

# Question of Article 97 still left hanging

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Anti-pipeline demonstrators outside Berkshire County Superior Court building on April 15. Recorder FILE PHOTO/Richie Davis

A constitutional amendment protecting publicly owned conservation land, once considered one of the strongest weapons against a planned natural gas pipeline through Franklin County, still hangs unresolved a month after a superior court judge's decision in Berkshire County.

In his May 8 decision in Berkshire Superior Court, Judge John A. Agostini ruled that Article 97, the state's Constitutional amendment prohibiting use of protected land is preempted by federal authority under the National Gas Act.

The case in question involves 2.3 miles of proposed pipeline in Otis State Forest sought for Tennessee Gas Pipeline Co.'s Connecticut Expansion Project.

Agostini stayed his order until July 29 to give the state Legislature — which has sole authority, by a two-thirds vote — to act on a bill that would allow the Article 97 land to be used for the pipeline. If the legislators don't give their approval, the judge said federal law would overrule them.

And the Berkshire decision, which essentially allows the pipeline project to proceed, was followed two weeks later by TGP's decision to end its Northeast Energy Direct pipeline, which would have crossed eight Franklin County towns on its way from Wright, N.Y., to Dracut, north of Lowell.

The Cummington-based group No Fracked Gas in Massachusetts called on pipeline opponents to persuade the attorney general's office to defend the state Constitution, suggesting an AG's May 26 "listening session" in Pittsfield as a good opportunity.

"This is a crucial time to attend and ask the AG's office to APPEAL THE CT EXPANSION EMINENT DOMAIN CASE, where Berkshire Co. Court ruled in favor of Kinder Morgan being allowed to condemn the pipeline right of way through Otis State Forest and set a precedent on ARTICLE 97," the group wrote on its online blog.

About 70 people attended that session (another is planned for June 16 at 6 p.m. at the UMass Center at Tower Square), many of them to encourage the AG to appeal Agostini's decision, according to published reports.

The campaign's president, Rosemary Wessel, said, "We were concerned that if they didn't appeal, it might set a bad precedent to leave it dangling out there."

But after attending the session and discussing the issue, Wessel said that because the case was decided at the Superior Court level, it is not considered binding, and there are concerns about the timing and ways an appeal could be raised in a higher court.

Yet, even though the NED project, as it was configured, is now dead, Wessel said, leaving the Article 97 question in limbo could still affect other protected parcels, such as 388-acre Quissett Wildlife Management Area along Spectra Energy's 21-mile Access Northeast pipeline planned through nine central and eastern Massachusetts towns, with a 27-mile spur through nine other towns.

"It's a policy that effects everywhere," she said.

Even without having a precedent legally set by the decision, said Kathryn Eiseman, co-director of Massachusetts Pipeline Awareness Network, "It makes a difference to pipeline companies in how

they approach” planning their projects. “It’s of absolute relevance how it’s dealt with. There is certainly a broad concern among land trusts about the posture on this. What could it mean to land trusts and the ability to protect land if the state doesn’t have their backs.”

Yet the attorney general’s office, without having a clear 30-day appeal deadline looming as there might be if Alberti’s decision was rendered as a final judgment, is weighing its options carefully.

“Our office is not pursuing an immediate appeal of the preliminary injunction granted to Kinder Morgan,” wrote the AG’s deputy press secretary, Emily Snyder in a June 3 statement. “We are pleased the judge stayed his order until July 29, recognizing the critical role of the Legislature in determining the status of conservation land and allowing time for the legislative process to run its course. We are continuing to evaluate all of our legal options going forward, including appeal of the underlying decision once it becomes final.”

Meanwhile, the state Legislature’s Committee on State Administration and Regulatory Oversight, which tabled the legislation the day before the company’s March filing of the Berkshire Superior Court suit against the state, still could make a recommendation to the full Legislature on whether to release the Otis parcel in question, according to its House chair, Rep. Peter Kocot, D-Northampton.

Kocot said his committee is still awaiting details about the terms of a mitigation agreements that TGP arranged with the state Department of Conservation and Recreation and with the Town of Sandisfield, as well as the disposition of a water quality certificate that he said has yet to be issued by the state Department of Environmental Protection for the project.

“This committee needs information before it can make a recommendation,” he said. “We have to know what is the real offer, what is the path and what are the mitigation measures before we can make a recommendation.”

Leigh Youngblood, executive director of Mount Grace Land Conservation Trust, said her organization was not at all surprised that the court found the state Constitution provision preempted by the Natural Gas Act.

“It’s an uphill battle, with the attorney general valiantly making a very steep climb,” she said, adding that it would have been easier to protect conservation land with Article 97 earlier in the process, before FERC issues its certificate for a project.

“This underscores the nature of getting a ‘no’ vote during the application process,” she said, emphasizing that in her opinion, it’s more powerful for the Legislature to vote against an Article 97 release than to simply not take action. ... That’s where the power of Article 97 is.”

But she added, “Public trusts cannot be dissolved by a legislative vote,” emphasizing that the proposed release of the Otis State Forest doesn’t meet the Executive Office of Energy and Environmental Affairs own Article 97 Disposition Policy, because the the Massachusetts Audubon Society, which granted the land to the state, opposes the proposed disposition.

“A public charitable trust is created when assets are gifted or conveyed for a specific charitable purpose (conservation) forever,” Youngblood said. “This is a binding action.”

Vincent DeVito, the attorney for Northeast Energy Solutions, a coalition of land trusts and environmental organizations, said he was heartened by a brief passage in Agostini’s decision, at least the way he read it.

NEES was not a party in the case, said DeVito.

“Based on a suggestion by the Commonwealth at the hearing,” said Agostini’s decision, “this issue need not be ultimately resolved. As noted by the assistant attorney general, the legislative session for this fiscal year ends on July 31, 2016. By giving the Legislature until July 31 to conduct a hearing and issuing any directives or recommendations regarding the project, this factual dispute and the significance of this “Kumbaya” language in the Certificate will be moot or simply be reduced to a legal argument for the appellate courts.”

By saying the Legislature can issue ‘any directives or recommendations,’ said DeVito, “The judge basically said, if the Legislature acts, it can also add additional restrictions .... I think that was key. It gave the Legislature some regulatory responsibility here.”