



Massachusetts Association of Conservation Commissions

protecting wetlands, open space and biological diversity through education and advocacy

By email to dpu.efiling@state.ma.us and Stephen.August@state.ma.us

March 24, 2016

Stephen August, Hearing Officer
Department of Public Utilities
Siting Division
1 South Station
Boston, MA 02110

Re: Northeast Energy Direct (NED) Survey Petitions
Tennessee Gas Pipeline Company, DPU 16-01/16-02/16-03

Dear Hearing Officer August:

Please accept these comments on the above referenced Northeast Energy Direct (NED) Survey Petitions. In these comments, we explain that the survey petitions incorrectly state that the proposed surveys would be exempt from Massachusetts Wetlands Protection Act (WPA) requirements. We ask that the survey orders include conditions relating to wetlands protection. We also explain why we believe it would be premature for the Department of Public Utilities (DPU) to issue the requested survey orders before the Federal Regulatory Energy Commission (FERC) completes its environmental review of the proposed NED pipeline and issues a National Environmental Policy Act (NEPA) Record of Decision (ROD) on the project.

In making these comments, we express no opinion as to whether the Survey Petitions accurately or correctly describe the need for or benefits of the proposed NED pipeline. Others have questioned the need for the NED pipeline. The Massachusetts Attorney General has released a report showing that the NED pipeline is not needed for electricity reliability.¹ We also express no opinion in these comments as to whether the benefits of the pipeline, if any, would be outweighed by the negative impacts of the pipeline, or whether Tennessee Gas Pipeline Company's (TGP) preferred route for the pipeline would be the route authorized by FERC were it to grant a certificate of public convenience and necessity to build and operate the NED pipeline.

We also express no opinion about TGP's claims in the Survey Petitions relating to Boards of Health orders except to note that federal preemption under the Natural Gas Act (NGA) would become effective for the NED pipeline when FERC issues a certificate of public convenience and necessity or a survey order for the project. See 15 USC 717f. If Boards of Health orders are preempted by the NGA at this stage of the FERC proceeding, then by extension the DPU survey orders would also be preempted because the NGA provides field preemption, not simply conflict preemption. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988).

¹ <http://www.mass.gov/ago/doing-business-in-massachusetts/energy-and-utilities/regional-electric-reliability-options-study.html> (accessed March 14, 2016)

We bring significant experience and expertise to these comments. The Massachusetts Association of Conservation Commissions (MACC), established in 1961 and incorporated in 1978, is the professional association of Massachusetts conservation commissions. The conservation commission in each of the 351 cities and towns in Massachusetts protects conservation lands and other natural resources in its community under the Massachusetts Conservation Act (G.L. c.40, § 8c) and administers and enforces the WPA (G.L. c.131, § 40) and municipal wetlands ordinances, bylaws, and regulations. Most projects in or near wetlands require a permit, known as an Order of Conditions, issued by the local conservation commission before work can be performed, and the work must be consistent with the conditions of the Order of Conditions and state and local wetlands protection requirements. 310 CMR 10.05; *Lovequist v. Conservation Commission of Town of Dennis*, 379 Mass. 7 (1979). We provide training and support to conservation commissions on their responsibilities and we author and publish *Protecting Wetlands and Open Space: MACC's Environmental Handbook for Massachusetts Conservation Commissioners*, which is an essential resource for those serving on, working with, or appearing before conservation commissions in Massachusetts.

Surveying Is Not Specifically Exempt From WPA Requirements

This claim of TGP, made in each of the Survey Petitions, is incorrect:

... no state permits are required to perform the Surveys. In particular, the Massachusetts Wetlands Protection Act Regulations specifically exempt coring and surveying activities from permit requirements. 310 CMR § 10.02 (“The following minor activities. . . are not otherwise subject to regulation under G.L. c. 131, § 40 [the Massachusetts Wetland Protection Act]: ...g. Activities that are temporary in nature, have negligible impacts, and are necessary for planning and design purposes (e.g., installation of monitoring wells, *exploratory borings*, sediment sampling and *surveying* and percolation tests for septic systems provided that resource areas are not crossed for site access)”) (emphasis added).

Contrary to TGP’s above claim, the WPA regulations do not specifically exempt coring and surveying activities from WPA permitting requirements.² Instead, the regulation TGP quoted applies only to some coring and surveying in a Buffer Zone; the exemption does not apply to coring and surveying in a wetland Resource Area.³ Also, the exemption is not absolute. Some coring and surveying in a Buffer Zone is subject to WPA requirements (as are coring and surveying activities in a wetland Resource Area).

As discussed below, coring and surveying in a Buffer Zone that would have no potential for adverse impact on a wetland resource area would be exempt from WPA requirements. Coring and surveying within a buffer zone that would have a potential for adverse impact on a wetland resource area is not

² The correct citation to the WPA regulation TGP quoted is 310 CMR § 10.02(2)(b)2.g.

³ The WPA regulates activities in both Resource Areas and Buffer Zones. A Resource Area is any of the Areas Subject to Protection under M.G.L. c.131, § 40, as set forth in 310 CMR 10.02(1). See the definition of Resource Area in 310 CMR 10.04. A Buffer Zone is “that area of land extending 100 feet horizontally outward from the boundary of any area specified in 310 CMR 10.02(1)(a).” See the definition of Buffer Zone in 310 CMR 10.04. A result of these regulations is that some Resource Areas have Buffer Zones and some do not. Resource Areas and Buffer Zones have different WPA requirements. Whether an activity would occur in a resource area or buffer zone may require a wetland delineation to be performed to determine the wetland boundaries.

exempt from WPA requirements. Coring and surveying in a wetland resource area, or crossing a wetland resource area to survey, is not exempt from WPA requirements.

Coring and surveying activities within a Buffer Zone often will be considered “minor activities” that are exempt from WPA requirements. 310 CMR 10.02(2)(b)1. and 2g. There are, however, limitations to that exemption. As set forth in 310 CMR 10.02(2)(b)2, the exemption for coring and surveying activities in a Buffer Zone only applies if those activities will “comply with 310 CMR 10.02(2)(b)1.” To comply means the coring and surveying work must be performed “solely within the buffer zone” and “in a manner so as to reduce the potential for any adverse impacts to the resource area...” 310 CMR 10.02(2)(b)1. “Factors to consider when measuring the potential for adverse impacts to resource areas include the extent of the work, the proximity to the resource area, the need for erosion controls, and the measures employed to prevent adverse impacts to resource areas during and following the work.” *Id.* Further, the limited exemption for coring and surveying applies “provided that resource areas are not crossed for site access.” 310 CMR 10.02(2)(b)2.g. That is important here because TGP has requested permission to travel across survey properties that may contain resource areas to access adjacent survey properties.

Understanding that not all coring and surveying in a Buffer Zone would be exempt from WPA requirements, one can review the surveying proposed by TGP to see if it would qualify for an exemption. Activities in a Buffer Zone, such property line surveys with rod and transit and laser surveying that do not require significant clearing or cutting of vegetation, and minor sediment sampling that has no potential impact on a resource area, likely would be exempt from WPA requirements pursuant to 310 CMR 10.02(2)(b)2.g. Some other activities in a Buffer Zone, such as deep geotechnical coring and surveying near a resource area, or significant clearing or cutting of vegetation, could have a potential adverse impact on a resource area and thus would not be exempt from WPA requirements. A conservation commission would consider the factors listed in 310 CMR 10.02(2)(b)1. to help it determine whether there would be the potential for adverse impacts. Activities that do not meet the standards of 310 CMR 10.02(2)(b)1. and 2. for an exemption are subject to WPA permitting requirements. 310 CMR 10.02(2)(b)3.

Coring and surveying are not exempt from WPA requirements when done in a wetland resource area. Even so, not every survey in a resource area would alter the resource area or have an impact on an interest that would trigger WPA requirements. Normal land surveying practices often do not require prior authorization. For example, property line surveying using rod and transit or laser without significant clearing or cutting of vegetation probably would not alter a resource area and thus not require conservation commission approval. On the other hand, if a survey in a resource area were intrusive, such as significant vegetation clearing or cutting, earth moving, holes digging, or driving a vehicle through a wetland resource area, there might be a potential alteration requiring prior approval. That is a judgment to be made by the conservation commission. The burden of proof would be on TGP to show that its survey work does not require an Order of Conditions or that the work would meet the requirements of the WPA for an Order of Conditions. 310 CMR 10.03(1).

The conservation commission, as the issuing authority, would make the determination of whether the proposed coring or surveying is exempt or requires its prior approval. If there is a question about whether a survey or a resource area crossing requires WPA review and approval, a Request for a Determination of Applicability or Notice of Intent must be filed with the conservation commission. 310 CMR 10.02(2)(b)3. If there is a positive Determination of Applicability, there must be a Notice of Intent and an Order of Conditions before the survey may proceed. *Id.*; 310 CMR 10.05(3) and (4).

The obvious misreading of the WPA regulations by TGP is troubling. TGP should know better than to claim that there is a blanket exemption in the WPA for its surveying work. DPU's decision on the Petitions should make clear that surveys authorized by the Survey Orders are not specifically exempt from WPA requirements.

TGP Should Be Required to Serve the Survey Orders on Conservation Commissions and Offer to Meet With the Conservation Commissions

If DPU will grant the Survey Petitions, we urge DPU to include conditions in each survey order requiring TGP to: 1) serve the survey order on the conservation commission in each municipality where it would conduct a survey pursuant to the order; and 2) offer to meet with the conservation commission in each municipality where it would be conducting a survey. The purpose of the meeting would be to provide the commission with maps and site plans for the surveys, a written description of the surveys it will undertake at each parcel it will survey and the survey work to be performed in a Buffer Zone or Resource Area or by crossing a Resource Area, as well as other information that may be requested by the commission.⁴ Alternatively, rather than offering to meet with the commission, TGP could file a Request for a Determination of Applicability for a formal determination by the conservation commission as to whether the WPA applies to the survey work to be performed. 310 CMR 10.05(3)(a). If the work is subject to WPA requirements, a Notice of Intent is required. 310 CMR 10.05(4).⁵

It Is Premature To Grant the Survey Petitions

TGP's pipeline proposal is undergoing NEPA review. FERC is the lead federal agency and thus responsible for the Environmental Impact Statement for the project. The deadline for filing comments on the scope of NEPA review was October 16, 2015. MACC filed scoping comments, as did many others. One issue highlighted in many of those comments was requiring an alternatives analysis, including an environmental assessment of alternative routes for the pipeline.⁶

TGP's application to FERC explained that the Massachusetts portion of the project would include:

- Approximately 64 miles of 30-inch pipeline, beginning at the New York/Massachusetts border and extending east and north to the Massachusetts-New Hampshire border in Franklin County, and including in the 64 miles the portion of mainline pipeline from the New Hampshire-Massachusetts border to Dracut, MA.
- Five lateral pipelines:
 - Maritimes Delivery Line: A 30-inch diameter, 0.75-mile pipeline extending from the Market Path Tail Station to an interconnect with the Maritimes & Northeast Pipeline System ("Maritimes")
 - Lynnfield Lateral: A 24-inch diameter, 14.28-mile pipeline extending from Dracut, MA
 - Peabody Lateral: A 24-inch diameter, 5.32-mile pipeline beginning at the new Lynnfield Lateral
 - Haverhill Lateral: A 20-inch diameter, 9.27-mile pipeline, extending from Massachusetts (7.23 miles located in Massachusetts) through New Hampshire

⁴ A commission might prefer to receive materials, or a formal filing by TGP, rather than start with such a meeting. That would be within the discretion of each commission to determine.

⁵ A Notice of Intent must be filed by the landowner or with the landowner's written permission. 310 CMR 10.05(4). We have found no case law or statutory authority for DPU to waive that WPA requirement.

⁶ MACC's scoping comments can be downloaded from here: http://maccweb.org/advocacy_letters.html

- Fitchburg Lateral Extension: A 12-inch diameter, 13.97-mile pipeline extending from New Hampshire through Massachusetts (8.89 miles located in Massachusetts)
- Three Compressor Stations:
 - One in Berkshire County
 - One in Franklin County
 - One in Middlesex County
- Many new and modified meter stations and various appurtenant and auxiliary facilities.

TGP's application to FERC for a certificate identified the above as its preferred pipeline route. TGP also identified alternative routes and explained why it chose its preferred route. Its currently preferred pipeline route is not the same route it preferred in its pre-filing with FERC. The FERC process anticipates that a proposed route may be modified throughout FERC review. Since TGP's formal application to FERC for a certificate, it has been asked by FERC to provide more information about alternative routes.

FERC has not released a Draft Environmental Impact Statement for public comment. It has asked TGP for additional responses to comments it received on the scope for NEPA review. Just last month, on February 26, FERC sent TGP a 67-page "Environmental Information Request."

NEPA requires the Environmental Impact Statement to rigorously explore and objectively assess the environmental impacts of the proposed project, and all reasonable alternatives to the proposed project, including the no action alternative, as required by the Council for Environmental Quality's regulations. 40 CFR 15.02.14. Such alternatives analysis is the "heart of the environmental impact statement." *Id.* It must be done in a comparative form to provide a clear choice among the alternatives and must include a discussion of direct effects and their significance; indirect effects and their significance; possible conflicts between the proposed action and the objectives of federal, state, regional, and local land use plans, policies, and controls for the area; the environmental effects of the alternatives and the proposed action; energy requirements and conservation potential of various alternatives and mitigation measures; natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures; historic and cultural resources; and the means to mitigate impacts. 40 CFR 1502.16. Through NEPA analysis, alternative less environmentally damaging routes for the pipeline may be highlighted.

We would expect the Draft Environmental Impact Statement to be released for public comment sometime in 2016. It should include a detailed environmental assessment of the preferred and alternative routes. The public will be able to comment on the draft. FERC will then prepare a final EIS and then a Record of Decision. As a result of that environmental review, FERC may mandate changes to the route preferred by TGP. In short, the route chosen by TGP, for which it has requested survey orders, is far from final. It may not be the route approved by FERC if it grants a certificate to TGP.

The power to exclude a person from one's own property "has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). DPU has the authority to grant survey orders preliminary to eminent domain proceedings and thus override a property owner's power to exclude a survey, but it is not mandated to do so. G.L. c.164, §72A, provides DPU with discretion, using the word, "may" rather than the word, "shall," in reference to granting a petition for a survey order. (Compare the use of the word "may" in the first sentence of §72A with the use of the word "shall" in the next sentence of §72A in reference to providing notice of the authorization granted.) DPU also has the specific authority to set

the effective date of an order for a natural gas pipeline to after the date of issuance of a FERC certificate or as determined by DPU. G.L. c.164, §75H.

DPU should exercise the discretion granted by G.L. c.164, §72A, §75D and §75H to prevent unnecessary and premature intrusions on lands where property owners have not authorized TGP to survey. TGP should not be given authority to survey property that may not be on the approved pipeline route. The phrase in §72A, “survey preliminary to eminent domain proceedings,” should be read to require the reasonable likelihood that the survey would be of the route for which there would be eminent domain proceedings. In this matter, it is too early to determine the pipeline route. TGP identified many alternative routes in its FERC filings and FERC then requested more information on the alternatives.

TGP claims in its petitions that surveys are required so it can provide information to FERC, citing to 18 CFR 380.12. Notwithstanding, TGP has already filed resources reports with FERC that are required by that regulation. Further, that regulation does not require TGP to survey. Instead, the regulation anticipates that applicants may not have access to property until they receive a FERC certificate: “If landowners deny access to private property and certain areas are not surveyed, the unsurveyed area must be identified by mileposts, and supplemental surveys or evaluations shall be conducted after access is granted. In such circumstances, reports, and treatment plans, if necessary, for those inaccessible lands may be filed after a certificate is issued.” 18 CFR 380.12(f)(2)(ii) (referring to cultural resources).

The surveys for which TGP has requested approval are not preliminary to eminent domain proceedings;⁷ instead the surveys are preliminary to FERC approval of a pipeline route. TGP desires the surveys to provide information that can be used for NEPA review, to convince FERC to accept its preferred route for the pipeline, and to grant it a certificate. If TGP receives a certificate, it may not then initiate eminent domain proceedings. It must first try to obtain the necessary right of way or easement through negotiations and may only initiate eminent domain proceedings thereafter. USC 717f(h). When FERC has approved the route, then the surveys might be considered preliminary to eminent domain proceedings.⁸

Conclusion

Some surveying proposed by TGP may require an Order of Conditions from the local conservation commission; other surveying may not require conservation commission review and approval. The burden will be on TGP to show that its survey work would not be subject to WPA requirements or to file

⁷ Except in the extraordinarily attenuated sense that everything TGP has done relating to the proposed pipeline could be seen as preliminary to potential eminent domain proceedings.

⁸ TGP claims the surveys are preliminary to eminent domain proceedings “because the property owners have not responded to Tennessee’s requests to enter the property to perform the Surveys, or have denied Tennessee permission to perform the surveys, it is very likely that they will not be willing to sell Tennessee the easement or other rights that Tennessee will need to construct the pipeline on the property. Thus, Tennessee will have to institute eminent domain proceedings ... in order to construct the pipeline.” TGP Petition in DPU 16-01, fn 27. It is pure speculation by TGP that each landowner not giving permission to survey now would not negotiate a price for an easement after FERC issues a certificate and when the alternative to a negotiation would be a condemnation proceeding. The incentives for a landowner to deny TGP survey access now, such as uncertainty of the pipeline route and whether FERC would issue a certificate for the project, will not be the same incentives if TGP receives a certificate. At the conclusion of the FERC process, a landowner’s incentive may be to negotiate a price for the easement rather than go to court in a condemnation proceeding. TGP’s reasoning is applicable to situations where landowners deny survey requests after TGP has a FERC certificate.

with the conservation commission. Considering TGP's failure to understand the WPA regulations, we ask the survey orders, if granted, to require TGP to serve the orders on conservation commissions and file with or offer to meet with the conservation commission in each community in which it will be performing surveys.

DPU should wait until after the NEPA process is concluded to determine if the surveys requested by TGP are "preliminary to eminent domain proceedings" for the properties to be surveyed. To do otherwise would be to give TGP a license to survey on private property that may not be on the route for the pipeline for which TGP would have eminent domain authority. All TGP would gain by a premature grant of survey authority is some time. The property owners would lose something much more valuable and of constitutional dimension: the power to exclude persons from their land. DPU should not read G.L. c.164, §72A and 75D so broadly as to favor TGP's timeline over the constitutional rights of property owners.

Thank you for the opportunity to provide these comments.

Sincerely,

A handwritten signature in blue ink that reads "Eugene B. Benson". The signature is written in a cursive, flowing style.

Eugene B. Benson
Executive Director
Eugene.Benson@macweb.org