

**COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS
MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION**

In the Matter of
Algonquin Gas Transmission, LLC

OADR Docket No.
WET-2016-025

Petitioner Town of Weymouth Conservation Commission’s Pre-Hearing Statement

The Town of Weymouth Conservation Commission (“Commission”) hereby submits its Pre-Hearing Statement pursuant to the Scheduling Order issued September 26, 2016. The Commission reserves the right to supplement this Statement.

I. Background

On February 22, 2016, Algonquin Gas Transmission, LLC (the “Applicant” or “Algonquin”) submitted its Notice of Intent to the Commission, for a natural gas compressor station, auxiliary buildings, associated accessory structures, pipelines, site-work, and stormwater management systems at 6 and 9 Bridge Street in North Weymouth (the “Facility,” construction and operation of which constitutes the “Project”). The Project is one component of the Atlantic Bridge Project (“Atlantic Bridge”), which would add capacity to the Applicant’s interstate natural gas pipeline network.¹ The Applicant has requested a certificate of public convenience and necessity under the *Natural Gas*

¹ In addition to Atlantic Bridge, the Applicant has also proposed the Access Northeast Project. FERC Docket PF16-1. The Access Northeast Project involves installing an additional Solar Taurus 70 compressor unit in a building extension built on the east side of the proposed compressor station building. The additional compressor will more than double the capacity of the proposed Facility. The expansion of the Facility, which the Applicant has deemed to be a separate project, is not including in this application.

Act, 15 U.S.C. §§ 717-717z, for all of Atlantic Bridge, including the Facility.² Atlantic Bridge has an in-service date of fall 2017.³

The proposed Project is located on a triangular-shaped peninsula within the Weymouth Fore River Designated Port Area (DPA). The peninsula is surrounded on the north and west by the Weymouth Fore River, and on the east by King's Cove. Adjacent waters are part of the Weymouth Fore River Estuary.⁴ The Fore River is a migratory corridor for river herring and rainbow smelt, which are listed as Species of Concern by the NOAA National Marine Fisheries Service. The Division of Marine Fisheries has designated the Fore River as providing spawning or migratory habitat for American eel, white perch, Atlantic tomcod, winter flounder, and shellfish.⁵

The proposed Project will disturb 4,870 square feet of Riverfront Area outside of Chapter 91 jurisdiction (along with 16,905 square feet of Riverfront Area within Chapter 91 jurisdiction) and 63,750 square feet of Buffer Zone to Coastal Bank, and will impact Land Under the Ocean, Land under a River, Land under a River that Underlies an Anadromous Fish Run, Coastal Beach, Land Containing Shellfish, and Coastal Bank.

Despite the dangers associated with the compressor station, the Applicant does not intend to staff the Facility at all times. Instead, the Applicant has proposed to conduct off-site monitoring of gas levels. While the Applicant will have the ability to shut the Facility down remotely if certain thresholds are triggered, personnel would require

² FERC Docket CP16-9.

³ FERC Docket CP16-9, Environmental Assessment at 1-3.

⁴ Massachusetts Coastal Zone Management Plan, Volume II of 2, Chapter 5: Massachusetts Coastal Regions and an Atlas of Resources. Plate 18 (June 1977).

⁵ See Technical Report TR-47.

approximately 30 minutes to arrive at the Facility during an emergency, and then only if access to the Facility remains unimpeded (which it may not, for example, in a severe coastal storm event).

The Applicant provided the Commission with the authorized property owner's signature on March 1, 2016, and the Commission scheduled its hearing for April 6. The Commission closed the hearing on May 25, and voted to deny the requested order of conditions, acting both under the *Wetlands Protection Act* and the Town's wetlands ordinance.⁶ On June 15, the Commission issued its written Denial Order.

On June 29, 2016, the Applicant filed its Request for a Superseding Order of Conditions (SOC).

On July 29, 2016, the owner of 6 & 9 Bridge Street notified MassDEP's Bureau of Waste Site Cleanup that two "Reportable Conditions" under the Massachusetts Contingency Plan (MCP) had been identified at the Project site during the Applicant's geotechnical testing: floating oil in a monitoring well and contaminated soil.⁷ The Applicant has assumed responsibility for carrying out the required response actions under the MCP. Based on Algonquin's Immediate Response Action Plan submitted to the Department on September 16, 2016, multiple rounds of groundwater sampling, extending into November 2017, will be required to characterize the extent of the groundwater contamination. Thus, according to this schedule, the Applicant intends to have the compressor station operational prior to understanding the scope of contamination fully.

Based on the list of relevant documents for the instant SOC appeal provided by MassDEP

⁶ The Applicant did not appeal the denial under the local ordinance to Superior Court within the 60-day period provided by *M.G.L. c.249, §4*. The denial has thus become final.

⁷ MassDEP Release Tracking Numbers (RTNs) 4-26230 and 4-26243.

on October 7, 2016, it does not appear that Algonquin notified MassDEP's wetlands program staff of the Reportable Conditions and associated response actions.

On September 7, 2016, the Department issued the SOC for the proposed Project. The Commission timely filed an Appeal Notice that commenced this adjudicatory proceeding.

II. Summary of the Decision Being Appealed.

The Department's SOC states that the proposed Project impacts only degraded Riverfront Areas and resource areas within a DPA that are not significant to the interests of the Wetlands Protection Act, and that the conditions imposed in the SOC would adequately protect the interests of the Act and ensure compliance with the requirements of 310 CMR 10.58(5) for Redevelopment within Previously Developed Riverfront Area.

III. Summary of the Final Relief Sought.

The Commission requests that the Department issue a Final Superseding Order prohibiting the Project on the grounds that the proposed work will impact resource areas significant to the interests of the Act and cannot be adequately conditioned to contribute to the protection of those interests.

IV. Disputed Relevant Facts for Resolution.

- a. Whether the proposed Project will alter the following resource areas outside a DPA: (1) Land Under the Ocean; (2) Coastal Beach; and (3) Land Containing Shellfish.

The proposed Project will alter Land Under the Ocean, Coastal Beach, and Land Containing Shellfish located outside a DPA. Specifically, the Project will generate air pollution, noise, vibration, and increased lighting, which will adversely impact those resource areas. Stormwater runoff from the site during and after construction will also

carry contaminants from the soil into nearby water bodies, resulting in an addition of pollutants thereto.

Furthermore, if the compressor station or the associated pipeline were to explode, the adjacent wetland resource areas would be directly impacted (e.g., due to potential failure of the Coastal Bank and subsequent release of contaminated soil from the site into coastal resource areas).

- b. Whether the proposed Project will alter the following resource areas within a DPA: (1) Land under a River; and (2) Land under a River that Underlies an Anadromous Fish Run.

For the reasons stated in Section IV.a, the proposed Project will significantly impact Land under a River and Land under a River that Underlies an Anadromous Fish Run.

- c. Whether the proposed Project will alter Coastal Bank.

The proposed Project will adversely impact Coastal Bank if the compressor station or the associated pipelines explode, which is a foreseeable occurrence. Specifically, an explosion would significantly compromise the stability of the Coastal Bank.

- d. Whether the Project complies with the performance standards for Land under the Ocean, codified at 310 CMR 10.25(6).

The proposed non-water dependent⁸ Project does not meet the performance standards for Land Under the Ocean because it will adversely affect marine fisheries habitat or wildlife habitat. See 310 CMR 10.25(6). Even if the Department were to find the Project to be water-dependent, the Project still fails to comply with the performance standards of 310 CMR 10.25(3) because it has not been designed using best available measures, so as to minimize adverse effects on the interests protected under the Act.

⁸ See Section V.b, below.

- e. Whether the Project fails to meet the performance standards for Land under any River and Land under Rivers that Underlie an Anadromous Fish Run.

The proposed Project does not satisfy the performance standards associated with impacts to Land under any River (310 CMR 10.56(4)(a)) and Land under Rivers that Underlie an Anadromous Fish Run (310 CMR 10.35(3)).

- f. Whether the proposed Project fails to meet the performance standards for Coastal Beach and Land Containing Shellfish.

The proposed Project does not comply with the performance standards at 310 CMR 10.27(6) and 10.34(4).

- g. Whether the proposed Project fails to meet the performance standards for Coastal Bank.

The proposed Project does not comply with the performance standards at 310 CMR 10.30(6).

- h. Whether the proposed Project fails to meet the performance standards for Previously Developed Riverfront Area.

The proposed Project does not comply with the performance standards at 310 CMR 10.58(5).

- i. Whether the Facility requires direct access to, or location in, marine, tidal or inland waters and therefore cannot be located away from said waters.

The proposed Facility does not require access to, or location in, marine, tidal or inland waters and can be reasonably located away from said waters. The Environmental Assessment conducted as part of the FERC certificate proceeding, and attached as Exhibit D to the Applicant's Notice of Intent, identifies viable alternative locations for the proposed Facility away from the coast and inland waters.⁹

⁹ See Attachment D to the Applicant's Notice of Intent; see also FERC Docket CP16-9, Environmental Assessment, Section 3.

- j. Whether the Project site constitutes a Land Use with Higher Potential Pollutant Loads, as defined in 310 CMR 10.04.

The Project site constitutes a Land Use with Higher Potential Pollutant Loads because it is a “Disposal Site” as defined under 310 CMR 10.04 and *M.G.L. c. 21E*. See also 310 CMR 40.0006 (defining “disposal site”). Specifically, the property owner recently notified the Department’s Bureau of Waste Site Cleanup of two “Reportable Conditions” under the Massachusetts Contingency Plan at the site. The property owner discovered floating oil in a monitoring well and soil contamination above Reportable Concentrations. The presence of these pollutants means that the site constitutes a “Disposal Site.” Therefore, the proposed site is a Land Use with Higher Potential Pollutant Loads, pursuant to the definition of that term in 310 CMR 10.04 (defining it to include “disposal sites”).

- k. Whether the proposed Project fails to meet the Massachusetts Stormwater Management Standards provided in 310 CMR 10.05(6)(k) through (q).

The Applicant intends to infiltrate stormwater into the site, which would facilitate the movement of soil contaminants into the wetland resource areas. Therefore, the proposed Project does not satisfy the Massachusetts Stormwater Management Standards, codified at 310 CMR 10.05(6)(k) through (q).

The proposed Project site also constitutes a Land Use with Higher Potential Pollutant Loads, and therefore the Project must “eliminate or reduce the discharge of stormwater runoff from such land uses to the maximum extent practicable” (310 CMR 10.05(6)(k)(5)) and Standard 4 of the Massachusetts Stormwater Handbook. The proposed Project fails to satisfy this requirement.

1. Whether, given the status of MCP response actions at the site, issuance of a Final SOC by the Department would protect the interests of the Act.

The Applicant has asserted that its proposed compressor station will be operational by fall of 2017. However, the Immediate Response Action Plan submitted to the Department by Algonquin regarding the recently reported groundwater contamination at the site states that multiple rounds of groundwater sampling, extending to November 2017, will be required to characterize the extent of groundwater contamination. Issuing a final SOC before the Applicant even understands the scope of the contamination on the site would place the wetland resources and the interests of the Act in jeopardy.

V. Disputed Legal Issues for Resolution.

- a. Whether the Department can consider the adverse impacts to resource areas outside the Project site caused by the Project.

The Department may consider the adverse impacts to resource areas outside the Project site caused by the Project, pursuant to 310 CMR 10.24(2). *See In the Matter of Community Boating Center, Inc*, 2011 WL 6425489, *9 n. 23 (Nov. 18, 2011) (OADR Docket, WET-2011-005, WET-2011-006) (noting that 310 CMR 10.24(2) “allows an issuing authority to impose conditions on a project in one resource area, i.e., land under ocean, [that] will adversely affect another resource area, i.e., coastal beach....”).

- b. Whether the proposed Facility is water-dependent.

The Facility is not water-dependent. A water-dependent use is defined as “those uses and facilities which require direct access to, or location in, tidal or inland waters and which cannot be located away from said waters.” 310 CMR 10.04. The operation of compressor stations does not require such access to the water. While 310 CMR 10.04 also provides that uses and facilities defined as water-dependent in 310 CMR 9.00,

Waterways, are also water-dependent uses for purposes of the Act, this is a determination that only the Waterways Division of the Department is authorized to make. The Wetlands Division must wait until the Chapter 91 license has been finalized before it can rely upon the water-dependent definition in the Chapter 91 regulations.

Even if the Wetlands Division could make this decision, the proposed Facility is not water-dependent, as defined in 310 CMR 9.12(2)(d), because a secondary facility is water dependent only if (1) it is ancillary to the infrastructure crossing; and (2) it “cannot reasonably be located or operated away from tidal or inland waters.” Furthermore, the Department may consider a secondary facility to be “ancillary” to an infrastructure crossing only if: (1) siting the secondary facility adjacent to the main facility is necessary for the operation of infrastructure crossing; and (2) its environmental impacts are within the ambit of those reviewed during the original permitting of the main facility. The proposed Facility does not meet this standard.

- c. Whether Coastal Bank, Land under any River, and Land under Rivers that Underlie an Anadromous Fish Run within a DPA are presumed to be significant to the interests of the Act.

Certain wetland resource areas within a DPA are listed in 310 CMR 10.26 as not significant to the interests of the Act. Notably, however, Coastal Bank, Land under any River, and Land under Rivers that Underlie an Anadromous Fish Run are not included on that list. Therefore, these resource areas’ presumptions of significance to the interests of the Act are not negated by their location within a DPA.

- d. Whether the Department must consider the risk of the Facility exploding, given that such an event would result in significant damage to the abutting wetland resource areas.

The Wetland Protection Regulations provide no justification for the Applicant's assertion (in its Request for SOC) that low-probability, high-impact events (such as an explosion) cannot be taken into account during wetland permitting. To the contrary, the regulations state (without qualification) that an Order of Conditions "shall impose such conditions as are necessary to meet the performance standards set forth in 310 CMR 10.21 through 10.60) and "shall prohibit any work or any portion thereof that cannot be conditioned to meet such standards." In fact, the Department is required to consider the explosion risk associated with the Facility. In *Allen v. Boston Redevelopment Authority*, 450 Mass. 242 (2007), the Supreme Judicial Court held that the Environmental Impact Report for a proposed biohazard research facility had to consider a low-probability event – the potential release of contagious pathogens. The court stated that the focus of the regulatory scheme was not "whether the release of a pathogen from the Biolab is probable in the first instance," but rather, "whether, if such a release occurs, even if the chances are remote, it is 'likely to cause damage to the environment.'" *Id.* at 255-56. Because the purpose of the *Massachusetts Environmental Protection Act* analysis is to inform agency permitting decisions, it follows naturally that permitting agencies must consider in their decisions low-probability events that are likely to cause damage to the environment if they occur.

Additionally (also contrary to the Applicant's assertions), the *Pipeline Safety Act* does not preclude the Department from considering the impacts of an explosion at the Facility on the adjacent wetland resources. See *Texas Midstream Gas Services, LLC v.*

City of Grand Prairie, 608 F.3d 200, 211 (5th Cir. 2010) (holding that PSA “only preempts *safety* standards” and did not preempt local setback requirement). Furthermore, the Applicant does not yet have a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission; thus, any preemptive effect that such a certificate would have under the *Natural Gas Act* is not yet in place. *Dominion Transmission, Inc. v. Summers*, 723 F. 3d 238, 244 (D.C. Cir. 2013) (holding that a “FERC certificate” preempts certain local requirements).

- e. Whether the Department can consider the impacts from air and noise emissions on the wetland resource areas.

The Department is required to consider impacts from air emissions, notwithstanding the fact that such pollutants are subject to other regulatory programs. In its Request for a Superseding Order of Conditions, the Applicant cited the Recommended Final Decision in *In re Webster Ventures*, OADR Docket No. WET-2014-016 (Feb. 27, 2015). However, this decision and the references cited therein stand only for the unremarkable proposition that certain concerns (such as traffic and air pollution) raised by petitioners challenging SOCs are outside the scope of the *Wetlands Protection Act*. They do not address the situation where a particular project’s impact affects resource areas protected under the WPA. In such a situation, the project impacts do come within the scope of the WPA, even if other regulatory programs may also be applicable. See, e.g., *In the Matter of William T. Matt*, 1998 WL 827677, DEP Docket No. 97-011, Final Decision (Oct. 7, 1998) (storage of materials in wetlands area constituted violations under both solid waste and wetlands regulatory schemes); *In Re Attleboro (Cranberry Pond Associates)*, 1987 WL 229013, DEP Docket No. 87-030, Summary Decision and Order of Dismissal (Aug. 24, 1987) (affirming conservation commission denial on basis of lack of

information about location of contamination at site also regulated under *M.G.L. c.21E*).

Foreseeable risk of destructive impacts to wetlands resource areas posed by operation of a facility is a proper consideration in a wetlands permit proceeding concerning construction of that facility. *See, e.g., In the Matter of Michael Newman and Polly Kornblith*, 2010 WL 4912396, OADR Docket No. WET-2010-016, Recommended Final Decision (Oct. 8, 2010) (adopted as Final Decision, Nov. 16, 2010) (denying horse stable project based on anticipated impacts to resource areas from runoff contaminated by manure and urine).

Here, the Department may therefore properly consider the Project's air and noise emissions because they will adversely impact the resource areas protected under the WPA.

VI. List of Witnesses

1. John Hinckley, QEP
RSG
55 Railroad Row
White River Junction, Vermont 05001

Mr. Hinckley is an expert in emissions estimation, emission control technology assessments, and air quality modeling. He will be testifying on matters related to air emissions.

2. Kevin D. Trainer, C.P.G., P.G., L.S.P.
GeoInsight
One Monarch Drive, Suite 201
Littleton, MA

Mr. Trainer specializes in assessing and remediating releases at contaminated sites, and will testify regarding contamination at the Project site and the Project's compliance with the MCP and the Massachusetts Stormwater Standards.

3. Diana Papoulias, PhD
Hughes Environmental Consulting
44 Merrimac Street
Newburyport, MA 01950

Dr. Papoulias is a biologist and will testify on impacts to biological resources.

4. Thomas G. Hughes, BS, MA
Hughes Environmental Consulting
44 Merrimac Street
Newburyport, MA 01950

Mr. Hughes is a wetlands consultant. He will testify regarding the Project's compliance with the performance standards set forth in 310 CMR 10.00.

Respectfully submitted,
WEYMOUTH CONSERVATION COMMISSION
By its attorneys,



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October 12, 2016

CERTIFICATE OF SERVICE

I, Rebekah Lacey, hereby certify that on October 12, 2016, I served a true copy of the foregoing document by electronic mail upon the following parties and persons:

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