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March 21, 2016

Via Priority Mail (Return Receipt) and Email

John P. Pucci (BBO #407560)
Buckley, Richardson & Gelinas, LLP
1500 Main Street, Suite 2700
P.O. Box 15507
Springfield, MA 01115

and

James L. Messenger (BBO #547236)
Brian J. Wall (BBO #688278)
Gordon Rees Scully Mansukhani, LLP
745 Atlantic Avenue, 4th Floor
Boston, MA 02111

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

Messrs. Pucci, Messenger, and Wall:

This sixty day Notice of Intent (“NOI”) to file a citizen suit against your client, Tennessee Gas Pipeline Company, LLC (“Tennessee” or “TGP”), a subsidiary of Kinder-Morgan, under Section 505 of the Clean Water Act¹ (“CWA”) for the violations described below is served on behalf of the Sandisfield Taxpayers Opposing the Pipeline (“STOP”). Any response to this letter should be addressed to the undersigned counsel for STOP at the above letterhead address.

¹ 33 U.S.C. § 1365.

STOP is a group of residents and taxpayers who live or own property in Sandisfield, Massachusetts, one of the communities crossed by the Connecticut Expansion Project² (the “Project” or 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 two 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 Federal Energy Regulatory Commission (“FERC” or 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.

Specifically, FERC issued a Certificate of Public Convenience and Necessity (“CPCN” or the “Certificate”) to Tennessee for the Project on March 11, 2016.³ Tennessee accepted this Certificate on March 16, 2016. Pursuant to Section 7 of the Natural Gas Act, having accepted the CPCN, Tennessee has been authorized by the Commission to begin eminent domain proceedings, commence felling trees, and placing construction equipment for the construction and/or “proper operation” of the facilities authorized therein.⁴ 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,*

² FERC Docket No. CP14-529.

³ It bears noting that the Certificate is ostensibly “conditioned” upon Tennessee’s receipt of a Water Quality Certification under Section 401 of the CWA. Assuming, *arguendo*, that such a certificate is even legally permissible, Tennessee cannot claim its protection (such as it is) or authority without first meeting the required condition, *i.e.*, securing a Section 401 Certification or waiver from the Massachusetts Department of Environmental Protection (“MassDEP”).

⁴ 15 U.S.C. § 717f(h).

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.⁵ By statute, all field activities, including 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.⁶ 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.”⁷ As regards construction and development, a “new source” is “any source... that commences construction activity after” December 1, 2009.⁸ The construction and development point source category expressly includes “interstate natural gas pipeline construction activity” as one of the regulated sources therein.⁹ Thus, the activities authorized by even a conditional CPCN are those such as “may result” in a “discharge to the navigable waters.”¹⁰ Indeed, in conditioning the CPCN on receipt of a 401 Certification from MassDEP, the Commission implicitly acknowledges this to be true.

If there were any doubt possible as to whether Tennessee will undertake activities which may result in a discharge under the CPCN, its recent Verified Condemnation Complaint (“Complaint”) removes it.¹¹ Tennessee filed the Complaint for, *inter alia*, condemnation of certain easements on land owned by

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

⁶ 33 U.S.C. § 1362(24).

⁷ 40 C.F.R. § 401.11(e).

⁸ 40 C.F.R. § 450.11(a); 74 FR 63057.

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

¹⁰ 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)).

¹¹ The Verified Complaint was filed on March 15, 2016 with the Berkshire Superior Court of the Commonwealth of Massachusetts, captioned *Tennessee Gas Pipeline Co., LLC v. Six Acres of Land More or Less, et al.* A copy of the Complaint (less supporting exhibits) is attached hereto as Exhibit 1.

the Commonwealth and “injunctive relief to allow immediate entry and possession of the easements.”¹² Specifically, Tennessee claims it “needs immediate possession to perform pre-construction activities”¹³ and to clear trees.¹⁴ These activities, according to Tennessee’s own statements, are part of the pipeline construction process.¹⁵ Tennessee’s stated intent is to complete all construction activities by November 1, 2016, and to begin construction activities by March 30, 2016.¹⁶

As noted, all field activities associated with the construction of a new pipeline are “new sources” of pollution for purposes of the Clean Water Act. Therefore, TGP’s current and imminent actions under the conditional CPCN certainly “may” result in a discharge to the waters of the United States. Tennessee is therefore obligated to secure a 401 Certification 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 “conditional” CPCN to Tennessee, the Commission has permitted activities¹⁷ which may result in a discharge to the jurisdictional waters, and therefore acted in violation of Section 401. Any field activities which Tennessee undertakes, which are allegedly authorized by the certificate, prior to the issuance of the state 401 Certification are likewise in violation of the Clean Water Act.

¹² Complaint at ¶1.

¹³ *Id.* at ¶60.

¹⁴ *Id.* at ¶61.

¹⁵ *Id.* at ¶55 (“Pipeline construction proceeds in stages, generally as follows: pre-construction activities, tree clearing, grading, excavating, trenching, stringing, welding, installation, backfilling, cleanup, grading, and restoration.”).

¹⁶ That is, within fourteen days of filing the Complaint. *See* Complaint at ¶56

¹⁷ Specifically, the commencement of Tennessee’s “construction and operation of facilities.” *See* 33 U.S.C. § 1341(a)(1); 33 U.S.C. § 1362(24).

Likewise, Tennessee will require a permit from the U.S. Army Corps of Engineers (“Corps”) under Section 404 of the CWA¹⁸ prior to engaging in any activity which may result in the discharge of dredge or fill material to the jurisdictional waters, along with a National Pollution Discharge Elimination System (“NPDES”) Permit¹⁹ for construction activities. Beginning construction activities prior to doing or failing to do so is a violation of Section 301 of the CWA.²⁰ Absent a 401 Certification, the Corps cannot and will not issue a 404 Permit. To date, Tennessee has not received coverage under any provision of the CWA for its imminent construction.

Section 505(a)(1) of the CWA²¹ authorizes citizens to commence a civil action “against any person... 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.”²² 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) and (d) of the CWA,²³ we will

¹⁸ 33 U.S.C. § 1344.

¹⁹ That is, a permit issued pursuant to 33 U.S.C. § 1342 by EPA or by MassDEP under its delegated authority.

²⁰ 33 U.S.C. § 1311.

²¹ 33 U.S.C. § 1365(a)(1)

²² 33 U.S.C. § 1365(f)(5). In full, the term “effluent standard or limitation under this chapter” means:

(1) effective July 1, 1973, an unlawful act under [33 U.S.C. § 1311(a)]; (2) an effluent limitation or other limitation under [33 U.S.C. §§ 1311, 1312]; (3) standard of performance under [33 U.S.C. § 1316]; (4) prohibition, effluent standard or pretreatment standards under [33 U.S.C. § 1317]; (5) certification under [33 U.S.C. § 1341]; (6) a permit or condition thereof issued under [33 U.S.C. § 1342], which is in effect under this chapter (including a requirement applicable by reason of [33 U.S.C. § 1323]; or (7) a regulation under [33 U.S.C. § 1345(d)]

²³ 33 USC §§ 1365(a) and (d)

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. Upon information and belief, these violations are imminent, and will be ongoing and continuous. 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 you under Section 505(a) of the Clean Water Act, 33 USC § 1365(a), for violations thereof.

Respectfully submitted,



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Encl.

Verified Complaint, less Exhibits thereto.

CC

Gina McCarthy, Administrator, EPA
H. Curtis Spalding, Regional Administrator, EPA Region I
Martin Suuberg, Commissioner, MassDEP
Commissioners, Federal Energy Regulatory Commission