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EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

November 21, 2018

In the Matter of
Algonquin Gas Transmission LLC

OADR Docket Nos. 2017-011, 012
Waterways Application No. W16-4600

Weymouth, MA

RECOMMENDED INTERLOCUTORY DECISION ON ISSUES 1, 7 AND 8

I. INTRODUCTION

In these consolidated appeals, a Ten Residents Group ("the Residents") and the Town of Weymouth ("Weymouth") (collectively "the Petitioners") challenge a Written Determination ("the Determination ") issued by the Boston Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") to Algonquin Gas Transmission LLC ("the Applicant"), pursuant to the Massachusetts Public Waterfront Act, G.L. c. 91 ("Chapter 91" or "c. 91"), and the Waterways Regulations, 310 CMR 9.00. The Determination authorized the Applicant's proposed construction of a natural gas compressor station ("the proposed Project") in the Weymouth Fore River Designated Port Area on filled tidelands of the Fore River at 6 & 50 Bridge Street in Weymouth ("the Project Site"). Determination at 1. The Department determined that the proposed compressor station is ancillary to the Applicant's existing I-10 (HubLine) pipeline because it is operationally related to the HubLine and requires an adjacent location. The HubLine is classified as a water-dependent-industrial infrastructure crossing facility.

The Petitioners' appeals raise numerous objections to the Determination. Pursuant to M.G.L. c 214, § 7A, the Ten Residents Group alleges that the proposed Project will cause "damage to the environment".[1] They claim error in the Department's determination that the proposed Project is an ancillary facility to a previously authorized water-dependent industrial infrastructure crossing facility for the transmission of natural gas [the HubLine]. Ten Residents Group Notice of Claim at 28. They claim that the c. 91 license cannot be issued for the proposed Project because it has not been found to have a water-dependent use. Ten Residents Group Notice of Claim at 31-32. Additionally, the Residents allege that the proposed Project does not serve a Proper Public Purpose in accordance with 310 CMR 9.31(2)(a), Ten Residents Group Notice of Claim at 35, and violates the interests of the waterways regulations at 310 CMR 9.55(1) and (2). Ten Residents Group Notice of Claim at 39. They seek a Final Decision finding, *inter alia*, that (1) the proposed Project is non-water-dependent; (2) does not serve a Proper Public Purpose; and (3) is not eligible for a c. 91 license. The Ten Residents Group requests that the Determination be "reversed, vacated or otherwise rescinded such that the [proposed Project] is not licensed for construction pursuant to M.G.L. c. 91." Ten Residents Group Notice of Claim at 42. In its Notice of Claim, Weymouth echoes the Residents' allegations regarding water-dependency and the project's failure to serve a Proper Public Purpose. Weymouth additionally claims that the c. 91 application is not complete, therefore the Department improperly issued the

[1] M.G.L. c. 214, § 7A states that

> "damage to the environment" shall mean any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth, whether caused by the defendant alone or by the defendant and others acting jointly or severally. Damage to the environment shall include, but not be limited to, air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds or other water resources, destruction of seashores, dunes, wetlands, open spaces, natural areas, parks or historic districts or sites. Damage to the environment shall not include any insignificant destruction, damage or impairment to such natural resources.

Determination; that the Determination improperly allows a Final License to be issued before the Applicant has demonstrated compliance with M.G.L. c. 111, §§ 142A through 142I and the Massachusetts Environmental Policy Act (MEPA); that certain non-accessory components of the proposed Project, e.g. the roadway, parking lot and underground utilities, were improperly permitted within the Determination; that the Determination fails to provide the minimum level of public access required by the waterways regulations; and that the license term of thirty (30) years is impermissible, given that the facility to which the proposed Project is allegedly ancillary, i.e. the HubLine, has a license which expires in approximately five years. Town of Weymouth's Notice of Claim at 10-18. Weymouth asks that the Determination be vacated and remanded to the Waterways program for reconsideration of the issues raised in the Weymouth's Notice of Claim.

After a prehearing conference on July 13, 2017 at which the issues to be adjudicated were specified, and in response to motions to stay filed by the Petitioners, I stayed the matters pending resolution in federal court of the question of whether the Weymouth wetland protection ordinance was preempted by the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717 *et seq.*[2] In late December 2017 the United States District Court for the District of Massachusetts ruled that the Weymouth wetlands ordinance and the denial of the Applicant's project were preempted by the NGA; judgment entered in the Applicant's favor on February 15, 2018. I vacated the stay

[2] The Weymouth Conservation Commission denied the Applicant's application for a local wetlands permit under the local wetlands ordinance. If the local ordinance and the local decision were not preempted then the Department would not be able to issue a waterways license. See 310 CMR 9.31(1)(b)("No license or permit shall be issued by the Department for any project… unless said project…complies with applicable regulatory programs of the Commonwealth, according to the provisions of 310 CMR 9.33); 310 CMR 9.33(1)(b)("All projects must comply with applicable environmental regulatory programs of the Commonwealth, including but not limited to…[the] Wetlands Protection Act…."). General Condition 3 of the state wetlands permit requires compliance with applicable local ordinances. If the local wetlands ordinance was an "applicable" local ordinance then the Applicant could not comply with the state wetlands permit and the project could not comply with 310 CMR 9.31 or 310 CMR 9.33.

thereafter, bifurcated the issues for resolution and set a schedule for filing of testimony and the hearing.[3] This Recommended Interlocutory Decision ("RID") addresses three of the eight issues raised in the appeals, specifically Issues for Resolution 1, 7 and 8, which pose the following issues for resolution: (1) Is the Project a water-dependent industrial use project pursuant to 310 CMR 9.12 and the determinative sub-issue of whether the compressor station is ancillary to the HubLine; (2) whether the Determination was properly issued before the application for a license was complete; and (3) whether the Applicant is required to obtain a municipal zoning certificate.

On May 29, 2018, Weymouth moved for summary decision on the ground that the Written Determination had expired by its terms on May 17, 2018 and without a valid Written Determination the Department could not issue a c. 91 license to the Applicant.[4] It was Weymouth's position that draft Special Condition 5 mandated this result.[5] The Applicant and the Department opposed the motion, arguing that the condition was not effective while these appeals were pending. Agreeing with those arguments, I denied the motion for summary decision on July 3, 2018.[6] I conducted an adjudicatory hearing on Issues for Resolution 1, 7 and 8 on August 1 and 2, 2018. The hearing was stenographically recorded. The parties filed their post-hearing closing briefs on August 24, 2018.

[3] See Order Vacating Stay, Bifurcating Issues and Setting Schedule for Litigation, March 27, 2018. Bifurcation was appropriate because there was the potential that no meaningful remedy would be available if the Petitioners prevailed on the issues relating to process. As well, if the Department erred in determining that the Applicant's project is a water-dependent industrial use then it was more efficient to adjudicate that issue first because the parties agreed such an error would require a remand to the Waterways program.

[4] See Town of Weymouth's Motion for Summary Decision, May 29, 2018.

[5] Draft Special Condition 5 specifies that the Written Determination is valid for one year after issuance.

[6] See Ruling on Town of Weymouth's Motion for Summary Decision, July 3, 2018.

After reviewing and evaluating the evidence, the arguments presented by the parties in their pre-hearing and post-hearing briefs, and the entirety of the administrative record in this proceeding, I recommend that the Department's Commissioner issue an Interlocutory Decision finding that (a) the compressor station is ancillary to a water-dependent industrial infrastructure crossing facility and is, therefore, by definition, water-dependent; a separate determination of water-dependency is not required for the compressor station; (b) the Department properly issued the Written Determination prior to receiving documentation relating to other state and local approvals because a final license will not be issued until such approvals are received by the Department and/or any final license will be contingent upon their receipt; and (c) the Applicant must obtain a local zoning certificate prior to final license issuance unless the local zoning law is preempted by the Natural Gas Act.

II. WITNESSES[7]

The following witness submitted pre-filed testimony on behalf of the Ten Residents Group and was available for cross-examination at the adjudicatory hearing by the Applicant and the Department:

1. Frank Singleton. Mr. Singleton is a resident of Weymouth and currently serves on the city's Conservation Commission. He holds an undergraduate degree in biology and a Master's Degree in environmental health. He has fifty years of environmental code enforcement experience, including as Director of Environmental Health for the Greenwich, Connecticut Health Department; Director of Health for the Chelsea, Massachusetts Department of Health;

[7] Throughout this RID, the witnesses' Pre-Filed Direct Testimony will be referred to as "[Witness] PFT at ¶ or Page:Line"; Pre-Filed Rebuttal Testimony will be referred to as "[Witness] PFR at ¶ ". The Hearing Transcript will be referred to as "Tr. 1 [for Day 1] or Tr. 2 [for Day 2] at [page:line(s)].

and Director of Health for the Lowell, Massachusetts Health Department. He is a member of the ISO-New England Consumer Liaison group.[8] Singleton PFT at ¶ 1.

The following witness submitted pre-filed testimony on behalf of the Town of Weymouth and was available for cross-examination at the adjudicatory hearing by the Applicant and the Department:

1. William Powers, P.E. Mr. Powers of Powers Engineering in San Diego, California is a registered professional engineer with a Bachelor's degree in mechanical engineering and a Master's degree in environmental science. Powers PFT at ¶¶ 3-4; Powers Exhibit 1. He has thirty years of technical experience primarily related to air emissions and air pollution control equipment, but also including projects involving natural gas pipelines and compressor stations. Powers PFT at ¶ 5; Powers Ex. 1; Tr. 1 at 42:10-24; Tr. 1 43:1-12

The following witnesses submitted pre-filed testimony on behalf of the Applicant and were available for cross-examination at the adjudicatory hearing by the Petitioners and the Department:

1. Jose Roberto "Bob" Bocock. Mr. Bocock is an Engineer Specialist in the Asset Planning Group at Enbridge, Inc. He holds a Bachelor's degree in chemical engineering and a Certificate in Accounting. Bocock PFT at 1:12-15. Since 1981 he has been employed by Algonquin SNG, Inc. and its successor entities. The majority of his experience is as a planner,

[8] ISO New England is an independent not-for-profit company authorized by the Federal Energy Regulatory Commission ("FERC") to perform grid operation, market administration and power system planning for the region covering Connecticut, Massachusetts, Rhode Island, Vermont, New Hampshire and part of Maine. The Consumer Liaison Group ("CLG") is a "[f]orum for the exchange of information between ISO New England and electricity consumers in New England." https://www.iso-ne.com/committees/industry-collaborations/consumer-liaison. The CLG meets four times a year and its meetings are open to the public.

analyzing the hydraulics of the Algonquin pipeline system, planning expansion facilities for the pipeline system, and helping prepare regulatory filings. Bocock PFT at 2:16-18; 27-30.

2. Michael Tyrrell. Mr. Tyrell is a Principal and Senior Project Manager at TRC Environmental Corporation in Manchester, NH. Tyrell PFT at 1:3-5. He holds a Bachelor's degree in Natural Resource Science. He has been employed at TRC since 2001. His experience includes over 27 years of environmental permitting and construction-compliance-management experience involving more than 1,300 miles of natural gas pipeline in the United States. Id. at 1:10-14. He is responsible for coordinating and managing environmental permitting, field studies, and construction compliance programs for constructing natural gas pipelines. Id. at 2:16-19.

The following witnesses submitted pre-filed testimony on behalf of the Department and were available for cross-examination at the adjudicatory hearing by the Petitioners and the Applicant:

1. Frank Taormina. Mr. Taormina works as a Regional Planner for the Department; he has held this position since 2014. Previously he worked in the Department of Planning and Community Development for Salem, Massachusetts for eleven years, three years as a City Planner and Conservation Agent, and eight years as a City Planner and Harbor Coordinator. Mr. Taormina holds a Bachelor's degree in geography with a concentration in Economic and Environmental Planning, and a Master's degree in Regional Planning. Taormina PFT at ¶¶ 1-3. His duties for the Department include reviewing c. 91 license and permit applications, primarily for complex projects, and drafting Written Determinations and License/Permit conditions. Mr. Taormina additionally offers guidance to applicants on permitting requirements, participates in

policy development, conducts field inspections and participates with the Massachusetts Office of Coastal Zone Management in the review processes for Municipal Harbor Planning and Designated Port Area ("DPA") boundaries. In his time with the Department, he has drafted forty-eight c. 91 licenses, including seventeen for projects located in a DPA. Id. at ¶ 4.

2. Ben Lynch. Mr. Lynch has been the Section Chief of the Waterways Regulation Program for the Department since 2002. He has been employed in the Waterways Regulation Program since 1995. He holds a Bachelor's degree and a Master's degree in Landscape Architecture. During his tenure with the Department, he has reviewed and approved over 5,000 c. 91 licenses, approximately 4,800 of those for water-dependent projects, including projects in the Fore River Designated Port Area. Lynch PFT at ¶¶ 1-3.

III. RULING ON TEN RESIDENTS GROUP'S MOTION TO COMPEL

On July 30, 2018, two days prior to the adjudicatory hearing in this matter, the Ten Residents Group moved for an order compelling the Applicant to produce documents requested by the group on June 28, 2018. Ten Residents Group's Motion to Compel Production of Documents from the Applicant.

The Motion to Compel is denied for the following reasons. The information the Ten Residents Group seeks may relevant in other contexts, but within the context of this appeal it is not likely to lead to the discovery of admissible evidence. There is no evidence in the record that the Access Northeast project is an active project.[9] More importantly, the discovery request was not timely, having been made after the deadlines for filing testimony had passed.

[9] At the time the FERC Certificate was issued for Atlantic Bridge, Access Northeast was in the pre-filing stage with FERC but was not yet considered by FERC to be a "proposal". See FERC Certificate at 26-29. Access Northeast has since been withdrawn from pre-filing.

VI. BACKGROUND

A. The Project Site

The Project Site is 12.3 acres in size, of which approximately 9.8 acres consist of previously authorized filled tidelands, 0.4 acres consist of flowed tidelands, and 2.1 acres of uplands outside of c.91 jurisdiction. Determination at 1. Existing facilities near the Project Site include a Massachusetts Water Resources Authority ("MWRA") sewage pumping station immediately adjacent to the north; the Braintree Weymouth Sewage Interceptor leading across the Fore River to the Deer Island wastewater treatment plant; an electric generating facility (Fore River Energy Center) to the south; the Applicant's existing Metering & Regulating ("M&R") station to the west;[10] and the Applicant's I-10 pipeline, also to the west. Id. The project site is located in the Weymouth Fore River Designated Port Area ("DPA").[11] Chapter 91 Waterways License Application – (Transmittal No. X267645), December 8, 2015 at § 1.1.1 ("Application"); Taormina PFT at 5, Taormina Ex. 3 (depicting Weymouth Fore River DPA). The property is in an area of Weymouth that is zoned industrial. Taormina PFT at 5; Taormina Ex. 4 (depicting I-1 Zoning district on Weymouth Zoning Map).

Historically, the Project Site was used for industrial purposes. These uses include unloading and storing coal and oil to support the electric power generation plant to the south of

[10] The purpose of the metering portion of an M&R station is to measure gas flow between the pipeline and, for example, a power plant. See, e.g. Tr. 1 at 234:5-6. The purpose of the regulating portion of this station is to manage the transition from high pressure to low pressure at the I-10/I-9 pipeline interconnection. Tr. 1 at 61:1-4.

[11] The Commonwealth of Massachusetts established ten DPAs to promote and protect water-dependent industrial uses. "State policy seeks to preserve and enhance the capacity of the DPAs to accommodate water-dependent industrial uses and prevent significant impairment by non-industrial or nonwater-dependent types of development, which have a far greater range of siting options." https://www.mass.gov/service-details/czm-port-and-harbor-planning-program-designated-port-areas

Bridge Street. Application at 2-1, § 2; see also Tyrell PFT at 7-8 (referencing historic uses as well as seven existing industrial uses in the vicinity of the proposed compressor station). In addition, contained within property acquired by or to be acquired by the Applicant is a public walkway along the shoreline of King's Cove. The walkway is the subject of a Conservation Restriction pursuant to M.G.L. c. 184, §§ 31-33 and is approximately 2.9 acres in size. Application at 2-1, § 2.

B. The Applicant's Existing Pipeline Network

The Applicant operates a natural gas pipeline which runs between Lambertville, NJ and Beverly, MA. Bocock PFT at 7:135-145; Bocock Ex. 2 ("Resource Report 10 – Alternatives", dated October 2015, Figure 10.5-3, showing the pipeline system).[12] The network includes two segments that interconnect in Weymouth, the I-9 and the I-10. The I-9 runs between Weymouth and Braintree, beneath the Fore River, and connects on its southern end to the pipeline network running south into New Jersey. Bocock PFT at 9:182-196; Powers PFT, Ex. 3.

The I-10 runs under the Fore River Basin, outer Boston Harbor and Massachusetts Bay between Weymouth and Beverly, where it connects to a pipeline operated by Maritimes and Northeast.[13] The I-10 is also known as the HubLine. Bocock PFT at 9:192-196; Bocock Ex. 3.[14] There are three lateral pipelines connected to the HubLine. Two of the laterals connect the HubLine to offshore liquefied natural gas ("LNG") ports and the Salem Lateral connects the

[12] A "Resource Report" is a document that is prepared by a FERC Applicant which FERC uses in preparation of its environmental assessment for a project. Tr. 1 at 174:20-24; 175:1.

[13] The Maritimes and Northeast pipeline system is shown in Bocock Ex. 5.

[14] The I-10 will be referred to as the HubLine throughout this RID.

HubLine to Footprint Power's Salem Harbor natural gas power plant. Bocock PFT at 9-10:197-202; Bocock Ex. 5 (showing the lateral pipelines connecting to the HubLine).

The HubLine, an approximately 30-mile long, 30" diameter pipeline, was licensed pursuant to c. 91 in 2002. Pursuant to Massachusetts Environmental Policy Act ("MEPA")[15], the Secretary of Environmental Affairs[16] found that the HubLine was water-dependent because it could not reasonably be located or operated away from tidal or inland waters. MEPA Certificate, March 19, 2002, Taormina Ex. 2 at 5. The license limited the use of the HubLine to 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 Certificate dated March 19, 2002." Tyrell Ex. 4 (License No. 9451); Taormina Ex. 2. At the time it was licensed, the purpose of the HubLine was to allow new and existing shippers on the eastern end of Algonquin's pipeline system to gain access through the Maritimes and Northeast pipeline to offshore supplies of Canadian gas. Powers PFT at ¶ 8. In other words, at the time the HubLine License was issued the pipeline was intended for north to south transport of natural gas from Canada.[17] The HubLine License does not by its terms restrict the direction of flow within

[15] M.G.L. c. 30, §§ 61-62H. Section 61 provides, in part, that "[a]ll agencies, departments, boards, commissions and authorities of the commonwealth shall review, evaluate, and determine the impact on the natural environment of all works, projects or activities conducted by them and shall use all practicable means and measures to minimize damage to the environment." Additional information regarding the purpose and intent of MEPA can be found at https://www.mass.gov/service-details/purpose-and-intent-of-mepa.

[16] The name of the Secretariat was changed to the Executive Office of Energy and Environmental Affairs ("EOEEA") subsequent to the issuance of the HubLine's c. 91 license.

[17] The HubLine License also licenses the "Deer Island Lateral", a 24" diameter pipeline approximately 5.4 miles long running to the MWRA wastewater treatment facility located on Deer Island. Aboveground facilities associated with the HubLine include a meter station, a block valve/receiver and regulator facilities onshore in Salem and Weymouth. The overview of the HubLine is shown in Tyrell Ex. 4. on Sheet 1 of 10 of the License Plans.

the pipe. Tr. 2 at 121:3-4 (Lynch testifying that the Department never required that the gas flow in only one direction).

The sections of Algonquin's pipeline network[18] that ultimately connect into the HubLine in Weymouth all have smaller diameter pipe size and lower Maximum Allowable Operating Pressures ("MAOP") than the HubLine. Powers PFT at ¶ 10; Application at Appendix A, Resource Report 10. The lower MAOPs range from 750 to 958 PSIG.[19] The HubLine's MAOP is 1440 PSIG. The I-9 normally operates within a range of 500-700 PSIG; the HubLine normally operates within a range of 900-1200 PSIG. Bocock PFT at 16:342-360; Powers PFT at ¶ 9. However, the HubLine has operated at a pressure as low at 750 PSIG during peak demand events. Tr. 1 at 68:21-24; Bocock Ex. 6 (Pressure Profile I-10 at Beverly, I-9 at Fore River). Because of the different MAOPs in the Applicant's pipeline segments, natural gas cannot currently flow from the southern segments with lower pressures, most specifically the I-9, into the higher pressure HubLine, resulting in a "bottleneck" at the I-9/HubLine, interconnection in Weymouth Tr. 1 at 67:15; Powers PFT at ¶¶ 10-11.[20]

C. The Atlantic Bridge Project

The proposed natural gas compressor station is one part of a larger, multi-state project called the Atlantic Bridge Project ("AB"). The Applicant describes AB as follows:

[18] These include the I-8, the I-9, the I-3 and the Q-1.

[19] "MAOP" is the maximum safe rating for the pipe; it can be operated up to that limit. The actual operating pressure of a pipeline may be significantly lower. MAOP is a function of the diameter of the pipe and the strength of the steel. Tr. 1 at 56:9-13; see also Bocock PFT at 15:336 ("The I-8 currently has an MAOP of 958 pounds per square inch gauge (psig), which is dictated by the wall strength of the pipeline as constructed").

[20] As Mr. Bocock testified, "Movement of natural gas within a pipeline system is a matter of hydraulics. Essentially, natural gas in a pipeline will always move from a zone of higher pressure towards a zone of lower pressure." Bocock PFT at 5:99-101.

> "The purpose of the Atlantic Bridge Project is to economically provide the pipeline capacity necessary for the transportation of significant and diverse natural gas supplies from a receipt point at Mahwah, New Jersey to the Project shippers' delivery points primarily in Massachusetts, Maine and at the United States ("U.S.") – Canadian border. The Project would provide additional capacity on the Algonquin system and facilitate south-to-north flow on the Maritimes system in order to provide additional gas supply to New England and the Maritime provinces of Canada.

Atlantic Bridge Project, Resource Report 10, Section 10.2, FERC Docket No. CP16-9-000 (October 2015)("RR10"); Bocock PFT at 12-13:262-273.[21] To achieve the AB's purpose of moving natural gas from south to north through the HubLine, natural gas in the pipeline needs to be able to flow from the Applicant's I-9 pipeline into the HubLine. Bocock PFT at 14:299-312. The Applicant has customers north of the HubLine with which it has agreements[22] to deliver natural gas supplies at certain delivery points and at certain pressures. Bocock PFT at 13:275-281. The Applicant sized and designed the AB project's facilities to meet the firm capacity requirements of the precedent agreements. Id.

In addition to the proposed compressor station in Weymouth, the AB project includes pipeline replacements in New York State and Connecticut; a new metering and regulating ("M&R") station in Connecticut; modifications to three existing compressor stations in New York and Connecticut; modifications to existing M&R stations in New York, Connecticut, Massachusetts and Maine; and facilities associated with the new pipeline. Atlantic Bridge Project, Environmental Assessment at 2-3, FERC Office of Energy Projects (May 2016); Bocock

[21] Algonquin sells capacity on its pipeline system to transport natural gas to its customers. Algonquin does not sell natural gas. Applicant's Hearing Memorandum of Law at 5, citing Bocock PFT at ln. 43-44 and 48-49. "These capacity commitments include the capacity to transport specific amounts of natural gas to the delivery points at customer-required operating pressures." Bocock PFT at 3:44-46.

[22] These are known as "precedent agreements".

PFT at 12-13:262-273; see also Order Issuing Certificate and Authorizing Abandonment ("FERC Certificate"), FERC Docket No. CP16-9-000 (January 25, 2017).[23]

The Applicant submitted an application for the AB project to the Federal Energy Regulatory Commission ("FERC")[24] that included siting a compressor station on the proposed project site in Weymouth as well as six alternative locations for the facility. Applicant's Closing Brief at 5. The Alternatives Analysis prepared by the Applicant and presented in Resource Report 10 ("RR10") indicated that each of the seven alternatives could achieve the project purpose, and concluded that the proposed project location in Weymouth is superior to the alternatives and is the Applicant's preferred site. FERC received public comments, conducted an Environmental Assessment under the National Environmental Policy Act ("NEPA")[25], applied the standards under the Natural Gas Act and approved the need for the AB project, including the compressor station in Weymouth. Id. at 5, citing Algonquin Gas Transmission, 158 FERC ¶ 61,061 (January 25, 2017).

D. The Compressor Station Project

The compressor station project consists of two new buildings: one natural gas-fired compressor unit providing an additional 7,700 horsepower and one 6,100 square foot auxiliary building that will house offices for personnel, electrical motor control centers, a control room, security system, garage bays, parts storage, compressed air system and an emergency generator.

[23] The FERC Certificate is attached as Exhibit 1 to the Applicant's Motion to Vacate the Stay. The FERC Certificate notes that the "vast majority" of comments FERC received on the Environmental Assessment concerned the proposed Weymouth Compressor Station. FERC Certificate at p. 16, ¶¶ 53-54.

[24] FERC is a federal agency that regulates the interstate transmission of electricity, natural gas, and oil. See https://www.ferc.gov/about/ferc-does.asp.

[25] 42 U.S.C. §§ 4321 *et seq.*

Determination at 2; Application at p. 1-2, § 1.1.1. The project also includes parking spaces, internal roadway circulation, underground utilities, and a 6,200 square foot stormwater basin that will connect to an existing onsite stormwater system and outfall structure, and the placement of 12,000 cubic yards of fill on top of previously authorized filled tidelands. Application at p. 1-2, § 1.1.1. The License Plans submitted to the Department showing the project's components are dated September 20, 2016 and are contained within the Supplement to Administrative Record within the Department's Basic Documents. The compressor station will interconnect with the Applicant's existing HubLine system at the Weymouth M&R station. Application at p. 1-2, § 1.1.1.

As discussed above at p. 12, the existing differences in MAOP and actual operating pressures between the HubLine and the other segments of the Applicant's pipeline system prevent the south to north flow required to achieve the AB project's purpose. The Applicant conducted a hydraulic modeling analysis of its existing pipeline system to determine if the AB project purpose could be achieved with existing facilities. The analysis showed that the existing facilities could not transport natural gas from the I-9 into the HubLine because they could not overcome the pressure disparity between those pipeline segments. The Applicant determined that additional compression is needed at the southern end of the HubLine. Bocock PFT at 14:301-312; Bocock Ex. 6. Mr. Bocock explained the need for compression within the pipeline system as follows:

> As natural gas moves through a pipeline, the combination of distance, friction, elevation, turbulence, temperature, and other forces reduce the pressure of the natural gas. Also, an increase in pressure is necessary where natural gas is transported from pipeline segments operating at a lower operating pressure into pipeline segments operating at a higher operating pressure. Thus, the pressure periodically must be restored or increased to ensure that natural gas flows throughout the pipeline system at sufficient pressures to

meet flow and pressure commitments to customers.

Bocock PFT at 6:109-115. See also Tr. 1 at 157:6-10. Weymouth's expert, Mr. Powers, concurred that overcoming the pressure differential between the I-9 and the HubLine requires either a boost in pressure or replacement of the existing lower MAOP pipelines south of the HubLine. Powers PFT at ¶ 11.

V. ISSUES FOR ADJUDICATION

As discussed above, the issues addressed in this RID are Issues for Resolution 1, 7 and 8, set forth below. They were determined at the pre-hearing conference based on the parties' pleadings, including the Appeal Notices and the Pre-Hearing Conference Statements, and discussions at the conference.[26]

[26] The remaining issues in these appeals will be decided after a second adjudicatory hearing. They are as follows and are numbered as per the PHC Report and Order:

> 2. Does the Project comply with the standards to preserve water-related public rights, pursuant to 310 CMR 9.35?
>
> 3. Does the Project serve a proper public purpose in accordance with 310 CMR 9.31(2)(a)?
>
> a. If the Project is presumed to serve a proper public purpose, is the presumption rebutted in accordance with 310 CMR 9.31(3) and 310 CMR 9.32 through 310 CMR 9.37?
>
> 4. Does 310 CMR 9.32 prohibit siting the project's "accessory uses" (internal roadway, parking spaces, underground utilities, stormwater basin and fill) in a Designated Port Area absent a finding that such uses are accessory to a water-dependent industrial use?
>
> 5. Is a license term of 30 years permissible for the project?
>
> 6. Do the Petitioners' claims relating to air pollution and noise state claims for which relief can be granted in this proceeding?

The Petitioners proposed adding as a sub-issue to Issue 6 the following question: "Are these claims nonetheless relevant to rebut the presumption in 310 CMR 9.31(2)(a) that the Project serves a proper public purpose?" Issues of air pollution and noise are outside the scope of the issues that can be adjudicated in an appeal arising under the waterways regulations. See In the Matter of Ikea Property, Inc., *Ruling on Motion to Dismiss*, 2005 MA ENV LEXIS 6 (March 10, 2005) and the cases cited therein. Therefore, this sub-issue is not included among the Issues for Resolution in the Appeals.

1. Is the Project a water-dependent industrial use project pursuant to 310 CMR 9.12?[27]

   a. Is the compressor station "ancillary" to the HubLine, as provided in 310 CMR 9.02?

7. Was it proper for the Department to issue the Written Determination without documentation relating to other state and local approvals, as required by 310 CMR 9.11(3)(c)(3)(d) and 310 CMR 9.11(3)(c)(3)(e)?

8. Is the Applicant required to obtain a municipal zoning certificate, in accordance with M.G.L. c. 91, § 18 and 310 CMR 9.34(1)?

VI. BURDEN OF PROOF AND STANDARD OF REVIEW

The Petitioners had the burden of proving by a preponderance of credible evidence that the Determination does not meet the requirements of the waterways regulations for each of the issues addressed in this RFD. In the Matter of Renata Legowski, OADR Docket No. 2011-039, Recommended Final Decision (October 25, 2012), 2012 MA ENV LEXIS 128, at 7-8 (party challenging Chapter 91 determination has burden of proof), adopted as Final Decision (November 5, 2012), 2012 MA ENV LEXIS 131. The ultimate resolution of factual disputes depends on where the preponderance of the evidence lies. Matter of Town of Hamilton, DEP Docket Nos. 2003-065 and 068, Recommended Final Decision (January 19, 2006), adopted by Final Decision (March 27, 2006).

[27] The parties agree that if the answer to this question is "no", then the case should be remanded to the Waterways program for further proceedings on the c. 91 application.

As for the relevancy, admissibility, and weight of evidence that the Petitioners, the Applicant, and the Department introduced in the Hearing, this is governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):

> [u]nless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

Under 310 CMR 1.01(13)(h), "[t]he weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. . . ."

My review of the project is *de novo*. In the Matter of Woods Hole, Martha's Vineyard & Nantucket Steamship Authority, OADR Docket No. 2016-025, Recommended Final Decision (March 27, 2017), adopted by Final Decision (April 13, 2017). See In the Matter of Francis P. and Debra A. Zarette Trustees of Farm View Realty Trust, 25 DEPR 24, Recommended Final Decision, February 20, 2018, adopted by Final Decision, March 1, 2018, quoting In the Matter of John Soursourian, OADR Docket No. WET-2013-028, Recommended Final Decision (2014), 2014 MA ENV LEXIS 49 at 36, adopted as Final Decision, 21 DEPR 63, 2014 MA ENV LEXIS 47 (2014) ("'[t]he Presiding Officer [responsible for adjudicating the administrative appeal] is not bound by MassDEP's prior orders or statements [in the case], and instead is responsible…for independently adjudicating [the] appeal and [issuing a Recommended Final Decision] to MassDEP's Commissioner that is consistent with and in the best interest of the [applicable law and regulations], and MassDEP's policies and practices."

VII. DISCUSSION AND FINDINGS

A. The Compressor Station is ancillary to the HubLine; the Department is not required to make a separate finding of water-dependency for an ancillary facility.

The Department determined that the compressor station is an ancillary facility to the HubLine, which is a water-dependent industrial Infrastructure Crossing Facility.[28] The Department also determined that the compressor station is a permissible use in jurisdictional tidelands within a DPA. Determination, Finding #3. The Petitioners dispute these findings. They assert that the compressor station does not fit the definition of "ancillary" within the waterways regulations and is not, itself, a water-dependent industrial use and therefore it is not allowed in the DPA.

The definition of "ancillary facility" is contained within the definition of Infrastructure Crossing Facility at 310 CMR 9.02. The definition provides:

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[28] Pursuant to 310 CMR 9.12(2)(b)16, "[t]he Department shall find to be water-dependent-industrial the following uses… other industrial uses or infrastructure facilities which cannot reasonably be located at an inland site as determined in accordance with 310 CMR 9.12(2)(c) or (d)."

310 CMR 9.12(2)(d) states: "In the case of an infrastructure crossing facility, or any ancillary facility thereto, for which an EIR is submitted, the Department shall find such facility to be water-dependent only if the Secretary [of Energy and Environmental Affairs] has determined that such facility cannot reasonably be located or operated away from tidal or inland waters, based on a comprehensive analysis of alternatives and other information analyzing measures that can be taken to avoid or minimize adverse impacts on the environment, in accordance with M.G.L. c. 30, §§ 61 through 62H. If an EIR is not submitted, such finding [of water-dependency] may be made by the Department based on information presented in the application and during the public comment period thereon."

An EIR was submitted for the HubLine and the Secretary of Environmental Affairs made the referenced determination. See MEPA Certificate at p.5, March 19, 2002, Taormina PFT Ex. 2. ("I hereby find that the project cannot be reasonably located or operated away from tidal or inland waters."). The Secretary's finding was based on the alternatives analyses conducted by the Applicant, including project-specific impacts, the relation of the HubLine to the natural gas distribution system, the feasibility of a land-based alternative, plus additional information and mitigation commitments in the draft and final Environmental Impact Reports. Id.

> Infrastructure Crossing Facility means any infrastructure facility[29] 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.

(Emphasis added). Therefore, in order for the compressor station to be considered an ancillary facility to the HubLine, it must be both "operationally related" to the HubLine, and "require an adjacent location" to the HubLine.[30] The phrases "operationally related" and "requires an adjacent location" are not further defined in the regulation.

Where, as here, these terms "operationally related to" and "requires an adjacent location" are not defined and have not previously been interpreted in any prior Final Decisions of the Department in administrative appeals of Department permits or enforcement orders, nor explained in Department guidance or policy, I rely on traditional rules of construction to interpret the regulatory requirements in the context of the waterways licensing system. See Warcewicz v. Dept. of Env'l Protection, 410 Mass. 548 (1991), citing Hellman v. Board of Registration in Medicine, 404 Mass. 800, 803 (1989) ("We interpret a regulation in the same manner as a

[29] An Infrastructure Facility is a "facility which produces, delivers, or otherwise provides electric, gas, water, sewage, transportation, or telecommunications services to the public." The HubLine delivers or otherwise provides gas to the public. It is, by definition, an Infrastructure Facility.

[30] By including these two prongs the Department put limits on what facilities it would consider for licensing within waterways jurisdiction. Dictionaries generally define "ancillary" as subordinate, subsidiary or auxiliary. See e.g. Merriam Webster Online Dictionary, https://www.merriam-webster.com/dictionary/ancillary; https://www.collinsdictionary.com/us/dictionary/english/ancillary; Black's Law Dictionary, Sixth Edition (1990) (all defining "ancillary" as subordinate, subsidiary or auxiliary). 310 CMR 9.02 does not change the ordinary meaning of the word.

statute, and according to traditional rules of construction."). Absent any ambiguity, the words in the regulation should be interpreted and applied according to their usual and ordinary meaning. Unless there is a clear intent to the contrary, meaning should not be implied. Warcewicz v. Department of Environmental Protection, 410 Mass. 548 (1991); see also In the Matter of Craig and Hope Beckman, OADR Docket No. WET-2014-022, Recommended Final Decision (May 21, 2015), adopted by Final Decision (May 29, 2015). A word's "usual and ordinary meanings" are derived "'from sources presumably known to the [regulation's] enactors, such as their use in other legal contexts and dictionary definitions.'" Police Dept. of Boston v. Fedorchuk, 48 Mass. App. Ct. 543, 548, 723 N.E.2d 41, 46 (2000), quoting Commonwealth v. Zone Book, Inc., 372 Mass. 366, 369, 361 N.E.2d 1239 (1977). See also In the Matter of Robert Zeraschi, Recommended Final Decision, 2008 MA ENV LEXIS 14, *16-17. Where language is unclear, the regulation should be construed with regard to the "objects sought to be obtained and the general structure of the [regulation] as a whole." Haynes v. Grasso, 353 Mass. 731, 734 (1968). See also In the Matter of Blackinton Common LLC, 2009 MA ENV LEXIS 5, *158-159.

1. The Compressor Station Is Operationally Related To The HubLine.

As noted above, to be considered an ancillary facility within the definition in 310 CMR 9.02, the compressor station must be “operationally related” to the infrastructure crossing facility to which it would be ancillary, in this case, the HubLine. It is undisputed that the HubLine can and does function sufficiently without a compressor station. The Petitioners’ assert that this fact should lead to a conclusion that the compressor station is not “operationally related” to the HubLine. I evaluate the question in the context of the Atlantic Bridge project, as that is how the compressor station has been proposed to the Department.

The Ten Residents Group presented testimony from Frank Singleton in support of their claim that Finding #3 in the Determination is erroneous in that it determined the compressor station is ancillary to the HubLine. Mr. Singleton opined that the purpose of the compressor station is inconsistent with the purpose of the HubLine as licensed, that is, carrying natural gas from the north to the south to augment the supply to the power plant near the site. Singleton PFT at 2. Because the compressor station "has nothing to do" with transporting natural gas from the north to supply the power plant, he concluded that the compressor station "is not ancillary to the water-dependent industrial use granted to the HubLine." Id. The Ten Residents Group asserts that because the compressor station has nothing to do with the original purpose of the HubLine, it is not operationally related to the HubLine. Memorandum of Law of the Ten Residents Group Concerning Issue Number One at 3-4.

Mr. Powers testified for Weymouth that the compressor station is not operationally related to the HubLine "in the sense that it's necessary in order for the HubLine to fulfill the function for which it was originally built." Powers PFT at ¶ 13. Nor will the compressor station improve the HubLine's functionality in transporting natural gas from north to south into New England Markets. Id. at ¶ 14. He further testified that the Applicant had proposed a project in 2008[31] that included installation of a larger pipe that would have addressed the pressure restrictions in Algonquin's existing pipeline system. According to Mr. Powers, if a portion of

[31] HubLine/East to West Project, I-10 Extension. See Powers Exhibits 4 and 5. The East to West ("E2W") project proposed to construct and operate about 31.4 miles of multi-diameter pipeline and related facilities, including compressor stations. As originally proposed by Algonquin, it included replacing the existing interconnected I-9 pipeline segment, I-8 pipeline segment and I-3 pipeline segment (each of which begins in Weymouth at the Fore River M&R Station) with a bigger diameter pipeline, the HubLine I-10 Extension. Powers PFT at ¶ 16; E2W prefiling report, Ten Residents Group Hearing Ex. 1. The E2W project "considerably shrunk" when the amount of gas subscribed for in the project's precedent agreements were well below the project's original expectation. Tr. 1 at 148-152.

that project had been built [the "HubLine I-10 Extension"], then the current bottlenecks would have been eliminated and the proposed compressor station "would not be under consideration." Id. at ¶¶ 16-21. Citing a statement in the project's draft Environmental Impact Statement, Mr. Powers opined that the compressor station "is not operationally related to a re-purposed HubLine in the sense that it is, a second-best approach to achieving reliable bidirectional flow." Id. at ¶¶ 22-23. In his opinion, where a better alternative exists [a bigger pipe], a second-best method, i.e. not as reliable, [a compressor station] should not be considered operationally related to achieving the purpose of the AB project. Id. However, on cross-examination by the Applicant's attorney, Mr. Powers admitted that if the compressor station is built and connected to the HubLine, it will be operationally related to the HubLine, (without conceding that compression is needed at all to achieve the project purpose, and if compression is needed, there are other reasonable locations for the compressor station). Tr. 1 at 81- 83.

Based on this testimony, Weymouth argues that "[b]ecause the compressor station is not operationally related to the HubLine as originally permitted…it is not ancillary." Final Brief of the Town of Weymouth at 7, 21 (emphasis added). Weymouth argues that "[f]or a facility to be 'ancillary' it must be 'operationally related' to the infrastructure facility as originally permitted." Id. at 21. In sum, Weymouth argues that the original HubLine was designed and licensed to move gas from north to south; the proposed compressor station will reverse that flow direction and move greater volumes of gas within the pipeline; and therefore, the compressor station will significantly change the original purpose of the HubLine license. "The fact that the compressor station is not, and has never been, needed to assist the HubLine in achieving its licensed purpose

– i.e., moving gas from the north to the south - demonstrates conclusively that the compressor station is not operationally related to the HubLine as permitted." Id. at 22.

The Applicant's undisputed evidence demonstrates that the compressor station will be physically connected to the HubLine at the proposed site. Tyrell PFT at 19:413-415. As well, Mr. Bocock testified that the HubLine already provides south to north flow along the Northeast Gateway Lateral. Bocock PFT at 10-11:243-160; see also Tyrell PFT at 19:404-406. The compressor station will provide an increase in pressure at the location where natural gas is transported from a pipeline segment with a lower operating pressure into a segment with a higher operating pressure. Bocock PFT at 6:110-113; 14:301-312. The Applicant disagrees that the HubLine's current functionality as a north to south transmission path is factually relevant. Rather, the question is whether the compressor station will be "operationally related" to the HubLine's transmission capacity, not whether the use of that capacity will change. Applicant's Closing Brief at 10-11. The Applicant cites the fact, supported by the Department's witnesses and the plain language of the HubLine's license, that the c. 91 license for the HubLine did not restrict the direction of flow within the pipe. Applicant's Closing Brief at 11; see also Tr. 2 at 121:1-4.

Mr. Lynch testified that the HubLine was licensed as a gas pipeline, but its directional flow was not limited. Tr. 2 at 121:1-4. The Department argues that the Applicant's witnesses, particularly Mr. Bocock, presented a persuasive case for why the compressor station is operationally related to the operation of the HubLine. Because compressor stations enable pipeline companies to continue the flow of gas through the pipeline, and the proposed compressor station will re-pressurize gas and enable it to be transported into the Maritimes

Pipeline system to meet the Applicant's customers' needs, the compressor station meets the definition of "operationally related". Department's Final Brief at 4-5, citing Bocock PFT at ln. 105-116, 299-302. I agree.

Findings

A preponderance of the evidence presented at the adjudicatory hearing supports a finding that the compressor station will be operationally related to the HubLine. Although the phrase has not been interpreted before, the usual and ordinary meanings of the words are clear. "Operationally" derives from the word "operation", defined as "the quality or state of being functional or operative". https://www.merriam-webster.com/dictionary/operation . "Related" derives from "relation", defined as "an aspect or quality that connects two or more things or parts as being or belonging or working together or as being of the same kind." https://www.merriam-webster.com/dictionary/relation. Webster's defines "related" as "connected by reason of an established or discoverable relation". https://www.merriam-webster.com/dictionary/related. Therefore, the plain meaning of the phrase "operationally related" in 310 CMR 9.02 is that the proposed facility must be functionally connected to, or working together with, the operation of the infrastructure crossing facility. I find this meaning to be clear from the context and the examples included in the definition in 310 CMR 9.02. Those examples include "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 CMR 9.02. Each of those ancillary facilities is functionally connected to the operation of the infrastructure crossing facility. The compressor station meets this definition.

The Petitioners did not present credible evidence to overcome Mr. Lynch's testimony that the HubLine was licensed as a natural gas transmission pipe without any restriction on the direction natural gas could flow within the pipe. The Petitioners have provided neither legal authority nor precedent of any kind for their contention that an ancillary facility must be operationally related to the Infrastructure Crossing Facility as originally permitted. My research has not revealed any such requirement, and I do not discern any basis in the regulation to imply one. [32] The evidence introduced at the adjudicatory hearing demonstrates that the compressor station will be physically connected to the HubLine through the existing M&R station on the project site and will enable the movement of natural gas from the Applicant's existing pipeline network at increased pressures into and through the HubLine. Once put into operation, the compressor station will play an integral role in enabling the flow of natural gas from the lower pressure pipeline segments to the south into the HubLine, thereby serving the purpose of the Atlantic Bridge project of delivering natural gas to contracted-for delivery points to the north. In other words, it will be functionally connected to the operation of the HubLine. I find, therefore, by a preponderance of the evidence, that the proposed compressor station will be operationally related to the HubLine.

2. The Compressor Station Requires a Location Adjacent to the HubLine.

As discussed previously, the compressor station is proposed to be located at the southern end of the HubLine in Weymouth, where the HubLine connects to the I-9 pipeline. Its purpose is to overcome a bottleneck at the I-9/HubLine interconnection that exists because of the pressure

[32] While it is true that the circumstances presented by this project are unique, where the Infrastructure Crossing Facility and the ancillary facility were proposed many years apart, I do not believe that matters to the analysis. See Tr. 2 at 94:13-96:8. This is because among the examples contained within 310 CMR 9.02 is at least one, a toll booth, that could be added to an Infrastructure Crossing Facility at a time separate from the original construction of the bridge or tunnel to which it is connected..

differentials within those pipeline segments. Bocock PFT at 14:307-309; Powers PFT at ¶ 11. Overcoming this bottleneck is necessary to achieve the purpose of the Atlantic Bridge project. The Chapter 91 Application for the compressor station states that "[t]he alternatives analysis shows the proposed compressor station must be sited close to the I-10 pipeline system near the coastline both for engineering reasons related to the maximum operating pressure of the pipeline system, and to minimize environmental impacts." Application at 4-1, § 4.0.

To reiterate, to be considered ancillary to the HubLine, the compressor station must require an adjacent location to the HubLine. 310 CMR 9.02 (within the definition of Infrastructure Crossing Facility). The Waterways Regulations do not define the phrase "requires an adjacent location" and the parties disagree about what the phrase means. The Petitioners assert that the meaning of "require" should be "to demand as necessary or essential". The Department asserts that it means "wanted or needed" by the Applicant. The Applicant contends it should mean "operationally reasonable." As with the previous section, I analyze the evidence and arguments in the context of the larger AB project and apply the standard rules of construction. See above at pp. 20-21.

The gravamen of the Petitioners' claims is that the compressor station does not require an adjacent location to the HubLine because there are reasonable and feasible alternative locations where it can be built. The Ten Residents Group also contends that it is not the existence of alternative locations that is fatal to the project, but the Department's failure to evaluate them to determine their impact on the DPA and whether, in light of the alternative locations, the project requires an adjacent location to the HubLine. Supplemental Memorandum of Law of the Ten Residents Group at 7. They contend that the Department's position fails to give the regulations

their plain and ordinary meaning where the language is clear.[33] Weymouth also argues, and Mr. Powers testified, that the Atlantic Bridge project's purpose can be achieved through means other than adding compression at the I-9/HubLine interconnection. The Petitioners both assert that the existence of reasonable and feasible alternatives to the proposed location of the compressor station in Weymouth proves that the compressor station does not require a location adjacent to the HubLine. The Applicant and the Department maintain that the compressor station is required at the North Weymouth parcel because the pressure differential that needs to be overcome is at the I-9/Hubline interconnection on the project site. Both the Applicant and the Department contend that the location within the DPA is appropriate for an industrial facility.

The Ten Residents Group witness, Frank Singleton, provided limited testimony on this issue. He stated "[t]he proposed compressor station can be built elsewhere on the existing Algonquin pipeline route and nothing about its proposed function to facilitate the reversal of pipeline flow makes it a water-dependent industrial or infrastructure facility." Singleton PFT at 3.

Weymouth's expert witness, William Powers, testified that the compressor station does not require an adjacent location to the HubLine in order for the AB project to achieve its overall goal of "permitting bi-directional flow, adding south-to-north capability, across the HubLine." Powers PFT at ¶ 24. He noted that the Applicant proposed six alternative locations in Massachusetts to the North Weymouth site. Id. at ¶ 25. In addition, he asserted that a new compressor station can be avoided altogether if the Applicant increased the capacity of existing

[33] The Ten Residents Group presents a cogent argument addressing the flaws in the Department's interpretation of the phrase "requires an adjacent location". While emphasizing that my review in this case is *de novo*, I agree that the Department's interpretation of the phrase in this case was flawed. See discussion, *infra*, at p. 34, note 38.

compressor stations or added larger diameter pipe. Id. at ¶¶ 26-27. Mr. Powers suggested adding a large-diameter pipe (the I-10 Extension) that would by-pass the I-9, something the Applicant had proposed in its East-to-West Project. See Tr. 1 at 68:16-73:11; 74:17-75:10. He also suggested adding compression capacity at an existing compressor station in Burrillville, Rhode Island with additional piping. Tr. 1 at 86:13-87:14. As well, he stated that lowering the operating pressure on the HubLine would enable south to north flow from the I-9. Tr. 1 at 68:9-71:71. Mr. Powers challenged the Applicant's rejection of land-based alternatives where the Applicant itself has proposed projects that would have had similar impacts as the rejected alternatives Tr. 1 at 74:5-12. He asserted that the Applicant's 2006 Algonquin Incremental Market ("AIM") project demonstrated that increasing the capacity at existing compressor stations can be used to increase natural gas flow south-to-north along the Applicant's pipeline. Powers PFT. at ¶¶ 28-29. Mr. Powers testified that a compressor station capable of achieving the AB project's purpose "can be located distant from the tidal waters of the Fore River." Id. at ¶ 30, citing to Resource Report 10 at 10-34 -10-42.

The Applicant presented the testimony of Mr. Bocock and Mr. Tyrell in opposition to the Petitioners' witnesses. Mr. Bocock's experience with the Applicant over more than thirty years has been as a planner analyzing the hydraulics of the Algonquin pipeline system and planning expansion facilities. Bocock PFT at 2:27-29. Mr. Bocock testified that the increase in pressure is needed at the proposed site. Bocock PFT at 14:301-312 (discussing results of hydraulic modeling analysis). He testified that the Applicant could construct a compressor station elsewhere, but not without building many miles of new [suction and discharge] pipeline, some of which would be hindered by existing physical conditions, such as underground utilities. Bocock PFT at 15:327-

332; 16:338-350. Mr. Bocock stated that the proposed location is the Applicant's preference because "it satisfies all of the operation parameters of the Algonquin system, meets the needs of the AB Project Purpose, and provide [sic] additional pressure to the pipeline system at the exact point required (the southern end of the [HubLine])." Bocock PFT at 18:402-405.[34] He further testified that the location is currently used, and has historically been used, for industrial purposes. Bocock PFT at 18:405-406. Mr. Bocock refuted each of Mr. Powers' suggestions as either not reasonable, not workable from a practical perspective, or resulting in the Applicant not being able to deliver natural gas to its customers as required. See Tr. 1 at 156:12-22; 122:4-18; 157:18-160:4

Mr. Tyrell is the principal coordinator of environmental permitting activities for the AB project. Tyrell PFT at 3:55-56. In that role he "managed the collection of information to prepare Resource Reports and permit applications." Tyrell PFT at 3:56-58. Mr. Tyrell testified that the pressure increase must occur at the proposed site to meet the AB Project Purpose. Tyrell PFT at 19:417-418. In evaluating potential locations for a compressor station, the Applicant considered the need for sufficient acreage for the facility and the construction workspace; the distance needed for suction and discharge pipelines to withdraw natural gas from, and return it to, the existing pipeline network and the need for those distances to be reasonable; and the need to minimize the environmental and social impacts associated with the installation of those pipelines. Tyrell PFT at 4-5:79-84. Resource Report 10 compiled the results of these evaluations. Tyrell PFT at 5:95-98. At the hearing, Mr. Tyrell acknowledged that all of the alternative locations in Resource Report 10 are technically feasible, Tr. 1 at 195:10-14, and considered

[34] I note that "preferred" and "required" are not synonymous.

reasonable. Tr. 1 at 175:13-23. He also acknowledged that environmental impacts detailed in Resource Report 10 include both temporary and permanent impacts without distinction. Tr. 1 at 232-233.

Mr. Tyrell testified that what makes the proposed site preferable to the alternative sites from an environmental perspective is the previous use of the property for fuel oil and coal storage for utility purposes and the proposed use of the site being consistent with the other industrial uses in the immediate vicinity. Tyrell PFT at 7:137-150. Because the proposed location is industrially zoned land, construction of the compressor station there will not impact forested lands, wetlands or waterbodies. As well, it will not require construction of any additional pipelines outside of the compressor station property. Tyrell PFT at 8:153-156.

The Ten Residents Group argues that the definition of the word "requires" applicable to the interpretation of 310 CMR 9.02 is "to demand as necessary or essential; have a compelling need for". Closing Brief of the Ten Residents Group Concerning Issue No. 1/1(a) at 15. They argue that the Department's interpretation of "requires an adjacent location" "as being satisfied by simply siting a proposed project in Chapter 91 Waterways jurisdiction effectively removes the word "requires" from the regulation entirely." Id.

Referencing the examples listed in 310 CMR 9.02, Weymouth contends that the meaning of "requires an adjacent location" is more limited than what the Department and the Applicant propose. Weymouth argues that "[u]nlike the compressor station at issue here, the listed facilities [in 310 CMR 9.02] must be located adjacent to their associated principal facilities in order for the principal infrastructure crossing facilities to operate properly." Final Brief of the

Town of Weymouth at 24. Weymouth concludes that this demonstrates that "it is not essential or necessary for the compressor station to be located in the coastal zone."[35]

The Applicant argues that the Department correctly determined that the compressor station is ancillary to the HubLine, and with that underlying finding, correctly determined that the compressor station is a water-dependent industrial use facility. Applicant's Closing Brief on Issues for Resolution 1, 7 and 8 at 8. The Applicant states that "[a] signal attribute of linear infrastructure networks is that any proposal to add new components must take account of the pre-existing network. In the Applicant's view, "requires an adjacent location" should be interpreted to mean that a proposed ancillary facility "must show that an adjacent location is operationally reasonable while non-adjacent locations would not be operationally reasonable or practicable." Id. at 13-14.

The Department argues that the terms of the regulation are met if the location is reasonable, considering the project's purpose, and based on the technical information provided with the Application and the Applicant's testimony. Department's Final Brief. at 6. Contrary to the Petitioners' assertions, the Department argues that the existence of an alternative site for the compressor station is insufficient "to prove that the requested location is not 'required'". Id.

Findings

As noted above, the Waterways Regulations do not define the phrase "requires an adjacent location". I have looked to the meanings of the word "require" found in various

[35] The examples listed in the regulation provide some support for this argument. Unlike the compressor station, which could be sited away from the HubLine and still meet the AB project purpose, albeit with greater impacts, less efficiency and at greater costs, none of the examples in 310 CMR 9.02 could meet their purpose absent an adjacent location. The compressor station does not neatly comport with these examples, though the regulation makes clear that the list is not exclusive, and I do not believe the Department could be expected to imagine every type of ancillary facility that might be proposed

dictionaries to discern the common meaning.[36] I find the best definition to apply to ancillary facilities to be "suitable or appropriate". I make this finding because I believe that when evaluating an ancillary facility (which the parties all acknowledge are virtually never in and of themselves water-dependent uses), 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 tidelands for the ancillary use is appropriate under all the circumstances presented. Based on the evidence presented at the adjudicatory hearing, I find that it is 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. A preponderance of the evidence supports a finding that the compressor station requires a location adjacent to the HubLine.

Adopting the Petitioners' preferred definition would result, in my opinion, in too rigid a standard with the consequence being that no project could ever be "required" if any reasonable alternative location existed. I do not believe that in developing regulations for licensing ancillary facilities to infrastructure crossing facilities the Department intended such a result. But I do

[36] See, e.g. Merriam-Webster defining "require" as:

1a **:** to claim or ask for by right and authority
b archaic **:** request
2a **:** to call for as suitable or appropriate the occasion requires formal dress
b **:** to demand as necessary or essential **:** have a compelling need for all living beings require food
3 **:** to impose a compulsion or command on **:** compel

reject the Department's more liberal interpretation of the term.[37] While an applicant's perspective should be a factor, since the applicant designs its project to achieve certain ends, that perspective should not be dispositive. The Department should scrutinize an Applicant's justifications for why a proposed ancillary facility "requires an adjacent location", and not just accept an applicant's word for it.[38]

I did not find anything within Mr. Singleton's testimony to be persuasive on this issue. Although Mr. Powers presented credible testimony generally, I find that it was not sufficient when weighed against the credible evidence presented by the Applicant's witnesses. First, he agreed with the Applicant that the pressure differential is located where the Applicant proposes to site the compressor station. Further, his testimony relied in large part on alternatives to this compressor station that are not being proposed to the Department as part of this proceeding. I consider a majority of his testimony to be speculative, because it relies on projects that were either proposed and modified or cancelled by the Applicant (East-to-West), proposed and withdrawn by the Applicant (e.g. Access Northeast), or require the Applicant to re-design the Atlantic Bridge project to avoid siting a compressor station in Weymouth. Mr. Powers testified about alternatives not only to the location of the compressor station, but alternatives to

[37] The Department believes that "requires an adjacent location" should be viewed from the perspective of the Applicant, i.e. the location is wanted or needed by the Applicant, and the Applicant determines what its own needs are. Department's Final Brief at 11-12.

[38] The Petitioners elicited testimony at the hearing that the Department did not do an independent review of whether the compressor station requires an adjacent location, it merely accepted the Applicant's conclusory statements in the Application. Tr. 2 at 35:6-12. To some extent the Department's position misapprehends the definition of "ancillary" in 310 CMR 9.02, and seems to replace the word "requires" with the word "has" in its interpretation of the regulation. As I understand Mr. Taormina's testimony, if a proposed facility is operationally related to the infrastructure crossing facility and has an adjacent location, i.e. the application proposes to place the facility adjacent to the infrastructure crossing facility, then the Department considers it "ancillary". Tr. 2 at 46:8-24. The regulation requires more scrutiny by the Department. Here, the de novo nature of this appeal allowed me to make this determination based on the evidence in the record.

compression itself at the site location. These included the possibility of constructing and/or modifying new and existing pipelines and other feasible options, some of which had been proposed by the Applicant in the past. Powers PFT at 8-10; Tr. 1 at 71:10-15; Tr. 1. at 72:12-24. Mr. Powers testified that no compression is needed if the Applicant just installs larger pipes [with higher MAOP] to eliminate pressure bottlenecks. Powers PFT at ¶ 26. However, as even Mr. Powers acknowledged, those projects were modified or cancelled for economic or business reasons and did not move forward, and may not be approvable by FERC. Tr. 1 at 76-79. At the hearing, Mr. Powers acknowledged that his professional experience has not included any projects involving the c. 91 regulatory program or projects in Massachusetts tidelands. Tr. 1 at 44:11-21.

By contrast, a preponderance of the evidence presented at the adjudicatory hearing demonstrates why the proposed location in Weymouth is suitable or appropriate for this project for the following reasons.

First, the proposed location is where the pressure bottleneck exists between the I-9 and the HubLine. It is at that interconnection where compression is needed to enable natural gas to flow into the HubLine from pipeline segments to its south. Powers PFT at 10-11; Bocock PFT at 14:301-312; Tr. 1 at 111:21-24, 113:4-6; see also pp. 29-31, above. This is the purpose of the Applicant's Atlantic Bridge project.

Second, construction of the compressor station at this site avoids the need to construct many miles of suction and discharge pipe to and from a distant compressor station, which would create greater environmental impacts. Tyrell PFT at 19:419-423; Resource Report 10 at Appendix 10B, Figures 10.8-2A through 10.8-8C. In that report, the Applicant presented several alternative locations for the compressor station that are not within tidelands, but all of the

alternatives had greater impacts to jurisdictional tidelands. Tyrell PFT at 17:364-370.[39] While the alternatives analysis prepared by the Applicant and presented in RR10 does not distinguish between permanent and temporary environmental impacts, building the compressor station on a historically industrialized property presents fewer impacts. See Tyrell Ex. 2, Table 10.8-1(comparing, for instance, 115.5 acres of forested impacts and 77.6 acres of wetlands impacts at the alternative location in Franklin to zero impacts of those types at the proposed Weymouth location); see also Tr. 1 at 232: 19-24 and 233:9-11(Mr. Tyrell testifying that comparative impacts in RR10 Table 10.8-1 [Ex. 2] include temporary and permanent impacts without distinction and that the permanent impacts are smaller than the overall numbers shown in the table).

Third, the project site is within the Weymouth Fore River Designated Port Area. In a DPA, uses are limited to water-dependent-industrial uses and ancillary facilities. Locating the compressor station in the DPA is a permissible and suitable use. Taormina PFT at 5.[40]

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[39] "The five on-shore alternatives each require installation of pipeline in flowed waters of the Fore River in order to reach the I-10. The two offshore alternatives each require installation of pipeline in flowed waters of the Fore River basin and beyond. By contrast, the proposed location involves construction on-shore only in filled tidelands used for decades for utility purposes."

[40] The DPA regulations are found at 301 CMR 25.00. Those regulations note that the Massachusetts Coastal Zone Management Program has identified DPAs as

> [G]eographic areas of particular state, regional, and national significance with respect to the promotion of commercial fishing, shipping, and other vessel-related activities associated with water-borne commerce and the promotion of manufacturing, processing, and production activities reliant upon marine transportation or the withdrawal or discharge of large volumes of water. These water-dependent industrial uses vary in scale and intensity but generally share a need for infrastructure with three essential components: a waterway and associated waterfront that has been developed for some form of commercial navigation or other direct utilization of the water, backland space that is conducive in both physical configuration and use character to the siting of industrial facilities and operations, and land-based transportation and public utility services appropriate for general industrial purposes.

301 CMR 25.01 The regulation further provides that

For all of these reasons, I find that the compressor station requires an adjacent location to the HubLine.

3. Water-Dependency.

Pursuant to 310 CMR 9.12(2)(b)16, "[t]he Department shall find to be water-dependent-industrial the following uses… other industrial uses or infrastructure facilities which cannot reasonably be located at an inland site as determined in accordance with 310 CMR 9.12(2)(c) or (d)." 310 CMR 9.12(2)(d) states:

> In the case of an infrastructure crossing facility, or any ancillary facility thereto, for which an EIR is submitted, the Department shall find such facility to be water-dependent only if the Secretary [of Energy and Environmental Affairs] has determined that such facility cannot reasonably be located or operated away from tidal or inland waters, based on a comprehensive analysis of alternatives and other information analyzing measures that can be taken to avoid or minimize adverse impacts on the environment, in accordance with M.G.L. c. 30, §§ 61 through 62H. If an EIR is not submitted, such finding [of water-dependency] may be made by the Department based on information presented in the application and during the public comment period thereon.

The Petitioners contend that 310 CMR 9.12 requires the Department to make a determination of water-dependency for the compressor station even if it is considered ancillary to the HubLine. See Memorandum of Law of the Town of Weymouth at 7-8; Memorandum of Law

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> Because economic, environmental, and social factors now virtually preclude further development of such an intensive nature, what remains of the industrialized coast should be preserved to the maximum extent practicable in order to meet the long-term, cumulative space needs of the water-dependent industries that these areas are so well-suited to accommodate. As a matter of state policy, it is not desirable to allow these scarce and non-renewable resources of the marine economy to be irretrievably committed to, or otherwise significantly impaired by, non-industrial or nonwater-dependent types of development, which enjoy a far greater range of locational options. Accordingly, within DPAs it is the intent of the CZM Program to encourage water-dependent industrial use and to prohibit on tidelands subject to the jurisdiction of M.G.L. c. 91 other uses except for compatible public access and certain industrial, commercial, and transportation activities that can occur on an interim basis without significant detriment to the capacity of DPAs to accommodate water-dependent industrial use in the future.

of the Ten Residents Group Concerning Issue Number One (Water-Dependent Industrial Use, 310 CMR 9.02 and 9.12) at 1; Final Brief of the Town of Weymouth at 20; Closing Brief of the Ten Residents Group Concerning Issue No. 1/1(a) at 13-14. Weymouth contends that regardless of whether the compressor station is ancillary to the HubLine, it is a nonwater-dependent use project. Final brief of the Town of Weymouth at 30. The Ten Residents Group contends that there is no exception for ancillary facilities in 310 CMR 9.12(1); the regulation requires the Department to classify the compressor station as water-dependent or non-water-dependent. Citing 310 CMR 9.12(2)(d), the Ten Residents Group argues that the Department did not analyze the project to determine whether it cannot reasonably be located or operated away from tidal water. The Department did not dispute that it did not conduct this analysis.

There are no prior Final Decisions of the Department in administrative appeals of Department permits or enforcement orders or Department guidance or policies regarding whether a separate determination of water-dependency needs to be made for an ancillary facility. The Written Determination found that "the use of filled private and Commonwealth Tidelands for said compressor station is considered an ancillary facility to a previously authorized water-dependent-industrial infrastructure crossing facility for the transmission of natural gas (authorized in DEP Waterways License No. 9451 issued in 2002) and permissible within a Designated Port Area per 310 CMR 9.12(2)(d) and the Secretary's Certificate (EEA #12355) dated March 19, 2002. Determination, Finding 3. The Department did not make a determination of water-dependency for the compressor station as part of its review of the proposed project. The

Department made a determination only that the facility was ancillary to the HubLine, a water-dependent-industrial infrastructure crossing facility.[41]

The Department's position is that ancillary facilities to water-dependent infrastructure crossing facilities do not require a separate finding of water-dependency; the Department only needs to find that they are ancillary. See Lynch PFT at 4; Taormina PFT at 3-4; Tr. 2 at 66:9-17; Department's Memorandum of Law at 4 (The language and intent of 310 CMR 9.12(2)(d) "clearly contemplate that the ancillary facility will be considered in the same category of water-dependency as the infrastructure crossing facility that it serves.") The rationale for this position is that a contrary position would undermine the purpose of making the ancillary facility and the infrastructure crossing facility consistent in both 310 CMR 9.02 and 310 CMR 9.12(2)(d). Department's Memorandum of Law at 4. The Department contends that requiring separate and possibly different determinations of water-dependency for these related facilities is too narrow a reading of the regulations and could yield irrational results inconsistent with the goals and policies of the Waterways program as reflected in the regulations. Lynch PFT at 3; Department's Memorandum of Law at 4-5; see also Tr. 2 at 44-47; 49:11-12 ("You don't pull apart the ancillary facility and make a separate finding of water-dependency.") To sum up the Department's position, once the Department determined that the proposed compressor station was ancillary to the HubLine, the compressor station itself was considered a part of that already-

[41] The Application presented a somewhat confusing picture, with the compressor station being described in a conclusory fashion as "ancillary", see Application at Section 4.0 ("The proposed compressor station will be ancillary to the operation of the I-10 Pipeline System…."), and also as "accessory to the HubLine and Algonquin's I-9 pipelines, each of which was licensed under Chapter 91 as water-dependent infrastructure crossing facilities" see Application at Section 5.0. At the hearing, Mr. Tyrell testified on cross-examination that referring to the compressor station in the Application as "accessory" was a typographical error, and the Applicant did not intend for the Department to make a determination of water-dependency for the project. Tr. 2 at pp. 217-219.

determined-to-be water-dependent-industrial infrastructure crossing facility. Therefore, a separate water-dependency determination was not required. According to the Department, the waterways regulations recognize that infrastructure crossing facilities need ancillary facilities that are not inherently water-dependent. Department's Final Brief at 2.

The Applicant concurs with the Department's position. The Applicant notes that it has never disputed that a compressor station in and of itself does not require a coastal location. That fact is immaterial, however, because ancillary facilities to infrastructure crossing facilities, such as a toll booth, are always structures that do not usually require a coastal location. But if these structures are determined to be ancillary facilities because they are operationally related and require an adjacent location within c. 91 jurisdiction, they then qualify as water-dependent-industrial uses under 310 CMR 9.00. "It is the relationship to an infrastructure crossing facility that matters, not the inherent water-dependency of compressor stations as such." Applicant's Closing Brief on Issues for Resolution 1, 7 and 8 at 19. Therefore, the Department is not required to find that the compressor station itself cannot reasonably be located or operated outside of tidelands. Id. at 19-20.

The Department's and the Applicant's arguments are more persuasive on this issue and I find that the Department is not required to make a separate finding of water-dependency for the compressor station. As an ancillary facility, the compressor station is considered part and parcel of the HubLine, the water-dependent industrial infrastructure crossing facility to which it is ancillary. Mr. Lynch testified that "[b]ecause ancillary facilities are determined to be operationally related which require an adjacent location, and are viewed by the [Waterways Regulation Program] to be subordinate to a primary, water-dependent infrastructure crossing

facility, they do not require a separate determination of water-dependency or other analysis." Lynch PFT at 4. In this instance, considering the compressor station as an auxiliary component of the HubLine, like the M&R station, helps highlight why the Department's position makes better sense.

In the MEPA Certificate for the HubLine, the Secretary of Environmental Affairs determined that the HubLine could not reasonably be located or operated away from tidal waters and was, therefore, water-dependent. Taormina Ex. 2, Certificate of the Secretary of Environmental Affairs on the Final Environmental Impact Report, EOEA #12355, Maritimes and Northeast Phase III and Algonquin HubLine Project, March 19, 2002 (HubLine MEPA Certificate).[42] As a result of my finding that the proposed compressor station is ancillary to the HubLine, it follows that the compressor station itself becomes classified by definition as a water-dependent-industrial use.

B. The Department properly issued the Written Determination before receiving other approvals required by 310 CMR 9.11(3)(c)(3)(d) and 310 CMR 9.11(3)(c)(3)(e).

It is undisputed that at the time the Department issued the Determination, the Applicant had not obtained a municipal zoning certificate, a wetlands permit, or an air plan approval. The waterways regulations state, as relevant to this appeal, that the Department shall determine that an application is complete only if the Applicant has submitted documentation relative to other approvals required for the project, including:

- a final Order of Conditions and a Water Quality Certificate, if applicable pursuant to 310 CMR 9.33, unless the application is a Combined

[42] The Secretary stated "Based on the alternatives analyses conducted to date in the EIR and EIS processes (including the project-specific impacts, the relation of the preferred alternative to the natural gas distribution system, and the feasibility of the land-based alternative), as well as the additional information and mitigation commitments contained in the Draft and Final EIRs, I hereby find that the project cannot be reasonably located or operated away from tidal or inland waters." MEPA Certficate at 5.

> Application, and a certification of compliance with municipal zoning, if applicable pursuant to 310 CMR 9.34(1); or a satisfactory explanation as to why it is appropriate to postpone receipt of such documentation to a later time prior to license or permit issuance; and
>
> - copies of all other state regulatory approvals if applicable pursuant to 310 CMR 9.33; or a satisfactory explanation as to why it is appropriate to postpone receipt of such documentation to a later time prior to license or permit issuance, or to issue the license or permit contingent upon subsequent receipt of such approvals.

310 CMR 9.11(3)(c)3.d. and e. 310 CMR 9.14(5) further provides that

> The Department shall issue a license, permit, draft license, draft permit, or written determination, as appropriate after the application is determined to be complete by the Department, in accordance with the provisions of 310 CMR 9.11(3)(c). The Department may extend such deadline upon request by the applicant. Where a draft license, draft permit, or written determination is issued, the final license or permit shall not be issued prior to receipt of the state and local approvals specified in 310 CMR 9.11(3)(c)3. Notwithstanding the foregoing, the Department may issue a license, permit, draft license, draft permit or written determination as part of a Combined Permit or as a separate license, permit, draft license, draft permit or written determination issued at the same time as the issuance of or after the issuance of the final Order of Conditions and/or Water Quality Certification.

Here, the Department determined that the Applicant had provided relevant documentation regarding other state and local approvals. Determination, Finding #5. It noted that a wetlands permit (Superseding Order of Conditions) had been issued by the state, after the Weymouth Conservation Commission issued a permit denial; that the state permit had been appealed to the Office of Appeals and Dispute Resolution ("OADR"); and that the appeal had been stayed by OADR pending the federal court's determination on the question of preemption of the local permit denial. It also noted that the Applicant submitted the Municipal Planning Board Notification, but had not received local zoning approval. The Determination noted that the FERC had issued a Certificate of Public Convenience and Necessity ("FERC Certificate") for the

project on January 25, 2017 and that the FERC Certificate stated that permits which "unreasonably delay the construction or operation of facilities approved by [FERC]" may be inconsistent with the Natural Gas Act. Id. The Department determined that this statement constituted a satisfactory explanation pursuant to 310 CMR 9.11(3)(c)(3)d. of the appropriateness of postponing receipt of the required documentation of other approvals to a later time prior to issuance of the final c. 91 license. Finally, the Determination states that "[the Final License will not be issued until the Department receives the local approvals specified in 310 CMR 9.11(3)(c)(3) or until a determination is made that such approvals are pre-empted under the Natural Gas Act." Id.; Taormina PFT at pp. 6-7; Lynch PFT at pp. 4-5.

Weymouth contends that the Department's issuance of the Determination without documentation of other state and local approvals, as required by 310 CMR 9.11(3)(c)3.d and 310 CMR 9.11(3)(c)3.e. was improper. Weymouth's Notice of Claim at 10-12; Weymouth's Memorandum of Law at 13-15; Final Brief of the Town of Weymouth at 33-36.[43] Specifically, Weymouth argues that the Department's action was premature because the Applicant had not demonstrated compliance with local zoning, the Massachusetts Wetlands Protection Act, or the Air Pollution Act, nor provided a satisfactory explanation of why it would be appropriate to delay receipt of such approvals. Final Brief of the Town of Weymouth at 33. Weymouth contends that the c. 91 application lacked an explanation for why the Department should act on the application absent these approvals. Id. at 34. Weymouth acknowledges that the Determination states that the Applicant submitted relevant documentation regarding other state and local approvals, but the submission lacks any reference to the required air permit.

[43] The Ten Residents Group did not submit evidence or argument on this issue.

Weymouth contends that "…the only rational conclusion is that no information was submitted or obtained." Town of Weymouth's Supplemental Memorandum of Law at 7, note 4. In Weymouth's view, lacking a complete application or a satisfactory explanation from the applicant, the Department should not have issued the Determination.

The Applicant disputes this argument. In its view, the Department has discretion under 310 CMR 9.00 to issue the Determination, as well as a Final Decision in the appeals, while other local and state approvals are pending. Applicant's Hearing Memorandum of Law at 27. The Applicant contends that the Department appropriately exercised its authority and discretion when the Determination was issued in May 2017, for the following reasons. The waterways application had been pending since December 2015. The wetlands SOC had been issued and the administrative appeal of that was pending. The federal court action to determine whether the local wetlands permit denial was preempted by the Natural Gas Act was also pending. According to the Applicant, these "circumstances necessarily constituted a 'satisfactory explanation' for why the Department had not yet received the other final approvals." Id. at 28. From the Applicant's perspective, if Weymouth's claim is granted, it "would mean that the Department may not issue a written determination under 310 CMR 9 until it has received final orders of conditions and a final air permit, after any appeals." Applicant's Closing Brief on Issues for Resolution No. 1, 7 and 8 at 23.

The Department agrees with the Applicant that the regulations provide it with the authority and discretion to issue a Written Determination concurrent with other permitting for a project. Department's Memorandum of Law at 5; Department's Final Brief at 16. It argues that the phrase "satisfactory explanation" means satisfactory to the Department, and is evidence of

that discretion. If something more was required of an applicant, the regulations would be more specific. Department's Memorandum of Law at 5. According to the Department, the regulatory language is "broad enough and sufficiently discretionary to only require some reason" for postponing receipt of other approvals. Department's Final Brief at 17. The Department maintains that while it is better to have all required permits in hand early, the sequence can be varied consistent with the regulations and without prejudice to any party. Id. In this case, the fact that the Applicant was diligently seeking other permits and approvals or arguing they were unnecessary justified postponing receipt of those permits and approvals to a later time prior to issuance of a final license. Further, the Department asserts that the regulations do not require that the Department explain or rationalize its decision about postponing receipt of other permits in the Determination. Id. The Department also notes that the unrefuted testimony of Ben Lynch demonstrates that the Waterways Regulation program typically does not require an air permit prior to issuing a c. 91 license. Id.; Lynch PFT at 5 ("Insofar as the air permit is concerned, pursuant to 310 CMR 7.00, the WRP generally considers receipt of [an air permit] as a condition subsequent for issuance of the final [waterways] License.")

Finding

I find that the Determination was properly issued even though the Application could not be considered complete. Despite the absence to date of other required final permits and approvals, the language of the applicable regulations, cited above, makes it plain that the Department is afforded discretion to act on an incomplete application and move the waterways permitting process forward under certain circumstances. I agree with the Applicant and the Department that the circumstances here regarding other permits and approvals constitute a

satisfactory explanation for why it is appropriate to delay receipt of those permits and approvals to a later time prior to issuance of the final license. The Determination specifically stated that the final license will not be issued until the Department receives the required state and local approvals, including the zoning certificate, or it is determined that these, or any of them, are preempted by the Natural Gas Act. Determination, Finding #5; Lynch PFT at 5. As well, the final license would be contingent on receipt of an air permit.

The c. 91 application itself provides a sufficient basis for the Department to have made its determinations. The Application states that the compressor station will comply with applicable environmental regulatory programs of the Commonwealth cited in 310 CMR 9.33.[44] Application at §§ 5-1 and 5-3. The Application also specifically identifies the permits needed by the project (including a wetlands permit and an air permit), id. at § 1-4, and provides a table showing the anticipated dates by which the Applicant would submit permit applications and receive the permits. Id. at pp. 1-10 to 1-11, Table 1.4-1. Mr. Lynch testified, unchallenged, that the Applicant explained to the Department that it was diligently pursuing the outstanding required permits and approvals. Lynch PFT at 5.

During the course of the Department's review of the waterways license application, the Applicant received its FERC Certificate. It also received a state wetlands permit.[45] It also brought an action in federal court prior to the issuance of the Determination seeking a declaration

[44] These environmental regulatory programs include the Massachusetts Wetlands Protection Act and the Air Pollution Act. See 310 CMR 9.33(1)(b) and (1)(o).

[45] The Department issued a Superseding Order of Conditions to the Applicant on September 7, 2016. That permit was appealed by the Weymouth Conservation Commission and is assigned OADR Docket No. WET-2016-025. An adjudicatory hearing in that appeal was conducted on August 10, 11 and 14, 2018. A Recommended Final Decision is anticipated in December 2018.

that the Weymouth wetlands ordinance was preempted by the Natural Gas Act.[46] The Applicant filed its application for an air permit. Applicant's Hearing Memorandum of Law at 14-17. There is no evidence that the Applicant has been dilatory in seeking the required permits. Viewed as a whole, these circumstances constitute a "satisfactory explanation" for why it was and is appropriate to postpone receipt of these required approvals to a later time prior to issuance of a final license.[47]

As the Department noted, "[t]he Waterways licensing regulations very clearly provide the Department with authority and discretion to proceed with waterways licensing currently with other pending permitting of a project." Department's Memorandum of Law at 5. I concur that this is the correct and better application of the waterways permitting process. Particularly for a project like the compressor station requiring multiple permits and approvals from multiple local, state and federal agencies, it makes good regulatory and policy sense to allow the Determination to be issued while these other permitting activities are occurring, and postpone final license issuance until the wetlands permit and the zoning certificate (if not preempted) are in hand, and to make the license contingent upon receipt of the air permit. For these reasons, I find that the Determination was properly issued prior to the receipt of other required approvals and permits.

[46] Algonquin Gas Transmission, LLC v. Weymouth Conservation Commission, No. 1:17-cv-10788-DJC. The complaint was filed on May 4, 2017. The court ruled in the Applicant's favor on December 29, 2017 and entered judgment on February 15, 2018.

[47] The Applicant has been pursuing a concurrence from the Massachusetts Office of Coastal Zone Management "(MCZM") that the project is consistent with MCZM's enforceable policies under the Massachusetts Coastal Management Plan. A consistency determination has not yet been made. That process has been tolled to February 9, 2019, pending the resolution of these waterways appeals. Applicant's Hearing Memorandum of Law at 17; Tyrell PFT, Ex. 8.

C. The Applicant is Required to Obtain a Municipal Zoning Certificate Unless this Requirement or the Weymouth Zoning Bylaw is Pre-empted by the Natural Gas Act.

M.G.L. 91, § 18 states that "[n]o license shall be granted for private tidelands unless the application therefor contains a certification by the clerk of the affected cities or towns that the work to be performed or changed in use is not in violation of local zoning ordinances and by-laws." The waterways regulations at 310 CMR 9.34(1) provide:

> Any project located on private tidelands or filled Commonwealth tidelands must be determined to comply with applicable zoning ordinances and by-laws of the municipality(ies) in which such tidelands are located. The Department shall find this requirement is met upon receipt of written certification issued by the municipal clerk, or by another municipal official responsible for administering said zoning ordinances and by-laws, and signed by the municipal clerk, stating that the activity to be licensed is not in violation of said ordinances and by-laws. Compliance with zoning does not apply to any public service project that is exempted from such requirements by law, including but not limited to action of the Department of Public Utilities pursuant to M.G.L. c. 40A, § 3.

A "public service project" is defined, as relevant to the Applicant's project, a project which consists entirely of a facility which produces, delivers, or otherwise provides electric, gas, water, sewage, transportation, or telecommunication services to the public. See 310 CMR 9.02. The Applicant's project qualifies as a public service project by virtue of it being ancillary to an Infrastructure Crossing Facility.

There is no disagreement among the parties that the Applicant neither applied for nor received a municipal zoning certificate. The disagreements relate to whether compliance with municipal zoning applies to the Applicant's project, and if it does not, whether a Final Decision can be issued prior to a determination of that question. The Applicant has maintained all along that local zoning is preempted by the Natural Gas Act. On May 3, 2018, the Applicant commenced an action in federal court to determine whether local zoning is preempted by the

Natural Gas Act. See Algonquin Gas Transmission, LLC v. The Town of Weymouth, Massachusetts, U.S.D.C. Massachusetts, Docket No. 1:18-cv-1087, Complaint, May 3, 2018. If the NGA preempts the Weymouth Zoning Ordinance, then the Applicant's project will be "exempted from [the zoning] requirements by law" and the Department can issue a waterways license without the zoning certificate. If the NGA does not preempt local zoning, then a zoning certificate will be required before a license can be issued.

The Applicant believes this issue should be removed from the Issues for Adjudication because the pre-emption issue will be decided in federal court and does not affect the other issues to be resolved in these appeals. Applicant's Closing Brief at 26. It appears from its closing brief that the Applicant is concerned that this proceeding, including the scheduled hearing on the remaining issues, might be delayed pending a decision by the federal court. Id. at 27. Delay due to the pending federal court action is neither planned nor warranted, and the hearing on the remaining issues can and will proceed regardless of the status of the federal court action.

The Department offers a contrary argument. Its position is that Issue 8 "should and must be fully resolved, and compliance with 310 CMR 9.34(1) assured, prior to the issuance of any Recommended Final Decision on the entire case…to ensure that any disagreements about compliance…are fully resolved." Department's Closing Brief at 20. I agree with this position. If compliance with local zoning is not preempted, then as part of the adjudicatory hearing, I will determine whether the Applicant complied with c. 91's requirements concerning zoning, and if it did not, will make recommendations accordingly.

CONCLUSION

In conclusion, based on a preponderance of the evidence, I recommend that the Department's Commissioner issue an Interlocutory Decision based on the following findings:

1. The compressor station is an ancillary facility to the HubLine, a water-dependent-industrial infrastructure crossing facility. The compressor station is operationally related to the infrastructure crossing facility and requires an adjacent location to the infrastructure crossing facility within the DPA. As an ancillary facility, it is considered a part of the water-dependent industrial infrastructure crossing facility and the regulations do not require a separate determination of water-dependency for the compressor station as a stand-alone facility.

2. The Department properly issued the Written Determination before receiving other required permits and approvals where the evidence clearly demonstrates that the Applicant was actively seeking those other permits or approvals.

3. The Applicant is required to demonstrate compliance with local zoning requirements unless such requirements are exempted by law, including preemption by the Natural Gas Act.

Date: 11/21/2018

Jane A Rothchild
Presiding Officer

NOTICE- RECOMMENDED INTERLOCUTORY DECISION

This decision is a Recommended Interlocutory Decision of the Presiding Officer. It has been transmitted to the Commissioner for his consideration. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Interlocutory Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

The parties are also advised that should the Commissioner adopt this Recommended Interlocutory Decision the Commissioner's Decision will not be immediately appealable to Court pursuant to G.L. c. 30A because the Decision will not be a Final Decision. Cf Town of East Longmeadow v. State Advisory Commission, 17 Mass. App. Ct. 939, 940 (1983) ("[a]n administrative order requiring subordinate administrative body to reconsider its order is neither final nor appealable" under G.L. c. 30A); Matter of National Development and NDNE Lower Falls, LLC, Docket No. 2008-073, Recommended Remand Decision (January 26, 2009), Decision Adopting Recommended Remand Decision (January 28, 2009).

SERVICE LIST

IN THE MATTER OF:	**ALGONQUIN GAS TRANSMISSION LLC**
Docket Nos. 2017-011 & 2017-012	**Weymouth**

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