FRRACS
NO COMPRESSOR
South Shore, MA

May 5, 2022

Ms. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: Algonquin LLC, Docket CP16-9-000, Docket CP16-9-012, Vacating of Chapter 91 Waterways permit for the Atlantic Bridge Weymouth MA compressor station

Dear Secretary Bose,

On May 2, 2022, Norfolk Superior Court Judge Joseph Leighton vacated the Chapter 91 Waterways permit for the Algonquin Weymouth compressor station and remanded the permit back to the MA Department of Environmental Protection. Please see the attached decision.

As you are aware, at the January 2022 FERC meeting, Chairman Glick noted that the Commission likely erred in its decision to grant the certificate of convenience to Algonquin (Enbridge) in 2017. The vacating of this crucial permit is another piece of evidence supporting the Chairman's statement.

This permit would also negate the MA Coastal Zone Management certification issued in November of 2019. The CZM certificate hinged on the granting of the Chapter 91 Waterways permit. We are questioning the right of Algonquin to continue not only the current new construction at the Weymouth compressor station, but the right of Algonquin to operate this station without the mandated waterways permit and, consequently, the mandated CZM certification.

We are requesting that the Commission review this issue and grant a ruling in its regard. Thank you for your attention to this matter.

Respectfully,
Alice P. Arena
President, FRRACS

Docket 5/2/22

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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1982-01503

TEN RESIDENTS GROUP

vs.

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION & another[1]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND DEFENDANTS' CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

In this action for judicial review pursuant to G. L. c. 30A, § 14, the plaintiff, a Ten Residents Group organized under G. L. c. 30A, § 10A and 310 Code Mass. Regs. § 9.17(1)(c), appeals from the final decision ("Decision") issued by defendant Massachusetts Department of Environmental Protection ("Department") to defendant Algonquin Gas Transmission, LLC ("Applicant") pursuant to G. L. c. 91, the Public Waterfront Act, and 310 Code Mass. Regs. § 9.00, the Department's Waterways Regulations, authorizing construction of a natural gas compressor station ("Compressor Station") on filled tidelands in Weymouth. The matter is before the court on the plaintiff's motion for judgment on the pleadings and the defendants' separate cross-motions for judgment on the pleadings. For the reasons set forth below, the plaintiff's motion is **ALLOWED**, and the defendants' motions are **DENIED**.

BACKGROUND

The following background is taken from the administrative record.

The Applicant operates a natural gas pipeline running between Lambertville, New Jersey and Beverly, Massachusetts. The pipeline includes the I-10 pipeline ("HubLine"), which is

[1] Algonquin Gas Transmission, LLC

approximately thirty miles long and runs under the Fore River Basin, Boston Harbor, and Massachusetts Bay between Weymouth and Beverly. The HubLine connects with the Applicant's I-9 pipeline in Weymouth, the Maritimes and Northeast pipeline in Beverly, and three lateral pipelines extending to offshore liquified natural gas ports and a natural gas power plant.

In 2002, the Department issued a c. 91 license for the HubLine, authorizing its use as a "water-dependent infrastructure crossing facility for the transmission of natural gas in accordance with 310 CMR 9.12(2)(b)9 and 9.12(2)d and the Secretary of Environmental Affair's [*sic*] Certificate dated March 19, 2002."[2] Recommended Interlocutory Decision ("RID") at 11. At the time, the HubLine was intended to transport natural gas north to south from Canada. The c. 91 license does not, however, restrict the direction of flow.

In furtherance of a multi-state project called the Atlantic Bridge Project, the Applicant now seeks to transport natural gas south to north, from a receipt point in New Jersey to New England and Canada. This cannot be done with the existing pipeline system because of a pressure disparity between the HubLine and connecting sections of the pipeline network, including the I-9 in Weymouth.

The Applicant applied to the Federal Energy Regulatory Commission ("FERC") for approval of the Atlantic Bridge Project. To allow gas to flow south to north, the Applicant proposed siting a compressor station at one of seven alternative locations, with the Compressor Station in Weymouth being its preferred location. FERC approved the need for the Atlantic Bridge Project, including the Compressor Station.

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[2] The Secretary of Environmental Affairs found that the HubLine was water-dependent because it could not reasonably be located or operated away from tidal or inland waters.

The Applicant also applied to the Department for a c. 91 license to construct the Compression Station in Weymouth's Fore River Designated Port Area ("DPA"). Under the Waterways Regulations, generally only water-dependent industrial uses are allowed in the DPA. See 310 Code Mass. Regs. § 9.32(1)(b). As proposed, the Compressor Station consists of a natural gas-fired compressor unit, a 6,100-square-foot auxiliary building, parking spaces, internal roadways, underground utilities, a 6,200-square-foot stormwater basin, and 12,000 cubic yards of fill. It will be physically connected to the HubLine and will enable the flow of natural gas from the existing pipeline network into and through the HubLine.

On May 17, 2017, the Department issued a written determination ("Determination") authorizing the proposed construction of the Compressor Station. The Department found that the Compressor Station is ancillary to a water-dependent industrial infrastructure crossing facility, specifically the HubLine. The Department did not make a determination of water-dependency for the Compressor Station. The plaintiffs appealed the Determination, contending that the Department erred by finding that the Compressor Station is an ancillary facility to the HubLine, and that the Compressor Station is ineligible for a c. 91 license because it was not found to be water-dependent and does not serve a proper public purpose.[3]

On November 21, 2018, after an adjudicatory hearing, a presiding officer of the Department's Office of Appeals and Dispute Resolution issued the RID. The presiding officer recommended that the Department's Commissioner issue an interlocutory decision finding that, among other things, "the compressor station is ancillary to a water-dependent industrial infrastructure crossing facility and is, therefore, by definition, water-dependent; a separate

[3] The town of Weymouth ("Town") also appealed the Determination and later brought an appeal from the Decision in the Superior Court, Civil Action No. 1982CV01502. That Superior Court case was consolidated with this case; the Town has since settled its claims.

determination of water-dependency is not required for the compressor station . . . ." RID at 5. The presiding officer determined that the Compressor Station satisfies the definition of "ancillary facility" contained within the definition of "infrastructure crossing facility" in the Waterways Regulations, which provides:

> "Infrastructure Crossing Facility" means any infrastructure facility which is a bridge, tunnel, pipeline, aqueduct, conduit, cable, or wire, including associated piers, bulkheads, culverts, or other vertical support structures, which is located over or under the water and which connects existing or new infrastructure facilities located on the opposite banks of the waterway. *Any structure which is operationally related to such crossing facility and requires an adjacent location shall be considered an ancillary facility thereto.* Such ancillary facilities generally include, but are not limited to, power transmission substations, gas meter stations, sewage headworks and pumping facilities, toll booths, tunnel ventilation buildings, drainage structures, and approaches, ramps, and interchanges which connect bridges or tunnels to adjacent highways or railroads.

310 Code Mass. Regs. § 9.02 (emphasis added).

The presiding officer found that while the HubLine functions sufficiently without the Compressor Station, the Compressor Station will be "operationally related" to the HubLine because it will be "functionally connected" to its operation. RID at 26.

The presiding officer also found that the Compressor Station requires a location adjacent to the HubLine. Noting that the phrase "requires an adjacent location" is undefined in the Waterways Regulations, the presiding officer drew from dictionary definitions of the word "require" and found that the best definition to apply was "suitable or appropriate" because "when evaluating an ancillary facility . . . it makes sense to evaluate the relationship of the ancillary facility to the existing water-dependent Infrastructure Crossing Facility in the context of the Applicant's larger project, and determine whether the use of the tidelands for the ancillary use is appropriate under all the circumstance presented."[4] RID at 32-33. She further found "that it is

[4] The presiding officer noted that Merriam-Webster defines the word "require" as:
1 a : to claim or ask for by right and authority

appropriate to locate the compressor station adjacent to the HubLine because that is where the pressure differential exists, construction of the facility there involves the fewest impacts to environmental resources, and the location within the DPA is suitable for this industrial facility." RID at 33.

On October 16, 2019, the presiding officer issued a Recommended Final Decision ("RFD") incorporating the RID and addressing other issues. She recommended that the Department's Commissioner issue a final decision adopting the RID, making certain additional findings, and approving the c. 91 license for the project.

On October 24, 2019, the Commissioner of the Department issued the Decision, which adopted the RFD.

DISCUSSION

Under G. L. c. 30A, § 14, the court may remand, set aside, or modify the Department's Decision if it is unsupported by substantial evidence, arbitrary or capricious, or based upon an error of law. See G. L. c. 30A, § 14(7); *Friends & Fishers of Edgartown Great Pond, Inc.* v. *Department of Envtl. Prot.*, 446 Mass. 830, 836 (2006). In reviewing the Decision, the court must "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G. L. c. 30A, § 14(7).

Here, the plaintiff contends that the Department made an error of law in concluding that the Compressor Station is an ancillary facility to the HubLine under the Waterways Regulations. The interpretation of an agency's regulation is governed by the traditional rules of statutory

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b archaic : request
2 a : to call for as suitable or appropriate [*sic*] the occasion requires formal dress
b : to demand as necessary or essential : have a compelling need for [*sic*] all living beings require food
3 : to impose a compulsion or command on : compel

RID at 33 n.36.

construction. See *DeCosmo* v. *Blue Tarp Redev., LLC*, 487 Mass. 690, 695 (2021). Thus, where the language of the regulation is clear and unambiguous, the court must interpret it as written. See *id.* at 695, 699–700. Where the language is ambiguous, the court must give deference to the agency's interpretation so long as it is reasonable. See *id.* at 695-696, 700. "However, this principle is deference, not abdication, and courts will not hesitate to overrule agency interpretations when those interpretations are arbitrary, unreasonable, or inconsistent with the plain terms of the regulation itself." *Warcewicz* v. *Department of Envtl. Prot.*, 410 Mass. 548, 550 (1991).

The regulation at issue provides that "[a]ny structure which is operationally related to such crossing facility and requires an adjacent location shall be considered an ancillary facility thereto." 310 Code Mass. Regs. § 9.02. The crux of the parties' dispute is the Department's interpretation of the word "requires" as meaning "suitable or appropriate." Because the word "requires" is unambiguous, the court must interpret it according to its plain terms and need not defer to the Department's interpretation. See *DeCosmo*, 487 Mass. at 699–700 (courts can interpret a plain and unambiguous regulation "without the assistance of, or deference to, the agency").

In making its interpretation, the Department purportedly applied the usual and ordinary meaning of "require" as set forth in the dictionary, citing the Merriam-Webster definition "to call for as suitable or appropriate [*sic*] the occasion requires formal dress."[5] RID at 33 & n.36. See *Commonwealth* v. *Fleury*, 489 Mass. 421, 425 (2022) (citation omitted) ("We derive the words' usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions."). However, the Department applied

[5] The Department omitted from this definition punctuation that makes clear that the phrase "the occasion requires formal dress" is an example of how to use the word "require."

only part of this definition—"suitable or appropriate"—and omitted the preceding language "to call for as." The Department thus distorted the definition of the word "require" and failed to apply its usual and accepted meaning.

The "to call for" language omitted by the Department means "of a thing: to require, demand; to make necessary."[6] Oxford English Dictionary (3d ed. 2016). Accordingly, "to call for as suitable or appropriate" means that something is *required*, *demanded*, or *made necessary* because it is suitable or appropriate, not that it is simply suitable or appropriate. The Department's interpretation was therefore "inconsistent with the plain terms of the regulation" and an error of law. *Warcewicz*, 410 Mass. at 550.

The defendants argue that interpreting the word "requires" as meaning necessary would lead to an absurd result because it would significantly limit what could qualify as an ancillary facility. See *DeCosmo*, 487 Mass. at 700, quoting *Massachusetts Fine Wines & Spirits, LLC* v. *Alcoholic Beverages Control Comm'n*, 482 Mass. 683, 687 (2019) (in interpreting a regulation, courts "apply the clear meaning of unambiguous words unless doing so would lead to an absurd result"). The court disagrees. Such an interpretation does not foreclose ancillary facilities altogether and there is nothing unreasonable about limiting ancillary facilities to those for which a location adjacent to an infrastructure crossing facility is necessary.

Therefore, the Decision is based upon an error of law and shall be set aside and remanded to the Department pursuant to G. L. c. 30A, § 14(7).[7] Upon remand, the Department shall

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[6] The phrase "to call for" also has other meanings, none of which are pertinent here: "of a person or body of people: to ask loudly or authoritatively for; to demand, request;" "to stop at a house or premises in order to collect (a person or thing);" "of an audience: to demand that (an actor, performer, playwright, etc.) appear on stage, esp. in order to receive applause;" "to set out or describe (an object, feature, distance, bearing, etc.) in a land survey or grant;" "to signal to one's partner by playing a particular type of card that he or she should lead with (a trump card);" "esp. of a book title: to indicate or claim that (a particular feature or element of a book) exists;" or "to indicate or anticipate (esp. future weather conditions) on the basis of present conditions or trends; to predict." Oxford English Dictionary (3d ed. 2016).

[7] Because of this result, the court need not consider the plaintiff's other challenges to the Decision.

reassess whether the Compressor Station is an ancillary facility to the HubLine as discussed herein.

ORDER

For the foregoing reasons, the plaintiff's motion for judgment on the pleadings is **ALLOWED**, and the defendants' separate cross-motions for judgment on the pleadings are **DENIED**. The Department's Decision is **VACATED** and the matter is **REMANDED** to the Department for further proceedings consistent with this Memorandum of Decision and Order.

Joseph F. Leighton, Jr.
Justice of the Superior Court

Dated: 3/2/2022