

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.