

Update: First Circuit Revises Prior Decision to Vacate Air Permit in Light of Material Developments

Article By:

Randall S. Rich

As discussed previously in [Pierce Atwood's Energy Infrastructure Blog](#), on June 3, 2020, the U.S. Court of Appeals for the First Circuit vacated an air permit issued by the Massachusetts Department of Environmental Protection (DEP) for the construction of a new compressor station proposed by Algonquin Gas Transmission (Algonquin) as part of its Atlantic Bridge natural gas pipeline project and remanded the matter to the agency for further analysis. [Town of Weymouth v. Massachusetts Department of Environmental Protection, et al.](#), No. 19-1794 (Jun. 3, 2020) (June 3 Opinion). Algonquin petitioned for panel rehearing as to the remedy only. On August 31, 2020, the Court granted Algonquin's petition and revised its June 3 Opinion to remand without vacatur. [Town of Weymouth v. Massachusetts Department of Environmental Protection, et al.](#), No. 19-1794 (Aug. 31, 2020).

When deciding whether to vacate the agency's decision or remand without vacating, the Court considered the "severity of the errors, the likelihood that they [could] be mended without altering the order, and on the balance of equities and public interest considerations." June 3 Opinion at 58. The Court ultimately determined that additional factors, including that DEP would expedite its review on remand so as to not exacerbate any harm from delaying the completion of the project, weighed in favor of vacatur. However, since issuance of the Court's June 3 Opinion, several material developments have occurred that impacted the Court's prior determination to vacate:

1. In its June 3 Opinion, the Court gave DEP seventy-five days to complete its review or show cause why additional time was needed. DEP has since confirmed that it will be unable to meet the seventy-five day deadline and will be unable to complete its review until January 19, 2021. The Court found this development "materially alter[ed] the 'balance of equities and public interest considerations'" that it considered in its June 3 Opinion because the project will be out of operation for most of the New England winter heating season when demand is at its peak.
2. Algonquin made its supplemental filing on the remaining Best Available Control Technology ("BACT") issue and DEP staff has concluded that an electric motor is not BACT. Although the conclusion is preliminary and not binding, the Court found this increases the likelihood that the permit will not be revoked, the permit will be approved, and any operations prior to

January 19, 2021 will not result in emissions in excess of Massachusetts' regulations.

3. While the DEP did not take a position on Algonquin Gas Transmission's petition to amend the remedy, DEP has not suggested that vacatur is necessary to perform its required reconsideration based on a supplemental record.

Based on these new developments, the Court amended its June 3 Opinion to remand the proceeding to the agency without vacating the air permit. The Court denied Petitioners' (the Town of Weymouth and others) request that, if the Court did not vacate the air permit, it enjoin Algonquin from operating the compressor station until DEP makes its final decision.

The Court also granted DEP's request to extend the completion of its remand proceedings until January 19, 2021. The Court expressly retained jurisdiction for the purpose of considering any further motions regarding the completion deadline. The remainder of the June 3 Opinion remains unchanged.

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National Law Review, Volume X, Number 245

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