Cape Climate Action

350 MASS

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ALGONQUIN PIPELINE RELOCATION (CCC FILE NO. 25012)
CAPE COD COMMISSION
3225 MAIN ST.
BARNSTABLE, MA 02630

On behalf of Cape Climate Action/350 Mass, a regionwide organization of climate activists across the towns of Cape Cod and operating as the Cape Cod chapter of 350 Mass, the leading Statewide grassroots advocate for climate solutions, we submit that the Commission is obligated by its governing statute to condition any approval of the proposed new Algonquin pipeline on capping the volume of gas transmitted via the new pipeline at current volumes.

Pursuant to Section 13(d)(2) of the Cape Cod Commission Act the Commission may only approve or approve with conditions a proposed Development of Regional Impact ("DRI") "if the Commission determines that "the proposed development is consistent with the regional policy plan ("RPP"). The RPP expressly requires that **"regional entities must all work together to reduce greenhouse gas emissions"**. *Cape Cod Regional Policy Plan 2025, at p. 95*. The Commission's regional greenhouse gas inventory determined that **methane gas produces just over 11% of the region's total greenhouse gas emissions**. *Cape Cod Commission, Cape Cod Regional Greenhouse Gas Inventory, February 2021, at pp. 5 and 13*. The Algonquin pipeline replacement proposed in this DRI would significantly increase the capacity of the pipeline above the transmission capacity of the existing pipelines, likely more than doubling total potential methane gas transmission into Cape Cod. While Algonquin does not currently plan to increase the volume of transmission, in part because there is no surplus gas available in its existing interstate pipeline deliveries to Massachusetts, Algonquin is also proposing a massive expansion of those interstate pipelines which would entirely alleviate those supply constraints, such that approval by this Commission of the expanded Cape Cod Canal pipelines without effective limits on transmission imposed by this Commission would potentially result in a material increase in total greenhouse gas emissions on Cape Cod.

In your 2021 Climate Action Plan, this Commission explained the urgency of reducing greenhouse emissions in order to preserve the Cape as eloquently as we might do as climate advocates:

> **Climate change is an unprecedented challenge that is transforming Cape Cod. Rising seas and changes to the coastline are the most dramatic evidence of climate change, but it is impacting every facet of Cape Cod's natural, built, and community systems. By the end of the century, damage to Cape Cod's buildings and land lost to inundation could alone total over $30 billion. Our land use patterns and way of living dictate our greenhouse gas (GHG) emissions, the leading cause of the climate crisis. Dedicated and immediate action is necessary to slow the effects of climate change and improve the region's resiliency to its impacts. The Cape Cod Climate Action Plan provides a framework for action to support a climate resilient region.**

Cape Cod Commission, 2021 Climate Action Plan, at page i. In its Climate Action Planbehalf of Cape Climate Action/350 Mass, the Cape Cod chapter of 350 Mass, which worked tirelessly over the past decade to persuade the Commission to incorporate these concerns about climate change into the RPP, we respectfully submit that the Commission may not lawfully approve the proposed DRI unless it determines that, with appropriate conditions, the development would not result in a signjificant increase in greenhouse gas emissions.

While in many circumstances FERC approval of a gas pipeline project would preempt some forms of State regulatory authority, the proposed Cape Cod Canal pipeline replacement is an entirely intrastate transmission line and Natural Gas Act expressly precludes Federal preemption of State authority over purely intrastate transportation:

> "the States retain jurisdiction over intrastate transportation, local distribution, and distribution facilities". *NW Central Pipeline vs. Kansas Corporation Commission, 489 U.S. 493, 507 (1989).*

The assumption that all matters arising from gas pipelines owned by multistate companies are preempted by FERC regulatory authority is simply incorrect. The Supreme Court has repeatedly upheld State authority and the outcome hinges on detailed analysis of the State regulatory role and its nexus to interstate commerce:

> "the Natural Gas Act 'was drawn with meticulous regard for the exercise of state power, not to handicap or dilute it in any way" . . . we must proceed cautiously, finding pre-emption only where detailed examination convinces us that a matter falls within the pre-empted field as defined by our precedents. *Oneok, Inc. v. Learjet, Inc., 575 U.S. 373 (2015).*

The emergent principle is that the courts will balance the nature of the state regulatory scheme, its objective, and the impact on interstate commerce:

> the Court, in determining the validity of state regulations, has been less concerned to find a point in time and space where the interstate commerce in gas ends and intrastate commerce begins, and has looked to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce. *Panhandle Pipe Line Co. v. Public Service Commission, 332 U.S. 507, 512 fn 7 (1947)*.

Applying this analysis, the relevant State regulatory objective is set out in the Cape Cod Commission Act and is particular to the unique vulnerability of the environment of Cape Cod:

> The region commonly known as Cape Cod, comprised of Barnstable county, including all geographic areas to the jurisdictional limit of the commonwealth, possesses unique natural, coastal, scientific, historical, cultural, architectural, archaeological, recreational, and other values; there is a regional, state and national interest in protecting, preserving and enhancing these values; and these values are being threatened and may be irreparably damaged by uncoordinated or inappropriate uses of the region's land and other resources. Cape Cod Commission Act, Section 1(a).

The Commission's responsibilities under the Act and its Regional Policy Plan do not reflect a State attempt to regulate the interstate gas industry but rather a very specific and localized intent to preserve a fragile local ecosystem. There is neither an intent nor a likely impact on matters reserved to FERC such as wholesale gas prices or terms of sale. This DRI is the ultimate example of an entirely intrastate issue: a roughly six mile pipe tunneled beneath a canal located entirely within one Massachusetts town to move gas from one neighborhood of Bourne, Massachusetts to another in the same town. When completed it will remain subject to FERC requirements as to operating safety, pricing, and other matter routinely governed by FERC. A condition attached by the Commission upon its approval, limiting volume of gas transmitted to current usage, which the applicant represents as reflecting its intention, does not in any way interfere with any federal interest impacting interstate commerce, and could not be preempted by any FERC action.

Submitted by Barry Margolin, Organizing Director, Cape Climate Action/350 Mass