

CLIENT ALERT

FERC Penalizes Gas Pipeline Company for Violating Project Certificate: Time to Revisit Project Certificate Compliance?

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On January 7, 2019, the Federal Energy Regulatory Commission (“FERC” or the “Commission”) approved a Stipulation and Consent Agreement (“Settlement”) between the Office of Enforcement (“OE”) and Algonquin Gas Transmission, LLC (“Algonquin”).¹ The Settlement resolves OE’s investigation into whether Algonquin violated its Incremental Market Project Certificate when it entered wetlands on the banks of the Hudson River outside the project’s right of way with construction equipment to try and retrieve a broken drill stem, without obtaining the required variance from the Commission. Algonquin agreed to pay a \$400,000 civil penalty and to submit semi-annual compliance reports for at least one year. It admitted the facts set forth in the Settlement but neither admitted nor denied the violations.

The Settlement may be the first civil penalty action against a pipeline company for violating the terms of its project certificate and is certainly the first in which FERC has used its penalty authority under the Energy Policy Act of 2005. FERC explains in its order approving the Settlement that Algonquin’s project certificate contained a number of conditions with which the company was required to comply:

- **Condition 1:** Required that any request for modification to construction procedures be approved in writing by the Office of Energy Projects (“OEP”) before using the modification.

¹ *Algonquin Gas Transmission, LLC*, 166 FERC 61,012 (2019) (hereinafter “Order”).

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- **Condition 4:** Required Algonquin to submit in writing all modifications to environmental conditions or site-specific clearances and any revision to survey alignment pads/sheets for the project.
- **Condition 5:** Required Algonquin to file with the Commission Secretary maps and aerial photographs of areas of the project that would be used or disturbed but were not previously identified, specifying wetlands as an example.

Order at 9. The Order asserts that Algonquin violated each of these conditions when it entered the wetlands without first securing a variance. OEP has collaborative processes in place to address a situation in which a pipeline company believes its construction operations cannot comport with the terms of its certificate. Order at 9 n.1. Those processes require that the needed variance be approved by FERC's OEP staff. *Id.* According to FERC, Algonquin failed to follow those necessary procedures.

The \$400,000 civil penalty that Algonquin paid to settle the allegations reflects Algonquin's full and comprehensive cooperation, that Algonquin was not unjustly enriched, that the affected area was small, and that the encroachment did not result in significant or permanent environmental damage. Order at 14; Settlement at 11. But it also reflects the Commission's observation that "although Algonquin had a compliance program in place, it was not sufficiently robust to detect or prevent the violation." Order at 14. Pipeline developers may wish to reassess whether their compliance policies and procedures would ensure compliance with all conditions in a project certificate and address the steps that would have to be taken if a variance were to become necessary. If this settlement is the first in a trend where OE takes a harder look at project certificate compliance, developers may be glad they did.

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