

LAW OFFICES OF CAROLYN ELEFANT PLLC



First Impression | Last Resort

2200 Pennsylvania Avenue N.W. 4th Flr. E. Washington D.C. 20037 | 202-297-6100

LawOfficesofCarolynElefant.com | licensed in MD, DC, NY

aenglish@carolynelefant.com | 301-466-4024 (direct line)

March 21, 2016

Via Courier

Chairman Norman Bay
Commissioners Cheryl LaFleur,
Tony Clark, and Colette Honorable
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

**Re: NOTICE OF INTENT TO FILE SUIT
UNDER THE CLEAN WATER ACT**

Chairman Bay and Commissioners:

This sixty-day Notice of Intent (“NOI”) to file a citizen suit against the Federal Energy Regulatory Commission (the “Commission”) and you, in your official capacity as Commissioners thereof, under Section 505 of the Clean Water Act¹ (“CWA”) for violations in connection with the Connecticut Expansion Project,² is provided on behalf of the Sandisfield Taxpayers Opposing the Pipeline (“STOP”). As detailed below, the Commission has violated, and continues to violate, the CWA by issuing a certificate of public necessity and convenience (the “Certificate”) to Tennessee Gas Pipeline, LLC authorizing construction and operation of the Connecticut Expansion Project (the “Project” or the “Pipeline”) prior to the certification required by Section

¹ 33 U.S.C. § 1365.

² FERC Docket No. CP14-529.

401 having been obtained or waived.³ Any response to this letter should be addressed to the undersigned counsel for STOP at the above letterhead address.

I. BACKGROUND

STOP is an unaffiliated organization comprised of residents and taxpayers who live or own property in Sandisfield, Massachusetts, one of the communities crossed by the Pipeline. STOP's members live, work, and recreate in the areas proposed for the Project. Sandisfield residents are already disproportionately burdened by pipelines; all STOP members' properties are already encumbered with rights-of-way containing one or more pipelines. Since the inception of this proceeding, STOP and its members have been active participants; filing comments and participating at scoping sessions. STOP has repeatedly made the Commission aware of the adverse impacts to their recreational, aesthetic, and environmental interests that the Project will have. However, despite STOP's well-researched, meaningful input in the proceeding, the Commission has either ignored or dismissed the environmental harms and/or impacts to the jurisdictional waters of the United States and the Commonwealth of Massachusetts which will result from the installation and operation of the Project.

The Connecticut Expansion Project consists of three pipelines totaling 13.42 miles in length, on its existing 200 and 300 Lines: (1) the New York Loop, a 1.35-mile-long, 36-inch-diameter loop on the 200 Line near Bethlehem, New York; (2) the Massachusetts Loop, a 3.81-mile-long, 36-inch-diameter loop on the 200 Line near the Town of Sandisfield, Massachusetts; and (3) the Connecticut Loop, an 8.26-mile-long, 24-inch-diameter loop on the 300 Line, which will extend from Compressor Station 2616 in Agawam, Massachusetts, to the East Granby Meter Station near Suffield and East Granby, Connecticut. Because the project will cross through, and discharge into various jurisdictional waters, Tennessee filed an application for a Section 401 water quality certificate with the Massachusetts Department of Environmental Protection ("MassDEP" or "Massachusetts DEP") in May 2015.

II. CWA VIOLATION, COUNT I: ISSUANCE OF FEDERAL LICENSE PRIOR TO GRANT OR WAIVER OF SECTION 401

³ 33 U.S.C. §1341(a).

On March 11, 2016, the Commission granted a Certificate of Public Convenience and Necessity (“CPCN”) to Tennessee Gas Pipeline, LLC (“Tennessee” or “TGP”), a subsidiary of Kinder-Morgan, for the Project.⁴ Yet to date, the Massachusetts DEP has neither granted nor waived Section 401 water quality certification for the Connecticut Expansion Project.

Section 401 states in relevant part that:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate...**No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence.**
[emphasis added]

An agency that has issued a [federal] permit without the appropriate certification is in violation of the certification requirement under 33 U.S.C. § 1341 and therefore in violation of an "effluent standard or limitation" under § 1365.⁵ Because the Commission issued a certificate to Tennessee Gas authorizing construction and operation of the Project without certification having been obtained from or waived by MassDEP, the Commission is in violation of Section 401.

III. CWA VIOLATION, COUNT II: POTENTIAL DISCHARGES INTO JURISDICTIONAL WATERS WITHOUT WATER QUALITY CERTIFICATE

Pursuant to Section 7f(h) of the Natural Gas Act,⁶ having been granted a certificate, Tennessee has authority to begin eminent domain proceedings and

⁴ See *Tennessee Gas Pipeline*, Order Issuing Certificate, 154 FERC ¶ 61,191 (March 11, 2016).

⁵ See *Oregon Natural Desert Assn v. Dombeck*, 172 F.3d 1092, 1095 (9th Cir. 1998)(holding that federal agency’s grant of license prior to issuance of water quality certificate violates Section 401 and is grounds for citizens’ suit under 33 U.S.C. §1365.

⁶ 15 U.S.C. § 717f(h).

intends to commence felling trees, and place construction equipment for the construction and/or “proper operation” of the facilities authorized therein.⁷ Despite the statutory prohibition against doing so, the Commission has therefore authorized Tennessee to undertake activities that “may result” in a discharge to the jurisdictional waters prior to obtaining a state water quality certification.

Section 401(a)(1) of the CWA prohibits Federal agencies from authorizing or permitting an applicant “to conduct *any* activity *including, but not limited to, the construction or operation of facilities*, which *may* result in any discharge into the navigable waters,” prior to issuance of a state water quality certification.⁸

By statute, the placement of equipment for the construction or operation of, *inter alia*, transmission facilities is considered part of “oil and natural gas exploration and production” activities.⁹ For purposes of the Clean Water Act, the United States Environmental Protection Agency (“EPA”) has defined “new sources” of pollution by regulation as generally being “any building, structure, facility or installation from which there is or may be the discharge of pollutants.”¹⁰ As regards construction and development, a “new source” is “any source... that commences construction activity after” December 1, 2009.¹¹ The construction and development point source category expressly includes “interstate natural gas pipeline construction activity” as one of the regulated sources therein.¹² Thus, the activities authorized by a CPCN are those such as

⁷ See Tennessee Letter to Commission, Accession #20160225-5200 (February 25, 2016) (urging Commission to expeditiously grant certificate to enable Tennessee to commence and complete tree-clearing by March 31, 2016); *Tennessee Gas Pipeline v. 6 Acres of Land More or Less*, Memo in Support of Verified Complaint at 18, (Superior Court of Massachusetts March 17, 2016)(attached as Exhibit 1) (describing intent to fell trees and initiate construction activities).

⁸ 33 U.S.C. § 1341(a)(1) (emphasis added).

⁹ 33 U.S.C. § 1362(24).

¹⁰ 40 C.F.R. § 401.11(e).

¹¹ 40 C.F.R. § 450.11(a); 74 FR 63057.

¹² 40 C.F.R. Chapter I, Subchapter N, Part 450.

“may result” in a “discharge to the navigable waters.”¹³ Indeed, in conditioning the Certificate on receipt of a 401 Certification, the Commission implicitly acknowledges this to be true.

As shown, TGP’s current and imminent actions under the Certificate certainly “may” result in a discharge to the waters of the United States. Tennessee is therefore obligated to secure a 401 Certification, or state waiver thereof, and provide it to the Commission before it may receive a license, permit, or other authorization from the Commission to conduct such actions. However, by the same token, the Commission is without power or authority to authorize such actions, absent Tennessee providing said Certification. By issuing a certificate to Tennessee, the Commission has permitted activities¹⁴ which may result in a discharge to the jurisdictional waters, and therefore acted in violation of Section 401.

Section 505(a)(1) of the CWA¹⁵ authorizes citizens to commence a civil action “against any ... governmental instrumentality or agency ... who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.” The term “effluent standard or limitation under this chapter” specifically includes, *inter alia*, “certification under section 1341 of this title.”¹⁶ Under Section 309(d) of the CWA, 33 USC § 1319(d), and 40 C.F.R. § 19, each of the above-described violations subjects the violator to a civil penalty of up to \$37,500 per day. In addition to such penalties, under Sections 505(a)

¹³ 33 U.S.C. § 1341(a)(1). *See also* *Gunpowder Riverkeeper v. Federal Energy Regulatory Commission*, 807 F.3d 267, 271 (D.C. Cir. 2015) (by granting a conditional CPCN, the Commission allows a grantee “immediately to exercise the power of eminent domain to obtain ‘the necessary right-of-way to construct, operate, and maintain a pipe line’ and to place any ‘equipment necessary to the proper operation of such pipe line.’”)(quoting 15 U.S.C. § 717f(h)).

¹⁴ Specifically, commencement of the “construction and operation of facilities.” 33 U.S.C. § 1341(a)(1); 33 U.S.C. § 1362(24).

¹⁵ 33 U.S.C. § 1365(a)(1)

¹⁶ 33 U.S.C. § 1365(f)(5).

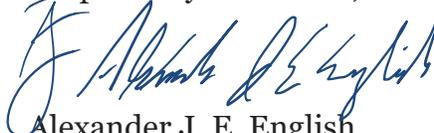
and (d) of the CWA,¹⁷ we will seek injunctive relief, costs, attorney's fees, and any other relief as is permitted by law.

* * *

The above-described violations reflect only what information currently available to us indicates. These violations are ongoing and continuous, and part of a pattern or practice of unlawful behavior on the part of the Commission. We intend to sue for all violations, including those a) yet to be uncovered and/or b) committed after the date of this NOI.

STOP believes that this Notice of Intent to sue sufficiently states grounds for filing suit. Accordingly, following the closure of the 60-day notice period, we intend to file a citizen suit against the Commission, and you as its Commissioners, under Section 505(a) of the Clean Water Act, 33 USC § 1365(a), for violations thereof.

Respectfully submitted,



Alexander J. E. English
Carolyn Elefant
Law Offices of Carolyn Elefant, PLLC
2200 Pennsylvania Ave., 4th Fl. E
Washington, D.C. 20037
301.466.4024 (direct line)
aenglish@carolynelefant.com

Encl.

Verified Complaint
Memorandum in Support

CC

Gina McCarthy, Administrator, EPA
H. Curtis "Curt" Spalding, Regional Administrator, EPA Region I
Martin Suuberg, Commissioner, MassDEP

¹⁷ 33 USC §§ 1365(a) and (d)