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**Sent via Electronic Mail**

August 30, 2021

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**Re: Complaint Under Civil Rights Act of 1964, 42 U.S.C. § 2000d**

Dear Ms. Stoneman, Ms. Dorka, Ms. Goodwill, and Ms. Tallbear:

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submit this complaint against the New York State Department of Environmental Conservation (“DEC”), the New York State Department of Public Service (“DPS”), and National Grid for bypassing federal and state environmental and pipeline safety laws to construct and operate a fracked gas pipeline through predominantly Black and Latinx communities in Brooklyn, New York. These actions are racially discriminatory and have caused unjustified, disproportionate adverse impacts on the basis of race and ethnicity in violation of Title VI of the Civil

Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7, and the implementing regulations of the United States Department of Transportation (“DOT”), 49 C.F.R. Part 21, the United States Environmental Protection Agency (“EPA”), 40 C.F.R. Part 7, and the United States Department of Energy (“DOE”), 10 C.F.R. Part 1040.

The National Grid Metropolitan Reliability Infrastructure Project (“North Brooklyn Pipeline” or “MRI pipeline”) is an incomplete seven-mile 30-inch high pressure pipeline designed to transport fracked gas under the predominantly Black and Latinx neighborhoods of Brownsville, Ocean Hill, Bushwick, and East Williamsburg, in Brooklyn, New York to National Grid’s Greenpoint depot facility near Newtown Creek.<sup>1</sup> From there, National Grid planned to truck Liquefied Natural Gas (“LNG”) to Massachusetts.<sup>2</sup>

Representing the pipeline to the public as small segments, National Grid evaded public hearings and disguised the nature of its construction work so that community members did not learn of the pipeline until it was nearly complete. National Grid began operating the pipeline without informing the public; pressure testing the pipeline; submitting critical integrity management and mapping information to the Pipeline and Hazardous Materials Safety Administration (“PHMSA”); conducting any environmental assessment or analysis of the pipeline’s impact on communities of color; planning any evacuation process; or seeking the approval of the New York City Council as required by state law. National Grid claimed that it needed to build the pipeline to maintain safe and adequate service, but the scale of the project dwarfed those needs and demonstrated National Grid’s true purpose: a massive expansion of fracked gas infrastructure that would generate profits for National Grid at the expense of predominantly Black and Latinx community members. The pipeline endangers community health and safety to this day.

National Grid did not need to build this pipeline. And it certainly did not need to build the pipeline where it did—almost exclusively through communities of color that already experience disproportionate poverty, pollution, and poor health outcomes in almost every category compared to whites. National Grid had other options, including routing the pipeline through whiter, higher-income areas and not building a pipeline at all.

New York’s regulatory agencies—the DEC and DPS—allowed this travesty to happen. The DEC issued a legally flawed order finding that National Grid’s proposed expansion of its Greenpoint Liquefied Natural Gas (LNG) facility would have no significant environmental impact while refusing to assess the impact of the very pipeline that fed that facility, despite taking the opposite position on a different pipeline planned in a predominantly white community, and despite the established literature on the serious adverse health consequences of pipelines for the surrounding community. The DPS violated its regulatory duty by ignoring to National Grid’s failure to comply with pipeline safety laws and even awarded National Grid a rate hike—yet another cost that will disproportionately burden Black and Latinx New Yorkers. At the eleventh hour, DPS barred National Grid from continuing construction on the small

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<sup>1</sup> *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of The Brooklyn Union Gas Company d/b/a National Grid NY for gas Service and KeySpan Gas East Corp. d/b/a National Grid for Gas Service*, Cases 19-G-0309 & 19-G-0310 [herein after Case 19-G-0309 et al.], Dkt. No. 238, *Order Approving Joint Proposal, as Modified, and Imposing Additional Requirements*, at 43 n. 76 (July 6, 2021), <https://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=19-G-0309&submit=Search>.

<sup>2</sup> *Sane Energy Project et al v. City of New York et al*, Case No. 518354/2021, Dkt. No 7, Art. 78 Petition, Ex. F, LNG Variance Petition, at 5, 20 (July 23, 2021), <https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=iK7Vyu3k1B/zGJuxqMhDVQ==>.

part of the pipeline that directly crosses a majority white community, but DPS approved an expansion of the pipeline that substantially increased the amount of gas flowing through Brownsville, Ocean Hill, Bushwick and East Williamsburg. At no point did DEC, DPS, or National Grid even consider, much less analyze, the racially adverse disparate impacts of the pipeline on Black and Latinx New Yorkers despite their legal obligations to do so.

DEC, DPS, and National Grid have discriminated against Black and Latinx residents of Brooklyn and disproportionately subjected them to unjustified health and safety risks and economic harms on the basis of race, in violation of Title VI. Title VI required all three entities to include communities of color in their decision-making and to analyze the disproportionate impact of their decisions on communities of color, and DEC, DPS and National Grid failed to do so. Complainants request that the DOT Departmental Office of Civil Rights, the EPA Office of Civil Rights, and DOE Office of Civil Rights and Diversity accept this complaint and investigate whether DEC, DPS and National Grid violated Title VI of the Civil Rights Act and its implementing regulations. For reasons of economy, we request that these investigations be consolidated, and that EPA, DOT and DOE collaborate and coordinate on remedial approaches. We request that EPA take the lead role at the federal level. We also request that the Civil Rights Division of the Department of Justice play an active role in coordinating these federal investigative and enforcement actions, consistent with the mission of the Federal Coordination & Compliance Section.

Complainants demand that National Grid stop the flow of gas through the North Brooklyn Pipeline. Complainants further request that DEC, DPS and National Grid: (a) conduct a full and fair analysis of disparate impacts from the pipeline (including air quality monitoring and modeling, soil and water analysis, a health assessment, a cooperative community needs assessment, and an economic assessment); (b) conduct a full and fair consideration of alternatives that would avoid such disparate impacts; and (c) ensure that National Grid perform all required environmental analysis, safety testing and address all identified risks for leaks, and obtain the legally required approval from the New York City Council for the pipeline route. Complainants request a public hearing, an opportunity they have never had. Finally, Complainants demand remedial measures to counter the negative impacts of the pipeline on the harmed communities, including regularly conducting and reporting on air quality monitoring for all pollutants of concern, making investments to improve the environment in the affected communities, and protecting residents from rate increases. If the DEC, DPS, and National Grid do not come into compliance voluntarily, Complainants request that DOT, EPA, and DOE suspend or terminate the federal financial assistance that they receive and take immediate legal action to ensure their compliance with Title VI.

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## II. JURISDICTION AND TIMING

Title VI of the Civil Rights Act of 1964 and its implementing regulations prohibit discrimination in federal, state, local, and private programs or activities that receive federal financial assistance. 42 U.S.C. § 2000d.

## **A. Program or Activity**

The DEC, DPS, and National Grid are all programs or activities within the ambit of Title VI. Title VI defines program or activity as “all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government . . . any part of which is extended Federal financial assistance.” 42 U.S.C. § 2000d-4a(1). If any part of a state entity receives federal funds, the whole entity is covered by Title VI.<sup>3</sup>

Title VI also defines program or activity to include “an entire corporation ... which is principally engaged in the business of providing education, health care, housing, [or] social services.” 42 U.S.C. § 2000d-4a(3)(A)(iii); 10 C.F.R. § 1040.3 (DOE regulations). The term “social services” should be construed broadly consistent with ordinary meaning.<sup>4</sup>

The DPS<sup>5</sup> and DEC<sup>6</sup> are agencies or instrumentalities of the State of New York. National Grid is a corporation that receives federal assistance and provides a “social service.” Specifically, it provides gas, heat and electricity, which are critical social services for over 1.3 million customers in the New York Area. In addition, National Grid provides low-cost fuel and Home Energy Assistance Program (“HEAP”) benefits.<sup>7</sup> As such, all three entities meet the definition of program or activity under Title VI and must comply with Title VI in all of their duties.

## **B. Federal Financial Assistance**

DPS, DEC, and National Grid are recipients of federal financial assistance as defined in Title VI implementing regulations for DOT, EPA, and DOE. The regulations define federal financial assistance to

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<sup>3</sup> *Ass’n of Mexican-Am. Educators v. Cal.*, 195 F.3d 465, 474-75 (9th Cir. 1999), *rev’d in part on other grounds*, 231 F.3d 572 (9th Cir. 2000).

<sup>4</sup> U.S. Dep’t of Justice, TITLE VI LEGAL MANUAL 30 (Section V), <https://www.justice.gov/crt/book/file/1364106/download> (“The terms ‘education, health care, housing, social service, or parks and recreation’ should be construed broadly consistent with ordinary meaning.”) (last visited Aug. 28, 2021).

<sup>5</sup> The New York State Department of Public Service (DPS) regulates and oversees access to electric, gas, and other services, and ensures that natural gas pipelines are constructed and operate safely, and comply with all state and federal requirements. NYS PBS § 3. The Public Service Commission (PSC) is the agency within DPS that oversees the manufacturing, transportation, sale, and distribution of gas and electricity. NYS PBS § 4. Under state law and through an agreement with the Department of Transportation Pipeline and Hazardous Materials Safety Administration (PHMSA), DPS is responsible for developing and enforcing safety standards for all natural gas and hazardous liquid pipelines located within the state. Before constructing and operating a pipeline, all pipeline operators must submit a letter of intent and proof of compliance with state and federal pipeline safety standards with DPS.

<sup>6</sup> The New York State Department of Environmental Conservation (DEC) is the State’s environmental protection and regulatory agency and is charged with regulating and enforcing New York’s environmental protection laws and related federal laws pursuant to an agreement with the Environmental Protection Agency. DEC’s administers state and federal anti-air pollution laws and plays a key role in issuing permits for gas infrastructure. NYS ECL § 3-0301(1)(i) (describing the DEC’s purpose as the “prevention and abatement of all water, land and air pollution including, but not limited to, that related to hazardous substances, particulates, gases, dust, vapors, noise, radiation, odor, nutrients and heated liquids.”).

<sup>7</sup> National Grid provides substantial assistance to low-income individuals. *See, e.g.*, National Grid, *New York City gas customers: Do you need help paying your bills?*, [https://www.nationalgridus.com/media/pdfs/billing-payments/bill-inserts/nyc/gas\\_financial\\_assistance\\_ny\\_bill\\_insert.pdf](https://www.nationalgridus.com/media/pdfs/billing-payments/bill-inserts/nyc/gas_financial_assistance_ny_bill_insert.pdf) (last visited Aug. 26, 2021).

mean “any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty)”). 10 C.F.R. § 1040.2(b)(3).

DPS receives pipeline safety base grants awarded by DOT’s PHMSA. According to PHMSA, DPS received a Natural Gas Pipeline Safety Base Grant in the amount of \$4,656,327 for fiscal years 2020-21.<sup>8</sup> It has received \$517,432 this year.<sup>9</sup>

DEC has nine active grants with the Environmental Protection Agency totaling \$492.5 million.<sup>10</sup> In 2021, DEC received \$213.6 million from the EPA.<sup>11</sup>

National Grid currently has a \$12.4 million grant from the Department of Energy to facilitate research and development.<sup>12</sup>

### C. Timeliness

On March 2, 2021, DEC issued a “negative declaration,” finding no significant environmental impact for an Article 19 Air State Facility permit application related to a limited part of Phase 5 of National Grid’s MRI project. In making this assessment, DEC impermissibly segmented its review and failed to analyze the “whole action,” including Phases 1-4 of the same project. Further, DEC failed to consider the impact of the pipeline on communities of color, despite the fact that it is routed through such communities.

On August 12, 2021, DPS approved a rate increase authorizing National Grid to complete construction and recover costs associated with Phases 1-4 of the MRI project. DPS approved this rate hike even though it was on notice that National Grid failed to comply with key components of the Pipeline Safety Act and state law. Furthermore, DPS failed to analyze the environmental impact of the pipeline. Nor did it analyze or consider the disproportionate impact of the pipeline on communities of color. DPS

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<sup>8</sup> USA Spending, Department of Transportation Grant Summary to New York State Public Service Commission for 2021, [https://www.usaspending.gov/award/ASST\\_NON\\_693JK32030032PGSB\\_6957](https://www.usaspending.gov/award/ASST_NON_693JK32030032PGSB_6957) (last visited Aug. 26, 2021). The purpose of this funding is to “develop, support and maintain inspection and enforcement activities for State gas and hazardous liquid pipeline safety programs.” *Id.*

<sup>9</sup> *Id.* In 2019, DPS received over \$5.5 million in federal special revenue funding. NYS DPS 2018-2019 Appropriations, <https://www.budget.ny.gov/pubs/archive/fy19/exec/agencies/appropData/PublicServiceDepartment.html> (last visited Aug. 26, 2021).

<sup>10</sup> USA Spending, Spending by Prime Award (Grants) FY 2021, <https://www.usaspending.gov/search/?hash=81ff1e533f058d96bcbc2ec1742d4d3f> (last visited Aug. 26, 2021).

<sup>11</sup> USA Spending, New York State Department of Environmental Conservation: 12-month federal grants and trends, <https://www.usaspending.gov/recipient/12daf674-a8e1-1168-cc5e-1600ca96e02f-C/latest> (last visited Aug. 26, 2021).

<sup>12</sup> National Grid, National Grid Annual Report and Accounts 2020/21, at 13, <https://www.nationalgrid.com/document/142126/download> (“[T]he US Department of Energy awarded \$12.4 million to facilitate research and development in accelerating hydrogen blending into the transmission infrastructure.”) (last visited Aug. 28, 2021); *see also id.* at 17, 42 (same). According to the DOJ, “the financial assistance does not have to relate to a program in which the complainant participates or seeks to participate or used for the complainant’s benefit. Rather, an agency only has to prove that the entity received federal financial assistance when the alleged discrimination occurred.” DEP’T OF JUSTICE, *supra* note 4 at 11-12 (Section V) (*citing Howe v. Hull*, 874 F. Supp. 779, 789 (N.D. Ohio 1994) (“Defendant cannot receive federal funds on the one hand, and on the other deny he is covered by the [federal Rehabilitation Act] simply because he received no federal funds for his involvement with [complainant].”).

did, however, require National Grid to halt construction on the portion of the MRI project that would have directly impacted majority white communities.

National Grid's siting, construction, and operation of the pipeline constitutes a systematic policy and practice of discrimination that continues to this day.<sup>13</sup>

### III. FACTUAL BACKGROUND

#### A. The Harmed Communities

##### 1. Demographics of the MRI North Brooklyn Pipeline Route

The North Brooklyn Pipeline runs through the neighborhoods of Brownsville and Ocean Hill (Brooklyn Community District 16), Bushwick (Brooklyn Community District 4) and East Williamsburg, Williamsburg, and Greenpoint (Brooklyn Community District 1).<sup>14</sup>

Approximately 159,000 New Yorkers, who are predominantly and disproportionately Black and Latinx, live within the 1,275-foot blast evacuation radius of the North Brooklyn Pipeline.<sup>15</sup> Overall, approximately 70 percent of the community surrounding the pipeline is non-white, and 30 percent is white.<sup>16</sup> The population of the surrounding communities in the 1,275 square foot blast zone of the pipeline in Brownsville is 78 percent Black, and 44 percent Black for the entire pipeline route.<sup>17</sup> In stark contrast, the population of New York City is only 30 percent Black. Similarly, the population of the 1,275 square foot blast-zone in Brownsville is 65% Latinx, and approximately 39.3 percent for the entire pipeline route blast-zone, while Latinx only comprise 29.8 percent of the population in New York City.<sup>18</sup>

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<sup>13</sup> On March 12, 2021, National Grid reported to PHMSA and DPS that it had not conducted any pressure tests and that it did not install any new transmission pipeline during 2020 even though it began operating Phases 1-4 of the pipeline in that year and continues operating the untested pipeline to this day. PHMSA FOIL Response, PHMSA FOIL Response, National Grid Annual Report for Calendar Year 2020 Natural Or Other Gas Transmission and Gathering Systems (March 12, 2021), Exhibit K [hereinafter PHMSA FOIL Response, National Grid Annual Transmission System Reports, Ex. K].

<sup>14</sup> The 59 Community Districts ("CDs") were established citywide by local law in 1975. For a complete listing of all CDs and their boundaries, visit <https://communityprofiles.planning.nyc.gov>; see also Hinterland K. et al., Community Health Profiles 2018, Brooklyn Community District 16: Brownsville; 2018, 40(59) [hereinafter "Brownsville Community Health Profiles 2018"]; Hinterland K. et al., Community Health Profiles 2018, Brooklyn Community District 4: Bushwick; 2018, 28(59) [hereinafter "Bushwick Community Health Profiles 2018"]; King L. et al., Community Health Profiles 2015, Brooklyn Community District 1: Greenpoint and Williamsburg; 2015, 25(59) [hereinafter "Greenpoint and Williamsburg Community Health Profiles 2015"].

<sup>15</sup> "New Yorkers mount resistance against North Brooklyn Pipeline", FRACTRACKER ALLIANCE, 18 May 2020, <https://www.fractracker.org/2020/05/new-yorkers-resistance-against-north-brooklyn-pipeline/>

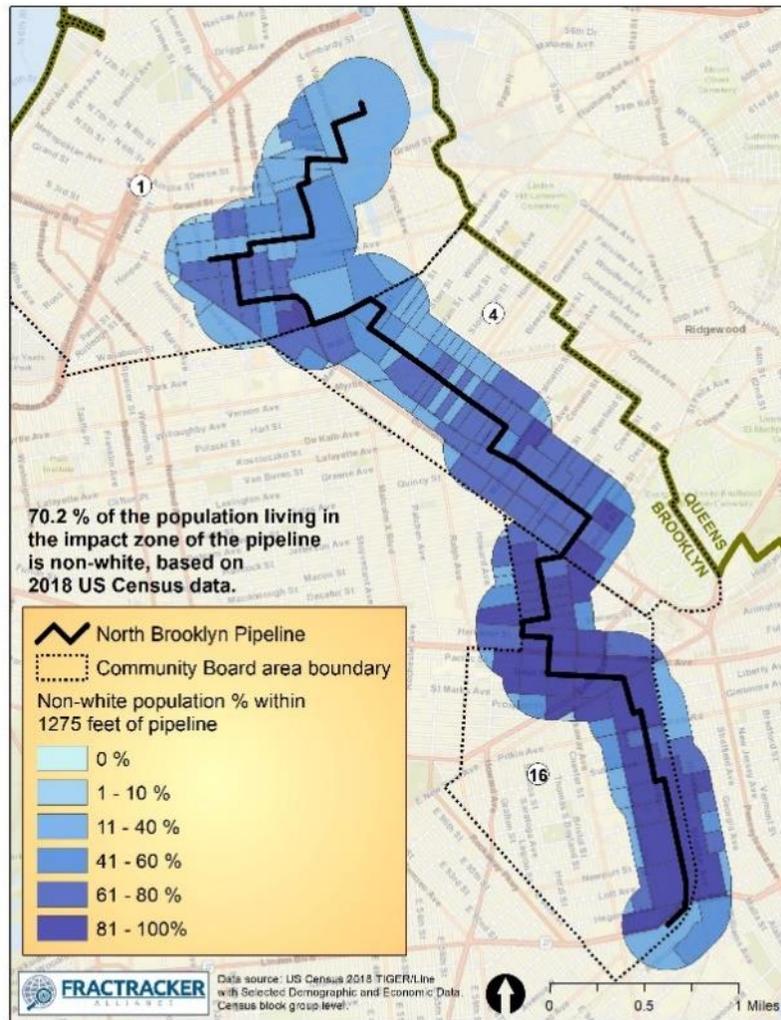
<sup>16</sup> Audrey Carleton, 'They're Liars': Activists Say Brooklyn Residents Were Not Informed Of Fracked Gas Pipeline, GUARDIAN (Dec. 21, 2020), <https://www.theguardian.com/environment/2020/dec/21/brooklyn-natural-gas-pipeline-fracking-bushwick>.; Fractracker Alliance analysis for National Center of Law and Economic Justice (on file with authors).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*; United States Census Bureau, Quick Facts for New York City, New York: Population Estimates (July 1, 2019), <https://www.census.gov/quickfacts/newyorkcitynewyork>

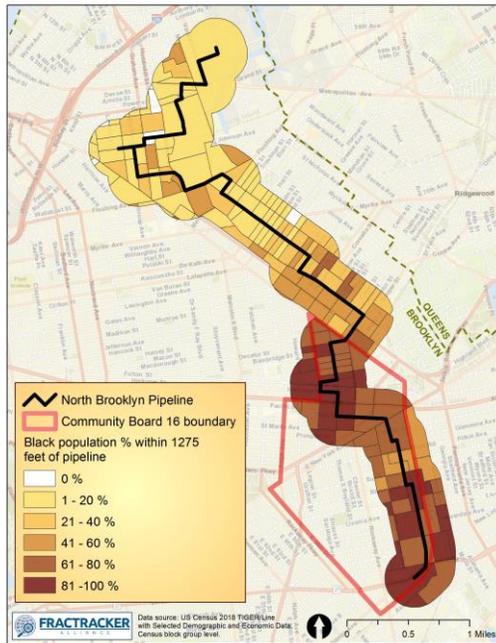
<b>Race of Residents in Blast Zone v NYC<sup>19</sup></b>			
<b>Residents in Blast Zone</b>			<b>NYC</b>
White	47,619	29.8%	42.7%
Black	70,849	44.3%	24.3%
Latinx	62,895	39.3%	29.1%

### Racial Demographics of Pipeline Blast Zone

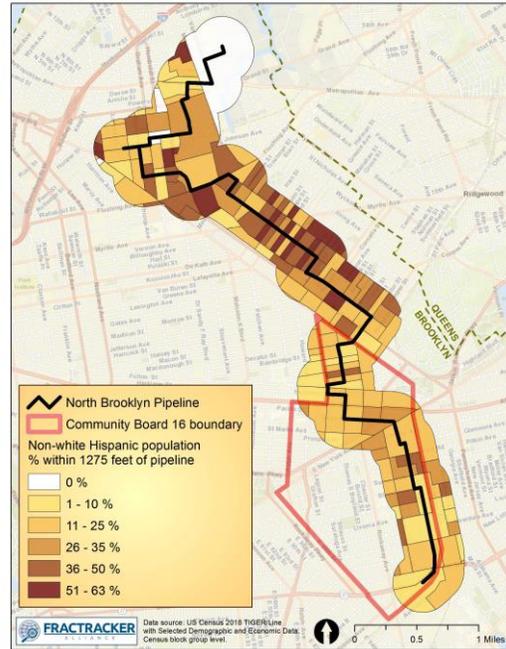


<sup>19</sup> *Id.* This complaint uses “Latinx” for U.S. Census-defined Hispanic population.

## Black Population of Blast Zone



## Latinx Population of Blast Zone



## 2. Brownsville and Ocean Hill

Brownsville and Ocean Hill residents already contend with staggering environmental injustices resulting from decades of racist public policies.<sup>20</sup> The City has designated this neighborhood an Environmental Justice Area.<sup>21</sup> The community is 76% Black<sup>22</sup> in sharp contrast to New York City as a whole, which is 22% Black<sup>23</sup> In Brownsville and Ocean Hill, the median household income hovers below \$33,000—49% lower than the citywide median.<sup>24</sup> Twenty eight percent of residents live in poverty, compared to 20% of all New York City residents.<sup>25</sup>

<sup>20</sup> Jennifer Pierre et al., *Building a Culture of Health at the Neighborhood Level Through Governance Councils*, 45 J. OF COMMUNITY HEALTH 871, 872 (2020): (“For New York City residents living in neighborhoods like East Harlem, Tremont and Brownsville, historical injustices, racist practices and policies have worsened environmental conditions and perpetuated poor health outcomes.”).

<sup>21</sup> See *Environmental Justice Areas*, NYCDOH, <https://nycdohmh.maps.arcgis.com/apps/instant/lookup/index.html?appid=fc9a0dc8b7564148b4079d294498a3cf> (designating Brownsville, Ocean Hill, Bushwick, and East Williamsburg Environmental Justice Areas) (last visited Aug. 26, 2021).

<sup>22</sup> Brownsville Community Health Profiles 2018, *supra* note 14, at 2.

<sup>23</sup> *Id.*

<sup>24</sup> NYU Furman Center, *State of the City 2019: Brownsville*, <https://furmancenter.org/neighborhoods/view/brownsville> (last visited Aug. 26, 2021).

<sup>25</sup> Brownsville Community Health Profiles 2018, *supra* note 14, at 7.

The health inequities currently and historically born by the Brownsville and Ocean Hill communities are astounding and unacceptable. New York City Department of Health and Mental Hygiene reports that a “baby born to a family that lives in the Upper East Side will live 11 years longer than a baby born to a family in Brownsville.”<sup>26</sup> The leading cause of premature death in the neighborhood is cancer, at a rate nearly twice as high as the citywide average.<sup>27</sup> Brownsville also has the highest rate for adult asthma in New York City (14%)<sup>28</sup> and more than double the rate of child asthma emergency department visits than the city average.<sup>29</sup> The neighborhood also has the second-highest concentration of public housing in the city and a high concentration of housing exposed to mold and pests.<sup>30</sup> The average life expectancy in Brownsville and Ocean Hill is six years below the citywide average.<sup>31</sup>

These existing health disparities are caused by many factors, including the quality of the local environment. The levels of the most harmful air pollutant, fine particulate matter (PM2.5), are 8.0 micrograms per cubic meter in Brownsville and Ocean Hill compared to 7.5 citywide.<sup>32</sup> Along the proposed pipeline route in these communities, there are 28 environmental remediation sites.<sup>33</sup>

Brownsville has the highest score of the city’s Heat Vulnerability Index, a measure of the risk of heat-related illness or death.<sup>34</sup> Only 71% of households have air conditioning, compared to 89% citywide.<sup>35</sup>

Brownsville is a resilient community that continues to resist the forces of racial capitalism. Situated on land stolen from the Lenape by white colonizers, the modern incarnation of Brownsville was developed as a residential neighborhood for Jewish immigrants who worked in factories in lower Manhattan.<sup>36</sup> The demographics shifted from the 1930s, as Black migrants from the Jim Crow era South moved into the neighborhood and Jews moved out, exercising social mobility not available to the Black residents.<sup>37</sup> The white flight out of Brownsville was precipitous: the neighborhood was two-thirds white

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<sup>26</sup> *Id.*, at 5.

<sup>27</sup> *Id.*, at 18 (reporting premature death from cancer in Brownsville at 80.8 compared to 46.2 citywide).

<sup>28</sup> Ian Kumamoto, *A Fracked Gas Pipeline Is Coming to Brooklyn. Residents Are Invoking BLM to Fight It*, VICE (Oct. 15, 2020, 10:36 am), <https://www.vice.com/en/article/v7m444/fracking-pipeline-brownsville-brooklyn-black-lives-matter-blm> (last visited Aug. 26, 2021); “Is Your Home Bad for Your Health? Know if Mold, Roaches and Rodents Are a Problem Before Moving In,” LOCALIZE (Jan. 21, 2019), <https://www.localize.city/blog/is-your-home-bad-for-your-health-know-if-mold-roaches-and-rodents-are-a-problem-before-moving-in/>.

<sup>29</sup> Brownsville Community Health Profile 2018, *supra* note 14, at 12.

<sup>30</sup> Kumamoto, *supra* note 29.; “Is Your Home Bad for Your Health? Know if Mold, Roaches and Rodents Are a Problem Before Moving In,” *supra* note 20.

<sup>31</sup> Brownsville Community Health Profile 2018, *supra* note 14, at 20.

<sup>32</sup> *Id.*, at 9.

<sup>33</sup> U.S. ENVIRONMENTAL PROTECTION AGENCY, “Aerometric Information Retrieval System—Airs Faculty Subsystem,” [https://cfpub.epa.gov/si/si\\_public\\_record\\_Report.cfm?Lab=&dirEntryID=2779](https://cfpub.epa.gov/si/si_public_record_Report.cfm?Lab=&dirEntryID=2779) (last visited Aug. 28, 2021). Draft DEC Environmental Assessment Form for National Grid North Brooklyn Pipeline Route created by NCLEJ staff, Exhibit N [hereinafter Draft DEC EAF North Brooklyn Pipeline, Ex. N].

<sup>34</sup> NEW YORK CITY DEPARTMENT OF HEALTH, “Environment & Health Data Portal: Heat Vulnerability Index,” [https://a816-doh.besp.nyc.gov/IndicatorPublic/HeatHub/hvi.html#:~:text=The%20Heat%20Vulnerability%20Index%20\(HVI.contribute%20to%20neighborhood%20heat%20risk](https://a816-doh.besp.nyc.gov/IndicatorPublic/HeatHub/hvi.html#:~:text=The%20Heat%20Vulnerability%20Index%20(HVI.contribute%20to%20neighborhood%20heat%20risk).

<sup>35</sup> Brownsville Community Health Profile 2018, *supra* note 14, at 9.

<sup>36</sup> Wendell Pritchett, *BROWNSVILLE, BROOKLYN: BLACKS, JEWS, AND THE CHANGING FACE OF THE GHETTO* 9 (University of Chicago Press 2002).

<sup>37</sup> *Id.*; see also Jerald Podair *Book Review: Brownsville, Brooklyn: Blacks, Jews, And The Changing Face Of The Ghetto*, URBAN STUDIES, Vol. 40, No. 1, 183-185 (January 2003).

in the mid-1950s and three-quarters Black and Puerto Rican in 1962.<sup>38</sup> Environmental injustice is a foundational feature of Brownsville: in the 1880s, fumes from the glue factories along Jamaica Bay would blow upwind into Brownsville.<sup>39</sup> In June of 1970, activists protested the mass accumulation of garbage in their neighborhood.<sup>40</sup> In 1988, a group of Brownsville activists sued the City for \$1.5 million for damages associated with the smoke stacks attached to the North River Sewage Treatment Plant. The plant was located less than half a mile away from the local middle school. As well, there was a 24-hour constant cycle of diesel trucks idling outside the plant, further adding to the poor air quality.<sup>41</sup>

### 3. Bushwick

Bushwick is also an Environmental Justice Area and overburdened with health inequities stemming from decades of racist public policies.<sup>42</sup> The Bushwick community is 65% Latinx,<sup>43</sup> in contrast to New York City as a whole at 29% Latinx.<sup>44</sup> Bushwick is a rapidly gentrifying area, increasing pressures on its community.<sup>45</sup> 25% of Bushwick residents live in poverty, compared to 20% of all New York City residents.<sup>46</sup>

Bushwick has the second highest score of the city's Heat Vulnerability Index.<sup>47</sup> Bushwick's level of the most harmful air pollutant, fine particulate matter (PM2.5), is 8.1 micrograms per cubic meter compared to 7.5 citywide.<sup>48</sup> Bushwick also sites a waste transfer station, further polluting its air quality.<sup>49</sup> Along the proposed pipeline route in Bushwick, there are multiple environmental remediation sites.<sup>50</sup>

### 4. East Williamsburg, Williamsburg, and Greenpoint

The end of the pipeline traverses the neighborhoods of East Williamsburg, Williamsburg, and Greenpoint, all part of Brooklyn Community District 1.<sup>51</sup> East Williamsburg is a designated

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<sup>38</sup> Pritchett, *supra* note 37, at 149, 152.

<sup>39</sup> *Id.*

<sup>40</sup> Joseph Lelyveld, *Brownsville Erupts in Violence Over Huge Accumulations of Garbage*, N.Y. TIMES, June 13, 1970, at 1, <https://www.nytimes.com/1970/06/13/archives/brownsville-erupts-in-violence-over-huge-accumulations-of-garbage.html> (last visited Aug. 28, 2021).

<sup>41</sup> NYC ENVIRONMENTAL RACISM, *Environmental Racism Case Study: New York City* <https://sites.google.com/a/owu.edu/nyc-environmental-racism/environmental-racism-case-study-new-york-city> (last visited Aug. 26, 2021).

<sup>42</sup> See NEW YORK CITY DEP'T OF HEALTH, "Environmental Justice Areas," <https://nycdohmh.maps.arcgis.com/apps/instant/lookup/index.html?appid=fc9a0dc8b7564148b4079d294498a3cf> (designating Brownsville and Bushwick Environmental Justice Areas) (last visited Aug. 28, 2021).

<sup>43</sup> Bushwick Community Health Profiles 2018, *supra* note 14, at 2.

<sup>44</sup> *Id.*

<sup>45</sup> Chelsey Sanchez, *High Rises In Bushwick? City's Rezoning Scheme Ignores Previous Community Plans*, *The Independent*, Dec 19, 2019, [https://independent.org/2019/12/high-rises-in-bushwick-citys-rezoning-scheme-ignores-previous-community-plans/?fbclid=IwAR1rwVpk5Le7hdqEAijnlZ7xbOYFdzpR3RCPC\\_D6BgHrSuvQY7bj0Uy8o](https://independent.org/2019/12/high-rises-in-bushwick-citys-rezoning-scheme-ignores-previous-community-plans/?fbclid=IwAR1rwVpk5Le7hdqEAijnlZ7xbOYFdzpR3RCPC_D6BgHrSuvQY7bj0Uy8o).

<sup>46</sup> Bushwick Community Health Profiles 2018, *supra* note 14, at 7.

<sup>47</sup> NEW YORK CITY DEP'T OF HEALTH, *supra* note 34.

<sup>48</sup> Bushwick Community Health Profiles 2018, *supra* note 14, at 9.

<sup>49</sup> Emily Pontecorvo, *Bike Messengers*, GRIST (June 12, 2020) <https://grist.org/energy/a-bike-ride-through-brooklyn-traces-the-path-of-national-grids-proposed-pipeline/> (last visited Aug. 27, 2021).

<sup>50</sup> U.S. ENV'TL PROTECTION AGENCY, *supra* note 33; Draft DEC EAF North Brooklyn Pipeline, Ex. N *supra* note 33.

<sup>51</sup> Greenpoint and Williamsburg Community Health Profiles 2015, *supra* note 14.

Environmental Justice Area and Williamsburg is a Potential Environmental Justice Area.<sup>52</sup> Greenpoint, the only neighborhood on the pipeline route that is not an Environmental Justice Area, is predominantly white.<sup>53</sup> Notably, however, the only part of this area that is not predominantly white, the New York City Housing Authority (“NYCHA”) Cooper Park Houses, is adjacent to National Grid’s LNG facility.<sup>54</sup> Greenpoint is home to one of the largest oil spills in U.S. history, as oil refineries leaked nearly 30 million gallons of oil into Newtown Creek for decades.<sup>55</sup> Newtown Creek is currently a Superfund site for which National Grid is partially responsible.<sup>56</sup>

## **B. History of the North Brooklyn Pipeline**

### **1. The 2016 Rate Case**

In January 2016, National Grid filed a rate case with the DPS Public Service Commission seeking higher rates for the period January 1, 2017 through December 31, 2019.<sup>57</sup> In its filing, National Grid explained its intent to use some of the increase to fund the Metropolitan Reliability Infrastructure Project, which it described as “an operational loop to the existing Brooklyn backbone system through the installation of approximately 34,000 feet of 30 inch, 350 psig transmission main from Linden Boulevard in Brownsville to Maspeth Avenue in Greenpoint and installation of associated gate stations.”<sup>58</sup> National Grid claimed the expansion was necessary to increase system reliability and operational flexibility. *Id.* The company also described its plans for capital upgrades to the Greenpoint Liquefied Natural Gas (LNG) facility.<sup>59</sup>

Though framed as a system reliability upgrade, in reality National Grid planned and proposed a major, multi-state expansion of fracked gas infrastructure, from which it would earn a profit and low-income Black and Latinx communities in Brooklyn would bear the risk. National Grid planned to use the pipeline to transport an additional 850,000 dekatherms of gas per day.<sup>60</sup> Under National Grid’s grand plan, it would bring fracked gas from Pennsylvania through the North Brooklyn Pipeline to the

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<sup>52</sup> See NYCDOH, *supra* note 43.

<sup>53</sup> *Id.*

<sup>54</sup> Samantha Maldonado, *Judge Temporarily Freezes Plan to Truck Frigid Liquid Natural Gas to Brooklyn*, The City (Aug. 5, 2021), <https://www.thecity.nyc/environment/2021/8/5/22612076/brooklyn-pipeline-national-grid-liquid-natural-gas-trucking> (last visited Aug. 29, 2021).

<sup>55</sup> Amir Khafagy, *A Pipeline Battle in the Heart of Brooklyn*, PROSPECT (Mar. 18, 2021),

<https://prospect.org/environment/pipeline-battle-in-the-heart-of-brooklyn/> (last visited Aug. 27, 2021).

<sup>56</sup> U.S. ENVTL. PROTECTION AGENCY, *Case Summary: Settlement Reached at Newtown Creek Superfund Site*, <https://www.epa.gov/enforcement/case-summary-settlement-reached-newtown-creek-superfund-site> (last visited Aug. 27, 2021).

<sup>57</sup> *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of The Brooklyn Union Gas Company d/b/a National Grid NY for gas Service and KeySpan Gas East Corp. d/b/a National Grid for Gas Service*, Cases 16-00252/16-G-0059 0310 [herein after Case 16-00252], Dkt. No. 1, *KEDNY Major Rate Case Filing*, (Jan. 26, 2016),

<http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=16-g-0059&submit=Search>.

<sup>58</sup> Case 16-00252, Dkt. No. 2, KEDNY-KEDLI Book 4-NY, at 82-83 (Jan. 29, 2016),

<http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=16-g-0059&submit=Search>.

<sup>59</sup> *Id.* at 79-80.

<sup>60</sup> Case 16-00252, Dkt. No. 2: KEDNY-KEDLI Book 4-NY, at 82-83 (Jan. 29, 2016); Case 16-00252, Dkt. No. 13, Book 4 KEDNY - C&U, at 23 (April 4, 2016).

Greenpoint LNG facility in New York, which would expand to increase production capacity.<sup>61</sup> From there, National Grid intended to transport LNG by truck for sale in Massachusetts.<sup>62</sup> Despite the fact that National Grid sought to bring gas from Pennsylvania to New York and then to Massachusetts, it did not seek a permit from the Federal Energy Regulatory Commission, which regulates the transportation of gas in interstate commerce.

National Grid did not assess the environmental risks of the proposed pipeline, including the impact on communities of color or greenhouse gas emissions it would produce.<sup>63</sup> Nor did National Grid consider the disparate impact of the pipeline on communities of color.<sup>64</sup> Similarly, National Grid did not evaluate potential greenhouse gas emissions or environmental justice impacts of the proposed Greenpoint LNG facility expansion or the LNG trucking station.<sup>65</sup> National Grid never conducted an evacuation zone study to determine how schools, residents, or businesses should respond in case of an emergency, and maintained that such a study was not necessary.<sup>66</sup> Nor did it seek the approval of the New York City Council for the pipeline law route, as required by state law.

National Grid routed the pipeline through predominantly Black and Latinx communities, with Phases 1-4 snaking through Brownsville, Ocean Hill, and Bushwick. In the primary part of Phase 5, the proposed pipeline route circumvented predominantly White areas to pass through predominantly Latinx neighborhoods. National Grid provided no reason for this convoluted route.<sup>67</sup>

National Grid considered and rejected various alternatives to the proposed pipeline. For example, National Grid rejected a possible route along Third Avenue in Brooklyn because it “would likely be more expensive and challenging from a routing and construction perspective, and would not provide as many benefits as the proposed project.”<sup>68</sup> National Grid did not elaborate on why the Third Avenue route—which would have been shorter and traversed a less heavily-residential neighborhood—offered fewer benefits and why it would be more expensive. However, this route would have traveled through some majority white and higher income neighborhoods.

National Grid also considered and rejected the option of doing “nothing.” *Id.* But it did not explore whether any actions short of building a massive fracked gas pipeline could improve system reliability and flexibility.

DPS did not hold hearings anywhere along the proposed pipeline’s route. DPS did not consider or acknowledge the disproportionate impact of the route on Black and Latinx communities. DPS approved a

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<sup>61</sup> The MRI pipeline “brings natural gas from Pennsylvania and runs through the Brownsville, Bedford-Stuyvesant, Bushwick, East Williamsburg and Greenpoint neighborhoods, ending at the National Grid depot facility in Maspeth, Queens near Newton Creek.” Case 19-G-0309 et al. *supra* note 1, at 43 n.76.

<sup>62</sup> *Sane Energy Project et al v. City of New York et al*, Case No. 518354/2021, Dkt. No 7, Art. 78 Petition, Ex. F, LNG Variance Petition, at 5, 20 (July 23, 2021), <https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=iK7Vyu3k1B/zGJuxqMhDVQ> [hereinafter National Grid FDNY Variance Petition].

<sup>63</sup> Case 19-G-0309 et al., Dkt. No. 111, Corrected Evid. Hrg. Transcript Volume 9, Corrected - Tuesday, Feb. 25, 2020 at 4590: 9-13 (Mar. 19, 2020).

<sup>64</sup> *Id.* at 4591: 13-21.

<sup>65</sup> *Id.* at 4602:19-4603:17.

<sup>66</sup> Case 19-G-0309 et al., *supra* note 1, Dkt No. 208: Exhibit Sane 11.4 (Mar. 02, 2020) at 2.

<sup>67</sup> Aiysha Rodriguez, *A Case Study of Environmental Injustice in New York City*, (Dec. 1, 2020) <https://storymaps.arcgis.com/stories/915c36e02c3d4c81b422c26eaa975155> (last visited Aug. 27, 2021).

<sup>68</sup> Case 16-00252, Dkt. No. 2: KEDNY-KEDLI Book 4-NY, Testimony of the Gas Infrastructure and Operations Panel, at 218, at 77 (Jan. 29, 2016) [hereinafter Testimony of the Gas Infrastructure and Operations Panel].

rate increase in an order issued and effective December 16, 2016.<sup>69</sup> Brownsville, Ocean Hill, Bushwick and East Williamsburg residents did not participate in the rate case, nor did they know of National Grid’s plans for their neighborhoods.

## 2. Construction of the North Brooklyn Pipeline Begins

National Grid segmented the MRI project into five phases of construction. Construction of Phase 1—the Brownsville segment—began quietly in May 2017.<sup>70</sup> National Grid failed to obtain authorization from the New York City Council as required by New York Transportation Corporation Law § 87. There were no public hearings or other opportunities for community members to learn about the proposed pipeline and share their concerns. National Grid claims that it performed public outreach to advise community members of the project.<sup>71</sup> Community members say otherwise.<sup>72</sup> Regardless, National Grid’s website and published materials misrepresent the nature of its work. An informational flyer for Phase 1 of the pipeline states that the company is “installing about 1.4 miles of new gas main from Linden Boulevard to Glenmore Avenue.”<sup>73</sup> National Grid made similar misrepresentations in the “Construction Updates” section of its website (these “Construction Updates” began in July 2018, in Phase 2 of pipeline construction).<sup>74</sup> In fact, National Grid was not installing a “gas main” but rather a transmission pipeline. The two are not the same.<sup>75</sup> The National Grid website describes construction of small segments of “gas main,” but nowhere does it describe the pipeline as a large, 7-mile expansion of its gas infrastructure designed to carry massive amounts of gas at high pressure.<sup>76</sup> And as described below, National Grid hid the nature of the project even when asked by local residents about the purpose of active construction.

## 3. National Grid Fails to Comply with Public Awareness Requirements under the Pipeline Safety Act

The federal Pipeline Safety Act and New York’s implementing regulations require pipeline operators to educate the general public about safety risks associated with a pipeline, including possible

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<sup>69</sup> Case 16-00252, Dkt. No. 127, *Order Adopting Terms of Joint Proposal and Establishing Gas Rate Plans* (Dec. 16, 2016).

<sup>70</sup> Jessie Edwards, *Controversial Fracked Gas Pipeline in Brooklyn Continues, Despite Calls to Stop Construction Immediately*, BK READER (October 13, 2020), <https://www.bkreader.com/2020/10/13/controversial-fracked-gas-pipeline-in-brooklyn-continues-despite-growing-calls-to-stop-construction> (last visited Aug. 27, 2021); NATIONAL GRID, “About the Metropolitan Natural Gas Reliability Project (June 2021),”

<sup>71</sup> *Id.*

<sup>72</sup> *See e.g., id.* (“Everyone in the neighborhood thought they were fixing the plumbing.”).

<sup>73</sup> National Grid, “Metropolitan Natural Gas Reliability Project – Phase 1,” [http://www.eastbrooklynbid.org/uploads/6/4/5/8/6458522/national\\_grid\\_metropolitan\\_gas\\_project\\_final\\_2017.pdf](http://www.eastbrooklynbid.org/uploads/6/4/5/8/6458522/national_grid_metropolitan_gas_project_final_2017.pdf) (last visited Aug. 29, 2021).

<sup>74</sup> National Grid, “Construction Update: July 18, 2018,” <https://nationalgridgasprojectsny.com/brooklynmetro/news/update-2/> (last visited Aug. 27, 2021).

<sup>75</sup> A “main” is “a distribution line that serves as a common source of supply for more than one service line.” 49 C.F.R. § 192.3. A “transmission line” is “a pipeline, other than a gathering line, that: (1) Transports gas from a gathering line or storage facility to a distribution center, storage facility, or large volume customer that is not downstream from a distribution center; (2) operates at a hoop stress of 20 percent or more of SMYS; or (3) transports gas within a storage field.” *Id.*

<sup>76</sup> *See, e.g.,* National Grid, “Construction Update: November 5, 2018,” <https://nationalgridgasprojectsny.com/brooklynmetro/news/construction-update-november-5-2018/> (last visited August 29, 2021).

leaks and what to do in case of accident.<sup>77</sup> The public education materials must be in English and other languages commonly understood by a significant number and concentration of the non-English speaking population in the operator’s area.<sup>78</sup> National Grid must submit its public education program to its state regulator, the New York State Department of Public Safety, for periodic review. Under the regulatory structure imposed by the PSA, DPS has primary responsibility for ensuring that National Grid meets its public awareness obligations.

Community members living in close proximity to the Brooklyn pipeline have consistently reported that they did not see any such public awareness materials. They report that National Grid never informed them of the pipeline, its risks, or precautions they should take in the case of an accident. For this reason, residents did not know that National Grid built a pipeline through their neighborhoods until 2020—in some areas, well after construction ended and even after part of it was operational. For example:

- According to (b) (6) (b) (6) who lives close to the pipeline with her son and husband, National Grid never sent or gave her any information about the pipeline, its risks, or precautions she should take in case of an explosion or leak.<sup>79</sup> She did not learn of the pipeline until June 2020, when a friend invited her to a protest held by the (b) (6) Privacy, (b) (7)(C) Enforcement Privacy. In addition, she contacted New York State Assemblymember Latrice Walker to set up a meeting. When they spoke around August 25, 2020, the Assemblymember stated that “she did not know much about the North Brooklyn Pipeline and that she thought the construction was just upgrading infrastructure.” In September 2020, (b) (6) gave a presentation about the pipeline to Brooklyn Community Board 16, which includes Brownsville and Ocean Hill, to “inform[] them about the pipeline’s size, the lack of environmental review it had undergone, and the impending rate hikes associated with its construction.” (b) (6) stated that “[p]rior to my contacting them, the community board did not seem to know anything about the pipeline” and that “[t]he members had a lot of questions about my presentation.”
- (b) (6) who has lived in Brownsville for over 30 years and who lives on the street where the pipeline is located, also never received any information from National Grid about the construction of the pipeline, the potential for leaks and hazards, or precautions to take in case of an emergency.<sup>80</sup> Around 2018 and again in January 2020, she often saw and heard construction on and around her block. She did not learn about the pipeline until well after construction crews had left in Summer 2020, after it had already been installed and was allegedly operational. According to (b) (6), “I am anxious and upset because the pipeline was placed so close to my home and I had no idea until at least two years after it was installed. It is very

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<sup>77</sup> 49 U.S.C. § 60116(a) (“Each owner or operator of a gas or hazardous liquid pipeline facility shall carry out a continuing program to educate the public on the use of a one-call notification system prior to excavation and other damage prevention activities, the possible hazards associated with unintended releases from the pipeline facility, the physical indications that such a release may have occurred, what steps should be taken for public safety in the event of a pipeline release, and how to report such an event.”); 9 C.F.R. § 192.616(a), (d) (“...each pipeline operator must develop and implement a written continuing education program that follows the guidance provided in the American Petroleum Institute’s (API) Recommended Practice (RP) 1162...”); 16 N.Y.C.R.R. § 255.616(a), (d) (same).

<sup>78</sup> 49 C.F.R. § 192.616(g) (“The program must be conducted in English in other languages commonly understood by a significant number and concentration of the non-English speaking population in the operation’s area.”).

<sup>79</sup> Exhibit B, Statement of (b) (6).

<sup>80</sup> Exhibit C, Statement of (b) (6).

unnerving because I know that gas lines in other areas have caused so much damage. I am concerned because we have both young people with asthma and other health conditions and senior citizens in this area. Respiratory issues are prevalent health concerns in our neighborhood.”<sup>81</sup>

- (b) (6) who has lived in Brownsville for over thirty years and currently resides a half block away from the pipeline, also never heard about the pipeline from National Grid.<sup>82</sup> There was frequent construction on her block beginning in 2018 or earlier. When (b) (6) asked a construction supervisor what they were doing, he replied that he worked for National Grid but did not tell her he was building a pipeline. (b) (6) volunteers on the board of the (b) (6) Privacy, (b) (7)(C) Enforcement Privacy Homeowners Association, which had to pay approximately \$7,000 to fix a sewer break on their block in 2019. (b) (6) believes this break was caused by National Grid’s construction. (b) (6) learned about the pipeline when her neighbors were protesting against it in the summer of 2020. Since 2017, (b) (6) has never received any information about the pipeline from National Grid, including information about the potential risks to her health and safety. (b) (6) states, “To say I am disappointed about the pipeline is an understatement. I feel targeted. I am angry that my neighbors and I were not informed about the pipeline before it was installed.”<sup>83</sup>
- (b) (6) who has lived in Ocean Hill-Brownsville in proximity to the pipeline site since 2005, also stated that National Grid never notified him of the pipeline, any risks of fire or explosion, or any precautionary measures. Nor has he seen any permits. He did not hear about the pipeline until he attended a rally in September 2020, where people were protesting the pipeline—when it was already operational. According to (b) (6), “Having National Grid build this pipeline in my neighborhood without my knowledge or consent feels like a slap in the face. It is frustrating and disrespectful that things like this happen in Black and Brown communities and it is hard to accept that this is happening and try to figure out how to fix it when it is not something we asked for.”<sup>84</sup>
- Similarly, (b) (6), and who lives three or four blocks away from the North Brooklyn Pipeline in Bushwick, Brooklyn, was never informed about the pipeline by National Grid. The first time she heard about it was in January 2020, when the No Bk Pipeline Coalition contacted her to challenge the pipeline. She was “especially surprised to hear that a pipeline was being constructed because we were community organizers and our work regularly included environmental and climate justice organizing.” National Grid never notified her of her proximity to the pipeline or the risks of or precautions to take against leaks and explosions, nor has she seen a permit. In addition, even though her daughter attends a public school that is adjacent to the pipeline site in Bushwick, she never received information from her daughter’s school or from National Grid concerning the pipeline or safety information.<sup>85</sup>
- (b) (6) who lives on the pipeline route in Williamsburg Brooklyn with her son who goes to a school three blocks away from the pipeline, also never heard about the pipeline or any risks or precautions from National Grid. (b) (6), who is also a member of

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<sup>81</sup> *Id.*

<sup>82</sup> Exhibit D, Statement of (b) (6)

<sup>83</sup> *Id.*

<sup>84</sup> Exhibit E, Statement of (b) (6)

<sup>85</sup> Exhibit F, Statement of (b) (6)

the (b) (6) Privacy, (b) (7)(C) Enforcement Privacy, first learned about the pipeline from in May 2020 from social media. She never heard about it from her son’s school, and tried contacting them to do education, but no one ever got back to her. According to (b) (6), “Community members who attended the (b) (6) Privacy, (b) (7)(C) Enforcement Privacy teach-ins were in disbelief when they heard about the pipeline. Many community members assumed that the construction on their streets had to do with water main issues. They had no idea that a pipeline was being built. It was interesting to track the different reactions of different members of the community when they learned about the pipeline because Williamsburg has many Black and Brown residents who are mostly low-income, but it also has some more affluent white residents. The Black and Brown residents were surprised to learn that the pipeline was why there had been digging and holes on their blocks. A lot of the small businesses in the neighborhood that are owned by people of color lost business from the construction that was blocking the road. However, many of the white residents did not even know about the construction because there was nothing happening on their streets.”<sup>86</sup>

#### **4. National Grid Files Second Rate Case Before DPS and Seeks Air Permit from the DEC, Triggering SEQRA Review**

In April 2019, National Grid filed a *second* rate case. This case sought additional recovery for Phases 4 and 5 of the pipeline, including the Greenpoint LNG facility and proposed LNG trucking station.

In May 2019, National Grid filed an air permit application with the NY DEC seeking to repermit the Greenpoint LNG station from a major Title V permit to a minor state facility permit. National Grid also sought permission to add two new CNG injection heaters and two new LNG vaporizers to the Greenpoint facility. The air permit application triggered the SEQRA review process, under which DEC must assess the environmental impact of the “whole action” of which the permitted process forms a part.

Although the work on the Greenpoint LNG facility was directly tied to the North Brooklyn Pipeline, National Grid made no reference to the pipeline in its application. In its rate case filings, National Grid repeatedly stated that the purpose of expanding the LNG facility was to produce and store gas that could be injected into the distribution system via the North Brooklyn Pipeline during times of peak demand. There would have been no reason to expand the Greenpoint facility without the extra capacity generated by the North Brooklyn Pipeline.<sup>87</sup> In fact, as National Grid represented to its shareholders and in the rate case for revenue, the North Brooklyn Pipeline and the Greenpoint LNG facility expansion (including the trucking station) were pieces of a single grand plan.

#### **5. Community Opposition Mounts As Brooklyn Residents Learn About the Pipeline**

In 2020, Brownsville, Ocean Hill, and Bushwick community members began learning about the pipeline for the first time through organizers with the (b) (6) Privacy, (b) (7)(C) Enforcement Privacy, which includes the (b) (6) Privacy, (b) (7)(C) Enforcement Privacy, an environmental advocacy group, had intervened in the 2019 rate case and learned of the existence of the pipeline. After finding out about the pipeline by attending events organized by the (b) (6) Privacy, (b) (7)(C) Enforcement Privacy, in the summer of 2020, Brownsville community members formed the (b) (6) Privacy, (b) (7)(C) Enforcement Privacy to organize opposition to the pipeline. Concerned about the pipeline’s impact on their health and safety, residents organized and joined protests, contacted their elected officials, submitted remarks in the rate case, and conducted community education to raise awareness about the pipeline.

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<sup>86</sup> Exhibit G, Statement of (b) (6) Privacy, (b) (7)(C) Enforcement Privacy].

<sup>87</sup> See generally Case 19-G-0309 et al., Dkt. No. 131, Exhibit 735 IR DPS-1091 (April 17, 2020).

For example, (b) (6), (b) (6), organized and participated in protests, contacted and met with her Assemblywoman and presented to Community Board 16 in September 2020.<sup>88</sup> According to (b) (6), “I am outraged that this pipeline was built in my community without my knowledge or consent. As the already densely populated New York City continues to build much-needed low-income housing in the neighborhood, there is an even greater risk of emergency if there is a leak or explosion and people have to evacuate. I am also terrified for my son’s future and the possible health effects associated with this pipeline.”<sup>89</sup> (b) (6), who is involved with the Parent-Teacher Association (PTA) at her son’s school, three blocks from the pipeline, informed science teachers and school officials about the pipeline, but did not hear back. She then joined (b) (6) Privacy, (b) (7)(C) Enforcement and began doing teach-ins at schools to educate them about the pipeline. She said that “community members who attended the (b) (6) Privacy teach-ins were in disbelief when they heard about the pipeline.”<sup>90</sup> Many residents expressed concern and protested the pipeline, based on deep concern about the health and safety of their and their families’ lives. For example, (b) (6), a member of (b) (6), who lives close to the pipeline, and whose daughter attends public school right next to the pipeline, helped organize (b) (6) Privacy, (b) (7)(C) Enforcement a Black, Brown, and Indigenous-led Coalition formed in opposition to the pipeline, protested pipeline construction multiple times, and even chained herself to the construction site.<sup>91</sup> According to (b) (6): “I am upset that this pipeline was placed in our neighborhood without our knowledge or consent. I am concerned because I know that the risks are real and that there have been fracked gas leaks in other states that contaminate air, water, dirt, and the earth. The fumes are toxic and can cause cancer and asthma. You can see from the map that these pipelines are deliberately being placed in Black and Brown neighborhoods.”<sup>92</sup>

After (b) (6), learned about the pipeline through a protest in 2020, “my neighbors and I did our own research and started informing our community as well. We started passing out flyers, held meetings in parks, and went door to door educating homeowners in Brownsville.”<sup>93</sup> She stated: “I think it is very unfair that certain neighborhoods are picked on and used for these purposes without their input. I believe it is only fair that when entities come into neighborhoods, they inform residents, so they have a say.”<sup>94</sup> (b) (6) was also one of the thousands of residents who submitted a comment in the rate case opposing the pipeline and rate hike to the former Governor and DPS PSC.<sup>95</sup>

In addition, elected officials began to learn and speak out about the pipeline publicly, to elected officials, and in the DPS-PSC rate case. On October 7 2020, Ocean Hill-Brownsville Assemblywoman Latrice M. Walker (D- 55), Councilwoman Alicka Ampry-Samuel wrote now-former Governor Cuomo, PSC Commissioner John Rhodes, and Mayor DeBlasio a letter expressing concern about the lack of transparency and environmental harms of the pipeline. Walker and Samuel stated:

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<sup>89</sup> *Id.*

<sup>90</sup> (b) (6) Statement.

<sup>91</sup> (b) (6) Statement, *see also* Todd Maisel, *Four chained demonstrators arrested in Brooklyn pipeline protest*, AMNY (Oct 15, 2020), <https://www.amny.com/news/brooklyn-demonstrators-chain-gas-pipeline-fracking/>.

<sup>92</sup> (b) (6) Statement.

<sup>93</sup> (b) (6) Statement.

<sup>94</sup> *Id.*

<sup>95</sup> Case 19-G-0309 et al., Comment No. 2057, Comment of (b) (6) to Governor Cuomo and Honorable Michelle Phillips, Public Service Commission (Oct. 19, 2020) (“We at Brownsville do not need a fracking gas line in our community. This will be a deterrent and a hazard to our community our water and our people. We say no to the Brooklyn gas pipeline.”).

We are fierce advocates for our beloved Brownsville community and some of us are lifelong residents, with a deep understanding of the historical implications of a lack of an investment in our community's infrastructure, and as time passes our systems begin to wane and must be modernized. However, due to a lack of transparency around this entire effort and a dearth of input from local residents, it is unclear whether the MRI Project accomplishes this goal or seeks to accomplish goals that are far beyond what is necessary for the sake of modernization and reliability. Many in our community have reason to suspect that this project is actually a pipeline that intends to circumvent state laws and transport fracked gas across Brooklyn, leading to the expansion of liquefied and compressed natural gas depots. Continuing to undertake fossil fuel expansion projects will only exacerbate the emissions of greenhouse gasses and criteria air pollutants that have devastated our residents, many of which are already suffering from a plethora of respiratory health issues that have become even more life-threatening as a result of the COVID-19 pandemic.<sup>96</sup>

And in March 2021, Councilwoman Alicka Ampry-Samuel and Public Advocate Jumaane Williams introduced a resolution in the New York City Council urging the New York State Public Service Commission to deny a rate hike and all fossil fuel infrastructure development for the Metropolitan Reliability Infrastructure project.<sup>97</sup> In their resolution, they noted that the “seven-mile long pipeline will trench through several low-income neighborhoods where the majority of the population are people of color, and these same communities are considered ‘environmental justice’ neighborhoods as the residents face disproportionate environmental health burdens,” and highlighted that “78 percent of Brownsville residents are Black and the neighborhood has the highest rates of adult asthma and the lowest life expectancy in the City of New York.”<sup>98</sup>

## **6. National Grid Unlawfully Begins Operating Phases 1-4 of Pipeline Without Critical Safety Procedures, Including Pressure Testing the Pipeline**

In April 2020, National Grid began operating phases 1-3 of the pipeline,<sup>99</sup> and it added phase 4 into service in November 2020.<sup>100</sup> National Grid performed no public education or outreach to inform the community that an active gas transmission pipeline now ran through their neighborhood. In fact, National

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<sup>96</sup> Exhibit H; Case 19-G-0309 et al., Comment No. 2209, Assemblywoman Latrice M. Walker New York Assembly, (Oct. 10, 2020). In the opening comment in the rate case, Assemblywoman Walker noted elected officials had been pleading with the city and DPS to stop construction and revoke work permits. *Id.* (“We the undersigned electorate collectively representing the community of Brownsville are writing to you in the voice of our constituents who have been pleading with the City and State administrations to revoke work permits administered to National Grid by New York City and to deny National Grid’s Rate Case for the construction of Phase 5 of the Metropolitan Reliability Infrastructure (MRI) Project.”).

<sup>97</sup> N.Y. City Council Res. No. 1562 (as introduced on Mar. 18, 2021)

<https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4856753&GUID=5DD20438-43C9-4F06-9C01-837F222ED230&Options=&Search=> (last visited Aug. 27, 2021).

<sup>98</sup> While the bill is still in conference, it especially is notable because, as described below, state law required National Grid to get the approval of two-thirds of the City Council for the route and to install and operate the pipeline, but failed to do so. N.Y.S. Trans .Corp. § 87. This resolution in opposition is the only reference to the pipeline in City Council’s records.

<sup>99</sup> Case 19-G-0309 et al., Dkt. No 131, Exhibit 735 (April 17, 2020) [hereinafter Exhibit 735].

<sup>100</sup> National Grid Response to SANE-23 Request for Information No. NG-1487, Case No. 19G-0-309 et al Date of Request: December 21, 2020 Request No. SANE-23 (Jan. 4, 2020), <https://drive.google.com/file/d/10XoUrB4Cp6U20OTUORbkXVEdLTScr3eo/view>

Grid did not disclose that it had begun operating the pipeline until January 2021, and only then when forced to answer questions as part of the discovery process in the rate case.

The federal Pipeline Safety Act and New York’s implementing regulations, issued by the Public Service Commission, impose critical public safety requirements on gas transmission pipeline operators to ensure safe operation of pipelines. National Grid appears to have flouted many of these provisions:

- **Failure to test:** Prior to operation a pipeline operator must file a report certifying the maximum operating pressure and that the line has been constructed and tested in accordance with the law, and that all leaks have been located and eliminated. **National Grid reported to PHMSA that it did not perform any pressure testing in 2018, 2019, or 2020, in violation of law.**<sup>101</sup>
- **Failure to submit mapping data to PHMSA:** Federal law requires pipeline operators to submit geospatial data to the PHMSA for inclusion in the National Pipeline Mapping System.<sup>102</sup> **National Grid did not do this, and as a result the North Brooklyn Pipeline does not appear in the National Pipeline Mapping System.**<sup>103</sup> The PHMSA uses geospatial data, in part, to identify high consequence areas in which pipeline operators must take additional safety precautions.

**Failure to file operating and maintenance plan:** Prior to operation a pipeline operator must prepare and file a detailed operating and maintenance plan.<sup>104</sup> The plan requirements are extremely detailed and comprehensive in order to assure safe operation. The PHMSA has no record of such a plan for the North Brooklyn pipeline, nor does the DPS website show that such a plan was ever filed.

## **7. DEC Issues a “Negative Declaration” and Refuses to Consider the Environmental Impact of the North Brooklyn Pipeline**

In November 2020, the DEC issued its first “Negative Declaration,” in response to National Grid’s application to expand its Greenpoint gas processing center,<sup>105</sup> in which DEC stated that the

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<sup>101</sup> National Grid Annual Transmission System Reports, Ex. K, *supra* note 13. Pressure testing is required by 16 N.Y.C.R.R. § 255.503(a) (“No person may operate a new segment of pipeline, or return to service a segment of pipeline that has been reconstructed, relocated, replaced, or reactivated until it has been tested in accordance with this Part to substantiate the proposed maximum allowable operating pressure and each leak has been located and eliminated.”). *See also* 49 C.F.R. § 192.503(a)(1) (same); 49 U.S.C. § 60139(d) (same).

<sup>102</sup> 49 U.S.C. § 60132(a)(1), (a)(4) (“[t]he operator of a pipeline facility (except distribution lines and gathering lines) shall provide to the Secretary of Transportation the following information with respect to the facility: (1) Geospatial data appropriate for use in the National Pipeline Mapping System or data in a format that can be readily converted to geospatial data. / (4) Any other geospatial or technical data, including design and material specifications, that the Secretary determines are necessary to this section.”).

<sup>103</sup> Department of Transportation Pipeline and Hazardous Materials Safety Administration, National Pipeline Mapping System, available at <https://pvnpm.phmsa.dot.gov/PublicViewer/> (last visited Aug. 28, 2021).

<sup>104</sup> 16 N.Y.C.R.R. § 255.603(b) (“Each operator shall prepare and file a detailed written operating and maintenance plan for complying with all the provisions of this Part before operations of a pipeline system commence...”).

<sup>105</sup>Exhibit A; *Sane Energy Project et al v. New York State Dept. of Environmental Conservation et al*, Case No. 706273/2021, Dkt. No. 3 Article 78 Petition, Exhibit A at 6 (March 18, 2021), <https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=QUstSgUASZLimsxWiySDoQ==&display=all&courtType=Queens%20County%20Supreme%20Court&resultsPageNum=1> (last visited Aug. 28, 2021) [hereinafter Negative Declaration].

proposed changes at the Greenpoint facility would not negatively impact the surrounding community.<sup>106</sup> The DEC also announced that the Greenpoint LNG expansion did not fall under Commissioner Policy 29,<sup>107</sup> which requires full environmental review and public hearings whenever a permit issuance would affect an environmental justice community (defined as a minority or low-income community that may bear a disproportionate burden of negative environmental consequences).<sup>108</sup> In reaching this decision, the DEC looked solely at the Greenpoint LNG facility and did not assess the environmental impact of the pipeline on the Brooklyn communities it impacted. Phases 1-4 of the pipeline run entirely through low-income communities of color that already bear a disproportionate share of environmental burdens even without the added burden of a fracked gas transmission pipeline.

██████████ along with ██████████ and the (b) (6) Privacy, (b) (7)(C) Enforcement Privacy, filed a public comment opposing the Negative Declaration on the grounds, among others, that DEC had improperly segmented its review, that SEQRA required the agency to consider the environmental impact of the “whole action” including the pipeline, and that CP-29 clearly applied given the communities affected by the pipeline.

Following the round of public comments, National Grid submitted a revised permit application in February 2021, and on March 2, 2021, DEC issued an updated negative declaration.<sup>109</sup> The “updated” negative declaration is virtually identical to the first. That is, DEC once again failed and refused to assess the environmental impact of the North Brooklyn Pipeline on the low-income communities of color through which it runs. This is in direct contrast to a position DEC took with federal regulatory authorities and in a permit denial decision in a predominantly white community on the basis that a pipeline and related infrastructure must be subject to a unified review.<sup>110</sup>

#### **8. DPS and National Grid Agree to Rate Case Settlement that Benefits White Communities in Greenpoint but Harms Low-Income Black and Latinx Communities Along the Pipeline Route**

In May 2021, the parties to the rate case reached a proposed joint settlement. The settlement provided that National Grid would stop construction on Phase 5 of the North Brooklyn pipeline and the Greenpoint LNG facility. Expenditures for those projects were excluded from the rate hike. But Phases 1-4 would continue in service and National Grid would be permitted to raise rates to pay for them.

In the staff statement in support of the settlement proposal, DPS staff explained that if National Grid wished to pursue Phase 5, it would need to submit an additional petition supported by a need analysis. The proposal would be reviewed by an independent expert, and work could only proceed if DPS specifically authorized it. Phase 5 of the pipeline is a small spur that would have directly connected the North Brooklyn Pipeline to the Greenpoint LNG facility, and it is the only section of the pipeline that runs through a majority white neighborhood.

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> N.Y.S. DEP’T ENV’T CONSERVATION, *CP-29 Environmental Justice and Permitting* (Mar.19, 2003), [https://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/cp29a.pdf](https://www.dec.ny.gov/docs/permits_ej_operations_pdf/cp29a.pdf) [Hereinafter CP-29].

<sup>109</sup> Negative Declaration, *supra* note 105 at 7-8.

<sup>110</sup> James Nani, *DEC Denies Permits for CPV Power Plant Pipeline* (Aug. 31, 2017), <https://www.recordonline.com/news/20170831/dec-denies-permits-for-cpv-power-plant-pipeline>; Letter and attachment from Thomas Berkman, Deputy Commissioner and General Counsel of the Department of Environmental Conservation to Georgia Carter, Vice President and General Counsel of Millennium Pipeline Company, (Aug. 30, 2017).

DPS allowed National Grid to continue running gas through Phases 1-4 of the pipeline even though DPS knew that no agency had reviewed and assessed the pipeline's safety or environmental impact on surrounding Black and Latinx communities, and even though DPS knew that National Grid never reported pressure testing or even the existence of the pipeline to state or federal regulatory agencies. Unlike with Phase 5 and the LNG Facility, DPS did not insist that an independent expert examine the need for and safety of Phases 1-4 of the pipeline.

In their Reply Brief in support of the settlement, DPS staff went so far as to deny that the North Brooklyn Pipeline disproportionately burdens disadvantaged communities, even though the pipeline exclusively runs through disadvantaged communities – except for the segment DPS put on hold. The residents of the pipeline communities, already overburdened with environmental hazards, bear all the environmental and public health risks and at the same time can least afford rate increases. DPS's only justification for its continued support for Phases 1-4 was that these phases had previously been approved in 2016 – when National Grid failed to comply with public awareness laws, avoided public hearings concerning its development plans, and actively misled community members about the nature of the project it had undertaken. The bottom line is that with Phases 1-4 of the pipeline in service, significantly more gas at significantly higher pressure is running through Brownsville, Ocean Hill, Bushwick and East Williamsburg, placing these communities—and only these communities—at risk.

On August 12, 2021, DPS entered an order approving the joint settlement and rate hike. In its Order, DPS applied New York's Climate Leadership and Community Protection Act (CLCPA), which requires all agencies to review whether their decisions create a negative environmental impact on disadvantaged communities. While DPS examined Phase 5, DPS barely acknowledged the pipeline and wrongly found that the North Brooklyn Pipeline did not disproportionately burden disadvantaged communities. In making this determination, DPS did not evaluate the relative economic, public safety, or environmental burden of the North Brooklyn pipeline on disadvantaged, Brown or Latinx communities as opposed to other communities. It simply stated that National Grid had an obligation “to continue providing safe and reliable service,” as if that obligation provides a blanket justification for requiring low-income communities of color to bear both the risks and the costs of providing such service.

### **C. National Grid's Pattern of Hazardous Leaks in New York**

Records submitted by National Grid indicate that emissions and leaks plague its Brooklyn pipeline structure, both new and old pipeline alike. Since 2016, there have been at least 22,107 leaks on the Brooklyn Backbone system alone.<sup>111</sup> In 2018, National Grid estimated that methane emissions throughout the delivery system totaled approximately 18,853 metric tons.<sup>112</sup> And each year, there are thousands of leaks that National Grid does not fix.<sup>113</sup> In 2020, National Grid had a backlog of 1,944 open leaks in its Brooklyn Backbone system.<sup>114</sup> National Grid-Brooklyn had the second-highest backlog of hazardous leaks that went unremedied in 2020, second only to National Grid Upstate.<sup>115</sup> These leaks

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<sup>111</sup> Exhibit J; Case 16-00252, Dkt. No. 366, Year End Leak Report (Jan. 29, 2021); Dkt. No. 56, 2019 Year End Leak Report (Jan 27, 2020), Dkt. No. 271, Year End Leak Report (Jan. 31, 2019); Dkt No. 213, Correction to Year End Leak Report (Jan. 31, 2018); Dkt. No. 144, 2016 Year End Leak Report and 2017 LPP Prioritization, Type 3 Leaks, and Capital Plan Report (Feb. 17, 2017) [hereinafter National Grid Year End Leak Reports, Ex. J].

<sup>112</sup> Case 19-G-0309 et al., Dkt. No. 98, Exhibit 611, Sane-1 Response (Mar. 2, 2020).

<sup>113</sup> National Grid Annual Leak Reports, Ex. J, *supra* note 111.

<sup>114</sup> Case 16-00252, *supra* note 58, Dkt. No. 12, Year End Leak Report (Jan. 29, 2021).

<sup>115</sup> NEW YORK STATE DEP'T OF PUB. SERV., *2020 Pipeline Safety Performance Measures Report*, at 30 (2021), <https://www3.dps.ny.gov/W/PSCWeb.nsf/All/9DBA66C148A1310985257B2600750639?OpenDocument>. National

result in a steady stream of emissions of methane and other toxic gasses, and put surrounding communities at risk of catastrophic fires and explosions.<sup>116</sup>

<b>Total Leaks on National Grid New York City System: 2020<sup>117</sup></b>		
<b>Leak Type</b>	<b>Total Leaks</b>	<b>Leaks currently outstanding</b>
Type 1 <sup>118</sup>	1,893	10
Type 2	283	3
Type 3	2,058	1,931

National Grid has spent an increasing amount on repairing leaks on its related Brooklyn Union Gas infrastructure. Between 2016 and 2019, National Grid doubled its expenditures on repairing Brooklyn Union pipeline leaks, from \$15.7 million in 2016 to \$28.9 million in 2019.<sup>119</sup>

In the last several years, National Grid has been cited and fined for thousands of regulatory violations for new pipeline segments that were not properly installed and for failing to repair leaking pipes. For example, in March 2021, DPS fined National Grid more than \$16 million for multiple regulatory violations and forced National Grid to re-dig all recently completed pipelines to ensure the integrity of pipeline joints and to repair and replace improper fuses.<sup>120</sup> In addition, DPS fined National Grid \$6 million for failing to fix substandard “cathodic pressure” protections at four regulator stations in Long Island. In its decision mandating this fine, DPS recognized that these systems protect against corrosion and “prevent methane leaks and the associated safety and environmental impacts associated with such leaks.”<sup>121</sup>

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Grid-Brooklyn also had among the highest number of unremedied leaks overall, second only to National Grid-Long Island. *Id.* at 31.

<sup>116</sup> See Section III. C.

<sup>117</sup> National Grid Year End Leak Reports, Ex. J, *supra* note 111.

<sup>118</sup> Type 1 leaks “constitute[] a potentially hazardous condition to the public or buildings” and “require[] an immediate effort to protect life and property,” and continuous repairs and surveillance until the leak is corrected N.Y. Comp. Codes R. & Regs. tit. 16, § 255.811(a), (b) (N.Y.C.R.R.).

<sup>119</sup> National Grid Annual Leak Reports 2016-2019.

<sup>120</sup> Order adopting Settlement Agreement, Case No. 17-G-0317 - In the Matter of an Investigation into The Brooklyn Union Gas Company d/b/a National Grid NY and KeySpan Gas East Corporation d/b/a National Grid Compliance with Operator Qualification, Performance, and Inspection Requirements with Respect to Work Completed by Company and Contractor Personnel; Case 18-G-0094 - Proceeding on Motion of the Commission for an Enforcement Against National Grid USA and its Subsidiary KeySpan Gas East Corporation d/b/a National Grid for Failure to Maintain and Reestablish Cathodic Protection. (Issued and Effective March 18, 2021).

<sup>121</sup> *Id.*

## IV. LEGAL VIOLATIONS

### A. Background: Title VI

Title VI of the Civil Rights Act of 1964 and its implementing regulations prohibit discrimination in federal, state, local, and private programs that receive federal financial assistance. 42 U.S.C. § 2000d; Title VI prohibits recipients from engaging in intentional discrimination or activities that result in a disparate impact on the basis of race. *Alexander v. Choate*, 469 U.S. 287, 293–94 (1985).<sup>122</sup>

Title VI’s implementing regulations “seek to ensure that programs accepting federal money are not administered in a way that perpetuates the repercussions of past discrimination.”<sup>123</sup> Congress enacted these regulations to ensure “that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.”<sup>124</sup> Thus, they require federal agencies “to take a close look at neutral policies that disparately exclude minorities from benefits or services, or inflict a disproportionate share of harm on them.”<sup>125</sup>

The regulations specifically prohibit recipients from “choos[ing] 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 sex; or with the purpose or *effect* of defeating or substantially impairing the accomplishment of the objectives of this subpart.” *Id.* § 7.35(c);<sup>126</sup>

In addition, Title VI regulations prohibits recipients of federal financial assistance from “us[ing] criteria or methods of administering its program which have the *effect* of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.”<sup>127</sup>

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<sup>122</sup> “Courts considering claims under analogous Title VI regulations have looked to Title VII disparate impact cases for guidance.” *New York Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (citations omitted).

<sup>123</sup> Dep’t of Justice, *supra* note 4, at 2 (Section 7).

<sup>124</sup> *Id.* at 1 (*citing* H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963)).

<sup>125</sup> For example, environmental agencies are required under Title VI to consider racially disparate adverse impacts when determining whether to issue an air pollution permit in addition to the applicant’s compliance with applicable air quality standards. *South Camden Citizens in Action v. New Jersey Dept. of Environmental Protection*, 145 F. Supp. 2d 446, 52 (D.N.J. 2001), *opinion modified and supplemented*, 145 F. Supp. 2d 505 (D.N.J. 2001), *order rev’d on other grounds*, 274 F.3d 771, (3d Cir. 2001).

<sup>126</sup> *See also* 49 C.F.R. § 21.5(c) (“In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation 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 the Act or this part.”); 49 C.F.R. § 1040.13(d) (In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination because of race, color, national origin, or sex (when covered by section 16 or 401) or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of title VI or this subpart.”).

<sup>127</sup> *Id.* § 7.35(b) (EPA); 49 C.F.R. § 21.5(b)(2) (DOT); 28 C.F.R. § 42.104(b)(2) (DOJ regulations). The regulations broadly protect against the “exclu[sion] from participation in, be denied the benefits of, or be subjected to discrimination under any [covered] program or activity . . . on the basis of race, color, national origin, or on the basis of sex in any program or activity receiving . . . assistance . . . .” 40 C.F.R. § 7.30; 49 C.F.R. § 21.5.

To establish a disparate-impact claim, the practice must have a “disproportionately adverse effect on minorities” and be “otherwise unjustified by a legitimate rationale.”<sup>128</sup> “[P]olicies, criteria or methods of administering programs that are neutral on their face but have the effect of discriminating” can result in a Title VI violation if the recipient cannot articulate a “‘substantial legitimate justification’ for the challenged policy or practice.”

Even when there is a substantial legitimate justification, employing a neutral policy that leads to disparate impacts may still constitute a violation of Title VI if there are less discriminatory alternatives that would achieve the same purpose.<sup>129</sup>

## **B. Adverse Disproportionate Impact Of The North Brooklyn Pipeline On Black And Latinx Individuals**

“I am anxious and upset because the pipeline was placed so close to my home and I had no idea until at least two years after it was installed. It is very unnerving because I know that gas lines in other areas have caused so much damage. I am concerned because we have both young people with asthma and other health conditions and senior citizens in this area. Respiratory issues are prevalent health concerns in our neighborhood.”

- (b) (6) who lives on the same block as the pipeline in Brownsville<sup>130</sup>

“I am outraged that this pipeline was built in my community without my knowledge or consent. As the already densely populated New York City continues to build much-needed low-income housing in the neighborhood, there is an even greater risk of emergency if there is a leak or explosion and people have to evacuate. I am also terrified for my son’s future and the possible health effects associated with this pipeline.”

- (b) (6), who lives close to the pipeline with her son and husband,<sup>131</sup>

The pipeline adversely impacts the health, safety, and economic circumstances of the predominantly Black and Latinx residents of Brownsville, Ocean Hill, Bushwick, and East Williamsburg. First, the pipeline imposes serious health risks to the surrounding community because of emissions of methane and other toxic substances that will affect the respiratory function of the surrounding community and create other health hazards. Second, the pipeline carries a risk of explosion, exacerbated by the failure to perform basic safety testing. And finally, the rate hike imposes a disproportionate energy burden on the harmed communities.

### **1. Disproportionate Health and Environmental Risks**

The construction and operation of the pipeline negatively impacts the health of the residents of the Brooklyn community along the pipeline route in multiple ways. First, methane and particulate matter emitted from the pipeline leads to ground-level ozone which affects respiratory function of the members

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<sup>128</sup> *Texas Dep’t of Hour. & Cmty. Affairs v. Inclusive Communities*, 135 S. Ct. 2507, 2521 (2015) (internal cites omitted).

<sup>129</sup> Dep’t of Justice, TITLE VI LEGAL MANUAL, Section VII, <https://www.justice.gov/crt/book/file/1364106/download> (last visited Aug. 28, 2021).

<sup>130</sup> Exhibit C, Statement of (b) (6).

<sup>131</sup> Exhibit B, Statement of (b) (6).

of the surrounding community, a disproportionate number of whom already suffer from some of the highest asthma rates and other respiratory conditions in the City. Second, the greenhouse gases created by the transmission and production of gas adversely impacts residents' health over the long-term by contributing to climate change, which aggravates existing health conditions like asthma and cardiovascular disease. In addition, the construction and operation of the pipeline leak methane and other toxic substances in the soil and water systems, harming and even killing the trees that mitigate the effects of climate change. Given that these communities already suffer from disproportionately high rates of cardiovascular, cancer, and respiratory disease, these harms are particularly severe.

#### a. Gas<sup>132</sup> Emissions and Methane

Brooklyn residents living alongside the North Brooklyn pipeline face immediate and long-term health risks from leaks of hazardous air pollutants including methane, a greenhouse gas that contributes to ground level ozone and atmospheric warming at an estimated 86 times more than carbon dioxide. Natural gas pipelines also release other toxic chemicals, including volatile organic compounds, through “fugitive air emissions,” which are both intentional and unintentional.<sup>133</sup> These fugitive emissions from pipelines expose the surrounding community to air pollutants that adversely impact air quality and the health of the surrounding community.<sup>134</sup>

Intentional emissions from vents or “blow-downs” are designed into the system for operational and safety purposes.<sup>135</sup> Blowdowns typically emit pipeline contents and methane at much higher concentrations than annual emissions data suggest. Thus, they hold the potential for release of large amounts of methane and other pollutants, exposing nearby residents to greater concentrations of toxic substances than are reflected in the estimates of exposure used in permitting decisions.<sup>136</sup>

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<sup>132</sup> According to the Congressional Research Service, “Natural gas is primarily a mixture of low molecular-weight hydrocarbon compounds that are gaseous in form at normal conditions. While the principal component of natural gas is methane (CH<sub>4</sub>), gas may contain smaller amounts of other hydrocarbons, such as ethane, propane, and butane, as well as heavier hydrocarbons. These nonmethane hydrocarbons include types of VOCs, classified as ground-level ozone (i.e., smog) precursors, as well as, in some cases, hazardous (i.e., toxic) air pollutants (HAPs).” U.S. CONGRESSIONAL RESEARCH SERVICE, METHANE AND OTHER AIR POLLUTION ISSUES IN NATURAL GAS SYSTEMS 3 (2020), <https://fas.org/sgp/crs/misc/R42986.pdf> (last visited Aug. 26, 2021); see also David A. Kirchgessner, et al., U.S. ENVIRONMENTAL PROTECTION AGENCY, ESTIMATE OF METHANE EMISSIONS FROM THE U.S. NATURAL GAS INDUSTRY 12, , <https://www3.epa.gov/ttnchie1/ap42/ch14/related/methane.pdf> (last visited Aug. 26, 2021);

<https://fas.org/sgp/crs/misc/R42986.pdf>

<sup>133</sup> Congressional Research Service, *Methane and Other Air Pollution Issues in Natural Gas Systems*, at 3 (2020), <https://fas.org/sgp/crs/misc/R42986.pdf>; David A. Kirchgessner, Robert A. Lott, et al., *Estimate of Methane Emissions from the U.S. Natural Gas Industry*, U.S. Environmental Protection Agency, at 12, <https://www3.epa.gov/ttnchie1/ap42/ch14/related/methane.pdf>.

<sup>134</sup> Jiaxin Fu et al., *Identifying and Regulating the Environmental Risks in the Development and Utilization of Natural Gas as a Low-Carbon Energy Source*, FRONTIERS IN ENERGY RSCH, March 2021, at 2, <https://www.frontiersin.org/article/10.3389/fenrg.2021.638105>; Nathan Phillips et al., *Mapping Urban Pipeline Leaks: Methane Leaks Across Boston*, ENV'T POLLUTION, 2013, <https://www.sciencedirect.com/science/article/abs/pii/S0269749112004800?via%3Dihub>.

<sup>135</sup> CONG. RSCH. SERV., R42833, AIR QUALITY ISSUES IN NATURAL GAS SYSTEMS 5 (2013),

[https://www.everycrsreport.com/files/20130416\\_R42833\\_0ee3e19ca94a72e47364b1107fe688b024a71f75.pdf](https://www.everycrsreport.com/files/20130416_R42833_0ee3e19ca94a72e47364b1107fe688b024a71f75.pdf).

<sup>136</sup> N.Y. State Madison Cnty. Dept of Health, Comment Letter Concerning Docket No. CP14-497-000, Dominion Transmission, Inc. (Oct. 15, 2014), [https://www.otsego2000.org/wp-content/uploads/2012/08/Madison\\_County\\_DOH\\_Comments\\_-\\_Docket\\_No.\\_CP14-497-000.pdf](https://www.otsego2000.org/wp-content/uploads/2012/08/Madison_County_DOH_Comments_-_Docket_No._CP14-497-000.pdf).

Unintentional emissions result from leaks in the system as well as malfunctions and excavation and other accidents. According to a report by the EPA’s Office of Inspector General, underground pipeline leaks are the second leading cause of fugitive emissions, and comprise 15 percent of total methane emissions from natural gas systems in the U.S.<sup>137</sup> Pipeline leaks contribute to “more than 13 million metric tons of carbon dioxide equivalent emissions.”<sup>138</sup> Recent research has found that the observed methane emissions from cities are about twice that reported in the U.S. EPA GHG inventory, and that nationwide methane emissions from gas distribution pipes are about five times greater than projected by the U.S. EPA GHG inventory.<sup>139</sup> Natural gas leaks occur throughout the gas distribution process and are one of the largest source of anthropogenic methane emissions in the United States,<sup>140</sup> According to the EPA, “[s]teady emissions result from unintentional leaks from sealed surfaces such as pipe connectors, valve packing, flange gaskets at surface facilities, and components and small holes in underground pipelines.”<sup>141</sup> As described below, with National Grid’s pipeline system, both old and new, is constantly leaking, and its failure to fix thousands of leaks a year, and these steady emissions are even more acute.

Leaks are common in pipeline systems, and are caused by material defects and failures, improper installation and connection of pipelines and joints, corrosion, excavation damage, and shoddy maintenance.<sup>142</sup> For this reason, proper installation and safety and testing precautions, as well as integrity management and reporting pipeline routes to federal and state agencies, are critical to minimizing leaks. This is particularly troubling for the pipeline because National Grid-New York City (Brooklyn and Queens) had the highest rate of pipeline damage due to its excavation practices in 2020, and between 2018-2020, National Grid reported 996 incidents of damage and 534 incidents of excavation damage in its New York City distribution system.<sup>143</sup>

Methane emissions, the primary air pollutant emitted and principal component of natural gas, are highly toxic and can have serious health consequences for the surrounding community.<sup>144</sup> Methane is a

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<sup>137</sup> David A. Kirchgessner, Robert A. Lott, et al., *Estimate of Methane Emissions from the U.S. Natural Gas Industry*, U.S. ENV’T PROT. AGENCY, <https://www3.epa.gov/ttnchie1/ap42/ch14/related/methane.pdf>.

<sup>138</sup> U.S. ENV’T PROT. AGENCY OFF. INSPECTOR GEN., IMPROVEMENTS NEEDED IN EPA EFFORTS TO ADDRESS METHANE EMISSIONS FROM NATURAL GAS DISTRIBUTION PIPELINES 3 (July 25, 2014), [https://www.epa.gov/sites/default/files/2015-09/documents/20140725-14-p-0324\\_0.pdf](https://www.epa.gov/sites/default/files/2015-09/documents/20140725-14-p-0324_0.pdf).

<sup>139</sup> Genevieve Plant et al., *Large Fugitive Methane Emissions from Urban Centers Along the U.S. East Coast*, 46 GEOPHYSICAL RSCH. LETTERS 8500, 8500 (July 2019), [agupubs.onlinelibrary.wiley.com/doi/abs/10.1029/2019GL082635](http://agupubs.onlinelibrary.wiley.com/doi/abs/10.1029/2019GL082635); Weller et al., *A National Estimate of Methane Leakage from Pipeline Mains in Natural Gas Local Distribution Systems*, 54 ENV’T SCI. & TECH. 8958 (June 2020), [pubs.acs.org/doi/10.1021/acs.est.0c00437](https://pubs.acs.org/doi/10.1021/acs.est.0c00437).

<sup>140</sup> Robert B. Jackson et al., *Natural Gas Pipeline Leaks Across Washington, DC*, 48 ENV’T SCI. & TECH. 2051, 2051 (2014), <http://www.epa.gov/climatechange/ghgemissions/usinventoryreport.html>.

<sup>141</sup> David A. Kirchgessner, Robert A. Lott, et al., *Estimate of Methane Emissions from the U.S. Natural Gas Industry*, U.S. ENV’T PROT. AGENCY, at 6, <https://www3.epa.gov/ttnchie1/ap42/ch14/related/methane.pdf>.

<sup>142</sup> U.S. Department of Transportation, *The State of the National Pipeline Infrastructure*, Pipeline and Hazardous Materials Safety Administration <https://www.hsd1.org/?view&did=804318> (“The potential consequences of gas transmission pipeline releases vary primarily both as a result of the size and operating pressure of the pipeline and as a consequence of the number of people living near the pipeline.”); KIRCHGESSNER ET AL., *supra note* 138 at 6.

<sup>143</sup> PHMSA FOIL Response, National Grid Annual Distribution System Reports (2018-2020), Exhibit L [hereinafter National Grid Annual Distribution System Reports, 2018-2020, Ex. L]; NEW YORK STATE DEP’T OF PUB. SERV., *2020 Pipeline Safety Performance Measures Report*, at 18, 30-31 (2021), <https://www3.dps.ny.gov/W/PSCWeb.nsf/All/9DBA66C148A1310985257B2600750639?OpenDocument>.

<sup>144</sup> CONG. RSCH. SERV., R42986, *supra note* 138, at 5-6; Audrey Carleton, ‘They’re Liars’: Activists Say Brooklyn Residents Were Not Informed Of Fracked Gas Pipeline, GUARDIAN (Dec. 21, 2020), <https://www.theguardian.com/environment/2020/dec/21/brooklyn-natural-gas-pipeline-fracking-bushwick>. Methane

precursor to ground-level ozone (smog), which is an air pollutant that contributes to a range of serious harm to human health. Methane, through ozone, reacts with lung tissue and can harm breathing passages, decrease the lungs' working ability and cause coughing and chest pain, eye and throat irritation and breathing difficulties even for healthy individuals.<sup>145</sup> These issues are especially acute for children and individuals with respiratory problems such as allergies, asthma, bronchitis and emphysema.<sup>146</sup> Methane can also exacerbate cardiovascular disease.<sup>147</sup> According to EPA's 2013 Integrated Science Assessment for Ozone, ozone exposures have been linked to increase risks of hospitalization for acute myocardial infarction, coronary atherosclerosis, stroke, and heart disease, even at ambient ozone levels well-below current air quality standards.<sup>148</sup> The impact of methane emissions is particularly severe for Brownsville, Ocean Hill, and Bushwick residents, because the air quality impacts from fugitive methane could especially impact those with asthma. All three areas have twice the child and adult asthma rate compared to the rest of the city; Brownsville and Ocean Hill have the highest rate for adult asthma in New York City (14%), with almost twice the amount of hospitalizations for both child and adult asthma.<sup>149</sup>

Methane is also associated with serious health effects through its contribution to climate change. Along the pipeline route, residents are in the 60<sup>th</sup>-100<sup>th</sup> percentile of exposure to air toxins, with most areas ranking in the 80<sup>th</sup> percentile in the state.

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has been found to leak from fracking wells, equipment, and pipelines at rates that make it worse for the environment than coal. Physicians for Social Responsibility, *Too Dirty, Too Dangerous: Why Health Professionals Reject Natural Gas*, 10 (Feb. 2017), <https://www.psr.org/wp-content/uploads/2018/05/too-dirty-too-dangerous.pdf>

<sup>145</sup> Pasquale Russo et al., *Air Emissions from Natural Gas Facilities in New York State*, INT'L J. ENV'T RES. PUB. HEALTH, May 2019; WASHINGTON COUNCIL OF GOV'T, STATE IMPLEMENTATION PLAN TO IMPROVE AIR QUALITY IN THE WASHINGTON, DC-MD-VA REGION 30 (2007), <https://www.mwcog.org/uploads/pub-documents/9FhcXg20070525084306.pdf>.

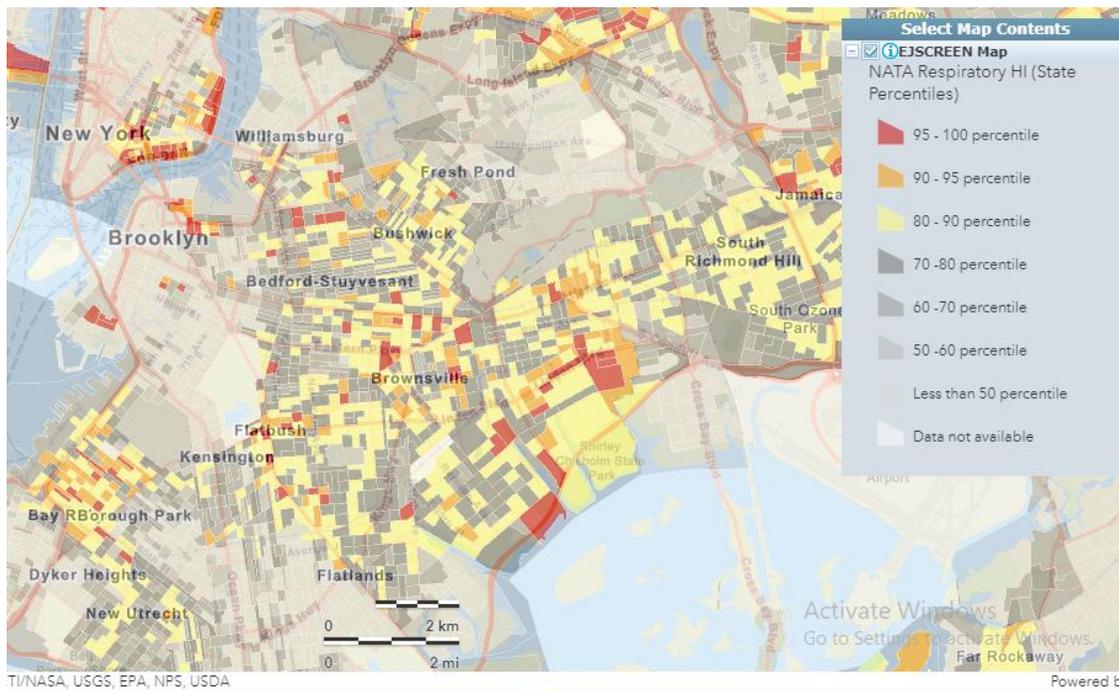
<sup>146</sup> Tim Keyes et al., AN ENHANCED PROCEDURE FOR URBAN MOBILE METHANE LEAK DETECTION 2 (October 2020), <https://www.cell.com/action/showPdf?pii=S2405-8440%2820%2931719-9>; David Shindell, *Reducing Methane is Crucial for Protecting Climate and Health, and It Can Pay For Itself – So Why Aren't More Companies Doing It?*, CONVERSATION (May 6, 2021), <https://theconversation.com/reducing-methane-is-crucial-for-protecting-climate-and-health-and-it-can-pay-for-itself-so-why-arent-more-companies-doing-it-160423>.

<sup>147</sup> *Id.*; Michelle C. Turner et al., *Long-Term Ozone Exposure and Mortality in a Large Prospective Study*, *American Journal of Respiratory and Critical Care Medicine*, 193 AM. J. RESPIRATORY AND CRITICAL CARE MED. 1134, 1135 (May 2016), <https://www.atsjournals.org/doi/pdf/10.1164/rccm.201508-1633OC>.

<sup>148</sup> U.S. ENV'T PROT. AGENCY, INTEGRATED SCIENCE ASSESSMENT FOR OZONE AND RELATED PHOTOCHEMICAL OXIDANTS 6-168 - 6-185 (Feb. 2013), <https://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=247492>.

<sup>149</sup> Brownsville Community Health Profiles 2018, *supra* note 11, at 12; Ian Kumamoto, *A Fracked Gas Pipeline is Coming to Brooklyn. Residents Are Invoking BLM to Fight It*, VICE (Oct. 15, 2020), <https://www.vice.com/en/article/v7m444/fracking-pipeline-brownsville-brooklyn-black-lives-matter-blm>; *Is Your Home Bad for Your Health? Know if Mold, Roaches and Rodents Are a Problem Before Moving In*, LOCALIZE (Jan. 21, 2019), <https://www.localize.city/blog/is-your-home-bad-for-your-health-know-if-mold-roaches-and-rodents-are-a-problem-before-moving-in/>. In addition, Brownsville has one of "the highest rates of premature mortality and chronic disease in New York City, with cancer, heart disease, HIV, and drug-related conditions being among the leading causes of premature mortality." JENNIFER PIERRE ET AL., BUILDING A CULTURE OF HEALTH AT THE NEIGHBORHOOD LEVEL THROUGH GOVERNANCE COUNCILS 872 (March 2020), <https://link.springer.com/content/pdf/10.1007/s10900-020-00804-0.pdf>. *Bushwick Community Health Profile 2018*, *supra* note at 12.

## NATA Respiratory Hazard Index



Source, EPA EJ Screen<sup>150</sup>

### b. Radioactive material

Another disproportionate impact that Brooklyn residents suffer is the potential buildup of radioactive material under the streets resulting from fracked gas.<sup>151</sup> Large fracked gas transmission pipelines—like the North Brooklyn Pipeline—pose particularly serious health and safety hazards. Radioactive materials naturally occur in shale and build up in pipelines. Evidence suggests that fracked gas from the Marcellus shale—the source of a significant portion of National Grid’s gas supply—may contain much higher concentrations of radioactive materials than previously estimated.<sup>152</sup>

### c. Contamination: Soil, Trees, and Water

Studies have also found that gas pipelines increase methane levels in the surrounding soil and water, negatively impact plant health, groundwater quality, and human health. Although methane is not directly toxic to plant matter, methane-rich soil can induce anaerobic soil conditions that are harmful for tree root

<sup>150</sup> *Id.*

<sup>151</sup> Justin Nobel, *America’s Radioactive Secret*, ROLLING STONE (Jan. 21, 2021), <https://www.rollingstone.com/politics/politics-features/oil-gas-fracking-radioactive-investigation-937389/>; Jessie Edwards, *Controversial Fracked Gas Pipeline in Brooklyn Continues, Despite Calls to Stop Construction Immediately*, BK READER (Oct. 13, 2020), <https://www.bkreader.com/2020/10/13/controversial-fracked-gas-pipeline-in-brooklyn-continues-despite-growing-calls-to-stop-construction/>.

<sup>152</sup> *Id.*

systems.<sup>153</sup> For example, one study in Massachusetts found that exposure to elevated soil methane concentrations was associated with significant increased odds of tree death, and that fugitive emissions from natural gas distribution infrastructure negatively impact urban vegetation health.<sup>154</sup> Just in National Grid's preliminary stages of constructing the pipeline in Brownsville, it had to get permits to build adjacent to construction to 209 trees along the pipeline route.<sup>155</sup>

Brooklyn residents also face potential adverse impacts to their water from pipeline leaks.<sup>156</sup> Applying the DEC mapping tool that the DEC and National Grid should have used in its application for its air permit to DEC had it properly submitted approval for the "whole action," see section VII A, the North Brooklyn Pipeline runs in close proximity to the Brooklyn-Queens Sole Source Aquifer, which is the sole or principal drinking water source for 650,000 people.<sup>157</sup> Contamination of this aquifer could create a significant hazard to public health. In addition, according to National Grid, the MRI Pipeline crossed three Department of Environmental Protection water pipelines.<sup>158</sup>

Given these serious health consequences of the pipeline resulting from pipeline emissions, radiation, and contamination and in light of the health and environmental burdens borne by Brown and Latinx residents, the pipeline is likely to have an adverse disproportionate impact on Black and Latinx residents living in proximity of the pipeline.<sup>159</sup> As described above, the community in Brownsville and Ocean Hill is 76% Black and 20% Latinx;<sup>160</sup> in sharp contrast to New York City as a whole, which is 22% Black and 29% Latinx.<sup>161</sup> The Bushwick community is 65% Latinx,<sup>162</sup> in contrast to New York City as a whole, which is 29% Latinx.<sup>163</sup>

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<sup>153</sup> Claire Schollaert et al, *Natural Gas Leaks and Tree Death: A First-Look Case-Control Study Of Urban Trees in Chelsea, MA*, ENV'T POLLUTION, Aug. 2020, at 2, <https://www.sciencedirect.com/science/article/pii/S0269749119376717>. ; M.D. Steven, et. al, *Oxygen and methane depletion in soil affected by leakage of natural gas*, EUR. J. SOIL SCI., 57 (6) (2006), at 800-807, 10.1111/j.1365-2389.2005.00770.x .

<sup>154</sup> Claire Schollaert et al, *Natural Gas Leaks and Tree Death* at 2.

<sup>155</sup> Case No. 19-G-0309, Dkt. No 95, Ex. 815-ALJ-1 Attachment 3 (Part 2) at 51-90 (June 22, 2021).

<sup>156</sup> Meghan Betcher et al., PIPELINE IMPACTS TO WATER QUALITY DOCUMENTED IMPACTS AND RECOMMENDATIONS FOR IMPROVEMENTS iv (August 2019), <https://www.tu.org/wp-content/uploads/2019/10/Pipeline-Water-Quality-Impacts-FINAL-8-21-2019.pdf>

<sup>157</sup> Draft DEC EAF North Brooklyn Pipeline, Ex. N supra note 33; *How May I Be Exposed by Contaminated Surface Water and Groundwater?*, N.Y.S. OFF. ATT'Y GEN., <https://ag.ny.gov/environmental/oil-spill/how-may-i-be-exposed-contaminated-surface-water-and-groundwater> (last visited Aug. 26, 2021).

<sup>158</sup> Exhibit 735, supra note 101, at 3.

<sup>159</sup> *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 145 F. Supp. 2d 446, 490-91 (D.N.J. 2001) *opinion modified and supplemented*, 145 F. Supp. 2d 505 (D.N.J.), *rev'd on other grounds*, 274 F.3d 771 (3d Cir. 2001).

<sup>160</sup> Brownsville Community Health Profiles 2018, supra note 14 at 2.

<sup>161</sup> *Id.*

<sup>162</sup> Bushwick Community Health Profiles 2018, supra note 14 at 2.

<sup>163</sup> *Id.*

## 2. Disproportionate Risk of Explosion

“I am outraged that this pipeline was built in my community without my knowledge or consent. As the already densely populated New York City continues to build much-needed low-income housing in the neighborhood, there is an even greater risk of emergency if there is a leak or explosion and people have to evacuate. I am also terrified for my son’s future and the possible health effects associated with this pipeline.”

- (b) (6) Brownsville resident who lives on the pipeline route<sup>164</sup>

The North Brooklyn pipeline also imposes a risk of explosion, often caused by leaks. The East Coast fracking boom of the past several years has resulted in several pipeline explosions, with devastating and catastrophic consequences. Scientists measured methane leakage from distribution pipes under the streets of Boston and found that of 100 natural gas leaks surveyed, 15 percent qualified as “potentially explosive,” concluding that “[a]ll leaks must be addressed, as even small leaks cannot be disregarded as ‘safely leaking.’”<sup>165</sup> According to the PHMSA, over the last 20 years there have been 12,506 pipeline incidents reported in the United States. Of these, around 300 significant pipeline incidents have killed 256 people and injured 1,142 others. For example, in 2010, a natural gas pipeline exploded in a residential neighborhood in San Bruno, California, killing eight people, injuring dozens more, and destroying 38 homes.<sup>166</sup>

As described above, the potential for damage from leaks from National Grid’s pipeline is serious, given National Grid’s poor safety record and the thousands of leaks on its New York pipeline system each year, including very recently upgraded pipelines. National Grid-NYC has continued to have the highest rates excavation damage and unremedied leaks in the state, which increases the chances of accidents.<sup>167</sup> According to DPS “[d]amage to underground natural gas facilities due to excavation activity is one of the leading causes of natural gas pipeline failures and accidents, both statewide and nationally.”<sup>168</sup> As described above, regulators recently found 1,616 violations on a new pipeline National Grid had just constructed, and fined National Grid \$6 million on a separate pipeline for unremedied valves that were leaking methane. National Grid recently experienced two significant safety incidents in its Brooklyn system, including an explosion resulting from excavation damage to a 12-inch leaking main that National Grid had failed to adequately mark. The explosion injured four people, one of whom had to be hospitalized, caused \$53,000 in damage, and released 1,158 thousand standard cubic feet of gas.<sup>169</sup>

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<sup>164</sup> Statement of (b) (6), Exhibit B.

<sup>165</sup> Margaret Hendrick; Robert Ackley, et. al., *Fugitive methane emissions from leak-prone natural gas distribution infrastructure in urban environments*, Environmental Pollution, 213, 710-716. doi: 10.1016/j. (2016).

<sup>166</sup> *San Bruno Residents Remember Those Killed In Pipeline Explosion*, ABC 7 NEWS (Sept. 9, 2014), <https://abc7news.com/san-bruno-natural-gas-explosion-anniversary-pge-pipeline-4-years/302058/>.

<sup>167</sup> PHMSA FOIL Response, National Grid Annual Distribution System Reports (2018-2020). Exs. ; NEW YORK STATE DEP’T OF PUB. SERV., *2020 Pipeline Safety Performance Measures Report*, at 18, 30-31 (2021), <https://www3.dps.ny.gov/W/PSCWeb.nsf/All/9DBA66C148A1310985257B2600750639?OpenDocument> .

<sup>168</sup> *Id.* at 12.

<sup>169</sup> PHMSA Foil Response, National Grid 2020 PHMSA Incident Report, Ex. .

Approximately 159,000 New Yorkers, who are predominantly and disproportionately Black and Latinx, live within the 1,275-foot blast evacuation radius of the North Brooklyn Pipeline.<sup>170</sup> Overall, approximately 70 percent of the community surrounding the pipeline is non-white, and 30 percent is white.<sup>171</sup> The population of the surrounding communities in the 1,275 square foot blast zone of the pipeline in Brownsville is 78 percent Black, and 44 percent Black for the entire pipeline route.<sup>172</sup> In stark contrast, the population of New York City is only 30 percent Black. Similarly, the population of the 1,275 blast-zone in Bushwick is 65% Latinx, and approximately 39.3 percent of all residents on the pipeline route Latinx, while Latinx residents only comprise 29.8 percent of the population in New York City.<sup>173</sup>

	Pipeline- 1275 ft	NYC
White	29.8%	42.7%
Black	44.3%	24.3%
Latinx (any race)	39.3%	29.1%

This area also contains 81 daycare facilities, 55 public schools, 22 public housing complexes, nine health care centers, eight private schools, three nursing homes, three EMS stations, and a medical center.<sup>174</sup> And the risk to the surrounding community is amplified because, as discussed above, National Grid failed to pressure test the pipeline prior to operation.

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<sup>170</sup>Kim Fraczek and Karen Edelstein, *New Yorkers mount resistance against North Brooklyn Pipeline*, FRACTRACKER ALLIANCE, (May 18, 2020), <https://www.fractracker.org/2020/05/new-yorkers-resistance-against-north-brooklyn-pipeline/>.

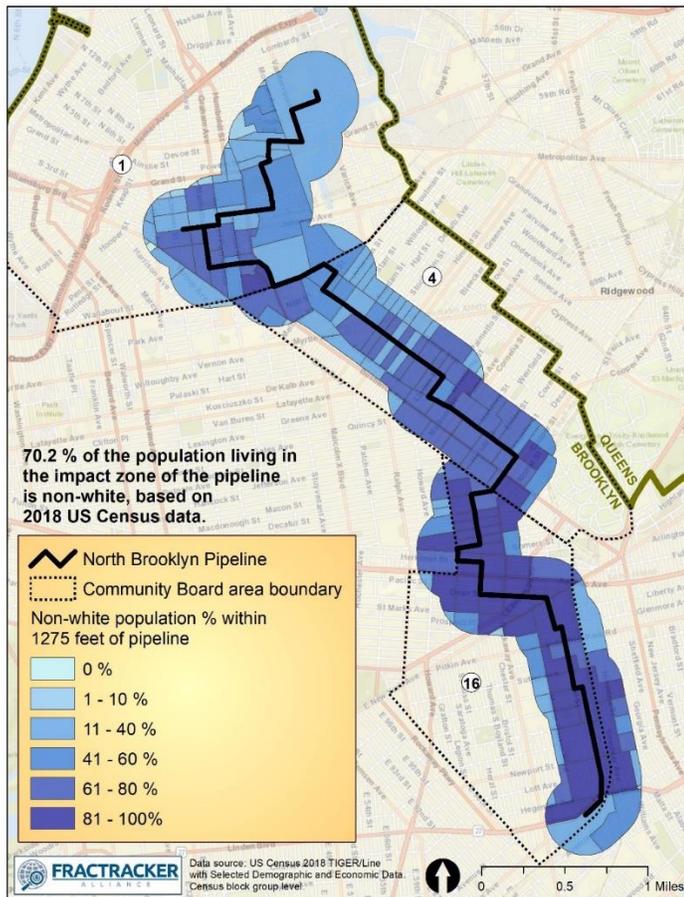
<sup>171</sup> Audrey Carleton, *'They're Liars': Activists Say Brooklyn Residents Were Not Informed Of Fracked Gas Pipeline*, GUARDIAN (Dec. 21, 2020), <https://www.theguardian.com/environment/2020/dec/21/brooklyn-natural-gas-pipeline-fracking-bushwick>.; Fractracker Alliance analysis for National Center of Law and Economic Justice (on file with authors).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*; United States Census Bureau, Quick Facts for New York City, New York: Population Estimates (July 1, 2019), <https://www.census.gov/quickfacts/newyorkcitynewyork>

<sup>174</sup> *Id.*

### Demographics of Pipeline Blast Zone



### 3. Disproportionate Economic Harms – Increased Energy Burden

Finally, the rate hike associated with the pipeline will cause disproportionate economic harm to Black and Latinx community members. Residents simply cannot afford these rate hikes. For example, in the most recent rate case, National Grid received an average monthly increase of \$4.89 per local customer. This may not matter much to an upper-income customer, but many low-income customers could not pay their bills before the rate hike, and the increase is crushing in light of the heavy energy burden already shouldered in these communities.

Energy burden is the percentage of household income dedicated to energy costs.<sup>175</sup> The average energy burden for households in the U.S. is approximately 3% of household income. For low-income households, and those living in environmental justice communities, that number jumps to an average of 8.6%.<sup>176</sup> An energy burden is considered high if a household spends more than 6% of household income

<sup>175</sup> *Energy Burden: What It Is and How Renewables Can Help*, CLIMATE REALITY PROJECT (Mar. 10, 2020), <https://www.climatealityproject.org/blog/energy-burden-what-it-and-how-renewables-can-help>.

<sup>176</sup> *Id.*

on energy costs.<sup>177</sup> Black households experience a median energy burden that is approximately 64% higher than white households, while Latinx households experience a median energy burden that is approximately 24% greater. In Brownsville, the median household income hovers below \$33,000—49% lower than the citywide median.<sup>178</sup> In addition, the rent burden for Brownsville residents is 57% of their income, and 55% for Bushwick, compared to 51% for New York City as a whole.<sup>179</sup> The implications are plain: rising gas bills create a disparate impact.

Moreover, the high price tag of new gas infrastructure like the North Brooklyn Pipeline will not only burden community members now — that burden could grow in the future. As climate policies push New Yorkers to switch to electric stoves and heating systems, the gas ratepayer pool will grow smaller, and fewer customers could be left footing the bill. Unless the state plans for an equitable transition, those remaining ratepayers are likely to be low-income residents who cannot afford electric upgrades.<sup>180</sup>

## VII. DISCRIMINATORY ACTS BY DEC, DPS, AND NATIONAL GRID

### A. DEC Unlawfully Failed to Assess the Environmental Impact of the Pipeline, Which Had a Significant Disparate Impact on Black and Latinx Communities in Brooklyn

On March 2, 2021, DEC determined that National Grid’s application for an air permit at the Greenpoint LNG facility had no significant effect on the environment and that it would not conduct a full environmental review of the project. DEC issued this determination without considering the impact of the pipeline and trucking station integrally associated with the LNG facility. DEC’s actions violated Title VI, state law, and its own policy.

First, Title VI imposes an affirmative obligation on funding recipients to include consideration of Title VI criteria in their permitting decisions.<sup>181</sup> DEC therefore had an obligation to consider whether its decision not to conduct an environmental review of the entire MRI Project (including the Greenpoint expansion, North Brooklyn Pipeline, and trucking station) would have a disproportionate impact on communities of color.<sup>182</sup>

Second, the State Environmental Quality Review Act (SEQRA)<sup>183</sup> requires DEC to make a positive declaration and prepare an environmental impact statement for any action “which may have a

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<sup>177</sup> Ariel Dreihobl et al., HOW HIGH ARE HOUSEHOLD ENERGY BURDENS? ii (2006), <https://www.aceee.org/sites/default/files/pdfs/u2006.pdf>.

<sup>178</sup> *State of the City 2019: Brownsville*, *supra* note 25. *Energy Burden*, *supra* note 179.

<sup>179</sup> Brownsville Community Health Profiles 2018, at 7, *supra* note 14; Bushwick Community Health Profiles 2018, at 7, *supra* note 14.

<sup>180</sup> Pontecorvo, *supra* note 50.

<sup>181</sup> *S. Camden Citizens in Action v. N.J. Dep’t of Env’t. Prot.*, 145 F. Supp. 2d 446, 476 (D.N.J. 2001), F. Supp. 2d 505 (D.N.J.), *rev’d on other grounds*, 274 F.3d 771 (3d Cir. 2001). (finding NJDEP violated section 602 of Title VI, and the EPA’s implementing regulations to that section, by failing to consider the potential adverse, disparate impact of its permitting decision with respect to a proposed facility in a predominantly Black neighborhood).

<sup>182</sup> In addition, DEC Commissioner Policy-29 Environmental Justice and Permitting Policy requires DEC to conduct an enhanced public participation plan in Potential Environmental Justice Areas to ensure meaningful and effective public notification and participation, and requires a full environmental assessment for communities of color. *Supra* note 111.

<sup>183</sup> 6 N.Y.C.R.R. Part 617; ECL art. 8; NYS ECL §§ 3-0301(1)(b); 3-0301(2)(m); 8-0113. In determining whether it must prepare an environmental impact statement, the agency must consider factors including the creation of hazards to human health, adverse changes in air quality or ground water, impairment of historical resources, as well as the geographic scope and number of people affected. 6 N.Y.C.R.R. § 617.7. If the agency determines either that there

significant effect on the environment.”<sup>184</sup> Critically, SEQRA regulations prohibit segmentation of connected actions into discrete parts.<sup>185</sup> The agency must consider the “entire set of activities or steps”<sup>186</sup> including “other simultaneous or subsequent actions which are . . . included in any long-range plan of which the action under consideration is a part.”<sup>187</sup> Here, the pipeline, LNG vaporizers and trucking station formed part of a single long-range plan to expand National Grid’s fracked gas infrastructure so as to increase gas production and processing capacity and sell more gas to more customers, including in Massachusetts.<sup>188</sup> National Grid has explicitly discussed these projects as interdependent, making clear that the Greenpoint LNG expansion had little utility if not connected to the North Brooklyn Pipeline, which was designed to add capacity to the existing, more limited 16-inch pipeline.<sup>189</sup> For this reason,

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will be no adverse environmental impacts or that the impacts will not be significant, it may issue a “negative declaration” that the proposed action will not significantly affect the environment. . *Coca-Cola Bottling Co. v. Board of Estimate*, 72 N.Y.2d 674, 680. The agency must identify and analyze relevant areas of environmental concern and support its determination with reasoned elaboration. *H.O.M.E.S. v. N.Y.S. Urb. Dev. Corp.*, 69 A.D.2d 222 (4th Dept. 1979).

<sup>184</sup> ECL § 8–0109(2); 6 N.Y.C.R.R. § 617.7(a)(1). To determine if an action may have a significant impact and requires an environmental impact statement, the agency must “thoroughly analyze ... relevant areas of environmental concern” to determine if there is a potential for adverse impacts, and prepare a written “determination of significance” that includes a “reasoned elaboration” of its conclusion. N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.7(b)(3), (4). While the agency may conclude that the action does not have the potential for adverse impact and therefore no EIS need be done, its determination must contain persuasive documentation demonstrating that the agency took a “hard look” at the likely consequences of the action. *H.O.M.E.S. v. New York State Urban Development Corp.*, 418 N.Y.S.2d 827, 832 (4th Dep’t 1979); *Chinese Staff and Workers Assn. v. City of New York*, 68 N.Y.2d 359, 363-364 (1986). The threshold for requiring an EIS is low and the standard for compliance is strict. *H.O.M.E.S.*, 418 N.Y.S.2d at 832.

<sup>185</sup> 6 N.Y.C.R.R. §§ 617.7(b)(1) and 617.3(g).

<sup>186</sup> 6 N.Y.C.R.R. §§ 617.3(g); 617.2(ah).

<sup>187</sup> 6 N.Y.C.R.R. § 617.7(c)(2)(i). New York courts have repeatedly held that the agency “must consider reasonably related long-term ... and cumulative effects, including other simultaneous or subsequent actions which are included in any long-range plan of which the action under consideration is a part.” *Farrington Close Condo. Bd. of Mgrs. v. Inc. Vill. of Southampton*, 205 A.D.2d 623, 626 (2nd Dept. 1994); *see also Westbury. v. Dep’t of Transp.* 75 N.Y.2d 62 (1989). To determine whether there has been illegal segmentation, an agency and courts consider: (1) the purpose or goal for each segment; (2) if there is a common reason for the timing of goals/are they occurring at the same time; (3) if there is a common geographic location involved; (4) if any of the activities share a common impact; and (5) whether the segments under the same or common ownership or control. N.Y.S. DEP’T OF ENV’T CONSERVATION, THE SEQR HANDBOOK 53 (Fourth Edition 2020) [hereinafter SEQR HANDBOOK]. In assessing whether there is a common impact, agencies consider whether the activities, in their totality, result in a potentially significant adverse impact, even if the impact of a single activity is not necessarily significant by themselves. *Id.* The prohibition against segmentation is “designed to guard against a distortion of the approval process by preventing a project with potentially significant environmental effects from being split into two or more smaller projects, each falling below the threshold requiring full-blown review.” *Long Island Pine Barrens Soc’y v. Planning Bd.*, 611 N.Y.S.2d 917, 919 (2nd Dept. 1994). Even where actions subject to SEQRA review may occur in stages, SEQRA requires they be considered together in a review of the “whole action” and prohibits segmenting environmental review of an action by defining various activities or stages of the action as unrelated as if they should be determined individually. The SEQR Handbook notes that typical situations of segmentation include an intentional avoidance of environmental review by a project sponsor or activities which may occur at different times. SEQR HANDBOOK, at 57.

<sup>188</sup> Exhibit 735, *supra* note 101.

<sup>189</sup> *Id.*, at 10; National Grid, ANNUAL REPORT AND ACCOUNTS 2019/20 40,

<https://www.nationalgrid.com/document/138751/download> [hereinafter NATIONAL GRID ANNUAL REPORT]. “One of our larger investments, The Metropolitan Reliability Infrastructure Project, will increase system reliability and operational flexibility of the existing transmission system in Brooklyn, New York ... [and] increase supply diversity.

SEQRA required DEC to assess the environmental impact of the pipeline along with the proposed expansion of the LNG facility. By failing to undertake this review, DEC violated Title VI.

As evidence of DEC's racial bias, in 2018 DEC took the opposite position in denying a permit for a new 7.8-mile section of the Millennial pipeline to supply a power plant in the town of Wawayanda, which is 92% white, on the ground that the federal review failed to analyze the environmental impact of both the pipeline *and* the power plant together.<sup>190</sup> DEC even objected to FERC's approval and environmental review of the pipeline without the power station for "fail[ing] to consider or quantify the downstream greenhouse gas emissions from the combustion of the natural gas transported by the project."<sup>191</sup> DEC denied permits to the Wawayanda pipeline, yet it failed to consider the same harms with respect to the North Brooklyn Pipeline and the Greenpoint Energy Center. DEC's failure to review the North Brooklyn Pipeline in connection with the LNG facility upgrade is part of a troubling pattern of environmental racism, enforcing environmental laws in white communities, while ignoring the environmental harms in communities of color.<sup>192</sup>

Finally, DEC's Commissioner Policy 29<sup>193</sup> requires full environmental review and public hearings whenever a permit issuance would affect an environmental justice community.<sup>194</sup> All of the communities along the pipeline route are state-designated Environmental Justice Areas that would be affected by the massive influx of fracked gas flowing through their communities because of the increased processing capacity afforded by the permit issuance. As (b) (6) [REDACTED] who lives on the same block as the pipeline, described: "I think it is very unfair that

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The project consists of roughly 40,000 feet of transmission main that will connect the Southern line to the Brooklyn Backbone and our Greenpoint Facility by autumn 2021." *Id.* at 40

<sup>190</sup> James Nani, *DEC Denies Permits for CPV Power Plant Pipeline*, RECORD ONLINE (Aug. 31, 2017), <https://www.recordonline.com/news/20170831/dec-denies-permits-for-cpv-power-plant-pipeline>; Letter and attachment from Thomas Berkman, Deputy Commissioner and General Counsel of the Department of Environmental Conservation to Georgia Carter, Vice President and General Counsel of Millenium Pipeline Company, (Aug. 30, 2017), [https://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/valleydecltr.pdf](https://www.dec.ny.gov/docs/permits_ej_operations_pdf/valleydecltr.pdf).

<sup>191</sup> *Id.*

<sup>192</sup> See, e.g., Sydney Brown and James Jones, *Environmental Justice Must be done in Delavan-Grider*, BUFFALO NEWS (Sept. 17, 2020), [https://buffalonews.com/opinion/another-voice-environmental-justice-must-be-done-in-delavan-grider/article\\_b27bf66c-f901-11ea-a1af-47bac005b439.html](https://buffalonews.com/opinion/another-voice-environmental-justice-must-be-done-in-delavan-grider/article_b27bf66c-f901-11ea-a1af-47bac005b439.html) (describing concerns about DEC's creation of a formal community Tonawanda Coke Working Group to address remediation in the predominantly white city of Tonawanda, and failure to create a similar working group to address the remediation of American Axle, located in a predominantly African American section of Buffalo); Eliza Sherpa et al., UNCOVERING ENVIRONMENTAL INJUSTICE USING COMMUNITY-BASED PARTICIPATORY RESEARCH IN ALBANY, NY, 16-17 (2014), [https://www.skidmore.edu/environmental\\_studies/capstone/projects/documents/8-SherpaShepherdVidal.pdf](https://www.skidmore.edu/environmental_studies/capstone/projects/documents/8-SherpaShepherdVidal.pdf) (describing community concerns over DEC's failure to assess risks and issuance of a Complete Application and failure to apply CP-29 to Global LLC oil shipments and boiler plant and related facilities in predominantly minority South Albany, which is already disproportionately overburdened environmental justice community); *Lawmaker Screams Environmental Racism After Hamptons Garbage Shipped To His Town*, CBS N.Y. (Jul. 28, 2014), <https://newyork.cbslocal.com/2014/07/28/lawmaker-screams-environmental-racism-after-hamptons-garbage-shipped-to-his-town/> (describing resident and legislators' complaints about DEC's approval to allow garbage from predominantly-white Hamptons to be held in predominantly-minority Brentwood); *N.Y. State Accused of Environmental Racism For Incinerator Site*, CHRISTIAN SCI. MONITOR (February 8, 1994), <https://www.csmonitor.com/1994/0208/08111.html> (describing DEC's failure to address and denial of the environmental hazards of a trash-burning incinerator in a predominantly Black neighborhood in Albany that burned approximately 350 tons of waste each day - sending arsenic, lead, mercury, and other pollutants into the air).

<sup>193</sup> CP-29, *supra* note 110.

<sup>194</sup> *Id.*

certain neighborhoods are picked on and used for these purposes without their input. I believe it is only fair that when entities come into neighborhoods, they inform residents, so they have a say.”

Had DEC conducted a full environmental review as required by SEQRA and CP-29, it may very well have found the project impermissible under SEQRA.<sup>195</sup> It would be classified as a Type 1 action, and there are multiple areas of potentially significant environmental impact in connection with the pipeline that would trigger review. These include hazardous materials, historical resources, proximity to more than two dozen remediation sites, gas methane emissions, soil contamination, and potential water contamination: the pipeline crosses three DEP water pipes and is in proximity to the Brooklyn-Queens aquifer, which supplies water to 650,000 people<sup>196</sup>. Moreover, DEC would have held public hearings, allowing the communities affected by the pipeline to ask important questions and present evidence about the existing environmental and public health burdens already borne by the community to which the pipeline would add. Instead DEC issued a negative declaration without analyzing the whole project or its racially disproportionate impact, ignoring community needs and subjecting individuals to discrimination because of their race.

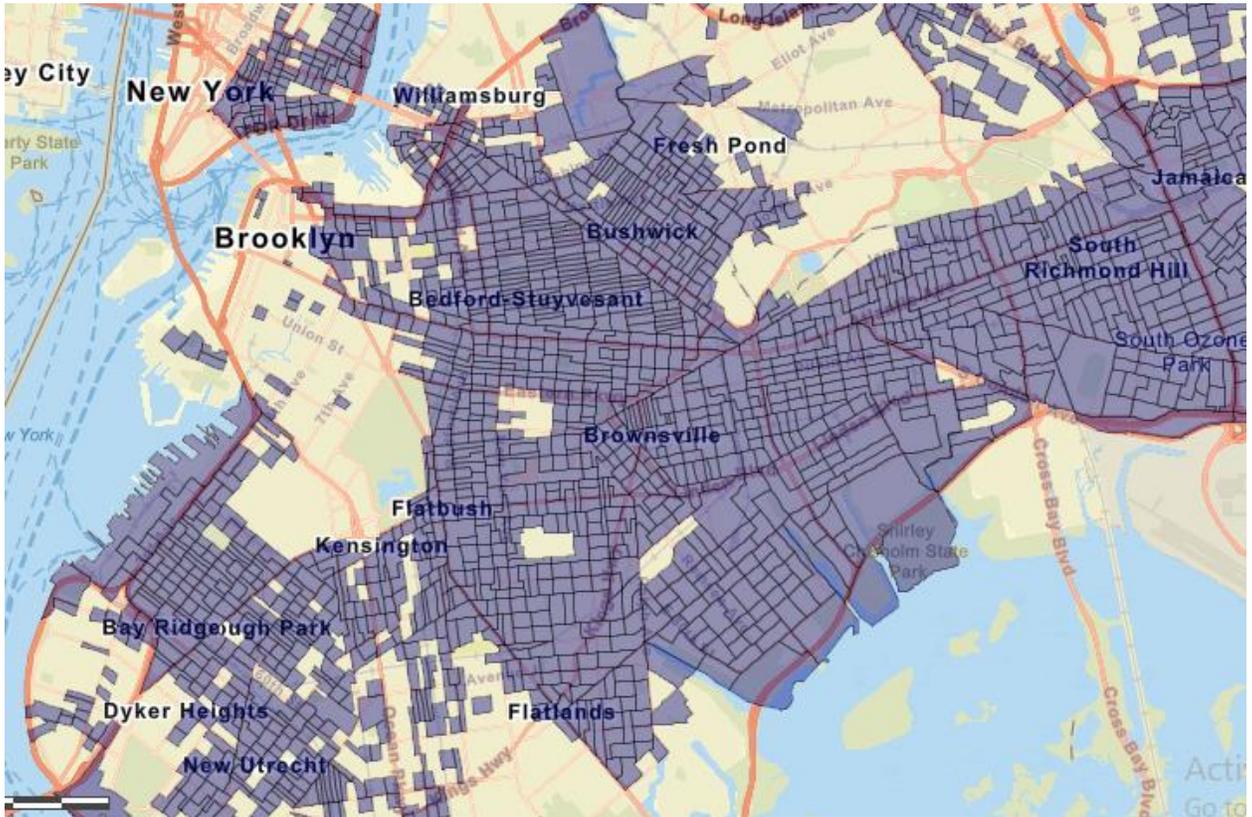
DEC had no substantial legitimate justification for refusing to conduct a full environmental review of the North Brooklyn Pipeline, nor has DEC explained why the primary purpose of its permitting program—the protection of air quality—cannot be achieved equally well in a less discriminatory manner. This constitutes a violation of Title VI.

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<sup>195</sup> The pipeline itself is a Type 1 action subject to SEQRA review: the seven-mile massive high-pressure pipeline is a physical alteration of 4,480 feet of land, well over the 10 feet listed in the definition for a Type I action. 6 NYCCR § 617.4(b)(2). In addition, according to the DEC’s own Environmental Assessment tool, the pipeline route is within 2000 feet of 28 DEC Environmental Remediation sites and in close proximity to a major water source. Further, the pipeline is substantially contiguous to 26 different National or State Register of Historic Places or State Eligible Sites, which also triggers a full environmental review. *See* Draft DEC EAF North Brooklyn Pipeline, Ex. N *supra* note 33; N.Y.C.R.R. § 617.7. *See, e.g., Sun Co., Inc. (R & M) v City of Syracuse Indus. Dev. Agency*, 209 A.D.2d 34 (4th Dept 1995); *Green Earth Farms Rockland, L.L.C. v Town of Haverstraw Planning Bd.*, 153 A.D.3d 823 (2d Dept 2017); *County of Orange v Vill. of Kiryas Joel*, 11 Misc. 3d 1056(A) (2d Dept. 2007); *Fleck v. Town of Colden*, 792 N.Y.S.2d 281 (4th Dept. 2005); *Chenango Valley Cent. Sch. Dist. v. Town of Fenton Planning Bd.*, No. 31820(U) (N.Y. Sup. Ct. 2017); *Cty. of Orange v. Vill. of Kiryas Joel*, 44 A.D.3d 765 (2nd Dept. 2007). Contrary to National Grid’s assertion, it would not have been exempted from review. *Town of Goshen v Serdarevic*, 17 AD3d 576, 579 (2d Dept 2005) (addition of drainage pipe, replacement of another pipe with a larger one, and extension of ditches were not matters of routine maintenance and subject to SEQRA review). In addition, contrary to National Grid’s misrepresentation, it had to apply for multiple discretionary permits that should have triggered SEQRA review.

<sup>196</sup> Draft DEC EAF North Brooklyn Pipeline, Ex. N *supra* note 195; Environmental Protection Agency, *EJSCREEN: Environmental Justice Screening and Mapping Tool*, <https://www.epa.gov/ejscreen> (last visited Aug. 29, 2021); New York State Department of Environmental Conservation, *DEC Mapping tools, Maps & Geospatial Information System (GIS) Tools for Environmental Justice*, [https://www.arcgis.com/home/webmap/viewer.html?url=https://services6.arcgis.com/DZHaqZm9cxOD4CWM/ArcGIS/rest/services/Potential\\_Environmental\\_Justice\\_Area\\_PEJA\\_Communities/FeatureServer&source=sd](https://www.arcgis.com/home/webmap/viewer.html?url=https://services6.arcgis.com/DZHaqZm9cxOD4CWM/ArcGIS/rest/services/Potential_Environmental_Justice_Area_PEJA_Communities/FeatureServer&source=sd)

## New York State-Designated Environmental Justice Areas



Source: Department of Environmental Conservation<sup>197</sup>

### **B. DPS Violated Title VI by failing to Require National Grid to comply with pipeline safety laws and by approving a rate hike without considering the disparate impact on people of color, each of which has had a disproportionate impact on communities of color**

“Community members (b)(6) Privacy, (b)(7)(C) Enf. Privacy were in disbelief when they heard about the pipeline. Many community members assumed that the construction on their streets had to do with water main issues. They had no idea that a pipeline was being built. It was interesting to track the different reactions of different members of the community when they learned about the pipeline because Williamsburg has many Black and Brown residents who are mostly low-income, but it also has some more affluent white residents. The Black and Brown residents were surprised to learn that the pipeline was why there had been digging and holes on their blocks. A lot of the small businesses in the neighborhood that are owned by people of color lost business from the construction

<sup>197</sup>New York State Dept, of Environmental Conservation, *DEC Mapping tools, Maps & Geospatial Information System (GIS) Tools for Environmental Justice*, [https://www.arcgis.com/home/webmap/viewer.html?url=https://services6.arcgis.com/DZHqZm9cxOD4CWM/ArcGIS/rest/services/Potential Environmental Justice Area PEJA Communities/FeatureServer&source=sd](https://www.arcgis.com/home/webmap/viewer.html?url=https://services6.arcgis.com/DZHqZm9cxOD4CWM/ArcGIS/rest/services/Potential%20Environmental%20Justice%20Area%20PEJA%20Communities/FeatureServer&source=sd)

that was blocking the road. However, many of the white residents did not even know about the construction because there was nothing happening on their streets.”

- (b) (6), who lives on the pipeline route in Williamsburg Brooklyn

The DPS used criteria and methods that have the effect of discriminating on the basis of race in violation of Title VI by approving a rate hike that authorized National Grid to construct the pipeline without complying with critical pipeline safety requirements that DPS is charged with regulating. In addition, in approving the rate hike, DPS failed to consider the pipeline’s environmental impact on communities of color, while analyzing the impact on communities in the predominantly white area of the project. As a result, DPS’ decision to approve the rate hike disproportionately put Black and Brown communities in serious danger of pipeline accidents in violation of both state law and Title VI. 49 CFR § 21.5(b)(2).

### **1. DPS failed to ensure that National Grid complied with federal safety standards prior to approving the rate hike, resulting in a disproportionate impact on Black and Latinx communities**

Pursuant to an agreement with the Department of Transportation, DPS enforces and oversees federal pipeline safety, integrity and public education standards for pipelines within New York State under the Natural Gas Pipeline Safety Act (“PSA”),<sup>198</sup> as well as state standards.<sup>199</sup> DPS is “the first line of defense” and is required to ensure that pipeline operators engage in required safety, testing, and public education and other federal standards before constructing and operating a pipeline, in order to “provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities.”<sup>200</sup>

In addition, the DPS Public Service Commission oversees gas companies’ requests to increase the rates consumers pay to build its gas infrastructure.<sup>201</sup> Before approving a utility’s ability to raise rates to expand its infrastructure, it must assure that the settlement is just, reasonable and in the public interest,

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<sup>198</sup> 49 U.S.C. § 60101 *et seq.* (“Pipeline Safety Act” or “PSA”).

<sup>199</sup> The Department of Transportation promulgates minimum federal safety standards for natural gas pipelines, and allows states to assume regulatory authority if it certifies it has adopted federal safety standards and damage prevention. 49 U.S.C. § 1674; 49 U.S.C. § 60105(b)(2). New York State law imposes similar mandates, and requires all pipeline operators to submit a letter of intent with precise specifications prior to beginning the construction of these pipelines. 16 NYCCR §§ 255.301, 255.302. While New York State normally subjects all pipelines over 125 psig to an extensive siting approval process, the statute exempts pipelines that are fully underground and located wholly within a City. The MRI pipeline is 300 psig and 34,000 feet and 7 miles. Case 16-00252, Dkt. No. 2, KEDNY-KEDLI Book 4-NY, *supra* note 59.

<http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=16-g-0059&submit=Search>).N.Y. Pub. Serv. Law §§ 121(2)(b) However, under federal and state law, all testing, education, and integrity requirements apply to pipeline construction and operation.

<sup>200</sup> 49 U.S.C. § 60102(a)(1)-(2); *Regulatory Fact Sheet: New York*, U.S. DEP’T TRANSP., [https://primis.phmsa.dot.gov/comm/FactSheets/States/NY\\_State\\_PL\\_Safety\\_Regulatory\\_Fact\\_Sheet.htm?nocache=748](https://primis.phmsa.dot.gov/comm/FactSheets/States/NY_State_PL_Safety_Regulatory_Fact_Sheet.htm?nocache=748) (last visited Aug. 26, 2021).

<sup>201</sup> N.Y. Pub. Serv. Law §§ 4; 5; 64 *et seq.* The Public Service Commission consist of five members who are appointed by the Governor, with the advice and consent of the Senate.

including that it is “consistent with the law and regulatory economic, social and environmental State and Commission policies”<sup>202</sup> and that it does “not disproportionately burden disadvantaged communities.”<sup>203</sup>

On August 12, DPS abdicated many of its statutory obligations in approving the settlement of the rate case and completion of the pipeline, disproportionately harming Black and Latinx individuals. First, DPS failed to ensure National Grid complied with PSA legal requirements prior to approving the pipeline. Under the PSA and New York State Law, pipeline operators must contact and notify residents, cities, schools, and businesses about their proximity to the pipeline, safety risks, including possible leaks, and what to do in the event of an accident, and submit its educational materials to DPS.<sup>204</sup> As described above, community members living in close proximity to the Brooklyn pipeline, including (b) (6) and multiple residents along the pipeline route said they never received any notification from National Grid—even though National Grid began operating the pipeline in April 2020. Further, National Grid did not start online website construction updates related to the project until July 18, 2018, after it completed most of the construction in Brownsville, and did not include any information about the full project, safety risks, or precautions as required by statute.<sup>205</sup>

National Grid’s public representations about its activities were deceptive and misleading, in that they implied that the massive fracked gas transmission pipeline under construction simply represented improvements to existing infrastructure. National Grid lulled community members into a false sense of security with these misleading representations, and DPS allowed this to occur. Had National Grid engaged in the robust communications required by the Pipeline Safety Act, the community would have learned about the pipeline in time to intercede against it. Thus, DPS bears direct responsibility for the fact that the Black and Brown communities along the pipeline route did not learn about the pipeline until it was too late—and they still have not received important public safety information. There is no substantial legitimate justification for this regulatory failure, and a less discriminatory alternative would have been for DPS to enforce the public awareness requirements of the Pipeline Safety Act.

Further, DPS failed to ensure that National Grid conducted the required pressure testing before operating the pipeline and complied with federal and state reporting obligations. Prior to operating a pipeline, an operator must test its pipelines for safety and file a report certifying the maximum operating pressure and that the line has been constructed and tested in accordance with the law, and that all leaks

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<sup>202</sup> Public Service Commission, Case No. 92-M-0138, Dkt. No 1, *Opinion, Order, and Resolution Adopting Settlement Procedures and Guidelines* (March 24, 1992) [hereinafter *Opinion, Order, and Resolution Adopting Settlement Procedures and Guidelines*]; Public Service Commission, Case No. 19-G-0309, Dkt. No 197, Staff Statement in Support of Joint Proposal (June 3, 2021) [hereinafter Staff Statement in Support of Joint Proposal].

<sup>203</sup> ECL 75-0109(3)(d); Jackson Morris & Miles Farmer, *Unpacking New York’s Big New Climate Bill: A Primer*, NRDC (June 20, 2019), <https://www.nrdc.org/experts/miles-farmer/unpacking-new-yorks-big-new-climate-bill-primer-0>.

<sup>204</sup> 49 U.S.C. § 60116; 9 C.F.R. § 192.616; 16 N.Y.C.R.R. § 255.616. The public education materials and outreach must be in English and other languages commonly understood by a significant number and concentration of the non-English speaking population in the operator’s area.

<sup>205</sup> Repeating its approach throughout its construction, National Grid minimized the nature of the seven-mile pipeline project and characterized it as simply limited installation of discrete segments, and not a massive seven-mile pipeline. See, e.g., *Construction Update: July 18, 2018*, NAT’L GRID, <https://nationalgridgasprojectsny.com/brooklynmetro/news/update-2/>. When two residents asked National Grid workers about what construction they were working on in Brownsville, they did not provide any information. See Statement of (b) (6), Ex. C; Statement of (b) (6), Ex. D.

have been located and eliminated.<sup>206</sup> Operators also must file annual reports detailing new pipeline and the safety and testing measures conducted each year.<sup>207</sup> On March 12, 2021, National Grid reported to PHMSA and DPS that it had not added any new transmission pipeline in its New York City system in 2020, despite the fact that it informed DPS that it placed Phases 1-3 in service in April 2020, and Phases 1-4 began operating as a transmission pipeline in November 2020.<sup>208</sup> Further, National Grid reported that it did not conduct any pressure or baseline testing of any pipe in 2018, 2019, or 2020.<sup>209</sup> DPS's failure to ensure National Grid complied with reporting and testing requirements is particularly troubling because Phase 4 of the pipeline significantly increased the volume and pressure of gas flowing under the streets of Brownsville, Ocean Hill, Bushwick and East Williamsburg. The absence of testing and reporting not only flouts state and federal law, but imposes a disproportionate impact on the safety of the surrounding Black and Latinx community.

The failure to pressure test and report the pipeline also raises concerns because DPS was aware that in its annual reports and leak reports, National Grid reported a high frequency of insufficient excavation practices and damage to its pipeline system. Between 2018-2020, National Grid reported 996 incidents of damage and 534 incidents of excavation damage in its New York City distribution system.<sup>210</sup> These incidents, as well as the number of leaks it reports on an annual basis to DPS, suggest that pipeline damage is frequent. In addition, according to DPS' State-wide annual pipeline safety report, in 2020, National Grid-New York had the highest rate of pipeline damage due to excavation practices and other safety failures of New York's 12 gas companies, and the second highest level of unremedied leaks in the state, including hazardous leaks.<sup>211</sup> As described above, National Grid submitted leak reports to DPS admitting to 22,000 leaks over the last five years, with a backlog of 1,944 leaks in need of repair as of December 2020.<sup>212</sup> In addition, National Grid reported 240 insufficient location practices and 122 insufficient incidents of its one-call notification system over the last three years, which is designed to prevent damage by notifying other operators to limit construction and accidents near highly flammable gas systems.<sup>213</sup>

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<sup>206</sup> 16 NYCCR § 255.302(b); 49 C.F.R. §§ 192.507; 192.509.

<sup>207</sup> 16 N.Y.C.R.R. § 255.829; 49 C.F.R. § 191.11; § 191.17; 49 U.S.C. § 60142(d)(1). According to the mandated annual report, “[f]ailure to report may result in a civil penalty not to exceed \$100,000 for each violation for each day the violation continues up to a maximum of \$1,000,000 as provided in 49 USC 60122.”

See U.S. Dep't of Transp., *Annual Report for Calendar Year 2020*,

[https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2021-05/GD\\_Annual\\_Form\\_PHMSA%20F%207100.1-1\\_CY%202018%20through%202020.pdf](https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2021-05/GD_Annual_Form_PHMSA%20F%207100.1-1_CY%202018%20through%202020.pdf).

<sup>208</sup> PHMSA FOIL Response, National Grid Annual Transmission System Reports, Ex. K, *supra* note 13.

<sup>209</sup> *Id.*; PHMSA FOIL Response, National Grid Annual Report for Calendar Year 2019 Natural Or Other Gas Transmission and Gathering Systems (March 2, 2020); National Grid Annual Report for Calendar Year 2018 Natural Or Other Gas Transmission and Gathering Systems (March 7, 2019), Exhibit K. [hereinafter PHMSA FOIL Response, National Grid Annual Transmission System Reports, Ex. K]. Pressure testing is required by 16 N.Y.C.R.R. § 255.503(a); 49 C.F.R. § 192.505 (strength testing); 49 U.S.C. § 60139. Strength and baseline testing is required by 49 C.F.R. § 192.506 (segment of steel transmission pipelines operating at a hoop stress level of 30 percent or more of SMYS must be spike and pressure tested); 49 C.F.R. § 192.507 (less than 30% of SYMS and above 100 psi); 49 C.F.R. § 192.509 (below 100 psi); 49 C.F.R. § 192.511 (service lines). National Grid reported inspecting 5 miles of pipeline with corrosion and metal tools and dent and deformation tools in 2020. However, these inspections do not appear to qualify for the requisite testing, and does not appear to apply to new pipeline, as National Grid reported none. National Grid 2020 Annual PHMSA Report at 3, 6. Ex.K.

<sup>210</sup> PHMSA FOIL Response, National Grid Annual Distribution System Reports, 2018-2020, Ex. L, *supra* note 101.

<sup>211</sup> NEW YORK STATE DEP'T OF PUB. SERV., *2020 Pipeline Safety Performance Measures Report*, at 18, 30-31 (2021), <https://www3.dps.ny.gov/W/PSCWeb.nsf/All/9DBA66C148A1310985257B2600750639?OpenDocument>.

<sup>212</sup> Case 16-00252, Item No. 12, Year End Leak Report (Jan. 29, 2021); National Grid Year End Leak Reports, Ex. J, *supra* note 111.

<sup>213</sup> PHMSA FOIL Response, National Grid Annual Distribution System Reports, 2018-2020, Ex. L, *supra* note 101

Similarly, the PSA requires pipeline operators to submit mapping and geospatial data to the PHMSA for inclusion in the National Pipeline Mapping System.<sup>214</sup> National Grid did not do this, and as a result the North Brooklyn Pipeline does not appear in the National Pipeline Mapping System.<sup>215</sup> The PHMSA uses geospatial data, in part, to identify high consequence areas in which pipeline operators must take additional safety precautions and to notify other operators of active pipeline systems to prevent serious damage from other construction projects.

PHMSA Map of Pipelines in Kings County, New York<sup>216</sup>



DPS received these reports, and despite knowing that the North Brooklyn Pipeline was operational in 2020 through National Grid’s filing in the rate case, failed to ensure that National Grid was taking the legally required precautions to ensure the safety of the Black and Latinx communities along the pipeline route. In addition, DPS approved the rate hike for the North Brooklyn pipeline despite knowing it was in violation of its regulatory duty to ensure that its approval of the settlement was “consistent with the law and regulatory economic, social and environmental State and Commission policies”<sup>217</sup> DPS thereby violated Title VI by approving a rate hike authorizing payment for the completion and operation

<sup>214</sup> 49 U.S.C. § 60132

<sup>215</sup> U.S. Department of Transportation, U.S. DEP’T TRANSP. NATIONAL PIPELINE MAPPING SYSTEM, <https://www.npms.phmsa.dot.gov/> (click on use public map viewer, choose “New York” as the “State” and “Kings” as the “County”).

<sup>216</sup> *Id.*

<sup>217</sup> *Opinion, Order, and Resolution Adopting Settlement Procedures and Guidelines, supra* note 207; Staff Statement in Support of Joint Proposal, *supra* note 207.

of the pipeline, despite National Grid’s violation of basic regulatory standards, creating a serious disproportionate impact on the safety of Black and Latinx communities.<sup>218</sup> DPS’s failure to ensure that National Grid complied with its core legal obligations under the PSA can have no substantial legitimate justification.

In contrast, DPS has repeatedly taken rigorous enforcement actions to mandate National Grid to fix pipeline construction and integrity issues in white communities. For example, in March 2021, DPS fined National Grid \$6 million for failing to fix substandard “cathodic pressure” protections at four regulator stations located in 90% white communities in Long Island. In its decision mandating this fine, DPS recognized that these systems are critical to protect against corrosion and “prevent methane leaks and the associated safety and environmental impacts associated with such leaks.”<sup>219</sup>

## **2. DPS failed to consider the impact on communities of color in approving the rate hike, in violation of CLCPA and Title VI**

DPS twice authorized the construction of and rate recovery for the pipeline without considering whether such actions would have a discriminatory impact. As a recipient of federal funds, DPS always had a clear legal obligation under Title VI to ensure that its actions did not have a racially discriminatory impact. DPS also failed to ensure that the North Brooklyn pipeline complied with the New York State Climate Leadership and Community Protection Act (CLCPA),<sup>220</sup> which requires agencies to “[p]rioritize measures to maximize net reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities.”<sup>221</sup> Although DPS’s Public Service Commission found the CLCPA applied, DPS staff and the PSC made no effort to analyze the impact of the pipeline on disadvantaged communities.<sup>222</sup> In their brief supporting the rate hike, DPS staff even argued, counterfactually, that “there is no evidence in these cases that the location of MRI project Phase 1 through Phase 4 or the proposed projects at the Greenpoint LNG facility ‘disproportionately burden disadvantaged communities.’”<sup>223</sup>

In approving the rate hike, PSC recognized that the CLCPA applied and analyzed the environmental impact of the Greenpoint expansion, located in a primarily white community. However, it declined to review the environmental impacts of the pipeline. DPS never analyzed whether its actions in approving the pipeline construction and associated rate hikes disproportionately harm Black and Latinx individuals. In its most recent order approving the joint settlement and rate hikes, DPS found that the pipeline and rate hike did not disproportionately burden disadvantaged communities because “the Joint

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<sup>218</sup> 49 C.F.R. § 21.5(b)(2).

<sup>219</sup> Public Service Commission, Case No. 17-G-0317, *In the Matter of an Investigation into The Brooklyn Union Gas Company d/b/a National Grid NY and KeySpan Gas East Corporation d/b/a National Grid Compliance with Operator Qualification, Performance, and Inspection Requirements with Respect to Work Completed by Company and Contractor Personnel*, Dkt. No 7, *Order Adopting Settlement Agreement* (March 18, 2021); Public Service Commission, Case No. 18-G-0094-*Proceeding on Motion of the Commission for an Enforcement Against National Grid USA and its Subsidiary KeySpan Gas East Corporation d/b/a National Grid for Failure to Maintain and Reestablish Cathodic Protection*, Dkt. No. 15, *Order Adopting Settlement Agreement* (March 18, 2021).

<sup>220</sup> Jackson Morris & Miles Farmer, *Unpacking New York’s Big New Climate Bill: A Primer*, NATIONAL RESOURCE DEFENSE COUNSEL (June 20, 2019), <https://www.nrdc.org/experts/miles-farmer/unpacking-new-yorks-big-new-climate-bill-primer-0>.

<sup>221</sup> ECL § 75-0109(3)(d). Section 7 of the CLCPA requires agencies issuing relevant approvals to ensure that they (1) do not interfere with the attainment of required greenhouse gas emissions limits; and (2) do not disproportionately burden disadvantaged communities. *Id.*

<sup>222</sup> Case No. 19-G-0309 et al, Dkt. No 238, *Order Approving Joint Proposal, as Modified, and Imposing Additional Requirements*, 69-70 (August 12, 2021) [hereinafter *Order Approving Joint Proposal*].

<sup>223</sup> Case No. 19-G-0309 et al, Dkt. No 205, DPS Staff Reply Statement, at 9 (June 14, 2021).

Proposal will allow the Companies to continue providing safe and reliable service” and because ensuring service through the winter “must be a priority for all communities impacted by the Joint Proposal, particularly low-income New Yorkers that may not be able to afford the energy efficiency products and heat pumps incentivized by the Joint Proposal.”<sup>224</sup> But this is beside the point. Of course, National Grid must ensure safe and adequate service throughout the winter heating season. The question is whether the low-income communities of color along the pipeline route shoulder a *disproportionate* amount of the burden associated with providing safe and adequate service. DPS failed even to consider this question. DPS did not, for example, weigh the environmental burdens imposed on the pipeline communities and compare those to burdens imposed on other communities or the burdens of not building the pipeline at all and instead undertaking other prudent action to address system reliability concerns. Nor did DPS consider the specific economic burden of raising rates in communities along the pipeline route and whether these low-income ratepayers should have to shoulder the expense of a pipeline built without their knowledge and against their wishes that poses significant public health risks to them. DPS failed to assess the impact of the pipeline on disadvantaged communities even though it approved Phase 4 which significantly increased the amount of gas running through the pipeline, and thus increased the environmental risks to communities of color.

By applying the mandated environmental impact analysis only to the predominantly white area surrounding the Greenpoint facility, and failing to examine the impact to communities of color, DPS violated both state law and Title VI by using criteria and methods that had a disproportionate impact on the safety of Black and Latinx individuals.

**C. National Grid’s siting of the pipeline, violation of public safety laws, and evasion of regulation discriminated against Black and Latinx communities by putting them at disproportionate risk in violation of Title VI.**

“Having National Grid build this pipeline in my neighborhood without my knowledge or consent feels like a slap in the face. It is frustrating and disrespectful that things like this happen in Black and Brown communities and it is hard to accept that this is happening and try to figure out how to fix it when it is not something we asked for.”

- (b) (6) resident of Brownsville since 2005

**1. Site Selection**

National Grid discriminated on the basis of race by choosing a route through communities that are 80% Black, Latino low-income, and that are already burdened by health disparities and environmental degradation. National Grid had other options which could have served the same purpose as the MRI Pipeline, but the company failed to analyze whether any of those routes might cause fewer disproportionately adverse impacts.<sup>225</sup>

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<sup>224</sup> *Order Approving Joint Proposal*, *supra* note 227, at 81.

<sup>225</sup> 10 C.F.R. § 1040.13(d) (“In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination because of race, color, national origin, or sex (when covered by section 16 or 401) or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of title VI or this subpart.”).

Not only did National Grid testify that it conducted no analysis of the pipeline's impact on disadvantaged communities,<sup>226</sup> it vehemently denied that the MRI Project was "located in areas with high concentrations of people of color and that the projects will have an adverse health impact on these communities,"<sup>227</sup> characterizing this reality as "unsupported by any meaningful evidence." National Grid further contended that the "arguments regarding the disproportionate impact on disadvantaged communities or purported adverse health impacts are without support in the record" and "based on opinion pieces and general studies."<sup>228</sup> National Grid's denial that the pipeline runs directly through Black and Brown communities despite the basic demographic reality, or that the pipeline could have any negative impact, speaks volumes to its discriminatory approach to this project, and constitutes a direct violation of Title VI's mandate that projects must consider the impact on Black and Brown communities.

Further, National Grid's assertion that the pipeline has no adverse environmental consequences to the surrounding communities is unsound, because it testified that it never assessed the environmental impact to determine how the surrounding communities would be impacted by the construction and operation of this massive pipeline.<sup>229</sup> As described above, it presented a legally impermissible segmented air permit application to DEC for expanding its LNG capacity at Greenpoint, which was dependent on the pipeline and trucking facility.

National Grid lacked a substantial legitimate justification for siting the pipeline where it did, and less discriminatory alternatives were available. For example, National Grid itself explained that it could have built the pipeline along Third Avenue in Brooklyn. This option also would have resulted in an operational loop to the Brooklyn Backbone, and National Grid admitted that it "could meet some of the objectives that the MRI Project provides."<sup>230</sup> National Grid's reasons for rejecting this option were perfunctory at best. National Grid asserted that a Third Avenue pipeline "would not provide as many benefits" but provided no explanation of what the "benefits" were and why a Third Avenue pipeline could not provide them.<sup>231</sup> The real reason for avoiding Third Avenue is contained in National Grid's statement that it "would likely be more expensive and challenging from a routing and construction perspective." There is nothing inherent in the geography or topology of Brooklyn to make construction on Third Avenue more difficult than along the chosen route. But the Third Avenue route would have required building through some upper-income, majority white neighborhoods with high property values. National Grid certainly would have encountered political opposition, and the residents of some neighborhoods along a hypothetical Third Avenue route would have had the financial and political resources to expose and fight the pipeline construction at an earlier stage. National Grid's specious rejection of the Third Avenue option raises the serious possibility that National Grid intentionally chose to site the pipeline in low-income Black and brown communities precisely because these communities were more likely to lack the political power and resources to oppose the pipeline in time to stop it. And that is exactly what occurred.

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<sup>226</sup> Case No. 19-G-0309, Corrected Evidentiary Hearing Transcript Volume 9 - February 25, 2020. at 394, Lines 17-21; 406, Lines 13-17 (March 19, 2020).

<sup>227</sup> Case No. 19-G-0309, Dkt. No 204, Reply Statement of the Brooklyn Union Gas Company D/B/A National Grid (June 14, 2021) at 12.

<sup>228</sup> *Id.* at 13.

<sup>229</sup> Case No. 19-G-0309, Corrected Evidentiary Hearing Transcript Volume 9 - February 25, 2020. at 393, Lines 9-13 (March 19, 2020).

<sup>230</sup> Testimony of the Gas Infrastructure and Operations Panel, *supra* note 69.

<sup>231</sup> *Id.* at 218.

Finally, National Grid lacked a substantial legitimate justification for embarking upon the North Brooklyn Pipeline and Greenpoint LNG expansion in the first place. National Grid did not have to build a new transmission pipeline in order to improve system reliability and operational flexibility. As documented in the March 2019 report *False Demand: The Case Against the Williams Fracked Gas Pipeline*,<sup>232</sup> National Grid did not need to increase system capacity in order to accommodate growth. National Grid admitted in the rate case that if it wished only to address PHSMA-required work on the Brooklyn Backbone, it would have designed and routed the pipeline differently.<sup>233</sup> And as National Grid ultimately conceded when it agreed to abandon Phase 5 and the LNG facility expansion, it can satisfy its obligation to deliver safe and adequate service with a smaller and more limited project than originally proposed.

Though National Grid characterized the pipeline as serving system reliability interests, the scale of the proposed project went far beyond simply shoring up the system in Brooklyn and Queens. National Grid's installation of 350 psi, 30-inch pipe, efforts to increase processing capacity in Greenpoint, and attempts to obtain permits to truck the processed gas to Massachusetts all strongly suggest that the real goal of the project was to bring in more gas than was needed locally in order to sell the excess downstream, boosting profits for National Grid and its shareholders at the expense of low-income people of color in Brooklyn.

National Grid never seriously tried to identify less discriminatory alternatives for meeting safety and reliability needs. And because National Grid successfully evaded regulatory oversight of the pipeline siting decision, no agency ever assessed the alternatives either. Meanwhile, while further expansion of fracked gas infrastructure no longer immediately threatens the predominantly white neighborhoods in Brooklyn, gas is running through the predominantly low-income Black and Latinx communities in Phases 1-4—and their gas bills will increase to pay for it.

## **2. Lack of Compliance**

At every step, from planning to construction to operation, National Grid employed criteria and methods that have the effect of discriminating on the basis of race by taking measures to evade state and federal regulations necessary to ensure the safety of the surrounding Black and Latinx community. Specifically, National Grid failed to comply with the Pipeline Safety Act's public awareness and testing requirements. Today, according to National Grid's most recent annual reports, gas is flowing through pipes that have not been pressure tested and checked for leaks. National Grid never conducted an evacuation zone study to determine how schools, residents, or businesses should respond in case of an emergency, and maintained that such a study was not necessary.<sup>234</sup> National Grid's evasion of its basic legal obligations has no substantial legitimate justification.

## **3. Regulatory Evasion**

National Grid demonstrated a consistent pattern of evading regulatory review at all levels of government. Critically, National Grid failed to apply to the Department of Energy's Federal Energy

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<sup>232</sup> 350.ORG, FALSE DEMAND: THE CASE AGAINST THE WILLIAMS FRACKED GAS PIPELINE 3 (Mar. 2019), [https://350.org/wp-content/uploads/2019/03/Stop\\_Williams\\_False\\_Demand.pdf](https://350.org/wp-content/uploads/2019/03/Stop_Williams_False_Demand.pdf) (last visited Aug. 29, 2021).

<sup>233</sup> Exhibit 735, *supra* note 101, at 7.

<sup>234</sup> Public Service Commission, Case No. 19-G-0309, Dkt. No 101, Exhibit 683 SANE-11 Response (March 2, 2020) at 2.

Regulatory Commission (FERC), and conduct the requisite environmental analysis for approval to build the pipeline.<sup>235</sup> At the time of construction, the pipeline was subject to FERC because it was intended to connect to an interstate pipeline and receive gas from Pennsylvania that would be transported out of state for consumption in Massachusetts. 15 U.S.C. § 717(b), (c).<sup>236</sup> Section 7 of the Natural Gas Act thus required National Grid to apply to FERC and justify the necessity of the pipeline and include an environmental assessment of its impact. To determine whether to approve or deny the project, FERC would have assessed whether the pipeline was in the public interest, including the full environmental justice impact of the pipeline and related gas infrastructure, and held public hearings.<sup>237</sup> However, there is no record that National Grid applied for or received a Certificate of Necessity in FERC’s database, and National Grid has testified that it never conducted an environmental analysis of the pipeline that was necessary for its application.<sup>238</sup>

Similarly, contrary to National Grid’s assertion that it was never subject to State Environmental Review because it never applied for discretionary permits in constructing the pipeline,<sup>239</sup> National Grid applied for multiple permits that should have triggered environmental review. In addition to its application for a permit for expansion of the Greenpoint Energy Center, National Grid applied for permits from the New York City Department of Environmental Protection for disposing billions of gallons of wastewater that should have triggered environmental review.<sup>240</sup> National Grid also conducted work pursuant to a DEP order to strengthen a sewer through which the pipeline passed, and the pipeline crossed through three separate Department of Environmental Protection water mains.<sup>241</sup> National Grid should have conducted and submitted an environmental assessment for these projects, and been subjected to SEQRA or the New York City Environmental Quality Review process.<sup>242</sup>

National Grid also did not apply for permits and approvals mandated by state and local law. For example, New York State Transportation Corporations Law § 87 prohibits the construction of a pipeline through a city without the approval of two thirds of its legislature. Specifically, prior to constructing the pipeline, National Grid was required to obtain “a resolution prescribing the route, manner of construction and terms upon which granted.” N.Y.S. Trans. Corp. § 87. Despite this statutory requirement, there is no

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<sup>235</sup> While intrastate pipelines are largely exempt from FERC, if such pipelines receive gas from out of state that will be consumed out of state, FERC applies. 15 U.S.C. § 717(b), (c). *Okla. Nat. Gas Co. v. FERC*, 28 F.3d 1281, 1285-86 (D.C. Cir. 1994); *La. Power & Light Co. v. Fed. Power Com.*, 483 F.2d 623 (5th Cir. 1973). Before the pipeline can be built, FERC must approve the project and grant the developer a “certificate of public convenience and necessity,” 15 U.S.C. §§ 717f(c)(1)(A); 717f(e).

<sup>236</sup> National Grid FDNY Variance Petition, *supra* note 62. It is also connected to a pipeline system that transports gas out of state. See YOU ARE HERE: MAPPING LOCAL FRACKING INFRASTRUCTURE AND COMMUNITIES OF RESISTANCE, <https://www.youareheremap.org/> (last visited Aug. 26, 2021).

<sup>237</sup> See 15 U.S.C. § 717f. To assess the pipeline, FERC is required to prepare an environmental impact statement (EIS) before approving the project under the National Environmental Policy Act of 1969 (NEPA), which requires for each “major Federal action [ ] significantly affecting the quality of the human environment.” See 42 U.S.C. § 4332(C). As part of this process, FERC is required to solicit public comments, hold public meetings on the project’s environmental effects, and, if necessary, modify any project plans in response to public concerns. It then must release a draft, then final impact statement. See also *Sierra Club v. FERC*, 867 F.3d 1357, 1364 (D.C. Cir. 2017). FERC is also empowered to attach “reasonable terms and conditions” to the certificate, as necessary to protect the public. *Id.*

<sup>238</sup> At the least, even if all gas is consumed wholly within NYS, National Grid should have applied for and received a FERC certificate under 18 C.F.R. § 284.224. Our review of FERC records indicate no such certificate.

<sup>239</sup> Case No. 19-G-0309, Dkt. No 210, Ex. 815-ALJ-1 Attachment 3 (Part 2) at 117-118 (June 22, 2021).

<sup>240</sup> *Id.* at 91-114.

<sup>241</sup> Exhibit 735, *supra* note 101, at 7.

<sup>242</sup> CEQR is the process by which New York City agencies determine what effect, if any, a discretionary action they approve may have upon the environment. See generally, 62 Rules of the City of New York (RCNY), Chapter 5.

record of National Grid ever seeking the approval of the New York City Legislature, or the Legislature passing such a resolution. To the contrary, the only reference to the MRI pipeline in New York City legislative records is a resolution proposed by Brownsville Councilmember Alicka Ampry-Samuel and former Councilmember and current Public Advocate Jumaane Williams vehemently objecting to the rate hike for the MRI pipeline based in large part on the unregulated dangers the pipeline imposes on Black and Latinx communities.<sup>243</sup>

In addition, National Grid failed to apply for other relevant permits, including permits for which it applied for smaller transmission pipelines in other communities. Despite the fact that the North Brooklyn Pipeline is located close to 28 historical sites, National Grid did not apply for the mandated City or State permits to excavate land to construct and operate the pipeline. Nor did it apply for a Stormwater Pollution Prevention Plan (SWPPP), even though it dumped billions of gallons of wastewater into New York City Sewers in building the MRI Pipeline. In contrast, when National Grid built a much smaller 8200 foot 12” 350 psig transmission main in Riverhead, which is 71.4% white, it applied and obtained approval for a SWPPP from DEC, as well as approvals from the New York State Department of Transportation (which it never did for the MRI project).<sup>244</sup> Similarly, prior to building similar infrastructure in South Hampton, which is 85.3% white, National Grid applied for and obtained the same approvals from DOT and DEC for constructing an 8,500 foot of 16-inch, 350 psig transmission main, a regulator station, and a 5,800 foot of 12-inch steel distribution main.<sup>245</sup>

National Grid’s bypassing of federal and state oversight has no legitimate justification. These practices have jeopardized and continue to jeopardize the lives and safety of the Black and Brown residents living around the pipeline and constitute “criteria and methods” that violate Title VI.<sup>246</sup>

### VIII. Relief Requested

In order to comply with Title VI and prevent unjustified disparate impacts:

- DOT should ensure that **DPS immediately stop the flow of gas**, rescind its approval of the rate hike, and analyze the disproportionate impact of the pipeline and rate hike on Black and Latinx individuals. Further, DOT must ensure that DPS investigates all of National Grid’s regulatory failures and evidence that National Grid never notified the public, tested, or even reported the existence of the pipeline to PHMSA. DOT must never allow National Grid to operate a pipeline without complying with the PSA and state law.
- EPA should ensure that DEC rescinds its negative declaration. If DEC considers National Grid’s application to upgrade its LNG capacity or renew any permits for the facility, DEC must consider the “whole action,” that includes the pipeline. DEC must then consider, in light of the whole action, whether its environmental assessment and permitting decision would

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<sup>243</sup> N.Y. City Council Res. 1562 (N.Y.C. 2021), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4856753&GUID=5DD20438-43C9-4F06-9C01-837F222ED230&Options=&Search=>.

<sup>244</sup>Case No. 19-G-0309, Dkt. No 210, Ex. 815-ALJ-1 Attachment 3 (Part 2) at 169 (June 22, 2021); Case No. 19-G-0309, Dkt. No. 111, Corrected Evidentiary Hearing Transcript Volume 9. February 25, 2020. at 1494-95 (March 19, 2020); United States Census Bureau, Quick Facts for Riverhead, New York: Population Estimates (July 1, 2019), <https://www.census.gov/quickfacts/riverheadcdpnewyork>

<sup>245</sup> *Id.*; United States Census Bureau, Quick Facts for East Hampton, New York: Population Estimates (July 1, 2019), <https://www.census.gov/quickfacts/fact/table/southamptontownsuffolkcountynewyork/IPE120219>

<sup>246</sup> 10 C.F.R. § 1040.13.

have discriminatory effects, which includes disparate levels of risk to air quality, soil, water, and safety of the community, and DEC must take affirmative steps to consider and prevent disparate impacts.<sup>247</sup> It also must hold hearings with the impacted communities prior to reaching a decision on the permit, and it must require National Grid to take affirmative steps to remediate the negative environmental impacts of the pipeline.

- DOE should investigate whether FERC had and continues to have jurisdiction over the North Brooklyn Pipeline based on National Grid’s intent at the time of construction to use the pipeline to transport gas in interstate commerce from Pennsylvania to New York to Massachusetts. If applicable, FERC should order National Grid to stop the flow of gas and mandate that National Grid complies with FERC’s regulatory process.
- Should DEC, DPS and/or National Grid fail to come into compliance, the relevant federal agencies should revoke all federal funding and pursue all legal relief to stop the flow of the gas and require that the disproportionate impacts on Black and Latinx residents are considered and their voices are heard as required by Title VI and state law.

In addition, we request these investigations be consolidated, and that EPA, DOT, DOE, and DOJ collaborate and coordinate on remedial approaches, and provide complainants with a public hearing.

Sincerely,

(b)(6) Privacy [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

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<sup>247</sup> Beyond rejecting the permit outright, DEC may be able to ensure compliance with Title VI by modifying permit conditions or requiring a different route; these would potentially be less discriminatory alternatives that satisfy DEC’s other obligations.