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June 19, 2018

The Honorable Andrew M. Cuomo  
 Governor of New York State  
 New York State Capitol Building  
 Albany, New York 12224

Attorney General Barbara D. Underwood  
 Office of the Attorney General  
 New York State Capitol Building  
 Albany, NY 12224-0341

**RE: New FERC Policy Dismissing Greenhouse Gas Impacts**

Dear Governor Cuomo and Attorney General Underwood,

On May 18, 2018 the Federal Energy Regulatory Commission (FERC) issued a policy decision abrogating its climate change review obligations. In bold defiance of the National Environmental Policy Act (NEPA) and recent court rulings, the federal agency announced that from now on it will no longer evaluate reasonably foreseeable greenhouse gas impacts associated with the upstream production or downstream consumption of natural gas when reviewing pipeline projects. Although applying to all projects subject to FERC review, the declaration was made within an order denying a request for rehearing by Otsego 2000 in docket number CP14-497-001 (Dominion Transmission, Inc.).<sup>1</sup> Notwithstanding the state's position on the Dominion project, we believe it is critical that the Governor and Attorney General formally object to this sweeping policy change which affects all pipelines, undermines efforts by New York to combat climate change, and directly contravenes actions taken by the State of New York.

As you know, on August 30, 2017, the New York State Department of Environmental Conservation (DEC) denied a water quality certificate for the Millennium Valley Lateral pipeline (CP16-17-001), and also requested a rehearing and stay of the project.<sup>2</sup> In doing so, the state of New York correctly argued that FERC had failed to evaluate downstream greenhouse gas impacts, in particular citing a recent ruling by the D.C. Circuit Court that such impacts must be considered (*Sierra Club v. FERC*, F.3d, 2017 WL 3597014). Rather than responding to this substantive concern, FERC issued an order waiving DEC's denial of the pipeline's

<sup>1</sup> FERC order denying rehearing re Dominion Transmission, Inc. CP14-497-001

<https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14922750>

<sup>2</sup> NYSDEC letter to Millennium, 3-3399-00071/00001 Valley Lateral Project, Notice of Decision; August 31, 2017:

<https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14670947>

NYSDEC Motion for reopening and stay, or in the alternative request for rehearing and stay under CP16-17; August 30, 2017

<https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14672239>

water quality certificate on procedural grounds without addressing greenhouse gas emissions at all.<sup>3</sup> Notably, the order also stated:

Because these requests, as well as New York DEC's rationale for denying certification, are not relevant to the issue of waiver under CWA section 401, **they will be addressed by the Commission in a separate order.**<sup>4</sup> (*emphasis added*)

On May 18, 2018, it became clear that the "separate order" mentioned by FERC last year is the order denying rehearing in CP14-497-001. By failing to address downstream greenhouse gas impacts raised by New York in the Millennium case and instead using the Dominion order as a platform to issue a new policy affecting all such pipelines, FERC effectively stymied New York's ability to seek redress of the climate issue. There is no doubt that if FERC had responded to the matter of greenhouse gas impacts as appropriate in the context of the case in which it was brought forth by DEC, the Attorney General's office would have argued the climate issue and prevailed.

Moreover, by rendering a broad determination regarding its scope of NEPA obligations inside of an order intended for a single project, FERC has essentially stripped impacted governments and communities across the nation of their right to fair and timely due process. Parties can only challenge a FERC decision if they have previously intervened in the docket. Yet states, local governments, and communities facing their own pipeline battles had no way of knowing or anticipating that they needed to intervene in Docket No. CP14-497-001 to protect themselves from a blanket decision by FERC to violate NEPA.

Needless to say, FERC's new policy announcement also directly undermines New York's own actions and responsibilities to reduce greenhouse gas emissions because the proliferation of natural gas infrastructure contributes to climate change. Relating to this, DEC has taken the position that federal preparation of an Environmental Impact Statement (EIS) by FERC under NEPA takes the place of an environmental review conducted under the State Environmental Quality Review Act (ECL Article 8). However, if FERC fails to perform a substantive evaluation of climate impacts, then such projects occurring within the state of New York will not receive the review and attention required with respect to what scientists warn is the most critical issue of our time.

Finally, it is important to note that FERC announced its new policy of not evaluating foreseeable greenhouse gas impacts while the federal agency is ostensibly accepting public comment on how to improve its review process (Notice of Inquiry regarding Certification of New Pipeline Facilities, Docket # PL 18-1-000). Rendering a change of this magnitude in the midst of such an effort displays insincerity and disregard for public input that it will receive.

It is imperative that the State of New York respond for several reasons:

- New York must demonstrate consistency in its expressed position regarding FERC's obligations pursuant to NEPA and recent case law. It would be inconsistent for New York to have objected to FERC's skirting of its obligations in August 2017, but remain silent in 2018 when FERC announces policy in flagrant defiance of that obligation.

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<sup>3</sup> FERC Declaration Order Finding Waiver Under Section 401 of the Clean Water Act; September 15, 2017 <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14681426>

<sup>4</sup> See footnote 13 of FERC order, *ibid*.

- New York must object to the manner in which DEC and Attorney General's office has been deprived of its legal right to argue greenhouse gas impacts in the Millennium Valley Lateral case.
- New York must strenuously object to FERC's new policy decision of ignoring upstream and downstream greenhouse gas impacts due to the far reaching impacts on state climate goals and other pipeline projects within New York.

The Governor and Attorney General would be in good company by objecting to this egregious action. On May 31, 2018, a letter signed by 245 organization including Delaware Riverkeeper Network, Otsego 2000, and Sierra Club expressing dismay and outrage over FERC's new policy was submitted to the docket for CP14-497-001.<sup>5</sup> Significantly, two of five FERC Commissioners have also disagreed with the Commission's decision and issued powerfully dissenting opinions. As Commissioner Glick aptly wrote:

“Climate change poses an existential threat to our security, economy, environment, and, ultimately, the health of individual citizens. Unlike many of the challenges that our society faces, we know with certainty what causes climate change: It is the result of greenhouse gas emissions, including carbon dioxide and methane—which can be released in large quantities through the production and the consumption of natural gas. Accordingly, it is critical that, as an agency of the federal government, the Commission comply with its statutory responsibility to document and consider how its authorization of a natural gas pipeline facility will lead to the emission of greenhouse gases, contributing to climate change...the Commission cannot determine whether a natural gas pipeline is in the “public interest” without considering the effect that granting a certificate will have on climate change.”

On its face, FERC’s assertion that the increased downstream use of gas transported by pipeline, and the climate changing impact of that use, are not reasonably foreseeable and determinable consequences of the pipeline projects it approves is absurd. As clearly articulated by the Court of Appeals for the D.C. Circuit in *Sierra Club v. FERC*:

An agency conducting a NEPA review must consider not only the direct effects, but also the *indirect* environmental effects, of the project under consideration. *See* 40 C.F.R. § 1502.16(b). “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.” *Id.* § 1508.8(b). The phrase “reasonably foreseeable” is the key here. Effects are reasonably foreseeable if they are “sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision.” *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016) (citation omitted). ...As we have noted, greenhouse-gas emissions are an indirect effect of authorizing this project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate. *See* 15 U.S.C. § 717f(e). The EIS accordingly needed to include a discussion of the “significance” of this indirect effect, *see* 40 C.F.R. § 1502.16(b), as well as “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions,” *see WildEarth Guardians*, 738 F.3d at 309 (quoting 40 C.F.R. § 1508.7).

For the Millennium Valley Lateral case in which DEC intervened, downstream emissions could have been readily calculated since the pipeline is intended to supply a single end-user.<sup>6</sup> However, even for pipeline

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<sup>5</sup> VOICES coalition letter submitted to FERC from 245 organizations; May 31, 2018 <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14934203>

<sup>6</sup> The sole recipient of gas from the Millennium Pipeline is Competitive Power Ventures, a 650MW gas-fired power plant under construction in Wawayanda, NY.

projects with more than one customer, like the Southeast Market Pipelines project cited above or CP14-497-001, downstream emissions can be reasonably estimated based on the volume of gas flow enabled by the respective project and/or projected usage.<sup>7</sup> FERC should not be permitted to flagrantly defy the courts. Similarly, with regards to upstream impacts, increased and ongoing extraction of gas from shale using fracking technology is not just reasonably foreseeable; it is a known and demonstrable effect of FERC-approved pipeline infrastructure that is obvious to any person of ordinary prudence, as are the related environmental and climate changing impacts that will result.

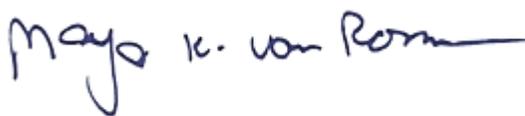
FERC is clearly obligated by NEPA and the order of the Court of Appeals for the D.C. Circuit, as well as by the reality of applicable science, laws, and facts, to evaluate the downstream and upstream climate impacts of pipeline projects under its review. For a comprehensive legal rebuttal to FERC's policy announcement, we refer you to the well-articulated opinions of Commissioners Glick and LaFleur, which appear as attached statements in the May 18, 2018 Order Denying Rehearing in the Dominion case.<sup>8</sup> We also refer you to the letter submitted by Delaware Riverkeeper Network to FERC on May 26, 2018.<sup>9</sup>

We respectfully urge the Governor of New York and Attorney General to object to this illegal and irresponsible pronouncement by FERC that it will not consider the climate changing impacts of pipeline infrastructure projects under its jurisdiction.

Sincerely,



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<sup>7</sup> In response to the Sierra Club v. FERC ruling, FERC produced a Supplemental Environmental Impact Statement (FERC EIS 0279F) containing an analysis of greenhouse gas emissions from downstream use of natural gas transported with the greenhouse gas impacts from the Southeast Market Pipeline project. The analysis provided net, gross, and full-burn scenarios (representing full combustion of maximum pipeline capacity). For context, an estimate of impact to the Florida 2015 Greenhouse Gas Inventory was also performed.

<https://elibrary-backup.ferc.gov/idmws/common/opennat.asp?fileID=14815941>

With respect to CP14-497, Dominion disclosed in a May 1, 2018 public meeting for the Borger compressor station that Cricket Valley Energy Center, an 1100MW gas-fired power plant under construction in Dover, NY, would be a major recipient of gas from its project.

<sup>8</sup> The dissenting opinion by Commissioner Glick can also be found here:

<https://www.ferc.gov/media/statements-speeches/glick/2018/05-18-18-glick.asp#.Ww3GZUgvzIV>

PDF: <https://www.ferc.gov/media/statements-speeches/glick/2018/05-18-18-glick.pdf>

The dissenting opinion by Commissioner LaFleur can also be found here:

<https://www.ferc.gov/media/statements-speeches/lafleur/2018/05-18-18-lafleur.asp#.Ww6h3UgvzIU>

PDF: <https://www.ferc.gov/media/statements-speeches/lafleur/2018/05-18-18-lafleur.pdf>

<sup>9</sup> Delaware Riverkeeper Network; May 26, 2018 <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14931003>