

CUNY CENTER for URBAN

ENVIRONMENTAL REFORM

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street NE, Room 1A
Washington, DC 20426

RE: CP13-36-000 Proposed Rockaway Delivery Lateral Project

Dear Secretary Bose,

Thank you for the opportunity to comment on the draft Environmental Impact Statement (“DEIS”) for the proposed Rockaway Delivery Lateral Project (“Rockaway Lateral”). The CUNY School of Law Center for Urban Environmental Reform (“CUER”) is opposed to much of the flawed DEIS released October 4 by the Federal Energy Regulatory Commission (“FERC”). CUER is taking this opportunity to voice its concerns with the manner that the FERC conducted the Environmental Justice analysis in the DEIS. This letter also incorporates and supports the comments submitted from CUER by Andy Jones.

Environmental Justice Analysis

Executive Order 12898 (“E.O. 12898”) calls on “each Federal agency” to make achieving environmental justice part of its mission. Executive Order 12898, Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Population, 59 Fed. Reg. 7629 (Feb. 11, 1994). “[E]ach Federal agency” is to carry out this mission “by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States.” *Id.* In an August 2011 Memorandum of Understanding on Environmental Justice and Executive Order 12898 (“MOU”) President Barack Obama reiterated the “continued importance of” E.O. 12898—“including as to agencies not already covered by the Order.”¹

It is true that the FERC is not a covered agency under E.O. 12898 or the MOU, and the FERC has consistently reiterated that neither E.O. 12898 nor Environmental Protection Agency (“EPA”) guidance regarding environmental justice matters are binding on the agency. *See, e.g.*,

¹ Memorandum of Understanding on Environmental Justice and Executive Order 12898 2, Aug. 2011, *available at* <http://www.epa.gov/compliance/ej/resources/publications/interagency/ej-mou-2011-08.pdf> [hereinafter MOU].

² *See also* MOU, *supra* note 1 (“the Order does not preclude other agencies from agreeing to undertake *the commitments* in the Order”) (emphasis added).

Tex. E. Transmission, LP & Algonquin Gas Transmission, LLC, 141 FERC 61043 (2012) (stating non-binding nature of E.O. 12898 and EPA guidance). Nonetheless, the FERC has undertaken a commitment to address environmental justice in the Rockaway Lateral project by including an environmental justice analysis in the DEIS. *See* The FERC, Rockaway Delivery Lateral Project Northeast Connector Project: Draft Environmental Impact Statement § 4.9.7 (Oct. 2013) (“DEIS”).² By doing an environmental justice analysis, the FERC clearly has a duty under the Administrative Procedure Act to conduct the analysis in a way that is not arbitrary and capricious. The strictures of E.O. 12898 and EPA guidance on environmental justice are thus a tool for assessing whether the FERC has been arbitrary and capricious in conducting its analysis.

By committing to perform an environmental justice analysis, the FERC should keep in mind how the rest of the federal government has defined the scope of that obligation. Moreover, more than a year before the FERC made public the DEIS, EPA commented on the FERC Notice of Intent (“NOI”) to prepare an environmental impact statement for the Rockaway Lateral. *See* Letter to Secretary Kimberley D. Bose; RE: Docket No. PF09-08, EPA Region 2 (June 11, 2012). Among other points, EPA suggested to the FERC that an environmental justice “analysis should be prepared to determine whether any racial, ethnic, or socioeconomic group is bearing a disproportionate share of the negative environmental consequences resulting from the construction of the pipeline.” *Id.* Regardless of whether the FERC’s inclusion of an environmental justice analysis in its DEIS is the result of EPA’s urging, the agency has clearly recognized its obligation to adequately conduct such an analysis by including a section in the DEIS devoted to environmental justice.

The FERC’s Environmental Justice Analysis Fails to Adequately Consider the Impacts of the Rockaway Lateral on Environmental Justice Communities

The FERC’s DEIS discusses environmental justice in relation to the Rockaway Lateral and environmental justice communities. In its own words, the FERC recognizes that the Brooklyn, NY, neighborhood of Marine Park is an environmental justice community, meaning that at least 51.5 percent of the population reported to be members of a minority group and/or at least 23.6 percent of the households reported incomes below the poverty line.³ According to EPA’s EJView map tool, as of 2010 the percentage of minorities by block in the area to the east of Flatbush Avenue and Avenue U was between 40% and 100%.⁴ Many areas to the west of Flatbush Avenue have similar population demographics. The impacts of the Rockaway Lateral will be felt in precisely those neighborhoods of special concern for environmental justice—neighborhoods composed of predominately minority populations.

The DEIS states that the environmental justice communities in Marine Park are about 400 feet west of the proposed M&R facility and uses this distance as grounds to assume the neighborhoods are far enough away to not be impacted by the project. Specifically, the FERC

² *See also* MOU, *supra* note 1 (“the Order does not preclude other agencies from agreeing to undertake *the commitments* in the Order”) (emphasis added).

³ The FERC bases its criteria for Marine Park on the 2003 Commissioner’s Policy 29 of New York State Department of Environmental Conservation.

⁴ *See* EPA, EJView, <http://epamap14.epa.gov/ejmap/entry.html> (last updated 1/11/2013).

determined that construction-related activities “would occur in non-residential areas where no EJ communities are present.” DEIS at 4-124. Additionally, the DEIS states that the primary-related health issue is the risk associated with an unanticipated pipeline failure. This lip service to environmental justice and quick write-off is a disservice and fails to anticipate effects on environmental justice communities from the Rockaway Lateral and the related National Grid plc (“National Grid”) Brooklyn-Queens Interconnect (“BQI”) project.

The FERC’s obligations to environmental justice are part and parcel of the agency’s obligation to engage in reasoned decision-making. Fulfilling these obligations requires more than lip service. EPA highlighted this obligation in its June 11, 2012 letter to the FERC, which advised the FERC to conduct an environmental justice analysis to determine whether ethnic, racial or socioeconomic groups bear a disproportionate share of the negative environmental consequences resulting from the construction or operation of the pipeline. The FERC has not *meaningfully addressed* EPA’s concerns. The seven paragraphs the FERC dedicated to environmental justice, out of a 316 page DEIS (excluding appendices) amounted to little more than a token mention. Instead of a genuine analysis of the concerns facing the identifiable environmental justice community that will be affected by the proposed project, the FERC offered merely a pro forma recitation of the need to consider environmental justice concerns. *Cf., e.g., Nat. Res. Def. Council v. Hodel*, 865 F.2d 288, 297-99 (D.C. Cir. 1988) (holding that agency’s simplistic analysis failed to meaningfully address EPA’s concerns in the DEIS and therefore failed to comply with NEPA).

First, addressing the FERC’s own statements, the fact that an environmental justice community lives 400 feet from the M&R facility is significant and should have warranted greater discussion. For an average person who walks three miles per hour, traveling 400 feet takes about ninety seconds. In other words, an environmental justice community lives only ninety seconds on foot from this pipeline! Yet the FERC categorically concluded that the 400-foot separation somehow converted this environmental justice neighborhood into a non-residential area. This 400 feet conclusion is wholly unsupported—the FERC offers it as a naked supposition. The DEIS offers no analysis of the distance, and no justification for this determination that a 400-foot separation is meaningful in the context of this neighborhood. If a ninety second walk means that an area is non-residential, then what about a sixty second walk? Or a thirty second walk? The FERC designation of this area as non-residential is wholly arbitrary and entirely unsupported.

Dismissing environmental justice concerns that construction on the Rockaway Lateral and the related BQI project will occur only on non-residential space and thus have no impact is arbitrary and capricious.⁵ *Cf. Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1179-80 (10th Cir. 2002) (finding a studied distance of 1,000 feet to be arbitrary and capricious for NEPA purposes since the lead agency ignored the mobility of certain wildlife). While 400 feet is taken to be non-residential when placed in the context of an environmental justice community, 400 feet is clearly residential in many neighborhoods throughout the United States due to required zoning

⁵ The related BQI project must be considered in an environmental justice analysis because all cumulative impacts from the Rockaway Lateral and the BQI must be considered. *See* 40 C.F.R. § 1508.7 (2013) (defining “cumulative impacts” as including actions taken by both federal and non-federal agencies).

setbacks and minimum lot sizes.⁶ When a town in Connecticut has zoning of two acres, 400 feet away is residential.⁷ This assertion is not to deny the real differences between a town in Connecticut and neighborhoods in Brooklyn—it instead demonstrates that the FERC has failed to show that 400 feet is far enough away from an environmental justice neighborhood and far enough away from the project to be considered “non-residential.” The FERC’s blanket statement is not enough and is arbitrary. A predominately minority community only 400 feet from a major portion of the Rockaway Lateral will bear many of the project’s negative impacts.

Natural gas pipeline ruptures and explosions in the United States are widely reported in the media and therefore create a perceived threat of danger. For example, the September 2010 San Bruno, CA, explosion that leveled a neighborhood and killed eight people was national news.⁸ As recently as November 29, 2013, a gas pipeline exploded in Missouri.⁹ In 2011 a gas pipeline exploded in Allentown, PA, killing five people,¹⁰ and in 2011 a gas pipeline exploded in Philadelphia, killing one person and injuring five others.¹¹ According to the federal Pipeline and Hazardous Materials Safety Administration, from 1993 to 2012 there were 5,612 significant incidents with gas pipelines, resulting in 367 fatalities, nearly 1,500 injuries and over \$6.5 billion in property damage.¹² In 2013 year to date, there have been 219 significant incidents with seven people killed, thirty-five injured and over \$2 million in property damage.¹³ These numbers cannot be ignored.

Furthermore, according to June 2010 guidance from the Pipeline Association for Public Awareness, the recommended minimum evacuation distance for natural gas pipeline leaks and

⁶ See, for example, the zoning requirements in the City of Newport, Rhode Island, available at http://www.cityofnewport.com/departments/zoning-inspections/zoning/pdf/guidelines_zoning_update.pdf.

⁷ See Grace E. Merritt, *2-acre Zoning Weighed to Limit Growth*, *The Courant*, June 18, 2001, http://articles.courant.com/2001-06-18/news/0106181332_1_zoning-commission-town-open-space.

⁸ See, e.g., Lee Ferran et al., *San Bruno Gas Explosion: Fire Contained, but Homes Still Too Hot to Search*, *ABCNews*, Sept. 10, 2010, <http://abcnews.go.com/US/california-fire-ball-claims-lives/story?id=11599994>.

⁹ See *Missouri gas pipeline ruptures, explodes*, *CBSNews* (Nov. 29, 2013, 1:23 PM), <http://www.cbsnews.com/news/missouri-gas-pipeline-ruptures-explodes/>.

¹⁰ E.g., Lykena Little et al., *Allentown, Pa., Explosion Leaves Five Dead*, *ABCNews*, Feb. 10, 2011, <http://abcnews.go.com/Business/pennsylvania-natural-gas-explosion-leaves-dead/story?id=12883552>.

¹¹ Lucy Kennedy, *Natural gas explosion in Philadelphia kills worker*, *PBS*, Jan. 19, 2011, <http://www.pbs.org/wnet/need-to-know/the-daily-need/fatal-gas-explosion-in-philadelphia-kills-one-and-injures-five/6465/>.

¹² U.S. DOT, Pipeline & Hazardous Materials Safety Admin., Significant Pipeline Incidents, <http://primis.phmsa.dot.gov/comm/reports/safety/SigPSI.html?nocache=14> (last updated Nov. 5, 2013, 8:21:48 PM).

¹³ *Id.*

ruptures is 547 feet for a 24-inch-diameter pipe at 100 psig.¹⁴ The distance grows as the pipeline diameter increases. The BQI and Rockaway Lateral pipelines will both have 26-inch-diameters. The BQI pipeline will also operate at an increased pressure when it connects with the Rockaway Lateral. *See* DEIS at 1-12. Moreover, the M&R facility that is only 400 feet from environmental justice communities will have a 26-inch-diameter inlet pipe and 8-, 12- and 30- inch-diameter outlet pipes. DEIS at 2-5. This explosion risk is in addition to the increased health impacts from possible leaks on the environmental justice neighborhood. Methane, the main component of natural gas, is an asphyxiant. Even should the FERC consider the new pipeline safe enough, it cannot ignore the reality that more natural gas will be delivered to an older and potentially more-easily leaking pipeline system connecting to the BQI, the Rockaway Lateral and the M&R facility nearby the environmental justice communities.¹⁵ The FERC's bald statement that the environmental justice community only a ninety-second walk from the M&R facility is far enough from the Rockaway Lateral denies the reality of the actual danger that will be created for this environmental justice community living in direct proximity to this pipeline.

Both the perceived and actual threat of living proximal to a natural gas pipeline causes the environmental justice communities living in these areas to bear a disproportionate share of the negative environmental consequences resulting from the construction or operation of the pipeline. Residents in these environmental justice communities are right to be concerned about the impact the pipeline will have on their property value. While there are few studies about the impact on housing values of homes near natural gas pipelines, this impact is clearly a foreseeable negative consequence on the communities. Because the FERC categorically decided that 400 feet was "far enough" away from the pipeline, the FERC did not even consider the possibility of decline in housing values. Instead, in a single paragraph, the FERC concluded there is no expectation that property values would be affected. *See* DEIS at 4-121. If the FERC is truly "sensitive to the fact that impacts on property values determined by an environmental review to be insignificant, or minimal, represent additional undesired impacts and may seem significant and burdensome to those in the" project's vicinity, it must make more than a bald assertion of no effect in its environmental review. *Millennium Pipeline Co., LLC*, 145 FERC 61007, ¶ 98 (2013). The FERC must be sensitive to the potential impacts on property values in the environmental justice community. Additionally, the immeasurable burden of living with the fear of an explosion or other accident should not be shoved onto this environmental justice community without careful consideration of the consequences. The FERC must seriously consider alternatives and/or mitigating factors to alleviate the negative burdens on the nearby neighborhoods.

¹⁴ *See* Pipeline Association for Public Awareness, Recommended Minimum Evacuation Distances For Pipeline Leaks and Ruptures (June 2010), *available at* <http://www.pipelineawareness.org/wp-content/uploads/2010/06/Evacuation-Distances-for-Natural-Gas.pdf>.

¹⁵ *See*, Associated Press, *Environmentalists, unions seek to fix gas leaks*, Wash. Post, Dec. 8, 2013, http://www.washingtonpost.com/business/environmentalists-unions-seek-to-fix-gas-leaks/2013/12/08/6f3d9e80-6026-11e3-a7b4-4a75ebc432ab_story.html (stating New York City still uses about 3,000 miles of decades-old pipeline).

Furthermore, these communities will foreseeably face the negative consequences of other environmental impacts discussed in the DEIS. The DEIS foresees increased traffic during the construction periods and anticipates land use impacts at Jacob Riis Park. Indeed, Rockaway Avenue would have significant construction due to the installation of the Rockaway Lateral and the BQI pipelines. This street is a major thruway for cars and public transit to commute through the Gateway National Recreation Area over Jamaica Bay into Jacob Riis Park on the Rockaway Peninsula. The DEIS discusses interference with recreation at the beach in Jacob Riis Park and to a pitch and putt course by Jacob Riis due to construction of the Rockaway Lateral—areas of recreation foreseeably used by the nearby environmental justice neighborhoods. The summertime construction will not only negatively impact air quality in the surrounding areas, but it will also inhibit the recreation of the environmental justice communities directly adjacent to the Rockaway Lateral and other environmental justice neighborhoods like Flatlands and Flatbush not far from the project.

Moreover, use-by-reservation areas for environmental education at Floyd Bennett Field will be impacted. *See* DEIS at 4-91. It is already difficult to receive a worthwhile environmental education in a metropolitan area such as New York City. Furthermore, it is especially important that environmental justice communities have access to environmental education. Such an education aids in both an individual's and a community's abilities to meaningfully and effectively participate in the public sphere—including commenting on federal and non-federal agency actions and rulemakings. Construction for the Rockaway Lateral and the M&R facility will impede access to an environmental education at Floyd Bennett Field by disrupting use-by-reservation activities. The FERC considered impacts from this disruption in a single sentence in the DEIS. The FERC should dedicate more discussion to the negative consequences of this impact while paying attention to the fact that the closest residents to Floyd Bennett Field live in an environmental justice neighborhood. It is thus foreseeable that the residents of the nearby environmental justice communities will bear the disproportionate share of the environmental burdens.

Conclusion

Because the FERC's environmental justice analysis fails to meaningfully address EPA's concerns and since it does not adequately review environmental justice issues that the FERC voluntarily decided to analyze, a comprehensive analysis must be conducted. Regardless of whether the BQI is outside the FERC's jurisdiction, the Rockaway Lateral exists solely for the purpose of effectuating the BQI, and the cumulative impacts on environmental justice communities from the two projects must be more comprehensively addressed together. In the alternative, the FERC should designate William Transco to find a new route among the ones rejected for the pipeline project that does not pass through recreational areas on Rockaway Peninsula and terminate proximal to an environmental justice community. After all, the FERC's duty under NEPA is to give a hard look at environmental consequences—not National Grid's plans. It is imperative that the FERC do more than simply pay lip service to its environmental justice analysis. By having taken on an environmental justice analysis, the FERC must adequately address issues in a manner that is not arbitrary and capricious.

Respectfully submitted by Ethan Middlebrooks on behalf of the CUNY Center for Urban Environmental Reform.

About the CUNY Center for Urban Environmental Reform (CUER)

CUER is a justice initiative at CUNY School of Law dedicated to developing new avenues of participation and new opportunities for citizen empowerment in environmental decision-making. Drawing from the emerging human rights norms of participation, access to information, transparency and intergenerational equity, CUER seeks to revitalize participatory environmental decision-making to help community members, scholars and policymakers communicate in a way that leads to better, more sustainable decision-making. In doing so, the Center facilitates important social conversations about the acceptability of environmental risks and the need for their equitable distribution.

Many of the standard techniques of environmental decision-making reduce society's ability to include issues of distributive justice and overall fairness in the decision. As a result, environmental policies have been repeatedly accused of perpetuating environmental injustice — with poor and minority communities consistently allocated a larger share of environmental bads while having access to fewer environmental goods. CUER's emphasis on environmental citizenship is an attempt to surface these justice dynamics that are too often ignored. Framing environmental choices as questions of fundamental equality in a political community, rather than as private choices about property, helps emphasize the role that power, access to information, and inequality play in shaping environmental outcomes.