



February 6, 2020

Via Email: Title_VI_Complaints@epa.gov and USPS First-Class Mail

U.S. Environmental Protection Agency
Mail code 230A
1200 Pennsylvania Avenue, NW
Washington, DC 20460

**Re: Complaint Against the North Carolina Department of Environmental Quality
Pursuant to Title VI of the Civil Rights Act of 1964 and EPA Implementing
Regulations**

Dear Director Dorka and External Civil Rights Compliance Office:

Friends of the Earth and The North Carolina Climate Solutions Coalition (“Complainants”) submit this complaint against the North Carolina Department of Environmental Quality (“DEQ”) for approving and subsequently failing to revoke a permit issued to Atlantic Coast Pipeline, LLC (“ACP”) under § 401 of the Clean Water Act of 1972 (“CWA”) in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7, and the United States Environmental Protection Agency’s (“EPA”) implementing regulations, 40 C.F.R. Part 7. DEQ’s actions will have an unjustified disproportionate impact on the basis of race and ethnicity against Native Americans and African Americans in violation of Title VI and agency regulations.

Complainants submit this complaint to preserve their rights in a timely way and will supplement the complaint with additional information in support of their claims. Below please find a brief summary of the basis for EPA’s jurisdiction: in short, the complaint meets all jurisdictional requirements: Complainants assert claims that (1) allege discrimination on the basis of race, color, or national origin; (2) raise claims against a recipient of federal funds; and (3) file this complaint in a timely way.

I. Basis for Complaint & Allegation of Discrimination

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance. EPA’s

implementing regulations, authorized by § 602 of the statute, 42 U.S.C. 2000d-1, prohibit actions with an unjustified disparate impact. 40 C.F.R. 7.35(b). Specifically EPA regulations prohibit using “criteria or methods of administering [a] program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, ... or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, [or]national origin....” 40 C.F.R. 7.35(b). The regulations also prohibit choosing “a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program or activity to which this part applies on the grounds of race, color, or national origin ...; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart.” 40 C.F.R. 7.35(c).

As described in a civil rights complaint filed by Complainant Friends of the Earth and a number of other environmental justice organizations in North Carolina against DEQ on May 15, 2018, DEQ’s decision to issue permits for the Atlantic Coast Pipeline will adversely and disproportionately affect Native Americans, who 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.” Letter from John D. Runkle, Attorney at Law, to External Civil Rights Compliance Office (“ECRCO”), 7 (May 15, 2018) (Title VI Environmental Justice Complaint against NC Department of Environmental Quality) (Appendix A). More generally, the complaint alleged that the permit would disproportionately affect communities of color, citing a study by the Research Triangle Institute, “Environmental Justice Concerns and the Proposed Atlantic Coast Pipeline Route in North Carolina,” March 2018, which concluded, “The counties crossed by the proposed ACP route collectively have a significantly higher percentage minority population than the rest of the counties in the state.” Appendix A at 8. The complaint further alleged that DEQ had ignored alternative routes, which were less discriminatory than the approved action. Appendix A at 8.

On August 24, 2018, EPA concluded that the complaint was not ripe for review on the basis that two permits issued by federal agencies still had to be modified before there would be a final order authorizing construction of the Pipeline. Letter from Dale Rhines, Deputy Director, ECRCO, to John D. Runkle, Attorney at Law, 2 (August 24, 2018) (Rejection without Prejudice of Administrative Complaint) (Appendix B). EPA dismissed the complaint without prejudice.

Information disclosed since that time strengthens the conclusion that the risks of the ACP and its related projects will fall most heavily in North Carolina on members of the Lumbee community – the largest community of Native Americans east of the Mississippi River. As Complainants wrote in an August 13, 2019 Petition to DEQ seeking revocation of the § 401 Water Quality Certification that DEQ had issued to the ACP, Letter from Donna Chavis, Friends of the Earth, and Rev. Mac Legerton, NC Climate Solutions Coalition, to Michael S. Regan (August 13, 2019)

(Atlantic Coast Pipeline – Petition for Revocation of 401 Water Quality Certification) (Appendix C), analysis of information now available shows that the ACP “threatens to inflict a wide variety of harms” to the Lumbee community, “including interference with their enjoyment of land, disruption and destruction of unmarked ancestral burials and sacred places, contamination of groundwater and aquifers, and general marring of the natural environment.” Appendix C at 20. Adverse impacts of the pipeline include among others: increased risk of flooding, aggravation of the climate crisis through the increased use of fracked gas, increased risk of groundwater contamination, increased risk of contact with toxic air pollution, and diminution in property value. *See* Appendix C.

Under Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341, states have the authority to review and approve, condition, waive, or deny water quality certification for any activity that is subject to a federal permit or license and may result in a discharge to waters of the United States. Under 40 C.F.R. § 122.64, the DEQ Division of Water Resources (“DWR”) grants and may revoke a permit for reasons including obtaining a permit by misrepresentation, failure to disclose fully all relevant facts, or a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge. Under 40 C.F.R. § 122.62, permits may be revoked if the Director has received new information that was not available at the time of the permit issuance, including any information indicating that cumulative effects on the environment are unacceptable. Complainants’ August 13, 2019 Petition asked DEQ to rescind its approval of the pipeline based on new information demonstrating, among other things, disparate and cumulative impacts posed by the project on the Lumbee community. To date, DEQ has failed to respond to the Petition and failed to rescind its approval of the ACP.

As the 4th Circuit recently stated in *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68 (4th Cir. 2020), “[E]nvironmental justice is not merely a box to be checked” and in that case, the court found that the Virginia State Air Pollution Control Board had not met its obligation to consider the disproportionate impact on communities of color living closest to the Compressor Station in Union Hill, Virginia by evaluating only compliance with air quality standards. *Friends of Buckingham*, 947 F.3d at 92. Civil rights obligations, like environmental justice obligations under Virginia law, stand in addition to responsibilities under environmental laws, and DEQ, no less than The Virginia State Air Pollution Control Board, must evaluate whether its decisions have a disproportionate impact on the basis of race, color, or national origin and come into compliance with Title VI where, as here, its actions will cause unjustified disproportionate impacts.

II. DEQ Receives EPA Funds

DEQ is a recipient of EPA funds. As the attached report from [USAspending.gov](https://www.usaspending.gov), attached as Appendix D, reflects, in FY2019, DEQ received at least \$67.6 million from the EPA.

III. Timeliness

Time limits for such complaints are intended to prevent individuals from sitting on their civil rights and coming forward too late after significant investment has been made on a project or action. The Complainants here have made a number of good faith efforts to notify DEQ as to their civil rights claims, including Friends of the Earth's initial May 15, 2018 civil rights complaint to EPA and Complainants' subsequent August 13, 2019 Petition for revocation of the § 401 certification. Notably, federal permits continue to be held up in litigation. *See Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150 (4th Cir. 2018), cert. granted *sub nom. United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S.Ct. 36, 204 L. Ed. 2d 1193 (2019), and cert. granted *sub nom. Atl. Coast Pipeline, LLC v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 36, 204 L. Ed. 2d 1193 (2019) (finding by the 4th Circuit that the Forest Service violated the National Environmental Policy Act, among other laws, by issuing a special use permit and record of decision authorizing construction of the pipeline through parts of national forests and granting right of way across the Appalachian National Scenic Trail).¹ If, based on EPA's reasoning in support of its decision to close Friends of the Earth's May 15, 2018 complaint, EPA finds that this complaint is not yet ripe, Complainants ask that EPA hold this complaint in abeyance until federal decisions are final or again close the complaint on ripeness grounds without prejudice. Complainants can then assert their rights in a timely way if and when such decisions are final.

A. Complainants Assert a Timely Claim that DEQ's Decision to Approve the ACP was Discriminatory.

EPA regulations state that complaints "must be filed within 180 calendar days of the alleged discriminatory acts, unless the OCR [now ECRCO] waives the time limit for good cause." 40 CFR § 7.120(b)(2). Complainant Friends of the Earth filed a timely complaint on May 15, 2018, alleging that DEQ had failed to adequately assess the disproportionate impacts of the decision to grant the permits and that, in fact, DEQ's action would have a disparate impact on the basis of race and national origin. Appendix A. EPA dismissed the claim as not ripe given that permits issued by federal agencies still needed to be modified. Appendix B at 2. Under this reasoning, a

¹ In August 2018, the 4th Circuit Court of Appeals vacated two permits issued to ACP; one was a Fish and Wildlife Service ("FWS") take permit; another was a permit issued by the National Park Service ("NPS") allowing ACP to intersect the Blue Ridge Parkway. *Sierra Club v. United States Department of the Interior*, 899 F.3d 260 (2018). FERC issued a stop work order following this decision, but lifted the order after FWS and NPS reissued permits on September 11 and September 14, 2018, respectively. The new FWS permit was again successfully challenged and the 4th Circuit vacated the biological opinion incidental take statement and remanded the case back to FWS. *Defenders of Wildlife v. Department of Interior*, 931 F.3d 339, 342 (4th Cir. 2019) (finding FWS's decision arbitrary and capricious). On December 13, 2018 the 4th Circuit vacated the Forest Service's decision to issue a permit to ACP under the Mineral Leasing Act. *Cowpasture River Pres. Ass'n*, 911 F.3d at 183. The project is halted until these permit are reissued and the Supreme Court makes a decision on *Cowpasture River Pres. Ass'n.*, 911 F.3d 150, cert. granted *sub nom. United States Forest Serv.*, 140 S.Ct. 36, cert. granted *sub nom. Atl. Coast Pipeline, LLC*, 140 S.Ct. 36.

challenge to DEQ's approval of the ACP may still not be ripe and Complainants would thus ask that ECRCO hold this complainant in abeyance or again dismiss without prejudice.

In the alternative, EPA should waive the 180-day timeline in this instance, given Complainants' good faith effort to notify DEQ of their claims, prior civil rights complaint filed with EPA, receipt of new information supporting their claims that was not disclosed at the time of DEQ's 2018 decision, and subsequent Petition asking DEQ to rescind its approval. *See* EPA, Case Resolution Manual, 10-11 (2017), *available at* https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf ("ECRCO will independently assess the record to determine whether a waiver is appropriate").

B. Complainants Assert Timely Claims Challenging DEQ's Failure to Rescind the Issuance of the § 401 Certification.

Information discovered by the Complainants demonstrates that the issuance of the § 401 certification was based on incomplete and inaccurate information that grossly underestimated the impacts of the project. New information disclosed after DEQ's 2018 approval of the ACP formed the basis of Complainants' April 13, 2019 Petition. Failure to revoke or modify the § 401 certification, allowing the project to go forward, will have adverse and disproportionate impacts on the Lumbee community and other communities of color.

DEQ's failure to respond to the Petition – and failure to rescind the Permit – can be challenged as a failure to act, which is subject to review for compliance with Title VI, or, in the alternative, as a constructive denial of the Petition.

Complainants' challenge to DEQ's failure to rescind approval of the ACP is timely filed because it is within 180 days of their August 13, 2019 Petition. A violation of Title VI and agency regulations can be established where a recipient fails to act. *See, e.g., United States v. Maricopa Cty., Ariz.*, 915 F. Supp. 2d 1073, 1080-81 (D. Ariz. 2012) (plaintiffs alleging failure to provide language assistance state a claim of national origin discrimination on the basis of disparate impact); *U.S. v. Town of E. Haven*, No. 3:12-cv-1652, 2012 WL 5869974, ¶ 43 (D. Conn. filed Nov. 20, 2012); *see generally* DOJ, Title VI Legal Manual, VII.1.a (identifying the facially neutral policy or practice), *available at* <https://www.justice.gov/crt/fcs/T6Manual7#E> ("the importance of identifying a specific practice does not necessarily mean that practice must be affirmatively undertaken; sometimes the relevant policy or practice could be the failure to do something, or even the failure to have a policy. In other words, inaction can exert a disproportionate adverse effect.")²

² DEQ's failure to respond to the Petition can be deemed a constructive denial of the Petition. The North Carolina Administrative Procedure Act ("APA") requires DEQ to respond to a rulemaking petition within 120 days. NC ST § 150B-20 (b). Failure of the agency to grant or deny the Petition within this time frame is considered denial. *Id.* at (d). Denial of a rulemaking decision is considered a final agency decision and subject to judicial review. *Id.* The

Conclusion

As the initial Friends of the Earth civil rights complaint alleged, DEQ's decision to issue a § 401 permit to Atlantic Coast Pipeline will have an unjustified disproportionate impact on the basis of race and ethnicity against Native Americans and African Americans in violation of Title VI and agency regulations. Complainants submit this complaint to preserve their rights and plan to supplement this complaint with additional supporting information. We request an opportunity to discuss the timeline for proceeding and look forward to hearing from you in the coming days.

Thank you for your investigation of this important matter.

Sincerely,



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(b) (6) Privacy

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APA sets even shorter timelines for other procedures, such as a 30-day limit to grant or deny a request for a declaratory ruling. NC ST § 15B-4(1). Taking the longer period allowed for DEQ to respond, DEQ's constructive denial of the Complainants' Petition occurred on December 11, 2019 — 120 days after the submission of the Petition on August 13, 2019. This Complaint is filed with 60 days of December 11, 2019.

On behalf of:

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CC:

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APPENDIX A

Initial Title VI Complaint and Attachments
Complaint Dated May 15, 2015

**JOHN D. RUNKLE
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2121 DAMASCUS CHURCH ROAD
CHAPEL HILL, N.C. 27516**

919-942-0600

(b)(6) Privacy, (b)(7)(C) Enf. Privacy

VIA EMAIL & MAIL

May 15, 2018

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 (b)(6) Privacy
[REDACTED]; Blue Ridge Environmental Defense League ("BREDL") (b)(6) Privacy
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] 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 (b)(6) Privacy, (b)(7)(C) Enf. Privacy BREDL, (b)(6) Privacy, (b)(7)(C) Enf. Privacy

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. [REDACTED] 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. [REDACTED] 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 [REDACTED]

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

(b)(6) Privacy, (b)(7)(C) Enf. Privacy

- d. (b)(6) Privacy, (b)(7)(C) Enf. Privacy a community-based group in Robeson County, NC, whose members are primarily Native American.
- e. (b)(6) Privacy, (b)(7)(C) Enf. Privacy a community-based group in Halifax County, NC, whose members are primarily African-American.
- f. (b)(6) Privacy, (b)(7)(C) Enf. Privacy 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.

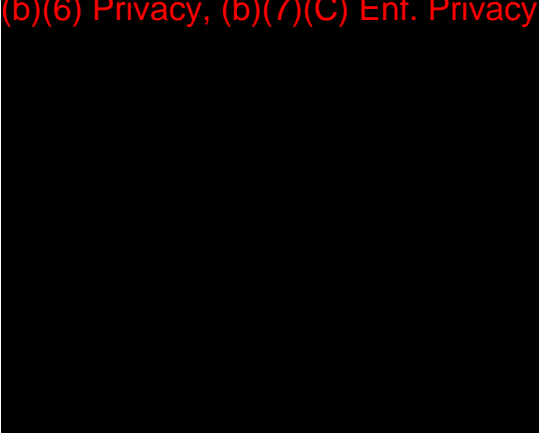
FOR THE ENVIRONMENTAL JUSTICE GROUPS

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."