

Commonwealth of Massachusetts  
Executive Office of Energy & Environmental Affairs

## Department of Environmental Protection

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**June 12, 2020**

In the Matter of  
Algonquin Gas Transmission LLC

Docket Nos. 2019-008, 009, 010,  
011, 012 and 013  
Air Quality Plan Approval  
Weymouth, MA

### **MassDEP COMMISSIONER'S REMAND ORDER**

These six consolidated administrative appeals involve an Air Quality Plan Approval (“the Air Permit”) that the Southeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to Algonquin Gas Transmission LLC (“the Applicant”) pursuant to the Department’s Air Pollution Control Regulations at 310 CMR 7.02 for the construction and operation of a natural gas compressor station in the Town of Weymouth (“the proposed Project”). The proposed Project is one component of the Applicant’s Atlantic Bridge Project (“AB” or “AB Project”), an interstate natural gas transmission project that the Federal Energy Regulatory Commission (“FERC”) authorized pursuant to the Natural Gas Act, 15 U.S.C. §§ 717 et seq. The appeals were filed by a Ten Persons Group (with residents of Weymouth, Braintree, Newton, and Quincy, Massachusetts); a Ten Persons Group (from Hingham, Massachusetts); the Town of Hingham;

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the City of Quincy; the Town of Braintree; and the Town of Weymouth with a Ten Citizens Group (collectively “the Petitioners”).

On June 27, 2019, following an evidentiary adjudicatory hearing, Presiding Officer Jane A Rothchild of the Department’s Office of Appeals and Dispute Resolution (“OADR”)<sup>1</sup> issued a Recommended Final Decision (“RFD”) recommending that I affirm the Air Permit subject to several modifications. On July 12, 2019, I issued a Final Decision adopting the RFD. The Petitioners sought judicial review of the Final Decision in the U.S. Court of Appeals for the First Circuit. The First Circuit issued its opinion on June 3, 2020. While the First Circuit affirmed the Final Decision on every issue except one, on that issue the Court held that the Department erred, “vacat[ed] the air permit,” and “remand[ed]” the matter to the Department “for it to conduct further proceedings, limited to the” identified issue. Town of Weymouth v. Mass. Dep’t of Env’tl. Protection, \_\_ F.3d \_\_, 2020 WL 2904672, at \*19 (1st Cir. June 3, 2020) (Slip Op. at 54).

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<sup>1</sup> OADR is a quasi-judicial office within the Department which is responsible for advising the Department’s Commissioner in resolving all administrative appeals of Department Permit decisions and enforcement orders in a neutral, fair, timely, and sound manner based on the governing law and the facts of the case. In the Matter of Tennessee Gas Pipeline Company, LLC, OADR Docket No. 2016-020 (“TGP”), Recommended Final Decision (March 22, 2017), 2017 MA ENV LEXIS 34, at 9, adopted as Final Decision (March 27, 2017), 2017 MA ENV LEXIS 38, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7). The Department’s Commissioner is the final agency decision-maker in these appeals. TGP, 2017 MA ENV LEXIS 34, at 9, citing, 310 CMR 1.01(14)(b). To ensure its objective review of Department Permit decisions and enforcement orders, OADR reports directly to the Department’s Commissioner and is separate and independent of the Department’s program offices, Regional Offices, and Office of General Counsel (“OGC”). TGP, 2017 MA ENV LEXIS 34, at 9. OADR staff who advise the Department’s Commissioner in resolving administrative appeals are Presiding Officers. Id. Presiding Officers are senior environmental attorneys at the Department appointed by the Department’s Commissioner to serve as neutral hearing officers, and are responsible for fostering settlement discussions between the parties in administrative appeals, and to resolve appeals by conducting pre-hearing conferences with the parties and evidentiary Adjudicatory Hearings and making Recommended Final Decisions on appeals to the Commissioner. TGP, 2017 MA ENV LEXIS 34, at 9-10, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7). The Department’s Commissioner, as the agency’s final decision-maker, may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision issued by a Presiding Officer in an appeal. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(b). Unless there is a statutory directive to the contrary, the Commissioner’s Final Decision can be appealed to Massachusetts Superior Court pursuant to G.L. c. 30A, § 14. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(f).



The issue on which the First Circuit found the Department had erred concerned whether the Department had reasonably evaluated the Best Available Control Technology (“BACT”) for the proposed Project’s Nitrogen Oxide (“NOx”) emissions. The First Circuit held that the Department erred on that issue by not calculating whether an electric motor would be cost effective. *Id.* at 5-9 (Slip Op. at 14-26). The Court expressly limited the remand proceeding to “filling the[] evidentiary gaps” on that issue alone and resolving, to the extent Algonquin chooses to pursue it on remand, the related issue whether the Department should exclude an electric motor from the BACT analysis because it would “redefine the source.” *Id.* at 19 (Slip Op. at 53-54); *see also id.* at 5 & n.6 (Slip. Op. 15-16 & n.6). The First Circuit afforded the Department seventy-five (75) days from the date of the Court’s opinion (June 3, 2020) to complete the remand proceedings unless, after consulting with the parties to the proceeding, the Department asks the Court to extend that period. *Id.* at 54 (Slip Op. at 19).

In accordance with the First Circuit’s June 3, 2020 opinion, I issue this Remand Order and specifically order the following:

1. This matter is remanded to OADR for resolution of the BACT issue by Presiding Officer Rothchild in accordance with the First Circuit’s June 3, 2020 opinion.
2. Within three (3) business days of this Remand Order, the parties shall confer with each other and jointly forward a memorandum by e-mail to OADR Case Administrator Bridget Munster at [caseadmin.oadr@mass.gov](mailto:caseadmin.oadr@mass.gov) informing Presiding Officer Rothchild whether or not they believe final adjudication on remand of the BACT issue can be reasonably concluded by the First Circuit’s 75 day deadline, specifically, Monday, August 17, 2020. Final adjudication on remand of the BACT issue means the remand proceedings conclude with my issuance of a Final

**In the Matter of Algonquin Gas Transmission, LLC  
OADR Docket Nos. 2019-008, 2019-009, 2010-010, 2019-011, 2019-012 & 2019-013  
MassDEP Commissioner’s Remand Order**

Decision on Remand on the BACT issue if one or more parties appeals the Southeast Regional Office's BACT Determination on remand.

3. In light of the First Circuit's expectation that the remand schedule for resolution of the BACT issue be expedited, the parties are strongly encouraged during their consultations pursuant to ¶ 2 above to agree on a reasonable proposed remand schedule and submit it to Presiding Officer Rothchild for her consideration within the required three (3) business day period. If, however, the parties cannot agree on a schedule (or all aspects of the schedule), each party shall provide some justification for its own schedule (or the parts of it on which the parties have not agreed) and explain why it is reasonable in light of the narrow scope of the remand and the First Circuit's directive for the remand to be conducted on an expedited basis. Any proposed remand schedule submitted to Presiding Officer Rothchild by the parties must include the following actions to be performed within reasonable timelines for their performance:

- (a) the Applicant's submittal to the Department's Southeast Regional Office of the necessary BACT data for the Department to make its BACT determination pursuant to 310 CMR 7.02, supported by the sworn Pre-filed Testimony ("PFT") and documentary evidence of the individual or individuals who compiled the necessary BACT data on behalf of the Applicant, and, if the Applicant chooses to pursue it, why the Department should exclude the electric motor as a project redesign together with any information or evidence that supports the Applicant's position (together, the "BACT issue");
- (b) the schedule for the Department's Southeast Regional Office to:

- (1) hold a public comment period solely on the BACT issue;
  - (2) concluding its analysis of the BACT issue, including its written responses to the comments it received during the public comment period on the BACT issue; and
  - (3) issuing a BACT determination, supported by the sworn PFT and documentary evidence of the Department staff who made the determination;
- (c) the time for the Petitioners and the Applicant to review the Department's BACT determination and inform OADR that they are satisfied with the determination or that they are appealing the determination to OADR; and
- (d) in the event of an appeal to OADR of the Department's BACT determination:
- (1) the time for the appealing party (the Petitioners and/or the Applicant) to file the PFT and documentary evidence of the individual or individuals who reviewed the Department's BACT determination on behalf of the appealing party (the Petitioners and/or the Applicant);
  - (2) the time for the Department to file the sworn rebuttal PFT of the Department staff who reviewed and/or oversaw the Department's review of the appealing party's (the Petitioners and/or the Applicant) claims challenging the Department's BACT determination;



- (3) the time for a non-appealing party (the Petitioners or the Applicant) to file the sworn rebuttal PFT of the individual or individuals who, on behalf of the non-appealing party, reviewed the appealing party's (the Petitioner or Applicant) claims challenging the Department's BACT determination;
- (4) the time for the Remand evidentiary Adjudicatory Hearing ("Remand Hearing") to be conducted by Presiding Officer Rothchild to determine whether the Department's BACT determination is correct;
- (5) the time for the issuance of a Recommended Final Decision On Remand ("RFD on Remand") by Presiding Officer Rothchild setting forth her findings and recommendation to me regarding the Department's BACT determination;<sup>2</sup> and
- (6) the time for the issuance of a Final Decision On Remand by me adopting, modifying, or rejecting Presiding Officer Rothchild's RFD on Remand.<sup>3</sup>

4. Within three (3) business days after receiving the parties' submittal as set forth in ¶¶ 2 and 3 above, Presiding Officer Rothchild shall make a determination regarding whether

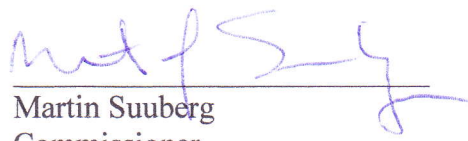
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<sup>2</sup> The timeline for issuance of Presiding Officer Rothchild's RFD on Remand should be a minimum of 30 days after the Remand Hearing in order to provide her with sufficient time to review the testimonial and documentary evidence that parties presented at the Remand Hearing.

<sup>3</sup> The timeline for my issuance of the Final Decision on Remand should be a minimum of five (5) business days in order to provide me with sufficient time to review Presiding Officer Rothchild's RFD on Remand.

final adjudication on remand of the BACT issue can be reasonably concluded by the First Circuit's deadline of Monday, August 17, 2020. Her determination shall be set forth in a proposed Remand Adjudication Scheduling Order that she is to issue to the parties and me within the same three (3) business day period.

5. If Presiding Officer Rothchild determines that final adjudication on remand of the BACT issue cannot be reasonably concluded by the First Circuit's deadline of Monday, August 17, 2020, her proposed Remand Adjudication Scheduling Order shall set forth a reasonable proposed deadline for final adjudication on remand of the BACT issue and the basis of the proposed deadline. Within (2) business days after receiving Presiding Officer Rothchild's determination and proposed Remand Adjudication Scheduling Order, I will inform the parties whether I concur with Presiding Officer Rothchild's determination and proposed Remand Adjudication Scheduling Order. If additional time is required, I will direct MassDEP's Office of General Counsel to request the Massachusetts Attorney General's Office to file a Motion with the First Circuit seeking approval of the proposed extended deadline for completion of the remand proceedings.

  
Martin Suuberg  
Commissioner