that is not an Environmental Justice Area, however, the New York City Housing Authority ("NYCHA") Cooper Park Houses, is adjacent to National Grid's LNG facility.[118] Greenpoint is home to one of the largest oil spills in U.S. history, as oil refineries leaked nearly 30 million gallons of oil into Newtown Creek for decades.[119] Newtown Creek is currently a Superfund site for which National Grid is partially responsible.[120]

National Grid's project is located almost exclusively in disadvantaged communities, thus disproportionately burdening these communities in contravention of the CLCPA. As such, the negative declaration should be annulled, the permit should be denied, and DEC should order that the pipeline immediately cease operation. Moreover, any decision to grant air permits to National Grid's Greenpoint facility would stand in sharp contrast to DEC's recent denial of permits to similar facilities and would constitute unlawful racial discrimination in violation of Title VI.

Sincerely,

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[117] *See* NYCDOH, *supra* note 43.
[118] Samantha Maldonado, *Judge Temporarily Freezes Plan to Truck Frigid Liquid Natural Gas to Brooklyn*, The City (Aug. 5, 2021), https://www.thecity.nyc/environment/2021/8/5/22612076/brooklyn-pipeline-national-grid-liquid-natural-gas-trucking (last visited Aug. 29, 2021).
[119] Amir Khafagy, *A Pipeline Battle in the Heart of Brooklyn*, PROSPECT (Mar. 18, 2021), https://prospect.org/environment/pipeline-battle-in-the-heart-of-brooklyn/ (last visited Aug. 27, 2021).
[120] U.S. ENVTL. PROTECTION AGENCY, *Case Summary: Settlement Reached at Newtown Creek Superfund Site*, https://www.epa.gov/enforcement/case-summary-settlement-reached-newtown-creek-superfund-site (last visited Aug. 27, 2021).

Exhibit A

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Millennium Pipeline Company, LLC **Docket No. CP16-17-000**

MOTION FOR REOPENING AND STAY OR, IN THE ALTERNATIVE, REQUEST FOR REHEARING AND STAY

Pursuant to Section 717r of the Natural Gas Act ("NGA")[1] and Rules 713 and 716 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission[2] ("FERC" or "Commission"), the New York State Department of Environmental Conservation ("NYSDEC" or "Department") respectfully makes this motion for reopening and stay or, in the alternative, rehearing and stay ("Request") of the November 9, 2016 Order Denying Motion to Dismiss and Issuing Certificate ("Order"), for the construction and operation the Valley Lateral project ("Project") (FERC Docket No. CP16-17). The Project, as proposed by Millennium Pipeline Company, LLC ("Applicant"), includes approximately 7.8 miles of new natural gas pipeline that will extend from the Applicant's existing main line pipeline north to the new CPV Valley Energy Center in the Town of Wawayanda, Orange County, New York, which is currently under construction, and for ancillary aboveground facilities.

[1] 15 U.S.C. § 717r
[2] 18 C.F.R. §§ 385.713 and 385.716

I. Statement of Issues

1. The Commission erred in not quantifying downstream greenhouse gas ("GHG") emissions in its environmental review of the Project. *See Sierra Club, et al. v. FERC*, -- F.3d --, 2017 WL 3597014 (D.C. Cir., Aug. 22, 2017).

2. In light of this oversight, and the new information provided by the D.C. Circuit's recent decision vacating the Commission's order in *Sierra Club*, the Commission should reopen the evidentiary record in this proceeding for the purpose of taking additional evidence - specifically, the quantification of GHG emissions associated with the combustion of the natural gas being transported by the Project that will be used solely at the CPV Valley Energy Center. *See* 18 C.F.R. § 385.716 and 40 C.F.R. § 1502.9(c)(ii); *see also Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989).

3. In the alternative, the Commission should grant rehearing of the Order to prepare a supplemental environmental review. *See* 18 C.F.R. § 385.713 and 40 C.F.R. § 1502.9(c)(ii); *see also Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989).

4. In either instance, the Commission should stay the Order during the pendency of review of this Request and any appeal thereof. *See* 18 C.F.R. § 385.713(e).

II. Background

On November 13, 2015, the Applicant filed an application with FERC seeking a certificate of public convenience and necessity pursuant to Section 7(c) of the NGA to construct and operate the Project. The Commission, pursuant to the NGA and the National Environmental Policy Act ("NEPA") conducted an environmental review of the Project, as proposed by the Applicant, and on May 9, 2016, issued an Environmental Assessment ("EA"). On November 9, 2016, the Commission issued the Order granting the requested certificate of public convenience and

necessity, which incorporated the findings of the EA therein and was subject to various conditions, including that the Applicant obtain certain authorizations from the Department, including (but not limited to) a Water Quality Certificate ("WQC") pursuant to Section 401 of the Clean Water Act ("CWA"). In the event that the Applicant does not obtain a WQC from the Department, all conditions of the Order cannot be satisfied and, accordingly, the Applicant would be foreclosed from commencement of the Project in any capacity.

On November 23, 2015, the Applicant submitted to the Department a Joint Application for a WQC, as well as permits under Articles 15 and 24 of the Environmental Conservation Law ("ECL") for the Project, all of which are required pursuant to Federal law, either as expressly stated in the CWA or as authorizations required by FERC in the Order under the NGA.[3] The Department found the Joint Application to be incomplete for multiple reasons, including the lack of an environmental review, which was concurrently being conducted by FERC. In addition to the lack of an environmental review, the Department also sought additional information from the Applicant in order to "complete" the application for purposes of review and determination. As of August 31, 2016 Applicant had fully responded to all of the Department's additional information requests. Because of a (i) lack of a complete environmental review for the Project and (ii) material change in applicable law (both as more particularly as discussed below), the Applicant has not received any authorizations from the Department – including a WQC. As such, all conditions of the Order have not currently been satisfied by the Applicant in order to proceed with construction of the Project.

[3] The NGA (i) expressly authorizes FERC to require such conditions as necessary (15 U.S.C. § 717f(e) (FERC may attach to its certificates "such reasonable terms and conditions as the public convenience and necessity may require")) and (ii) broadly defines the other required authorizations for a Certificate to include "any permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law." 15 U.S.C. §§ 717n(a)(1), (2).

III. FERC's Environmental Review Pursuant to NEPA is Fatally Flawed

Recently, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") reviewed a challenge by *Sierra Club* to FERC's environmental review of the Southeast Market Pipelines project (FERC Docket Nos. CP14-554-000, CP15-16-000, CP15-17-000). *Sierra Club, et al. v. FERC*, -- F.3d--, 2017 WL 3597014 (DC Cir. Aug. 22, 2017). The Southeast Market Pipelines project is comprised of three natural-gas pipelines in Alabama, Georgia, and Florida which, in part, will provide natural gas to a single power plant in Martin County, Florida. The D.C. Circuit held that the FERC's environmental review of the Southeast Market Pipelines project was deficient, finding that FERC failed to give "a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so." *Sierra Club*, -- F.3d --, at *10.

In explaining its rationale, the D.C. Circuit pointed out that an "agency conducting a NEPA review must consider not only the direct effects, but also the *indirect* environmental effects, of the project under consideration. 'Indirect effects' are those that 'are caused by the [project] and are later in time or farther removed in distance, but are still reasonably foreseeable.'" *Sierra Club*, -- F.3d --, at *8 (internal citations omitted). Any such indirect effects must be mitigated by FERC. *See* 15 U.S.C. § 717f(e); *Sierra Club*, -- F.3d --, at *10. The D.C. Circuit found that GHG emissions from the burning of natural gas that will be transported by the Southeast Market Pipelines project will contribute to climate change and are reasonably foreseeable indirect effects that must be considered by FERC in its NEPA review. *Sierra Club*, -- F.3d --, at *8. This is especially true, the Court noted, when burning the gas in particular power plants "is not just 'reasonably foreseeable,' [but] is the project's entire purpose, as the pipeline developers themselves explain." *Id.* at *8. Therefore, the Court vacated the FERC order for the Southeast

Market Pipelines project and remanded to FERC for preparation of a conforming environmental impact statement.

Here, the only stated purpose of the Project is to provide "127,200 dekatherms (Dth) per day of incremental firm natural gas transportation service from [the Applicant's] existing mainline . . . to [the CPV Valley Energy Center] . . . currently under construction." Order, para. 3. In conducting its environmental review, just as in *Sierra Club,* the Commission failed to consider or quantify the indirect effect of downstream GHG emissions that will result from burning the natural gas that the Project will transport to CPV Valley Energy Center. *See Sierra Club*, -- F.3d --, at *8 (Concluding that "at a minimum, FERC should have estimated the amount of power-plant carbon emissions that the pipelines will make possible."). Nor did the Commission include any explanation as to why such downstream GHG emissions were not quantified or considered. *See id.* While the EA makes a cursory reference to the cumulative impacts of the Project in connection with the CPV Valley Energy Center (*see* Section B.10 of the EA), it totally lacks any estimate of "the amount of power-plant emissions that the [Project] will make possible." *Sierra Club*, -- F.3d --, at *8. Thus, under the *Sierra Club* rationale, FERC's environmental review of the Project is similarly flawed and must be supplemented or repeated in its entirety. As described above, the Commission's similar flaw regarding the Southeast Market Pipelines project led to the D.C. Circuit vacating the Commission's order in that proceeding.

While the Department has continued to review the Applicant's Joint Application in good faith, the D.C. Circuit's decision in *Sierra Club* has effectively rendered the environmental review conducted for this Project incomplete and inadequate. In *Marsh v. Oregon Natural Resources Council*, the Court stated: "NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct . . . [i]t would be incongruous with this

approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval." 490 U.S. 360, 371 (1985) (internal citations omitted).

In accordance with both *Marsh* and *Sierra Club*, the Commission should grant this Request in its entirety, and supplement its environmental review of the Project to include an analysis of the downstream GHG emissions from the gas carried to CPV Valley Energy Center by the Project and combusted at the CPV facility. Absent proper NEPA review that would occur by granting this Request, FERC risks violation of the D.C. Circuit's clear directive, and its February 9, 2016 order would likely be subject to vacatur. *Sierra Club*, -- F.3d --, at *14. Comprehensive NEPA review by the Commission – whether in the form of a Supplemental Environmental Assessment or an Environmental Impact Statement – is critical for the Department to have a complete record upon which it can rely and render its decision on the Joint Application in the appropriate timeframe.[4]

[4] *See* 6 NYCRR § 621.3(a)(7)

IV. Conclusion

For the foregoing reasons, NYSDEC respectfully requests that the Commission grant reopening and stay or, in the alternative, rehearing and stay, of the Order and, pending such rehearing, including any appeals thereof, grant a stay of the Order. In the event that the Commission denies this Request, the Joint Application currently pending before the Department shall be considered denied as of August 30, 2017 for lack of a complete environmental review and a material change in applicable law.[5] As stated above, in this event the Applicant would be unable to meet all conditions set forth in the Order and, thus, would be precluded was commencement of any activities associated with the Project.

Dated: Albany, New York
August 30, 2017

Respectfully submitted,

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[5] *See* 6 NYCRR §§ 621.10(f) and 621.13(a)(4).