

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

May 30, 2019

In the Matter of

Algonquin Gas Transmission, LLC

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

ORDER REGARDING FURTHER SCHEDULING

These consolidated appeals challenge an Air Quality Plan Approval (“Air Permit”) that the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to Algonquin Gas Transmission, LLC (“the Applicant”) on January 11, 2019 for construction and operation of a natural gas compressor station in the Town of Weymouth. I conducted a three-day evidentiary adjudicatory hearing (“Hearing”) on the appeals on May 15- May 17, 2019. The Hearing was suspended at the end of the day on May 17, 2019, for reasons discussed in my Order to Show Cause dated May 20, 2019.

The parties to the appeals filed the following pleadings and documents with the Office of Appeals and Dispute Resolution (“OADR”) since May 20, 2019:

1. Massachusetts Department of Environmental Protection's Response to Order to Show Cause, dated May 22, 2019, which included the affidavit of Glenn Keith and approximately 208 pages of email messages.¹

2. Ten Persons Group Memorandum Concerning New Alpha Analytical Data, dated May 23, 2019, which included two exhibits: Exhibit 1 is a section from the National Toxicology Program Report on Carcinogens (14th ed.) regarding 1,3-Butadiene; Exhibit 2 is a statement dated May 21, 2019 from the Metropolitan Area Planning Council ("MAPC") entitled "MAPC Statement: Updated Weymouth Air Quality Data."

3. Town of Weymouth's Response to the Department of Environmental Protection's Response to Order to Show Cause, dated May 23, 2019, which included one attachment, a statement dated May 21, 2019 from the Metropolitan Area Planning Council ("MAPC") entitled "MAPC Statement: Updated Weymouth Air Quality Data."

4. Filings were made also by Petitioners Town of Hingham and Town of Braintree adopting the response filed by the Town of Weymouth, and by Petitioner Hingham 10 Persons Group, adopting the response of the Ten Persons Group.

5. Applicant's Memorandum Regarding Alpha's Additional Reports, dated May 28, 2019, which included an affidavit of Christopher M. Long, Sc.D., DABT and two exhibits, Long's curriculum vitae and a document prepared by Long entitled "Review of Alpha Analytical

¹ Many of the pages are duplicate messages. 192 pages of email messages were filed with MassDEP's response and distributed to the service list. An additional 16 pages of email messages (a total of 7 messages) were hand delivered to OADR by MassDEP separately. As to those 7 messages, MassDEP asserted the Attorney Work Product rule, and requested that I review these messages in camera, which I have done. I find these 7 messages to be privileged communications.

Laboratory's Additional reports of Analyses of MassDEP's July to August 2018 Ambient Air Sampling in the Fore River Basin Area.”

I have carefully reviewed all of the filings, and acknowledge the arguments and concerns raised by all of the parties, particularly the Petitioners' concerns regarding the fairness of this adjudicatory proceeding and the Applicant's concern regarding unnecessarily delaying a Final Decision by MassDEP's Commissioner.² As a result of my review, and in accordance with the provisions of 310 CMR 1.01(1)(b)³, 310 CMR 1.01(5)(a)⁴,³ and 310 CMR 1.01(5)(b),⁵ I issue the following orders:

1. The parties shall appear for a continuation of the adjudicatory hearing on Monday, June 10, from 9:00 AM until 1:00 PM, and if necessary, on Tuesday, June 11 from 12:00 PM until 5:00 PM. The materials submitted by the Department in response to the Order to

² Weymouth and the Ten Persons Group want the HIA process to be re-opened. As I have made clear from the outset of these appeals, the HIA is not an appealable decision and is not reviewable in this proceeding. I cannot expand the scope of this air permit appeal to include a review of the HIA. If there is a remedy to be had for MassDEP's alleged failure to provide MAPC with a comprehensive set of data for the HIA, it exists elsewhere.

³ “310 CMR 1.01 shall be construed to secure a just and speedy determination of every appeal. Issues not addressed in 310 CMR 1.01 or for which a party seeks clarity are to be considered in light of the entire M.G.L. c. 30A.”

⁴ “The Presiding Officer shall have the power to take any action authorized by M.G.L. c. 30A to conduct a just, efficient and speedy adjudicatory appeal, and to write a fair and impartial recommended decision for consideration by the Commissioner. The Presiding Officer may, on the Presiding Officer's own initiative or on a party's motion where appropriate, without limitation... manage the presentation of the evidence and participation of the parties so as to develop an adequate and comprehensible record of the adjudicatory appeal....”.

⁵ Consistent with the right to a just and speedy resolution of the adjudicatory appeal, parties at their option may present their case or may be assisted by an authorized representative. The parties, or their authorized representatives shall have a right, subject to the powers of the Presiding Officer at 310 CMR 1.01(5)(a) to:

1. present witnesses;
2. present and establish relevant facts by oral or written testimony and documentary evidence;
3. advance pertinent arguments;
4. refute testimony including an opportunity to cross-examine adverse witnesses; and
5. examine and introduce pertinent documents.

In the Matter of Algonquin Gas Transmission, LLC

OADR Docket Nos. 2019-008 through 2019-013

Order Regarding Further Scheduling

Show Cause demonstrate that the Petitioners were prevented from having a fair and complete opportunity to cross-examine the Department's witnesses on the additional data and its relationship to the air permit at issue in these consolidated appeals. This easily could have been avoided with prompt disclosure of the new Alpha data by MassDEP to OADR and the parties prior to the start of the hearing on May 15, 2019. In fact, MassDEP received the first of seven data reports on Friday, May 10, 2019, and had the entire set of reports from Alpha before the close of business on Monday, May 13, 2019. Affidavit of Glenn Keith at p. 2. Had that disclosure been made, I could have determined, after a discussion with all of the parties, whether it made sense to delay the start of the hearing by one or two days, and the parties could have prepared themselves accordingly. Instead, MassDEP's late disclosure upended the proceedings, created a perception of withholding information that might be relevant to resolution of the appeals, and threatens to delay the issuance of a Final Decision in accordance with the schedule agreed upon by the Applicant and MassDEP in related federal court litigation, and set forth in the Pre-hearing Conference Report & Order. Having reviewed the materials filed by MassDEP in response to the Order to Show Cause, I find that MassDEP did not have a reasonable basis for delaying disclosure of the Alpha reports to the parties until the hearing was two-thirds completed on May 16, 2019 and until after the Petitioners' witnesses had completed their testimony on that same date. This was simply not fair. The remedy for MassDEP's lack of timely disclosure of the data is for me to schedule additional hearing time to accord the Petitioners the opportunity for additional cross-examination of MassDEP's witnesses.⁶ This cross-examination may include the

⁶ I will note that among the *in camera* materials is a suggestion by MassDEP that the data are irrelevant to the air

In the Matter of Algonquin Gas Transmission, LLC

OADR Docket Nos. 2019-008 through 2019-013

Order Regarding Further Scheduling

numerous questions raised by the Ten Persons Group in their response, but the scope of cross-examination will be limited to the new data and MassDEP's knowledge and actions related thereto.

2. By no later than 3:00 PM on Wednesday, June 5, 2019, MassDEP shall identify, in writing and under oath, the earliest date on which any MassDEP witness who testified at the hearing first knew of MassDEP's request to Alpha for the additional data. As noted by the Town of Weymouth, this information is relevant to the weight and credibility of the MassDEP witnesses' testimony.

3. By no later than 3:00 PM on Wednesday, June 5, 2019, MassDEP shall provide copies of all communications related to MassDEP's May 2, 2019 request to Alpha Analytics, including but not limited to MassDEP's first request to Alpha for any data not previously produced by Alpha to MassDEP.

4. The affidavit of Christopher M. Long, Sc.D., DABT and his two exhibits, Long's curriculum vitae and a document prepared by Long entitled "Review of Alpha Analytical Laboratory's Additional reports of Analyses of MassDEP's July to August 2018 Ambient Air Sampling in the Fore River Basin Area", as well as all references in the Applicant's response are stricken from the record. Although Mr. Long had been identified as a potential witness by the Applicant in its pre-hearing statement, he did not file any testimony prior to the hearing. I did not grant leave to file any additional testimony and none was requested by the Applicant. The

permitting and not admissible because they relate the Health Impact Assessment (which is not subject to review in this proceeding). As MassDEP well knows, determinations of relevance and admissibility are made by the Presiding Officer in an appeal. Moreover, the new data fell within MassDEP's continuing discovery obligations to the Petitioners to supplement discovery responses on a timely basis.

In the Matter of Algonquin Gas Transmission, LLC

OADR Docket Nos. 2019-008 through 2019-013

Order Regarding Further Scheduling

Applicant introduced this unsolicited affidavit and report of Mr. Long, which begs for rebuttal and in fairness to the opponents, requires it. Yet the Applicant argues that the appeal must move ahead to a Final Decision according to the agreed-upon schedule, with a Final Decision issued no later than June 28, 2019. That is not possible without allowing an opportunity for rebuttal and cross-examination. In the interest of not prolonging this adjudicatory proceeding any longer than is necessary to afford the Petitioners a full and fair opportunity to cross-examine MassDEP's witnesses, and in order to adhere to the schedule as closely as possible, I am striking these materials.

5. The parties shall file preliminary closing briefs, including proposed findings of fact, conclusions of law, and recommended final decision, based on the record to date, by 5:00 PM on Friday, June 7, 2019. The parties may file supplemental closing briefs after the close of the hearing, but no later than 5:00 PM on Tuesday, June 18, 2019.

Date: 5/30/2019



Jane A Rothchild
Presiding Officer

In the Matter of Algonquin Gas Transmission, LLC

OADR Docket Nos. 2019-008 through 2019-013

Order Regarding Further Scheduling

SERVICE LIST

IN THE MATTER OF:

ALGONQUIN GAS TRANSMISSION, LLC

Docket Nos. 2019-008, 009, 010, 011, 012, 013

Weymouth

REPRESENTATIVE

PARTY

Michael H. Hayden, Esq.
Morrison Mahoney LLP
250 Summer Street
Boston, MA 02210-1181
mhayden@morrisonmahoney.com

PETITIONER (in 2019-008)
Ten Residents Group

Margaret Bellafiore
49 Caldwell Street
Weymouth, MA 02191
Margaret@mobius.org

PETITIONER (in 2019-008)
Ten Residents Group

Elizabeth Moulds, Pro Se
70 Winter Street
Hingham, MA 02043
egmoulds@gmail.com

PETITIONER (in 2019-009)
Hingham Ten Persons Group

Kerry T. Ryan, Special Counsel
Bogle, Deascentis & Coughlin, P.C.
25 Foster Street, First Floor
Quincy, MA 02169
ktr@b-dlaw.com

PETITIONER (in 2019-010)
Town of Hingham

Stephen J. Durkin, Esq.
Assistant City Solicitor
City of Quincy
Quincy City Hall
1305 Hancock Street
Quincy, MA 02169
sdurkin@quincyma.gov

PETITIONER (in 2019-011)
City of Quincy

John J. Goldrosen, Esq.

PETITIONER (in 2019-012)

In the Matter of Algonquin Gas Transmission, LLC

OADR Docket Nos. 2019-008 through 2019-013

Order Regarding Further Scheduling

Assistant Town Solicitor
Town of Braintree
One JFK Memorial Drive
Braintree, MA 02184
jgoldrosen@braintreema.gov

Town of Braintree

J. Raymond Miyares, Esq.
Bryan Bertram, Esq.
Ivria Glass Fried, Esq.
Katherine Stock, Esq.
Miyares and Harrington, LLP
40 Grove Street, Suite 190
Wellesley, MA 02482
ray@miyares-harrington.com
bbertram@miyares-harrington.com
ifried@miyares-harrington.com
kstock@miyares-harrington.com

PETITIONER (in 2019-013)
Town of Weymouth & Weymouth Ten
Citizens Group

Joseph Callanan, Esq.
Town Solicitor
Town of Weymouth
75 Middle Street
Weymouth, MA 02189
jcallanan@weymouth.ma.us

PETITIONER (in 2019-013)
Town of Weymouth & Weymouth Ten
Citizens Group

Ralph Child, Esq.
Nicholas Cramb, Esq.
Jennifer Mather McCarthy, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and
Popeo, P.C.
One Financial Center
Boston, MA 02111
RChild@mintz.com
nccramb@mintz.com
jmmccarthy@mintz.com

APPLICANT
Algonquin Gas Transmission LLC

Mike Dingle, Esq., Chief, Litigation
MacDara Fallon, Senior Counsel
Jenny E. Outman, Senior Counsel
Lauren Karam, Counsel
MassDEP Office of General Counsel
One Winter Street

DEPARTMENT

In the Matter of Algonquin Gas Transmission, LLC

OADR Docket Nos. 2019-008 through 2019-013
Order Regarding Further Scheduling

Boston, MA 02108
mike.dingle@state.ma.us
macdara.fallon@mass.gov
jenny.e.outman@mass.gov
lauren.karam@mass.gov

Cc:

Thomas Cushing, Permit Chief DEPARTMENT
Bureau of Air & Waste
MassDEP Southeast Regional Office
20 Riverside Drive
Lakeville, MA 02347
thomas.cushing@mass.gov

Shaun Walsh, Chief Regional Counsel DEPARTMENT
MassDEP/Southeast Regional Office
Office of General Counsel
20 Riverside Drive
Lakeville, MA 02347
shaun.walsh@mass.gov

Leslie DeFilippis, Paralegal DEPARTMENT
MassDEP/Office of General Counsel
One Winter Street
Boston, MA 02108
Leslie.defilippis@mass.gov

In the Matter of Algonquin Gas Transmission, LLC
OADR Docket Nos. 2019-008 through 2019-013
Order Regarding Further Scheduling