



August 4, 2017

Karen Gaidasz
Division of Environmental Permits, Major Projects Management
New York State Department of Environmental Conservation
625 Broadway, 4th Floor
Albany, NY 12233-1750

RE: Millennium's Valley Lateral Project application for Article 24 - Freshwater Wetlands
Article 15 - Title 5 Stream Disturbance, Section 401 - Clean Water Act - Water Quality
Certification, DEC Application ID 3-3399-00071/00001 WQC

Dear Ms. Gaidasz,

Riverkeeper, Inc. ("Riverkeeper") hereby submits its comments regarding Millennium Pipeline Company, L.L.C.'s ("Millennium" or "the Applicant") application for a Clean Water Act ("CWA") Section 401 Water Quality Certification ("WQC") for the Valley Lateral Project, Application ID No. 3-3399-00071/00001 ("WQC Application").¹ For the reasons set forth herein, the New York State Department of Environmental Conservation ("the Department," or "DEC") must deny the Millennium's CWA Section 401 Water Quality Certification.

Riverkeeper is a member-supported environmental watchdog organization dedicated to defending the Hudson River and its tributaries and to protecting the drinking water supply of nine million New York City and Hudson Valley residents. Through enforcement and litigation, policy and legislation, as well as educational outreach, Riverkeeper works to stop polluters, champion public access to the river, influence land use decisions, and restore habitat, benefiting the natural and human communities of the Hudson River and its watershed. As part of its

¹ Riverkeeper's comments also apply to Millennium's permit applications for Freshwater Wetlands (Article 24) and Title 5 Stream Disturbance (Article 15) permits. Both of these permit applications and the application for the Clean Water Act Section 401 Water Quality Certification were submitted in a combined, joint application (dated November 2015), and are subject to the same comment period. See New York State Department of Environmental Conservation (NYSDEC), Notice of Complete Application and Notice of Legislative Public Comment (July 5, 2017).

mission, Riverkeeper has consistently opposed the gas-fired CPV Valley Energy Center (“CPV” or “CPV plant”) and its related infrastructure.²

The Valley Lateral Project’s applications for Article 24- Freshwater Wetlands, Article 15 (Title 5 Stream Disturbance) and Section 401 (Clean Water Act Water Quality Certification) should all be denied, for the following reasons set forth herein: (I) The CPV/Valley Lateral Project’s applications were illegally segmented; (II) Even if Millennium's application were valid, the Valley Lateral Project would have an unacceptable impact on the wetlands, waterbodies, and ecosystems in its path; (III) The CPV and the Valley Lateral Project are unnecessary projects in light of renewable energy and efficiency availability in the region, and inconsistent with the State’s commitments to reducing greenhouse gas emissions; (IV) New York has banned high-volume hydraulic fracking within its borders out of concern for human health and the environment, and should not be using fracked gas for the same reasons.

Background

The proposed Valley Lateral Project is a 7.8 mile, 16-inch diameter pipeline, associated meter stations, a launcher facility, and a receiver facility in Orange County, New York. The Valley Lateral Project would provide natural gas to the CPV Valley Energy Center (“CPV”), a 650 megawatt gas-fired power plant currently under construction.³ The Valley Lateral Project would be the third large piece of natural gas infrastructure to begin construction in Orange County in recent years, after CPV and Millennium’s Minisink Compressor Station (“MCS”), completed in 2013.⁴

In seeking permission to build this pipeline, Millennium has demonstrated that it is reluctant go through all necessary permitting steps required by law, and instead seeks to go around the Department's permitting process whenever possible. The Federal Energy Regulatory Commission (“FERC”) issued a provision certificate of public convenience for the Valley Lateral Project on November 9, 2016, conditioned upon Millennium’s proof of having obtained

² See Letter from Kate Hudson, Watershed Program Director, Riverkeeper, Inc., to Barbara Parsons, Chair, Town of Wawayanda Planning Board (Apr. 5, 2013) (on file with Riverkeeper) (submitting comments urging the Town to not approve construction of the CPV plant and highlighting that generating power from natural gas was not necessary given the availability of renewable resources and energy efficiency).

³ Millennium Pipeline Co., L.L.C., Valley Lateral Project Joint Application for Permit, NYSDEC Freshwater Wetland Permit, Protection of Waters/Stream Disturbance, Section 404 Nationwide Permit, Section 401 Water Quality Certification (Nov. 2015) at 1-1 (“WQC Application”) *available at* http://www.millenniumpipeline.com/wp-content/uploads/2017/06/PUBLIC_Valley-Lateral_JPA_NOV-2015.pdf.

⁴ See Press Release, Millennium Pipeline, Millennium Announces Minisink Compressor Project to Increase Natural Gas Pipeline Capacity *available at* http://www.millenniumpipeline.com/documents/millennium_pr_07152011.pdf. See also http://www.millenniumpipeline.com/project_gallery.html (noting the Minisink Compressor Station was completed in 2013) http://www.millenniumpipeline.com/documents/millennium_pr_07152011.pdf.

all authorizations required by law.⁵ Millennium submitted an incomplete application in November 2015, forcing the Department to repeatedly submit requests for additional information.⁶ Once its application was finally complete in November 2016, and the Department set a timeline for review, Millennium sued DEC, alleging that DEC had waived its ability to review the application because the Department had waited more than one year to act on Millennium's application. DEC, in contrast, stated that it only needed to act within one year of receiving a *complete* application and that the Department had until August 30, 2017, to approve or deny the application.⁷

Before the case was argued, on March 9, 2017, Millennium requested permission from FERC to begin tree felling work in the path of the pipeline, falsely stating that it had all required permits, when in fact it still lacked the Section 401 permit at issue here.⁸ On March 10, 2017, the New York State Attorney General's Office sent a letter to FERC, strongly opposing Millennium's Request for Partial Notice to Proceed to start tree clearing work in the path of the pipeline.⁹ The Attorney General's office urged that "Millennium's attempt to strategically compartmentalize [permit] requirements to engineer FERC's piecemeal authorization for segmented construction activities, including this request for tree cutting, should be flatly rejected by the agency."¹⁰

The Court, on June 23, 2017, dismissed Millennium's case for lack of standing, finding no cognizable injury, and affirming that the Department may follow its stated schedule of review.¹¹ As the Department reviewed Millennium's application, Riverkeeper urges it to remain cognizant of Millennium's history of attempts to evade full and transparent review of the application here discussed.

I. The Department Must Deny the CWA 401 Water Quality Certification, because Millennium has impermissibly segmented the CPV and Valley Lateral projects

Millennium's Valley Lateral Project and CPV projects are interdependent, and have been impermissibly segmented under both New York State and Federal Law. The Department must wholistically evaluate the water quality impact of both projects before issuing a Section 401 permit to Valley Lateral Project. Millennium has demonstrated a pattern of attempts to impermissibly segment projects— an independent assessment found that Millennium continues

⁵ Millennium Pipeline Co. v. Seggos, 860 F. 3d 696, 699 (D.C. Cir. 2017).

⁶ Id.

⁷ Id.

⁸ Letter from Lisa M. Burianek, Assistant Attorney Gen., State of N.Y. Office of the Attorney Gen., to The Hon. Kimberly D. Bose, Sec'y, Fed. Energy Regulatory Comm'n (Mar. 10, 2017) (on file with Riverkeeper).

⁹ Id.

¹⁰ Id.

¹¹ Id.

to “overbuild” projects in Pennsylvania (building project segments larger than engineering dictates is necessary) so as to facilitate illegally segmentation projects moving forward.¹²

A. The CPV and Valley Lateral projects have been impermissibly segmented under New York State Law

Under New York State law, “segmentation” refers to the “division of the environmental review of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance.”¹³ When evaluating an action, “the entire set of activities or steps must be considered... whether the agency decision-making relates to the action as a whole or to only a part of it.”¹⁴ Because considering only one segment of a project at a time “is contrary to the intent of SEQRA,” an agency “must *clearly state* in its determination of significance, and any subsequent [environmental impact statement] the supporting reasons” and “must demonstrate that such review is *clearly no less* protective of the environment.”¹⁵ An “action” is “projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure;” actions “common consist of a set of activities or steps.”¹⁶

Per Saratoga Springs Preservation Foundation v. Boff, “[d]ivision is impermissible when environmental review of an action is divided into smaller stages in order to avoid the detailed review called for under SEQRA.”¹⁷ Such segmentation is allowed if the “agency conducting environmental review clearly sets forth reasons supporting segmentation and demonstrates that such a review is *clearly no less* protective of the environment” (internal quotations omitted) (emphasis added).¹⁸ In Saratoga Springs, the court found that the agency’s review segmented review of the demolition of an older building and the later construction of a new building was no less protective of the environment than the joint review would have been.¹⁹

In contrast to Saratoga Springs and Finger Lakes, the “segments” of the CPV/Valley Lateral Project are utterly interdependent. The CPV power plant currently sits unconnected to any source

¹² Richard B. Kuprewicz, Accufacts, Observations Concerning the Millennium Pipeline Eastern System Upgrade Project Proposal, FERC Docket No. CP-16-486 (March 26, 2017) (On file with Riverkeeper).

¹³ N.Y. Comp. Codes R. & Regs. Tit. 6, §617.2(ag).

¹⁴ §617.3(g).

¹⁵ §617.3(g) (emphasis added).

¹⁶ §§617.2-3.

¹⁷ 973 N.Y.S. 2d 835, 838 (N.Y. App. Div. 2013).

¹⁸ Id.

¹⁹ Id.; See also Finger Lakes Preservation Ass’n v. Town Bd., 887 N.Y.S. 2d 499 (N.Y. Sup. Ct. 2009) (holding that the enactment of a local rezoning law and the subsequent application for a wind power development was not an impermissible segmentation).

of natural gas. It is difficult to conceive that any company would construct a natural gas power plant, unconnected to any source of natural gas, and leave it there to sit inoperable. The construction of the CPV power plant and Valley Lateral Project to connect that pipeline to the preexisting Millennium natural gas pipeline are interdependent activities- one would not occur without the planned construction of the other. Independent examination of the CPV and Valley Lateral Project thus impermissibly examines the impact of a inoperable power plant and a relatively short gas pipeline, without wholistically examining the impact of CPV operating as a result of its connection to Valley Lateral Project pipeline. Without examining both projects as a whole, the true environmental impacts of the project have been masked. The segmented consideration of CPV and Valley Lateral Project fails to meet the standard of “clearly no less protective of the environment.”²⁰ In fact, it is less protective of the environment for these two project to be evaluated as if their separate impacts are no greater than the sum of their parts.

B. Millennium illegally segmented the CPV and Valley Lateral projects under National Environmental Policy Act and the Clean Water Act

Beyond the CWA permit at hand, this project is also illegally segmented under the National Environmental Policy Act (“NEPA”) and the Clean Water Act (“CWA”). A project is illegally segmented under NEPA “when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration.”²¹ Section 404 Water Quality certificates are impermissibly segmented if the cumulative effects of the waterbody crossings are not evaluated on a regional basis, such as the cumulative effects on a watershed or on an ecoregion.²²

In Delaware Riverkeeper Network v. Federal Energy Regulatory Commission, the D.C. Circuit found that Tennessee Gas Pipeline Company’s attempt to segment an overhaul of a portion of its pipelines in Pennsylvania, including multiple pipeline, compressor stations, and monitoring infrastructure, approved and constructed over the course of about three years, was an illegally segmented project.²³ The Court also noted, citing Taxpayers Watchdog v. Stanley,²⁴ that there are factors which could justify segmentation: if a project has a logical termini; if a project has substantial independent utility; and if the project does not foreclose the opportunity to consider

²⁰ Saratoga Springs Preservation Found. v. Boff, at 838.

²¹ Delaware Riverkeeper Network v. Fed. Energy Regulatory Comm’n, 753 F.3d 1304, 1314 (D.C. Circuit 2014)

²² Sierra Club v. U.S. Army Corps of Eng’rs, 803 F.3d 31, 53 (D.C. Cir. 2015).

See also 77 Fed. Reg. at 10,264, noting that per Nationwide Permit 12, “cumulative effects are evaluated on a regional basis” and that “[c]umulative effects analysis may be done on a watershed basis, or by using a different type of geographic area, such as an ecoregion.”

²³ Id. at 1316.

²⁴ Taxpayers Watchdog v. Stanley, 819 F.2d 294 (D.C. Cir. 1987).

alternatives.²⁵ The Court noted that the project in question failed two of those factors, and further cited the “physical, functional, and financial links” between the projects in questions.²⁶

As in Delaware Riverkeeper, CPV and the Valley Lateral Pipeline projects are impermissibly segmented under all four factors. First, the logical terminus of the CPV plant is with its connection to a source of power. As the CPV plant cannot operate without the buildout of additional infrastructure to commit it to a source of natural gas, the Valley Lateral Project should have been included within its logical terminus. Without the CPV plant, the Valley Lateral Project would have no logical utility—it would be a pipeline to nowhere. Likewise, CPV would have no logical utility without being connected to a source of natural gas—it would just sit there, inoperable and useless. Third, building the power plant first, without any connection to a natural gas source, could be seen as an attempt to foreclose any alternative other than building another natural gas pipeline to connect the plant to the fuel it needs to operate.

In addition, and as in Delaware Riverkeeper, CPV and the Valley Lateral Projects have “physical, functional, and financial links.” Millennium states point-blank in its WQC application that the purpose of the project is to “provide firm transportation of natural gas to the new 650 megawatt gas-powered CPV Valley Energy Center.”²⁷ The projects will be physically and functionally connected—as noted above, one would have no utility without the other. They are also financially linked, because the CPV could not operate and generate revenue without the Valley Lateral pipeline supplying it with gas.

II. Even if Millennium’s application were valid, the Department must deny the CWA 401 Water Quality Certification because the application fails to demonstrate that the Valley Lateral Project will comply with New York State Water Quality Standards

Section 401 of the Clean Water Act requires anyone applying for a federal license or permit to conduct an activity which “may result in a discharge to navigable waters” must first obtain certification that the activity complies with applicable state water quality standards.²⁸ Specifically, in order to grant a CWA § 401 WQC, the state must be able to certify that any potential discharge from the proposed project “will comply with the applicable provisions of sections [301], [302], [303], [306], and [307]” of the CWA.²⁹ Clean Water Act § 401(d) further

²⁵ 753 F. 3d at 1315. (note that a fourth factor, “does not irretrievably commit federal funds for closely related projects,” is not relevant to the facts at hand).

²⁶ 753 F. 3d at 1315-18.

²⁷ WQC Application at 1-1.

²⁸ Clean Water Act § 401(a).

²⁹ Id.

provides that a state may condition the grant of a WQC, and provides that the WQC “shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant . . . will comply with any applicable effluent limitations and other limitations, under section [301 or 302 of the CWA] . . . and with any other appropriate requirement of State law set forth into such certification.”³⁰

In accordance with New York State regulations, the Department may only issue a WQC if the agency finds that the applicant has “demonstrate[d] compliance” with applicable water quality standards.³¹ This State requirement is more stringent than federal regulations, which only require a certifying state to find that “there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards.”³² If the WQC is denied by the State, “no license or permit shall be granted.”³³ As set forth below, Millennium has failed to demonstrate that the Valley Lateral Project will comply with New York State water quality standards, and therefore the Department must deny the CWA § 401 WQC for Valley Lateral Project.

A. Applicable New York State Water Quality Standards

Construction of the Valley Lateral Project will directly disturb 13 waterbodies— seven perennial, four intermittent, and two ephemeral.³⁴ It will also directly impact 25 different wetlands.³⁵ Additionally, as these streams are in the Lower Hudson River Watershed, the Hudson, as well as the Rutgers Creek and Masonic Creek-Walkkill River drainages,³⁶ will be adversely affected by stormwater runoff and any upstream increases in turbidity due to construction activities. These waterbodies and wetlands cover a wide range of surface water classifications, and are subject to a number of water quality standards encompassing designated best usages, narrative water quality criteria, and numerical water quality criteria set forth in 6 NYCRR Parts 662, 663, 664, 665, 701, 702, 703, and 704; and are subject to the New York State Clean Water Act antidegradation policy.

1. Designated Best Uses and Classification Standards

Eight of the waterbodies (both perennial and intermittent waterbodies) to be crossed by the Valley Lateral Project are designated as Class C, with three of those waterbodies also designated

³⁰ CWA § 401(d); see also PUD No. 1 v. Wash. Dep’t of Ecology, 511 U.S. 700, 707-708 (1994).

³¹ 6 NYCRR § 608.9(a).

³² 40 CFR § 121.2(a)(3).

³³ CWA § 401(a), supra.

³⁴ WQC Application at Table 3.2.1-2.

³⁵ Id. at Table 3.3.1-2.

³⁶ Id. at 3.1

as trout waters, or Class C(T).³⁷ The best usages designated for Class C waters is fishing; “[t]hese waters shall be suitable for fish, shellfish and wildlife propagation and survival [and] for primary and secondary contact recreation.”³⁸ For the Class C(T) stream, additional protections are applied including “[a]ny water quality standard, guidance value, or thermal criterion that specifically refers to trout or trout waters applies.”³⁹ The remaining five waterbodies to be crossed by Valley Lateral Project have “N/A” listed for their designation.⁴⁰

Of the wetlands to be impacted, seven are Class II wetlands, two are Class III wetlands, and five are eligible for state regulation as Class II or III wetlands but have not yet been listed.⁴¹ Class II wetlands may be the “traditional migration habitat of an endangered or threatened animal species” or the “resident habitat of an animal species vulnerable in the State.” Class III wetlands may be the “habitat of an animal species vulnerable in the major region of the State in which it is found, or it is traditional migration habitat of an animal species vulnerable in the State or in the major region of the State in which it is found” or contain “a plant species vulnerable in the major region of the State in which it is found.”⁴² They may also “contain a plant species vulnerable in the State” or support “an animal species in abundance or diversity unusual for the county in which it is found.”⁴³ Class II wetlands provide “important wetland benefits, the loss of which is acceptable only in *very limited circumstances*” and Class III wetlands provide “wetland benefits, the loss of which is acceptable only after the exercise of caution and discernment.”⁴⁴

2. Applicable Narrative Standards

There are a number of narrative water quality standards that are applicable to the construction of the Valley Lateral Project. All waters impacted by the Project “must be suitable for fish, shellfish and wildlife propagation and survival” and “suitable for primary and secondary contact recreation.”⁴⁵ For wetlands, permits are only granted if “the proposed activity will not substantially alter or impair the functions or benefits of a wetland.”⁴⁶

3. Applicable Numerical Standards

³⁷ WQC Application at 3.3.

³⁸ N.Y. Comp. Codes R. & Regs tit. 6 § 701.8.

³⁹ 6 NYCRR § 701.25(b).

⁴⁰ WQC Application at table 3.2.1-2

⁴¹ Id. at Table 3.2.1-2; see also Millennium Pipeline, Response to 2nd Notice of Incomplete Application at Table 3.3.1-2 (Aug. 16, 2016) (on file with Fed. Energy Regulatory Comm’n.).

⁴² 6 NYCRR §664.5.

⁴³ Id.

⁴⁴ 6 NYCRR §663.5 (emphasis added).

⁴⁵ 6 NYCRR §701.8.

⁴⁶ 6 NYCRR § 663.5.

Numerical standards for dissolved oxygen (DO) also apply to the waterbodies impacted by the Valley Lateral Project. In (nontrout) Class C waters, “the minimum daily average shall not be less than 5.0 mg/L, and at no time shall the DO concentration be less than 4.0 mg/L.”⁴⁷ For Class C(T) waters, “the minimum daily average shall not be less than 6.0 mg/L, and at no time shall the concentration be less than 5.0mg/L.”⁴⁸

4. Antidegradation Policy

In accordance with the CWA, state water quality standards must also include a statewide antidegradation policy, which in New York, is set forth in the Department’s 1985 Water Quality Antidegradation Policy.⁴⁹ The Department implements the Antidegradation Policy through technology based and water quality based controls, as well as the use of classifications and water quality criteria contained in New York’s water quality standards. The Antidegradation Policy requires that existing in stream uses must be maintained and protected.⁵⁰ State antidegradation policies must be implemented in a manner “consistent with existing uses of the stream”⁵¹ and “no activity is allowable . . . which could partially or completely eliminate any existing use.”⁵² Thus, an applicant for water quality certification pursuant to CWA § 401 must demonstrate compliance with both designated and existing uses.⁵³

B. The Valley Lateral Project project fails to demonstrate compliance with New York State Water Quality Standards such that the Water Quality Certification must be denied

New York State has recently announced large investments in protecting the State’s water quality, including new initiatives to protect drinking water at its source.⁵⁴ However, the Valley Lateral

⁴⁷ 6 NYCRR § 703.3.

⁴⁸ *Id.*

⁴⁹ N.Y. State Dep’t Env’tl. Conservation, Organization and Delegation Memorandum No. 85-40, Water Quality Antidegradation Policy (Sept. 9, 1985).

⁵⁰ *Id.*; see also 40 CFR § 131.12(a)

⁵¹ *PUD No. 1 v. Wash. Dep’t of Ecology*, 511 U.S. at 719 (internal quotations omitted).

⁵² *Id.*, 511 U.S. at 718-719 (internal quotations omitted).

⁵³ Note that existing uses which are actually attained in the water body on or after November 28, 1975 must be maintained and cannot be (even partially) eliminated, whether or not such uses are included in the water quality standards as designated uses. 40 CFR §§ 131.12(a)(1), 131.3(e), and 131.10(h)(1). Existing use protections apply to all waters. *Ohio Valley Env’tl. Coalition v. Horinko*, 279 F. Supp. 2d 732, 740 (S.D. W.Va. 2003) (citing 40 CFR § 131.12(a)(1)). As the U.S. Environmental Protection Agency has observed, the antidegradation policy “protects the highest use attained in the water body on or after November 28, 1975.” *Id.*, 279 F. Supp. 2d at 751.

⁵⁴ Press Release, New York State Governor’s Office, Governor Cuomo, Signs Legislation Investing \$2.5 Billion in Clean Water Infrastructure and Water Quality Protection,, <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-investing-25-billion-clean-water-infrastructure-and-water> (Last visited August 2, 2017).

Project is likely to result in numerous potentially significant environmental impacts, including violations of the New York State water quality standards. The WQC Application suffers from an lack of sufficient detail on the specific environmental and water resources impacts such that the Department must follow its precedent laid down in the Constitution Pipeline case and *deny* the CWA § 401 WQC for the Valley Lateral Project.

1. The WQC Application lacks critical information

First, an in-depth discussion of stormwater runoff and detailed, site-specific plans for stormwater management and discussion of stormwater control—are largely missing from the WQC Application. By failing to include an in depth discussion of likely impacts from stormwater runoff and detailed, site-specific stormwater management plans, the WQC Application fails to demonstrate that the Valley Lateral Project will comply with water quality standards. As discussed below, poorly controlled stormwater runoff will result in the violation of a number of water quality standards governing turbidity, phosphorus, dissolved oxygen, best usages, and antidegradation. In order to receive certification pursuant to CWA § 401, the Applicant must demonstrate as part of the WQC Application that stormwater runoff from the Valley Lateral Project will not result in violations of New York water quality standards; they have failed to do so in this case.

As discussed above, the Department may only issue certification pursuant to CWA § 401 if it finds that the Applicant has demonstrated compliance with applicable water quality standards. The Department may not certify that the Valley Lateral Project as currently configured will comply with water quality standards based on an assumption that stormwater controls yet to be developed will ensure that the Project does not result in discharge of pollutants such as turbidity and phosphorous.

Second, the Wetlands Mitigation Plan is devoid of the necessary level of detail to ensure that appropriate precautions and restoration and mitigation measures are undertaken by the Applicant. The Valley Lateral Project, if constructed, would cross one of the most sensitive network of wetlands and water bodies in New York State. It would also run adjacent to the Ridge Preservation Areas in the Town of Wawayanda, which the DEC has listed as a Critical Environmental Area since 1993.⁵⁵ Despite the sensitive nature of the this area, the WQC is sorely lacking in detail. For example, there is no specific information as to which re-seeding mixes will be used in which areas following wetland disturbances, calling them only “native seed mix.”⁵⁶ The types of vegetation used to re-establish the impacted wetlands is crucial to determining

⁵⁵ N.Y. State Dep’t of Env’tl. Conservation, Critical Environmental Areas in Orange County, <http://www.dec.ny.gov/permits/25137.html> (Last visited Aug. 1, 2017).

⁵⁶ WQC Application at 3-27.

whether the project complies with the necessary regulations and requirements. Without this information, neither the public nor the Department has sufficient information to determine whether water quality standards will be complied with by the Valley Lateral Project.

Third, the Department's decision to deny the CWA § 401 WQC for the Constitution Pipeline Project is directly applicable to the Valley Lateral Project's WQC Application. As the Department noted when it denied the WQC for the Constitution Pipeline Project: "failure to adequately address [environmental] concerns limit[s] the Department's ability to assess the impacts and conclude that the Project will comply with water quality standards."⁵⁷ Here, the Applicant has failed to demonstrate that construction of the Valley Lateral Project will comply with New York State water quality standards, and the Department must deny the Water Quality Certification for the Project. That decision is an important and powerful precedent of the State implementing the CWA to protect New York's waterways, and because the WQC Application is similarly devoid of requisite information, and because the likely water quality impacts of the Valley Lateral Project are so similar to the Constitution Pipeline Project, that precedent should be binding here, resulting in a denial of the CWA § 401 WQC for the Valley Lateral Project.

2. If the WQC Application is Supplemented and Resubmitted, Additional Issues Regarding the Applicant's Construction and Mitigation Plans Must Be Addressed

Despite the lack of critical, and necessary, information in the WQC Application to determine compliance with State water quality standards, numerous adverse water quality-related impacts are likely to occur from the construction of the Valley Lateral Project. As submitted, the WQC Application does not demonstrate that the Project will comply with water quality standards, for the reasons set forth below, the Department's must deny the CWA § 401 WQC. If, however, the WQC Application is supplemented and resubmitted, *at a minimum*, the following adverse environmental impacts and water quality concerns must be addressed in order to demonstrate compliance with water quality standards. Should the WQC Application be amended, supplemented, and/or resubmitted, Riverkeeper reserves its right to publicly comment on that new Valley Lateral Project WQC Application at that time.

a) Increased Erosion and Pollutants from Stormwater Runoff

⁵⁷ Letter from John Ferguson, N.Y. State Dep't of Env'tl. Conservation, to Lynda Schubring, Constitution Pipeline Co., L.L.C. (Apr. 22, 2016) (denying Constitution's application for certification under Section 401 of Clean Water Act) ("Constitution Pipeline WQC Denial"), at 3, *available at* http://www.dec.ny.gov/docs/administration_pdf/constitutionwc42016.pdf.

Unless strictly controlled, stormwater runoff during construction of the Valley Lateral Project, as well as long term changes in stormwater runoff quality, quantity, velocity, and drainage patterns post-construction, will result in violations of water quality standards governing turbidity, phosphorus, dissolved oxygen, best usages, and/or the Department's Antidegradation Policy for the waterbodies directly impacted by the project construction, as well as the greater drainage and watersheds.

Stormwater runoff from the Valley Lateral Project is likely to increase turbidity. When construction activities remove vegetation and expose soils, forest canopies no longer intercept stormwater and root systems no longer hold soils in place. Construction site runoff can erode exposed soils and transport sediment to receiving waters, thereby increasing turbidity.⁵⁸ In contrast, forested lands contribute on average only one ton of sediment per acre per year, or 0.1% of the amount from construction site runoff.⁵⁹ Suspended sediment in aquatic systems degrades aquatic wildlife habitat, reduces species diversity and damages commercial and recreational fisheries.

In addition, nutrients and toxic materials, including pesticides, industrial wastes, and metals, can bind to silt and clay particles that runoff transports to waterbodies. Sediment particles also shield pathogenic microorganisms, such as *Giardia* and *Cryptosporidium*, from detection, which can result in waterborne disease outbreaks. Long-term changes in hydrology and surface drainage patterns may also result from construction activities, particularly in areas, such as steep slopes, where changes in ground cover and topography can increase stormwater runoff, reduce the ability of natural systems to filter pollutants, and permanently alter drainage patterns.⁶⁰

Increases in turbidity from stormwater runoff may also hinder best usages for all classes of waterbodies crossed by and affected by the Valley Lateral Project. The increase in suspended sediment, may degrade aquatic wildlife and fish habitat, which would impair the use of Class C and D waters for fishing and fish and wildlife propagation and/or survival.

In addition to impairing the best usages of the waterbodies impacted by project construction, any increases in turbidity as a result of stormwater runoff will violate the narrative water quality standard for turbidity, which prohibits any increase that causes "a substantial visible contrast to natural conditions." This standard applies across all classes of waterbodies affected by the Valley Lateral Project.

⁵⁸ See U.S. Env'tl. Protection Agency, Construction Site Management Measure III: Construction Activities, available at <http://water.epa.gov/polwaste/nps/czara/ch4-3a.cfm>.

⁵⁹ *Id.*

⁶⁰ N.Y. State Dep't of Env'tl. Conservation, New York Standards and Specifications for Erosion and Sediment Controls (Aug. 2005), at 1.3.

Increased turbidity also affects dissolved oxygen levels in waterbodies, potentially in contravention of state numerical standards for dissolved oxygen trout waters, as well as Class AA, A, C, and D waters generally. As set forth above, New York State has set strict numerical limitations for dissolved oxygen in nontrout and trout waters, and those limits apply to all waters impacted by the Valley Lateral Project. A rise in turbidity increases biological oxygen demand in surface waters, which in turn decreases the level of dissolved oxygen. Therefore, any increased levels of turbidity caused by stormwater runoff from the Valley Lateral Project will in turn result in decreased levels of dissolved oxygen and further harm to aquatic life.

Stormwater runoff from the Valley Lateral Project may also increase phosphorus in violation of water quality standards. Vegetation clearing during project construction and for right-of-way maintenance can cause nutrients, such as phosphorus, to be transported downstream during rain events rather than being assimilated by plants *in situ*. As discussed above, the narrative water quality standard for phosphorus prohibits any increase that “will result in growths of algae, weeds and slimes that will impair the waters for their best usage.” Growth of algae, weeds, and slimes degrades aquatic wildlife and fish habitat, which would impair the use of all impacted waters for fishing and fish and wildlife propagation and survival.

Finally, degradation of water quality that impairs existing uses will violate the Department’s Antidegradation Policy. As detailed above, stormwater runoff from the Valley Lateral Project has the potential to significantly lower water quality as a result of discharges of turbidity and phosphorus, as well as through impacts from turbidity including lower levels of dissolved oxygen, which is a serious concern for the waterbodies impacted by the Valley Lateral Project, particularly for trout waters. Degradation in water quality will likely impair existing uses including drinking water, fishing, and fish and wildlife propagation and/or survival.

b) Waterbody and Wetland Degradation due to trench construction

As the Department acknowledged in its recent denial of the WQC for the Constitution Pipeline Project, pipeline construction crossing waterbodies presents risks to those waterbodies’ sensitive and complex ecology:

The individual quality and integrity of streams form the primary trophic levels that support many aquatic organisms and enable the provision of stream ecosystems at large. Under the Project’s proposal, many of the streams to be crossed present unique and sensitive ecological conditions that may be significantly impacted by construction and jeopardize best usages. For a number of reasons, streams that support trout and other cold

water aquatic species are typically the most sensitive. The physical features of these streams include dense riparian vegetation often composed of old-growth trees which are free of invasive species and that shade and cool streams while also maintaining the integrity of adjacent banks or hillslopes. Undisturbed spring seeps provide clean, cold water and stable yet sensitive channel forms maintain the integrity of the stream itself and further preserve water quality. Biologically, these streams are vital in providing complex habitat for foraging, spawning and nursery protection by wild reproducing trout.⁶¹

The Valley Lateral Project is likely to significantly impact the streams in the right-of-way during trench crossing. For four of the waterbodies crossed by the Project, the Applicant has proposed to use dry crossing method which involves damming or diverting water from the stream, and is likely to result in numerous temporary and permanent impacts and violations of the New York State water quality regulations.⁶² Such crossings can result in large increases in downstream sedimentation, which, in this case, has the added impact of potentially impacting the Wallkill and Hudson Rivers. This construction method can also lead to lateral bank erosion and changes in stream channel morphology and stability, which can destabilize slopes and ultimately widen the stream.⁶³ Any use of in-water blasting will exacerbate these impacts, as will construction, clearing, and siting of temporary workspace within 100-foot stream buffer areas.

The Department expressed concerns about the risk of short and long-term negative impacts to stream ecology and water quality resulting from pipeline construction—all of which apply to the Valley Lateral Project—when it denied the Constitution Pipeline Project’s WQC, explaining that:

Initially, 100 percent loss of stream and riparian habitat will occur within the [right-of-way] as it is cleared and the pipeline trenched across streams. The trenching of streams will destroy all in-stream habitat in the shorter term and in some cases could destroy and degrade specific habitat areas for years following active construction. For example, highly sensitive groundwater discharge areas within streams could be disturbed, resulting in loss or degradation to critical spawning and nursery habitat. In addition, physical barriers will temporarily prevent the movement of aquatic species during active construction and changes to the stream channel will persist beyond the active

⁶¹ Constitution Pipeline WQC Denial, at 3.

⁶² Letter from Millennium Pipeline Co., L.L.C., to Karen M. Gaidasz, Project Manager, N.Y. State Dep’t of Env’tl. Conservation (Aug. 16, 2017) (responding to 2nd notice of incomplete application) at table 3.2.1-2, *available at* http://www.millenniumpipeline.com/wp-content/uploads/2017/06/PUBLIC_Valley-Lateral_Response-to-2nd-NOIA_AUG-2016.pdf.

⁶³ U.S. Env’tl. Protection Agency, Urbanization and Streams: Studies of Hydrologic Impacts, *available at* <http://water.epa.gov/polwaste/nps/urban/report.cfm>.

construction period, creating physical and behavioral barriers to aquatic organism passage.

Changes to thermal conditions will also likely occur due to clearing of riparian vegetation. Because of the need to maintain an accessible ROW, subsequent revegetation will take considerable time to replace what was lost, notably long-lived, slow growing forest trees. Loss of riparian vegetation that shades streams from the warming effects of the sun will likely increase water temperatures, further limiting habitat suitability for cold-water aquatic species such as brook trout. The loss of shade provided by mature riparian vegetation may be exacerbated in the long term by climate change and thus be more significant since small changes in the thermal loading of cold water trout streams could result in the long term loss of trout populations.

Trenching of streams can also destabilize the stream bed and such conditions can temporarily cause an exceedance of water quality standards, notably turbidity. Turbidity and sediment transport caused as a result of construction can negatively impact immediate and downstream habitat, can smother or kill sensitive aquatic life stages and reduce feeding potential of all aquatic organisms. More specifically, visual predators such as brook trout find food using visual cues. Thus, reductions in clear water conditions may reduce feeding success that can ultimately result in impacts on aquatic species' propagation and survival and corresponding reductions in the attainment of the waters' best usages.

As a result of chronic erosion from disturbed stream banks and hill slopes, consistent degradation of water quality may occur. Changes in rain runoff along ROW may change flooding intensity and alter stream channel morphology. Disturbed stream channels are at much greater risk of future instability, even if the actual work is conducted under dry conditions; long ranging stream erosion may occur up and downstream of disturbed stream crossings well beyond the time of active construction. This longer term instability and erosion can result in the degradation of spawning beds and a decrease in egg development. The loss of spawning potential in some cold headwater streams may significantly reduce the long-term viability of these streams to support trout.⁶⁴

Similarly, construction of the Valley Lateral Project is likely to also degrade the wetlands and streams it crosses due to trench excavation, blasting, and disturbance of 100-foot buffer areas. As an essential component of ecological systems, wetlands perform a number of important functions, especially critical in areas like Hudson River watershed. Wetlands serve as water

⁶⁴ Constitution Pipeline WQC Denial, at 4-5.

storage resource, absorbing and retaining flood and storm waters, ground water, and aquifers that may feed local drinking water supplies. Wetlands also perform crucial filtration functions, trapping pollutants and nutrients such as nitrogen and phosphorous and assimilating them in wetland vegetation. In addition, wetlands are biologically productive resources with abundant vegetation and shallow waters that provide diverse habitats for fish and wildlife species to flourish.⁶⁵

The Applicant seeks to cross numerous wetlands— by using construction methods that involve direct wetland disturbance: open cut trenching through the sensitive wetlands to install the new pipe.⁶⁶ Such construction will result in loss of wetland vegetation and biota and can hinder critical wetland functions including filtration, storage, and recharge. Any blasting in wetlands is likely to exacerbate these already serious impacts.

Construction and vegetation clearing within the wetland buffers can also impede wetland functions since these areas are important transitional areas that intercept stormwater from upland habitat before it reaches wetlands or other aquatic habitat. Other water quality benefits of wetland buffer zones that will be lost by disturbances associated with the Valley Lateral Project include reducing thermal impacts (shade), nutrient uptake, providing infiltration, reducing erosion, and restoring and maintaining the chemical, physical, and biological integrity of water resources.⁶⁷

c) Hydrostatic Test Water Discharge

The Applicant plans to use 400,000 gallons of water for hydrostatic testing, or testing of pipeline integrity before entry into service.⁶⁸ The WQC Application does not state the source for this water, only that it will be “commercially available,” while still reserving that it may ultimately use surface water.⁶⁹ After use, the Applicant will discharge the remaining hydrostatic test water into upland areas as specified in the WQC Application, avoiding wetlands and riparian areas “to the extent practicable.”⁷⁰

⁶⁵ See USEPA, Functions and Values of Wetlands, *available at* <http://water.epa.gov/type/wetlands/outreach/upload/functions-values.pdf>.

⁶⁶ Letter from Millennium Pipeline Co., L.L.C., to Karen M. Gaidasz, Project Manager, N.Y. State Dep’t of Env’tl. Conservation (Aug. 16, 2017) (responding to 2nd notice of incomplete application) at table 3.3.1-2, *available at* http://www.millenniumpipeline.com/wp-content/uploads/2017/06/PUBLIC_Valley-Lateral_Response-to-2nd-NOIA_AUG-2016.pdf.

⁶⁷ See U.S. Env’tl. Protection Agency, Aquatic Buffer Model Ordinance, *available at* <http://water.epa.gov/polwaste/nps/moll.cfm>.

⁶⁸ WQC Application 3-13.

⁶⁹ *Id.*

⁷⁰ *Id.*

Hydrostatic test water that is discharged after use will contain any contaminants present in the original water, as well as any chemical additives used during hydrostatic testing. Although the WQC Application does not discuss using chemicals for testing, avoiding such use is not guaranteed or required by any permit. In addition to the potential for discharge of any contaminants in the test water, the post-testing discharge itself may result in erosion and channelization at the point of discharge, potentially increasing sediment runoff and turbidity in receiving waters.

The Applicant also plans to discharge water that accumulates in open trenches during pipeline construction.⁷¹ According to the WQC Application, the Applicant will discharge this water – which will be heavily laden with sediment – into “an energy dissipation/filtration dewatering device, such as a hay bale structure or filter bag,” down-gradient from the trench.⁷² Any discharged trench water that is not infiltrated and is carried back into receiving waters will increase turbidity.

Increases in turbidity may impair best usages for all classes of waterbodies impacted by the Valley Lateral Project and violate the narrative water quality standard for turbidity, which prohibits any increase that causes “a substantial visible contrast to natural conditions.” Increases in turbidity also affect dissolved oxygen levels in waterbodies, potentially in contravention of state numerical standards for dissolved in trout waters, as well as all waters impacted for the Project. Discharge of contaminants and/or chemical additives in the hydrostatic test water may also violate narrative standards governing the presence of toxic or other deleterious substances, which are prohibited “in amounts that will adversely affect the taste, color or odor thereof, or impair the waters for their best usages.” Degradation of water quality that impairs existing uses will also violate NYSDEC’s Antidegradation Policy.

Discharge of hydrostatic test water and trench dewatering must occur well outside of wetland and riparian areas, and must not be allowed within construction workspace or 100 feet of wetlands and waterbodies. The use of chemical additives during and following hydrostatic testing must also be explicitly prohibited, and must apply to the entire project area.

C. The cumulative impacts of the Valley Lateral Project, CPV power plant and related projects in the watershed also warrant denial of the CWA § 401 Water Quality Certification

⁷¹ WQC Application 2-10.

⁷² Id.

The cumulative effects of a waterbody crossings must be evaluated for regional— ie, watershed or ecoregional— effects before a Section 404 Water Quality certificate can be issued.⁷³ The Department recently explained how the combined effects of multiple stream crossings on a single waterbody and its tributaries can have significantly different impacts than a single crossing.⁷⁴ In that matter, the Department denied the Section 401 WQC for the Constitution Pipeline because, *inter alia*, the applicant failed to provide the Department with sufficient information on cumulative impacts of the proposed project and route alternatives that might avoid some of the impacts. Because the Valley Lateral Project, when considered together with the CPV power plant and Minisink Compressor Station, has a cumulative impact on the sensitive Wallkill River and Hudson River watersheds, the Applicant has failed to demonstrate compliance with water quality standards, including designated and existing uses. Thus, the WQC for the Valley Lateral Pipeline must be denied.

As discussed above, the Valley Lateral Pipeline is the third of three major, inexorably linked projects within the watershed, along with the CPV power plant and the Minisink Compressor Station.⁷⁵ The cumulative impacts of these projects—or more correctly, different segments of the same pipeline project—exacerbate the water quality impacts of each segment, although the impacts of each leg individually are enough to impair water quality for the impacted resources. Riverkeeper previously commented at length that these projects constitute illegal segmentation for purposes of NEPA, and that their adverse environmental impacts must be considered together. The same is true for the Department’s consideration under Section 401 of the Clean Water Act—the Applicant must demonstrate the Valley Lateral Project— both on its own *and together with the CPV Power Plant and the Minisink Compressor Station*— complies with all applicable New York State water quality standards. The Applicant has failed to do so and as such the Department must deny its CWA § 401 WQC.

Indeed, the Department recognized the importance of considering cumulative impacts as part of the CWA § 401 WQC process, when it denied the WQC for the Constitution Pipeline Project:

Cumulatively, within such areas, as well as the [right-of-way] generally, impacts to both small and large streams from the construction and operation of the Project can be profound and could include loss of available water body habitat, changes in thermal conditions, increased erosion, and creation of stream instability and turbidity.

⁷³ See *Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31, 53 (D.C. Cir. 2015), *supra*.

See also 77 Fed. Reg. 10,184, 10,264 (Feb. 21, 2012) noting that per Nationwide Permit 12, “cumulative effects are evaluated on a regional basis” and that “[c]umulative effects analysis may be done on a watershed basis, or by using a different type of geographic area, such as an ecoregion.”

⁷⁴ See *Constitution Pipeline WQC Denial*, at 3-5.

⁷⁵ See discussion of illegal segmentation of the Lateral Valley Pipeline and the CPV power plant, *supra*.

* * *

Impacts to these streams are exacerbated as the cumulative negative effects of multiple crossings are added . . . Many of these streams are part of tributary networks that are dependent upon the contributing quality of connected streams to supply and support the physical and biological needs of a system. This is especially true in supporting the viability of wild trout populations.

* * *

Finally, at the landscape level, impacts to streams from the [right-of-way] construction are analogous to the cumulative impacts from roads. There is an established negative correlation between road miles per watershed area and stream quality. Thus, increases in the crossings of streams by linear features such as roads and the pipeline [right-of-way] can have cumulative impacts beyond the individual crossings. [High ratios of crossings per square mile] may cause a permanent degradation in stream habitat quality and likewise affect associated natural resources, including aquatic species' propagation and survival.⁷⁶

The Department also discussed “the potential for cumulative adverse impacts from [fracking infrastructure...][which] could affect community character and wildlife habitat from the network of pipelines needed to facilitate high-volume hydraulic fracturing activities” when it banned fracking in the state in 2015.⁷⁷

Thus, as the Department did with respect to the Constitution Pipeline Project, it must also deny the CWA § 401 WQC for the Valley Lateral Project: the cumulative impacts of the project itself, as well as when coupled together with the impacts from CPV power plant and Minisink Compressor Station, are too great, and the Applicant cannot demonstrate compliance with the water quality standards.

III. The CPV and the Valley Lateral Project are unnecessary projects in light of the renewable energy potential in the State, and their approval would undermine the State's ability to meet its greenhouse gas emission targets.

First, the energy that CPV and Valley Lateral Project will provide is not necessary and could be supplanted entirely with renewable energy and energy efficiency. CPV and Valley Lateral Project are not necessary to generate the energy that New York needs, even in the face of the

⁷⁶ Constitution Pipeline WQC Denial, at 3-5.

⁷⁷ *Id.* at 27-28.

imminent closure of Indian Point Energy Center. Indian Point's replacement energy can be entirely replaced by more efficient energy use alone by 2023, and alternatively with combinations of energy efficiency and renewable energy production.⁷⁸ Furthermore, wind, water, and solar energy generation could meet all of New York's energy needs by 2050 for all purposes— electricity generation, transportation, heating and cooling, and industrial uses.⁷⁹ Neither cited analysis indicates any need whatsoever for a new gas-fired power plant nor for additional natural gas infrastructure in this state.

Second, approval of the Valley Lateral Project is in direct opposition with New York State's goals to reduce greenhouse gas emissions. In 2015, Governor Cuomo signed the Under 2 MOU, reaffirming the state's commitment to reducing greenhouse gas emissions by 80% below 1990 levels by the year 2050, pledging to reduce the state's green emissions 40% by 2030, and directing state agencies to work with other states to develop a broader North American carbon market.⁸⁰ In the press release, Cuomo said that New York was "demonstrating the leadership and focus that this issue demands." In 2016, Governor Cuomo established the Clean Energy Standard, which allowed the New York State Public Service Commission's to mandate and implement a plan that 50% of New York's electricity to come from renewable energy sources by 2030.⁸¹ In 2017, New York became a member of the U.S. Climate Alliance, a bipartisan coalition of states committed to reducing greenhouse gas emissions consistent with the goals of the Paris agreement.⁸² New York also signed the "We Are Still In" pledge this year, a commitment of hundreds of U.S. states, localities, universities, and businesses who pledge to "pursue ambitious climate goals...to ensure that the U.S. remains a global leader in reducing [greenhouse gas] emissions."⁸³

The DEC's approval of the Valley Lateral Project would jeopardize all of those commitments. If the Valley Lateral Project is completed, the CPV plant will raise New York's greenhouse gas emissions and will stand in the way of renewable energy production. Allowing this pipeline and

⁷⁸ Fagan et al, Clean Energy for New York: Replacement Energy and Capacity Resources for the Indian Point Energy Center Under New York Clean Energy Standard (CES), (Feb. 2017) at 3, *available at* <http://www.synapse-energy.com/sites/default/files/Clean-Energy-for-New-York-16-121.pdf>

⁷⁹ The Solutions Project, 100% New York, <http://thesolutionsproject.org/infographic/#ny> (last visited August 2, 2017).

⁸⁰ Press Release, New York State Governor's Office, Governor Cuomo, Joined by Vice President Gore, Announces New Actions to Reduce Greenhouse Gas Emissions and Lead Nation on Climate Change, <https://www.governor.ny.gov/news/governor-cuomo-joined-vice-president-gore-announces-new-actions-reduce-greenhouse-gas-emissions> (Last visited July 31, 2017).

⁸¹ Press Release, Governor Cuomo Announces Establishment of Clean Energy Standard that Mandates 50 Percent Renewables of 2030, <https://www.governor.ny.gov/news/governor-cuomo-announces-establishment-clean-energy-standard-mandates-50-percent-renewables>

⁸² U.S. Climate Alliance, <https://www.usclimatealliance.org/> (last visited 7/31/2017)

⁸³ We Are Still In, <http://wearestillin.com/#section2>, (Last visited July 31, 2017).

plant to operate will lock in greenhouse gas emissions for the entire life cycle of the plant, jeopardizing New York's status as a leader on climate change and greenhouse gas emissions reduction. In short, issuing the permit to allow the pipeline to operate would be the opposite of "demonstrating the leadership and focus that this issue demands." Instead, it would be a conscious decision on behalf of New York state's government to undermine its own commitments and shirk its responsibility as an international leader on climate change.

Indeed, the Department recently recognized unacceptable risk that development of natural gas infrastructure poses to reducing greenhouse gas emissions, in its finding statement banning fracking in the state:

"While natural gas may serve as a "bridge" or "transitional fuel" towards greater utilization of non-emitting clean energy sources, increased natural gas development could extend the use of fossil fuels, or delay the necessary deployment of clean energy."⁸⁴

* * *

The Department notes that, regardless of the magnitude of methane emissions from natural gas infrastructure, the consumption of fossil fuel, including natural gas, to produce energy contributes to climate change. Additionally, the increased availability of low-cost natural gas has the potential to undermine the deployment of various types of renewable energy and energy efficiencies, thereby suppressing investment in and use of these clean energy technologies.⁸⁵

IV. New York has banned high-volume hydraulic fracking within its borders out of concern for human health and the environment, and should not be expanding fracked-gas infrastructure for the same reasons.

The CPV and Valley Lateral Project projects blatantly contradict Governor Cuomo's explicitly stated goal of "investing in the fight against dirty fossil fuels and fracked gas from neighboring states."⁸⁶ Governor Cuomo issued a moratorium on fracking in 2011,⁸⁷ and New York State

⁸⁴ N.Y. State Dep't of Env'tl. Conservation, Findings Statement, Final Supplemental Generic Env'tl. Impact Statement on the Oil, Gas and Solution Mining Regulatory Program: Regulatory Program for Horizontal Drilling and High-Volume Hydraulic Fracturing to Develop the Marcellus Shale and Other Low-Permeability Gas Reservoirs, (June 2015)("DEC Fracking Findings Statement") at 9, *available at* http://www.dec.ny.gov/docs/materials_minerals_pdf/findingstatehvhf62015.pdf.

⁸⁵ *Id.* at 18.

⁸⁶ N.Y. State Governor's Office, 2017 State of the State, at 57-58, *available at* <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2017StateoftheStateBook.pdf>

⁸⁷ DEC Fracking Findings Statement at 6.

formally banned fracking in 2015.⁸⁸ In its finding statement, which ultimately banned fracking within the state, the Department recognized that fracking infrastructure, including pipelines and compressor stations, could have unjustifiably negative impacts on human health and the environment, and discussed those impacts at length.

The Department recognized throughout its statement that natural gas pipelines and related infrastructure would create adverse impacts to ecosystems, wildlife, and other state natural resources:

In addition to the direct impacts from each phase of well development, the authorization of high-volume hydraulic fracturing would also induce growth in the natural gas industry. This growth would in turn generate the construction of *natural gas pipelines, gathering lines, compressor stations and other associated infrastructure beyond the well pad*. This ancillary activity has the potential to create adverse impacts to state-owned lands, freshwater wetlands, forests and other habitat due to fragmentation, streams where pipelines cross, air resources (from compressor stations), visual resources, agricultural lands, threatened and endangered species, and the spread of invasive species.⁸⁹

* * *

[S]ignificant adverse impacts to ecosystems and wildlife would occur during the construction and operation of associated infrastructure *such as utility corridors, gas pipelines, and compressor stations*... High-volume hydraulic fracturing operations have the potential to industrialize rural areas of New York, which would result in serious and unavoidable impacts to habitats (e.g., fragmentation, loss of connectivity, degradation, nighttime lighting and noise), species distributions and populations, and overall natural resource biodiversity. Habitat loss, conversion, and fragmentation (both short-term and long-term) would result from land grading and clearing, and the *construction of well pads, roads, pipelines, and other infrastructure associated with gas drilling*.⁹⁰

* * *

The construction of *natural gas pipelines, compressor stations and other associated infrastructure* has the potential to create adverse impacts to state-owned lands, freshwater wetlands, forests and other habitat due to fragmentation, streams where pipelines cross,

⁸⁸ Glenn Coin, New York State Officially Bans Fracking, Syracuse.com (June 29, 2015), http://www.syracuse.com/news/index.ssf/2015/06/new_york_officially_bans_hydrofracking.html

⁸⁹ DEC Fracking Findings Statement at 10 (emphasis added).

⁹⁰ *Id.* at 16 (emphasis added).

air resources (from compressor stations), visual resources, agricultural lands, and threatened and endangered species, and to contribute to the spread of invasive species.⁹¹

The Department also highlighted the particular risks that fracking activities, including their infrastructure, pose to agricultural land:

[A]gricultural land could be lost due to high- volume hydraulic fracturing activities, as well as adverse impacts to organic agriculture. The potential significant adverse environmental impacts relating to agricultural land must be considered within the framework of the goals of Article 14, Section 4 of the New York State Constitution, which specifically states that the policy of the state is to “encourage the development and improvement of its agricultural lands for the production of food and other agricultural products [which]...shall include the protection of agricultural lands.”⁹²

Those risks are particularly pertinent to the Valley Lateral Pipeline, which would be located in Orange County, the county generating the highest agricultural sales in the entire lower Hudson Valley.⁹³ Millennium’s WQC application states that the project’s preferred alternative route would impact 63.1 acres of agricultural land during construction,⁹⁴ while its Environmental Assessment estimated 71.3 acres of impacted agricultural land.⁹⁵ 62.5 percent of land impacted by the the pipeline’s construction, and 70.8 percent impacted by its operation, would take place in active agricultural land.⁹⁶

The Department also expressed concerns about the additional truck traffic that construction associated with fracking infrastructure, including pipelines, compressor stations, and power plants, would generate, and the cumulative effects that those trucks would have on local environments and air quality:

The cumulative impact of this substantial amount of truck traffic has the potential to result in significant adverse impacts on local roads and, to a lesser extent, state roads where truck traffic from this activity is concentrated... such traffic has the potential to damage roads. In addition to road damage, increased truck traffic proportionally increases

⁹¹ *Id.* at 27 (emphasis added).

⁹² DEC Fracking Findings Statement at 23.

⁹³ Office of the State Comptroller, The Importance of Agriculture to the New York State Economy (March 2015) at 3 available at http://www.osc.state.ny.us/reports/importance_agriculture_ny.pdf.

⁹⁴ Millennium Pipeline, Response to 2nd Notice of Incomplete Application at Table 4 (Aug. 16, 2016) (on file with Fed. Energy Regulatory Comm’n.).

⁹⁵ Millennium Pipeline Co., L.L.C., Valley Lateral Project Environmental Assessment (May 2016) at Table B-7 (on file with Fed. Energy Regulatory Comm’n.).

⁹⁶ *See id.* (stating the construction total in agricultural land as 63.10 acres and the operational total in agricultural land as 31.09 acres, compared to total acres across all land types as 101.00 and 43.94 acres, respectively).

the number of vehicle breakdowns and vehicle accidents, and increases the risk of spills of potentially hazardous materials. These increased risks correspondingly increase the risk of and frequency of public health impacts. Increased truck traffic also creates potential adverse impacts related to noise and air emissions... it could also have ancillary community character impacts on surrounding communities, some of which may have decided to limit or ban high-volume hydraulic fracturing operations through local law.”⁹⁷

Should the Valley Lateral Project be approved and the CPV plant come into operation, a community group estimates that there would be 840 to 1680 tanker trucks traveling to and from the site each year.⁹⁸

The Department also expressed serious concerns about the multiple, adverse public health outcomes associated with fracking, including worsened air quality, the potential for soil and water contamination, changes to community character, and climate change impacts, as well as the serious health impacts which burden people living near fracking infrastructure. All of those impacts, quoted below, also apply to fracking infrastructure including pipelines, power plants and compressor stations:

[Fracking] impacts may be associated with adverse public health outcomes and include: [1] air impacts that could affect respiratory health due to increased levels of particulate matter, ozone, diesel exhaust, or volatile organic compounds; [2] surface spills from use, transport or storage of chemicals or wastewater potentially resulting in soil, groundwater, and surface water contamination; [3] surface water contamination resulting from inadequate wastewater treatment; [4] community character impacts such as increased vehicle traffic, road damage, noise, odor complaints, and increased demand for housing and medical care; and [5] climate change impacts due to methane and other volatile organic compound releases to the atmosphere and their resulting public health impacts.⁹⁹

* * *

Several recently published reports cited in the NYSDOH Public Health Review present data from surveys of health complaints among residents living near high-volume hydraulic fracturing activities [including pipelines and compressor stations]. Commonly reported symptoms include skin rash or irritation, nausea or vomiting, abdominal pain, breathing difficulties or cough, nosebleeds, anxiety/stress, headache, dizziness, eye

⁹⁷ Id. at 21.

⁹⁸ Protect Orange County, CPV Fact Sheet,

<http://www.blog.protectorangecounty.org/the-science/fact-vs-fracked-fiction/>, (last visited August 2, 2017).

⁹⁹ DEC Fracking Findings Statement at 25

irritation, and throat irritation in populations within close proximity...¹⁰⁰

The Department also expressed concerns about the high level of radioactivity found in gas from the Marcellus Shale—the source of the gas that the Valley Lateral Project would carry- and its potential risk to human health and the environment:

Gamma ray logs from deep wells drilled in New York over the past several decades show the Marcellus Shale to be higher in naturally-occurring radioactive material (NORM) than other bedrock formations including other potential reservoirs that could be developed by high-volume hydraulic fracturing... the build-up of NORM in pipes and equipment has the potential to cause a significant adverse impact because it could expose workers handling pipes, for cleaning or maintenance, to increased radiation levels. Disposal of this equipment also may cause significant adverse impacts.¹⁰¹

After an exhaustive review, the Department determined that the risks associated with fracking—including the build-out of fracking-related infrastructure- were too great for the State to bear. There is no new evidence that suggests exposure to fracking infrastructure and the burning of fracked gas from the Marcellus shale has become safer. In fact, residents living near the Minisink Compressor station are already reporting negative health impacts from the station's emissions, including nosebleeds, headaches and skin rashes,¹⁰² leading at least one Minisink family to abandon their home.¹⁰³

V. Conclusion

In conclusion, the Applicant has impermissibly segmented its projects in Orange County, which should render its application invalid. The Applicant failed to demonstrate compliance with New York State water quality standards and therefore the Department must deny the WQC for the Valley Lateral Project. Beyond that, the CPV and Valley Lateral Projects are untenable in light of New York's commitment to expanding renewable energy, reducing greenhouse gas emissions, and protecting New Yorker's health and environment from the adverse impacts of fracking.

On behalf of our thousands of members, thank you for considering our comments on the Clean Water Act Section 401 Water Quality Certification and permit applications for the proposed

¹⁰⁰ *Id.* at 26

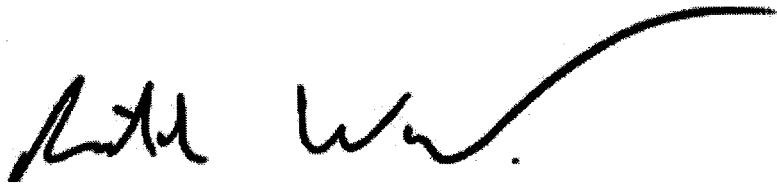
¹⁰¹ *Id.* at 15, 19.

¹⁰² Southwest Pennsylvania Environmental Health Project, Summary of Minisink Monitoring Results, at 1, *available at* <http://www.environmentalhealthproject.org/resources/17/click/5>.

¹⁰³ Jessica Cohen, Home Sick from Toxic Emissions, UTNE Reader, <http://www.utne.com/environment/home-sick-from-toxic-emissions-zm0z15wzdeh?collection=1> (last visited August 2, 2017).

Valley Lateral Project. Please do not hesitate to contact me if you have any questions. I can be reached via phone at (914) 478-4501, or email at rwebster@riverkeeper.org.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard Webster", with a long, sweeping flourish extending to the right.

Richard Webster, Esq.
Legal Director of Riverkeeper, Inc.