

CLIENT ALERT

# Energy Project Enforcement Actions at FERC: A New Trend?

February 2, 2021

## AUTHORS

Paul J. Pantano, Jr. | Thomas R. Millar

On January 28, 2021, the Federal Energy Regulatory Commission (“FERC” or the “Commission”) approved a Stipulation and Consent Agreement between the Office of Enforcement (“OE”) and Freeport LNG Development, L.P. (“Freeport”).<sup>1</sup> The Freeport Settlement resolves OE’s investigation into whether Freeport violated Section 3(e) of the Natural Gas Act (“NGA”), which governs FERC’s authority over the siting, construction, expansion, or operation of a liquefied natural gas (“LNG”) terminal, as well as a prior Commission Order, when it performed certain construction-related activities without prior Commission approval and submitted admittedly inaccurate and misleading statements in a report to the Commission.<sup>2</sup> Freeport agreed to pay a civil penalty of \$550,000 and stipulated to the facts in Section II of the Freeport Settlement, but neither admitted nor denied the alleged violations set forth in Section III.<sup>3</sup>

The Freeport Settlement is already the second civil penalty action in 2021 for violations related to an energy project.<sup>4</sup> On January 19, 2021, the Commission approved a Stipulation and Consent Agreement between OE and Tres Palacios LLC (“Tres Palacios”) for failing to conduct sonar surveys of its natural gas storage facilities.<sup>5</sup> By contrast, there has been only

<sup>1</sup> *Freeport LNG Dev., L.P.*, 174 FERC ¶ 61,055 (2021) (“Freeport Order”) and the Stipulation and Consent Agreement attached thereto (“Freeport Settlement”).

<sup>2</sup> *Freeport LNG Dev., L.P.*, 148 FERC ¶ 61,076 (2014) (the “2014 Order”).

<sup>3</sup> Freeport Settlement at PP 22-23.

<sup>4</sup> *See Algonquin Gas Transmission, LLC*, 166 FERC ¶ 61,012 (2019).

<sup>5</sup> *Tres Palacios LLC*, 174 FERC 61,060 (2021) (“Tres Palacios Order”) and the Stipulation and Consent Agreement attached thereto (“Tres Palacios Settlement”).

---

## Energy Project Enforcement Actions at FERC: A New Trend?

one other enforcement action in connection with an energy project in the last five years. OE's recent activity may signal a trend, which we foresaw as a possibility when the first civil penalty action of this nature was published in 2019.<sup>6</sup>

### The Freeport Settlement

In 2014, FERC authorized Freeport to construct a new LNG export terminal at the site of its existing LNG receiving and regasification terminal.<sup>7</sup> The terms and conditions of the 2014 Order, effectuated pursuant to Section 3(e) of the NGA, forbid construction at jurisdictional natural gas facilities without prior Commission approval. Appendix A of the 2014 Order obligated Freeport "to inform the Commission of 'all problems encountered and each instance of noncompliance.'"<sup>8</sup> However, upon commencement of site work, Freeport's contractor engaged in construction-related activities on land outside the acreage authorized by the Commission for the LNG site.<sup>9</sup> Freeport did not immediately bring this instance of noncompliance to the Commission's attention.<sup>10</sup> Instead, Freeport requested a variance to use the land but did not disclose that its contractor had already begun construction activity in the unpermitted area and implied that it had the right to enter the additional acreage when parts of that land were not leased by Freeport's contractor.<sup>11</sup>

After learning of the variance request, a local resident contacted the Commission about Freeport's potentially unauthorized construction activities. Thereafter, staff from FERC's Office of Energy Projects ("OEP") contacted Freeport regarding the allegation.<sup>12</sup> Freeport conducted an internal investigation and addressed the construction activity in a report filed with the Commission on April 15, 2016. However, parts of Freeport's April 15 report were inconsistent with information that it had in its possession prior to filing the report. Freeport admitted that it failed to correct these inaccuracies in subsequent communications with OEP staff and failed to provide staff with information it had showing the extent of its violation.<sup>13</sup> In May 2016, Freeport informed OEP that the April 15 report contained several inaccurate statements, including that construction-related activities had not occurred on the unpermitted portion of land prior to filing the variance request.<sup>14</sup>

---

<sup>6</sup> See Paul J. Pantano, Jr. & Thomas R. Millar, *FERC Penalizes Gas Pipeline Company for Violating Project Certificate: Time to Revisit Project Certificate Compliance?*, WILLKIE FARR & GALLAGHER CLIENT ALERT, Jan. 10, 2019, [here](#).

<sup>7</sup> See the 2014 Order at P 89.

<sup>8</sup> Freeport Settlement at PP 20-21.

<sup>9</sup> *Id.* at PP 4, 7.

<sup>10</sup> See *id.* at PP 8-9.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at PP 10, 12.

<sup>13</sup> *Id.* at PP 12-14.

<sup>14</sup> See *id.* at PP 7, 15.

---

## Energy Project Enforcement Actions at FERC: A New Trend?

Two months later, the Commission granted the variance request and referred the matter to OE.<sup>15</sup> OE determined that Freeport violated Section 3(e) of the NGA and the 2014 Order in two ways: (1) by not receiving approval prior to conducting construction-related activities outside the area authorized by the Commission; and (2) by failing to completely and accurately disclose the aforementioned construction violation—conduct that OE concluded constituted a misrepresentation.<sup>16</sup>

### The Tres Palacios Settlement

In 2007, Tres Palacios obtained from the Commission a Certificate of Public Convenience and Necessity to construct and operate its natural gas storage facility, which consisted of three underground salt dome caverns.<sup>17</sup> The Certificate Order required Tres Palacios, among other things, to conduct sonar surveys of the caverns every five years.<sup>18</sup> The sonar surveys were required to monitor the caverns' dimensions and shapes, including the cavern roofs, and to estimate pillar thickness between caverns.<sup>19</sup> Though Tres Palacios initially complied with the sonar survey requirement, it subsequently let more than five years lapse without conducting any sonar surveys.<sup>20</sup>

In March 2016, an intervenor with knowledge of the natural gas storage facility's operations moved for an order directing Tres Palacios to comply with the Certificate Order.<sup>21</sup> Tres Palacios then submitted a filing that acknowledged its noncompliance and requested a waiver from the Certificate Order's conditions.<sup>22</sup> Tres Palacios had not previously requested an extension of time to comply with the conditions.<sup>23</sup>

The Commission referred the matter to OE, which opened a nonpublic investigation into whether Tres Palacios violated any Commission rules.<sup>24</sup> OE concluded that Tres Palacios failed to timely conduct sonar surveys in violation of the Certificate Order and section 7(e) of the NGA, which "empowers the Commission to 'attach to the issuance of the

---

<sup>15</sup> *Id.* at P 16.

<sup>16</sup> *Id.* at PP 19-21.

<sup>17</sup> *Tres Palacios Gas Storage LLC*, 120 FERC ¶ 61,253 (2007) ("Certificate Order").

<sup>18</sup> Tres Palacios Settlement at PP 4-5.

<sup>19</sup> *Id.* at P 5.

<sup>20</sup> See *id.* at P 7. Deadlines under the Certificate Order to complete the sonar surveys were June 23, 2013 for Cavern 1, December 14, 2013 for Cavern 2, and June 6, 2015 for Cavern 3. *Id.*

<sup>21</sup> *Id.* at P 10. The intervenor was Underground Services Markham, LLC, which held the leasehold interest in the property where the salt caverns were located. See Underground Services Markham, LLC, Motion for Order Directing Compliance, Docket Nos. CP14-27-000, CP10-499-000, and CP07-90-000 (filed Mar. 23, 2016).

<sup>22</sup> Tres Palacios Settlement at P 10.

<sup>23</sup> *Id.*

<sup>24</sup> Tres Palacios Order at P 1; Tres Palacios Settlement at P 13.

---

## Energy Project Enforcement Actions at FERC: A New Trend?

certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.”<sup>25</sup>

Tres Palacios agreed with the facts as stipulated in Section II of the Tres Palacios Settlement, but neither admitted nor denied the violations alleged in Section III.<sup>26</sup> It also agreed to pay a civil penalty of \$700,000 and to submit at least two annual compliance reports to OE. OE reserved the option to require the submission of a third annual report in its sole discretion.<sup>27</sup> Tres Palacios agreed that each of its compliance reports will:

- Identify any known violations of Commission-required Tres Palacios certificate conditions, including a description of the nature of the violation and what steps were taken to rectify the situation;
- Describe all compliance measures and procedures Tres Palacios instituted or modified during the reporting period related to compliance with Commission-required certificate conditions;
- Describe all Commission-related compliance training administered during the reporting period, including dates such training occurred, topics covered, and procedures used to confirm which personnel attended; and
- Detail any upcoming sonar surveys, due dates of the surveys, anticipated dates the surveys will be conducted, and whether Tres Palacios has funds available to obtain the surveys.<sup>28</sup>

Each compliance report will also need to contain an affidavit executed by an officer of Tres Palacios stating it is true and accurate to the best of his or her knowledge. Finally, upon request, Tres Palacios must provide to OE documentation supporting the contents of its reports.<sup>29</sup> The Commission determined that the remedy recommended by OE considered the factors described in the Revised Policy Statement on Penalty Guidelines, including the fact that Tres Palacios cooperated with OE during the investigation. Accordingly, the Commission determined that the Tres Palacios Settlement reflected a fair and equitable resolution of the matters concerned and was in the public interest.<sup>30</sup>

---

<sup>25</sup> Tres Palacios Settlement at PP 15-16.

<sup>26</sup> *Id.* at P 17.

<sup>27</sup> *Id.* at PP 17-18.

<sup>28</sup> *Id.* at P 20.

<sup>29</sup> *Id.* at PP 21-22.

<sup>30</sup> Tres Palacios Order at PP 18-19.

---

## Energy Project Enforcement Actions at FERC: A New Trend?

### Conclusion

OE's recent activity appears to indicate a new trend in FERC enforcement. The Freeport and Tres Palacios settlements each involved alleged failure to properly oversee the project and to promptly inform the Commission of project issues and noncompliance with regulatory obligations. In each matter, a third party exposed the alleged violation to the Commission, so there was no self-report.<sup>31</sup>

As we advised with respect to a similar energy project enforcement action in 2019, and as the Freeport and Tres Palacios settlements reaffirm, failure to dedicate sufficient resources to ensure compliance with FERC requirements can lead to enforcement action.<sup>32</sup> The Freeport and Tres Palacios settlements also show that the Commission expects project developers to keep it informed of project issues and potential violations. Particularly in today's climate of enhanced scrutiny of energy projects by industry watchdogs, competitors, citizens and, it appears, FERC, project developers have a strong incentive to ensure compliance with all FERC requirements. Hoping that problematic conduct will fly under the Commission's radar appears increasingly unlikely to succeed and is risky.

---

<sup>31</sup> See the Freeport Settlement at P 10; see also the Tres Palacios Settlement at P 10.

<sup>32</sup> See Paul J. Pantano, Jr. & Thomas R. Millar, *FERC Penalizes Gas Pipeline Company for Violating Project Certificate: Time to Revisit Project Certificate Compliance?*, WILLKIE FARR & GALLAGHER CLIENT ALERT, Jan. 10, 2019, at 2, [here](#) (“[D]evelopers 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.”).

---

## Energy Project Enforcement Actions at FERC: A New Trend?

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

---

**Paul J. Pantano, Jr.**

202 303 1211

ppantano@willkie.com

**Thomas R. Millar**

202 303 1144

tmillar@willkie.com

Copyright © 2021 Willkie Farr & Gallagher LLP.

This alert is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Palo Alto, San Francisco, Chicago, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at [www.willkie.com](http://www.willkie.com).