

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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August 30, 2017

Ms. Georgia Carter
Vice President and General Counsel
Millennium Pipeline Company LLC
One Blue Hill Plaza, 7th Floor
PO Box 1565
Pearl River, NY 10965

Mr. John Zimmer
Pipeline / LNG Market Director
TRC Environmental Corp.
650 Suffolk St., Suite 200
Lowell, MA 01854

Re: 3-3399-00071/00001 – Valley Lateral Project
Notice of Decision

Dear Ms. Carter and Mr. Zimmer:

On November 23, 2015, Millennium Pipeline Company LLC (Millennium) submitted to the New York State Department of Environmental Conservation (Department) the above-referenced Joint Application for the Valley Lateral Project (Project). The Joint Application was for a Water Quality Certificate (WQC) pursuant to Section 401 of the Clean Water Act, as well as permits pursuant to Environmental Conservation Law (ECL) Article 15, Protection of Waters and Article 24, Freshwater Wetlands.

On August 30, 2017, the Department submitted to the Federal Energy Regulatory Commission (FERC) a Motion for Reopening and Stay or, in the Alternative, Request for Rehearing and Stay with regard to the Project (Request) in relation to FERC Docket No. CP 16-17. A copy of the Request is attached to this Notice as Exhibit A. In accordance with 6 NYCRR Part 621, the Department provides this Notice to Millennium that Millennium's Joint Application for the Project is deemed denied as of the date of this Notice, consistent with the Department's Request to FERC. As required by 6 NYCRR § 621.10, a statement of the Department's basis for this Decision is provided below.

Pursuant to 6 NYCRR § 621.10(f), “[a]n application for a permit may be denied for failure to meet any of the standards or criteria applicable under any statute or regulation pursuant to which it is sought, including applicable findings required by article 8 of the ECL and its implementing regulations in Part 617 of this Title” Here, FERC's environmental review of the Project, conducted pursuant to the National Environmental Policy Act (NEPA), takes the place of an

environmental review conducted under the State Environmental Quality Review Act (ECL Article 8). Based on the recent decision by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Sierra Club, et al. v. FERC*, -- F.3d--, 2017 WL 3597014 (D.C. Cir., Aug. 22, 2017), as described in more detail in Exhibit A, FERC's environmental review of the Project is inadequate and deficient.

In addition, pursuant to 6 NYCRR § 621.10(f), an application for a permit may be denied "for any of the reasons set forth in section 621.13(a)(1)-(6) of this Part." Among these reasons is "newly discovered material information or a material change in environmental conditions, relevant technology or *applicable law or regulations* . . ." (emphasis added). Here, as described in the attached Request (Exhibit A), there has been a material change in applicable law during the course of the Department's review of the Joint Application. Namely, as further explained in Exhibit A, the *Sierra Club* decision found that FERC failed to consider or quantify the downstream greenhouse gas emissions from the combustion of the natural gas transported by the Project as part of NEPA review. Here, just as in *Sierra Club*, FERC failed to consider or quantify the indirect effects of downstream GHG emissions in its environmental review of the Project that will result from burning the natural gas that the Project will transport to CPV Valley Energy Center.

For the foregoing reasons, and in the event that FERC denies the Department's Request, Millennium's Joint Application for the Project is deemed denied as of the date of this Notice due to (i) the lack of a complete environmental review for the Project and (ii) a material change in applicable law (the D.C. Circuit's decision in *Sierra Club*). The Department reminds Millennium that, during the pendency of FERC's review of the Department's Request, commencement of any and all activities related to the construction of the Project are currently prohibited.

Sincerely,



Thomas Berkman
Deputy Commissioner and General
Counsel

cc: FERC
Karen Gaidasz, NYSDEC

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 Commission² (“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

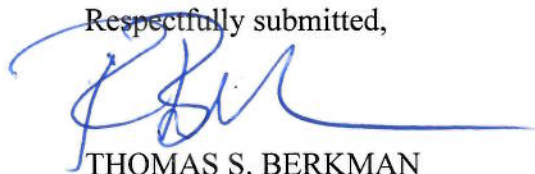
⁴ See 6 NYCRR § 621.3(a)(7)

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).