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VIA EMAIL & MAIL

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U.S. Environmental Protection Agency
Office of General Counsel
External Civil Rights Compliance Office (ECRCO)
Mail Code 1201A
1200 Pennsylvania Avenue, NW
Washington, DC 20460
[Title VI Complaints@epa.gov](mailto:Title_VI_Complaints@epa.gov)

Re: Title VI Environmental Justice Complaint against
NC Department of Environmental Quality

To Whom It May Concern:

Pursuant to Title VI of the Civil Rights Act of 1964, 42 USC ¶ 2000d, now comes NC WARN; Clean Water for NC; Blue Ridge Environmental Defense League (“BREDL”) and its chapters, Concerned Stewards of Halifax County, Nash Stop the Pipeline, Wilson County No Pipeline, No Pipeline Johnston County, Cumberland County Caring Voices; EcoRobeson; Concerned Citizens of Tillery; Concerned Citizens of Northampton County; Friends of the Earth; and the NC Environmental Justice Network (collectively the “Environmental Justice Groups”), by and through the undersigned counsel, with a complaint against the NC Department of Environmental Quality (“DEQ”) for discriminatory actions the agency has taken in issuing permits for the proposed Atlantic Coast Pipeline (“ACP”).

The Environmental Justice Groups allege DEQ discriminated on the basis of race and color in issuing permits and certifications to the ACP as part of the permitting process. The failure to assess the environmental justice impacts of the proposed ACP on communities of color along the route led to the improper actions taken by DEQ through

the Division of Water Resources, the Division of Air Quality, and the Division of Energy, Mineral and Land Resources (collectively the “State agencies”).

As part of this complaint, the Environmental Justice Groups request a prompt and complete investigation of their allegations by the General Counsel and the External Civil Rights Compliance Office (“ECRCO”) pursuant to 40 CFR ¶ 7.120, including a public hearing on the matter in North Carolina.

BACKGROUND

On September 18, 2015, the ACP, LLC filed an application under section 7(c) of the Natural Gas Act, requesting authorization to construct, own, and operate the ACP, including three compressor stations and at least 564 miles of pipeline across West Virginia, Virginia, and North Carolina. The purpose of the proposed ACP is to deliver up to 1.5 billion cubic feet per day of fracked natural gas to customers in Virginia and North Carolina.

The Federal Energy Regulatory Commission (“FERC”) has the authority under Section 7 of the Interstate Natural Gas Pipelines and Storage Facilities Act (“NGA”) to issue a certificate to construct a natural gas pipeline. As described in the Commission guidance manuals, environmental documents are required to describe the purpose and commercial need for the project, the transportation rate to be charged to customers, proposed project facilities, and how the company will comply with all applicable regulatory requirements.

As part of its review process, FERC prepares environmental documents, and in this case, a Draft Environmental Impact Statement (“DEIS”) was prepared and released on December 30, 2016. On October 13, 2017, FERC granted a conditional certificate for the pipeline, with the most significant conditions based on subsequent actions by the State agencies.¹

The certificate issued by FERC is not final, in that FERC has not ruled on pending motions for rehearing – a necessary step to judicial review – by several parties, including NC WARN, BREDL, and Clean Water for NC.

While FERC was conducting its certificate process, the State agencies received and reviewed applications from the ACP for various certifications and permits.² After public hearing processes, the State agencies issued each of the permits.

¹ FERC Order Issuing Certificates, October 13, 2017. Available at: www.documentcloud.org/documents/4108369-FERC-ACP-Order.html

² The applications and permits are available at <https://deq.nc.gov/about/divisions/energy-mineral-land-resources/acp> and are incorporated herein by reference.

1. The Division of Water Quality issued the 401 Water Quality Certification for the entire route in North Carolina on January 26, 2018.
2. The Division of Energy, Mineral and Land Resources issued the Erosion and Sedimentation Control Permit for the entire route in North Carolina on February 1, 2018.
3. The Division of Energy, Mineral and Land Resources issued the Stormwater Permits for activities in Nash and Cumberland Counties on February 2, 2018.
4. The Division of Air Quality issued the Air Quality Permit for the Northampton compressor station on February 27, 2018.

It should be noted a Memorandum of Understanding (“MOU”) between the ACP and N.C. Governor Cooper was released on January 25, 2018.³ It provided, among other commitments, the ACP would provide \$58.7 million into a trust fund for the mitigation of environmental damages caused by the pipeline’s construction and operation. The permits were issued soon after the MOU was made public.

THE PUBLIC INTEREST GROUPS

The Environmental Justice Groups are not-for-profit corporations acting in the public interest and community groups organized to protect the family and property of their members. The Environmental Justice Groups have members adjacent to or in close proximity to the proposed ACP corridor and blast zone. Many of the members of the Environmental Justice Groups are African-American and Native American who will face disproportionate impacts from the proposed ACP.

- a. NC WARN is a statewide group concerned about the climate crisis and the impacts of natural gas infrastructure, including the disproportionate impact on families who are most affected.
- b. Clean Water for NC is a statewide group with a long history of working for environmental justice for North Carolina communities, including providing support for its members along the proposed pipeline route.
- c. BREDL is a regional environmental and social justice organization with at least five chapters with members directly on the path of the proposed pipeline. The chapters are: Concerned Stewards of Halifax County, Halifax County, NC; Nash Stop the Pipeline, Spring Hope, NC; Wilson County No Pipeline, Kenly, NC; No

³ The Mitigation Project MOU between the ACP and Governor Cooper is available at https://files.nc.gov/governor/documents/files/2018_01_25_MOU.pdf?K8Jzy_R7221YZ3Am3iXOaTtIOjoZiDZX

Pipeline Johnston County, Johnston County, NC; and Cumberland County Caring Voices, Eastover, NC.

- d. EcoRobeson is a community-based group in Robeson County, NC, whose members are primarily Native American.
- e. Concerned Citizens of Tillery is a community-based group in Halifax County, NC, whose members are primarily African-American.
- f. Concerned Citizens of Northampton County is a community-based group in Northampton County, NC, whose members are primarily African-American.
- g. Friends of the Earth is a national organization with members in North Carolina and an office in Durham, NC, working to reduce the impacts of climate change and to provide a healthier environment for all people.
- h. NC Environmental Justice Network is a North Carolina group promoting health and environmental equality for all people of North Carolina.

The Environmental Justice Groups and their members will be significantly affected and aggrieved by the proposed ACP. Many of the economic concerns and environmental impacts affecting the Environmental Justice Groups and their members, and especially those in communities of color, have not been taken into consideration by FERC in its conditional issuance of the Certificate or by the State agencies which adopted the FERC's DEIS.

The Environmental Justice Groups allege, among other issues, FERC and the State agencies failed to assess the impacts on families and communities along the route, the environmental and health impacts from the construction and operation of the pipeline, and its cumulative impacts, including the worsening of the climate crisis. The increased usage of fracked gas has aggravated the effects of climate change and the most vulnerable communities along the ACP route are in many cases the same communities being most harmfully impacted by climate change.

Several of the same Environmental Justice Groups brought concerns about the impacts on communities of color to FERC in its hearing process and additionally submitted comments and testimony to the State agencies on the permits.⁴ The Environmental Justice Groups and their members attended numerous hearings and public meetings on issues related to the ACP and submitted comments on the proposed permits to the agencies. In addition to the environmental justice concerns, the Environmental Justice

⁴ The JOINT COMMENTS BY PUBLIC INTEREST GROUPS ON DRAFT ENVIRONMENTAL IMPACT STATEMENT, April 5, 2017, by 20 public interest groups (including many of the Environmental Justice Groups herein) submitted to FERC and the State agencies is available at www.ncwarn.org/wp-content/uploads/ACP-DEIS-Joint-Comments.pdf. Among other issues, well-documented concerns about environmental justice were presented.

Groups allege the procedures for the issuance of the permits *sub judice* were not fair and impartial.

The members of the Environmental Justice Groups will be significantly affected and aggrieved by the construction and operation of the proposed ACP. The actions allowed by the permit decisions would have a significant and adverse impact on the health and well-being of the members of the Environmental Justice Groups, and on their families, the use and enjoyment of their property, the value of their property and other economic interests. Again, members in communities of color would bear a disproportionate impact.

Many of the families on the ACP route are having their property taken by the ACP through eminent domain. Many of the families are within the blast zone and / or evacuation zones around the proposed pipeline. Many of the families have drinking water wells which may be negatively impacted by groundwater contamination from the proposed pipeline. Many of the families will be significantly and adversely impacted by the toxic air pollutants emitted by the pipeline and the proposed compressor station in Northampton County.

BASIS FOR COMPLAINT

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal financial assistance from discriminating on the basis of race, color, or national origin in their programs or activities. In this matter, the Environmental Justice Groups allege the State agencies discriminated on the basis of race and color because they failed to assess the disproportionate impacts of the proposed ACP on communities of color.

The State agencies receive financial assistance from the U.S. Environmental Protection Agency ("EPA"). In the Schedule of Expenditures of Federal Awards, the NC Office of State Controller provided a spreadsheet showing the State agencies received approximately \$71.5 million from EPA in the latest fiscal year. ATTACHED. The State agencies have received similar financial assistance from EPA over the past several years.

Because of the financial assistance from EPA, the State agencies are required to comply with relevant civil rights law, including Title VI. In her letter of January 18, 2017, to the State agencies Lilian S. Dorka, ECRCO Director, presented the U.S. EPA's External Civil Rights Compliance Office Compliance Toolkit ("Toolkit"), which is a clarification of existing law and policy intended to provide guidance to promote and support EPA recipients' compliance with federal civil rights laws.⁵ Ms. Dorka, in her letter, reiterated EPA's position on this: "All applicants for and recipients of EPA financial assistance have an affirmative obligation to comply with federal civil rights obligations." ECRCO has the duty to investigate complaints against these recipients of EPA financial assistance to determine if they comply.

⁵ www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf

ALLEGATION OF DISCRIMINATION

The State agencies in issuing their permits did not adequately address sociological and demographic issues in order to assess discrimination based on race and color pursuant to Title VI. The Environmental Justice Groups herein use the term “environmental justice” as a shorthand for this discrimination, i.e., a determination of whether the actions would have a disproportionate impact on African-American and Native American families along the proposed route of the ACP.

The State agencies relied on a flawed analysis conducted by ACP in its application and by FERC in its Order and the state agencies failed to conduct a sufficient analysis of their own. The issuance of the permit did not reflect the disproportionate impacts on communities of color.

This failure is especially troublesome in that the State agencies have their own Environmental Equity Initiative, effective October 19, 2000. ATTACHED. Like the Federal agencies’ requirements to comply with Title VI of the Civil Rights Acts, this policy initiative requires the State agencies to assess the potential impacts of permit decisions on low-income communities and communities of color, and specifically to review Title VI compliance. The State agencies cannot rely on analyses by other agencies such as FERC, especially as it is apparent those analyses are flawed.

In most instances, the State agencies follow the NC Department of Transportation Title VI guidelines.⁶ This restricts their analysis to comparing the demographics at the county level with the directly impacted community within a one-mile radius. Local level data is used to recognize any variations with the county rather than look at other actions, such as alternate routes, that may have a far less impact on communities color. Only the following conditions are flagged as potential communities of concern: (1) 10% or more in comparison to the county average; (2) 50% or more minority, i.e. people of color; or (3) 5% or more in comparison to the county average for poverty. Similar to the FERC analysis, this process produces flawed conclusions that systematically discount the disproportionate impacts.

In its Order granting its conditional certificate for the ACP, FERC states it is not required to comply with Executive Order 12898 which mandates that specified federal agencies make achieving environmental justice part of their missions by identifying and addressing, as appropriate, disproportionately high and adverse human or environmental health effects of their programs, policies, and activities on minorities and low-income populations. FERC’s unsupported position is one of the issues raised by the request for rehearing of FERC’s decision by some of the Environmental Justice Groups.

Regardless of FERC’s flawed position, the State agencies are required to review the impacts of their decisions on low-income communities and communities of color

⁶ www.ncdot.gov/programs/titleVI/

pursuant to both the EPA directives and their own internal policy. The State agencies certainly cannot simply rely on the ACP / FERC analysis of the environmental justice impacts.

Even FERC recognizes the ACP would have an impact on low-income families, yet fails to further assess the impacts on these low-income communities and communities of color. More than half of North Carolina counties along the route are below the median income for the State with concentrations of African-American and Native American families.

Notably, although FERC's study appropriately compares *poverty data* in census tracts within one mile of the pipeline corridor to poverty data for the State as a whole, but when it comes to *population percentages for communities of color*, FERC compares census tracts near the pipeline only with the percentage of minorities in the county in which the census tract is located.

As most of the North Carolina counties along the proposed ACP corridor have communities of color significantly above the State average this decision greatly minimizes the apparent disproportionality in minorities impacted. The decision to use county-level reference statistics for race and ethnicity left regulators unable to determine whether any pipeline route through these specific counties would place a disproportionate burden on minority populations when compared to the broader population of North Carolina, a population that would reportedly benefit from the project through electricity generation.

Northampton County, for instance, is 58 percent African-American, compared to a State average of 22 percent. A comparable analysis to disproportionate impacts on low income residents would use a comparison to State non-white populations, and would result in a dramatically different conclusion.

Native Americans are over-represented in the North Carolina segments of the ACP area by a factor of ten compared to statewide demographics --13% of affected population along the route versus 1.2% Native Americans in the North Carolina population. Disproportionate impact analysis can only be conducted using the right comparisons.

In the NAACP's report, "Fumes Across the Fence-Line: The Health Impacts of Air Pollution from Oil & Gas Facilities on African American Communities," November 2017, the health and safety impacts of compressor stations have been well documented. ATTACHED.⁷ Much of the natural gas infrastructure, including the proposed ACP in North Carolina, is being sited in communities of color, and as a result those communities are disproportionately impacted.

⁷ Additionally available online at www.naacp.org/wp-content/uploads/2017/11/Fumes-Across-the-Fence-Line_NAACP_CATF.pdf

The State agencies appear to have relied on FERC's flawed analysis of environmental justice without any separate analysis. In its lack of understanding of the simple term "disproportionate," FERC asserts that because impacts may be happening in low population areas, fewer people would be hurt and therefore it cannot see evidence of disproportionate impact. As noted above, FERC's Order ¶ 255 concludes "[t]hese impacts would occur along the entire pipeline route and in areas with a variety of socioeconomic background." Just because there is a low population concentration does not mean people of low income or people of color would not be disproportionately impacted.

A recently published study by the Research Triangle Institute, "Environmental Justice Concerns and the Proposed Atlantic Coast Pipeline Route in North Carolina," March 2018, demonstrates both the failures of FERC's analysis and ACP's impacts on communities of color.⁸ ATTACHED. The study concludes, "The counties crossed by proposed ACP route collectively have a significantly higher percentage minority population than the rest of the counties in the state (at the 99% confidence level)."

In addition to the fundamental flaws in the methodology used by FERC and adopted by the State agencies, the analysis fails to identify the major impacts on Native American populations living along the preferred pipeline route.⁹ Data show that in North Carolina alone, approximately 30,000 Native Americans live in census tracts along the route. This number represents one quarter of the State's Native American population and one percent of the entire Native American population of the U.S. FERC and State agencies' analysis is silent on this issue.

FERC simply concluded the preferred route has no disproportionate impacts on the African-American and Native American communities. It draws this conclusion by counting the number of census tracts with "meaningfully greater" minority populations than the county in which they are located. Failure of the environmental justice analysis to detect these impacts is based on serious flaws in the methodology.

FERC, and the State agencies, further fail to compare the currently preferred route with other alternative routes. It should be noted at least one of the earlier proposed routes would have passed through wealthier and predominately white communities near Raleigh, NC.

Compounding the failure of a proper environmental justice analysis, FERC refused formal consultation with the tribal councils along the route of the ACP. This consultation

⁸ Wraight, S., Hofmann, J., Allpress, J., and Depro, B. (2018). Environmental Justice Concerns and the Proposed Atlantic Coast Pipeline Route in North Carolina. RTI Press Publication No. MR-0037-1803. Research Triangle Park, NC: RTI Press. <https://doi.org/10.3768/rtipress.2018.mr.0037.1803>

⁹ Emanuel, R., Flawed Environmental Justice Analyses, Science Magazine, July 21, 2017. ATTACHED. Emanuel, R., Comments to the Federal Energy Regulatory Commission on the Draft Environmental Impact Statement for the Atlantic Coast Pipeline, LLC, Dominion Transmission, Inc. and Atlantic and Piedmont Natural Gas. Co., Inc., April 6, 2017. ATTACHED.

on tribal sites, and cultural and environmental resources known both profoundly and intimately by members of the Indian tribes should have occurred as an integral part of the review process, not as an afterthought. 18 C.F.R. § 2.1c(e) states “(e) [FERC], in keeping with its trust responsibility, will assure that tribal concerns and interests are considered whenever the Commission's actions or decisions have the potential to adversely affect Indian tribes or Indian trust resources.”

Representatives of the State agencies met with representatives of the tribes at the NC Council of Indian Affairs on August 9, 2017. However, the limited process did not allow detailed concerns to be incorporated into the State agencies' decisions.

FERC's summary analysis in the environmental documents takes a single, interstate project and breaks it down into a series of county-level projects for evaluating impacts on minorities. In doing so, the analysis masks large disproportionate impacts on Native American and African-American families and communities along the route. Along with FERC, the State agencies have discriminated against these populations.

CONCLUSION

EPA, after the investigation by ECRCO and public hearing in North Carolina, should require DEQ to rescind each of the permits and demand a new environmental justice analysis based on demographic data that considers reference populations more carefully.

Pursuant to 40 CFR ¶ 7.120(d), it is our understanding ECRCO is required to notify us within 20 calendar days of acknowledgement of this complaint and of your subsequent actions regarding it.

FOR THE ENVIRONMENTAL JUSTICE GROUPS

Respectfully submitted,

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cc. Roy Cooper, Governor
Michael Regan, Secretary, DEQ

ATTACHMENTS

Schedule of Expenditures of Federal Awards

NCDEQ (formerly NCDENR) Environmental Equity Initiative

NAACP, "Fumes Across the Fence-Line: The Health Impacts of Air Pollution from Oil & Gas Facilities on African American Communities"

Research Triangle Institute, "Environmental Justice Concerns and the Proposed Atlantic Coast Pipeline Route in North Carolina"

Emanuel, R., "Flawed Environmental Justice Analyses"

Emanuel, R., "Comments to the Federal Energy Regulatory Commission on the Draft Environmental Impact Statement for the Atlantic Coast Pipeline, LLC, Dominion Transmission, Inc. and Atlantic and Piedmont Natural Gas. Co., Inc."