

151 FERC ¶ 61,160
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

Arlington Storage Company, LLC

Docket No. CP13-83-002

ORDER DENYING REHEARING

(Issued May 20, 2015)

1. On December 29, 2014, Gas Free Seneca, LLC (Gas Free Seneca) filed a timely request for rehearing¹ of a November 24, 2014 Notice² issued by the Secretary of the Commission that rejected as untimely Gas Free Seneca's request for rehearing of the notice authorizing Arlington Storage Company, LLC (Arlington) to proceed with construction on the Gallery 2 Expansion Project. As discussed below, this order denies Gas Free Seneca's December 29 rehearing request. For clarity, we also explain why the arguments raised in Gas Free Seneca's original request for rehearing would have been unavailing, in any event.

¹ The offices of the Commission are open each day, except Saturdays, Sundays, and Holidays, from 8:30 a.m. to 5:00 p.m. 18 C.F.R. § 375.101(c) (2014). Rule 2007(a)(2) provides that the last day of a time period will not end on a weekend, legal holiday, or other day when the Commission is otherwise closed for business. In this instance, the 30-day deadline for seeking rehearing of the Secretary's November 24, 2014 Notice would have been December 25, 2014, but that day and Friday, December 26, 2014, were holidays followed by the weekend. Therefore, Gas Free Seneca's time period for seeking rehearing of the Secretary's Notice did not expire until Monday, December 29, 2014, at 5:00 p.m.

² 149 FERC ¶ 61,158 (2014) (November 24 Notice).

I. Background

2. On May 15, 2014, the Commission issued an order³ granting Arlington authorization to expand storage capabilities with the Gallery 2 Expansion Project at its Seneca Lake Storage Project, located in Schuyler Count, New York. No requests for rehearing on the May 15 Certificate Order were filed. The certificate of public convenience and necessity authorizing the construction and operation of Gallery 2 was conditioned upon the completion of certain environmental construction and mitigation measures as well as engineering measures prior to placing the caverns in service, as outlined in the ordering paragraphs and described in detail in Appendix A and Appendix B. On August 12, 2014, Arlington filed its Implementation Plan. On September 30, 2014, the Commission's Office of Energy Projects (OEP) issued a notice authorizing Arlington to proceed with construction (September 30 Notice to Proceed with Construction).

3. Gas Free Seneca submitted a request for rehearing of OEP's September 30 Notice to Proceed with Construction electronically on October 30, 2014, at 5:12:50 p.m. On November 24, 2014, the Commission's Office of the Secretary (Secretary) issued the November 24 Notice, rejecting as untimely Gas Free Seneca's request for rehearing, and explaining that because Gas Free Seneca's rehearing request was submitted after 5:00 p.m. Eastern time, the end of the Commission's regular business hours, the rehearing request was considered as filed on the next business day, i.e., October 31, 2014, which was thirty-one days after the issuance of the September 30 Notice to Proceed with Construction.⁴

4. Gas Free Seneca contends that the Commission has the authority to waive the 5:00 p.m. filing deadline and should do so in this case.

II. Request for Rehearing

5. The Natural Gas Act (NGA) section 19(a) allows an aggrieved party to file a request for rehearing within 30 days after the issuance of a final Commission decision.⁵

³ *Arlington Storage Company, LLC*, 147 FERC ¶ 61,120 (2014) (May 15 Certificate Order).

⁴ *See* 18 C.F.R. § 385.2001(a)(2) (2014) ("Any document received after regular business hours is considered filed on the next regular business day.").

⁵ 15 U.S.C. § 717r(a) (2012) ("Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this

Rule 2007 of the Commission's Rules of Practice and Procedure provides that when the time period prescribed or allowed by statute falls on a weekend, holiday, or a day when the Commission is closed due to weather or other adverse conditions, the statutory time period does not end until the close of business of the next day which is not a weekend, holiday, or a day when the Commission is closed due to weather or other adverse conditions.⁶ The Commission's business hours are "from 8:30 a.m. to 5:00 p.m.,"⁷ and filings – paper or electronic – must be made before 5:00 p.m. in order to be considered filed on that day. The regulations provide that "any document received after regular business hours is considered filed on the next regular business day."⁸

6. The Commission's regulations, read in conjunction with NGA section 19(a), mean the deadline for filing requests for rehearing of the September 30 Notice to Proceed with Construction was October 30, 2014, at 5:00 p.m. As noted, Gas Free Seneca's rehearing request was submitted at 5:12:50 (i.e., 12 minutes and 50 seconds after 5:00 p.m.). Because Gas Free Seneca's request for rehearing was received after 5:00 p.m. on October 30, it must, pursuant to our regulations, be considered to have been filed on October 31.

7. In a later filing on October 30, 2014, Gas Free Seneca's attorney, W. Ross Scott, acknowledged that the rehearing request was filed after 5:00 p.m., but argues that due to

chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order."). See 18 C.F.R. § 385.713(b) (2014) ("A request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding."). The 30-day deadline has not been altered since the statute's enactment in 1938.

⁶ 18 C.F.R. § 385.2007(a)(2) (2014). In 2004, the Commission amended Rule 2007 to add the language addressing temporary closures due to weather or other adverse conditions, noting that, if filings required to be made by deadlines could be deemed untimely as a result of government closures, "[t]his would particularly be a problem in connection with statutory deadlines *that the Commission cannot extend*, such as the 30-day period for requesting rehearing of a Commission order." *Emergency Closures*, Order No. 645, FERC Stats. & Regs. ¶ 31,156, at P 2 (2003) (emphasis added).

⁷ 18 C.F.R. § 375.101(c) (2014).

⁸ 18 C.F.R. § 385.2001(a)(2) (2014).

extenuating circumstances the request should be deemed timely.⁹ In a November 30, 2014 pleading, Gas Free Seneca asserts that the Commission can waive Rule 2007 because the 5:00 p.m. deadline is a matter of discretion.¹⁰ It argues that in Order No. 703¹¹ the Commission made clear that it has complete discretion to determine the time of day that is the deadline on the thirtieth day of the statutory period for filing rehearing requests, and that Order No. 703 “nowhere suggests that how the Commission computes time and defines the length of the thirtieth day of a filing period raises a jurisdictional issue.”¹²

8. Although the courts have been clear that the Commission cannot waive the 30-day statutory deadline for filing requests for rehearing,¹³ Gas Free Seneca is correct that an agency has discretion to establish procedures for determining how time and the end of

⁹ Letter motion submitted October 30, 2014, 7:34 p.m., by Gas Free Seneca’s attorney, W. Ross Scott explaining that he was delayed in filing the rehearing request because as he was finishing the document he needed to take a call from a family member who was meeting with a doctor regarding a serious medical issue.

¹⁰ Gas Free Seneca’s November 20, 2014 answer was filed in response to Arlington’s November 4, 2014 motion that we reject Gas Free Seneca’s rehearing request because it was filed late and constituted a collateral attack on the May 15 Certificate Order authorizing Arlington’s expansion project. Gas Free Seneca’s answer emphasizes that Arlington’s pleading also includes arguments to answer Gas Free Seneca’s arguments in its request for rehearing. Rule 213(a)(2), 18 C.F.R. § 385.213(a)(2) (2014), of the Commission’s Rules of Practice and Procedure prohibits answers to requests for rehearing and answers to answers. However, we will waive this regulation to permit both answers because doing so will assist us in our decision-making process.

¹¹ *Filing Via the Internet*, Order No. 703, FERC Stats. & Regs., ¶ 31,259 (2007).

¹² Gas Free Seneca’s November 20, 2014 answer at 3.

¹³ See *Boston Gas Co. v. FERC*, 575 F.2d 975, 978 (1st Cir. 1978), and *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1005 (D.C. Cir. 1987) (finding that the Commission does not have discretion to waive the 30-day deadline for rehearing requests).

a statutory period is computed.¹⁴ Indeed, the Commission considered whether the 5:00 p.m. filing deadline for paper filings should be extended until midnight for electronic filings. However, the Commission rejected that idea in Order No. 703 after considering the commenters' objections, including "the personal hardship of late-hour filing, unfairness to paper filers, and the possibility that some filers would use the opportunity to file improper reply comments in response to comments filed earlier in the day." The Commission concluded that the filing deadline for electronic filings and paper filings should be the same and "will remain at close of business, i.e., 5:00 p.m., Eastern time."¹⁵ As the Commission explained in *Cameron LNG, LLC*,¹⁶ applying the 5:00 p.m. filing deadline to electronic filings is not arbitrary: the Commission intended to provide paper filers and eFilers a level playing field. The Commission has emphasized that:

Filers, particularly those filing requests for rehearing where the deadline for filing is set by statute and cannot be waived, are strongly encouraged to file well in advance of 5:00 p.m. to minimize the possibility that unexpected problems may delay the filing beyond the 5:00 p.m. Eastern deadline for filing.¹⁷

9. In *Tennessee Gas Pipeline Co.*¹⁸ a rehearing request by the Londonderry Neighborhood Coalition (Coalition) was filed late despite a Postal Service guarantee that

¹⁴ For example, in *Bartlik v. U.S. Department of Labor*, 62 F.3d 163, 166 (6th Cir. 1995), the court reasoned that provisions such as the Commission's weekend/holiday rule do not amount to an improper attempt to expand jurisdiction but rather provide a procedural computational rule.

¹⁵ *Filing Via the Internet*, Order No. 703, FERC Stats. & Regs. ¶ 31,259, at PP 30-31 (2007). See also Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,621, at P 21 (2007) (stating that "[c]urrently, both Internet and paper filings must be received by the close of business, i.e., 5 p.m. to be considered to have been filed on that date.").

¹⁶ 148 FERC ¶ 61,237, at P 7 (2014) (*Cameron LNG*).

¹⁷ *Notice of Display of Time on Commission's Electronic Filing System*, Docket Nos. RM07-16-000 and RM01-5-000 (June 28, 2010) (citation omitted). See also *Cameron LNG*, 148 FERC ¶ 61,237, at P 8 (2014) (reiterating that filers are strongly encouraged to file well in advance of the 5:00 p.m. deadline to minimize the possibility that unexpected last-minute problems may delay the filing until after 5:00 p.m.).

¹⁸ 95 FERC ¶ 61,169 (2001).

it would timely deliver the pleading. The Coalition argued that the Commission's discretion to waive the requirement that rehearing requests be within thirty days was demonstrated by its adoption of Rule 2007 to provide that if the last day of a required time period falls on a Saturday, Sunday, or holiday, the time period does not end until the close of the next Commission business day. After observing that "[s]ection 19(a) is a jurisdictional requirement that the Commission does not have the discretion to waive, even for good cause," the Commission explained that "Rule 2007 does not operate to waive the 30-day filing requirements for rehearing requests established by NGA section 19(a); it describes the procedures by which time is computed."¹⁹ On appeal, the court affirmed the Commission, noting that "there was no reason [the late filer] had to wait until the last minute to file its petition."²⁰ Gas Free Seneca pleads it encountered an extenuating circumstance causing the delay, but does not address why it waited to the last minute of the last day to file its request for rehearing.²¹

10. Further, the Commission has been clear that there is no "*de minimis*" exception that would allow us to treat that Gas Free Seneca's request for rehearing as timely because it missed the deadline by less than thirteen minutes. In *Cameron LNG*, the Sierra Club's request for rehearing of the order authorizing Cameron LNG's project was filed at 5:00:25, 25 seconds after the 5:00 p.m. deadline, and the Secretary issued a notice rejecting the Sierra Club's filing as a rehearing request because it was late but explaining that the filing was considered filed as of the next business day. The Sierra Club sought rehearing of the Secretary's notice, arguing that filing only seconds late is "plainly *de minimis*." In its order denying rehearing, the Commission observed that the Sierra Club had provided no explanation for why it waited until minutes before the close of business to begin making its filing, and it had not alleged any "extraordinary circumstances or hardship that caused its delay" or presented any other "compelling justification" for filing late.²² Finally, the Commission explained that:

¹⁹ *Id.* at 61,547.

²⁰ *Londonderry Neighborhood Coalition v. FERC*, 273 F.3d 416, 425 (1st Cir. 2001).

²¹ Letter motion submitted October 30, 2014, 7:34 p.m., by Gas Free Seneca's attorney, W. Ross Scott.

²² *Cameron LNG*, 148 FERC ¶ 61,237 at P 23.

With regard to harm or prejudice, Sierra Club underestimates the potential harm that granting its request would pose to the administrative process. Were we to apply the regulations as the Sierra Club suggests, the certainty provided to entities interested in Commission proceedings under our current rules would be compromised, and those that play by the rules would run a constant risk that the Commission might allow others to do otherwise.²³

11. While we appreciate that the attorney for Gas Free Seneca experienced a situation which understandably caused him to focus his immediate attention on something other than finishing the rehearing document, we feel compelled after consideration of the pertinent regulations and policy implications to uphold the rejection of the pleading as untimely.²⁴

12. In any event, for the reasons discussed below, we reject Gas Free Seneca's argument that OEP's Notice to Proceed with Construction was issued in error or prematurely and that we should issue a stop work order.

III. Other Issues Raised by Gas Free Seneca

13. On August 12, 2014, Arlington filed its Implementation Plan as required by Environmental Condition 6 in Appendix B to the May 15 Certificate Order. In its untimely request for rehearing of OEP's Notice to Proceed with Construction that was rejected by the Secretary's November 24, 2014 Notice, Gas Free Seneca contends that OEP should not have granted construction clearance because Arlington's Implementation Plan did not identify how all of the May 15 Certificate Order's engineering and environmental conditions were to be satisfied. Gas Free Seneca further asserts that certain conditions of the May 15 Certificate Order had not been met at the time OEP issued its September 30 Notice to Proceed with Construction and still have not been satisfied.

²³ *Id.* at P 25.

²⁴ *See, e.g., Boston Gas v. FERC*, 575 F.2d 975 (1st Cir. 1978). In finding the Commission had no discretion to waive the 30-day statutory deadline for filing rehearing requests, the court noted "[w]e see no basis for replacing the uniform ground rules the statute so clearly sets forth with a rule permitting either unguided discretion or inadvertence to control the jurisdiction of the federal courts."

14. Specifically, Gas Free Seneca argues that Arlington Implementation Plan fails to satisfy the May 15 Certificate Order's conditions because it does not: (1) indicate how it will maintain the integrity of the salt caverns being used for gas storage and mitigate community risks related to such use of salt caverns; (2) show how it will address groundwater and surface water risks; (3) indicate how it will implement construction procedures and mitigation measures; (4) indicate how it will incorporate mitigation requirements in bid documents, construction contracts and construction drawings; (5) indicate the location, dates and times of training programs; and (6) demonstrate that Arlington had already obtained an Underground Storage Modification Permit from the New York State Department of Environment Conservation (NYSDEC).

15. As discussed below, none of the issues raised by Gas Free Seneca provide any basis for finding that OEP's September 30 Notice to Proceed with Construction was issued prematurely or in error.

A. Cavern Integrity

16. The May 15 Certificate Order authorized Arlington to expand its natural gas storage facilities to include two interconnected bedded salt caverns (collectively known as Gallery 2) previously used to store liquefied petroleum gas (LPG). Environmental Condition 6 in Appendix B to the May 15 Certificate Order required Arlington to file an Implementation Plan addressing how Arlington "will implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EA, and required by the Order."

17. Gas Free Seneca alleges that Arlington's Implementation Plan fails to demonstrate that Arlington will be able to maintain the integrity of the caverns being used for gas storage so that its operations do not present safety or environmental risks. This allegation reflects a misunderstanding of the purpose of the Implementation Plan, which is to describe how Arlington will satisfy the environmental conditions to mitigate the effects of the construction activities authorized by the May 15 Certificate Order. The conditions to ensure that Arlington's gas storage operations will not result in safety and environmental risks by compromising the integrity of the caverns are the engineering conditions set forth in Appendix A to the May 15 Certificate Order.

18. To ensure that the integrity of the caverns is maintained, the May 15 Certificate Order's engineering conditions require, *inter alia*, that Arlington: comply with maximum volumetric requirements and maximum and minimum operating pressures; conduct a mechanical integrity test to verify the lack of communication between caverns; periodically check the integrity of casing strings; conduct periodic sonar surveys of the caverns to monitor their dimensions, shape, and pillar thickness between openings; establish a subsidence monitoring network; have an emergency shutdown system in

place; conduct leak detection tests and monitor surface areas in and around the storage facilities' boundaries to ensure that no gas is migrating out of the caverns; and file semi-annual reports with the Commission.

19. At this stage of project construction, the Commission requires no specific information from Arlington to demonstrate compliance with the engineering conditions to maintain cavern integrity once gas storage operations begin. The engineering conditions for the caverns had no bearing on OEP's decision whether to issue its September 30 Notice to Proceed with Construction so that Arlington could begin installing the 500 feet of pipeline, skid-mounted compressor unit, temporary brine facilities and instrument lines, and plugging and abandoning two existing wells as authorized by the May 15 Certificate Order.

20. Further, the May 15 Certificate Order thoroughly addressed Gas Free Seneca's arguments that the location and geology of Arlington's caverns makes them unsuitable for gas storage operations.²⁵ Specifically, the May 15 Certificate Order addressed Gas Free Seneca's arguments regarding potential seismic activity in the area, the proximity to Lake Seneca, the particular characteristics of salt and shale bedding planes of the formation in which Arlington's salt caverns lie, the caverns' irregular shapes and lack and stability in the size of the caverns. Gas Free Seneca did not seek rehearing of the May 15 Certificate Order, and the arguments raised in its request for rehearing of OEP's Notice to Proceed with Construction are the same arguments that were addressed by the May 15 Certificate Order; thus, Gas Free Seneca's objections on rehearing constitute a collateral attack on our findings in the May 15 Certificate Order.

21. In any event, the only "new" information that Gas Free Seneca presents is its allegation that one of Arlington's employees recently acknowledged to a resident of the Town of Hector that certain information that Arlington had filed in support of its application was not consistent with information and findings in other reports cited by Gas Free Seneca during this proceeding. However, our May 15 Certificate Order has already addressed these discrepancies in the course of responding to Gas Free Seneca's arguments that the EA's analysis of geologic risks associated with the Gallery 2 caverns was too limited in its discussion of significant seismic activity or other geologic hazards and did not take into account the significance of geologic structure and the presence of sub-surface faulting.

Specifically, the May 15 Certificate Order addressed the reports by two geologists, Dr. Young and Dr. Clark, that Gas Free Seneca cited to rebut the EA's findings and cites

²⁵ May 15 Certificate Order, 147 FERC ¶ 61,120 at PP 23–32 (*Engineering Issues*) and PP 77-94 (*Geologic Hazards*). See also EA at 10-11 (*Geologic Hazards*).

again in its request for rehearing of OEP's Notice to Proceed with Construction.²⁶ The May 15 Certificate Order found that the low-seismic risk discussed in the EA was actually supported by the published literature cited by Gas Free Seneca's experts.²⁷ The May 15 Certificate Order also addressed the claim that a seismic event had caused the collapse of the roof of one of Arlington's caverns while it was being operated by U. S. Salt, explaining that the occurrence of a seismic event had never been validated and an inspection of the cavern had shown that there had been no roof collapse.²⁸ In addition, the May 15 Certificate Order explained that a particular seismic fault line over which concerns had been expressed was in fact east of the Gallery 2 caverns, not located beneath the Gallery 2 caverns.²⁹ In response to the claim that Arlington's storage operations would result in pressure changes in the Gallery 2 caverns that could cause the reopening of healed fractures originally caused by the previous salt mining, the May 15 Certificate Order explained that, unlike the dramatic and sudden pressure changes during salt mining operations that caused the fractures, the pressure changes during storage operations will be much smaller and occur gradually and therefore will not create the risk of reopening of the healed fractures.³⁰

B. Groundwater and Surface Water Risks

22. Gas Free Seneca acknowledges that the EA and the May 15 Certificate Order addressed the activities that could result in water being contaminated by brine during Arlington's construction activities.³¹ However, in its request for rehearing of OEP's Notice to Proceed with Construction, Gas Free Seneca asserts that OEP erred in accepting

²⁶ Rehearing request, Exhibit A, p. 2.

²⁷ May 15 Certificate Order at P 81.

²⁸ *Id.* at P 82.

²⁹ *Id.* at P 86.

³⁰ *Id.* at PP 90-92. In the May 15 Certificate Order, we concluded:

In consideration of our review of the geologic information provided by Gas Free Seneca's expert geologists, we restate the EA's conclusion that there will be no significant impact on environmental resources due to geologic hazards or from the geologic framework present in the Gallery 2 Project area. *Id.* at P 94.

³¹ Rehearing request, Appendix A at 5. The EA for Arlington's Gallery 2 expansion addressed potential impacts on water resources. As part of this analysis, the EA considered the activities that could cause brine to enter Seneca Lake, i.e., Arlington's

(continued ...)

Arlington's Implementation Plan because it does not address the risk that Arlington's pressurization of gas in the storage caverns will create the risk that brine water will seep through the surrounding geologic formation and bedrock basin of Seneca Lake.³² Gas Free Seneca asserts that Arlington's gas storage operations therefore will pose a continuing risk of further aggravating Seneca Lake's persistently elevated chloride concentration, which Gas Free Seneca believes has resulted from the salt mining and other gas storage operations in the area.

23. In its request for rehearing of OEP's Notice to Proceed with Construction, Gas Free Seneca asserts that we have not considered the risk that Arlington's pressurization of gas could cause brine water to seep into Seneca Lake.³³ That is not correct. As discussed above, the May 15 Certificate Order explained that while U.S. Salt's previous mining operations had included activities that resulted in dramatic and sudden pressure changes that resulted in fractures in the salt and rock layers surrounding the caverns, those fractures have healed as the result of the crystallization of halite in the fractures and the recrystallized halite is more resistant than the original salt to fracturing.³⁴ The May 15 Certificate Order also explained that Arlington's gas storage operations will not result in the dramatic and sudden pressure changes that would be likely to reopen the healed fractures or create new fractures³⁵

24. The above findings in the May 15 Certificate Order regarding the likelihood that Arlington's storage operations could cause fractures were not relevant only for the purpose of assessing the risk that gas might migrate out of the storage caverns; the risk assessment also recognized that fractures can provide pathways for water and any substances dissolved in the water. Thus, the finding that Arlington's pressurization of

injection of gas into wells to displace brine from the wells; the transportation of the brine using a temporary brine pump and pipeline to U.S. Salt's facilities for use in its salt production activities; U.S. Salt's storage of the additional brine (approximately 1,000,000 barrels); and Arlington's activities to plug and abandon two wells which could cause additional brine to reach the surface. EA at 16-18 and May 15 Certificate Order at PP 95-99.

³² Rehearing request, Appendix A at 6.

³³ *Id.*

³⁴ May 15 Certificate Order at P 89 and P 92.

³⁵ *Id.* at PP 90-92.

gas is unlikely to reopen or cause fractures was also the basis for the May 15 Certificate Order conclusion that Arlington's proposed operational pressures are unlikely to result in brine water seeping into Seneca Lake or other potable groundwater sources.³⁶

25. In view of the above findings and the May 15 Certificate Order's engineering conditions, there was no need to include any other specific conditions to address the risk that Arlington's pressurization of gas could cause brine water to seep through rock fractures into Seneca Lake. Consequently, OEP did not err in issuing its Notice to Proceed with Construction because Arlington's Implementation Plan did not address such a possibility.

C. Construction Procedures, Mitigation Measures, and Incorporation of Requirements into Contracts and Drawings

26. Gas Free Seneca states that Arlington's Implementation Plan fails to explain, as required, how Arlington will implement construction procedures and mitigation measures, and how Arlington would incorporate requirements in contracts and drawings.

27. The Implementation Plan filed on August 12, 2014, acknowledges that:

Arlington, through its application to the Commission (including responses to staff data requests, and supplemental information submissions), has agreed to implement various construction procedures and mitigation measures.

28. The Implementation Plan further states:

Arlington has reviewed its application, its responses to the staff data requests and supplemental information submissions, the EA, state and federal permits, and the Certificate Order to develop a thorough understanding of agreed upon construction procedures and mitigation measures.

29. In addition, the Implementation Plan states:

Construction procedures and special mitigation measures, such as required training, identification of special construction areas, amendments to address construction site-specific conditions, and

³⁶ *Id.* at P 93.

other requirements will be incorporated directly in the body of, or as attachments to the Project Environmental Permit Book.³⁷

30. It was sufficient that Arlington's Implementation Plan include the above acknowledgements of its commitments and obligations in undertaking the construction activities authorized by the May 15 Certificate Order. It was not necessary that its Implementation Plan list every applicable condition. Nor would it have been practicable for Arlington's Implementation Plan to describe everything that will be necessary to comply with every condition.

31. However, in developing its caverns for use as gas storage facilities, Arlington will have to comply with NYSDEC's regulatory standards to protect underground sources of drinking water.³⁸ In the event any brine or other fluids are circulated to the surface as the result of Arlington's activities to plug and abandon two existing wells, Arlington will have to properly dispose of any displaced fluids in accordance with the terms of NYSDEC Permits To Plug And Abandon.³⁹

32. Arlington also will implement its Spill Prevention, Containment and Countermeasure Plan to contain, handle and mitigate any surface spills that occur during construction.⁴⁰ Additionally, Arlington has adopted the Commission's *Upland Erosion*

³⁷ The Project Environmental Permit Book is a reference document Arlington will supply to its contractors and inspectors to use in the field to maintain compliance with the environmental and engineering conditions applicable to the Project.

³⁸ As discussed in the EA and in the May 15 Certificate Order, the project will not require construction of new intermediate brine storage facilities. All of the brine removed from the caverns will be piped into U.S. Salt's existing brine processing facilities through temporary brine facilities (brine pump and associated pipeline). The U.S. Salt facilities are subject to NYSDEC's requirements to ensure that the brine ponds are monitored and maintained in leak-free condition in accordance with U.S. Salt's underground injection control permit. EA at 16-17; May 15 Order at P 96.

³⁹ EA at 18.

⁴⁰ EA at 18; May 15 Order at P 99. A risk management plan was not required under the U. S. Environmental Protection Agency's (EPA) regulations as no regulated substance will be handled or stored at Arlington's facilities. However, Arlington would be subject to general duty clause in EPA's regulations in the event any regulated substance or other extremely hazardous substance is stored on site. EA at 32.

*Control, Revegetation, and Maintenance Plan*⁴¹ and *Wetland and Waterbody Construction and Mitigation Procedures*⁴² for the Gallery 2 Project, which will disturb a total of 6.60 acres of land.⁴³

33. Although Gas Free Seneca contends that Arlington's Implementation Plan did not include specific information on how it plans to incorporate certificate conditions and requirements into contracts and drawings, Arlington's Implementation Plan includes the required sworn statement by Arlington's Vice President and General Counsel, James Johnston, that all company personnel, environmental inspectors and contract personnel will be trained on the implementation of the required environmental mitigations measures and informed that the Environmental Inspector will have overall authority for ensuring that these construction and mitigation measures are conducted properly and be responsible for reporting any non-compliance to the Commission.⁴⁴

34. Further, Arlington is required to file a Bi-Weekly Environmental Compliance Report describing work done to date, any problems encountered and every instance of non-compliance observed by the Environmental Inspector, and corrective actions

⁴¹ <http://www.ferc.gov/industries/gas/enviro/plan.pdf>.

⁴² <http://www.ferc.gov/industries/gas/enviro/procedures.pdf>.

⁴³ EA at 13; May 15 Order at P 98-99. We note that although survey results did not identify any historic properties or other cultural resources that could be affected by Arlington's project (EA at 24-25), Arlington was required to file and obtain approval of an Unanticipated Discovery Plan since its project will disturb approximately 6.60 acres of land. *Id.* at 25. We also note that NYSDEC has already issued Arlington an Air Facility Registration Certificate. EA at 31. In the event, emissions from Arlington's gas storage facilities should exceed threshold levels in any year, Arlington would be required to comply with EPA's applicable reporting requirements. EA at 34.

⁴⁴ Mr. Johnston's sworn statement was included as Attachment C to Arlington's Implementation Plan filed on August 12, 2014. Environmental Condition 3 in Appendix B to the May 15 Certificate Order required that, prior to any construction facilities, Arlington file such a sworn affirmative statement certified by a senior company office that that all company personnel, environmental inspectors and contract personnel will be trained on the implementation of the required environmental mitigations measures and informed that the Environmental Inspector will have overall authority for ensuring that construction and mitigation measures are conducted properly and responsibility for reporting any non-compliance to the Commission.

implemented and their effectiveness. In addition, the bi-weekly reports must include copies of any correspondence that Arlington received from another agency regarding non-compliance with applicable requirements and Arlington's response.

35. In view of these considerations, even if Gas Free Seneca's request for rehearing of OEP's Notice to Proceed with Construction had been filed timely, its objection that Arlington's Implementation Plan did not include specific information on how it planned to incorporate certificate conditions and requirements into contracts and drawings would not have justified Gas Free Seneca's request that we issue a stop work order to Arlington. In this regard, we note that Arlington's bi-weekly status report filed on March 15, 2015 indicated that Arlington has not yet commenced any of the construction activities authorized by the May 15 Certificate Order.

D. Environmental Compliance Training

36. Arlington's Implementation Plan states that all company project inspectors and key contractor personnel, including the project superintendent, crew foremen, and other supervisory personnel, will be given a 2-hour training course, to be conducted prior to commencement of construction. The Implementation Plan states that Commission staff will be provided advance notice of the date, time, and location of the training class and are welcome to attend and provide additional guidance. The Implementation Plan also states that other non-key contractor personnel will be given a 1/2-hour training course prior to working on the project site.

37. Gas Free Seneca objects that the Implementation Plan does not specify the locations, dates and times for all environmental compliance training. However, Arlington has not started site construction activities yet, and it may be too early to determine the availability of the company and contractor personnel that will receive the training. It is acceptable and practicable for Arlington to identify the specific dates, times, and locations for training once it has a construction schedule and the dates for training have been set.

E. Required Permits

38. Gas Free Seneca also contends that Arlington's Implementation Plan is deficient because Arlington has not yet obtained its Underground Storage Modification Permit from NYSDEC. Environmental Condition 9 of the May 15 Order provides that Arlington must file documentation that it has received all applicable authorizations required under *federal* law before it receives authorization to commence construction activities. The May 15 Order did not condition clearance for the commencement of construction on Arlington having already obtained any applicable state or local permits.

39. The Commission encourages cooperation between companies subject to its jurisdiction and state and local authorities, and applicants may be required to comply with reasonable state and local regulations and permit conditions where no conflict exists. However, the NGA preempts state and local regulation of the construction and operation of facilities for the transportation of gas in interstate commerce to the extent state or local requirements would conflict with federal regulation.⁴⁵ Because state and local agencies cannot require unreasonable permit conditions or otherwise unreasonably delay the construction and operation of facilities approved by the Commission under the NGA, the Commission's certificate orders do not condition the commencement of construction on a company having already obtained all applicable state and local permits.

The Commission orders:

Gas Free Seneca's December 29, 2014 request for rehearing of the Secretary's November 24, 2014 Notice rejecting Gas Free Seneca's untimely request for rehearing of OEP's September 30, 2014 Notice to Proceed with Construction is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴⁵ See, e.g., *Dominion Transmission, Inc.*, 143 FERC ¶ 61,148, at P 9 (2013), citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *National Fuel Gas Supply v. Public Service Commission*, 894 F.2d 571 (2d Cir. 1990); and *Iroquois Gas Transmission System, L.P.*, 52 FERC ¶ 61,091 (1990) and 59 FERC ¶ 61,094 (1992).