

DrummondWoodsum

LEGAL MEMO

TO: Merrimack Town Manager; Town Council

FROM: JBTourangeau DATE: February 12, 2015

SUBJECT: Should the Town Actively Participate in the Natural Gas Pipeline Siting Process?

In Brief:

We recommend that the Town actively participate in the pipeline proceedings before FERC and that the Town respond, in a limited fashion, to the request that the Town identify sensitive environmental areas and that the Town allow, with conditions, the field surveys of the parcels it owns which will be crossed by the current pipeline route.

Background:

In September, 2014, the Tennessee Gas Pipeline Company, LLC ("TGPC") submitted a request to the Federal Energy Regulatory Commission ("FERC") for participation in FERC's National Environmental Policy Act ("NEPA") pre-filing process. The TGPC pre-filing application seeks approval for "the construction and operation of the proposed Northeast Energy Direct Project ("NED Project")." TGPC "proposes to expand and modify its existing pipeline system in Pennsylvania, New York, Massachusetts, Connecticut, New Hampshire, and Rhode Island. The NED Project is being developed to meet the increased demand in the Northeast United States for transportation capacity of natural gas." FERC encourages use of the pre-filing process and, accordingly, granted TGPC's request thereby commencing FERC Docket No. PF14-22. It is possible to register online with FERC to receive notice of all activity in this docket.

Creation of this pre-filing docket initiates an extensive FERC process. During the pre-filing procedure, TGPC must study site locations (including route studies and field surveys), identify stakeholders, and provide opportunities for public discussion (open houses). After the open houses, FERC will issue a Notice of Intent regarding Environmental Assessment ("EA"). Thereafter, FERC may (and in this matter is likely to) hold a public scoping meeting and site visits in the project area as well as consult with interested stakeholders.

Following completion of this scoping work TGPC will submit a formal application to FERC. Documents filed by TGPC in the pre-filing process indicate that the formal application may be submitted as early as September, 2015. When formal application is made, FERC will issue a Notice of Application. This Notice of Application will specify the deadline for filing motions to intervene and comment on the application.

After receiving a formal application, FERC will analyze data received throughout the pre-filing process and prepare a draft Environmental Assessment. FERC provides for comments on the draft and final EA. Following issuance of the final EA, FERC may issue an order regarding certification of "public necessity and convenience." Following issuance of this certification order, parties (i.e. those

entities which have properly intervened) may request rehearing by FERC and/or appeal to court within specific timelines.

The Town is currently considering whether and how to participate in the FERC proceedings regarding the NED Project.

In late January of 2015, the Town of Merrimack ("Town") Community Development Office received a letter from AECOM, a Rhode Island consultant apparently retained by TGPC. In this letter, AECOM asked that the Town review its records and comment regarding the presence of sensitive environmental areas within a certain distance of the proposed NED Project within the Town. The Town is currently considering whether to respond to this request.

In early February of 2015, the Town received letters from TGPC requesting access to four parcels of Town owned land over which the NED Project is currently proposed to pass. TGPC seeks access to these parcels in order to complete field surveys of those parcels. The Town is currently considering how to respond to these survey requests.

Questions:

Should the Town actively participate in the FERC proceedings regarding the NED Project?

Should the Town prepare a response to the AECOM request for information regarding sensitive environmental areas in Town which may be impacted by the NED Project?

Should the Town allow access to Town lands for field surveys of those Town owned parcels impacted by the NED Project?

Discussion:

To assist the Town's decisions regarding the above questions we discuss herein the associated benefits and liabilities for potential answers to each of the above questions. In short, from a legal perspective, the answer to each of these questions is relatively straightforward: Yes.

The most significant downsides to participating in the FERC process and the associated documentation of sensitive environmental areas and field surveys on Town owned lands are the cost and the perception that participation is somehow permitting or facilitating the pipeline. While the costs are likely to be significant in terms of both staff time and consultant costs, the Town's participation in the process will result in an outcome that is more desirable than that to be obtained by sitting silent on the sidelines.

At this point in time in the FERC process, the Town can register in the pre-filing docket in order to receive all docket filings. The Town may also file with FERC a letter regarding its intent to participate in the FERC process as an interested stakeholder. As such, the Town may also respectfully request FERC consultation regarding the impacts of NED Project. Throughout the pre-filing process it is more likely that the proposed pipeline route will change than that it will be unchanged, the Town's participation will allow for knowledge of those changes and greater information about those changes as well as access to FERC personnel in the stakeholder process.

The field surveys and identification of environmentally sensitive areas are pieces of the FERC process which illustrate how the Town's participation is more effective than stonewalling. If the Town allows the field surveys it may propose specific terms such as access to the information collected about the property and that the property be returned to the same condition as prior to the field survey. If the Town disagrees with any information discovered then it can address those disagreements before FERC. Should the Town refuse access for the field study, then the property is not excluded from the pipeline route, it is simply included with less accurate information for FERC to consider in the EA. This does not benefit the Town.

Likewise, identifying environmentally sensitive areas impacted by the NED Project will allow FERC to consider, and mitigate, those impacts as part of the EA process. Refusing to provide such information will simply allow for decisions to be made regarding routing the NED Project without full information regarding sensitive environmental areas in the Town. This is not in the Town's best interest. Now, this is not to say that the Town has a moral imperative to spend thousands to hire a consultant to identify every sensitive environmental area- that is TGPC's obligation. The Town's objective here might be to identify the most significant issues and to flag for TGPC that the Town is highly protective of such areas and looks forward to working with TGPC and TGPC's consultants to complete a fulsome identification of such areas so that they can be protected in accord with law in the EA process.

In short, the Town has much to lose by not participating in the FERC process first as an active stakeholder in the pre-filing process and then as an intervenor in the application process. This participation will give the Town the right to be heard by FERC regarding all aspects of the application and then in court as necessary. Failure to participate will mean that, down the line, the Town has no right to do so (if the Town fails to properly intervene). Once an entity has no right to be heard it is entirely without leverage to effectuate any change in the proceedings.

DRAFT
Town of Merrimack

February __, 2015

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

RE: Tennessee Gas Pipeline Company, L.L.C.; Federal Energy Regulatory Commission
("Commission") Docket No. PF14-22-000

Dear Secretary Bose:

The Town of Merrimack ("Town"), a municipality within the State of New Hampshire, appreciates the opportunity to submit these preliminary comments in conjunction with the pre-filing phase of Tennessee Gas Pipeline Company's (TGP) proposed Northeast Energy Direct pipeline ("NED Project"). The Town hereby notifies both the Commission and TGP of its intention to actively participate in Docket No. PF14-22 in order to preserve its rights as an interested stakeholder.

The NED Project as currently proposed would include over ___ miles of new pipeline in Town, capable of transporting up to 2.2 billion cubic feet per day of natural gas. This pipeline crosses municipal watersheds including the aquifer that supplies more than half of the Town's water, municipally owned and privately protected conservation areas which areas protect identified endangered species and their habitats, permanent open space and recreation lands, residential properties, and may have impacts to the NH Plating Site (a federal Superfund Site). The Town is in the process of working with TGP to identify sensitive environmental areas impacted by the proposed route and to complete surveys of Town owned lands.

Given the unprecedented scale of the project and associated impacts, the Town respectfully requests that the Commission provide a fulsome public process, including comprehensive public outreach, public scoping meetings and active engagement of stakeholders like the Town in this pre-filing process in order to ensure that such significant stakeholder concerns are fully addressed in any future certificate application to the Commission for this project. The Town will actively participate in this pre-filing process in order to achieve this end. Accordingly, the Town anticipates submission to the Commission of Town compiled sensitive area and field survey information in order to ensure full transparency in this process.

Sincerely,

DRAFT

February __, 2015

Lori Ferry, Project Manager
AECOM
10 Orms Street, Suite 405
Providence, RI 02904

RE: Information Request, Tennessee Gas Pipeline Company, LLC, Northeast Energy Direct Project, FERC Docket No. PF14-22

Dear Ms. Ferry:

The Town of Merrimack (“Town”) received and reviewed the Tennessee Gas Pipeline Company, LLC (“TGP”) January 26, 2015 request that the Town identify whether sensitive environmental areas within .25 or .50 miles (dependent on the nature of the sensitive area) of the proposed Northeast Energy Direct Project (“NED Project”)- a natural gas pipeline which will traverse the Town.

Given that the NED Project as currently proposed impacts multiple conservation areas, wellhead protection areas including the aquifer that provides more than half of the Town’s water, scenic areas, habitat for identified endangered species, recreational areas, schools, hospitals, and the residences and water supplies of many of the Town’s citizens, it is vital to the Town that all such areas be accurately assessed and identified so as to ensure that all impacts to such sensitive receptors are avoided and/or mitigated. To this end the Town is highly motivated and willing to assist in accurate identification of these areas. As such, we have enclosed a preliminary list of such areas.

Unfortunately, the Town’s resources are limited and the TGP request imposes a significant burden with regard to both staff and financial resources. The Town, must, therefore, request additional time and assistance from TGP to supplement these materials. We look forward to a public meeting with TGP to discuss how to best establish a process that will allow these areas to be fully identified and addressed.

The Town also asks that TGP provide the Town with an opportunity to review and comment upon any such materials prepared for submission to the Federal Energy Regulatory Commission in the above captioned matter in advance of such filing.

Sincerely,

Timothy Thompson, Director

cc: Eileen Cabanel, Town Manager

DRAFT ACCESS AGREEMENT RE FIELD SURVEYS

The Town of Merrimack (“Town”) received four requests for access for Tennessee Gas Pipeline, LLC or its designated contractors (“TGP”) to access properties owned by the Town known as _____ insert property descriptions _____ (“Property”) in order for TGP or its designated contractors to perform field surveys necessary for the above captioned FERC Docket No. PF14-22 environmental screening.

The Town consents to these requests for access on the following terms:

The Town will permit, at any given time, no more than four (4) employees and consultants of the TGP the right, but not the obligation, of ingress to, egress from, and access under, above, and through, the Property by foot and limited vehicular access for the purpose of allowing TGP to conduct nonintrusive field surveys.

The Town reserves the right to prevent activity that, in its reasonable judgment, could result in damage or injury or threaten interference with activities of the Town. TGP shall have no access to buildings on the Property.

Before undertaking any activity on the Property, TGP shall give the Town reasonable advance notice no less than 24 hours in advance, by telephone conversation with _____ at (603) _____, or in writing, of planned activity, including notice of the areas of the Property that are expected to be accessed. TGP shall also provide the Town with reasonable advance notice of the name and contact information for each and every individual exercising rights under this Agreement. Notwithstanding anything contained herein to the contrary, seven (7) days advance notice given by TGP to the Town shall constitute reasonable advance notice for purpose of this Agreement. TGP agrees that the Town may be present during any activities conducted on

the Property.

Access shall occur solely between the dates of _____, 2015 and _____, 2015. This Agreement shall automatically terminate on _____, 2015 unless an extension is approved in writing by the Town and TGP.

TGP shall reasonably cooperate with the Town regarding all activities that are conducted on the Property. TGP shall bear the responsibility of determining the location of any utilities. In conducting all activities TGP shall exercise due care and shall ensure that each and every individual accessing the Property under this Agreement behaves in a professional manner.

After completing the activities contemplated by this contract, TGP shall ensure removal of their equipment and shall restore any part of the Property that was affected by its activities to a condition that is substantially similar to the condition of the Property at the time immediately preceding the commencement of said activities.

The Town shall receive and have reasonable opportunity to review and comment upon any report or other documentation of the results of TGP activities under the Agreement prior to finalization of any such report or other documentation.

TGP shall indemnify and hold harmless the Town from (a) any damage to the Property, (b) damage to any property of any person not a party to this Agreement, or for bodily injury to any person or third party that is caused by TGP as a result of the activities of TGP related to activities contemplated by this Agreement. The Town shall promptly notify TGP in writing of any damage to the Property that has allegedly been caused by any TGP pursuant to any activity of TGP on the Property. Before it will be liable to provide any monetary payment to the Town for any indemnified damage to the Property, TGP shall have the right to restore or repair the damage to its prior condition, using contractors and consultants selected by them and reasonably

satisfactory to the Town. TGP shall indemnify the Town for TGP noncompliance with this Agreement and this indemnification shall survive termination of the Agreement.

EXECUTED: _____, 2015.

TOWN OF MERRIMACK:

By: _____

Print Name: _____

Title: _____

**TENNESSEE GAS PIPELINE
COMPANY:**

By:

PrintName:

Title:

February 26, 2015

POTENTIAL COUNCIL ACTION ITEMS (No particular order, not exhaustive)

- **1/29/15** - Continue to press KM for a Public Meeting in Merrimack
- **1/29/15** - Place an action item on Feb 12th agenda requesting the council to take no action regarding request from Kinder Morgan to survey town-owned parcels until Merrimack Public Meeting
- **1/29/15** - Place NED Pipeline Update on future council agendas - **Completed 2/12/15**
- **1/29/15** - Update list of properties that directly abut proposed pipeline route with a list of properties that fall into pipeline hazard zone
- **1/29/15** - Consider consultant to:
 - Research communities' property value effects of recent pipeline installations - **Engaged Avitar**
 - Evaluate impacts on the sewer line - **Engaged Wright Pierce**
- **1/29/15** - Support Conservation Commission's efforts to update data for environmental impacts on HHNP and Gilmore Woods - **Ongoing**
- **1/29/15** - Support Merrimack Village District's efforts to protect Wellhead Protection Zone and Aquifer Protection Zone - **Ongoing**
- **1/29/15** - Request KM list of abutters notified of project and requests for permission to survey - **No response from KM**
- **1/29/15** - Work with property owners to develop a list of who has been notified of the project and requests for surveys
- **1/29/15** - Maintain contacts at FERC and NH Congressional delegation - **Ongoing (NH delegation attends Managers meetings)**
- **1/29/15** - Consult with PSNH (Eversource) regarding where they are in the process with KM and PUC - **No response**
- **1/29/15** - Consult and share information with large companies (A-B/InBev, Elbit, Premium Outlets, Fidelity, PanAm, PSNH, Pennichuck, etc.) - **Meeting Scheduled for 2/26/15**
- **2/12/15** - Section 106 of the National Historic Preservation Act of 1966 (NHPA) - **Pending formal application**

▪-Original
▪-Update
▪-Completed
▪-Town Manager Update