

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on June 6, 2007

COMMISSIONER PRESENT:

Cheryl A. Buley

CASE 07-T-0538 - Notice of Intention filed by Fortuna Energy Inc. to Construct a Fuel Gas Transmission Line, Containing Approximately 3,160 feet of 6-Inch Coated Steel Pipeline, Located in the Town of Caton, Steuben County.

ORDER GRANTING CERTIFICATE OF
ENVIRONMENTAL
COMPATIBILITY AND PUBLIC NEED

(Issued and Effective June 7, 2007)

INTRODUCTION

On May 11, 2007, Fortuna Energy Inc. (Fortuna or the Company) filed a Notice of Intention (NOI) pursuant to §121-a(2) of the Public Service Law (PSL) to construct approximately 3,160 feet of 6-inch coated steel pipeline in the Town of Caton, Steuben County. The NOI complied with the PSL and our regulations.

ENVIRONMENTAL REVIEW

Facility Description

The pipeline is proposed to be composed of a 6-inch grade X-52 Dual Layer Fusion Bond Epoxy (FBE) and PowerCrete (Road Crossings) over coated steel pipe and to transport gas from one recently drilled gas well, the McNaughton #1 Well (API# 31-101-23951-00), to the Fortuna 6-inch pipeline located in the Town of Caton, Steuben County. The Company plans to begin construction of the pipeline shortly after a Certificate of Environmental Compatibility and Public Need (Certificate) is granted.

Commencing at Fortuna's recently drilled McNaughton #1 Well, the proposed 6-inch pipeline would follow a northwestern direction for 100 feet, then west for 150 feet. At this point, the pipeline would turn in a due north direction for 1,600 feet and cross under an unnamed intermittent stream. The pipeline would then turn northwest for 1,310 feet, parallel to Fortuna's 6-inch pipeline, crossing under one public road (Deyo Road). The pipeline would connect to Fortuna's existing 6-inch pipeline (authorized in Case 05-T-0054) on the west side of Deyo Road. The pipeline would traverse a total distance of 3,160 feet.

Environmental Resources

The pipeline would pass through woodlands for 1,880 feet, an existing right-of-way (ROW) through woodlands for 1,050 feet, active agricultural land for 200 feet, and public road crossings for 30 feet. Fortuna states that it has acquired a maximum ROW width of 70 feet for most of the route. The pipeline would be installed within a maximum ROW width of 50 feet (except where noted on the project NOI map), 10 feet of which would be temporary, and 40 feet of which would be permanent. A maximum ROW width of 50 feet for an approximate distance of 100 feet may need to be cleared during construction in certain areas (streams, road crossings and areas of cross slope); however, the Company has committed to minimizing clearing to 40 feet in most areas. Efforts would be made by the Company to keep ROW disturbance to a minimum. The approximate locations of timber stacking areas (20 by 60 feet, unless otherwise noted) are shown on the NOI project map. If any additional stacking areas are needed, the Company is directed to follow the process for changing the project established in Ordering Clause 1(b) in this Order.

Environmental impact of the pipelines would be minimized by reducing the clearing required for construction, and allowing a portion of the ROW to re-vegetate naturally after construction. Fortuna would neatly stack firewood and timber in tree length along the edge of the ROW for landowners, if permitted by landowner agreements. The Company would chip and stack brush along the edge or buried within the ROW. No logs, brush, chips, or stumps would be stored in any wetlands or floodplains. No open burning is authorized because environmentally superior disposal alternatives are

available. Access to the proposed pipeline is provided by public roads, public access roads, well site access roads, and ROW granted by landowners.

Fortuna states that the project would cross one small wetland. The Company is committed to delineating wetland boundaries on or adjacent to the ROW. Wetland boundaries would be established under the guidance and direction of a qualified wetland specialist prior to the start of construction. Fortuna indicates that there are state wetlands located to the west (State Wetland CT-5) and east (State Wetland CT-6) of the pipeline alignment. The Company contends that the pipeline would not cross these state wetlands or their associated 100 foot buffer areas.

Fortuna advises that no existing or officially approved planned residential, commercial, industrial, institutional, or recreational land uses are adjacent to or crossed by the proposed pipeline; it is not aware of the existence of vulnerable ecosystem features or resources (including floodplains, springs, wells, unique old growth forest, productive timber stands, or active sugar bushes). No trees from the State Registry of Big Trees were identified along the proposed route. The Company indicates that no designated visual resources, including scenic areas, roads, vistas, and overlooks, would be affected by this project.

The Company advises that it has contacted applicable municipal, county, and state entities with jurisdiction over portions of this project, and there are no applicable laws that Fortuna finds unreasonably restrictive. The Town of Caton has no ordinances, laws, resolutions or other actions, regulations, local standards, or requirements that apply to this project.

Fortuna will construct, operate, and maintain the pipeline in accordance with PSL §121-a(1), applicable to construction of fuel gas transmission lines less than ten miles long. The Company will follow the standards and practices set forth in the Department of Public Service (DPS) Revised Environmental Management and Construction Standards and Practices (EM&CS&P), dated February 28, 2006, and adopted in an Order Granting Certificate of Environmental Compatibility, and Public Need and Approving Environmental Management and Construction Standards and Practice issued December 7, 2006 in Case 06-T-1383. Fortuna identified general and

site-specific measures and techniques for use in connection with this project.¹ In order to minimize disruption and environmental impacts associated with construction, the Company is directed to use its best efforts to coordinate pipeline construction with other known construction activities in the immediate vicinity of the project.

Party Comments

By letter dated May 23, 2007, the New York State Department of Environmental Conservation (DEC) states that the project would cross approximately 150 feet east of the boundary of regulated New York State Freshwater Wetland CT- 5 and about 800 feet west of the boundary of Wetland CT-6. DEC further reports that boundaries of wetlands as mapped are approximate boundary locations, and that delineation of wetland locations is required for regulatory determinations. DEC suggests that, if field delineation confirms the mapped boundary locations, then activities and disturbances related to pipeline construction would occur outside of the wetlands and regulated adjacent areas. DEC contends, however, that, if it is determined that activities would disturb Wetland CT-5 or its adjacent area, construction should not commence until DEC Staff reviews and approves a proposal by the Company. The proposal would include, among other things, a demonstration that there are no alternate routes that would avoid Wetland CT-5 and its adjacent area. DEC did not report the specific functions and benefits that CT-5 provides.

DEC regulations, in 6 NYCRR §663.5, include the relevant standards for weighing potential impacts to New York State regulated wetlands.² The standards are based on wetland class and characteristics, including the benefits afforded by the specific wetland. Wetland CT-6 is a Class I wetland, but is located well to the east of and at a significantly lower elevation than the proposed pipeline location. Wetland CT-5 is a Class III wetland, and is located closer to the proposed pipeline location at a similar

¹ Fortuna states that blasting might be needed on this pipeline project and that the Company will follow the blasting requirements in DPS's Revised EM&CS&P.

² Pursuant to PSL Article VII, we apply state standards in considering the location of proposed facilities.

elevation. Weighing standards for Class III wetlands include minimizing degradation to, or loss of, any part of the wetland or its adjacent area, and minimizing any adverse impacts on the functions and benefits that the wetland provides. Generally, avoidance or minimization of impacts is promoted through line adjustment to avoid any disturbance, or consideration is given to alternative installation techniques to minimize the extent of direct wetlands impacts. We will require Fortuna, before commencing construction, to have any wetland boundaries in close proximity to the pipeline ROW staked and flagged. If the proposed pipeline ROW is within the 100-foot adjacent area of Wetland CT-5, Fortuna shall provide, for DPS Staff review, plans to minimize or avoid impacts to Wetland CT-5.

DEC officials indicate that no New York State protected streams (Stream Classifications of C(t) or above) would be crossed by this project. DEC states that the intermittent stream mentioned in the NOI is not shown on the Town of Caton USGS Topographic Quadrangle Map, and that the contour lines indicate drainage that flows from Wetland CT-5 to CT-6. DEC did not indicate any stream classification for this watercourse. DEC emphasizes that erosion and sediment control techniques must be employed to prevent any impacts to the intermittent stream channel downstream of the pipeline construction area. DEC requests that measures be employed to ensure that disturbed areas are returned to original grade and that a well developed vegetation cover becomes established on disturbed areas. DEC's requests are generally reasonable and we will require the Company to comply with them.

According to DEC officials, the Company would need to obtain a General Permit for Stormwater Discharges from Construction Activities (GP 02-01), if this project results in disturbance of five acres or more of soil. To obtain coverage under the General Permit, all conditions of the permit must be met, including the preparation and implementation of an appropriate Stormwater Pollution Prevention Plan (SWPPP) and the filing of a NOI with DEC. Before construction begins, Fortuna is required to send a copy of this NOI to DPS Staff.

DEC officials indicate that the proposed construction activities located northwest of Deyo Road will occur within an archeologically sensitive area. DEC's letter states that it has reviewed the available information in the New York Heritage Program database on known occurrences of rare or state listed animals and plants, significant natural communities, and other significant habitat, and no occurrences were found. DEC states that its database does not include federally listed or proposed endangered or threatened species and suggests that the Company contact the U.S. Department of the Interior's Fish and Wildlife Service for this information.

By letter dated May 14, 2007, the New York State Department of Agriculture and Markets (Ag&Mkts) provided comments on the proposed pipeline. Key comments include discussions of the agricultural soils present, the addition of extra topsoil to compensate for some of Fortuna's existing sunken pipeline ditch, standard agricultural and restoration measures (topsoil full width stripping and segregation, installation of in-trench drain lines, decompaction, and rock picking), and minimum pipeline burial depth. Officials from the Steuben County Soil & Water Conservation District agree with Ag&Mkts's comments. Fortuna states that it will follow all recommendations contained in Ag&Mkts's letter.

Fortuna reports that this project would not cross any county agricultural districts. Company officials indicate that, according to the Steuben County Planning Department, the proposed project would not cross any floodplains. Steuben County officials did not file comments on this project.

A Phase I Cultural Resource Survey was conducted on the existing pipeline ROW prior to construction. Based upon that review; it was the opinion of the Office of Parks, Recreation and Historic Preservation (OPR&HP) that the existing pipeline would have no impact upon culturally sensitive areas or sites eligible for inclusion in the State and National Registers of Historic Places. Fortuna informs DPS Staff that it submitted the above information to OPR&HP for its review. The Company is required to send copy of a letter of "No Impact" from the OPR&HP to DPS Staff before construction may

commence. If the Company uncovers any archaeological resources during construction, it is required to stop work and contact OPR&HP and DPS Staff.

DPS Staff Analysis

DPS Staff met with the Company and Ag&Mkts officials at the project site to review issues regarding pipeline construction, in relation to stream and intermittent drainage crossings, wetland crossings, active agricultural fields, ROW clearing, road crossings, and the pipeline route. The pipeline route was selected to minimize impacts on the above resources, as well as private property and public roads. The pipeline would be buried to a minimum depth of 36 inches, unless solid rock is encountered in the pipeline trench; in which case, the Company would comply with the depth requirements in 16 NYCRR Part 255, 48-inches in active agricultural fields. The pipeline would be buried to a minimum depth of 60 inches under all streams and drainages.

Water Quality Certification

The Company requested that the Commission issue a water quality certification, pursuant to §401 of the Federal Clean Water Act (CWA), for activities associated with construction of its proposed pipeline. The CWA requires a federal permit to discharge dredged or fill material into "navigable waters" (33 U.S.C. §§ 1311(a) and 1342(a)) and requires an applicant for a permit to provide a certification from the State that the discharge will comply with the State's water quality standards. CWA §410 defines "navigable waters" as waters of the United States, including the territorial seas (33 U.S.C. §1362(7)). The Army Corps of Engineers, which issues the permits, defines these waters to include tributaries (33 CFR §328.3(a)(5)) and other types of water sources.³

³ Noteworthy for future reference is the fact that the classification of certain waters, including tributaries, is undergoing reexamination by the U.S. Supreme Court. The Court raised questions regarding the meaning of navigable waters in the CWA and the definition used by the Army Corps of Engineers and remanded the case to the lower court for further proceedings (Rapanos v. United States, 547 U.S. ___, 126 S. Ct. 2208 (2006)). Depending on the outcome of the case, the Army Corps of Engineers may revise its definition of waters that requires discharge permits under the CWA.

Fortuna would apply for any federal permits it needs after issuance of this Order granting this Certificate. In this Order, the Commission imposes standards that assure that the Applicant complies with applicable state water quality standards. Given the ministerial nature of decisions to grant water quality certifications and the normal 60 day period for granting the certifications established in federal rules (33 C.F.R. Part 325.2(b)(1)(ii)), we delegated responsibility for granting water quality certifications in connection with Article VII Certificates to the Director of the Office of Electricity and Environment. The Director will issue a water quality certification after the Certificate has been granted.

The Company proposes to use an open cut, dry stream crossing (dam and pump around) method, but states that it may use a directional drill or conventional bore. Ten days before pipeline construction commences across any stream or drainage, a meeting will be held between DPS Staff, the Company, and the Company's contractor to verify the crossing methods and techniques and restoration methods to be used in connection with the water courses.

GAS SAFETY REVIEW

The intended maximum allowable operating pressure of 1,440 pounds per square inch gauge (psig) is unique to gathering lines in Steuben County and surrounding counties. Operating pressures for gathering lines located in the western and central counties of New York State are typically less than 300 psig. More recently, operating pressures of gathering lines associated with the Trenton-Black River gas production field are greater than 1,000 psig. The higher pressures for gathering lines operating in excess of 300 psig require additional measures to ensure their safe operation. Accordingly, the Company is directed to design, construct, test, operate, and maintain the proposed pipeline, in accordance with the provisions of 16 NYCRR Part 255 applicable to steel transmission lines. In addition, all downstream piping connected to this pipeline shall also be considered transmission piping and subject to requirements found in 16 NYCRR Part 255 for the operation and maintenance, operator qualifications, and emergency plans for transmission pipelines.

PSL §119-b(1)(d) exempts gathering lines from the class of underground facilities that must be protected from damage. It is appropriate, however, due to the high operating pressure and location of this pipeline, that Fortuna be a member of the one-call notification system in the area where the line is located (Dig Safely New York). Fortuna states that it is a member of Dig Safely New York and would comply with the requirements contained in 16 NYCRR Part 753 regarding the protection of underground facilities.

CONCLUSION

Since no substantial public interest warrants additional review, a Certificate is granted pursuant to PSL §121-a(6).

It is ordered:

1. Fortuna Energy Inc. (the Company) is granted a Certificate of Environmental Compatibility and Public Need, pursuant to Public Service Law §121-a(6), to construct the fuel gas transmission line described in its Notice of Intention filed May 11, 2007 and in this Order, subject to the following conditions:

- (a) the Company shall apply the measures and techniques for environmental management and construction of this project indicated in its Notice of Intention and reflected herein;
- (b) the Company shall report to Department of Public Service (DPS) Staff any proposed changes to the approved project, including proposed changes to the approved measures and techniques to be applied to the environmental management and construction of this project; DPS Staff shall refer to the Director of the Office of Electricity and Environment (OEE), for approval, those proposed changes that would not cause substantial change in environmental impact or a change in the location of any portion of the certified site or right-of-way (ROW) of the project and shall refer all other proposed changes to the Commission; the Company shall not

- execute any proposed change until it receives oral or written notification from the Director of OEE or the Commission;
- (c) the Company shall file as-built drawings with DPS Staff should the pipeline deviate from the centerline of the proposed ROW; any change in the location of the proposed ROW shall be reported as set forth in the preceding condition;
 - (d) the Company shall provide construction contractors with complete copies of the Certificate, the Environmental Management and Construction Standards and Practices (EM&CS&P), updated construction drawings, and any site-specific plans;
 - (e) the Company shall designate a full-time supervisor with stop-work authority over all aspects of this project; the supervisor shall be on site during all phases of construction and restoration; the full-time supervisor and the environmental and construction monitors shall be equipped with sufficient documentation, transportation, and communication equipment to monitor effectively contractor compliance with the provisions of this Order, applicable sections of the Public Service Law and the EM&CS&P; the name and qualifications of the environmental monitor shall be submitted to DPS Staff at least one week prior to the start of construction;
 - (f) the Company shall notify all construction contractors that the Commission may seek to recover penalties for violations of the Certificate, not only from the Company but also from its construction contractors, and that construction contractors may also be liable for other fines, penalties, and environmental damage;
 - (g) the Company shall notify DPS Staff of the proposed commencement date at least ten days prior to the start of construction;
 - (h) before pipeline construction may commence, both edges of the ROW shall be staked and flagged and any wetland boundaries within, and in close proximity to, the pipeline ROW shall be staked

and flagged; if the pipeline ROW is within the 100-foot adjacent area of Wetland CT-5 as so delineated, the Company shall provide, for review, as set forth in accordance with condition 1(b) an explanation of how it plans to minimize or avoid impacts to Wetland CT-5;

- (i) the Company shall confine clearing and subsequent mechanical treatment of vegetation to the minimum extent necessary for construction, operation, and maintenance of the certified facility;
- (j) the Company shall exercise all necessary and reasonable precautions to minimize sedimentation and soil erosion in work areas and on the ROW; further, the Company shall take prompt and effective action to control sedimentation and erosion, in the event it does occur;
- (k) in areas of the ROW subject to soil erosion (including stream approaches), the Company shall install temporary erosion control devices as soon as practicable, but in no event later than the end of the work day;
- (l) if dry conditions exist such that dust from construction or restoration activities become a nuisance or hazard to adjacent homeowners, pedestrians, livestock, motorists, or others, the Company shall direct that these dry areas be dampened by water truck or other appropriate means;
- (m) the Company shall seed and mulch the ROW no more than five days after final grading;
- (n) no open burning is permitted;
- (o) the certified work is subject to inspection by authorized representatives of DPS;
- (p) the maximum pressure of the pipeline shall not exceed 1,440 pounds per square inch gauge; the Company shall design, construct, test, operate, and maintain the pipeline in accordance with the provisions of 16 NYCRR Part 255 applicable to steel transmission lines; the

Company shall be a member of the one-call notification system in the area where the line is located and comply with the requirements for excavators and operators for the protection of underground facilities set forth in 16 NYCRR Part 753; at least 30 days before construction commences, the Company shall submit an Appendix 7-D to DPS Gas Safety Staff in Albany; also, the Company shall notify Dig Safely New York of the addition of this pipeline to its system prior to the pipeline in-service date;

- (q) the Company shall amend its Operation and Maintenance and Emergency Procedures, as required by 16 NYCRR §§ 255.603(b) and 255.615 to reflect the addition of this pipeline and all interconnected pipelines to its system; in addition, the Company shall amend its program for operator qualification, as required by 16 NYCRR §255.604, to include covered tasks and qualifications of personnel related to operations and maintenance of this pipeline and all inter-connected pipelines;
- (r) the Company shall comply with the Integrity Management Requirements as found in 16 NYCRR Part 255;
- (s) the Company shall make available to DPS Gas Safety Staff the mill certification corresponding to the steel pipeline being used;
- (t) before construction may commence, the Company shall provide to DPS Staff a copy of a letter of “No Impact” from the Office of Parks, Recreation and Historic Preservation (OPR&HP); in the event culturally significant resources are found on or near the pipeline ROW, the Company shall immediately contact OPR&HP and follow any recommendations it makes; disputes shall be referred to the Commission;
- (u) the Company shall notify DPS Staff prior to construction in the affected area that each necessary local, state, and federal permit required in connection with this project has been obtained and shall

provide a copy of each permit to DPS Staff; in addition, a copy of all other plans and documents discussed in the body of this Order shall be provided to DPS Staff before construction commences;

- (v) at least ten days prior to the start of construction, the Company shall hold a pre-construction meeting; the Company shall supply draft minutes from this meeting to all attendees; the attendees may offer corrections or comments and the Company shall issue the finalized meeting minutes to all attendees; if, for any reason, the pipeline contractor cannot finish the construction of this project and a new pipeline contractor is needed, then another pre-construction meeting with the same format as outlined above in this Ordering Clause shall be held;
- (w) ten days prior to pipeline installation across any stream or drainage on this project, the Company shall meet with DPS Staff (Field Compliance Unit) and the contractor to determine the type of crossing method, erosion control measures, and materials used to install the stream crossing; field meeting notes shall be taken by the Company of issues discussed at this meeting and a copy of these notes shall be distributed to the attendees;
- (x) at least ten days prior to construction in active agricultural fields, representatives from the Department of Agriculture and Markets (Ag&Mkts), DPS Field Staff, the Company and the Company's contractor shall conduct a field review of the project to discuss compliance with the recommendations of Ag&Mkts described above regarding construction, restoration, and mitigation to be used in active agricultural fields; agricultural mitigation, restoration, and clean-up may include, but shall not limited to the following, full-width topsoil stripping, removal of rock four inches or larger, importing of topsoil, surface or subsurface shattering, deep tillage, repair of broken tile or tiling systems, and installation of new

intercept tiles; construction and restoration in active agricultural fields shall be done when soil moisture conditions are suitable for construction equipment, as determined by DPS Field Staff in consultation with the Staff of Ag&Mkts and the Company;

- (y) before construction may commence, the Company shall contact the U.S. Department of the Interior's Fish and Wildlife Service to obtain information concerning federally listed or proposed endangered or threatened species along the pipeline route;
- (z) at least ten days before any blasting operations begin on this project, a meeting will be held with DPS Field Staff, the Company, and the Company's contractor to discuss blasting procedures and other pertinent information;
- (aa) the Company shall consult with each local department or agency having jurisdiction over public roads that would be crossed or paralleled by the pipeline or used for direct access to the ROW; at least 15 days before the Company begins construction within the ROW limits of such roads or takes direct access from them, it shall notify each such department or agency of the approximate date work will begin, the crossing locations or uses, depth of facility crossings, details and specifications for repaving (if any), and related considerations;
- (bb) should circumstances warrant before construction commences, the Company may seek to change the pipe diameter from six inches to four inches by following the change process as outlined in Ordering Clause 1(b) above;
- (cc) within ten days after the ROW is completely restored, the Company shall so notify DPS Staff in writing; also, within ten days after the pipeline is in service, the Company shall so notify DPS Staff in writing;

- (dd) within one year after the in-service date of the project, the pipeline ROW shall be fully restored;
- (ee) the Company shall promptly notify DPS Staff in writing should it decide not to complete construction of all or any portion of this project; it shall serve a copy of such notice upon all parties; and
- (ff) if construction of the project hereby certified is not commenced within eight months, this Certificate may be vacated without further notice.

2. This proceeding is continued, but shall close ten days after the ROW is completely restored, unless the Secretary to the Commission finds good cause to continue the proceeding further.

(SIGNED)

Commissioner