

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

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In the matter of: )  
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Algonquin Gas Transmission, LLC )  
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\_\_\_\_\_)

OADR Docket No: WET- 2016-025  
Weymouth, MA

**MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION'S  
MOTION FOR STAY**

**Background**

On June 16, 2016, Petitioner Weymouth Conservation Commission issued an Order of Conditions denying a Notice of Intent submitted by Algonquin Gas Transmission, LLC (“Applicant”) regarding a project located at 6 & 9 Bridge Street, Weymouth, MA (the “Project”). Petitioner’s denial was issued pursuant to both the Wetlands Protection Act, G.L. c.130, §40 (“MWPA”) and a local By-law. Applicant filed a timely request to the Department for a Superseding Order of Conditions (“SOC”) under the MWPA. However, Applicant did not seek judicial review of the by-law denial. On September 7, 2016, the Department issued a SOC approving the Project. General Condition 3 of the SOC provides that the SOC “does not relieve the [applicant]...of the **necessity** of complying with all other applicable **federal, state, or local statutes, ordinances, bylaws, or regulations.**”(emphasis supplied). Moreover, in Section D. “Findings Under Municipal Wetlands Bylaw or Ordinance” the SOC states: “To the extent that the Order [of Conditions] is based on a municipal bylaw or ordinance, and not on the Massachusetts Wetlands Protection Act or regulations, **the Department has no jurisdiction to**

**supersede the local by-law order.”** (emphasis supplied). On September 21, 2016, Petitioner filed this appeal, claiming that the SOC violates the MWPA and numerous provisions of the regulations promulgated thereunder at 310 CMR 10.00.

On October 4, 2016, Applicant filed a Motion Regarding By-Law Denial (“Motion”). The Motion avers that Applicant did not seek judicial review of the by-law denial because the by-law is preempted by the Natural Gas Act, 15 U.S.C. §§ 717 et seq. and thus the stay provision set forth in 310 CMR 1.01(6)(h) does not apply to this proceeding. The Department and the Petitioner filed responses to Applicant’s Motion.

At the Prescreening Conference held on October 17, 2016, the Presiding Officer allowed a group of 16 persons to intervene as a party pursuant to G.L. c.30A, §10A. The Presiding Officer also identified the issues for adjudication and established a schedule for filing of prefiled testimony and an adjudicatory hearing. The Presiding Officer declined on jurisdictional grounds to determine whether the Weymouth bylaw is preempted by the Natural Gas Act (“NGA”), but, based on the absence of any appeal of the bylaw denial, agreed that the bylaw stay provision does not apply to this proceeding. However, following further discussion, the Department indicated that there may be additional grounds for a stay, and the Presiding Officer ordered the Department to file its motion for stay by October 28, 2016.

The Department now moves for a stay of these proceedings pursuant to 310 CMR 1.01(5)(a)3. until the Applicant has obtained (i) a Certificate of Public Convenience and Necessity (“Certificate”) from the Federal Energy Regulatory Commission (“FERC”); and (ii) a ruling from FERC<sup>1</sup> or a court of competent jurisdiction holding that the Weymouth bylaw and denial thereunder are preempted by federal law.

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<sup>1</sup> FERC’s Rules of Practice and Procedure permit persons to file a petition for, inter alia, “a declaratory order or rule to terminate a controversy or remove uncertainty.” 18 CFR 385.207(a)(2). This procedure appears to be available

## **Argument**

### **A. Authority To Issue Stay**

Pursuant to 310 CMR 1.01(5)(a)3, a Presiding Officer may “stay appeals where the failure to previously obtain a final decision required under another law would result in an unnecessary expenditure of the Department’s administrative resources, or for other good cause....” See *In the Matter of Rocky Mountain Spring Water*, OADR Docket No. 2012-043, 214 MA ENV LEXIS 24 (2014) (drinking water appeal stayed while petitioner sought resolution of property dispute in superior court); See also *In the matter of L.S. Starrett Co.*, OADR Docket No. WET-2009-035, 2014 MA ENV LEXIS 518 (stay of wetland appeal while applicant sought jurisdictional ruling from FERC). The circumstances of this case provide ample good cause for a stay pursuant to 310 CMR 1.01(5)(a)3 in order to avoid the unnecessary expenditure of the Department’s administrative resources and the resources of the other parties herein. There is no question that the parties and OADR have expended considerable resources in this matter, and will continue to do so as this appeal proceeds to hearing. Indeed, despite the Presiding Officer’s substantial reduction of the issues which were initially proposed for adjudication, the parties have identified 16-18 witnesses, many of whom are experts, who will need to prepare prefiled testimony and exhibits and appear for cross examination at the adjudicatory hearing.

### **B. FERC Certificate**

Before any applicant may construct or extend natural gas transportation facilities, it must obtain a Certificate from FERC pursuant to Section 7(c) of the NGA. 15 U.S.C. §717f(c)(1)(A). FERC may issue a Certificate if it finds that “the applicant is able and willing properly to do the acts and to perform the service proposed...and that the proposed service” and “construction...is

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for resolution of issues concerning federal preemption of state and local regulatory authority. See, *PacifiCorp*, 115 FERC ¶ 61,194 (2006).

or will be required by the present or future public convenience and necessity.” Id., §717f(e). As part of its certificate authority, FERC has the “power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.” Id. FERC has extremely broad authority to condition certificates. See, e.g., *Transcontinental Gas Pipe Line Corp. v. FERC*, 589 F.2d 186 (5<sup>th</sup> Cir. 1979), *cert. denied* 100 S.Ct. 1275, 445 U.S. 915.

Applicant has applied for, but has not yet obtained from FERC a Certificate for the Project. As Applicant has acknowledged, the Project “will be constructed and operated only after FERC issues a Certificate authorizing the Project and then in accordance with the conditions of the Certificate.” See Applicant’s Motion Regarding By-Law Denial, at 3. On May 2, 2015, FERC issued an Environmental Assessment (“EA”) for the entire Atlantic Bridge Project which concluded, *inter alia*, that the anticipated environmental impacts “associated with this Project can be mitigated to support a finding of no significant impact.....” EA, p.1-3, §1.3.

It does not appear, and Applicant has not claimed, that issuance of a FERC Certificate is contingent upon issuance of a Final Decision in this adjudicatory proceeding. To the contrary, as the Applicant has emphasized throughout this case, the FERC Certificate will govern how the Project proceeds. Without a Certificate, however, it is not possible at this time to determine the nature and extent of mitigation that FERC will require regarding the proposed work that is the subject of the Department’s SOC, nor is it possible to determine whether and to what extent any condition imposed by FERC may require modifications to the SOC. It would not be prudent for the parties in this *de novo* proceeding to forge ahead with testimony, exhibits and preparation for a hearing without knowing the relevant requirements or conditions that FERC will establish in its Certificate. Accordingly, the instant appeal should be stayed until such time as FERC issues a

Certificate so that the Presiding Officer and the parties herein will have the benefit of the FERC decision and may utilize their resources efficiently to achieve an appropriate result in this case.

**C. Bylaw Denial and General Condition No. 3**

The Department lacks jurisdiction to review a local decision made under a local bylaw, and its deference to local regulation is embodied in General Condition No. 3 that appears in every SOC. *Matter of John McLaughlin*, OADR Docket No. WET-2016-011, Order Continuing Stay or Proceedings in Appeal (August 1, 2016), *citing Oyster Creek Preservation, Inc. v. Conservation Commissioner of Harwich*, 449 Mass. 859 (2007). The Presiding Officer has determined that (a) she lacks jurisdiction to decide whether the Weymouth bylaw and the bylaw denial are preempted by the NGA; and (b) the bylaw stay provision does not apply to this case because there has been no appeal of the bylaw denial.

In the absence of a ruling or other determination that the Weymouth bylaw denial is preempted by federal law, the bylaw denial is final. In other cases involving bylaw denials which have become final, either because the denial was not appealed or because on appeal the denial was affirmed by the court, prior MassDEP administrative decisions have held that given the terms of the SOC's General Condition 3, further project review under the MWPA in an administrative appeal would be a "futile academic exercise" because the Department cannot supersede the local bylaw and the project cannot go forward. *Matter of John Walsh and Walsh Brothers Building Co., Inc.*, Memorandum and Order Denying Petitioners' and Harwich Conservation Commission's Joint Motion to Proceed (September 10, 2013), 2013 MA ENV LEXIS 92, at 11-12, *citing Matter of Howard Fafard*, Docket Nos. 96-040, 96-044, Final Decision (December 4, 1996), 1996 MA ENV LEXIS 122 at 6-7. Accordingly, in order to avoid the instant proceeding from becoming a "futile academic exercise," this appeal should be stayed

until Applicant obtains a ruling that the Weymouth bylaw, and the denial thereunder, are preempted by federal or other law.

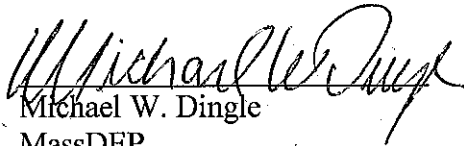
**Conclusion**

For all of the foregoing reasons, the instant proceedings should be stayed pursuant to 310 CMR 1.01(5)(a)3. until such time as the Applicant obtains (i) a FERC Certificate and (ii) a ruling that the Weymouth bylaw, and the denial thereunder, are preempted by federal law.

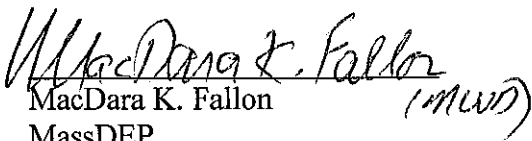
Dated: October 28, 2016

Respectfully submitted,

Massachusetts Department of Environmental Protection,  
By its attorneys:



Michael W. Dingle  
MassDEP  
One Winter Street  
Boston, MA 02108  
617-292-5959  
[Mike.dingle@state.ma.us](mailto:Mike.dingle@state.ma.us)



MacDara K. Fallon (MWD)  
MassDEP  
One Winter Street  
Boston, Ma 02108  
617 574 6829  
[MacDara.Fallon@state.ma.us](mailto:MacDara.Fallon@state.ma.us)