BEFORE THE UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Tennessee Gas Pipeline Company, L.L.C. Connecticut Expansion Project	)	Docket No. CP14-529-000

MASSACHUSETTS PIPELINE AWARENESS NETWORK'S ANSWER
IN OPPOSITION TO RENEWED REQUEST FOR A PARTIAL NOTICE TO PROCEED

The Massachusetts PipeLine Awareness Network ("MassPLAN") is a party to this proceeding, as set forth in the Federal Energy Regulatory Commission's ("Commission") March 11, 2016 Order Issuing Certificate ("Certificate Order"). 154 FERC ¶ 61,191 (2016). Pursuant to 18 C.F.R. § 385.213(a)(3), MassPLAN hereby submits this answer in opposition to the renewed request ("Request") of Tennessee Gas Pipeline Company, L.L.C. (the "Company") for a limited notice to proceed with tree felling ("Limited NTP") for the Connecticut Expansion Project (the "Project").

MassPLAN's grounds for opposing the Company's Request for a Limited NTP include, without limitation, the following:

1) Of the three section 401 water quality certifications required for this Project, one remains pending. The Company's reference to Massachusetts' initial certification as "the final CWA Section 401 certification for this Project" is inappropriate and apparently intentionally misleading.[1] The federal Court of Appeals for the First Circuit will imminently rule on an expedited appeal concerning the Section 401 water quality certification issued by the Western Regional Office of the Massachusetts Department of Environmental Protection ("MassDEP") on June 29, 2016 (the "Initial

1 Under a charitable reading, one might imagine that the Company's Request refers to Massachusetts' June 29, 2016 certification as the "final" meaning the third of three – but for the fact that Connecticut issued its section 401 certification more than three months later.

MassDEP Determination"). The appeal is fully briefed and oral argument was heard on January 10, 2017. At issue in that court proceeding, among other things, is whether the Initial MassDEP Determination constitutes a final agency action that establishes rights, duties, and privileges – the hallmarks of a final order (*see* First Circuit brief appended hereto). The Attorney General of Massachusetts, on behalf of MassDEP, concurs with the petitioners in the appeal that the Initial MassDEP Determination is ***not*** a final order. By the Initial MassDEP Determination's own terms, no action can be taken until the state regulatory process has concluded with a final decision from the commissioner of MassDEP, which decision is anticipated before the end of March.

2) The Company's proposed work schedule appears to be in violation of controlling Massachusetts law concerning discharge of fill material into waters of the United States within the Commonwealth of Massachusetts. Tree felling for the Project is planned in and adjacent to wetlands and water bodies within the Commonwealth of Massachusetts, which are within the purview of any MassDEP water quality certification. As explained by MassDEP staff in an affidavit (the "2016 Foulis Affidavit", appended hereto) submitted to the Commission on April 14, 2016, "under applicable Massachusetts law, …. ***the felling of trees and leaving debris in place itself constitutes an impermissible discharge of fill.***" The schedule submitted by the Company to the Commission on January 27, 2017 indicates that the Company plans to clear the work areas for the Project two weeks to 2.5 months ***after*** the conclusion of tree felling. Insofar as trees would be felled and left in place within vegetated wetlands, such activity would adversely affect the aquatic ecosystem and water quality in several respects, as enumerated in the 2016 Foulis Affidavit.

3) A final judgment has not yet been issued in the eminent domain proceeding initiated by the Company against the Commonwealth of Massachusetts, seeking to condemn easements through Otis State Forest in Berkshire County, Massachusetts – one of the places the Company seeks to

commence tree felling. A hearing on a potential settlement regarding this condemnation proceeding is scheduled for February 6, 2017.

4) The Commission has long recognized the need to consider final state approvals and fully incorporate state conditions following a complete state review as part of its permitting process. The incipient nature of the Certificate Order underscores the importance of and respect for the state process built into the Natural Gas Act and the Commission's review process. *See Finavera Renewables Ocean Energy, Ltd*, 122 FERC ¶ 61,248, at P 15 (2008); *see also Crown Landing LLC*, 117 FERC ¶ 61,209, at P 21 (2006). The Company's efforts to undermine state processes and begin tree felling for this Project before Massachusetts has completed its reviews should be rejected.

5) As noted by the Company, tribal consultations, required pursuant to section 106 of the National Historical Preservation Act, remain ongoing. Noticeably omitted by the Company however, is the fact that, pursuant to the implementing regulations of the National Historic Preservation Act, the Commission "***must complete the section 106 process*** 'prior to the approval of the expenditure of any Federal funds on the undertaking or ***prior to the issuance of any license***.'" 36 C.F.R. § 800.1(c). The Narragansett Indian Tribe has asserted an interest in seeing that ceremonial stone landscape features along the proposed route are protected, rather than dismantled or bulldozed for construction, or potentially damaged by tree felling activities. Under 36 C.F.R. § 800.1(c), the Commission must not authorize any work that could "restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties." *Id.*

6) Pursuant to the Order of Conditions issued by the Conservation Commission of the Town of Sandisfield, Massachusetts, the Company is required, prior to the commencement of work, to submit data to the appropriate Massachusetts state agency pertaining to vernal pools, which data the

Company gathered more than 18 months ago.[2] On information and belief, the Company had not submitted the data at the time that it submitted its renewed Request for a Limited NTP.

7) Requests for rehearing of the Certificate Order remain pending before the Commission, more than ten months after the Certificate Order was issued. Allowing work to begin for the Project when the underlying need for the Project remains in question will irreparably prevent the redress sought. By declining to rule on the merits of the rehearing request filed by the Sandisfield Taxpayers Opposing the Pipeline, the Commission continues to prevent judicial review of its own finding of need for the Project.

For the foregoing reasons, MassPLAN respectfully requests that the Company's Request for permission to proceed with tree felling be denied.

Respectfully submitted,

Kathryn R. Eiseman, Director
Massachusetts PipeLine Awareness Network
17 Packard Road
Cummington, MA 01026
info@massplan.org
(413) 320-0747

January 30, 2017

2 Condition 46 of the Sandisfield Conservation Commission's Order of Conditions for the Project states in full: "Prior to the commencement of work, the applicant shall submit to MA Natural Heritage Endangered Species Program (MA NHESP) data collected on the ten (10) potential vernal pools identified during the 2014/2015 spring vernal pool studies (Attachment C2 of the June 2015 NOI submittal), such that the potential vernal pools may be certified."

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Civil Appeal No. 16-2100

BERKSHIRE ENVIRONMENTAL ACTION TEAM, INC., JEAN ATWATER-WILLIAMS, RONALD M. BERNARD, CATHY KRISTOFFERSON, CHERYL D. ROSE, IRVINE SOBELMAN, PAULA L. TERRASI, SUSAN K. THEBERGE, ROSEMARY WESSEL, KATHRYN R. EISEMAN, ARIEL S. ELAN, ELLIOT FRATKIN, MARTHA A. NATHAN, KENNETH HARTLAGE, RONALD R. COLER, JANE WINN, and HEATHER MORRICAL,

Petitioners,

v.

TENNESSEE GAS PIPELINE COMPANY, LLC, and MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

On appeal from the Massachusetts Department of Environmental Protection, Docket No. 1:15-cv-00199-PB

PETITIONERS' BRIEF

Richard A. Kanoff, No. 28462
rkanoff@burnslev.com
Susan E. Stenger, No. 8661
sstenger@burnslev.com
Saqib Hossain
shossain@burnslev.com
BURNS & LEVINSON LLP
125 Summer Street, Boston, MA 02110
617-345-3000
Attorneys for Petitioners

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, Berkshire Environmental Action Team, Inc., hereby states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock. It does not issue stock. Berkshire Environmental Action Team, Inc., is a nonprofit corporation and advocates for the protection of the natural environment in Berkshire County.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

State Statutes and Regulations

GLOSSARY

CWA	Clean Water Act
FERC	Federal Energy Regulatory Commission
MassDEP	Massachusetts Department of Environmental Protection
NGA	Natural Gas Act
Project	Connecticut Expansion Project

JURISDICTIONAL STATEMENT

This Court has original and exclusive jurisdiction to review MassDEP's approval (or denial) of Tennessee Gas Pipeline Company LLC's ("Tennessee Gas") application for a water quality certification under Section 401 of the CWA ("Certification").

The Natural Gas Act ("NGA") provides:

> **The United States Court of Appeals** for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated **shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a** Federal agency (other than the Commission) or **State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law**, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 *et seq*.).

15 U.S.C. § 717r(d)(1) (emphasis added).

This statute applies here as Tennessee Gas proposes to construct new interstate gas pipeline facilities subject to § 717f of the NGA. The Citizens'[1] Petition for Review ("Citizens' Petition"), filed on August 26, 2016, relates to the decision of MassDEP, a state administrative agency, to issue an initial

[1] The "Citizens" refers to the Petitioners: Berkshire Environmental Action Team, Inc., Jean Atwater-Williams, Ronald M. Bernard, Cathy Kristofferson, Cheryl D. Rose, Irvine Sobelman, Paula L. Terrasi, Susan K. Theberge, Rosemary Wessel, Kathryn R. Eiseman, Ariel S. Elan, Elliot Fratkin, Martha A. Nathan, Kenneth Hartlage, Ronald R. Coler, Jane Winn, and Heather Morrical.

approval of the water quality certification pursuant to federal law (the CWA). *See Tennessee Gas Pipeline Co. v. Del. Riverkeeper Network*, 921 F. Supp. 2d 381, 392 (M.D. Pa. 2013) ("*Delaware Riverkeeper*"); *see also Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1091 (9th Cir. 2014) ("*Columbia Riverkeeper*"). Thus, the Court of Appeals has clear, original, exclusive authority for judicial review of MassDEP's issuance of a final Certification.[2]

All parties agree that this Court has original and exclusive jurisdiction over an appeal from the MassDEP under Section 19(d) of the NGA, 15 U.S.C. § 717r(d)(1) ("Section 19(d)"). *See* [Citizens' Memorandum of Law ("Citizens' Memo."), pp. 6-7]; *see also* [Tennessee Gas's Memorandum in Opposition ("Opp. Memo."), pp. 9-10].

The issue before this Court is *when* such jurisdiction is conferred.

---

[2] The Massachusetts Department of Environmental Protection ("MassDEP") has subject matter jurisdiction of this case under Mass. Gen. L. c. 21, §§26-53, 314 C.M.R. § 4.00 et. seq., and 314 C.M.R. § 9.00 *et. seq*. The MassDEP's regulations establish criteria for evaluation, in accordance with Section 401 of the Clean Water Act ("CWA") of applications for discharge of dredged or fill material, and of applications for dredging and dredged material management.

Timeliness of Appeal.

If not deemed premature, as argued *infra*, this appeal is timely. Section 717r(d)(1) does not specify a jurisdictional time requirement for seeking judicial review of a state agency order with the Court of Appeals. In this case, the Citizens filed for judicial review within the 60-day jurisdictional time limit set forth in §717r(b), the most analogous applicable time requirement. *See Columbia Riverkeeper*, 761 F.3d at 1092 ("In adding § 717r(d)(1) to § 717r when it enacted the EPAct, Congress did not give any sign it intended federal courts to exercise a broader scope of review over non-FERC decisions than over FERC decisions").

Section 717r(b) provides the only jurisdictional time requirements in Section 717r. It specifically relates to judicial review by courts of appeals of orders of the Federal Energy Regulatory Commission ("FERC") and provides for 60 days following a FERC order on rehearing to appeal to the courts of appeals.[3] *Williston Basin Interstate Pipeline Co. v FERC*, 475 F3d 330 (D.C.

[3] 717r(b) states: "Review of Commission order. Any party to a proceeding under this Act [*15 USCS §§ 717* et seq.] aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the [circuit] court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part."

Cir. 2006) (Where a pipeline company's petition for review of three orders by FERC was dismissed for lack of jurisdiction because company failed to comply with time requirements in 15 U.S.C. § 717r(a) and (b) where company did not timely file petition for judicial review within 60 days and nor did it timely file petition for further commission rehearing within 30 days).[4]

Exhaustion of Remedies Not Required.

Finally, although the NGA does not require that state administrative remedies be exhausted prior to seeking judicial review of a state order or action, it does require (as set forth herein) that the agency determination be final.[5] In this case, exhaustion is not a jurisdictional requirement, because § 717r(d)(1) serves as a direct-review statute, designed to enable litigants to bypass state and district courts in favor of review by a federal court of appeal. Accordingly, courts have not required exhaustion of administrative remedies after the original agency's issuance of a final decision. *See Delaware Riverkeeper*, 921 F. Supp.

---

[4] Similarly, Federal Rule of Appellate Procedure 15(a) does not provide a specific time frame, and instead states that "[r]eview of an agency order is commenced by filing, *within the time prescribed by law*, a petition for review" with the clerk of the appropriate court of appeals (emphasis added).

[5] In the absence of any such explicit mandate, it is within the Court's discretion to determine whether the exhaustion doctrine is applicable here. *Cf. Arbaugh v. Y&H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 1237, 163 L. Ed. 2d 1097 (2006).

2d. at 392 ("[T]he extremely limited legislative history of Section 717r also supports finding that Congress intended to cut out all review after the **original agency** made its permitting decision.") (emphasis added). Here, the MassDEP is the only agency that has jurisdiction, *i.e.*, the original agency, and following issuance of its final order, such order will be subject to review by this Court. There is no requirement (or need) to exhaust as no other agencies or courts are or will be involved following MassDEP's review.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether MassDEP's initial determination to grant a Certification for Tennessee Gas's proposed Connecticut Expansion Project (the "Project") is ripe for review or whether MassDEP has jurisdiction to continue its Certification review in light of the Citizens' timely filing of a Notice of Claim.

II. In the alternative, whether MassDEP's determination initially granting a Certification is inconsistent with federal law, not supported by any legally rational basis, contradicted by record evidence, and arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law given that MassDEP:

A. Ignored or failed to properly consider less environmentally damaging alternatives for the Project;

B. Issued the Certification for a Project that will "result in substantial adverse impacts to the physical, chemical, or biological integrity of surface waters of the Commonwealth," by failing to adequately protect surface water standards as a result of blasting, failing to comply with Massachusetts stream crossing standards, and altering water temperatures;

C. Failed to protect Outstanding Resource Waters and wildlife habitat by allowing discharges to Outstanding Resource Waters without a variance; failing to require that appropriate and practicable steps be taken to avoid and minimize potential adverse impacts to waters of the United States within the Commonwealth; and

D. Failed to require best management practices or ensure compliance with the state Stormwater Management Standards.

STATEMENT OF THE CASE

Tennessee Gas filed an application with FERC on July 31, 2014, for a Certificate of Public Convenience and Necessity ("FERC Certificate") to construct and operate the Project. [FERC Certificate, ¶ 1]. The Project is one of a series of natural gas pipeline projects to update Tennessee Gas's existing pipeline system in New York, Connecticut, and Massachusetts. *Id* ¶ 3. In Massachusetts, this Project involves the installation of approximately 3.8 miles of 36 inch diameter pipeline through the southwestern Massachusetts towns of Agawam and Sandisfield, including State-protected and environmentally sensitive areas of Otis State Forest. *Id*.

This case concerns MassDEP's initial approval of Tennessee Gas's application for a water quality certification for the Project. As required by the FERC approval process, any project applicant seeking to construct and operate an interstate natural gas pipeline project, such as the Project, must obtain "a [water quality certification] from the State in which the discharge originates … that any such discharge will comply with" applicable state water quality standards. 33 U.S.C. § 1341 (a)(1).

On June 29, 2015, Tennessee Gas submitted its application to MassDEP for issuance of a Section 401 water quality certification ("Application"). The Citizens timely submitted written comments during the public comment period

at MassDEP. The Citizens oppose Tennessee Gas's Application, because the Project as proposed would run afoul of numerous Massachusetts Surface Water Quality Standards as set forth in 314 C.M.R. § 4.00 and 314 C.M.R. § 9.00. These deficiencies and the significant impacts of the Project as approved on water uses and the quality of waters are detailed in the Citizens' Notice of Claim for Adjudicatory Hearing ("Notice of Claim") and discussed in Section II *infra*. Add.66.

The Western Regional Office of MassDEP issued the Certification as part of its ongoing administrative permitting process. By its terms, the Certification was not a final Section 401 water quality certification approval. Rather, MassDEP's evaluation of Tennessee Gas's Application is ongoing, and is currently scheduled for an adjudicatory hearing on January 18, 2017, and a final determination by the MassDEP Commissioner ("Commissioner") pursuant to 310 C.M.R. § 1.01(14)(b) by April 3, 2017.

The Citizens' Petition was filed as a necessary response to Tennessee Gas's August 16, 2016, filing ("Verified Complaint") in the United States District Court for the District of Massachusetts (the "U.S. District Court") alleging, *inter alia*, that the MassDEP lacks jurisdiction to continue with its administrative process and that its ongoing hearing process should be stayed because 15 U.S.C. § 717r(d)(1) gives this Court jurisdiction to hear the appeal

of an initial MassDEP Certification. [D. Ct. Doc. 1, ¶¶ 2, 4]. By order dated September 27, 2016, the U.S. District Court stayed its consideration of Tennessee Gas's complaint pending this Court's consideration in the instant case. [D. Ct. Doc. 33, p. 3].

Tennessee Gas's mistaken assertion and belief, as submitted to the U.S. District Court, that jurisdiction *currently* belongs in this Court, thus compelled the Citizens' Petition to be filed now, despite the Citizens' belief that this Court does not yet have jurisdiction. The Citizens submit that the MassDEP has jurisdiction to continue its review at this time.[6] The Citizens' Petition was filed to ensure that their rights to appeal the Certification remained timely and to prevent any attempt by Tennessee Gas to deny the Citizens their right to appeal to this Court, as may be appropriate, pursuant to § 717r(d)(1) following issuance of a final Certification.

This case presents an issue of first impression in the First Circuit regarding the definition of "order or action" as contained in § 717r(d)(1): whether a determination by MassDEP regional staff granting an initial

---

[6] The certification issued by the MassDEP is part of its ongoing adjudicatory proceedings (initiated when Tennessee Gas submitted its application to MassDEP) and there is no final determination by MassDEP regarding the Water Quality Certification. Citizens have appropriately filed for an adjudicatory hearing at MassDEP and are actively pursuing their right for a final decision by the Commissioner.

Certification to an applicant such as Tennessee Gas is "an order or action of a [. . .] State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval"; or whether, if a party such as the Citizens timely files a notice of claim for adjudicatory hearing in the MassDEP pursuant to MassDEP regulations, an appeal to this Court is not ripe until the Commissioner has issued a final decision following conclusion of the MassDEP's administrative adjudicatory process. The Citizens also submit, in the alternative, should this Court determine it has jurisdiction at this time, that the MassDEP's issuance of the Certification is arbitrary and capricious and the Certification should be rescinded or remanded to the MassDEP, as set forth *infra*, in Section II.

RELEVANT PROCEDURAL HISTORY

The Citizens seek consideration of the singular core jurisdictional dispute at the center of three proceedings currently underway at the MassDEP, the U.S. District Court, and this Court—whether MassDEP has the authority to continue its review of the Certification. MassDEP has asserted jurisdiction to continue its ongoing and detailed evaluation of the Certification and to determine whether Tennessee Gas should be issued a final permit based upon its Application. [Scheduling Order, ¶¶ 3, 10]. In turn, Tennessee Gas requested a stay of the ongoing evaluation of the Certification, which was denied by

MassDEP on the basis that "… the WQC is not a final agency decision of MassDEP subject to judicial review by the First Circuit." *See* [Order Denying Motion to Stay, p. 5]. Accordingly, the MassDEP process remains active and ongoing with a specific schedule for further fact finding, presentation of witnesses, and evaluation of evidence as part of MassDEP's process to determine whether a final water quality certification should be issued. [Scheduling Order, ¶ 8]. The Citizens submit that the MassDEP evidentiary and fact finding process should be allowed to proceed to conclusion.

Similarly, in its Verified Complaint before the U.S. District Court, Tennessee Gas sought to enjoin further consideration by MassDEP of its initial Certification. [D. Ct. Doc. 1, ¶¶ 1, 6]. As noted, the U.S. District Court deferred action pending action in this Court. [D. Ct. Doc. 33, p. 3]. Accordingly, and in order to address the significant jurisdictional question raised by the concurrent filings by Tennessee Gas at MassDEP and in the U.S. District Court, the Citizens seek redress with this Court, and request that this Court dismiss without prejudice, the Citizens' Petition as premature, or in the alternative, stay the instant proceeding. In the event the Court assumes jurisdiction to review the Certification, it should determine that MassDEP acted unlawfully in violation of Massachusetts water quality standards in issuing the Certification.

STATEMENT OF FACTS

Regulatory Context.

This case involves the approval process for an interstate natural gas pipeline governed by the NGA, 15 U.S.C. § 717 *et seq.* The NGA regulates the transportation and sale of natural gas in interstate commerce. 15 U.S.C. § 717b; *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300–01 (1988). Pursuant to Section 7 of the NGA, a natural gas pipeline company must obtain a FERC Certificate before it constructs, extends, acquires, or operates any facility for the transportation or sale of natural gas in interstate commerce. 15 U.S.C. § 717f(c)(1)(A). The FERC Certificate is issued if it is found that the proposed project "is or will be required by the present or future public convenience and necessity," and FERC may attach "to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require." *Id.* at § 717f(e).

The NGA was amended by the Energy Policy Act of 2005 ("EPAct"), Pub. L. No. 109–58, § 313(b), 119 Stat. 594, 689–90 (2005), "to provide natural gas companies with a cause of action in federal court to challenge an agency's order, action, or failure to act with respect to permits necessary for the construction or operation of natural gas projects." *Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 85 (2d Cir. 2006) ("*Islander*

East"). The legislative history of Section 19(d) as reviewed by the court in *Islander East* reveals that Congress's main concern was the *sheer length* of cumulative time involved with agency decision review at multiple successive levels. *See* 482 F.3d at 90-91. EPAct was passed under the backdrop of projects being *denied* federally required permits, and was therefore designed to preserve states' authority, to prevent states from unjustifiably blocking projects, and to provide for expedited federal judicial review of a project:

> The EPAct resolved a number of important issues…. Although Congress's grant of "exclusive authority" to FERC in siting decisions precluded the states' imposition of state law requirements, **the EPAct preserved the states' authority under several federal environmental laws** to require project proponents to obtain a state compliance certification. **But to prevent states from using this authority to block [natural gas] projects completely**, … the EPAct allowed for federal judicial review of an order or action of a "State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval," Pub. L. No. 109-58, § 313, 119 Stat. at 689-90, codified at *15 U.S.C. § 717r(d)(1)*; *see Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot., 482 F.3d 79, 85 (2d Cir. 2006)* (**stating that legislative history confirms that this provision was enacted to allow expedited federal judicial review of a state's denial of a required federal permit**); *see also Dweck, Wochner, & Brooks, supra, at 482-83* (noting that the conflict between Islander East and Connecticut led Congress to enact *§ 717r(d)*).

Columbia Riverkeeper, 761 F.3d at 1088 (emphasis added).

The EPAct thus did not contemplate that an ongoing state review should be interrupted by an expedited federal judicial review. *See Columbia*

Riverkeeper, 761 F.3d at 1092 (the Ninth Circuit court recognized that its interpretation of § 717r(d)(1) was consistent with other operative sections of the NGA: "Although § 717r(b) permits federal court review of 'an order' issued by FERC, the Supreme Court (as well as our sister circuits and our own precedents) read this language as authorizing judicial review only over final orders. In adding § 717r(d)(1) to § 717r when it enacted the EPAct, Congress did not give any sign that it intended federal courts to exercise a broader scope of review over non-FERC decision than over FERC decisions.") (internal citations omitted).

Moreover, EPAct did not diminish or undermine the explicit statutory requirement that the states undertake a full and complete review pursuant to the CWA. The NGA provides that "[e]xcept as specifically provided in" the NGA, "nothing in this chapter affects the rights of States under . . . the [CWA]." 15 U.S.C. § 717b(d). The NGA establishes FERC as the lead agency for "coordinating all applicable Federal authorizations." 15 U.S.C. § 717n(b)(1). In conjunction with FERC's review of an interstate natural gas project application, FERC requires that the project comply with the requirements of all relevant federal laws, including the CWA. *Islander East*, 482 F.3d at 84.

Accordingly, the NGA expressly preserves the rights of states under the CWA. *See* 15 U.S.C. § 717b(d)(3); *see also AES Sparrows Point LNG, LLC*

v. Wilson, 589 F.3d 721 (4th Cir. 2009) (upholding the State of Maryland's denial of a WQC for a Commission approved liquefied natural gas terminal and related interstate pipeline); *Islander East*, 467 F.3d 295; *Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141 (2d Cir. 2008). Applicants are obligated to seek certification from the "[s]tate in which the discharge originates." 33 U.S.C. § 1341(a)(1).

The Supreme Court explained that Congress provided states with authority "to enforce 'any other appropriate requirement of State law,' 33 U.S.C. § 1341(d), by imposing conditions on federal licenses for activities that may result in a discharge."[7] *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 547 U.S. 370, 386 (2006) (State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution). Section 401(a) forbids a federal agency from granting a "license or permit" unless the certification has been first obtained or waived, and prohibits the issuance of a license or permit where the state has denied certification. *Id*.

[7] The Court noted: "No [person] will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No [person] will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements." 116 Cong. Rec. 8984 (1970)." *Id.*

Thus, EPAct and the CWA seemingly create a symbiotic regulatory context in which the states have a right to protect their waterways and project developers have rights to an expedited judicial review in this Court. Applicants for water quality certification are explicitly required to comply with state water quality standards as part of their federal permits. *See* 33 U.S.C. § 1341(d). Section 401(d) states that any certification may include "any other appropriate requirement of State law set forth in such certification and shall become a condition on any Federal license or permit, subject to the provisions of this section." 33 U.S.C. § 1341(d); *see also PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 707-708, 711 (1994) (explaining that Section 401(d) "expands the state's authority to impose conditions on the certification of a project," including "appropriate state law requirements").

It is this federally mandated federal-state partnership that provides the regulatory context for this case. The MassDEP exercises delegated authority to issue, condition, or deny water quality certifications. Mass. Gen. L. c. 21, §§ 26-53, 314 C.M.R. § 4.00 *et. seq.*, and 314 C.M.R. § 9.00 *et. seq.* Any Section 401 water quality certification must comply with those provisions, including provisions relating to the DEP's adjudicatory process and its issuance of a final permit.

The EPAct did not change this requirement. Indeed, the risk of such delay, as contemplated by EPAct, is not at issue in the present case. The Commissioner is scheduled to issue a final decision by April 3, 2017. All parties agree that there is no state judicial review of MassDEP's final permit. [Citizens' Memo. pp. 6-7; Opp. Memo. pp. 9-10]. Moreover, Tennessee Gas could have but did not request expedited consideration—its failure to do so should preclude any assertion that the MassDEP process will in some way materially delay its project.

Accordingly, this Court should allow MassDEP to continue its ongoing process as set forth in the CWA and pursuant to MassDEP's delegated authority. Alternatively, this Court should rescind the Certification or remand this matter to the MassDEP as set forth *infra*, in Section II.

FERC Process.

The FERC Certificate was issued on March 11, 2016, and approved the construction and operation of the Project, subject to conditions, including obtaining necessary federal authorizations. [FERC Certificate ¶ 34]. FERC will not authorize the construction of the Project until all applicable federal authorizations are received. This includes permits under section 404 of the CWA and those required under federal law as delegated to state agencies, such as the Water Quality Certification, air quality permits under the Clean Air Act,

and National Historic Preservation Act section 106 consultations with State Historic Preservation Offices. *Id.* FERC has not authorized construction of this Project.

MassDEP Process.

On or about June 29, 2015, Tennessee Gas filed its Application. Additionally, as part of the Massachusetts Environmental Policy Act ("MEPA") review process, Tennessee Gas submitted a Final Environmental Impact Report ("FEIR") which evaluated the Project's potential environmental impacts, alternative routes, and mitigation programs to address such impacts.

During the written comment period, the Citizens, state and federal agencies, and environmental organizations raised significant concerns including but not limited to: environmental degradation; the impacts of the Project on surface water quality, vernal pools and wildlife habitat as a result of discharge of dredged or fill material to waters of the United States within the Commonwealth, blasting, and other components of the Project; the stated Project purpose; and the sufficiency of Tennessee Gas's alternatives analysis. *See*, *e.g.*, [Letter from Morrical (July 29, 2015)]; [FEIR, Letter from Massachusetts Department of Conservation and Recreation ("DCR") (November 7, 2014)]; [Letter from Army Corps of Engineers (January 15, 2016)]; [Letters from BEAT (July 29, 2015, December 11, 2015, April 19,

2016)]; [Letter from Mass Audubon Society (November 23, 2015)]; [Sandisfield Taxpayers Opposing the Pipeline comments (July 29, 2015).]

On June 29, 2016, MassDEP issued the Certification for the Project. On July 20, 2016, the Citizens timely filed a Notice of Claim with the MassDEP.

On August 8, 2016, MassDEP issued a Scheduling Order and asserted continuing jurisdiction over the Citizens' Notice of Claim by, *inter alia*, scheduling a Pre-Screening/Pre-Hearing Conference ("PHC"). [Scheduling Order, ¶ 2]. Following the PHC, on October 13, 2016, the Presiding Officer issued a Report and Order identifying the issues for adjudication (which include Petitioners' standing, and whether the WQC complies with 314 C.M.R. §§ 4.04, 4.05, 9.05, 9.06, and 9.07), the witnesses for each party (nine total, including expert witnesses for each party), and the schedule for proceeding, all designed to establish a complete record and allow MassDEP to make a fully informed determination of whether a final Certification should be approved. [PHC Report and Order, pp. 5-23.]

RULINGS PRESENTED FOR REVIEW

The ruling presented for review is the initial Certification, issued by MassDEP, approving Tennessee Gas's Application under Section 401 of the CWA.

STANDARD OF REVIEW

Whether this Court has jurisdiction to hear the appeal now — i.e., whether the appeal is ripe — is a question of law subject to *de novo* review. In a recent third circuit case involving issues similar to the present case, the court stated "[a]t the *time of the filing* of the petition, the challenged agency action must be ripe for review." *See Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, Nos. 15-2122, 15-2158, 2016 U.S. App. LEXIS 14508, at *48 (3d Cir. Aug. 8, 2016) (emphasis added). The third circuit also noted that this is an established legal principle with respect to agency law.[8]

If, *arguendo*, this Court determines the appeal is ripe, then this Court reviews the question of whether the Certification was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

---

[8] *See TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 133 (D.C. Cir. 1989) (agency action that was not final at the time of filing of petition may only be reviewed upon the filing of another petition); *W. Union Tel. Co. v. FCC*, 773 F.2d 375, 378 (D.C. Cir. 1985) (court lacked jurisdiction over a challenge to a now-final agency action that was filed before action became final); *Pennzoil Co. v. FERC*, 645 F.2d 394, 398 (5th Cir. 1981) (requirement that an agency's action be ripe for judicial review before merits of any review petition will be addressed is one which applies to action of other agencies as well as that of FERC)." *Id.* at *48, fn. 91.

SUMMARY OF ARGUMENT

The Citizens submit that MassDEP has the authority to conclude its administrative review, by conducting an adjudicatory hearing and issuing a Final Decision from its Commissioner thereon, and this Court does not have jurisdiction until such time as the MassDEP issues a final decision on the Citizens' timely filed Notice of Claim. The federal courts that have reviewed similar questions have determined that a **final** agency order is required. The MassDEP's determination by regional staff at this early stage of review is not a final order. Accordingly, the Court should dismiss the Citizens' Petition as premature, without prejudice.

In the event that the case is deemed jurisdictional to this Court at this time, the Citizens submit that MassDEP failed to consider certain requisite information and criteria in its review, and acted unlawfully in certifying that the Project complied with Massachusetts' water quality standards. MassDEP specifically failed to enforce 314 C.M.R. §§ 4.00 and 9.00 when MassDEP issued the Certification.

In Massachusetts, a Certification cannot be issued prior to MassDEP insuring that a proposed project meets the standards outlined in Mass. Gen. L. c. 21, §§26-53, 314 C.M.R. § 4.00 *et. seq*., and 314 C.M.R. § 9.00 *et. seq*. MassDEP's failure to apply the standards and criteria set forth in its own

regulations renders the Certification unlawful. Specifically, the Certification authorizes construction and operational activity that is prohibited by Massachusetts' water quality standards. The Certification contravenes the MassDEP regulations prohibiting discharge of dredged or fill material where there exists a practicable alternative with less adverse impact on the aquatic ecosystem, as is the case here. 314 C.M.R. § 9.06(1); *see also* 314 C.M.R. § 9.07(1); 314 C.M.R. § 4.04(5)(a)(2). Among other things, the MassDEP failed to adequately consider alternatives to the Project which would temporarily discharge dredged or fill material to sensitive resource areas and alter significant vernal pool habitats, surface water impacts of Project discharges, and blasting. Add.73-74.

Citizens respectfully request that the Certification be rescinded, or remanded to ensure compliance with Massachusetts' water quality standards.

ARGUMENT

I. THIS COURT SHOULD DISMISS THE APPEAL AS PREMATURE.

A. Applicable Precedents Require A Final Order Or Action.

The Certification is not a final order or action as required by § 717r(d)(1). Federal courts have uniformly determined "order or action" means a final order or action. *See Columbia Riverkeeper*, 761 F.3d at 1097 (dismissing administrative appeal of Coast Guard's letter of recommendation to court of appeals under 15 U.S.C. § 717r(d)(1), holding that a "letter of recommendation" was not a final agency order or action "to issue, condition, or deny any permit, license, concurrence, or approval"). No case has established jurisdiction in a U.S. Court of Appeals for review under the NGA at a stage comparable to what is underway at MassDEP at this time.

Most recently, the Ninth Circuit undertook a comprehensive review of 15 U.S.C. § 717r(d)(1) and following its review of the plain meaning and overall statutory scheme determined that a final order or action was required. First, the Court determined that key terms that are not defined in the applicable jurisdictional section in the Clean Water Act must be given their common meaning:

> [§ 717r(d)(1)] does not define the terms "order or action" or "permit, license, concurrence, or approval," and so we interpret these words according to "their ordinary, contemporary, common meaning." In making this interpretation, we give due consideration to the context of these words "with a view to their place in the overall statutory scheme."

Columbia Riverkeeper, 761 F.3d at 1091 (internal citations omitted).

The Ninth Circuit was mindful of the Supreme Court's holding that "[t]he strong presumption is that judicial review will be available only when agency action becomes final." *Id.* at 1091-1092 (quoting *Bell v. New Jersey*, 461 U.S. 773, 103 S. Ct. 2187, 76 L. Ed. 2d 312 (1983) (citations omitted). "This long-standing rule of construction reflects the Supreme Court's inference that Congress generally does not intend to 'afford [] opportunity for constant delays in the course of the administrative proceeding,' such as would arise if courts could review every interim agency order or action." *Id.* at 1092 (citing *Metro. Edison*, 304 U.S. at 383) (internal quotations omitted).

The Ninth Circuit concluded that only final decisions are subject to appeal to this Court:

> Nothing in § 717r(d)(1) overcomes this "strong presumption." *Bell*, 461 U.S. at 778. Congress's intent to authorize judicial review over only final orders or actions is strongly supported by the language of § 717r(d)(1), which limits judicial review to those agency decisions that "issue, condition, or deny any permit, license, concurrence or approval," **the sort of final decisions that occur at the conclusion of an administrative process.**

Columbia Riverkeeper, 761 F.3d at 1092 (emphasis added).

Continuing, the Ninth Circuit held that

> … **§ 717r(d) authorizes judicial review only over orders or actions that are "final." An action or order is "final when it imposes an obligation, denies a right, or fixes some legal relationship."**

Columbia Riverkeeper, 761 F.3d at 1092-1093 (internal citations omitted) (emphasis added).

Other relevant federal cases have reached similar conclusions regarding the need for a "final" order or action.

In *Islander East*, the United States Court of Appeals for the Second Circuit reviewed an appeal by Islander East Pipeline Company from the final denial of a water quality certification. In that case, unlike the instant case, the Connecticut Department of Environmental Protection ("CTDEP")[9] had completed its internal review, which included a final determination regarding the applicant's request for a declaratory ruling under applicable CTDEP regulations, and the case was thus deemed ripe for review by the U.S. Court of Appeals pursuant to § 19(d) of the NGA, 15 U.S.C. § 717r(d). Significantly, the initial appeal of the CTDEP final agency certification denial had

[9] The CTDEP is now called the Department of Energy and Environmental Protection. We will continue referring to CTDEP for consistency as referenced in *Islander East*.

commenced in the Connecticut Superior Court before the enactment of 15 U.S.C. § 717r(d) and the appeal, after passage of § 717r(d), was subsequently deemed subject to the Court of Appeal's jurisdiction.[10]

Thus, the "appeal" referenced in the above section was in the context of an appeal to the state superior court, following administrative action in Connecticut by the CTDEP. Accordingly, it is beyond dispute that the CTDEP determination was a final order, subject to review, whether by the superior court (prior to EPAct), or by the United States Court of Appeal following its passage. The *Islander East* decision does not stand for the proposition that an appeal is warranted before a final order by the issuing agency, or that the agency review process can be interrupted at an early stage.

In addition, other federal courts following review of similar questions have concluded that final agency action is required before the United States Court of Appeals has jurisdiction. In *Delaware Riverkeeper*, the court enjoined the Pennsylvania Environmental Hearing Board ("EHB") from reviewing a

[10] *Islander East* raised first impression questions of jurisdiction regarding which court — the state appellate court (superior court) or the U.S. Court of Appeals —had jurisdiction. In this context, the *Islander East* court considered the legislative history for guidance with respect to which court (state or U.S. Court of Appeals) had jurisdiction following a final agency determination.

final permit that the state's Department of Environmental Protection ("PADEP") had issued to Tennessee Gas.

In *Delaware Riverkeeper*, the permit under review in Pennsylvania was a final permit and the contested appeal, unlike the present case, was an appeal to a separate administrative agency specifically established to hear appeals of final permits.[11] In this context, the district court declined to allow further appeal of the final permit by PADEP to another state agency, and instead determined that the final permit issued by PADEP was subject to appeal to the U.S. Court of Appeals.

There are significant differences in the regulatory context between the PADEP/EHB process in Pennsylvania and the MassDEP process in the present case. The EHB is completely independent of the PADEP,[12] and undertakes a *de*

---

[11] The district court reviewed a **final** permit issued by the PADEP and the question in that case was whether a **final** PADEP permit was more appropriately before the EHB or the U.S. Court of Appeals. The reference to a "final agency decision" (*i.e.*, "[Section 717r(d)(1)] does not mandate that judicial review wait until a *final* agency decision has been rendered…"), referred to an EHB 'final agency decision', and not to the PADEP. *Delaware Riverkeeper*, 921 F. Supp. 2d at 391.

[12] Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 Penn. Stat. §§ 7511-7516.

novo review[13] as a reviewing body, following a final PADEP "action." The EHB rules define action as "[a]n order, decree, decision, determination or ruling by the [PADEP] affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification," and allow subject matter jurisdiction **only over final PADEP** actions adversely affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person. 25 Pa. Code § 1021.2(a); *see also Stanley R. Jake*, 2014 EHB at 59. Moreover, the EHB acknowledges that it is required to independently review a final permit.[14]

---

[13] As the EHB has stated: "[T]he [EHB] conducts its hearings de novo. We must fully consider the case anew and we are not bound by prior determinations made by [PADEP]. Indeed, we are charged to "redecide" the case based on our de novo scope of review. The Commonwealth Court has stated that "de novo review involves full consideration of the case anew. The [EHB], as reviewing body, is substituted for the prior decision maker, [the PADEP], and redecides the case." *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991) (citation omitted). Rather than deferring in any way to findings of fact made by the Department, the [EHB] makes its own factual findings, findings based solely on the evidence of record in the case before it. *See, e.g., Westinghouse Electric Corporation v. DEP, 1999 EHB 98, 120 n. 19*." *Stanley R. Jake v. Pennsylvania*, 2014 EHB 38, 47 (Adjudication issued Feb. 18, 2014)(citing *Smedley v. DEP*, 2001 EHB 131, 156.)

[14] *See Borough of St. Clair v. Pennsylvania*, 2014 EHB 76, 90 (Adjudication issued March 3, 2014) ("…Our responsibility as an independent reviewing agency is [ ] to decide whether the [PADEP'S] *final* action-the one being appealed-was lawful, reasonable, and supported by the facts.") (italics in original) (citations omitted).

The district court recognized the significant powers and independence of the EHB and that the EHB can effectively displace PADEP's final decision and thereby impedes on the jurisdiction of the U.S. Court of Appeals. *See Delaware Riverkeeper*, 921 F. Supp. 2d at 389 ("The EHB's decision is an adjudication [as opposed to a regulation], and constitutes precedent as binding as any other, in that, in a situation which presents the same facts, and applies the same law, it will control the result, until such time as a party argues successfully that it was inaccurate or incorrect.") (Internal quotations and citations omitted).[15]

Thus, the agency appeals process in Pennsylvania is critically distinct from that in Massachusetts, in that the EHB is a separate entity empowered to unilaterally accept, reject, or modify an underlying final PADEP action and as noted below, the MassDEP adjudicatory proceeding is wholly within the agency.

B. The MassDEP Determination is Not a Final Order or Action.

In stark contrast to the facts in *Islander East* and *Delaware Riverkeeper*, the MassDEP has not issued a final permit. Instead, as is discussed *infra*, the Massachusetts regulatory scheme culminates in a final decision that is issued by

[15] EHB's authority includes the power to modify PADEP's action and to direct PADEP as to the proper action to be taken. *See* 35 Penn. Stat. § 7514(a); *see also Pequea Twp. v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998).

the Commissioner of MassDEP following additional deliberate consideration within the MassDEP of the application, the issuance of a regional Certification, and an adjudicatory hearing. The Certification in question was issued by the Western Regional Office of MassDEP and has not yet been reviewed by the Commissioner. Only after the issuance of a final permit, by the Commissioner, are the applicant's legal rights, duties and privileges determined as detailed in *Columbia Riverkeeper*.

Any suggestion by Tennessee Gas to the contrary is belied by a plain reading of the MassDEP regulations. The MassDEP process begins with the filing of an application, which triggers the permit approval process and initiates an "adjudicatory proceeding." MassDEP's regulations at 310 C.M.R. § 1.01 define adjudicatory proceeding as a proceeding "that may culminate in an adjudicatory hearing and the Commissioner's **issuance of a final decision**." 310 C.M.R. § 1.01(1)(c) (emphasis added). Adjudicatory hearing is defined as a hearing under Mass. Gen. L. c. 30A, "where parties may present evidence on issues of fact, and argument on issues of law and fact **prior to the Commissioner's issuance of a final decision.**" *Id.* (emphasis added)

In this case, Tennessee Gas submitted its Application, and following the consideration of the Application, the MassDEP regional staff granted an initial Certification. Add.03. The Citizens then timely filed a Notice of Claim

requesting an adjudicatory hearing on this matter pursuant to 314 C.M.R. § 9.10(1) and, consequently, this permit application is now in the "adjudicatory hearing" phase of the adjudicatory proceeding—which began when MassDEP received a permit application for approval. *See Matter of Palmer Renewable Energy, LLC*, 19 DEP Rptr. 205 (Docket No. 2011-021 & 022, Final Decision) (September 11, 2012) ("…the adjudicatory proceeding starts when the applicant files the permit application, and encompasses both informal and formal hearing steps of the process…[t]he adjudicatory proceeding commenced when the applicant filed the application for [the permit] and sought MassDEP's determination of its right to construct and operate a facility."). *Id.* at 206.

Thus, there is no final decision until the completion of an adjudicatory proceeding. A final decision is "[ ] issued by the Commissioner, consistent with the requirements of 310 C.M.R. § 1.01(14)(b), from which any party may seek **judicial review** pursuant to Mass. Gen. L. c. 30A, § 14(1)." 310 C.M.R. § 1.01(1)(c) (emphasis added) (see also definition therein for "adjudicatory appeal"). The MassDEP regulations by design do not allow the Certification to be effective until the time for appeal at MassDEP has expired, and a final decision is issued: "No activity may begin prior to the expiration of the appeal period **or until a final decision is issued by the [MassDEP] if an appeal is filed**." 314 C.M.R. § 9.09(1)(e) (emphasis added).

Here, consistent with the regulatory framework, Condition No. 15 of Certification states: "No work subject to this Certification, including the cutting of trees, may be conducted prior to the expiration of the Appeal Period set forth below and any appeal proceedings that may result from an appeal." Add.06. Said appeal period and appeal proceedings refer to the notice of claim for adjudicatory hearing in the MassDEP. *Id.* Add.17-19. Thus, MassDEP's regulations and Condition No. 15 prevents the Certification from constituting the issuance of a permit with any legal effect until after the appeal period and after, if timely sought, the adjudicatory hearing and the Commissioner's final decision thereon. After issuance of a final decision, *i.e*. following an adjudicatory hearing at the MassDEP, a person who has the right to seek judicial review of the decision may file an appeal with the appropriate court. *See* 310 C.M.R. § 1.01(14)(f) (generally, agency appeals are to the appropriate Massachusetts Superior Court under Mass. Gen. L. ch. 30A, § 14).

The adjudicatory hearing at MassDEP is an integral part of the administrative process, and should not be conflated with judicial review of state administrative actions, such as by the Massachusetts Superior Court or to the Massachusetts Appeals Court. The Certification remains subject to an ongoing deliberative process by MassDEP, subject to further analysis by MassDEP as provided for in its regulations. Accordingly, there is no final agency action on

this matter and no permit present for the applicant to commence filling or dredging activities in resource areas identified in such a permit. Until the final decision issues, any permit is subject to potential significant change, modification, or even denial during the remainder of the adjudicatory hearing process. It is the role of the Commissioner to issue a final decision stating the conditions to which a permit is subject. In this matter, no "permit" yet exists for the federal court to review. Even assuming that the initial Certification issued is reviewable by this Court, it is defective for the reasons set forth in Section II below.

Moreover, MassDEP's ongoing review, as discussed *supra*, is distinct and distinguished from the agency determinations in similar cases reviewed by federal courts. In each of those cases, the agency determination was complete, and obligations, rights or legal relationships implicated and thus the "order or action" was final as it related to the certification. Here, there is no final permit subject to third party administrative review (such as the EHB), as in *Delaware Riverkeeper* or subject to appellate court review as in *Islander East*. By law, no legal rights, duties or privileges are affected at this stage of the administrative process.

II. IN THE ALTERNATIVE, THE PROJECT FAILS TO SATISFY THE MASSDEP'S WATER QUALITY STANDARDS AND CRITERIA.

A. The Project Has Significant Impacts.

The Project Site in Sandisfield traverses Otis State Forest and is part of an interconnected area of protected open space encompassing more than 8,500 acres, as identified in BioMap2 (a conservation planning tool designation used to describe the most ecologically valuable lands in the Commonwealth by the Massachusetts Division of Fisheries and Wildlife) as a Core Habitat for many species of turtles and dragonflies; other flora and fauna that are significantly impacted by alterations to pristine water resources; and forested exemplary natural communities, which provide buffers to these pristine water resources. [FEIR, Letter from DCR, pp. 2-3]. The Project would have dramatic and significant impacts including: (i) discharges of dredged or fill material to more than ten (10) acres of waters of the United States within the Commonwealth (Add.03); (ii) intense bedrock blasting including within wetlands [Application, Table 5-6]; (iii) alterations to wetlands with vernal pool habitat characteristics [Application, §5.1.4, February 2016 Supplemental Information, Attachment 1, p. 11]; and (iv) withdrawals and discharges of more than 1,000,000 gallons of water for testing protocols resulting in erosion and causing turbid discharges and increased sedimentation to waterbodies including Spectacle Pond Brook

and the Clam River [FEIR, Letter from DCR, p. 1].

The MassDEP is the administrative agency charged by the CWA to issue or deny water quality certifications for projects in the Commonwealth of Massachusetts and to evaluate the impacts from the Project as noted above. *See* Mass. Gen. L. c. 21, §§ 26-53, 314 C.M.R. § 4.00 *et. seq*., and 314 C.M.R. § 9.00 *et. seq*.

As discussed below, the Certification approves a Project that fails to satisfy the standards and criteria set forth at 314 C.M.R. §§ 4.04, 4.05, 9.06 and 9.07, and is thus arbitrary and capacious or otherwise not in accordance with the law. "A decision is arbitrary and capricious 'if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Craker v. DEA*, 714 F.3d 17, 26 (1st Cir. 2013) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Moreover, although reviewing courts are deferential to agencies, they must still undertake a thorough evaluation of the agency decision based on the record, and "… determine whether the decision was based on a consideration of the relevant factors and whether the agency made a clear error of judgment."

Airport Impact Relief, Inc. v. Wykle, 192 F.3d 197, 202 (1st Cir. 1999) (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989)).

> While this is a highly deferential standard of review, it is not a rubber stamp. The reviewing court must undertake a 'thorough, probing, indepth review' and a 'searching and careful' inquiry into the record. Only by carefully reviewing the record and satisfying itself that the agency has made a rational decision can the court ensure that agency decisions are founded on a reasoned evaluation of the relevant factors.

Id. at 378 (citations omitted).

MassDEP's Certification is unlawful for the reasons set forth below.

B. MassDEP's Decision is Unlawful Because the Alternatives Analysis Is Deficient and Ignores the Regulatory Standards.

MassDEP's regulations require an analysis of practical alternatives: "[n]o discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge that would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 314 C.M.R. § 9.06(1); *see also* 314 C.M.R. § 9.07(1) (providing that "[n]o dredging shall be permitted if there is a practicable alternative…"); 314 C.M.R. § 4.04(5)(a)(2) (providing that Certification may be issued where "[n]o less environmentally damaging alternative site for the activity, receptor for the disposal, or method of

elimination of the discharge is reasonably available or feasible.").[16] The regulations further provide that:

> Where the activity associated with the discharge does not require access or proximity to or siting within wetlands and waters to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve the discharge of dredged or fill material are presumed to be available, unless clearly demonstrated otherwise. In addition, all practicable alternatives to the proposed activity, which do not involve a discharge, are presumed to have less adverse impact on the aquatic ecosystem unless clearly demonstrated otherwise.

314 C.M.R. § 9.06(1)(a).

"The scope of alternatives to be considered shall be commensurate with the scale and purpose of the proposed activity, the impacts of the proposed activity, and the classification, designation and existing uses of the affected wetlands and waters in the Surface Water Quality Standards at 314 C.M.R. § 4.00 …" 314 C.M.R. § 9.06(1)(b). *See also Matter of Giombetti*, 8 DEP Rptr. 29 (Final Decision, Docket Nos. 97-169, 97-185) (February 6, 2001) (the MassDEP Commissioner determined that a practicable alternative did exist at the time the applicant was contemplating construction of its new headquarters, and the water quality certification was denied).

---

[16] The term "aquatic ecosystem" is defined at 314 C.M.R. § 9.02 as "Waters of the United States within the Commonwealth, including wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals."

In the present case, the Project fails to satisfy the criteria set forth at 314 C.M.R. § 9.06(1) and 9.07(1), as there are practicable alternatives to the proposed discharge to waters of the United States within the Commonwealth, including Bordering Vegetated Wetlands ("BVW"), Isolated Vegetated Wetlands ("IVW") and Land Under Water ("LUW"), and dredging of LUW, that would have less adverse impact on the aquatic ecosystem without other significant adverse environmental consequences. The Project does not involve a water dependent activity, so practicable alternatives that would avoid discharge of dredged or fill material are presumed to exist. 314 C.M.R. § 9.06(1)(a). Tennessee Gas's analysis of alternatives does not address practicable alternatives from the start of planning to the time of MassDEP's issuance of the Certification, and essentially presents the preferred option as the only option. Furthermore, the scope of alternatives produced by Tennessee Gas in its Application was not commensurate with the scale and purpose of the Project, which proposes to discharge dredged or fill material to more than ten (10) acres of waters of the United States within the Commonwealth. 314 C.M.R. § 9.06(1)(b). Add.03. In its analysis, Tennessee Gas simply presented MassDEP with a *fait accompli* and rejected alternatives based upon self-serving reasoning, conclusory statements and hypothetical outcomes, as illustrated below. [Application, p. 3-1, App. B-1].

For example, Tennessee Gas rejected the "no-build" or "no-action" alternative, without analysis, because "the market served by the Project may experience energy shortages and reliability challenges in times of peak demand, or users may revert to the consumption of alternative fuels…" [Application, p. 3-1] (emphasis added). Similarly, Tennessee Gas stated that although "increases in renewable energy sources such as solar and wind power have made great advances in Massachusetts, these increases will not be able to offset the need for the Project," and that "energy conversation alone, or in concert with renewable sources, will not satisfy the current energy demand of consumers, or the growth demands, served by this Project." [Application, p.3-1].[17] According to Tennessee Gas, foregoing this Project "would not avoid the impacts of the infrastructure development" because the additional pipeline must be built to meet demand, meaning the no-build alternative "would divert the impacts of this expansion to other locations that may result in greater impacts." [Application, App. B-1, §1.5]. (emphasis added).

The lengthier discussion provided in the "Project Alternatives" set forth in Appendix B-1 similarly concludes that the proposed route is the "preferred

[17] Comments to MassDEP correctly noted that the Tennessee Gas's stated purpose, and bald rejection of the roles of renewable energy sources that would undercut that purpose, are contrary to the Massachusetts' Global Warming Solutions Act and a study performed by the Attorney General in the fall of 2015. [BEAT July 29, 2015 Comment, p.1.]

route" based upon Tennessee Gas's superficial analysis of alternatives; Tennessee Gas presented no meaningful, objective support for the conclusions set forth in that document. [Application, App. B-1]. For instance, Tennessee Gas recognized that viable "System Alternatives" making use of existing or proposed pipeline "would make it unnecessary to construct all, or part, of the proposed Project," but rejected this alternative based upon hydraulic modeling "used in combination with Tennessee's vast experience with pipeline and compression installation and operations…" [Application App. B-1, §1.2]. Similarly, other Tennessee Gas evaluations lack detailed analysis and support. *See* [Application App. B-1, §1.3.1.1] (no possible alternative location on route of existing pipeline between Town Hill Road and Station 261 in Agawam and no alternative to the west because "three existing pipeline facilities are already located along this section of ROW.")

Rather than improving the efficiency of its existing pipeline infrastructure, which is already so extensive that its existence restricts the options for building more, Tennessee Gas unilaterally rejected viable alternatives and presented MassDEP with no meaningful alternatives. MassDEP's acceptance of Tennessee Gas's artificial limitation on the scope of its alternatives analysis is arbitrary and capricious. Add.03.

With respect to alternative pipeline routes that would avoid DCR land, Tennessee Gas's alternatives analysis provided no meaningful options. The two alternative routes were 14.05 and 11.43 miles in length respectively (compared to the proposed route's 3.81 mile length); neither alternative route was within or adjacent to the existing Right of Way; and the environmental impacts from both alternatives would have been far greater. [Application, App. B-1, §1.3.1.4].

Tennessee Gas rejected a roadway alternative, however, which would have drastically reduced impacts (both temporary and permanent) to wetlands by placing the pipeline within existing local roads. [Application, App. B-1, §1.3.1.5]. The stated reasons for rejecting this alternative were "impacts to residences, required forest clearing adjacent to the road and disruption to area roadways and the general public during construction." [Application, App. B-1, §1.3.1.5]. These are not factors set forth in MassDEP's regulations, and cannot reasonably serve to be the basis for evaluation or rejection by MassDEP.

In short, Tennessee Gas rejected the roadway option, a practicable alternative to the proposed discharge which would have met the regulatory goal of decreasing negative impacts to the aquatic ecosystem without introducing other environmental harm, based upon factors not set forth in the regulations. *See* 314 C.M.R. § 9.06(1). MassDEP's determination that the Project proposes "the 'least environmentally damaging practicable alternative,' and therefore

meets the criteria at 314 C.M.R. § 9.06(1)," is therefore arbitrary and capricious. Add.03.

The record reflects comments highlighting these shortcomings, which MassDEP ignored. In a letter dated January 15, 2016, the Army Corps of Engineers indicated that Tennessee Gas had failed to perform a sufficient alternatives analysis for CWA purposes. Specifically, Tennessee Gas had not established that there are no "practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences," as is required by 314 C.M.R. § 9.06(1). Specifically:

> During field coordination we pointed out several instances where reconfiguration of temporary work space (TWS) and alternate temporary work space (ATWS) in wetlands appeared practicable. It seems that the July 2014 analysis submitted with the U.S. Army Corps of Engineers (Corps) application and the Connecticut 401 Water Quality Certification application is limited to an analysis of options to address system and route variations within the FERC process or concerns raised by abutters/property owners in Sandisfield, Massachusetts. The September 30, 2015 Draft Environmental Impact Report submittal to Massachusetts Dept. of Environmental Protection (MassDEP) addresses an alternative to crossing of the Massachusetts Dept. of Conservation and Recreation property in Sandisfield. The November 16, 2015 submission to the Corps and MassDEP addresses only reduction in TWS and ATWS for Spectacle Pond Brook and specific areas in Sandisfield, Massachusetts. **These submittals do not adequately document what measures and industry-specific best management practices (e.g. HDD, consolidating stockpile & staging) were considered, otherwise built into the project**

> **design or deemed impracticable to avoid or minimize impact to various individual wetland and waterway crossings.** However, the revisions do imply that such site-specific modifications or minor route reconfiguration (cross-over) to reduce TWS/ATWS in wetland areas (especially WMA-7 and WMA-18 and VPCT-7-1, VPCT-9, VPCT-13, VPCT41-1, VPCT-49 and VPCT-51) may be both feasible and practicable in other location. (emphasis added).

Add.78.

The Army Corps letter goes on to note that Tennessee Gas failed to "clearly document how an analysis of alternatives considered and implemented, or ultimately discounted, modification of the size and/or configuration of TWS/ATWS areas or use of alternate technology/construction practices to avoid/minimize each impact to wetland and waterways in both Massachusetts and Connecticut." Add.78.

The Army Corps also stressed the importance of evaluating all wetlands and waters equally to avoid and minimize adverse impacts. Doing so is "crucial for special aquatic sites, such as vernal pools or streams that possess riffle and pool habitat," and the Corps called on Tennessee Gas to identify in its analysis "all measures considered, and/or ultimately taken, by Tennessee Gas during the design/layout process to remove or address engineering constraints to wetland avoidance and minimization." Add.78.

Similarly, the DCR requested a "fuller discussion of alternative locations, as well as detailed criteria for evaluation, because clear cutting, blasting,

grading, trenching and compaction of DCR lands will change the habitat types, functions and values, and affect biodiversity on this conservation land." [FEIR, Letter from DCR, p.2]. DCR further stated that although Tennessee Gas ostensibly presented "three alternatives to avoid DCR land," the alternatives analysis "fails to compare the ecological quality of impacted resources of the Preferred Alternative located on DCR property" with two of those alternatives, and rejected the third option for work in roadways due to resident opposition. *Id*.

The Berkshire Regional Planning Commission ("BRPC") also recognized the insufficiency of Tennessee Gas's alternatives analysis. The Berkshire Regional Planning Commission called for Tennessee Gas to "provide a more complete alternatives analysis in order to ascertain which alternative minimizes overall impacts to land, Article 97 and conserved land, wetlands, and rare species," while detailing "trade-offs … such as increased impacts on some resources to avoid impacts to other resources … ." [FEIR, Letter from BRPC, p.10 (November 7, 2014)].

Other public comments pointed out the fact that Tennessee Gas did not adequately evaluate an alternative to build additional infrastructure in Connecticut, and avoid construction and resulting degradation of water quality in Massachusetts, despite the fact that the additional pipeline capacity created

by this Project is under contract with three Connecticut utilities. [FEIR, Letter from BEAT, p. 3, section B-10 (November 7, 2014)]; [Application, p.1-2]. The Connecticut alternative suggested by these comments is not an abstract or hypothetical location for the proposed facilities; at the time that the Application was submitted, Tennessee Gas was planning to construct a pipeline loop in Connecticut as part of a separate project (the Northeast Energy Direct project) to serve two of the same Connecticut utilities.[18] That project was cancelled while the Application was still pending at MassDEP, yet the loop that had been researched and promoted in Connecticut was never revisited as an alternative to the Project at issue. This failure to consider alternatives in Connecticut runs afoul of the standard set forth at 314 C.M.R. § 4.04(5)(a)(1), which requires that an applicant establish that the proposed discharge to protected waters "is necessary to accommodate important economic or social development in the area in which the waters are located."

---

18 Specifically, comments submitted to MEPA pointed out that "just south of the Agawam loop included in this DEIR, [the Applicant] is proposing another loop to be included with its Northeast Energy Direct project. Why is a loop in Connecticut being included with a project that proposes to run from Pennsylvania, through New York, then across the northern tier of Massachusetts? Why was this loop not considered as an alternative to the Sandisfield loop? And if they neglected to mention this possibility, how many other possible loops are they neglecting to mention?" [FEIR, Letter from BEAT, p. 3, section B-10].

Tennessee Gas's February 2016 submittal to MassDEP is not sufficient to remedy these shortcomings. This submittal responded to MassDEP's request for information, which sought information on Tennessee Gas's preferred option (assessing reductions of proposed workspace and construction methodology), but did not require additional information regarding alternatives that would have avoided DCR land. [Correspondence from MassDEP to Tennessee Gas, January 6, 2016 p. 2]. Tennessee Gas did not provide substantive and quantitative information necessary to support its conclusions or meaningfully compare the alternatives. Rather, as detailed above, it offers self-serving statements and conclusory statements to support dismissal of alternate routes.

For instance, in response to one public comment regarding a co-location alternative (placing the new pipeline in the ROW for the existing pipeline to reduce impacts), Tennessee Gas admits that "co-location reduces the amount of new impacts to previously undisturbed areas resulting from construction and operation of pipeline facilities," but does not adequately explain why this alternative is rejected. [FEIR, March 2015, Table 8-11, Response to Comments from Susan Baxter, November, 2014]. It appears that Tennessee Gas made only one variation to the route as a result of comments on its proposal, which is described in its Alternatives Analysis. [Application, App. B-1, §1.3.2]; [February 2016 Letter from Tennessee Gas to MassDEP, Attachment 1].

MassDEP, in issuing the Certification, failed to properly consider less environmentally damaging alternatives for the Project, thereby failing to satisfy the standard set forth in the regulations and is arbitrary and capricious. The MassDEP ignored less environmentally damaging alternative routes or designs for the Project that were suggested in public comments and specifically identified by the Army Corps of Engineers, DCR, and others, but were not properly considered and addressed by Tennessee Gas or MassDEP. MassDEP improperly relied upon 314 C.M.R. § 9.09(1)(d) in determining that proposed restoration, enhancement and preservation satisfies the criteria set forth at 314 C.M.R. § 9.06(2).[19] Add.03. The Citizens intend to present evidence relating to alternatives as part of the ongoing process underway at MassDEP. MassDEP's determination, based upon its limited analysis to date, ignores the standards established by its own regulations, and is arbitrary, capricious or otherwise not in accordance with law.

[19] 314 C.M.R. § 9.09(1)(d) provides that a Certification must contain "any conditions deemed necessary by the Department to insure maintenance or attainment of water quality, minimization of any damage to the environment that may result from the project, or compliance with any applicable provisions of Massachusetts law that the Department is authorized to administer." However, as discussed in public comments, MassDEP itself has recognized that reliance on off-site replication and mitigation in insufficient. *See* [Letter from Massachusetts Audubon Society, p.3 (November 23, 2015)]; *see also* [BEAT December 11, 2015 comment].

C. MassDEP's Decision is Unlawful Because it Results in Unacceptable Unnecessary Environmental Degradation.

Section 9.06(7) of 314 C.M.R. requires that "[n]o discharge of dredged or fill material shall be permitted in the rare circumstances where the activity meets the criteria for evaluation but will result in substantial adverse impacts to the physical, chemical, or biological integrity of surface waters of the Commonwealth." These types of impacts are more specifically incorporated in other sections of the regulations, including 314 C.M.R. § 4.05(3)(b), which addresses the temperature of Class B waters such as those affected by the Project. This provision protects against temperature fluctuations in several ways, including a prohibition on "changes from natural background conditions that would impair any use assigned to this Class, including those conditions necessary to protect normal species diversity, successful migration, reproductive functions or growth of aquatic organisms." 314 C.M.R. § 4.05(3)(b)(2). Similarly, 314 C.M.R. § 9.06(2)(b)(2) provides that, to obtain approval for a discharge of dredged or fill material associated with construction of a new non-tidal crossing, an applicant must establish that the crossing satisfies the Massachusetts stream crossing standards.

The Certification allows work that will result in substantial adverse impacts to the physical, chemical and biological integrity of surface waters of the Commonwealth and accordingly is arbitrary, capricious or otherwise not in

accordance with law. Blasting threatens to alter the physical characteristics of the waters and wetlands by fracturing bedrock and altering the flow of groundwater and surface water, redirecting it away from wetlands. Tree-cutting and destruction of other vegetation along the Site will change thermal conditions in nearby waters by removing or reducing shade and increasing water temperatures, harming the habitat function of vernal pools, streams and tributaries, particularly cold-water fisheries like Worthington Brook.[20] These impacts are reflected in DCR's comments, which state that "clear-cutting, soil disturbance, and trenching of the extremely steep slopes within the Project area pose serious risks for erosion and sedimentation of nearby wetlands, streams, and upland habitats." [FEIR, Letter from DCR, p. 4].

1. Trenching and Blasting Will Harm Wetlands and Fail to Satisfy Water Quality Standards.

Tennessee Gas failed to produce a sufficient operation and maintenance plan or establish that the Project complies with Massachusetts stream crossing standards. 314 C.M.R. § 9.06(2)(b)(1 and 2) and 9.07(1). For instance, the proposed trenching of stream crossings (such as Spectacle Pond Brook) "is a highly impactful construction technique involving significant disturbance of the

[20] The MassDEP identified Spectacle Pond Brook as a cold-water fishery in the Certification, however, it is unclear whether this designation is accurate. Add.14-15. Regardless, it appears that the MassDEP disregarded impacts to a water body that it believed to be a cold-water fishery.

existing stream bed and potential long-term flow disruption, destruction of riparian vegetation" which presents significantly greater disturbance and impacts than alternative trenchless techniques. [Letter from New York State Department of Environmental Conservation, p.8 (April 22, 2016)].

Indeed, DCR requested that Tennessee Gas "should evaluate using special construction techniques" for the Spectacle Pond Brook crossing, including "use of a temporary bridge spanning the brook for passage of construction equipment, proper timing to avoid high flows, minimizing stream crossing widths, using the existing ROW as much as possible, and avoiding impacts to riparian trees marked in the field with DCR staff …" [FEIR, Letter from DCR, p.3]. Trenching of the steep slopes within the Project area is likely to contribute to erosion and sedimentation of nearby wetlands, streams, and upland habitats. *Id.*

The Project is expected to require blasting to install the pipeline below Spectacle Pond Brook (and elsewhere on the Site), but Tennessee Gas's generic Blasting Plan lacks information regarding specific blasting locations. [Application, §5.3]. Tennessee Gas has identified fifteen locations where bedrock blasting will likely be required, totaling approximately 20,064 feet in length. [Application, Table 5-6]. Of those fifteen areas, seven are categorized as "high probability" that bedrock will be encountered, six are categorized as

"moderate probability," and two are categorized as "low probability." *Id.* One "high probability" location is identified as being within wetlands, while another "moderate probability" location is identified as being partially within wetlands. *Id*.

The New York State Department of Environmental Conservation ("NYSDEC") denied a water quality certification for a pipeline earlier this year in part because, as in the present case, "[t]he Blasting Plan does not provide site-specific information where blasting will occur but instead provides a list of potential blasting locations based on the presence of shallow bedrock." [Letter from NYSDEC, p.13]. Unlike MassDEP, however, NYSDEC was "unable to determine whether this Plan is protective of State water quality standards and in compliance with applicable State statutes and standards." *Id*.

Tennessee Gas's Blasting Plan also lacks sufficient information to determine what impacts would result from blasting. [Application, §5.3]. For example, the Application recognizes that significant impacts from blasting "within or downslope of a wetland could be carrying away or redirecting surface water or groundwater from the wetlands by flow into and through the pipeline trench itself," and that "there is potential for water from wetlands to flow into the trench after construction is completed through fractures in the bedrock and be conveyed away from the wetland." [Application, §5.3.1.1].

Impacts from blasting upslope of a wetland may include "reduction of surface water recharge to the wetlands by carrying away surface water or groundwater that enters into and through the trench, water which otherwise contribute to the recharge of wetlands." Despite stating precautions to prevent these impacts, blasting is an inherently dangerous and imprecise method which will result in lateral fracturing of bedrock. [Application, §5.3.1.2].

The Blasting Plan focuses primarily on physical safety and compliance with state and federal standards, but does not provide sufficient information to determine whether blasting protocols would be adequate to protect water quality standards.[21] Therefore, MassDEP lacked sufficient information to issue the Certification. Citizens will provide additional information at the MassDEP adjudicatory hearings relating to blasting impacts. MassDEP's issuance of the Certification is arbitrary, capricious or otherwise not in accordance with the law.

---

[21] Blasting is a particular sensitive issue, not only because of the potential impacts to water quality, but because prior blasting by Tennessee Gas in Sandisfield ruptured the pipeline and required evacuation of residents. *See* [FEIR, Letter from BRPC]; FEIR, Letter from BEAT]. As recognized by the BRPC, a blasting impact zone analysis addressing "the possibility that a blasting incident might have impacts on the existing pipelines" and "quantifying the amount of impact for various land uses … ." [FEIR, Letter from BRPC, p.12].

2. Tree Cutting Will Harm the Physical and Chemical Characteristics of Surface Waters.

The Project fails to satisfy the criteria set forth at 314 C.M.R. § 9.06(7) and 4.05(3)(b)(2) for other reasons, as the Certification allows work that will result in substantial adverse impacts to the physical, chemical and biological integrity of surface waters of the Commonwealth. Tree-cutting and destruction of other vegetation along the site will change thermal conditions in nearby waters by removing or reducing shade and increasing water temperatures, harming the habitat function of vernal pools, streams and tributaries, particularly cold-water fisheries like Worthington Brook. *See* [Affidavit of David Foulis, pp. 4-5].

Clear-cutting of trees within the Project area creates the likelihood of erosion and sedimentation of nearby wetlands, streams, and upland habitats. [FEIR, Letter from DCR, p.4]. DCR recognized that "[a]ll streams with the Project area are tributaries to the Clam River and are important to cold and warm water fisheries, protection of water quality, groundwater, storm damage protection, and a large array of wildlife." [FEIR, Letter from DCR, p.3].

Felling of trees at the Project site will change thermal conditions in nearby waters (by removing or reducing shade and increasing water temperatures), harm the habitat function of vernal pools, streams and tributaries, and increase erosion and sedimentation of nearby wetlands, streams, and upland

habitats. Therefore, the Certification allows work that fails to satisfy the standards at 314 C.M.R. § 9.06(7) and 4.05(3)(b)(2), and is arbitrary, capricious, or otherwise not in accordance with the law.

D. MassDEP's Decision is Unlawful Because It Fails to Protect Habitat and Outstanding Resource Waters Contrary to Its Own Regulations.

As noted above, all of the streams in Sandisfield affected by the Project are tributaries to the Clam River, and along with the Worthington Brook in Agawam, are considered important to protection of cold and warm water fisheries, water quality, groundwater, and wildlife. [FEIR, Letter from DCR, p.3]. The "wetlands, streams and springs in the Project areas are important for the protection of groundwater quality, storm damage prevention, flood control, pollution prevention, wildlife habitat, and fisheries." [FEIR, Letter from DCR, p.4]. Furthermore, the Project would negatively affect wildlife and its habitat, as "[f]isheries and aquatic invertebrates are highly sensitive to increases in siltation and water temperature, changes in hydrology, and loss of forested riparian habitats that often result from construction disturbance." [FEIR, Letter from DCR, p.3].

1. The Project Fails to Satisfy MassDEP's Regulations by Discharging to Wetlands Containing Vernal Pools Without a Variance.

The Project fails to satisfy the criteria set forth at 314 C.M.R. § 9.06(3), which prohibits discharge of dredged or fill material to Outstanding Resource Waters without a variance. Outstanding Resource Waters are defined to include vernal pools. 314 C.M.R. § 4.06(2).

Specifically, "[w]ork is proposed to occur within portions of wetlands which contain vernal pool habitat. Ten wetlands with vernal pool habitat characteristics have proposed impacts as a result of the Project." [Application, §5.1.4]. The Project will have a heavy impact on wetlands containing vernal pool habitat: workspace impacts will total 285,158 square feet; operational impacts will total 67,171 square feet; and permanent access roads will total 4,635 square feet. [Application, Table 5-5]. Indeed, in its February 2016 submittal to MassDEP, Tennessee Gas indicates that operational impacts will result in *alteration of 1.02 acres of vernal pool habitat in four separate wetlands* in Massachusetts, and clarifies that "operational impacts" means impacts to wetlands in permanent workspace. [Application, February 2016 Supplemental Information, Attachment 1, p. 11].

The Certification approves plans that propose discharges within (and within extremely close proximity to) no fewer than ten wetlands containing

vernal pools and associated habitat, which should properly be classified as Outstanding Resource Waters, without requiring a variance. [Application, Table 5-5]. Indeed, the plans of record indicate that in some places the limit of work is located directly on the boundary of uncertified vernal pools. [Application, App. C-5, F-1]. Tennessee Gas, in undertaking studies to confirm the presence of Vernal Pools but failing to submit data to NHESP to have them certified, intentionally sought to avoid stricter scrutiny and notice requirements by circumventing the MassDEP's jurisdiction over those areas, which are known to have high habitat value.

DCR concurs, disagreeing with Tennessee Gas's characterization of the vernal pools identified along the Project site as "potential" because Tennessee Gas's own "documentation of the obligate species [present in these vernal pools] is evidence that these areas are functioning as vernal pool habitat." [FEIR, Letter from DCR, p.4].

MassDEP acquiesced in Tennessee Gas's characterization of "potential" vernal pools on the Project site, despite the fact that studies confirming the presence of certifiable vernal pools had been completed. As a result, Tennessee Gas was allowed to avoid stricter scrutiny and notice requirements by evading

MassDEP's jurisdiction over those vernal pools.[22] Therefore, the Certification approves a Project that will discharge dredged or fill material to Outstanding Resource Waters without a variance, contrary to the requirements of 314 C.M.R. § 9.06(3). MassDEP's failure to require Tennessee Gas to accurately identify Outstanding Resource Waters, or apply its regulations prohibiting discharges to Outstanding Resource Waters without a variance to do so, is arbitrary, capricious, or otherwise not in accordance with the law.

2. MassDEP Failed to Adequately Protect High Quality Waters and Cold Water Fisheries Pursuant to its Regulations.

DCR recognized that, with respect to Sandisfield impacts, "[a]ll streams within the Project area are tributaries to the Clam River and are important to cold and warm water fisheries." [FEIR, Letter from DCR, p.3]. Worthington Brook in Agawam is a designated cold-water fishery (and, in issuing the Certification, MassDEP apparently believed that Spectacle Pond Brook is a cold-water fishery, too). DCR warned that "[a]ny temporary or permanent impacts to Land Under Water, Stream Banks, and Riverfront Area should be avoided to the maximum extent possible" in order to "protect the water quality,

[22] Tennessee Gas failed to provide Notice in the Environmental Monitor, and should have been required to do so pursuant to 314 C.M.R. § 9.05(3), as the Project proposes discharges within Vernal Pools and their habitat, which are classified as Outstanding Resource Waters.

aquatic and terrestrial habitat potential, and continued integrity of the stream." [FEIR, Letter from DCR, p.3].

As discussed above, the Application does not reflect Tennessee Gas having taken "appropriate and practicable steps" to avoid and minimize potential adverse impacts to BVW, IVW and LUW, and the Project thus fails to satisfy the criteria set forth at 314 C.M.R. § 9.06(2) and 9.07(1). MassDEP's failure to adequately consider the applicable criteria and require Tennessee Gas to avoid and minimize impacts as set forth by DCR is arbitrary, capricious, or otherwise not in accordance with the law.

E. MassDEP's Decision is Unlawful Because It is Inconsistent With Stormwater Management Standards.

The Project fails to satisfy the criteria set forth at 314 C.M.R. § 9.06(5 and 6) and 4.05(3)(b)(7), as the Certification does not require best management practices to attenuate pollutants and provide setbacks from receiving waters or wetlands in accordance with MassDEP's Stormwater Management Standards. Specifically, the proposal to discharge more than 1,000,000 gallons of water after pumping it from Lower Spectacle Pond for use in hydrostatic testing will result in erosion and cause turbid discharges and increased sedimentation to waterbodies including Spectacle Pond Brook and the Clam River. Similarly, trenching of the steep slopes within the Project area is likely to contribute to erosion and sedimentation of nearby wetlands, streams, and upland habitats.

[FEIR, Letter from DCR, p.3]. In addition, the Certification does not require that the water be tested for chemical contamination after contact with the lining of the pipeline prior to discharging the water. As a result, untreated and improperly treated stormwater will be discharged directly to wetlands. The failure to require best management practices is arbitrary, capricious, or otherwise not in accordance with the law.

Thus, the Project fails to satisfy the following standards: Stormwater Management Standard #1 ("prohibits discharge of untreated stormwater directly to or cause erosion in wetlands or waters of the Commonwealth."); Stormwater Management Standard #4 ("requires removal of 80% of the average annual post-construction load of Total Suspended Solids (TSS)."); Stormwater Management Standard #8 (requires an erosion control plan). [Stormwater Management Policy Handbook, Volume 1, Ch.1, pp. 1-2 (February 2008)].

The MassDEP issued the Certification without sufficient information to determine whether the Project is able to meet these standards. Indeed, the Certification simply points to the 2003 National Pollutant Discharge Elimination System program's Construction General Permit, requires that a copy of the Notice of Intent for the Construction General Permit be provided to MassDEP when filed, and reserves MassDEP's right to inspect the Stormwater

Pollution Prevention Plan. Add.16. MassDEP's failure can only be described as arbitrary and capricious, or otherwise not in accordance with the law.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Citizens respectfully request that the Citizens' appeal be dismissed without prejudice, as premature, or alternatively, that this Court stay the Citizens' appeal pending a final decision from MassDEP. In the event the Court does not dismiss or stay, the Citizens respectfully request that the Certification be rescinded or remanded, and any other relief the Court deems just and equitable.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 13034 words, including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Word 2013 in Times New Roman style, font-size 14.

/s/ Richard A. Kanoff

Attorney for Petitioners
Dated: October 14, 2016

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d), that on October 14, 2016, the foregoing Petitioners' Brief was filed through the CM/ECF system and copies will be served electronically through the CM/ECF system on all parties or their counsel of record who are registered as ECF filers [and by electronic mail on non-registered ECF filers as indicated by "*"] as follows:

Counsel for Respondent Tennessee Gas Pipeline Company, LLC:

James L. Messenger, Esquire
Gordon & Rees LLP
21 Custom House Street, 5th Floor, Boston, MA 02110
jmessenger@gordonrees.com

Brian Joseph Wall, Esquire
Gordon & Rees LLP
21 Custom House Street, 5th Floor, Boston, MA 02110
bwall@gordonrees.com

Counsel for Respondent Massachusetts Department of Environmental Protection:

Matthew C. Ireland
Seth Schofield
Assistant Attorneys General
Massachusetts Attorney General's Office
One Ashburton Place, Suite 1800, Boston, MA 02108
matthew.ireland@state.ma.us
seth.schofield@state.ma.us

/s/ Richard A. Kanoff

Attorney for Petitioners
Dated: October 14, 2016

ADDENDUM

The Decision At Issue:

Statutes, Rules, and Regulations At Issue:

Additional Pertinent Documents:

BEFORE THE UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Tennessee Gas Pipeline Company, LLC Connecticut Expansion Project	)	Docket No. CP14-529-000

AFFIDAVIT OF DAVID FOULIS

I, David Foulis, do on oath depose and state as follows:

1. I am an Environmental Analyst for the Bureau of Water Resources of the Massachusetts Department of Environmental Protection ("MassDEP") Western Regional Office in Springfield, Massachusetts. I am assigned to the Bureau's Wetlands and Waterways Program, and I am the staff person chiefly responsible for the review, processing, and analysis of a Water Quality Certification application submitted by Tennessee Gas Pipeline Company, L.L.C. ("TGP") for a project referred to as the Massachusetts portion of the Connecticut Expansion Project.

2. I have been employed by the Massachusetts Department of Environmental Protection, Wetlands and Waterways Program, as an Environmental Analyst III since May 6, 1999, and as an Environmental Analyst IV since October 5, 2003. My duty station is presently the Department's Western Regional Office at the Springfield State Office Building. Prior to January 21, 2001, I served as a Wetlands Program Circuit Rider in the Southeast Regional Office in Lakeville.

3. In carrying out my duties, I am responsible for assignment of permit applications, license applications, and permit appeals in the Department's Western Regional Office Wetlands and Waterways Program (hereinafter "WERO-WWP"); initial supervision of all WERO-WWP staff assigned to permit/license/appeal cases; and making final recommendations to issue permits and licenses to my supervisor, the WERO-WWP Chief, David Cameron. I am responsible for initial oversight of all Notice of Intent reviews, Orders of Conditions reviews, processing and issuance of Superseding Orders, Superseding Determinations, and §401 Water Quality Certifications, Waterways Standard and Simplified Licenses and Permits; and other tasks required of the Department under the Massachusetts Wetlands Protection Act (G.L., c. 131, § 40), the Rivers Protection Act (Acts of 1996, c. 258), the Massachusetts Clean Waters Act (G.L. c. 21, §§ 26 through 53); and the Massachusetts Public Waterfront Act (G.L. c. 91) within the 106 municipalities of the Western Region. I am responsible for Higher Level Enforcement Actions, Lower Level Enforcement Actions, penalty assessments, Certificates of Compliance, Extension Permits, and compliance inspections and review, as assigned by Mr. Cameron. Additionally, I serve as the Western Region point-of contact for all lake and pond management projects.

4. I have been a participant in the permitting/certification process relative to the Massachusetts Wetlands Protection Act and Massachusetts Clean Waters Act permitting for the TGP "Connecticut Expansion Project".

5. TGP applied for a 401 Water Quality Certification ("WQC") from Massachusetts for its Connecticut Expansion Project by way of an application dated June 30, 2015, received by MassDEP on July 7, 2015, and entered into MassDEP's permit tracking system on July 17, 2015, which serves as the official start date. MassDEP has one year from its receipt of the request to issue its certification. The Federal Clean Waters Act ("CWA") at §401(a)(1) states that "If the State…fails or refuses to act on a request for certification within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived…." 33 U.S.C. 1341(a)(1). FERC regulations at 18 CFR 4.34(b)(5)(iii) state, in pertinent part, that "[a] certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification.".

6. In the course of that permitting process, I was a participant in various calls and meetings relative to the Connecticut Expansion Project, including a meeting on January 19, 2016.

7. The Massachusetts sites involved in the Connecticut Expansion Project contain and include "Waters of the United States within the Commonwealth" ("WOTUSIC") which have been determined to meet the jurisdictional definition of "Bordering Vegetated Wetland" ("BVW"), "Isolated Vegetated Wetland" ("IVW"), [each as defined at 314 CMR 9.02]; and Land Under Water ("jurisdictional resource areas"). The project will result in the temporary discharge of dredged or fill material into: 439,520 square feet of Bordering Vegetated Wetland; 16,988 square feet of Isolated Vegetated Wetland; and 615 square feet of Land Under Water associated with the Clam River in Sandisfield and Worthington Brook in Agawam, and the associated tributary intermittent/perennial streams to the Clam River in Sandisfield and Worthington Brook in Agawam; and the permanent discharge of dredged or fill material into 4,792 square feet of Bordering Vegetated Wetland. The sum of these proposed activities will result in the discharge of dredged or fill material into 461,915 square feet of "Waters of the United States within the Commonwealth." The route also has some potentially certifiable vernal pools.

8. A January 19, 2016 meeting between MassDEP, the United States Army Corps of Engineers, New England District, Regulatory Branch ("ACOE"), and TGP representatives was held at MassDEP's Central Regional Office in Worcester, Massachusetts (as most convenient to all attendees). The meeting had been scheduled to address a January 6, 2016 MassDEP request to TGP for additional information pertaining to its Project in order to clarify what MassDEP sought and to make sure the parties were "on the same page" with regard to what was being sought. The bulk of the meeting involved going over MassDEP's request paragraph-by-paragraph. None of the January 6, 2016 request pertained to tree clearing. However, tree clearing was discussed in a cursory and general fashion in the course of the meeting.

9. At the time of the January 19 meeting, it was MassDEP's understanding, based on my communications up to that date with TGP, that any vegetation to be removed would be removed in such a manner that their removal would not result in a "discharge" to WOTUSIC. (See TGP's June 2015 application for 401 certification, where they had proposed to remove vegetation "immediately" upon its being cut ("Trees that have [after felling] inadvertently fallen into waterbodies or beyond the [Right of Way] shall be removed immediately." [401 Water Quality Cert. App., Conn. Expansion Project, June 2015, Book 1 of 2, pp. 5-21]).

10. I was not aware until TGP filed with FERC its March 22, 2016 Partial Notice to Proceed with Tree Felling that TGP was proposing something different from what had been discussed generally.

11. A 401 WQC is required prior to the tree felling as now proposed, and TGP's reference in its April 11 filing to statements by MassDEP staff in January 2016 is misleading. TGP asserts that "the MA DEP indicated [in the January 19 meeting] that non-mechanized tree felling activities could proceed prior to issuance of the Section 401 certification." However, MassDEP did not discuss tree felling in significant detail with TGP as to this Project, but only generally and based on the foregoing understandings as to how TGP would conduct tree felling. MassDEP has never received a specific proposal from TGP regarding the proposal to fell trees and leave the trees in WOTUSIC. The conversation which TGP references in its April 11 filing happened in January, prior to TGP's March 22, 2016 request to proceed with tree felling.

MassDEP, after consultation with the ACOE (on which the ACOE more recently has reversed position), has determined in past cases that certain vegetation removal projects or project components may not entail the "discharge of dredged or fill material" (as defined at 314 CMR 9.02) into WOTUSIC if the following methods and techniques are employed in combination:

- Removal of woody vegetation in WOTUSIC via use of low ground pressure (generally 6 PSI, and more recently 3 PSI) specialized forestry equipment, namely tracked feller-bunchers or equivalent machinery;
- Operation of tracked feller-bunchers in WOTUSIC only during frozen ground conditions, as verified by designated compliance monitors prior to initiation of work;
- Removal of as much cut vegetation as possible from treated WOTUSIC, and proper upland disposal thereafter;
- Use of standardized Forestry BMPs to minimize impact to WOTUSIC;
- Not employing swamp mats or corduroy roads, either permanent or temporary, for any vegetation removal work within WOTUSIC.

OR

- Cutting of woody vegetation in WOTUSIC via the use of hand-held tools (chainsaws, etc.) by personnel on foot;

- Removal of cut woody vegetation from WOTUSIC via the use of chains or ropes attached to winches or vehicles with winches, only if winches/vehicles are located entirely outside of any WOTUSIC.

If such methods, in combination, are practicable, then MassDEP requires the applicant to provide a brief proposal and description of the techniques for further consideration as to the applicability of WQC requirements to such techniques in whole or in part. TGP has never provided a specific proposal to MassDEP.

12. The foregoing process was only generally and briefly mentioned at the January 19 meeting, and no reference was made to leaving vegetation in place for an unspecified period. Further, MassDEP noted in the meeting that any proposal would have to be viewed in light of the "single and complete project" requirements of 314 CMR 9.00.

13. Felling whole trees and leaving them within a vegetated wetland ("Bordering" and/or "Isolated" in MassDEP parlance) would have deleterious effects that would increase with the density of tree removal and the time in which the trees would be left. Specifically, leaving cut trees in place would adversely affect the "Aquatic Ecosystem" (as defined at 314 CMR 9.02), as it would:

- Provide a physical barrier to the horizontal movement of terrestrial wetland wildlife;
- Provide a vertical barrier to use of the substrate and underlying plant community by most aerial wetland wildlife (specifically bird and flying mammal species);
- Reduce or destroy the ability of existing herbaceous and low-growing woody hydrophytes from growth and expansion by physically covering existing plants, and the seed bank in the soil; and simultaneously modifying the surrounding reduced patches not physically covered via the affects of shading and interception of precipitation;
- Eliminate arboreal habitat without replacing that habitat component with herbaceous habitat;
- Reduce or eliminate direct sunlight from the substrate and underlying vegetation and seed bank;
- Potentially compress hydric soils over time due to the sheer weight of the biomass, which in turn will create changes to natural surface water cycles;
- Intercept and redirect precipitation in ways which could create different drainage patterns within the wetland.

From the standpoint of water quality (chemical, temperature), covering a vegetated wetland with felled woody vegetation will:

- In the short term if conducted after leaf-out, introduce masses of rapidly decaying leaf matter into the substrate during periods of vegetative growth, causing a shift in the detrital regime of the previously forested wetland;
- Surge the chemical byproducts of decay into the ecosystem more rapidly than during senescence and cooling temperatures typical of autumn leaf fall;

- Potentially result in thermal impacts, which may be less dramatic, but could exceed normal impacts to ambient air and surface water temperatures caused by canopy shading.

14. In fact, under applicable Massachusetts law, which is to be considered as part of the federal 401 process, the felling of trees and leaving debris in place itself constitutes an impermissible discharge of fill. Under Massachusetts' 401 regulations, "No discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge that would have less adverse impact...." 314 CMR 9.06(1). Given that the applicant previously identified and proposed a practicable tree removal alternative in the Water Quality Certification application which would result in no (zero) placement of felled trees within vegetated wetlands ("Trees...shall be removed immediately..."), MassDEP is precluded and prohibited from permitting a project component that would now have a greater adverse impact.

[THIS SPACE INTENTIONALLY LEFT BLANK]

Signed under the pains and penalties of perjury this 14th day of April, 2016,

David Foulis
Wetlands and Waterways Program
Western Region- Bureau of Water Resources
Massachusetts Department of Environmental Protection

Document Content(s)