



Commonwealth of Massachusetts  
Executive Office of Energy & Environmental Affairs

## Department of Environmental Protection

Western Regional Office • 436 Dwight Street, Springfield MA 01103 • 413-784-1100

Charles D. Baker  
Governor

Karyn E. Polko  
Lieutenant Governor

Matthew A. Beaton  
Secretary

Martin Suuberg  
Commissioner

February 6, 2017

Ms. Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, D.C. 20426

Re: Tennessee Gas Pipeline Company, LLC,  
Connecticut Expansion Project, Docket No. CP14-529-000,  
*Response of Massachusetts Department of Environmental Protection  
In Opposition to Tennessee's Renewed Request for a NTP for Tree Felling*

The Massachusetts Department of Environmental Protection (MassDEP) respectfully submits this response to Tennessee Gas Pipeline Company, L.L.C.'s ("Tennessee") January 27, 2017, renewed request for a limited notice to proceed (NTP) with tree felling for the Connecticut Expansion Pipeline project (Project). As the agency responsible for issuing a Water Quality Certificate (WQC) required by Section 401 of the Clean Water Act (CWA), 33 U.S.C. § 1341, MassDEP has previously filed comments in the above captioned docket.

Because a final CWA Section 401 WQC has not yet issued for the Massachusetts portion of the Project, MassDEP opposes Tennessee's renewed NTP request, for the reasons set forth below.

On June 29, 2016, MassDEP issued an initial decision approving, with conditions, Tennessee's application for a CWA Section 401 WQC. On July 20, 2016, several petitioners

This information is available in alternate format. Contact Michelle Waters-Ekanem, Director of Diversity/Civil Rights at 617-292-5751.  
TTY# MassRelay Service 1-800-439-2370  
MassDEP Website: [www.mass.gov/dep](http://www.mass.gov/dep)

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filed an administrative appeal with MassDEP challenging the initial June 2016 decision.<sup>1</sup> By its own terms, MassDEP's initial June 2016 decision prohibits the commencement of any work, "including the cutting of trees," during the pendency of any administrative appeal proceeding and prior to issuance of a final CWA Section 401 WQC by the MassDEP Commissioner following an administrative appeal.<sup>2</sup>

The Commission should not grant Tennessee's request for a limited NTP to begin tree felling for the Massachusetts portion of the Project until the MassDEP Commissioner issues a final CWA Section 401 WQC for the Project. MassDEP held a hearing on the petitioners' administrative appeal on January 18, 2017. The MassDEP Commissioner is tentatively scheduled to issue a final decision by March 27, 2017, on Tennessee's application for a CWA Section 401 WQC. MassDEP's schedule for petitioners' administrative appeal is attached hereto as "Exhibit 1."<sup>3</sup>

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<sup>1</sup> Tennessee's January 27, 2017, request for a NTP to commence tree felling for the Project neglects to inform the Commission of the ongoing and nearly complete administrative appeal of MassDEP's initial June 2016 decision on its application for a CWA Section 401 WQC.

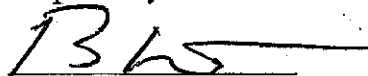
<sup>2</sup> Condition 15 of MassDEP's initial June 2016, decision provides that "[n]o work subject to this [initial certification decision], including the cutting of trees, may be conducted prior to the expiration of the Appeal Period . . . and any appeal proceeding that may result from an appeal." See also 314 Code of Massachusetts Regulations (C.M.R.) 9.09(1)(e) ("No activity [subject to an initial water quality certification decision] may begin prior to the expiration of any appeal period or until a final decision is issued by the Department [MassDEP] if an appeal is filed").

<sup>3</sup> Tennessee's January 27, 2017, NTP request fails to inform the Commission that petitioners in the MassDEP administrative appeal also filed a protective petition in the United States Court of Appeals for the First Circuit challenging MassDEP's initial June 2016, decision on Tennessee's application for a WQC. See *Berkshire Environmental Action Team, et al., v. Tennessee Gas Pipeline Company, LLC, and MassDEP*, First Circuit No. 16-2100. One issue in the First Circuit proceeding is whether MassDEP's initial June 2016 decision is a final WQC for purposes of judicial review by a United States Court of Appeals pursuant to Section 19(d) of the Natural Gas Act, 15 U.S.C. § 717r (d)(1)-(3), or whether the Court only has subject matter jurisdiction to review the final WQC scheduled to be issued by the MassDEP Commissioner by the end of March, 2017. The First Circuit heard argument on this question on January 10, 2017.

Waiting to authorize tree clearing in Massachusetts until MassDEP issues a final WQC will not delay the Project or threaten Tennessee's ability to meet its anticipated November 2017, in-service target date for the Project, let alone the Commission's March 2018, in-service deadline. Indeed, by the schedule attached to its January 2017, NTP request, Tennessee proposes that tree felling commence in mid-March, 2017—just prior to MassDEP's expected final WQC decision. There is also no need for Tennessee to complete all tree felling activity in Massachusetts prior to March 31. The USFWS made clear in a letter last year that Tennessee wrongly believed that USFWS guidelines strictly prohibit any tree clearing activity after March 31 that may impact migratory birds. *See* April 12, 2016, USFWS letter to Tennessee regarding tree clearing in migratory bird habitat, attached hereto as "Exhibit 2" (noting that an "October 1 to March 31 timeframe had erroneously been applied to migratory birds in documents prepared by [Tennessee and its consultant] and that Tennessee Gas is [now] aware that there is no time-of-year restriction related to the MBTA [Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712]"). Tennessee may commence tree clearing after March 31, 2017, so long as it meets migratory bird conservation measures previously identified by the USFWS and the Commission, including the requirement that Tennessee provide "qualified wildlife rehabilitators that may be called upon if necessary during tree felling and other Project activity." *See* FERC May 4, 2016, letter to Tennessee, attached as "Exhibit 3."

For all the above reasons, the Commission should deny Tennessee's request for a limited NTP to start tree felling for the Massachusetts portion of the Project until the MassDEP Commissioner issues a final CWA Section 401 WQC for the Project.

Respectfully submitted:



Massachusetts Department of Environmental Protection  
Brian D. Harrington, Deputy Regional Director  
Bureau of Water Resources, Western Region  
413-755-2291  
[Brian.D.Harrington@state.ma.us](mailto:Brian.D.Harrington@state.ma.us)

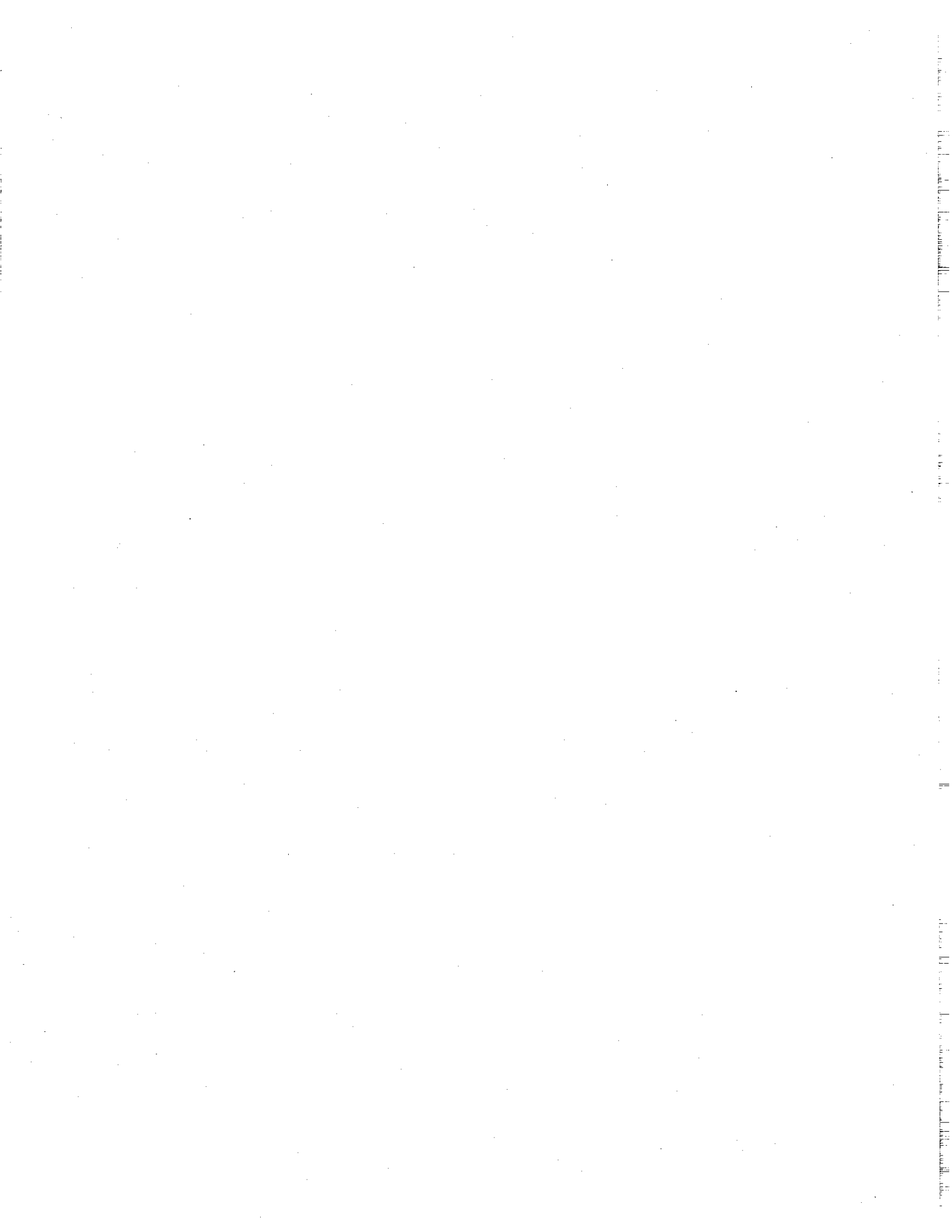


TENNESSEE GAS PIPELINE COMPANY, LLC

CONNECTICUT EXPANSION PROJECT

DOCKET NO. CP14-529-000

MASSDEP EXHIBIT 1



COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

January 20, 2017

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In the Matter of  
Tennessee Gas Pipeline Company, LLC

OADR Docket No. 2016-020  
USACOE Application No. NAE-2013-  
02329  
MassDEP Wetlands File Nos.  
087-0610 and 278-0130  
MassNHESP Tracking No. 13-32620  
MEPA EOEAA No. 15205  
Transmittal No. X265051  
Agawam & Sandisfield, MA

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**POST-ADJUDICATORY HEARING ORDERS**

**INTRODUCTION**

In this appeal, a Citizen's Group comprised of 15 citizens of the Commonwealth residing in Amherst, Ashby, Ashfield, Cummington, Dalton, Montague, Northampton, Pepperell, Pittsfield, or Sandisfield, Massachusetts;<sup>1</sup> the Berkshire Environmental Action Team, Inc. ("BEAT"); Jean Atwater-Williams; Ronald M. Bernard; and Heather Morrival (collectively "the Petitioners") challenge a Water Quality Certification ("WQC") that the Western Regional Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") issued on June 29, 2016 to Tennessee Gas Pipeline, LLC ("the Applicant")

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<sup>1</sup> The names of the 15 citizens are listed in note 1, at p. 2 of the Petitioners' Appeal Notice.

pursuant to the Massachusetts Clean Waters Act ("MCWA"), G.L. c. 21, §§ 26-53; the Massachusetts Surface Water Quality Standards, 314 CMR 4.00 ("SWQ Standards"); the Massachusetts WQC Regulations at 314 CMR 9.00 ("WQC Regulations"); and Section 401 of the federal Clean Water Act, 33 U.S.C. § 1251, et seq. ("Section 401"). The Department issued the WQC to the Applicant in connection with the latter's natural gas pipeline expansion project on a Site in Western, Massachusetts which encompasses parcels of land located in Agawam and Sandisfield, Massachusetts ("the proposed Project"). The parcel located in Agawam is known as "the Connecticut Loop, 300 Line" and the parcel located in Sandisfield is known as "the Massachusetts Loop, 200 Line."

The Petitioners contend that the Department improperly issued the WQC because the WQC purportedly fails to comport with a number of the Massachusetts Surface Water Quality Standards at 314 CMR 4.00 and the WQC Regulations at 314 CMR 9.00, and as such, they request that the be WQC be vacated. Petitioners' Appeal Notice, at pp. 7-11; Petitioners' Pre-Hearing Statement, pp. 5-8.

In response, the Applicant contends that the Department's Office of Appeals and Dispute Resolution ("OADR"), where the Petitioners' appeal of the WQC is pending for resolution, lacks jurisdiction over the appeal because in the Applicant's view, the U.S. Court of Appeals for the First Circuit ("the First Circuit") has exclusive jurisdiction over the appeal pursuant to the U.S. Natural Gas Act ("NGA"), 15 U.S.C. § 717r(d)(1). [Applicant's] Special Appearance and Motion for Stay, August 17, 2016 ("Applicant's Motion to Stay"), at p. 1; Order Denying Applicant's Motion to Stay Proceedings, September 28, 2016, at p. 4; [Applicant's] Special Appearance and Pre-Hearing Statement, September 28, 2016 ("Applicant's Pre-Hearing Statement"), at pp. 2-3. In the alternative, the Applicant contends that if OADR has jurisdiction



over the appeal, the Petitioners lack standing to challenge the WQC and “the WQC [should] be made final, excepting Condition 15 [of the WQC] which should be removed” because in the Applicant’s view, “it is beyond the jurisdiction of MassDEP’s authority to implement and is preempted by the NGA.” *Id.*, at pp. 2-4.

While the Petitioners and the Department disagree regarding whether the Petitioners have standing and the WQC is valid (the Department contends the Petitioners lack standing and the WQC is valid while the Petitioners contend otherwise), they both agree that OADR has jurisdiction over the Petitioners’ appeal of the WQC because the Department’s issuance of the WQC was not a final agency action of the Department subject to appeal to the First Circuit. Petitioners’ Opposition to [Applicant’s] Motion for Stay, August 26, 2016; [Department’s] Opposition to [Applicant’s] Motion for Stay, September 2, 2016; Petitioners’ Pre-Hearing Statement, September 21, 2016; Department’s Pre-Hearing Statement, at pp. 4-5. They contend that the Department’s issuance of the WQC was not a final agency action of the Department because the Petitioners appealed the WQC to OADR, and as a result, the WQC will only become a final agency action of the Department subject to appeal to the First Circuit if the Department’s Commissioner, the final decision-maker in this appeal, issues a Final Decision affirming the WQC. *Id.* Earlier in the appeal, I issued a Ruling agreeing with the Petitioners and the Department on the jurisdiction issue. See Order Denying Applicant’s Motion to Stay Proceedings, September 28, 2016 (“September 28<sup>th</sup> Order”).<sup>2</sup>

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<sup>2</sup> The jurisdiction issue is also the subject of litigation between the parties in the U.S. District Court for the District of Massachusetts and the First Circuit, which the Applicant commenced in August 2016 after the Petitioners filed this appeal of the WQC. See Tennessee Gas Pipeline Company, LLC v. Massachusetts Department of Environmental Protection, et al., C.A. No. 1:16—cv-11671-NMG; Berkshire Environmental Action Team, Inc., et al. v. Tennessee Gas Pipeline Company, LLC and Massachusetts Department of Environmental Protection, No. 16-2100. Early on in the litigation, the Applicant sought an injunction to enjoin OADR’s proceedings over the Petitioners’ appeal of the WQC. The Petitioners and the Department opposed the Applicant’s request for such

## THE EVIDENTIARY ADJUDICATORY HEARING

On January 18, 2017, I conducted an evidentiary Adjudicatory Hearing (“Hearing”) to resolve the issues in this appeal. The Hearing was recorded by a certified court stenographer/reporter at the Applicant’s expense, who has prepared a written transcript of the Hearing that will be filed with OADR by January 23, 2017.<sup>3</sup> A total of nine witnesses filed sworn Pre-filed Testimony on behalf of the parties for the Hearing in support of the parties’ respective positions in the case and were available for sworn cross-examination at the Hearing. The parties chose to cross-examine only five of the nine witnesses at the Hearing.<sup>4</sup>

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injunctive relief. To date, neither the U.S. District Court nor the First Circuit has issued an Order enjoining OADR’s proceedings over the Petitioners’ appeal of the WQC, and, as a consequence, the proceedings in this appeal have continued without interruption.

<sup>3</sup> On this date, the certified court stenographer/reporter provided OADR and the parties with an electronic copy of the Hearing transcript, and the Applicant gave notice that it will file a hard copy of the transcript with OADR by January 23, 2017.

<sup>4</sup> Five individuals filed PFT in support of the Petitioners’ claims in the appeal:

- (1) the Petitioner Jean Atwater-Williams (“Ms. Atwater-Williams”);
- (2) the Petitioner Ronald M. Bernard (“Mr. Bernard”);
- (3) the Petitioner Heather Morrival (“Ms. Morrival”);
- (4) Matthew Schweisberg, PWS, Principal  
Wetland Strategies and Solutions, LLC (“Mr. Schweissberg”); and
- (6) Jane Winn, Executive Director of the Berkshire Environmental  
Action Team, Inc. (“Ms. Winn”).

Neither the Applicant nor the Department cross-examined Ms. Atwater-Williams, Mr. Bernard, and Ms. Morrival. The Applicant cross-examined Ms. Winn. The Applicant and the Department cross-examined Mr. Schweissberg.

Two individuals filed PFT in support of the Applicant’s claims in the appeal:

- (1) James Flynn, Project Manager, Tennessee Gas Pipeline Company, LLC (“Mr. Flynn”); and
- (2) Dennis Lowry, Senior Program Manager/ Wetlands Ecologist, AECOM (“Mr. Lowry”).

The Petitioners cross-examined Mr. Flynn and Mr. Lowry. As for the Department’s witnesses, they were:

- (1) David Cameron, Section Chief, Wetlands Program,

## RECOMMENDED FINAL DECISION AND FINAL DECISION

At the Hearing, I conferred with the parties and their respective counsel regarding the schedule for the filing of the written transcript of the Hearing and parties' Post-Hearing Closing Briefs, and after doing so, I ordered the following Schedule:

- (1) **by Monday, January 23, 2017:** the written transcript of the Hearing to be filed with OADR;
- (2) **by Monday, February 13, 2017:** the Parties' Post-Hearing Closing Briefs are to be filed with OADR.<sup>5</sup>

At the Hearing, I also established the schedule for the issuance of my Recommended Final Decision ("RFD") and the Department's Commissioner's Final Decision in the appeal as follows:

- (1) **by Monday, March 6, 2017:** RFD is issued; and
- (2) **by Monday, March 27, 2017:** Department's Commissioner's Final Decision is issued.<sup>6</sup>

Under 310 CMR 1.01(14)(b), the Department's Commissioner is the Final Decision-maker in this appeal, and as such, he may adopt, modify, or reject my RFD in the case. The Commissioner's Final Decision is subject to rights of reconsideration under 310 CMR

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MassDEP/Western Regional Office ("Mr. Cameron"); and

- (2) David Foulis, Environmental Analyst, Wetlands Program  
MassDEP/Western Regional Office ("Mr. Foulis").


The Petitioners cross-examined Mr. Cameron and Mr. Foulis.

<sup>5</sup> As discussed at the Hearing, the parties shall in their Post-Hearing Closing Briefs address all of the Issues for Resolution in the appeal as set forth on pp. 5-10 of my October 16, 2016 Pre-Screening/Pre-Hearing Conference Report and Order. The parties shall also address in their respective Briefs the merits of the Applicant's Motion to Dismiss and Motion to Supplement the Record, which were filed on January 17, 2017.

<sup>6</sup> As I explained at the Hearing, the March 27, 2017 deadline for the Commissioner's Final Decision is subject to the Commissioner's schedule. I also explained that any Final Decision issued by the Commissioner is subject to a Motion for Reconsideration. See below, at p. 6.

1.01(14)(d) and judicial review pursuant to G.L. c. 30A, § 14. Once the Final Decision is issued “a party may file a motion for reconsideration setting forth specifically the grounds relied on to sustain the motion” if “a finding of fact or ruling of law on which a final decision is based is clearly erroneous.” 310 CMR 1.01(14)(d). “Where the motion repeats matters adequately considered in the final decision, renews claims or arguments that were previously raised, considered and denied, or where it attempts to raise new claims or arguments, it may be summarily denied. The motion [must] be filed within seven [business] days from the date the decision is [issued] to the parties.” *Id.* The filing of a motion for reconsideration is not required to exhaust administrative remedies for the purpose of obtaining judicial review of the Final Decision pursuant to G.L. c. 30A, § 14. *Id.*

Date: 1/20/17

  
Salvatore M. Giorlandino  
Chief Presiding Officer

**SERVICE LIST**

**Petitioners:** A Citizen's Group comprised of 15 citizens of the Commonwealth residing in Amherst, Ashby, Ashfield, Cummington, Dalton, Montague, Northampton, Pepperell, Pittsfield, or Sandisfield, Massachusetts;<sup>7</sup>

the Berkshire Environmental Action Team, Inc. ("BEAT");  
Jean Atwater-Williams; Ronald M. Bernard; and Heather Morrival;

**Legal representative:** Luke H. Legere, Esq.  
Gregor I. McGregor, Esq.  
McGregor & Legere, P.C.  
15 Court Square, Suite 500  
Boston, MA 02108  
**e-mail:** llegere@mcgregorlaw.com  
gimcg@mcgregorlaw.com;

**Applicant:** Tennessee Gas Pipeline Company, LLC;

**Legal representative:** James L. Messenger, Esq.  
Margaret R. Stolfa, Esq.  
Gordon & Rees  
Scully Mansukhani  
21 Custom House Street, 5<sup>th</sup> Floor  
Boston, MA 02110  
**e-mail:** jmessenger@gordonrees.com  
mstolfa@gordonrees.com;

**The Department:** David Cameron, PWS & Wetlands Program Chief  
MassDEP/Bureau of Water Resources  
436 Dwight Street  
Springfield, MA 01103  
**e-mail:** David.Cameron@state.ma.us;

**[continued on next page]**

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<sup>7</sup> The names of the 15 citizens are listed in note 1, at p. 2 of the Petitioners' Appeal Notice.

[continued from preceding page]

David Foulis, Environmental Analyst  
MassDEP/Bureau of Water Resources  
436 Dwight Street  
Springfield, MA 01103  
e-mail: David.Foulis@state.ma.us;

**Legal Representatives:** MacDara Fallon, Senior Counsel  
MassDEP/Office of General Counsel  
One Winter Street  
Boston, MA 02108  
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cc: Christine LeBel, Chief Regional Counsel  
MassDEP/Western Regional Office  
Office of General Counsel  
436 Dwight Street  
Springfield, MA 01103  
e-mail: Christine.LeBel@state.ma.us;

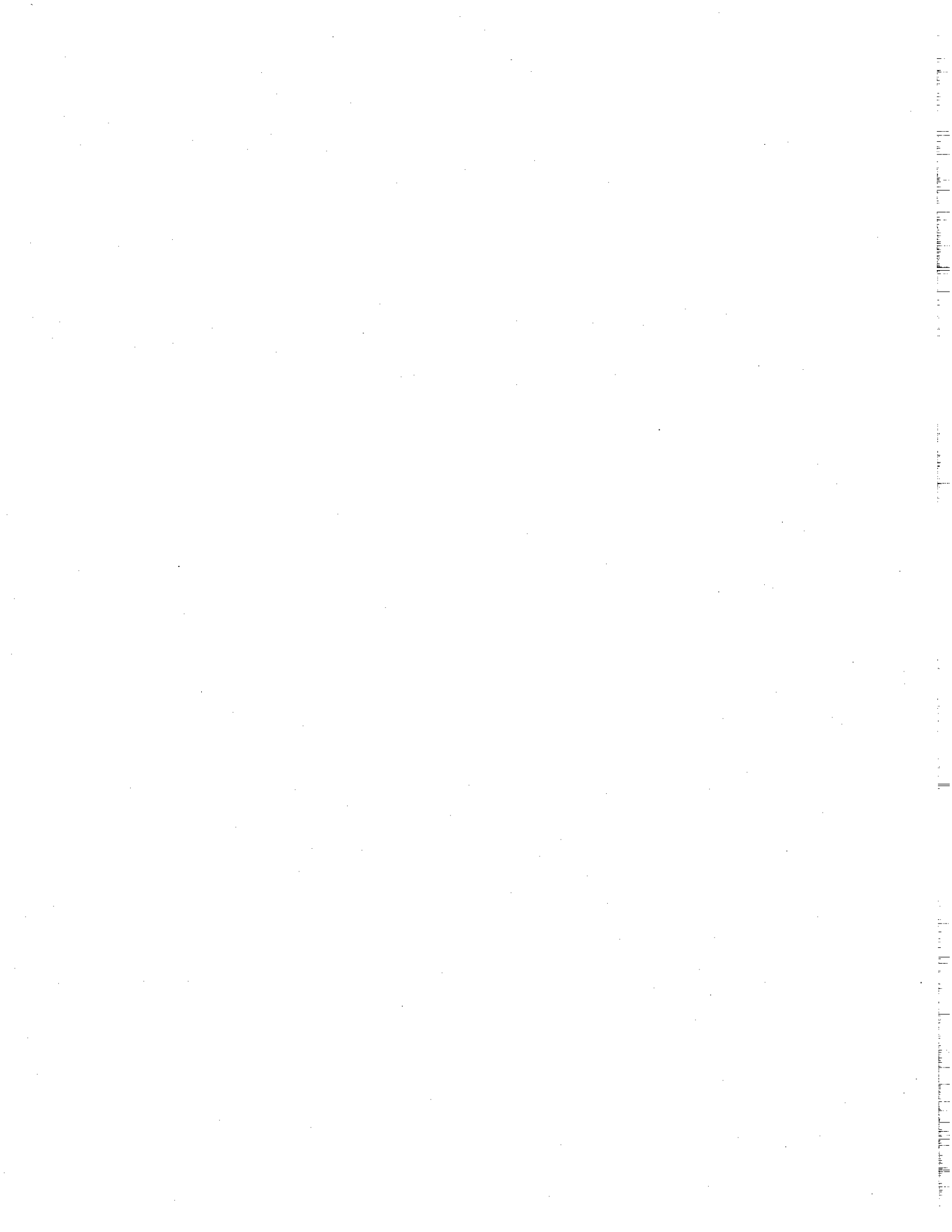
Leslie DeFilippis, Paralegal  
MassDEP/Office of General Counsel  
One Winter Street  
Boston, MA 02108

TENNESSEE GAS PIPELINE COMPANY, LLC

CONNECTICUT EXPANSION PROJECT

DOCKET NO. CP14-529-000

MASSDEP EXHIBIT 2







# United States Department of the Interior



## FISH AND WILDLIFE SERVICE

New England Field Office  
70 Commercial Street, Suite 300  
Concord, NH 03301-5087  
<http://www.fws.gov/newengland>

REF: Connecticut Expansion Project

April 12, 2016

Brian Benito  
Tennessee Gas Pipeline Company, L.L.C.  
8 Anngina Drive  
Enfield, CT 06082

Dear Mr. Benito:

This responds to your correspondence to the U.S. Fish and Wildlife Service's (Service) New York Field Office (NYFO), dated March 2, 2016, and to the New England Field Office (NEFO), dated March 7, 2016, regarding the subject Connecticut Expansion Project (Project). The Tennessee Gas Pipeline Company (Tennessee Gas) proposes to construct and operate the subject Project, the purpose of which is to upgrade an existing natural gas pipeline system in New York, Massachusetts, and Connecticut. The Project would install approximately 13.3 miles of pipeline looping (installation of new pipeline along existing pipeline within active rights-of-way).

In your letters, you requested information on the presence of hibernacula and known roost trees for the federally threatened northern long-eared bat (*Myotis septentrionalis*) in the vicinity of the Project. You also requested approval from each office to conduct vegetation clearing activities through May 1, 2016—beyond the March 31, 2016, date that Tennessee Gas had proposed to avoid impacts to the federally endangered Indiana bat (*Myotis sodalists*) and to minimize impacts to breeding migratory birds. Subsequently, on April 12, 2016, you sent an email to Maria Tur of the NEFO staff stating that Tennessee Gas had reevaluated the potential effects of the Project and determined that the Project would have no effect on the Indiana bat.

Your letters to both NYFO and NEFO stated that the Service and the Federal Energy Regulatory Commission (FERC) had specified that, pursuant to the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703-712; Ch. 128; July 13, 1918; 40 Stat. 755), tree clearing should occur between October 1 and March 31. However, after a subsequent clarifying discussion with Ms. Tur, you sent her an email on April 1, 2016, clarifying that the October 1 to March 31 timeframe had erroneously been applied to migratory birds in documents prepared by AECOM and Tennessee Gas and that Tennessee Gas was aware that there is no time-of-year restriction related to the MBTA.

To summarize, for this Project, as proposed, the October 1 to March 31 timeframe is not relevant to the Indiana bat, nor is it relevant to the northern long-eared bat under the final 4(d) Rule for the Northern Long-Eared Bat. Further, the MBTA does not contain specific time-of-year restrictions for activities that may affect migratory birds. Therefore, we will not discuss an October 1 to March 31 time-of-year restriction with regard to these species in the balance of this letter.

Pursuant to section 7(a)(2) of the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531-1533), Federal agencies, including FERC, have a responsibility to consult with the Service when projects they fund, authorize, or carry out may result in effects to federally listed or proposed species. It is our understanding that FERC has designated you and AECOM as non-Federal representatives for this Project. Your request and our response are provided in accordance with section 7 of the ESA and the MBTA.

#### Indiana Bat

While there is an historical occurrence record for this species within the project area, and suitable roosting and/or foraging habitat may be present, extremely low numbers, if any, of Indiana bats remain in the project area due to the decline of this species subsequent to the onset of white nose syndrome.

On April 12, 2016, you sent an email to Ms. Tur stating that, based on past discussions with the NYFO (including the information above), and a report from the Service's Information for Planning and Conservation system indicating that the Indiana bat is not present in the proposed project area, Tennessee Gas (and by extension, FERC) determined that the proposed Project would have no effect on the species. Accordingly, no time-of-year restriction is necessary to avoid impacts to the species in the project area.

#### Northern Long-Eared Bat

On behalf of FERC, AECOM previously consulted with the NYFO regarding the northern long-eared bat. The NYFO concurred with a "may affect, but not likely to adversely affect" determination in a letter dated October 16, 2015 (enclosed) for approximately 4.5 acres of tree removal, which would take place between October 1 and March 31. The letter also outlined other conservation measures that FERC agreed to implement for the New York portion of the Project.

Subsequent to the October 16, 2015 correspondence, the Service published a final 4(d) Rule for the Northern Long-Eared Bat.<sup>1</sup> The 4(d) rule went into effect on February 16, 2016, and provides measures that are necessary and advisable to provide for the conservation of the species. The Service later developed an optional framework to streamline section 7 consultations for the northern long-eared bat and a streamlined consultation form for Federal projects that fit under the 4(d) rule.<sup>2</sup>

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<sup>1</sup> <http://www.fws.gov/midwest/endangered/mammals/nleb/pdf/FRnlebFinal4dRule14Jan2016.pdf> (accessed April 2016).

<sup>2</sup> <http://www.fws.gov/midwest/endangered/mammals/nleb/s7.html> (accessed April 2016).

We understand that you and FERC are now assessing whether this Project conforms to the Service's programmatic biological opinion for the final 4(d) rule for northern long-eared bat. To assess if this project is within 0.25 mile of a known hibernaculum or within 150 feet of a known maternity roost, please visit <http://www.fws.gov/midwest/endangered/mammals/nleb/nhisites.html> (accessed April 2016), and follow the links for each state in which the Project would occur. If you determine that the Project meets the criteria for eligibility under the final 4(d) rule, please prepare and submit the streamlined consultation form (enclosed) indicating that FERC will be relying on the Service's biological opinion for compliance with section 7(a)(2) of the ESA for potential impacts to the northern long-eared bat. A signed copy of the form should be mailed or faxed to both NYFO and NEFO.

### Migratory Birds

Migratory birds, such as waterfowl, passerines, and raptors are Federal trust resources and are protected by the MBTA, which prohibits taking, possession, transport, import, export, selling, purchase, barter, or selling migratory birds, their eggs, parts, and nests, except when specifically authorized by the Department of the Interior. The Service is the primary Federal agency responsible for administering and enforcing the MBTA. Neither the MBTA, nor its implementing regulations at 50 CFR Part 21, provides for permitting of "incidental take" of migratory birds that may be killed or injured by projects. As a reminder, Executive Order 13186 (EO), *Responsibilities of Federal Agencies to Protect Migratory Birds*, directs Federal agencies to ensure that migratory bird protection and conservation are considered in projects that are undergoing review under the National Environmental Policy Act. The Service and FERC entered into a Memorandum of Understanding in March 2011 to comply with the EO.<sup>3</sup>

Migratory birds are likely to be present within a variety of habitats found within the more than 13 miles that make up the project area. As mentioned previously, the MBTA does not contain specific time-of-year restrictions for activities that may affect migratory birds. However, to avoid and minimize effects on migratory birds, the Service recommends that vegetation clearing and other activities that may affect migratory birds occur outside of the breeding seasons for migratory bird species that may occur in the project area. Breeding seasons vary by species and geographic location, but generally start in early spring and end by early fall. The Service is available to provide technical assistance and recommendations for ways to minimize impacts to migratory birds during the breeding season; however, at this time there is no mechanism for the Service to provide an exemption to the prohibitions in the MBTA.

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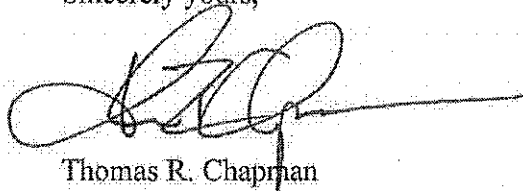
<sup>3</sup> <https://www.ferc.gov/legal/mou/mou-fws.pdf> (accessed April 2016).

Brian Benito  
April 12, 2016

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Thank you for your coordination on this Project. Please contact Ms. Tur at 603-223-2541 with any additional information or for further assistance.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'TRC', with a long horizontal flourish extending to the right.

Thomas R. Chapman  
Supervisor  
New England Field Office

Enclosures

Brian Benito  
April 12, 2016

5

cc: Reading file  
Elaine P. Baum (Elaine.Baum@ferc.gov)  
NYFO, Patricia Cole, Noelle Rayman, David Stilwell  
ES: MTur:4-12-16:603-223-2541



## United States Department of the Interior



### FISH AND WILDLIFE SERVICE

3817 Luker Road  
Cortland, NY 13045

October 16, 2015

Mr. Timothy O'Sullivan  
Project Manager  
AECOM  
10 Orms Street, Suite 405  
Providence, RI 02904

Dear Mr. O'Sullivan:

This responds to your September 14, 2015, letter regarding Tennessee Gas Pipeline Company's proposal to construct and operate the Connecticut Expansion Project that will be located in New York, Massachusetts, and Connecticut. The project involves 13.3 miles of pipeline looping, which is the installation of new pipeline along an existing pipeline within an active right-of-way. This letter specifically addresses portions of the project that are proposed in New York. Separate correspondence will be needed for the Massachusetts and Connecticut portions of the project. The New York portion, known as the "New York Loop", involves the construction of new 36-inch pipeline looping totaling 1.35 miles in the Town of Bethlehem, Albany County. The pipeline will be built along the south side of the existing line.

As you are aware, federal agencies, such as the Federal Energy Regulatory Commission (FERC), have responsibilities under Section 7 of the Endangered Species Act of 1973 (ESA) (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*) to consult with the U.S. Fish and Wildlife Service (Service) regarding projects that may affect federally-listed species or designated critical habitat, and confer with the Service regarding projects that are likely to jeopardize federally-proposed species or adversely modify proposed critical habitat. We understand that all FERC licensees, applicants, pipeline companies, and their representatives have been designated the FERC's non-federal representative for the purposes of completing informal consultation pursuant to Section 7(a)(2) of the ESA.

On behalf of the FERC, AECOM has determined that the proposed project "may affect, but is not likely to adversely affect," the federally-listed threatened northern long-eared bat (*Myotis septentrionalis*; NLEB). While there is a NLEB hibernaculum within 2.0 miles of the project area, the Service concurs with your determination given that no known roosts are located within or adjacent to the project area, a relatively small number of trees are proposed for removal (approximately 4.5 acres), and trees will be removed between October 1 and March 31, when bats are in hibernation.

We also encourage the incorporation of the following conservation measures into the project to further avoid and minimize impacts to this species:

- Bright orange construction fencing and flagging will be used to demarcate trees to be protected compared with those to be cut prior to the initiation of any construction;
- Artificial dyes, coloring, insecticide, algacide, and/or herbicides will not be used around waterbodies for long-term maintenance of the pipeline; and
- The number of lights will be limited and will include motion sensors, be shielded, and will be directed downward toward the ground and buildings.

Should project plans change, or if additional information on listed or proposed species or critical habitat becomes available, this determination may be reconsidered. The most recent compilation of federally-listed and proposed endangered and threatened species in New York is available for your information. Until the proposed project is complete, we recommend that you check our website every 90 days from the date of this letter to ensure that listed species presence/absence information for the proposed project is current.\*

Any additional information regarding the proposed project and its potential to impact listed species should be coordinated with both this office and with the New York State Department of Environmental Conservation.

Thank you for your time. If you require additional information or assistance please contact Noelle Rayman at 607-753-9334. Future correspondence with us on this project should reference project file 130813.

Sincerely,

  
for David A. Stilwell  
Field Supervisor

\*Additional information referred to above may be found on our website at:  
<http://www.fws.gov/northeast/nyfo/es/section7.htm>

cc: NYSDEC, Albany, NY (Env. Permits, C. Herzog)  
NYSDEC, Schenectady, NY (Env. Permits)

## Northern Long-Eared Bat 4(d) Rule Streamlined Consultation Form

Federal agencies should use this form for the optional streamlined consultation framework for the northern long-eared bat (NLEB). This framework allows federal agencies to rely upon the U.S. Fish and Wildlife Service's (USFWS) January 5, 2016, intra-Service Programmatic Biological Opinion (BO) on the final 4(d) rule for the NLEB for section 7(a)(2) compliance by: (1) notifying the USFWS that an action agency will use the streamlined framework; (2) describing the project with sufficient detail to support the required determination; and (3) enabling the USFWS to track effects and determine if reinitiation of consultation is required per 50 CFR 402.16.

This form is not necessary if an agency determines that a proposed action will have no effect to the NLEB or if the USFWS has concurred in writing with an agency's determination that a proposed action may affect, but is not likely to adversely affect the NLEB (i.e., the standard informal consultation process). Actions that may cause prohibited incidental take require separate formal consultation. Providing this information does not address section 7(a)(2) compliance for any other listed species.

### Information to Determine 4(d) Rule Compliance:

	YES	NO
1. Does the project occur wholly outside of the WNS Zone <sup>1</sup> ?	<input type="checkbox"/>	<input type="checkbox"/>
2. Have you contacted the appropriate agency <sup>2</sup> to determine if your project is near known hibernacula or maternity roost trees?	<input type="checkbox"/>	<input type="checkbox"/>
3. Could the project disturb hibernating NLEBs in a known hibernaculum?	<input type="checkbox"/>	<input type="checkbox"/>
4. Could the project alter the entrance or interior environment of a known hibernaculum?	<input type="checkbox"/>	<input type="checkbox"/>
5. Does the project remove any trees within 0.25 miles of a known hibernaculum at any time of year?	<input type="checkbox"/>	<input type="checkbox"/>
6. Would the project cut or destroy known occupied maternity roost trees, or any other trees within a 150-foot radius from the maternity roost tree from June 1 through July 31.	<input type="checkbox"/>	<input type="checkbox"/>

You are eligible to use this form if you have answered yes to question #1 or yes to question #2 and no to questions 3, 4, 5 and 6. The remainder of the form will be used by the USFWS to track our assumptions in the BO.

**Agency and Applicant<sup>3</sup> (Name, Email, Phone No.):**

**Project Name:**

**Project Location (include coordinates if known):**

**Basic Project Description (provide narrative below or attach additional information):**

<sup>1</sup> <http://www.fws.gov/midwest/endangered/mammals/nleb/pdf/WNSZone.pdf>

<sup>2</sup> See <http://www.fws.gov/midwest/endangered/mammals/nleb/nhisites.html>

<sup>3</sup> If applicable - only needed for federal actions with applicants (e.g., for a permit, etc.) who are party to the consultation.



<b>General Project Information</b>	<b>YES</b>	<b>NO</b>
Does the project occur within 0.25 miles of a known hibernaculum?	<input type="checkbox"/>	<input type="checkbox"/>
Does the project occur within 150 feet of a known maternity roost tree?	<input type="checkbox"/>	<input type="checkbox"/>
Does the project include forest conversion <sup>4</sup> ? (if yes, report acreage below)	<input type="checkbox"/>	<input type="checkbox"/>
Estimated total acres of forest conversion		
If known, estimated acres <sup>5</sup> of forest conversion from April 1 to October 31		
If known, estimated acres of forest conversion from June 1 to July 31 <sup>6</sup>		
Does the project include timber harvest? (if yes, report acreage below)	<input type="checkbox"/>	<input type="checkbox"/>
Estimated total acres of timber harvest		
If known, estimated acres of timber harvest from April 1 to October 31		
If known, estimated acres of timber harvest from June 1 to July 31		
Does the project include prescribed fire? (if yes, report acreage below)	<input type="checkbox"/>	<input type="checkbox"/>
Estimated total acres of prescribed fire		
If known, estimated acres of prescribed fire from April 1 to October 31		
If known, estimated acres of prescribed fire from June 1 to July 31		
Does the project install new wind turbines? (if yes, report capacity in MW below)	<input type="checkbox"/>	<input type="checkbox"/>
Estimated wind capacity (MW)		

**Agency Determination:**

By signing this form, the action agency determines that this project may affect the NLEB, but that any resulting incidental take of the NLEB is not prohibited by the final 4(d) rule.

If the USFWS does not respond within 30 days from submittal of this form, the action agency may presume that its determination is informed by the best available information and that its project responsibilities under 7(a)(2) with respect to the NLEB are fulfilled through the USFWS January 5, 2016, Programmatic BO. The action agency will update this determination annually for multi-year activities.

The action agency understands that the USFWS presumes that all activities are implemented as described herein. The action agency will promptly report any departures from the described activities to the appropriate USFWS Field Office. The action agency will provide the appropriate USFWS Field Office with the results of any surveys conducted for the NLEB. Involved parties will promptly notify the appropriate USFWS Field Office upon finding a dead, injured, or sick NLEB.

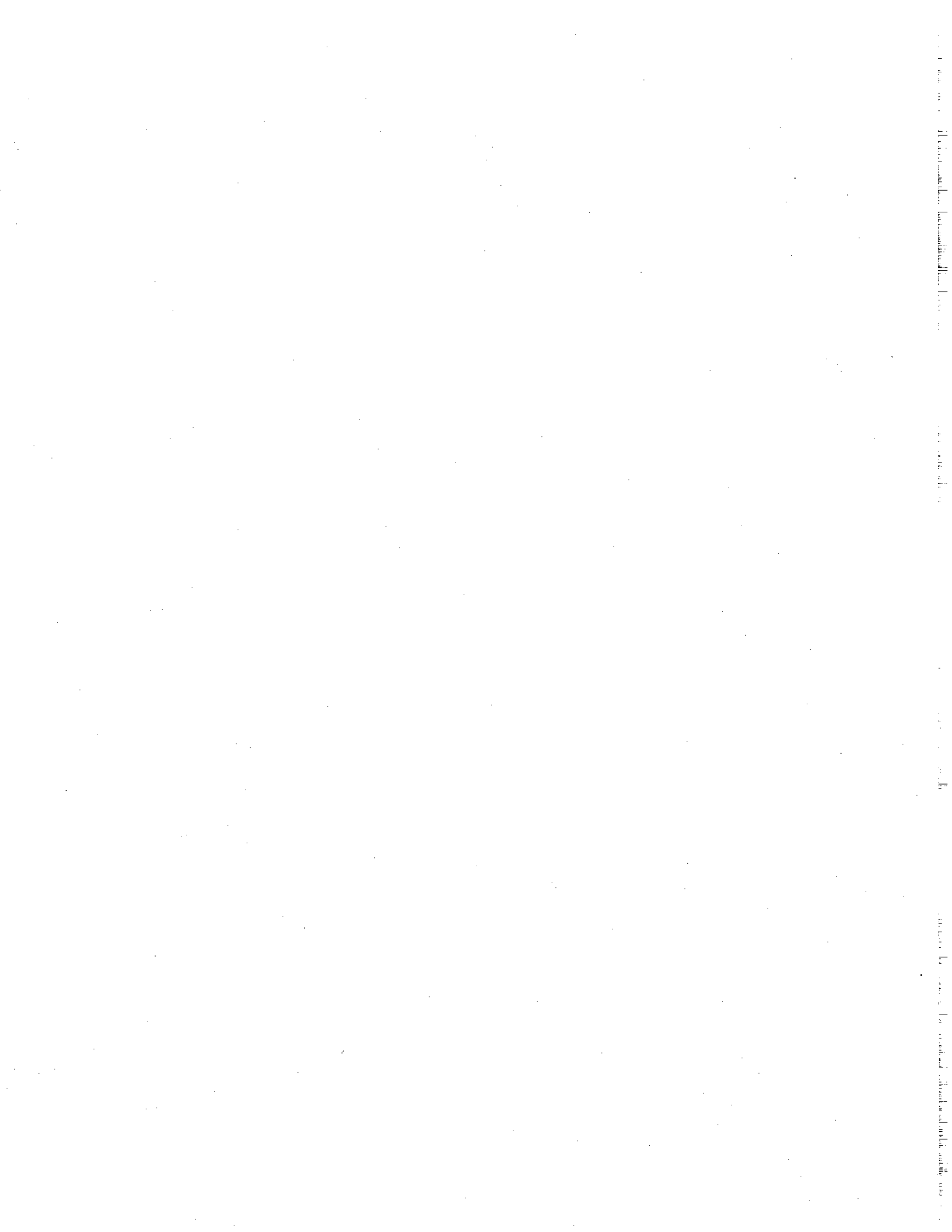
Signature: \_\_\_\_\_

Date Submitted: \_\_\_\_\_

<sup>4</sup> Any activity that temporarily or permanently removes suitable forested habitat, including, but not limited to, tree removal from development, energy production and transmission, mining, agriculture, etc. (see page 48 of the BO).

<sup>5</sup> If the project removes less than 10 trees and the acreage is unknown, report the acreage as less than 0.1 acre.

<sup>6</sup> If the activity includes tree clearing in June and July, also include those acreage in April to October.

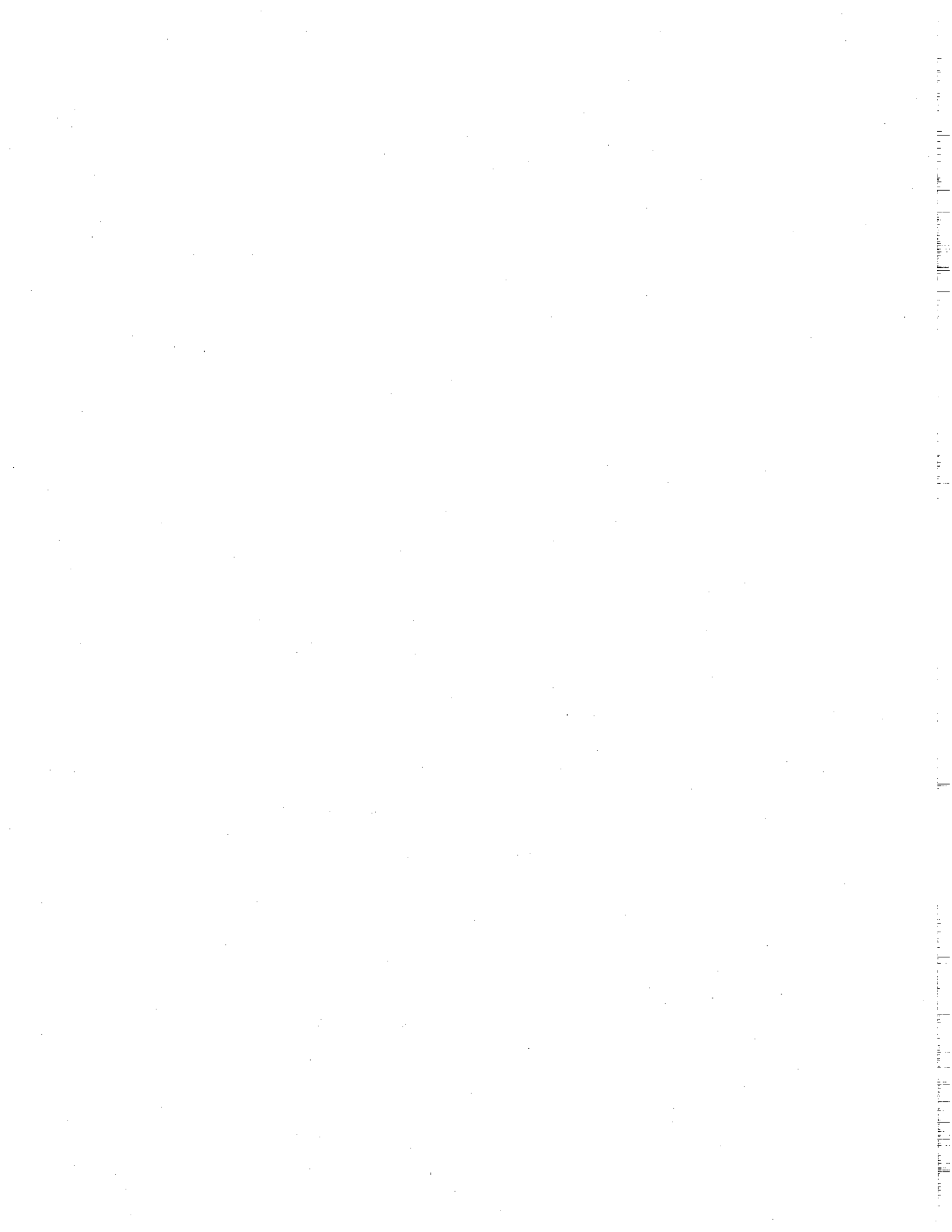


TENNESSEE GAS PIPELINE COMPANY, LLC

CONNECTICUT EXPANSION PROJECT

DOCKET NO. CP14-529-000

MASSDEP EXHIBIT 3



FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, D.C. 20426

OFFICE OF ENERGY PROJECTS

**In Reply Refer To:**  
OEP/DG2E/Gas Branch 1  
Tennessee Gas Pipeline  
Company, L.L.C  
Docket No. CP14-529-000  
§ 375.308(x)

May 4, 2016

Mosby Perrow  
Assistant General Counsel  
Tennessee Gas Pipeline Company, L.L.C.  
1001 Louisiana Street, Suite 1000  
Houston, Texas 77002

**Re: Request for Additional Information Response to the Request for Limited Notice  
to Proceed with Tree Felling**

Dear Mr. Perrow:

Provide the information described in the enclosure to assist in our analysis of the Implementation Plan and request for a limited Notice to Proceed dated March 22, 2016 for the Connecticut Expansion Project (Project). This information must be provided before we can complete our review. File your response in accordance with the provisions of the Commission's Rules of Practice and Procedure. In particular, 18 Code of Federal Register (CFR) 385.2010 (Rule 2010) requires that you serve a copy of the responses to each person whose name appears on the official service list for this proceeding.

**File a complete response as soon as practicable.** The response must be filed with the Secretary of the Commission at:

Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E., Room 1A  
Washington, DC 20426

If certain information cannot be provided within this time frame, indicate which items will be delayed and provide a projected filing date.

File all responses under oath (18 CFR 385.2005) by an authorized Tennessee Gas Pipeline L.L.C. representative and include the name, position, and telephone number of the respondent to each item.

Thank you for your cooperation. If you have any questions, please contact me at (202) 502-6467.

Sincerely,

Elaine Baum  
Environmental Project Manager  
Gas Branch 1  
Office of Energy Projects

Enclosure

cc: Public File, Docket No. CP14-529-000

ENCLOSURE

Tennessee Gas Pipeline L.L.C. (Tennessee)  
Docket No. CP14-529-000

1. The U.S. Fish and Wildlife Service - New England Field Office (USFWS), as the lead USFWS office for this Project, provided comments to FERC in an email dated April 28, 2016, regarding Tennessee's proposed conservation measures for migratory birds. The USFWS has requested that Tennessee provide a list of qualified wildlife rehabilitators in the Project area that may be called upon, if necessary, during tree felling and other Project activities. Provide this information and describe how Tennessee will implement this request.

