



August 4, 2017

Karen Gaidasz, Project Manager
NYSDEC-Division of Environmental Permits
625 Broadway, 4th floor
Albany, New York 12233

Re: Valley Lateral Project, Application ID 3-3399-00071/00001
Request to deny Applicant water quality certification under section 401 of the Clean Water Act

Dear Ms. Gaidasz,

We write on behalf of the Natural Resources Defense Council (NRDC) to request that the New York State Department of Environmental Conservation (DEC) deny federal Clean Water Act Section 401 certification to Millennium Pipeline Company's (collectively, "Applicant") Valley Lateral Project ("Project"), Application ID 3-3399-00071/00001. The basis for our request is that Applicants have failed to demonstrate that the Project complies with state water quality standards.

In particular, Applicants have failed to show that the Project complies with 6 NYCRR Part 703, including, but not limited to, standards for turbidity and thermal impacts 6 NYCRR § 703.2, and 6 NYCRR Part 701 (best usages). Significantly, however, this pipeline project should not be considered in isolation as it is part of the Eastern System Upgrade Project, which would transport fracked gas from the Millennium Pipeline to the Competitive Power Venture's (CPV) Valley Energy Center. When considering the cumulative impacts of the Valley Lateral Project, DEC should also consider the cumulative impacts of the entire proposed Eastern System Upgrade Project as described by DEC's own website,¹ and the CPV Valley Energy Center, on New York State water quality.

This letter contains three parts. First, this letter summarizes the Valley Lateral Project and its companion projects within the Eastern Systems Upgrade Project and CPV Systems. Second, it outlines the statutory framework applicable to the 401 water quality certification determination. Finally, it explains why DEC should deny 401 certification to the Valley Lateral Project. In addition to detailing how the Applicants have failed to demonstrate that the Pipeline will meet state water quality standards, we also explain that denial by the agency would be consistent with DEC's previous analyses of water quality impacts on pipelines. We also document the widespread opposition to this project throughout the state.

¹ DEC, *Eastern System Upgrade Project*, <http://www.dec.ny.gov/permits/110557.html>.

FACTUAL BACKGROUND

As the Department knows, the proposed Valley Lateral Project includes the construction of 7.9 miles of new, 16-inch diameter natural gas pipeline extending from Millennium's existing pipeline system in Minisink, to the CPV Valley Energy Center in Orange County, New York. According to Millennium, the purpose of the Project is to transport 130,000 dekatherms per day (Dth/d) of natural gas to power the 650-megawatt gas-powered CPV Valley Energy Center. The Project would also consist of additional infrastructure, including a tap valve, a pig launcher and receiving facility, a new delivery meter station, and associated piping. The construction and maintenance of the Project would also require the construction of new roads and pipeyards. Notably, the Project is just one segment of the larger Eastern System Upgrade Project, which includes the construction of a new compressor station in Sullivan County, as well as additional infrastructure and upgrades to existing facilities.

The Project's construction would cross 19 waterbodies, seven of which are class C fisheries and 2 are class C(T). The Project would also cross a total of 23 wetlands totaling almost 2 acres. Additionally, the Project would cross four principal aquifers that provide drinking water to municipal water systems, and be within 3 miles of public water supply wells in Unionville and less than 1 mile in Wawayanda. Millennium proposes to cross waterbodies using open-cut "trenching," dam-and-pump, flume crossing and horizontal directional drilling (HDD) methods.

Given the Project's proximity to municipal water systems, any impacts to water quality have the potential to impair drinking water supplies for New Yorkers living in Orange County and beyond.

On April 30, 2015, Millennium submitted an application with the Federal Energy Regulatory Commission (FERC) to commence the pre-filing review process, and in November 2015, the Applicants applied to DEC for certification under section 401 of the Clean Water Act, which DEC subsequently rejected because it was incomplete. In July, 2017, DEC issued a notice of complete application.

DEC SHOULD DENY 401 CERTIFICATION TO THE VALLEY LATERAL PROJECT

1) The Construction of Natural Gas Pipelines Harm Water Quality

Every step required in pipeline construction has the potential to impair water quality. And while the environmental impacts of pipelines begin at construction, they can persist for years after construction is complete.² Moreover, the many individual effects of pipeline construction can have a cumulative effect that is greater than the sum of its parts.

² See, e.g., Scott Reid & Paul Anderson, *Effects of Sediment Released During Open-Cut Pipeline Water Crossing*, 24 Can. Water Resources J. 235, 243 (1999), available at <http://dx.doi.org/10.4296/cwrj2403235> (last visited Sept. 13, 2016) [hereinafter "Reid"] (citing studies that document changes to nearby stream morphology as many as four years after construction had been completed); Lucie Levesque & Monique Dube, *Review of the Effects of In-Stream Pipeline Crossing Construction on Aquatic Ecosystems*, 132 *Envtl. Monitoring & Assessment* 395, 399 (2007). [hereinafter "Levesque"] (citing studies that document changes to aquatic organisms as many as four years after construction was completed).

a) Construction Activity Generally

The construction of any pipeline requires that the entire right-of-way be cleared of trees and other significant vegetation. The land within the right-of way, including stream banks, must be excavated to lay the pipe, then backfilled. Work staging areas must also be constructed, often along the banks of the stream crossings, and access roads must be built, requiring further clearing, grading, and compacting of soil. For this Project, over 117 acres of land will be cleared for the Project's construction, including more than 53 acres of land permanently cleared for operation.³

These construction activities significantly degrade water quality. To begin with, when vegetation, which ordinarily holds soil in place and absorbs precipitation, is removed, the volume and intensity of stormwater runoff increases.⁴ This, in turn, exacerbates erosion, increases turbidity in nearby streams and brooks, and may lead to increased flooding and habitat loss.⁵

Heavy equipment used in the construction of a pipeline may also compact soil, which damages soil porosity and soil structure, exacerbating and accelerating stormwater runoff and erosion.⁶ The effects of soil compaction are not short-term. Once soil is compacted, it is very difficult to restore so that infiltration of surface water or the regrowth of healthy vegetation matches rates that existed prior to construction.⁷

b) Pipeline Watercourse and Wetlands Crossings

Fourteen of the twenty-three wetlands that will be crossed by the Project will be done using a cross-cut "trenching method," the most disruptive and damaging form of stream crossing.⁸ Trenching results in 100 percent loss of stream and riparian habitat within the right-of-way for the duration of construction. Trenching also disturbs the downstream channel bed and channel banks, increasing erosion, and sedimentation downstream.⁹ Trenching can generate a plume of turbid water downstream from the construction site.¹⁰ And while downstream turbidity plumes are usually limited to the duration of in-stream construction, turbidity can generate longer-lasting effects.¹¹ Sediment erosion and deposition in the stream can deepen the stream

³ FERC, Environmental Assessment of Valley Lateral Project 7 (2016) [hereinafter "EA"].

⁴ DEC, Final Supplemental Generic Environmental Impact Statement of Regulatory Program for Horizontal Drilling and High-Volume Hydraulic Fracturing to Develop the Marcellus Shale and Other Low-Permeability Gas Reservoirs, Findings Statement 10 (2015), available http://www.dec.ny.gov/docs/materials_minerals_pdf/findingstatehvhf62015.pdf (last visited Sept. 13, 2016) [hereinafter "SGEIS"].

⁵ *Id.* 6-14-15, 51.

⁶ Letter from Bridget M. Lee, Earthjustice, to Kimberly D. Bose, Secretary, FERC (Apr. 7, 2014), exhibit A (Meliora Environmental Design, Professional Review & Comment on DEIS (2014)) [hereinafter, "Meliora"], 9-11, available at http://earthjustice.org/sites/default/files/files/CommentsonConstitutionDEIS_4.7.14.pdf (last visited Oct. 17, 2016).

⁷ Meliora 9-10.

⁸ EA E-1.

⁹ Levesque 396.

¹⁰ Reid 240; Levesque 398.

¹¹ Reid 242.

and change the shape of the channel across its floodplain.¹² These longer-term changes can compromise water quality and destroy crucial habitat for aquatic species. DEC, federal guidelines, and even industry itself discourage trenching, because during times of high stream flow, stream scour may expose the pipes to rocks, trees, and other objects. This may lead to the pipes leaking, or even rupturing, impacting both the natural environment, and, potentially, the drinking water supply. As such, Applicants have failed to show that there would be no increase in turbidity “that will cause a substantial visible contrast to natural conditions” and no alteration in flow “that will impair the waters for their best usages.”¹³

As water quality deteriorates, aquatic species, such as plants, fish, mollusks, crustaceans, and insects, may suffer significant harm—both in the short and long-term.¹⁴ For example, healthy streams typically have gravel bottoms and cobble bars free of mud and sediment. These provide aquatic animals with spawning areas.¹⁵ They also provide benthic invertebrates, such as mussels and crustaceans, space for attachment, protection, feeding, and oxygen consumption.¹⁶ When sediment settles, it smothers fish eggs, destroys the primary habitat for many benthic invertebrates, and deprives fish of a key food source (i.e., invertebrates).¹⁷ Nine of the streams that would be crossed by the Project are Class C waterbodies, capable of supporting fisheries, and two may support trout populations.¹⁸

2) Applicants Fail to Show That the Valley Lateral Project Would Comply With Water Quality Standards.

By itself, the Project would impair state water quality. Significantly, however, this pipeline is just one segment of a larger pipeline construction project. Potential water quality impacts become even more severe when the Project is rightly considered as a segment of the entire Eastern System Upgrade Project, as well as the CPV Valley Energy Center.

While the impacts of the Valley Lateral Project segment of this project alone are sufficient to deny water quality certification, ECL § 3-0301(1)(b) requires DEC to examine the cumulative impacts of the entire Millennium Pipeline System, including the CPV Valley Energy Center.¹⁹ As the Department has previously noted its denial of the Constitution pipeline, the many individual effects of pipeline construction can have a cumulative effect that is greater than the sum of its parts.²⁰ While a pipeline crossing through a stream or river, or within a watershed,

¹² J. M. Castro et al., *Risk-Based Approach to Designing and Reviewing Pipeline Stream Crossings to Minimize Impacts to Aquatic Habitats and Species*, 31 *River. Res. & Application* 767, 767 (2015), available at <http://acwi.gov/sos/pubs/3rdJFIC/Contents/8F-Castro.pdf> (last visited Sept. 13, 2016) [hereinafter “Castro”]; Reid 243.

¹³ *Id.*

¹⁴ Castro 767.

¹⁵ *Meliora* 13.

¹⁶ Levesque 400.

¹⁷ *Id.* at 400–02.

¹⁸ EA 54

¹⁹ N.Y. *Envtl. Conserv. Law* § 3-0301(1)(b).

²⁰ Letter from John Ferguson, Chief Permit Administrator, DEC, to Lynda Schubring, Environmental Project Manager, Constitution Pipeline Company 3 – 5 (Apr. 22, 2016); Letter from John Ferguson, Chief Permit Administrator, DEC, to Ronald Kraemer, National Fuel Gas Supply Corporation and Empire Pipeline 3 – 5 (Apr. 7, 2017).

may not have significant effects on fish and fish habitat in that system, construction of multiple crossings on a stream or river, or within a watershed, has the potential for cumulative effects such that “the capacity of the system to recover from impact may be exceeded, and the detrimental effects of crossing construction permanent.”²¹

Here, DEC should consider the impacts of the Valley Lateral Project in conjunction with the Eastern System Upgrade and the CPV Valley Energy Center for the following reasons. First, these projects serve the same purpose—namely, to provide additional gas supply to New York State via the Millennium Pipeline. Second, the Eastern System Upgrade and the Valley Lateral Project are referred to as part of the same project by DEC.²² Third, project sponsor, Millennium, sponsors both the Eastern System Upgrade and the Valley Lateral Project. Notably, the CPV Valley Energy Center would have no supply of natural gas without the Valley Lateral Project. For these reasons, the potentials impacts of this Project must be considered cumulatively.

3) DEC’s Denial of the Valley Lateral Project’s 401 CWA Application Would Be Consistent with DEC’s Earlier Findings Regarding the Impact of Natural Gas Pipelines on Water Quality.

DEC’s decision to deny 401 certification for the Pipeline would not be the first time the State has determined that proposed natural gas pipelines could adversely impact water quality. In 2015, DEC conducted a supplemental environmental review of natural gas hydraulic fracturing, including a review of the environmental impacts of natural gas pipelines, and found that natural gas pipelines that carry the “fracked” gas have the potential to impair water quality.²³ Based on that review, New York State determined that fracking had sufficient potential to have significant adverse environmental impacts to justify a prohibition of it within New York.²⁴

Since the fracking ban, DEC has denied 401 certification to two natural gas pipelines: Constitution Pipeline,²⁵ and Northeast Access Pipeline.²⁶ A similar denial here would be in line with DEC’s previous findings related to the impacts of natural gas pipelines on water quality.

4) A Wide Coalition of Civil Rights, Community and Environmental Groups Oppose the Valley Lateral Project

A variety of organizations have organized to oppose the construction of the Valley Lateral Project, as well as the CPV Valley Power Plant. The movement has included opposition from former Ohio Congressman Dennis Kucinich and actor James Cromwell.²⁷

²¹ Levesque 407.

²² DEC, *Eastern System Upgrade Project*, <http://www.dec.ny.gov/permits/110557.html>.

²³ SGEIS 29.

²⁴ *Id.* at 6-51.

²⁵ Letter from John Ferguson, Chief Permit Administrator, DEC, to Lynda Schubring, Environmental Project Manager, Constitution Pipeline Company (Apr. 22, 2016).

²⁶ Letter from John Ferguson, Chief Permit Administrator, DEC, to Ronald Kraemer, National Fuel Gas Supply Corporation and Empire Pipeline (Apr. 7, 2017).

²⁷ Matthew Apuzzo, *Orange County residents joined by Kucinich to protest power plant*, LEGISLATIVEGAZETTE.COM, June. 29, 2017, <http://legislativegazette.com/archives/5917>.

In addition to water quality impacts, environmental groups and local landowners have voiced concerns over the impacts of the pipeline on air quality and climate change impacts of the CPV Valley Power Plant, which would be fed by the Valley Lateral Project. Additionally, both the Project, and the CPV Valley Energy Center are sited within 10 miles of historically burdened environmental justice communities in Orange County.

In addition to NRDC, national and New York-based organizations that oppose the Valley Lateral Project include Catskill Mountainkeeper, Sane Energy Project, Food & Water Watch, Protect Orange County, Sullivan County Residents Against Millennium, and Middletown NAACP.

Thank you in advance for your consideration of these comments. We stand ready to provide additional information on why the Valley Lateral Project 401 certification should be denied.

Sincerely,



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