

THE RECORDER

GREENFIELD, MASS. ESTABLISHED 1792 - N.E. NEWSPAPER OF THE YEAR 2012

Pipeline review process leaves room for public involvement



This is the proposed path of the pipeline would take traveling east under the Connecticut River following the utility lines from Deerfield on left to Montague on the right. (Recorder/Paul Franz)

By RICHIE DAVIS

Recorder Staff

Thursday, June 11, 2015

(Published in print: Friday, June 12, 2015)

Fifth in a series

(EDITOR'S NOTE: In coming weeks, Tennessee Gas Pipeline Co.'s proposed Northeast Energy Direct pipeline through Franklin County will proceed through a Federal Energy Regulatory Commission process to choose which issues to include in an environmental review to begin this fall. This series explores the project from a variety of angles.)

As Thursday night's state Department of Public Utilities hearing in Greenfield demonstrated, there are a variety of ways people can make their voices heard over the planned Tennessee Gas Pipeline project.

DPU's review of a long-term supply agreement between the developer of the Northeast Energy Direct project and Berkshire Gas Co., along with those of other regulated gas companies, is one of a few areas that fall under state, rather than federal, jurisdiction. Yet more public hearings, as well as other opportunities for intervention and involvement by individuals, organizations and government bodies, lie ahead in the federal and state decision-making process.

Yet despite lots of opportunities for participation in the process dominated by the Federal Energy Regulatory Commission, "There are very few certificate applications that are denied," Newton-based attorney Jeffrey Bernstein advised a forum last month in Greenfield. "Some are withdrawn or changed, but there are very few cases in which a pipeline proponent goes all the way through the process and finds that their application is denied."

The first trees could begin coming down along the path of the natural gas pipeline across 62 miles of Massachusetts as early as January 2017, assuming the proposed \$5 billion project is approved and stays on schedule.

The 430-mile project is planned to cut across Berkshire County, Plainfield and eight Franklin County towns before heading through southern New Hampshire on its way to Dracut, north of Lowell. The project would bring natural gas from the shale fields of western Pennsylvania through New York state to expand New England's pipeline capacity.

TGP's formal application with the Federal Energy Regulatory Commission for the project is still three months away. The Houston-based company is completing a second draft environmental report for FERC, setting the stage for it to apply for its major permit, a Certificate of Public Convenience and Necessity.

But already, in anticipation of FERC opening a "scoping" process that would determine what issues the company needs to explore in a required environmental impact statement, towns have begun compiling lists of concerns they want addressed. Once FERC's process begins, individuals and organizations can also recommend areas to be addressed, and the federal agency is expected to hold public hearings on what should be included in the year-long environmental review.

The Franklin Regional Council of Governments has also begun gathering technical and legal experts to help in framing and reviewing how those issues are examined — and how towns that choose to can negotiate with TGP over environmental and construction conditions that can be incorporated.

Once the environmental review is released — beginning with a draft version around March 2016, with a second draft expected three months later — there will be more opportunities for public comment, including public hearings.

Although TGP and its parent company, Kinder Morgan, have repeatedly said they will comply with all state and municipal authorities, the siting of interstate gas pipelines is controlled under the National Gas Act, which conveys federal preemption authority and allows land-taking by eminent domain for the project.

State authorities, especially the Executive Office of Energy and Environmental Affairs, will review the process, which also calls for review under the Massachusetts Environmental Policy Act.

In a presentation last September, Shauna Cleveland of the Conservation Law Foundation said pipeline companies must apply for all necessary state and local permits required under the federal Clean Water Act and Clean Air Act. Local conservation commissions can issue conditions to protect local wetlands and waterways, but FERC can decide whether those conditions are outweighed by the need for the pipeline, so it's essential that the state and local authorities document their rationale why their proposed conditions are important to show that the purpose of local jurisdiction wasn't simply attempting to obstruct progress on the project.

Even if the federal government preempts the state or local authority's proposed conditions, those can be appealed in federal court, said Cleveland, emphasizing the need for local jurisdictions to register to receive project updates from FERC and to check its docket. (The FERC docket number in the pre-filing phase is PF14-22.)

Cleveland also strongly advised towns and regional planning agencies to formally intervene in the FERC filing once the agency posts notice that TGP's formal application has been submitted. The Franklin COG plans to become a formal intervenor to respond to TGP's environmental impact statement.

"Otherwise," she warned, "you won't be able to enter information into the record to inform the (FERC) commissioners as to the conditions that are necessary and what conditions on the ground are and what the appropriate route and scope of the (environmental review) should be. I'd say its pretty critical" as the boards proceed to make their own permitting decisions, and protect community land, public safety and public health.

Boston regulatory attorney Richard Kanoff, who represents the opposition New England Pipeline Awareness Network, agreed that the process leaves plenty of room for public involvement.

"I think the public, intervenors and stakeholders, need to participate in all the regulatory processes that are available," including at FERC, the DPU and in the wetlands review process, which will involve local conservation commissions and the Massachusetts Department of Environmental Protection.

Kanoff said hearings by FERC and probably Massachusetts DEP will likely give local citizens an opportunity to have their voices heard.

Massachusetts Association of Conservation Commissions Executive Director Eugene Benson said that although the federal law "clearly limits the role conservation commissions and the DEP can play to enforce the Wetlands Protection Act and local bylaws," the pipeline company is required by FERC to go through Massachusetts' wetlands process — which, again, is open to public participation.

"It's a limited role," Benson said, since neither the DEP nor conservation commissions can reject the pipeline or alter its route, but they can impose conditions such as erosion control, stormwater control, sediment control and wetland restoration after construction. And if allowed, they have enforcement authority to assure those conditions are met.

Bernstein, the attorney who spoke at a forum sponsored by the Franklin COG last month, said FERC tries to "harmonize" its decision with what it hears from other jurisdictions and allows the state to decide on required air pollution, wetlands and water-quality certificates — and conditions set on those permissions may go further than what FERC's requirements call for.

But in setting guidelines for erosion and sedimentation control, road openings, or other parameters, Bernstein said, federal rules don't allow state, regional or local rulings that "inhibit or unreasonably delay construction and operation of the pipeline," he said. "If a locality is trying to prevent construction of the pipeline and imposes a series of conditions where the real intent is not to get the pipeline proponent to abide by these conditions, but to try and prevent it altogether," FERC will override those by preemption, or the pipeline company will go to court and argue they go too far."

Bernstein said he doesn't know what the outcome would be of a conflict over the Massachusetts Constitution's Article 97 — protecting publicly protected land that lies along the route deemed necessary for the pipeline — if the entire state Legislature fails by a two-thirds vote to release it.

But he said that standards of review for FERC's decision on a certificate of public convenience and necessity include whether the project is financially viable, whether it's needed, whether it "can it stand on its own without having existing gas transportation customers provide subsidies, and do the overall public benefits outweigh the adverse impacts?"

When it comes to safety and health concerns, local health boards have state authority for issues including health and environmental protection as well as promoting a healthy community, the Conway Board of Health said in a report in January.

Once FERC issues its ruling, Bernstein said, anyone disagreeing can ask for a rehearing and can appeal it in court, although he added that appeals are typically decided on "specific legal issues. Very, very, very rarely does the court substitute its technical judgment for the technical findings that FERC has made and that come out of the environmental review process."

If FERC, after reviewing TGP's application, considering public comments and issues raised in the upcoming environmental impact statement, approves the project as many expect, it may issue a certificate by Oct. 31, 2016, and the pipeline could be ready for operation in roughly two years for the start of the 2018-19 heating season, the company estimates.

Granted its certificate, TGP would be allowed the right of eminent domain if necessary to build the project. The interstate pipeline would then come under regulation by the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration.

You can reach Richie Davis at: rdavis@recorder.com or 413-772-0261, ext. 269