

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**

100 CAMBRIDGE STREET, BOSTON, MA 02114 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

**February 10, 2026**

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In the Matter of 196 Edward  
Foster Road, LLC

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OADR Docket Number: 2024-026  
DEP Draft License No. 23-WW01-0124-APP  
Scituate, Massachusetts

**RECOMMENDED FINAL DECISION**

A Ten-Residents Group (“Petitioner”) has filed this appeal with the Office of Appeals and Dispute Resolution (“OADR”)<sup>1</sup> of the Massachusetts Department of Environmental Protection (“Department”) challenging the Department’s issuance of draft Waterways License 23-WW01-0124-APP (“Draft License”) pursuant to G.L. c. 91 (“Chapter 91”) and 310 CMR 9.00, *et seq.* (“the Waterways Regulations”) and dated August 21, 2024. The Draft License permits 196 Edward Foster Road, LLC (“Applicant”), to construct and maintain a pier, ramp, and float in and over the waters of Scituate Harbor at 196 Edward Foster Road in Scituate (“Property”) for the purpose of noncommercial docking and boating access to navigable waters (“Pier” or “Project”). The Petitioner contends that the Project will obstruct an existing jetty, restrict public access to the beach, create risks during storms, and infringe on the rights of small boat owners. The Department and the Applicant respond that the Draft License complies with Chapter 91 and the Waterways Regulations.

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<sup>1</sup> OADR is an independent quasi-judicial office in the Department which is responsible for advising its Commissioner in resolving all administrative appeals of Department Permit Decisions, Environmental Jurisdiction Determinations, and Enforcement Orders.

I conducted an evidentiary Adjudicatory Hearing (“Hearing”) on March 20, 2025, to adjudicate this appeal. The Parties’ witnesses who had filed testimony in advance of the Hearing, appeared at the Hearing and were cross-examined. I have reviewed the recording of the Hearing, the Parties’ briefing, the Parties’ Pre-Filed Testimony (“PFT”) and appended exhibits, and the documents produced by the Department at the outset of the appeal. After reviewing these materials, I recommend that the Commissioner issue a Final Decision upholding the Draft License with the addition of a Special Condition that the floats, ramps, and gangways be removed from October 30 to April 15 annually, as discussed below.

**I. Issues for Adjudication.**

The Issues for Adjudication (“Issues”) in this appeal are as follows:

1. Whether the Department correctly determined that the Project complies with the public rights of navigation requirements of 310 CMR 9.35(2)(a).
2. Whether the Department correctly determined that the Project complies with the public rights of free passage over and through the water, which exist in all waterways pursuant to 310 CMR 9.35(2)(b).
3. Whether the Department correctly determined that the Project complies with the public rights associated with a common landing, public easement, or other historic legal form of public access pursuant to 310 CMR 9.35(2)(c).
4. Whether the Department correctly determined that the Project complies with the public rights of fishing and fowling pursuant to 310 CMR 9.35(3)(a).
5. Whether the Department correctly determined that the Project complies with the public passage requirements of 310 CMR 9.35(3)(b).

6. Whether the Department correctly determined that the Project provides commensurate compensation to the public for any interference with its broad rights to use Commonwealth tidelands pursuant to 310 CMR 9.35(4).

7. Whether the Department correctly determined that the Project complies with the requirement of 310 CMR 9.37(1)(b) that the Project does not “pose an unreasonable threat to navigation, public health or safety, or adjacent buildings or structures, if damaged or destroyed in a storm.”

## **II. Witnesses.**

In accordance with 310 CMR 1.01(13)(h)3., the Parties submitted written Pre-Filed Testimony from their witnesses, and those witnesses were subject to cross-examination at the Hearing by opposing counsel. Prior to the Hearing, on February 12, 2025, the Department filed a Motion to Strike Testimony and Exhibits proffered by the Petitioner. On February 28, 2025, the Petitioner filed an Opposition to the Motion to Strike.<sup>2</sup> I issued an Order on the Motion to Strike on March 18, 2025, granting in part and denying in part the Motion to Strike. As I discuss each witness below, I identify what portions of the Petitioner’s PFT,<sup>3</sup> if any, were stricken (or accepted for a narrower purpose) in the Order on the Motion to Strike.

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<sup>2</sup> The Applicant offered no position on the Motion to Strike.

<sup>3</sup> Citations to the pertinent PFT, pleadings, and other documents are as follows:

Pre-Filed Testimony: “[Witness] PFT, ¶ [paragraph]”

Pre-Hearing Memorandum: “[Party] Memo., p. [page number]”

Rebuttal Pre-Filed Testimony: “[Witness] RPFT, ¶ [paragraph]”

Rebuttal Memorandum: “[Party] Rebuttal Memo., p. [page number]”

Exhibits: “[Witness] Ex. [Exhibit identifier]”

Adjudicatory Hearing Audio: “Hearing, [time]”

Closing Brief: “[Party Name] Brief, p. [page]”

Citations to the audio of the Adjudicatory Hearing indicate the approximate time of the relevant testimony in the recording.

**A. Petitioner.**

**1. Heather Jenkins.**

Ms. Jenkins has lived in Scituate since birth,<sup>4</sup> approximately 900 feet from the Property.<sup>5</sup> She attended Boston University and majored in biology with a focus on marine ecology including coastal and ocean habitats and marine invertebrates.<sup>6</sup> She uses the public beach at the end of Edward Foster Road for kayaking and sailing.<sup>7</sup> I find her qualified to offer opinion testimony regarding coastal and ocean habitats along the Massachusetts coast. In the Matter of Dan and Eva Barstow, OADR Docket No. 2019-026, Recommended Final Decision (January 22, 2020), 2020 WL 2616472, \*4, adopted as Final Decision (February 19, 2020), 2020 WL 2616471.

Ms. Jenkins testifies to her experiences in the area of the Pier and her observations of activities performed by others in the area.<sup>8</sup> Ms. Jenkins then testifies to each of the Issues for Adjudication.<sup>9</sup> I struck part of her testimony in my Order on Motion to Strike.<sup>10</sup>

**2. Alan J. MacLeod.**

Mr. MacLeod has lived in Scituate part- or full-time for 35 years.<sup>11</sup> He spent 60 years as a registered architect in Massachusetts<sup>12</sup> and was the CEO of a commercial construction

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<sup>4</sup> H. Jenkins PFT, ¶ 2.

<sup>5</sup> Id. at ¶ 3.

<sup>6</sup> Id. at ¶ 6.

<sup>7</sup> Id. at ¶¶ 8-9.

<sup>8</sup> Id. at ¶¶ 10-11.

<sup>9</sup> Id. at ¶¶ 14-23, 25-26, 28-31, 33-35, 37-41, 48, 53-54.

<sup>10</sup> In the Order on Motion to Strike, I struck Paragraphs 24, 32, 42 through 47, and 49 through 52 of Heather Jenkins' PFT, as well as the first sentence of paragraph 27 and the first sentence of paragraph 36. I also struck Exhibits C, Y, Z, AA, and BB. The second sentence of paragraph 27 of Ms. Jenkins' PFT was admitted only for what actions she would take if the pier was built, and Exhibit D of her PFT was accepted only as a chalk.

<sup>11</sup> MacLeod PFT, ¶ 2.

<sup>12</sup> Id. at ¶ 5

corporation.<sup>13</sup> He has been a sailor in the Scituate Harbor since at least 1968.<sup>14</sup> He has maintained and used an anchorage with an outhaul line to a post on the public beach in the waters adjacent to the Project site.<sup>15</sup> He uses the public beach for access to sail to deeper water.<sup>16</sup>

Mr. MacLeod testifies to his experiences in the area of the Pier and his observations of activities performed by others in the area.<sup>17</sup> Mr. MacLeod then testifies to each of the Issues for Adjudication.<sup>18</sup> I struck part of his testimony in my Order on Motion to Strike.<sup>19</sup>

### 3. Elizabeth Petit.

Ms. Petit has lived in Scituate for 62 years.<sup>20</sup> She has extensive experience sailing in the local area.<sup>21</sup> She has swum in the area for many years.<sup>22</sup> “In high school [she] was a docent with the Scituate Historical Society.”<sup>23</sup> Growing up, she went to the beach virtually every day in the summer for swimming, sailing, and beachcombing.<sup>24</sup> Beginning in 2012, she returned to Scituate and often swam in the area while looking after her aging parents.<sup>25</sup>

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<sup>13</sup> Id.

<sup>14</sup> Id. at ¶ 7.

<sup>15</sup> Id.

<sup>16</sup> Id. at ¶ 10.

<sup>17</sup> Id. at ¶¶ 17.

<sup>18</sup> Id. at ¶¶ 24-49, 51

<sup>19</sup> In the Order on the Motion to Strike, I struck paragraphs 50 and 52 of Mr. MacLeod’s PFT. I accepted the commentary in the upper-left corner of Exhibit A(2) and the entirety of Exhibit C of Mr. MacLeod’s PFT as a chalk.

<sup>20</sup> Petit PFT, ¶ 2.

<sup>21</sup> Id. at ¶ 4.

<sup>22</sup> Id. at ¶ 5.

<sup>23</sup> Id. at ¶ 24.

<sup>24</sup> Id. at ¶ 5.

<sup>25</sup> Id.

Ms. Petit testifies to her experiences in the area of the Pier and her observations of activities performed by others in the area.<sup>26</sup> Ms. Petit then testifies to each of the Issues for Adjudication.<sup>27</sup> I struck part of her testimony in my Order on Motion to Strike.<sup>28</sup>

#### 4. Richard Mark Fenton.

Mr. Fenton has lived in Scituate for 29 years.<sup>29</sup> He is a mechanical engineer and has worked as a public health, planning, and transportation consultant assisting in the development of active transportation (walk, bike, and transit) infrastructure and policies.<sup>30</sup> He frequently surfs, kayaks, and canoes in the area.<sup>31</sup>

Mr. Fenton testifies to his experiences in the area of the Pier and his observations of activities performed by others in the area.<sup>32</sup> He testifies to facts regarding Issues 1 through 6.<sup>33</sup> I struck part of his testimony in my Order on Motion to Strike.<sup>34</sup>

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<sup>26</sup> Id. at ¶¶ 4-9.

<sup>27</sup> Id. at ¶¶ 12-32.

<sup>28</sup> In the Order on Motion to Strike, I struck everything after the first sentence of paragraph 25 of Ms. Petit's PFT; the second sentence of paragraph 26; the second and third sentences of paragraph 32; paragraphs 33 and 34; and the second, third, fourth, fifth, and sixth sentences of paragraph 16. I also struck Exhibits D-2 and D-7 of Ms. Petit's PFT. The first sentence of paragraph 32 of Ms. Petit's PFT was admitted only for background, and Exhibit D-5 of Ms. Petit's PFT was accepted as a chalk.

<sup>29</sup> Fenton PFT, ¶ 2.

<sup>30</sup> Id. at ¶ 3.

<sup>31</sup> Id. at ¶¶ 7-8.

<sup>32</sup> Id. at ¶¶ 8-9.

<sup>33</sup> Id. at ¶¶ 10-16.

<sup>34</sup> In the Order on Motion to Strike, I struck paragraphs 17 and 18 of Mr. Fenton's PFT.

## 5. Lyle Jenkins.

Mr. Jenkins has lived in Scituate for over 39 years.<sup>35</sup> He is a mechanical engineer by trade.<sup>36</sup> He uses the harbor for paddleboarding, sailing, and kayaking.<sup>37</sup> He has accessed the Jetty<sup>38</sup> for stargazing, walking, hiking, and jogging.<sup>39</sup>

Mr. Jenkins testifies to his observations of the activities performed by others in the area of the Pier.<sup>40</sup> He also testifies to Issues 1 through 6.<sup>41</sup> I struck part of his testimony in my Order on Motion to Strike.<sup>42</sup>

## 6. Payson R. Whitney, III, P.E.

Mr. Whitney is a registered professional civil engineer with over 30 years of experience in civil and coastal engineering.<sup>43</sup> He is the National Market Director for Coastal and Offshore Services in the Planning, Permitting, and Licensing practice of TRC Companies, Inc., a multi-disciplinary environmental consulting and engineering firm.<sup>44</sup> He has worked for TRC for over 26 years.<sup>45</sup> He has worked on numerous projects involving waterfront development or coastal permitting, including dredge design; marina planning, permitting, and design; commercial and residential waterfront development; and offshore energy-generation and transmission projects.<sup>46</sup>

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<sup>35</sup> L. Jenkins PFT, ¶ 1.

<sup>36</sup> Id. at ¶ 2.

<sup>37</sup> Id. at ¶¶ 5-6.

<sup>38</sup> The “Jetty” is defined below in the description of the Project site starting on page 12.

<sup>39</sup> Id. at ¶¶ 7-8.

<sup>40</sup> Id. at ¶ 9.

<sup>41</sup> Id. at ¶¶ 12-17.

<sup>42</sup> In the Order on Motion to Strike, I struck paragraphs 18 through 26 of Mr. Jenkins’ PFT.

<sup>43</sup> Id. at ¶ 3.

<sup>44</sup> Whitney PFT, ¶ 2.

<sup>45</sup> Id.

<sup>46</sup> Id. at ¶ 5.

Many of the projects he has worked on involve the assessment of potential impacts from coastal flooding and potential impacts to navigation.<sup>47</sup> He testifies to Issue 7.<sup>48</sup> I find him qualified to offer expert testimony in this appeal. Barstow, 2020 WL 2616472 at \*4.

**7. Mary Ann McDonald Jenkins.**

Ms. McDonald Jenkins has lived in Scituate for over 64 years.<sup>49</sup> Her family has lived in Scituate since 1863.<sup>50</sup> She has experienced many severe weather events in Scituate.<sup>51</sup> She has used the public beach area for kayaking, sailing, and photography.<sup>52</sup>

Ms. McDonald Jenkins testifies to all of the Issues for Adjudication.<sup>53</sup> I struck part of his testimony in my Order on Motion to Strike.<sup>54</sup>

**B. Applicant.**

**1. Paul J. Armstrong.**

Mr. Armstrong has been a resident of Marshfield, Massachusetts, for his entire life, and has spent significant time in Scituate Harbor.<sup>55</sup> He has been in the business of construction of waterfront residential homes and residential and commercial piers for over 40 years.<sup>56</sup> He has been a licensed construction supervisor for over 30 years<sup>57</sup> and has a Hoisting Engineer's

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<sup>47</sup> Id. at ¶ 6.

<sup>48</sup> Id. at ¶¶ 14-42.

<sup>49</sup> McDonald PFT, ¶ 1.

<sup>50</sup> Id. at ¶ 3.

<sup>51</sup> Id. at ¶ 5.

<sup>52</sup> Id. at ¶¶ 7 and 10.

<sup>53</sup> Id. at ¶¶ 13-21, 23

<sup>54</sup> In the Order on Motion to Strike, I struck Paragraphs 22 and 24 through 27 of Ms. McDonald-Jenkins' PFT.

<sup>55</sup> Armstrong PFT, ¶ 1.

<sup>56</sup> Id. at ¶ 3.

<sup>57</sup> Id.

License from the Commonwealth of Massachusetts.<sup>58</sup> He has constructed numerous residential and commercial piers in Scituate Harbor.<sup>59</sup> He testifies to the design of the Pier.<sup>60</sup> I find him qualified to offer expert testimony in this appeal. Barstow, 2020 WL 2616472 at \*4.

## **2. Stephen Mone.**

Mr. Mone is the current Harbormaster for the Town of Scituate, and has been since July 2015.<sup>61</sup> He is also a licensed United States Coast Guard captain.<sup>62</sup> He oversees Scituate’s approximately 21 miles of waterways to ensure water safety, maritime law enforcement, and the assignment of moorings and slips.<sup>63</sup> Based on his work as the Scituate Harbormaster, he is knowledgeable concerning the navigable channels, boat mooring fields, and commercial and residential docks in Scituate Harbor, and the movements of watercraft within the Harbor.<sup>64</sup> He testifies that the Pier will “not pose a hazard to navigation in Scituate Harbor.”<sup>65</sup> I find him qualified to offer expert testimony in this appeal. Barstow, 2020 WL 2616472 at \*4.

## **3. Richard Grady.**

Mr. Grady is a professional engineer in the Commonwealth of Massachusetts.<sup>66</sup> He has operated a civil engineering, land surveying, and landscape architecture firm serving the South Shore and Cape Cod since 1998.<sup>67</sup> He has served as a Principal Engineer on a wide variety of

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<sup>58</sup> Id.

<sup>59</sup> Id. at ¶ 7.

<sup>60</sup> Id. at ¶¶ 10-17.

<sup>61</sup> Mone PFT, ¶ 1.

<sup>62</sup> Id.

<sup>63</sup> Id. at ¶ 2.

<sup>64</sup> Id.

<sup>65</sup> Id. at ¶ 4.

<sup>66</sup> Grady, ¶ 1.

<sup>67</sup> Id.

projects including subdivision design, horizontal and vertical roadway design, drainage system design, percolation testing and soil evaluation, engineering surveys, sewage disposal and sewer system design, site plan design, grading design, Chapter 91 permitting, Planning Board permitting, Conservation Commission permitting, Board of Health permitting, and Department permitting.<sup>68</sup> He has prepared numerous site plans and dock designs that required Chapter 91 Licensing.<sup>69</sup> He describes the Project<sup>70</sup> and the permitting process,<sup>71</sup> and he testifies to each of the Issues for Adjudication. I find him qualified to offer expert testimony in this appeal. Barstow, 2020 WL 2616472 at \*4.

#### **4. Joseph Harold.**

Mr. Harold is a Manager of the Applicant. He has lived on First Cliff adjacent to the beach and Jetty where the proposed Pier is located in the Town of Scituate.<sup>72</sup> His current home overlooks the beach and Jetty.<sup>73</sup> He describes his observations of the beach where the Pier will be located and the public's use of the beach.<sup>74</sup>

#### **C. Department.**

##### **1. Cally Harper, Ph.D.**

Dr. Harper obtained her doctorate in Ecology and Evolutionary Biology from Brown University in 2013.<sup>75</sup> She is an Environmental Analyst who has been employed by the Department since January 2021 and worked with the Waterways Program from October 2021 to

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<sup>68</sup> Id. at ¶ 2.

<sup>69</sup> Id. at ¶ 4.

<sup>70</sup> Id. at ¶¶ 6-10, 22.

<sup>71</sup> Id. at ¶¶ 11-21.

<sup>72</sup> Harold PFT, ¶ 2.

<sup>73</sup> Id. at ¶ 3.

<sup>74</sup> Id. at ¶¶ 3-10.

<sup>75</sup> Harper PFT, ¶ 1.

the present.<sup>76</sup> She administers and enforces the provisions of Chapter 91 and reviews applications to determine whether they comply with Chapter 91 and the Waterways Regulations.<sup>77</sup> She has reviewed over 200 applications for water-dependent use projects that include private and public piers, ramps, floats, marinas, seawalls, buildings, dredging, beach nourishment, and other jurisdictional activities.<sup>78</sup> I find her qualified to offer expert testimony in this appeal. Barstow, 2020 WL 2616472 at \*4.

### **III. The Project and its surroundings.**

The Applicant submitted its Chapter 91 Waterways License Application on September 23, 2023.<sup>79</sup> The proposed Project consists of a 20-foot ramp beginning on contour elevation 10 and attached to a pile-supported dock 121 feet and five inches long.<sup>80</sup> The pier is then attached to a 40-foot ramp that rests on wheels on a 10-foot by 20-foot float.<sup>81</sup> The float is anchored by four wooden piles.<sup>82</sup> There are cross-braces securing the pilings throughout.<sup>83</sup> There is a five-foot pass-through clearance at the mean annual High-Water Mark.<sup>84</sup> At mean low water, the vertical separation between the bottom of the float and land under the ocean is 3.31 feet.<sup>85</sup> The spacing between the decking is one inch.<sup>86</sup> The structure is more than 25 feet from the bordering property

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<sup>76</sup> Id. at ¶ 2.

<sup>77</sup> Id.

<sup>78</sup> Id.

<sup>79</sup> See Chapter 91 Application, p. 4 (produced by the Department at the outset of the appeal).

<sup>80</sup> Grady PFT, ¶ 9.

<sup>81</sup> Id.

<sup>82</sup> Id.

<sup>83</sup> Id.

<sup>84</sup> Id.

<sup>85</sup> Id.

<sup>86</sup> Id.

lines.<sup>87</sup> The tip of the float is approximately 200 feet from the end of the jetty to the east and approximately 400 feet from a Federal Navigation Channel to the north.<sup>88</sup> As for the construction of the Pier, piles would be driven to a minimum depth of 15 feet; two 4”×10” cap beams would be used instead of the industry standard of 4”×8” beams; 4”×12” stringers would be used instead of the 4”×10” standard; the spacing between the deck boards would be one inch to allow for water flow, and cross-braces would be placed as low as possible on the piles for maximum stability.<sup>89</sup>

Adjacent to the Property to the west is a 40-foot beach that marks the end of Edward Foster Road. Edward Foster Road is a public way that runs south-to-north perpendicular to Scituate Harbor and terminates at the beach. This beach is referred to variously as “Rocky Beach” or “Shingle Beach” by the local residents.<sup>90</sup> To the west of Rocky Beach is additional beach extending approximately 1,000 feet and ending at a National Oceanic and Atmospheric Administration (“NOAA”) pier.<sup>91</sup>

A plan that is part of the Draft License illustrates the dock, ramp, and float and the Chapter 91 jurisdictional lines:<sup>92</sup>

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<sup>87</sup> Id.

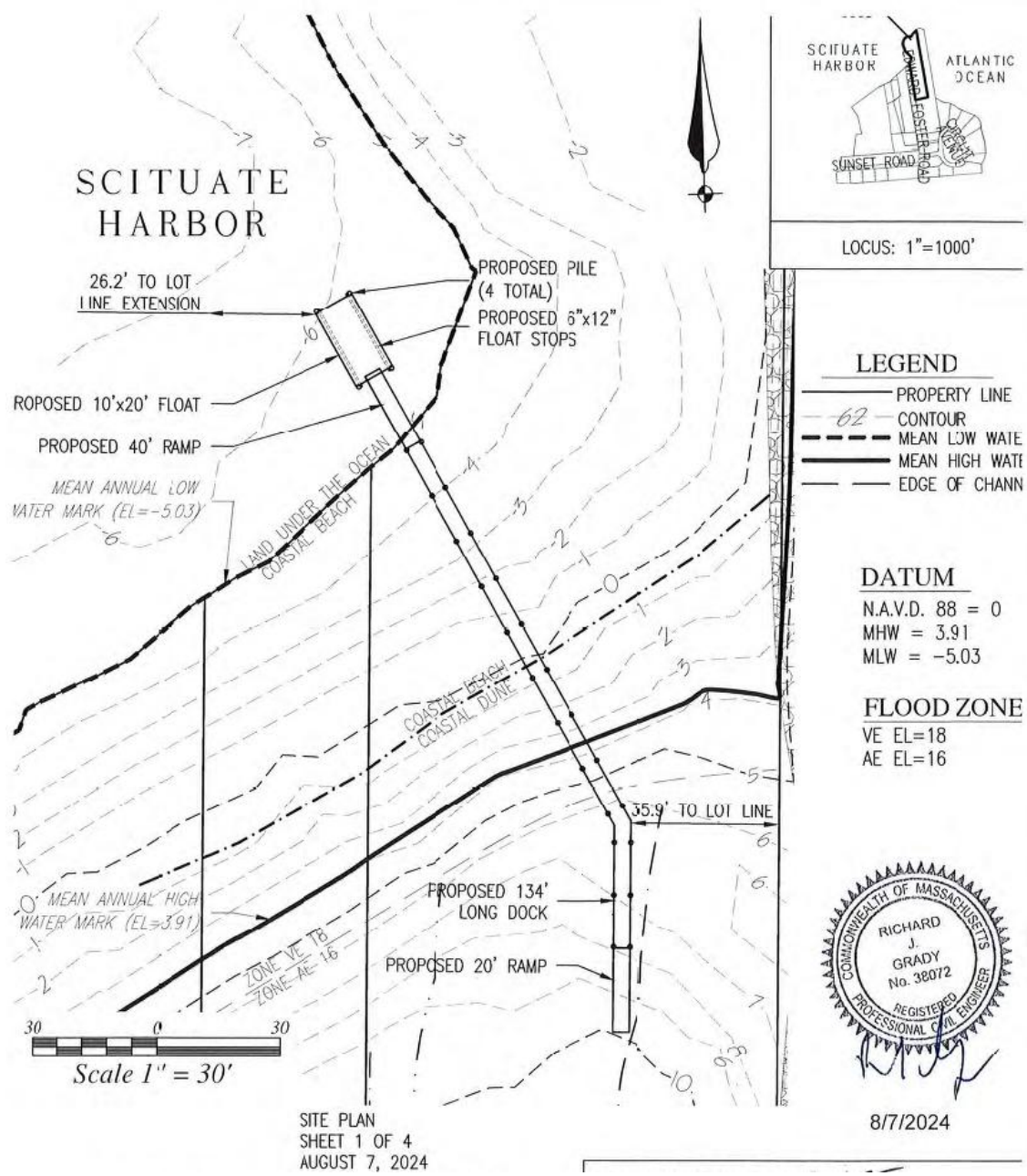
<sup>88</sup> Id.

<sup>89</sup> Armstrong PFT, ¶ 10.

<sup>90</sup> Fenton PFT, ¶ 6; H. Jenkins, ¶ 8; Petit PFT, ¶ 16.

<sup>91</sup> Id.

<sup>92</sup> See Draft License, p. 9.



The portion of the pier and ramp between the mean High Water Mark and the mean Low Water Mark is on private tidelands.<sup>93</sup> The remainder of the ramp and the float are on Commonwealth tidelands.<sup>94</sup>

<sup>93</sup> Harper PFT, ¶ 18.

<sup>94</sup> Id.

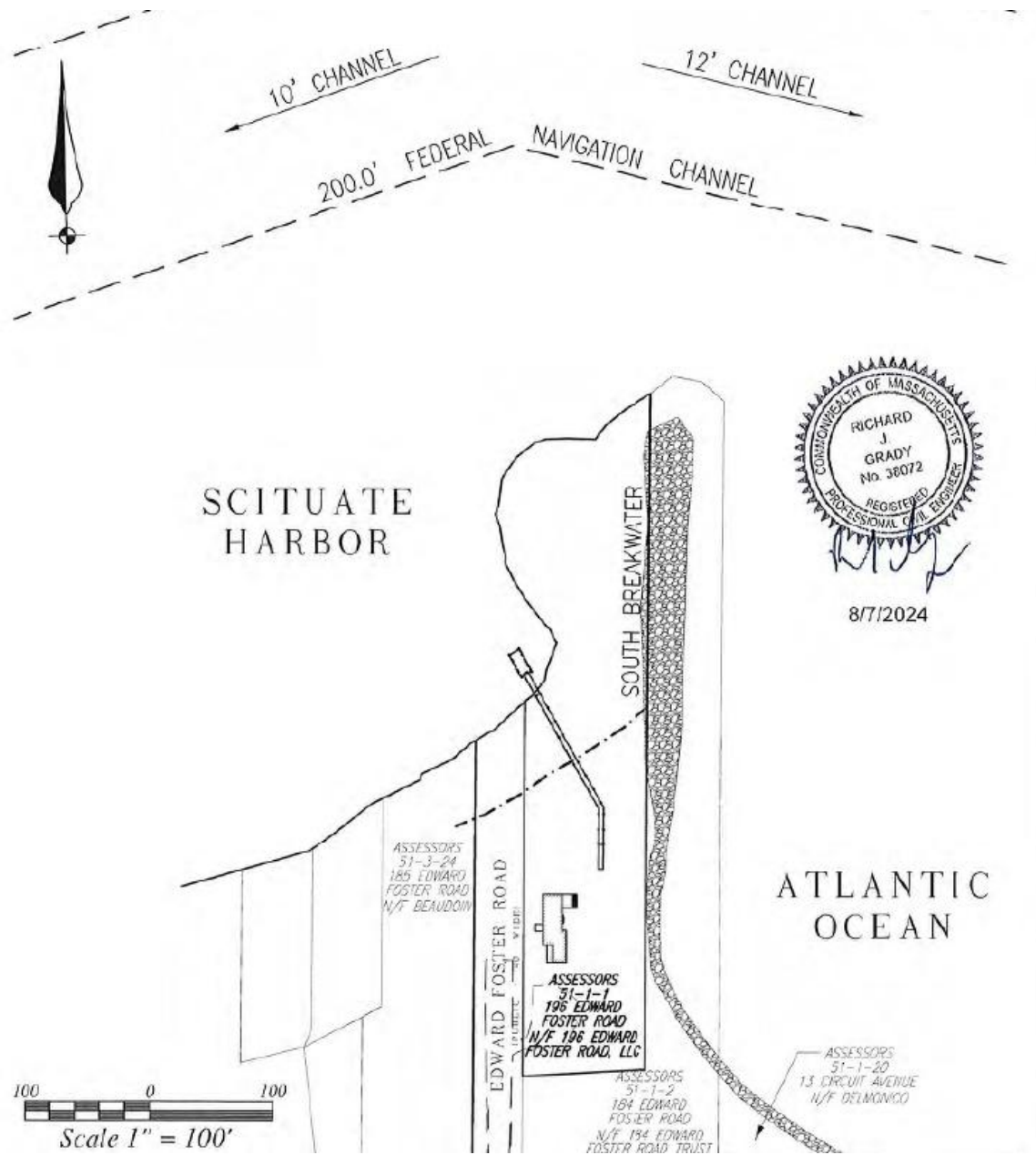
The Draft License also includes a zoomed-out image of the proposed Pier and its surroundings.<sup>95</sup> This map shows the Pier as well as a rock jetty to the immediate east of the Property labeled “SOUTH BREAKWATER” (“Jetty”).<sup>96</sup> The image also demarcates a Federal Navigation Channel that passes to the north of the Property (“Federal Navigation Channel”):<sup>97</sup>

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<sup>95</sup> Id. at p. 10.

<sup>96</sup> Id.

<sup>97</sup> Id.



On September 11, 2024, the Petitioner timely filed a Notice of Claim appealing the Draft License.<sup>98</sup>

<sup>98</sup> See Notice of Claim.

#### IV. The Applicable Regulatory Standards.

##### A. Chapter 91.

“Throughout history, the shores of the sea have been recognized as a special form of property of unusual value[,] and therefore subject to different legal rules from those which apply to inland property.” In the Matter of Onset Bay II Corporation, OADR Docket No. 2012-034, Recommended Final Decision (August 28, 2020), 2020 WL 6115205, \*4, adopted as Final Decision (September 23, 2020), 2020 WL 6115206 (“Onset Bay II”), citing Navy Yard Four Associates, LLC v. Department of Environmental Protection, 88 Mass. App. Ct. 213, 218 (2015) (“NYFA”), citing Boston Waterfront Development Corp. v. Commonwealth, 378 Mass. 629, 631 (1979). “Under common law, private ownership in coastal land could historically extend only landward of the mean high water mark.” NYFA, 88 Mass. App. Ct. at 218. “Seaward of the high water mark, ownership remained with ‘the Crown [and eventually the Massachusetts Bay Colony, followed by the Commonwealth,] but subject to the rights of the public to use the coastal waters for fishing and navigation.’” Id., quoting Opinion of the Justices, 365 Mass. 681, 684 (1974). “This changed, however, with the Colonial Ordinance of 1641-1647, which authorized the transfer of title to property between the high and low water marks—the tidal flats—to private parties, though this title has always had ‘strings attached.’” Id., quoting Arno v. Commonwealth, 457 Mass. 434, 449. “While ‘[g]reater public rights exist in submerged lands, the land lying seaward of the low water mark,’ both tidal flats and submerged lands are referred to collectively as ‘tidelands,’ and ‘[a]ll tidelands below [the historic] high water mark are subject to [the Public Trust Doctrine].’” Id., quoting Arno, 457 Mass. at 436 and 449; Trio Algarvio, Inc. v. Commissioner of Dept. of Env'tl. Protection, 440 Mass. 94, 97 (2003). In this Recommended Final Decision (“RFD”), I will refer to the public’s rights under the Public Trust Doctrine as “Public Trust Rights.”

Under the Public Trust Doctrine, “the Commonwealth holds tidelands in trust for the use of the public for, traditionally, fishing, fowling, and navigation.” Boston Edison Co. v. Massachusetts Water Resources Authority, 459 Mass. 724, 735 (2011). Chapter 91 and the Waterways Regulations “represent the modern embodiment of the Public Trust Doctrine, and ‘govern . . . water[-dependent] and nonwater-dependent development in tidelands and the public’s right to use those lands.’” NYFA, 88 Mass. App. Ct. at 218. “As such, those parties seeking to put tidelands to either water-[-dependent] or nonwater-dependent use [within the meaning of the Waterways Regulations at 310 CMR 9.12] . . . must first obtain a license [from the Department] pursuant to [Chapter 91].” Id.

Tidelands subject to Chapter 91 licensing are classified as either “Commonwealth Tidelands” or “Private Tidelands” as defined by 310 CMR 9.02. Commonwealth Tidelands are:

tidelands held [1] by the Commonwealth, or [2] by its political subdivisions or a quasi-public agency or authority, in trust for the benefit of the public; or [3] tidelands held by a private person by license or grant of the Commonwealth subject to an express or implied condition subsequent that it be used for a public purpose.

310 CMR 9.02 (definition of “Commonwealth Tidelands”). The historic low water mark (“HLWM”) is defined as:

the low water mark which existed prior to human alteration of the shoreline by filling, dredging, excavating, impounding or other means[, and in] areas where there is evidence of such alteration by fill, the Department [is required to] make its determination of the position of the historic low water mark in the same manner as described in 310 CMR 9.02: Definitions: Historic High Water Mark.

Id. (definition of “historic low water mark”). The historic high-water mark (“HHWM”) is:

the high water mark which existed prior to human alteration of the shoreline by filling, dredging, excavating, impounding, or other means[, and in] areas where there is evidence of such alteration by fill, the Department [is required to] presume the historic high water mark is the farthest landward former shoreline which can be ascertained with reference to topographic or hydrographic surveys, previous license plans, and other historic maps or charts, which may be supplemented as appropriate by soil logs, photographs, and other documents, written records, or information sources of the type on which reasonable persons are accustomed to rely in the conduct of serious business affairs. [This] . . . presumption may be overcome by a clear showing that a seaward migration of such shoreline occurred solely as a result of natural accretion not caused by the owner or any predecessor in interest. For Great Ponds, the historic high water mark is synonymous with the natural high water mark.

Id. (definition of “historic high water mark”). Private Tidelands are:

tidelands held by a private person subject to an easement of the public for the purposes of navigation and free fishing and fowling and of passing freely over and through the water . . . .

Id. (definition of “Private Tidelands”). “The [Waterways] [R]egulations [at 310 CMR 9.02] establish a presumption that tidelands are [P]rivate [T]idelands if they are landward of the [HLWM] or . . . 100 rods (1,650 feet) seaward of the [HHWM].” In the Matter of Navy Yard Four Assoc., Ltd., OADR Docket No. 2010-062, Recommended Final Decision (November 21, 2011), 2011 WL 6425501, \*4, adopted as Final Decision (November 22, 2011), 2011 WL 6400161. “Generally, [P]rivate [T]idelands include the area between the high and low water mark, where public rights are more limited than on Commonwealth tidelands.” Id. at \*5.

“[T]o carry out its statutory obligations [under Chapter 91] and the responsibility of the Commonwealth for effective stewardship of trust lands,” the Department promulgated the Waterways Regulations at 310 CMR 9.00. 310 CMR 9.01(2); In the Matter of Jimary Realty Trust, OADR Docket No. 2016-015, Recommended Final Decision (August 3, 2018), 2018 WL 6040709, \*4, adopted as Final Decision (August 14, 2018), 2018 WL 6040708. “The general purposes served by [the Waterways Regulations],” include:

(a) [the] protect[ion] and promot[ion] [of] the public’s interest in tidelands, Great Ponds, and non-tidal rivers and streams in accordance with the public trust doctrine, as established by common law and codified in the Colonial Ordinances of 1641-47 and subsequent statutes and case law of Massachusetts;

(b) [the] preserv[ation] and protect[ion] [of] the rights in tidelands of the inhabitants of the Commonwealth by ensuring that the tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose; [and]

(c) [the] protect[ion] [of] the public health, safety, and general welfare as it may be affected by any project in tidelands, great ponds, and non-tidal rivers and streams . . . .

310 CMR 9.01(2)(a)-2(c); Jimary, 2018 WL 6040709 at \*4.

**A. Licensing under Chapter 91 and the Waterways Regulations.**

Under G.L. c. 91, § 14, “[t]he [D]epartment may license and prescribe the terms for the construction or extension of a . . . structure, or for the filling of land or flats, or the driving of piles in or over tide water below high water mark.” In accordance with its statutory authority under G.L. c. 91, § 18, the Department has promulgated the Waterways Regulations that include licensing provisions regulating the proposed uses of and construction activities in tidelands.

Under 310 CMR 9.03(1):

[w]ritten authorization in the form of a license, permit, or amendment thereto must be obtained from the Department before the commencement of one or more activities specified in . . . 310 CMR 9.05 and located in one or more geographic areas specified in 310 CMR 9.04 . . . .

The geographic areas subject to licensing include “all filled tidelands, except for landlocked tidelands,” which are not pertinent to this appeal. 310 CMR 9.04(1), 9.04(2). “[A]n application for [a] license or license amendment shall be submitted to the Department for the following activities involving work on or use of fill or structures [in tidelands]”:

(a) any construction, placement, excavation, addition, improvement, maintenance, repair, replacement, reconstruction, demolition or removal of any fill or structures, not previously authorized, or for which a previous grant or license is not presently valid;

(b) any existing or proposed use of any fill or structures not previously authorized, or for which a previous grant or license is not presently valid;

(c) any structural alteration of fill or structures from the specifications contained in a valid grant or license, whether such authorization was obtained prior to or after January 1, 1984; or

(d) any change in use of fill or structures from that expressly authorized in a valid grant or license or, if no such use statement was included, from that reasonably determined by the Department to be implicit therein, whether such authorization was obtained prior to or after January 1, 1984.

310 CMR 9.05(1). The proposed Project involves the construction of a pier, which is a water-dependent structure, and therefore requires a license pursuant to 310 CMR 9.05(1)(a).

**B. The Petitioner’s Burden of Proof at the Hearing.**

At the Hearing, the Petitioner, as the party challenging the Draft License, had the burden of proof on all of the Issues for Adjudication. Onset Bay II, 2020 WL 6115205 at \*16; In the Matter of Renata Legowski, OADR Docket No. 2011-039, Recommended Final Decision (October 25, 2012), 2012 WL 5988808, \*2, adopted as Final Decision (November 5, 2012), 2012 WL 5988807 (party challenging Chapter 91 determination has burden of proof); In the Matter of Webster Ventures, LLC, OADR Docket No. 2015-014, Recommended Final Decision (June 3, 2016), 2016 WL 3632236, \*21, adopted as Final Decision (June 15, 2016), 2016 WL 3632244; Jimary, 2018 WL 6040709 at \*4. Specifically, the Petitioner had the burden of proving at the Hearing by a preponderance of the credible evidence through the sworn testimonial and documentary evidence of competent witnesses, including expert witnesses, that the Department erred in issuing the Draft License. Legowski, 2012 WL 5988808 at \*4-\*5.

It is well settled that “[a] competent source [of evidence includes] a witness who has sufficient expertise to render testimony on the technical issues on appeal.” In the Matter of Pittsfield Airport Comm’n, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 WL 3427461, \*11, adopted as Final Decision (August 19, 2010), 2010 WL

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3427460. Whether the witness has such expertise depends on “whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony.”

Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted); see, e.g., In the Matter of Carl Carulli, OADR Docket No. DEP-06-071, Recommended Final Decision (August 10, 2006), 2006 WL 4211673, \*3-\*7, adopted as Final Decision (October 25, 2006) (dismissing claims regarding flood control, wetlands replication, and vernal pools for failure to provide supporting evidence from competent source).

**C. The Standard of Review.**

My review of the evidence presented at the Hearing is *de novo*, meaning that my review is anew, irrespective of any prior determination of the Department in issuing the Draft License to the Applicant. Onset Bay II, 2020 WL 6115205 at \*17; In the Matter of Woods Hole, Martha’s Vineyard & Nantucket Steamship Authority, OADR Docket No. 2016-025, Recommended Final Decision (March 27, 2017), 2017 WL 1656437, adopted as Final Decision (April 13, 2017), 2017 WL 1656447; Jimary, 2018 WL 6040709 at \*4. Put another way, as the Presiding Officer responsible for adjudicating the appeal, “[I am] not bound by MassDEP’s prior orders or statements [in the case], [but] instead [am] responsible . . . for independently adjudicating [the] appeal[l] and [issuing a Recommended Final Decision] to MassDEP’s Commissioner that is consistent with [Chapter 91] and . . . [the Waterways] Regulations . . . .” Jimary, 2018 WL 6040709 at \*4; cf. In the Matter of John Soursourian, OADR Docket No. WET-2013-028, Recommended Final Decision (June 13, 2014), 2014 WL 2996120, \*12, adopted as Final Decision (June 19, 2014), 2014 WL 2996126.

G.L. c. 30A, § 11(2), and 310 CMR 1.01(13)(h) govern the relevancy, admissibility, and weight of the evidence that was presented at the Hearing. G.L. c. 30A, § 11(2), states as follows:

[u]nless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

Under 310 CMR 1.01(13)(h), “[t]he weight to be attached to any evidence . . . rest[s] within the discretion of the Presiding Officer . . . .” Speculative evidence was accorded no weight given its lack of probative value in resolving the issues in the case. In the Matter of Sawmill Dev. Corp., OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), 2015 WL 5758252, \*29, adopted as Final Decision (July 7, 2015), 2015 WL 5758285 (petitioners’ expert testimony “that pharmaceuticals, toxins, and other potentially hazardous material would be discharged from effluent generated by . . . proposed [privately owned wastewater treatment facility] . . . was speculative in nature and not reliable”).

V. **Analysis.**

A. **The Petitioner has not met its burden to show that the proposed Project fails to comply with the public rights of navigation requirements of 310 CMR 9.35(2)(a).**

The Petitioner contends that the proposed Project will significantly interfere with public rights of navigation.<sup>99</sup> The Applicant and the Department contend that the proposed Project will not significantly interfere with those rights.<sup>100</sup> Under 310 CMR 9.35(2)(a), the Project may not:

significantly interfere with public rights of navigation which exist in all waterways. Such rights include the right to conduct any activity which entails the movement of a boat, vessel, float, or other watercraft; the right to conduct any activity involving the transport or the loading/unloading of persons or objects to or from any such watercraft; and the natural derivatives thereof.

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<sup>99</sup> Petitioner Memo., p. 5.

<sup>100</sup> Applicant Memo., p. 5; Department Memo., p. 8.

1. The Department shall find that the standard is not met in the event a project will: . . .

d. require the alteration of an established course of vessels; . . .

j. impair in any other substantial manner the ability of the public to pass freely upon the waterways . . .<sup>101</sup>

By its terms, 310 CMR 9.35(2)(a) imposes “an explicit regulatory obligation [upon the Department] to [only authorize] . . . those structures such that the legal and reasonably foreseeable waterborne traffic associated with them does not significantly interfere with the Public Trust Rights. Onset Bay II, 2020 WL 6115205 at \*36, citing In the Matter of David Fuhrmann, OADR Docket No. 2013-027, Recommended Final Decision (February 19, 2015), 2015 WL 9999156, \*9, adopted as Final Decision (April 8, 2015), 2015 WL 2381865.

Within this framework, the right to navigate is construed liberally but is not unlimited. In the Matter of Pontoosuc Lake Properties, LLC, OADR Docket No. 2021-019, Recommended Final Decision (July 24, 2023), 2023 WL 10950112, \*11, adopted as Final Decision (October 27, 2023), 2023 WL 10950111. Mere inconvenience or anecdotal or conclusory statements of alleged navigation interference is not sufficient for the Petitioner to meet its’ burden. Id.; see also In the Matter of Sari Lipkin, DEP Docket No. 92-043, Final Decision (December 22, 1995), 1995 WL 805814, \*3-\*4 (summary decision granted when petitioners failed to provide evidence that a pier proposed 162 feet from their sailboat mooring would significantly interfere with navigation).

Cases have long interpreted the Waterways Regulations to give several, non-exclusive factors that can be considered to determine whether a proposed project significantly interferes with the right to navigation. These factors include the difficulty of adjustments by existing users,

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<sup>101</sup> The Petitioner does not allege that the Project fails to meet the other enumerated categories of 310 CMR 9.35(2)(a)1.

, and whether alternatives are available. Pontoosuc Lake, 2023 WL 10950112, \*11. Additionally, “[i]n determining whether interference is significant, the Department may [also] consider whether and the degree to which the interference is experienced by the public in general or a single abutter, and the “difficulty [of] adjustments [to a vessel’s course] by existing users.” Id., quoting In the Matter of Lawrence and Charlotte Oliveira, OADR Docket No. 2010-017, Recommended Final Decision (January 7, 2011), pp. 14-15, adopted as Final Decision (January 7, 2011), 2011 WL 573403. See also, e.g., In the Matter of Stanley A. Sylvia, DEP Docket No. 95-110, Final Decision (February 4, 1997), 1997 WL 113771, \*6-\*7 (more difficult launching for one family is not significant interference); Oliveira, pp. 18-19 (project for one user would result in significant interference with “established course of navigation” used by many to reach a specific cove). Additional factors include who is experiencing the interference, the anticipated frequency of the interference, and the extent or type of interference. In the Matter of Keith and Valerie Stamp, OADR Docket No. 2015-024, Recommended Final Decision (August 4, 2016), \*17, adopted as Final Decision (August 8, 2016), 2016 WL 4361502; citing Legowski, 2012 WL 5988808 at \*7 (“merely having to navigate around a dock is not significant interference, particularly when the dock is an impediment to just one abutting property, and such property owner has an alternative navigation route.”).

The Petitioner raises two arguments in support of its claim: (1) the Project as proposed will require the alteration of an established course of vessels, and (2) the Project as proposed will impair the ability of the public to pass freely upon the waterway.<sup>102</sup> The Appellant and the Department both argue that the Project complies with 310 CMR 9.35(2)(a).<sup>103</sup> I take each argument in turn.

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<sup>102</sup> Petitioner Memo., p. 5.

<sup>103</sup> Petitioner Brief, p. 9; Department Brief, pp. 2-8.

**1. The Petitioner has not demonstrated that the proposed Project will significantly interfere with an ‘established course of vessels’**

The Petitioner contends that the Project will require the alteration of an established course of vessels, particularly those vessels that launch from Rocky Beach and cross the Federal Navigation Channel or leave Scituate Harbor.<sup>104</sup> The alleged course of vessels follows east from Rocky Beach along the shoreline and then north along the west side of the Jetty.<sup>105</sup> The Applicant and the Department argue that this route is not an “established course.”<sup>106</sup>

While not defined, the phrase “established course of vessels” as used in 310 CMR 9.35(2)(a)1.d. is not synonymous with “habitual use” by vessels in a particular area and is not a guarantee that mariners that will not have to alter their preferred course of navigation in that area as the result of a Chapter 91 project. In the Matter of Westlook Farm Pier Assoc., Inc., OADR Docket No. 2021-031A, 2021-031B, Recommended Final Decision (June 16, 2023), 2023 WL 10950129, \*15, adopted as Final Decision (December 22, 2023), 2023 WL 10950128. The phrase means “more than a particular boater’s favored route.” See Stamp, p. 20, citing In the Matter of Douglas Abdelnour, et al., DEP Docket Nos. 88-138, 88-358, 88-359, 88-360, 88-361, 90-270, Final Decision (November 22, 1994), p. 10 (established course of vessels not found where shell fishermen, sail boaters and windsurfers regularly used the area in question and area was considered an “informal navigational channel”).<sup>107</sup> An “established course of vessels” means

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<sup>104</sup> Fenton PFT, ¶¶ 11; H. Jenkins PFT, ¶¶ 8-9, 19-21; L. Jenkins PFT, ¶¶ 6, 13; M. Jenkins PFT, ¶¶ 8-9, 19-21; MacLeod PFT, ¶¶ 27-34; Petit PFT, ¶ 13.

<sup>105</sup> See, e.g., M. Jenkins PFT, ¶ 7 (“I have kayaked out from my house over to the area where the dock is being proposed countless times and I have used the area behind the jetty to time my paddling out of the harbor to avoid being swamped by boat wake which can be significant in the outer harbor especially with some large motor boats. I also sail in a small boat out of the harbor and have used the same tactic.”).

<sup>106</sup> Department Memo., pp. 7-8; Department Brief, p. 3; Applicant Brief, p. 9.

<sup>107</sup> Abdelnour states in part as follows:

[T]he equation of mere use with a route or channel blurs beyond recognition any meaningful regulatory distinction between areas or stretches of waterways that are true existing channels and those that are not. Basically, this interpretation transforms into a channel any area or stretch of a waterway in which people carry out any water-related activity, whether commercial or recreational navigation, swimming, diving,

that a particular course must have been established by mariners, and must be continued for a compelling and legitimate navigational reason, and not just because a number of boaters are in the habit of navigating in the area where a project is proposed. Id., citing Onset Bay II, 2020 WL 6115205 at \*39; Pontoosuc Lake, 2023 WL 10950112 at \*12.

If there is an established course of vessels, there must be a significant impact from having to navigate around a new structure. “[I]mplicit in this regulatory concept is the inability, without significant adverse consequences, to change course in order to pass around a new, [Chapter 91] licensed structure.” Westlook, 2023 WL 10950129 at \*15, citing Onset Bay II, 2020 WL 6115205 at \*39; see also Webster Ventures, 2016 WL 3632236 at \*26 (a particular course must have been established by mariners for a compelling and legitimate navigational reason and must be continued for a compelling and legitimate navigational reason, not just because boaters’ habit of navigating there); Sylvia, 1997 WL 113771 at \*6 (established course was not significantly interfered with where one boater had more difficult alternative); cf. Oliveira, pp. 18-19 (proposed project used by one would require alteration of established course of vessels in violation of regulations, where that course was used by many to access one particular cove).

The Petitioner contends that the alleged established course of vessels—east from Rocky Beach along the shoreline and then north along the west side of the Jetty—is directly impacted by the Project such that it results in significant interference with the public rights of

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shellfishing, surfing, sunbathing on the deck of a boat or wading in the ebb tide. It is difficult to imagine any area or stretch of a waterway along the coast of the Commonwealth that is not used in one or more of these ways and that therefore does not qualify as a “channel” under the petitioners’ boundless definition of that term . . . .

The dictionary definitions suggest, correctly, that a “navigable route regularly used” is a directional course or passage within or through a waterway that is customarily, usually or normally used to reach a particular place or places—in other words, one that could be marked in the waterway and plotted on its nautical chart, and which therefore could (if the appropriate authorities desired to do so) be officially designated, with specificity, as a channel for the passage of vessels.

Abdelnour, pp. 10-11.

navigation.<sup>108</sup> The Petitioner does not argue that the alleged established course of vessels is “official.” It is not marked by buoys like, for example, the Federal Navigation Channel to the immediate north, and does not appear on nautical charts. Rather, the Petitioner contends that the alleged established course of vessels was established by sailors of small craft using Rocky Beach.

The Petitioner’s witnesses explain that small craft travel close to the shore and the Jetty because this route “provides shelter and connects on the north end [of the Jetty] to a crossing point for the public and Petitioner’s witnesses in smaller, non-motorized vehicles.”<sup>109</sup> In particular, the Petitioner’s witnesses expressed concern about larger boat traffic in the Federal Navigation Channel<sup>110</sup> and its associated wakes,<sup>111</sup> wind and waves,<sup>112</sup> and safety in low-light conditions such as early morning.<sup>113</sup> Mr. Fenton expressed his concern that the Pier “will be particularly impactful for the least experienced canoe, kayak, and standup paddlers who would be at greatest risk if forced closer to the active boat channel.”<sup>114</sup> Mr. Jenkins testified that, in particular, “[t]his is the only area within Scituate Harbord that is free of boat traffic and moorings at both high and low tide. It’s the one location in the outer harbor where small boats are not constantly dodging boats entering and leaving the harbor.”<sup>115</sup>

I find that the Petitioner has not proven that there exists an establish course of vessels. First, the course of vessels is not marked by buoys or otherwise officially recognized. Second,

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<sup>108</sup> Petitioner Memo., p. 7.

<sup>109</sup> Id., citing L. Jenkins PFT, ¶ 13; M. Jenkins PFT, ¶¶ 7, 13; Fenton PFT, ¶ 11; H. Jenkins PFT, ¶¶ 19-20.

<sup>110</sup> H. Jenkins PFT, ¶ 19.

<sup>111</sup> Hearing, 13:23, 16:45.

<sup>112</sup> H. Jenkins PFT, ¶ 19.

<sup>113</sup> H. Jenkins PFT, ¶ 19.

<sup>114</sup> Fenton PFT, ¶ 11.

<sup>115</sup> L. Jenkins PFT, ¶ 13; see also Fenton PFT, ¶ 11.

the Petitioner has established only that its witnesses prefer to navigate close to the shore. No one testified that the course the Petitioner advocates is the only route to sail out of Scituate Harbor. The only testimony is that the witnesses prefer hugging the coastline to avoid the wakes and waves made by boats in the Federal Navigation Channel.<sup>116</sup> Third, the routes that the witnesses use change based on the tide. Mr. Fenton testified that there is a significant difference in depth between high and low tide in the area of the proposed Project, and that low tide is unique because watercraft are closer to the Federal Navigation Channel as they leave the shore.<sup>117</sup> During low tide (a period of approximately two hours) the watercraft prefer to remain closer to shore,<sup>118</sup> but there was no testimony that they had to sail through that same course at times other than low tide.

The Petitioner has also not shown that the alleged course was established for a compelling and legitimate navigational reason. See Onset Bay II, 2020 WL 6115205 at \*39. Mr. Fenton offers his Exhibits B and C that purport to demarcate the alleged course of vessels with a red line, but the lines of Exhibits B and C (which have different scales) do not appear to match.<sup>119</sup> While Heather Jenkins testified that small craft stay “up to five feet” from the Jetty during high tide to avoid the larger boat traffic,<sup>120</sup> others take different approaches. When traveling north along the Jetty, Mr. MacLeod stays 120 feet away from the Jetty.<sup>121</sup> This distance is nearly 90 feet east of the proposed Dock<sup>122</sup> and not the same route used by others. Given these

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<sup>116</sup> H. Jenkins PFT, ¶ 19; Hearing, 13:23, 16:45.

<sup>117</sup> Hearing, 15:06, 15:45.

<sup>118</sup> Hearing, 22:50.

<sup>119</sup> See Fenton Ex. B; Fenton Ex. C.

<sup>120</sup> H. Jenkins, ¶ 19.

<sup>121</sup> MacLeod PFT, ¶ 29.

<sup>122</sup> Draft License, p. 9.

facts and that the Petitioner’s witnesses testify to using different courses, I find that the Petitioners have not demonstrated an established course of vessels. In light of the foregoing, the Petitioner has failed to meet its burden to show that the Project would significantly interfere with an established course of vessels.

**2. The Petitioner has not demonstrated that the proposed Project will significantly interfere with the ability of the public to pass freely upon the waterway**

Ms. Petit eloquently articulates the Petitioner’s main concerns regarding the alleged impact the Project will pose to navigation and is worth quoting in full:

The proposed pier and dock will be a significant obstacle to sailing at high tide. For sailing anywhere, you need room to maneuver. If you are trying to launch off Rocky Beach, especially with an onshore breeze (from the north), you will immediately need to start tacking (a sailing maneuver that involves turning a boat’s bow through the wind to change direction) to get off the beach. The pier structure will create a wall that cuts off the watersheet between the east boundary of Rocky Beach and the [J]etty, which is an area historically used for tacking off the beach. The option at high tide will be to first tack to the west then back eastward until “hitting” the pier then tack west again until clear of the dock/float. It cuts off a good portion of the deeper water needed to maneuver since as you move west across Rocky Beach and the watersheet in front of 185 Edward Foster Road, the slope of the beach is more gradual, so the water is shallower than that near the jetty. It would be easy to get hemmed in by the proposed float (and any boat docked at it). Depending on the tide, in shallower water you have less maneuverability. When you are sailing toward the beach with an offshore/southerly breeze, you will be limited in your tacking as well. In each case, the pier will cut off a significant amount of the watersheet used for tacking. At low tide the pier structure will be less of an issue since most of it will be out of the water. However, the last few pilings and dock/float will sever access to the watersheet east of the dock but the sea bottom is mostly exposed there at low tide, so it is too shallow to navigate anyway.<sup>123</sup>

Heather Jenkins similarly testifies that she will be “unable to kayak under the proposed pier due to the low clearance even with the skill required to avoid the pilings, and limited space

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<sup>123</sup> Petit PFT, ¶ 13.

to maneuver paddles.<sup>124</sup> Mr. MacLeod also testifies that his “navigation strategy is dependent on the conditions presented by current wave and/or wind direction and the availability of water depth of at least two-and[-]one-half feet . . . .”<sup>125,126</sup>

The Applicant responds to the Petitioner’s argument in only a conclusory fashion. Mr. Mone testifies that “[b]ased upon [his] review of the plans and familiarity with the proposed location of the dock, [he] determined that the dock will not pose a hazard to navigation in Scituate Harbor.”<sup>127</sup> Mr. Mone does not explain why he came to this conclusion, though it comports with a conclusion that he expressed in an E-mail of June 22, 2023.<sup>128</sup> Mr. Armstrong testifies “that the pier as designed and constructed will not pose an unreasonable threat to navigation”<sup>129</sup> and “will not significantly interfere with the public rights of navigation in the Crow Point cove, or in Scituate Harbor.”<sup>130</sup> Mr. Mone and Mr. Armstrong offer only conclusory statements, asserted without factual support and as such their testimony on this issue carries little weight. See In the Matters of Jean T. Ricupero and Karen and Thomas Doyle, OADR Docket No. WET-2017-015 and 016, Recommended Final Decision (June 26, 2018), 2018 WL 6040713, \*4, adopted as Final Decision (July 13, 2018), 2018 WL 6040712 (expert testimony fails to support burden where conclusory statements are asserted without factual support)

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<sup>124</sup> H. Jenkins, ¶ 22.

<sup>125</sup> MacLeod PFT, ¶ 28.

<sup>126</sup> There is a dispute whether a mooring placed by Mr. MacLeod near the Project site is present legally. Applicant Memo., p. 4; Harold PFT, ¶ 5. I do not address this issue because it is not relevant to my decision and outside of my jurisdiction to decide. Even if the anchor point is there legally, I find that Mr. MacLeod’s assertion that it is “virtually [guaranteed] that my boat will sustain damage from physical contact with either the float or a vessel moored to it” is speculative. MacLeod PFT, ¶ 34.

<sup>127</sup> Mone PFT, ¶ 4.

<sup>128</sup> Grady Ex. 13.

<sup>129</sup> Armstrong PFT, ¶ 13.

<sup>130</sup> Armstrong PFT, ¶ 14.

Conversely, the Department provides a detailed explanation of why the proposed Project does not significantly interfere with navigation. On behalf of the Department, Dr. Harper testified that, “[a]lmost all new structures will require mariners to alter their prior habitual courses, if they have been traveling in that area prior to the structure being built.”<sup>131</sup> Dr. Harper acknowledged that “[t]he ability to transport, load and unload persons or objects from a watercraft also depends on maintaining sufficient distance between structures.”<sup>132</sup> However, the distances between the proposed Project and the Jetty and the Federal Navigation Channel will “provide[] for safe navigation, berthing[,] and adequate clearance for property owners to approach their property from a waterway and approach the waterway from their property.”<sup>133</sup> She concludes, and I agree, that “there will be ample open water to the north of the float for boaters to reach the breakwater and/or to pass freely upon the waters of Scituate Harbor.”<sup>134</sup>

Based upon the testimony presented, when the proposed Project is constructed, there will remain sufficient space for smaller craft to maneuver in the area of Rocky Beach and the Jetty. Dr. Harper testified that “the breakwater extends approximately two hundred (200) feet further seaward than the proposed seaward extent of the Project.”<sup>135</sup> Moreover, the “seaward extent of the Project will be approximately four hundred (400) feet south of the” Federal Navigation Channel.<sup>136</sup> Ms. Petit’s concern that “[t]he pier structure will create a wall that cuts off the watershed between the east boundary of Rocky Beach and the [J]etty,” is not supported by the

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<sup>131</sup> Harper PFT, ¶ 14.

<sup>132</sup> Harper PFT, ¶ 23.

<sup>133</sup> Id.

<sup>134</sup> Harper PFT, ¶ 22.

<sup>135</sup> Id.

<sup>136</sup> Id.

record which demonstrates that there will still be at least 200 feet in which to utilize the cover of the Jetty to maneuver north to the mouth of Scituate Harbor.<sup>137</sup>

In further response to Dr. Harper’s testimony, Mr. Fenton testifies on behalf of the Petitioner:

based on extensive personal experience, the Federal Navigation Channel would be an entirely inappropriate location for many small unpowered craft (kayaks, canoes, and paddleboards) and indeed might be quite dangerous for the operators of those small craft, and for the larger recreational and commercial motorized craft that routinely operate in that channel as they might be challenged to avoid the smaller craft.<sup>138</sup>

However, this statement mischaracterizes Dr. Harper’s testimony. Dr. Harper does not suggest that smaller craft should use the Federal Navigation Channel, but rather that there is at least 400 feet of watersheet between the furthest seaward end of the Project and the Federal Navigation Channel.<sup>139</sup> I therefore agree with the Department that there is “ample open water to the north of the Project site for the public to pass freely upon the waters of Scituate Harbor”<sup>140</sup> and sail without significant interference.

The Petitioner argues that larger vessels frequently sail too quickly in Scituate Harbor<sup>141</sup> and stray from the designated Federal Navigation Channel.<sup>142</sup> These boating actions can cause large wakes that can result in unsafe conditions for smaller vessels.<sup>143</sup> It is appropriate for the Department to review safety as it relates to the proposed Project and to assume proper and appropriate use of the waterway by mariners. See Pontoosuc Lake, 2023 WL 10950112 at \*14. I

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<sup>137</sup> Petit PFT, ¶ 13.

<sup>138</sup> Fenton RPFT, ¶ 5.

<sup>139</sup> Harper PFT, ¶ 22.

<sup>140</sup> Harper PFT, ¶ 22 (emphasis in original).

<sup>141</sup> The speed limit in Scituate Harbor in the navigation channel is 6 knots. H. Jenkins PFT, ¶ 18.

<sup>142</sup> H. Jenkins, PFT ¶ 18.

<sup>143</sup> Id.

asked Dr. Harper at the Hearing whether she considered the fact that larger vessels traveling unlawfully fast in Scituate Harbor cause wakes for which smaller vessels must compensate.<sup>144</sup> She testified that while the Department relies on the Harbormaster for enforcement of speed limits, she also testified that she considered the distance of the proposed Project from the Federal Navigation Channel and the wakes in her analysis of the Project's effect on navigation.<sup>145</sup>

The Petitioner contended only that the presence of the Jetty will make sailing more difficult, but this assertion alone is not so significant an interference to prohibit the Project. See Sylvia, 1997 WL 113771, \*6-\*7. While the presence of wakes in Scituate Harbor is a legitimate concern for sailors of smaller craft, I find that the distance of the proposed Project from the Federal Navigation Channel is far enough that the effects will be minimal and will not interfere with safe boating practices.

Lastly, the Petitioner relies heavily on Oliveira in support of its contention that it has proved a significant interference in navigation.<sup>146</sup> The Petitioner argues that in Oliveira, "the circumstances were similar to here, where the owner of a single-family residence proposed a long (223 foot) private pier in a residential area where there was no town wharf, marina, or significant mooring field nearby."<sup>147</sup> The Petitioner's reliance on Oliveira is misplaced for two reasons. First, in Oliveira, the interference with navigation was present at all times, see Oliveira at pp. 10-11, unlike here, where the Petitioner's witnesses have testified that interference with craft is most prominent at low tide<sup>148</sup> or high tide.<sup>149</sup> Second, in Oliveira, the route was subjected

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<sup>144</sup> Hearing, 3:00:00.

<sup>145</sup> Hearing 3:01:00.

<sup>146</sup> Petitioner Memo., p. 7.

<sup>147</sup> Id.

<sup>148</sup> See, e.g., Hearing 15:06, 15:45, 22:50.

<sup>149</sup> See, e.g., Petit PFT, ¶ 13.

to heavy traffic: one witness “counted more than 20 kayaks and rowboats crossing the location of the proposed pier” during the weekends in the summer. Oliveira at p. 10. Here, the witnesses testified that the portion of Scituate Harbor proximate to the Project is used by sailors with much less regularity.<sup>150</sup> As a result, the Petitioner has failed to demonstrate that the proposed Project will significantly interfere with the ability of the public to pass freely upon the waterway. The Petitioner has not demonstrated that the proposed Project fails to comply with the public rights of navigation requirements of 310 CMR 9.35(2)(a).

**B. The Petitioner has not met its burden to show that the Project fails to comply with the public rights of free passage over and through the water, which exist in all waterways, pursuant to 310 CMR 9.35(2)(b).**

The Petitioner argues that the “Project will significantly interfere with the Public Trust Rights of free passage over and through the water, including the rights to float on, swim in, or otherwise move freely within the water column.”<sup>151</sup> The Applicant and the Department contend that the Project does not significantly interfere with the public’s rights of free passage.<sup>152</sup>

The regulations at 310 CMR 9.35(2)(b) provide that “[t]he project shall not significantly interfere with public rights of free passage over and through the water, which exist in all waterways. Such rights include the right to float on, swim in, or otherwise move freely within the water column without touching the bottom, and, in Commonwealth Tidelands and Great Ponds, to walk on the bottom.” The Department may only authorize those structures such that the legal and reasonably foreseeable waterborne traffic associated with them does not significantly

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<sup>150</sup> H. Jenkins PFT, ¶ 11 (she sees between one and five paddleboarders, swimmers, and kayakers per week in the summer); Fenton PFT, ¶ 9B (he observes individuals in kayaks “once every week” during the summer); L. Jenkins PFT, ¶ 9 (Rocky Beach is used by “one or two to as many as four people” during summer weekends). H. Jenkins RPFT, ¶ 11, is vague about the magnitude of usage of the beach for sailing purposes. Ms. Petit concedes that she sailed frequently from 1968 to 1985, but in the last 20 years, she has “seen people enjoy more quiet pursuits.” Petit RPFT, ¶ 13.

<sup>151</sup> Petitioner Memo., p. 10; Petitioner Brief, p. 11.

<sup>152</sup> Applicant Memo., pp. 5-6; Applicant Brief, p. 11; Department Brief, p. 8; Department Memo., p. 8; Harper PFT, ¶ 26.

interfere with the Public Trust Rights. Pontoosuc Lake, 2023 WL 10950112 at \*11. However, merely having to share the use of a waterway does not equate to significant interference. Id., citing Legowski, 2012 WL 5988808 at \*9. Legowski goes on to say:

The regulations do not specify how to assess the level of interference to determine its significance. In light of this, it is appropriate to consider various factors, including the amount of area being interfered with, the type and frequency of such interference, the ease with which the alleged interference can be avoided, and whether the interference is experienced by a single abutter or the general public as a whole.

Legowski, 2012 WL 5988808 at \*9.

The Petitioner first argues that the Project will “cut across an established swimming lap route from the public beach to the end of the jetty.”<sup>153</sup> “[T]he Project would force the public to swim or navigate around the pier, forcing them closer to the navigational channel and the motors, wakes, and waves associated with the navigational channel as well as closer or into stronger tidal currents . . . .”<sup>154</sup> The Applicant contends that “there is not enough deep water to swim, and it is highly unlikely that someone would attempt to float there.”<sup>155</sup> The Department contends that the evidence relied on by the Petitioner, that the public swims in the vicinity of the proposed Project, is merely anecdotal and does not establish a significant interference with public rights. Pontoosuc Lake, 2023 WL 10950112, \*11. The Department notes that only Ms. Petit testified that she swims in the area of the Project.<sup>156</sup> Moreover, there is approximately 1,100 feet between the Project site and the NOAA pier, which is the next structure on the beach.<sup>157</sup> There is also 400

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<sup>153</sup> Petitioner Memo., p. 10, citing Petit PFT, ¶¶ 6, 14-15.

<sup>154</sup> Petitioner Brief, p. 11, citing Petit PFT, ¶¶ 14, 15; Fenton PFT, ¶ 12; H. Jenkins PFT, ¶¶ 18, 19, 21-23.

<sup>155</sup> Applicant Memo., p. 6.

<sup>156</sup> Department Memo., p. 9, citing Petit PFT, ¶ 14.

<sup>157</sup> Department Memo., p. 9, citing Harper PFT, ¶ 29.

feet from the seaward edge of the Project to the Federal Navigation Channel.<sup>158</sup> The record demonstrates that there is ample area in which to swim.

The Petitioner next argues that the Project “would force the public to go around the pier, forcing them closer to the [Federal Navigation Channel] and the motors, wakes, waves associated with the navigational channel as well as closer or into stronger tidal currents” and “cut down the size of the waterway available to the public.”<sup>159</sup> This concern was addressed above starting at page 29 and does not meet the Petitioner’s burden for the same reasons.

The Petitioner contends that “[s]wimming through the piles is not an option as the line of sight to the shore will be lost and swimmers will not be able to see the pilings under the water while swimming, so swimmers will be forced out around the float and into much deeper water.”<sup>160</sup> The Applicant argues in response that the distance between the pilings is 15 feet each, which is ample room for swimmers to maneuver between the piles.<sup>161</sup> Ms. Petit testified on cross-examination that she could turn around when she reached the pier and float, because people “are very mobile when they’re swimming, so [they] can turn.” Hearing, 1:31:40. I find that swimmers would be able to swim under the Pier given the distance between the pilings.<sup>162</sup> As the Department argues, “[m]embers of the public will [also] continue to be able to reach the [Jetty] by going around the [proposed] Project, or by passing beneath the [proposed] Project.”<sup>163</sup> Dr. Harper notes that there is also “ample open water to the west of the [proposed] Project site

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<sup>158</sup> Harper PFT, ¶ 22.

<sup>159</sup> Petitioner Memo., p. 10, citing Petit PFT, ¶¶ 14, 15; Fenton PFT, ¶ 12; H. Jenkins PFT, ¶¶ 18, 19, 21-23; Petitioner Brief, p. 12.

<sup>160</sup> Petitioner Brief, p. 11, citing Petit PFT, ¶¶ 6, 14, 15.

<sup>161</sup> Applicant Memorandum, p. 7.

<sup>162</sup> Ms. Petit testifies that she would be uncomfortable swimming underneath the Pier. Petit PFT, ¶¶ 14-15. This is a statement of her own preferences. It does not show that the presence of the Pier substantially interferes with all swimmers.

<sup>163</sup> Department Memo., p. 9.

for the public to pass freely upon the waters of Scituate Harbor.”<sup>164</sup> Notably, even if a swimmer travelled around the Pier, they would only swim through waters no deeper than 10 feet at mean high tide and one foot at mean low tide.<sup>165</sup> The proposed Project would pose merely an inconvenience for the public. See Pontoosuc Lake, 2023 WL 10950112, \*11. I therefore find that the Petitioner has failed to meet its burden to show that the proposed Project significantly interferes with the public rights of free passage over and through the water.

C. **The Petitioner has not met its burden to show that the Project fails to comply with the public rights associated with a common landing, public easement, or other historic legal form of public access pursuant to 310 CMR 9.35(2)(c).**

The regulations at 310 CMR 9.35(2)(c) provide that, “[t]he project shall not significantly interfere with public rights associated with a common landing, public easement, or other historic legal form of public access from the land to the water that may exist on or adjacent to the project site.” The phrase “significant interference” is not defined in the Waterways Regulations. Sylvia, 1997 WL 113771 at \*5. However, the Waterways Regulations acknowledge that the building of any structure in a waterway “may give rise to some unavoidable interference with certain water-related public rights. Such interference may be allowed provided that mitigation is provided to the greatest extent deemed reasonable by the Department, and that the overall public trust in waterways is best served.” 310 CMR 9.35(1); see also Sylvia, 1997 WL 113771 at \*5.

In order to prevail on this Issue, the Petitioner must first show that there exist “public rights associated with a common landing, public easement, or other historic legal form of public access” to the water adjacent to the Project site. 310 CMR 9.35(2)(c). The Petitioner argues that Rocky Beach, the 40-foot beach adjacent to the Project site at the end of Edward Foster Road (a

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<sup>164</sup> Harper PFT, ¶ 21 (emphasis in original).

<sup>165</sup> Draft License, p. 9.

public way), meets the definition of a “Town Landing.”<sup>166</sup> The Applicant does not contest this assertion.<sup>167</sup> The Department argues that the Petitioner offers no definition of the phrase “Town Landing” and that its assertion that the beach is a Town Landing is conclusory and unsupported.<sup>168</sup> In support of its assertion that the beach is a Town Landing, the Petitioner submits testimony that this 40-foot stretch of beach is “is used by many to launch kayaks, paddleboards, wind surfers, and small sailboats.”<sup>169</sup> Surfers use the beach to park and then carry their boards to the Jetty.<sup>170</sup> For the purposes of this RFD, I assume that the beach is a Town Landing and is subject to 310 CMR 9.35(2)(c).

The Petitioner must next show that the Project “significantly interfere[s] with public rights associated with” the public beach. 310 CMR 9.35(2)(c). The Petitioner contends that it does,<sup>171</sup> while the Applicant and the Department argue that it does not.<sup>172</sup> The Petitioner’s argument is unavailing for two reasons. First, the Petitioner incorporates by reference into its argument regarding Issue 3 the arguments that it made regarding Issues 1 and 2.<sup>173</sup> These arguments are unsuccessful for the reasons given above on pages 22-37. Second, the Petitioner has not shown that the existence of the Pier will affect the Petitioner’s members’ public rights to access Rocky Beach. As the Department notes, “the Petitioner’s witnesses allege, at most, that the Project may cause them to alter their *navigation* practices.”<sup>174</sup> There is no contention that the

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<sup>166</sup> Petitioner Memo., p. 11.

<sup>167</sup> See Applicant Memo., p. 7; Applicant Brief, pp. 13-14.

<sup>168</sup> Department Memo., p. 11; Department Brief, p. 10.

<sup>169</sup> L. Jenkins PFT, ¶ 14; see also MacLeod PFT, ¶ 12; Petit PFT, ¶¶ 4, 17-18.

<sup>170</sup> L. Jenkins PFT, ¶ 14.

<sup>171</sup> Petitioner Brief, p. 14.

<sup>172</sup> Applicant Memo., p. 7; Department Memo., pp. 11-12; Department Brief, pp. 12-13.

<sup>173</sup> Petitioner Brief, p. 14 (“As discussed above under Issues 1 and 2, the Project will significantly interfere with the public rights associated with the public access from the land to the water that exists adjacent to the project site.”)

<sup>174</sup> Department Brief, p. 12 (emphasis in original).

existence of the Pier will prevent anyone from continuing to access Rocky Beach, even if they may have to use it in a slightly different way. The Pier will be more than 25 feet away from the abutting property lines, including 56 feet from the edge of Rocky Beach,<sup>175</sup> and will pose no significant interference with individuals' use of Rocky Beach. I therefore find that the Petitioner has failed to meet its burden to show that the Project fails to comply with the public rights associated with a common landing, public easement, or other historic legal form of public access.

**D. The Petitioner has not met its burden to show that the Project fails to comply with the public rights of fishing and fowling pursuant to 310 CMR 9.35(3)(a).**

The Public Trust Doctrine protects the right of the public to engage in the free exercise of navigation, fishing, and fowling in tidal waters. See Arno v. Commonwealth, 457 Mass. 434, 449 (2010), quoting Boston Waterfront Development Corp. v. Commonwealth, 378 Mass. 629, 631-639 (1979). Accordingly, 310 CMR 9.35(3)(a) provides that a proposed “project shall not significantly interfere with public rights of fishing and fowling which exist in tidelands . . . .” These rights include: (1) “the right to seek or take any fish, shellfish, fowl, or floating marine plants, by any legal means, from a vessel or on foot”; (2) “the right to protect habitat and nutrient source areas in order to have fish, fowl, or marine plants available to be sought and taken”; and (3) “the natural derivatives thereof.” 310 CMR 9.35(3)(a). This regulation requires “[t]he Department [to] find that the standard is not met in the event the [proposed] project: 1. poses a substantial obstacle to the public’s ability to fish or fowl in waterway areas adjacent to the project site; or 2. results in the elimination of a traditional fishing or fowling location used extensively by the public.” Id.

The Petitioner does not make any arguments regarding fowling, but does offer several arguments supporting the proposition that the proposed Project will interfere with the public’s

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<sup>175</sup> Grady PFT, ¶ 25; Harper PFT, ¶ 23.

right to fish. Petitioner Memo., pp. 13-14; Petitioner Brief, pp. 14-16. In response, the Applicant and the Department argue that the proposed Project does not significantly interfere with fishing rights. Applicant Memo., p. 8; Department Memo., pp. 12-14.

As a preliminary matter, the Petitioner contends that the area of the Project on the beach has been used for fishing for many decades.<sup>176</sup> In particular, the public uses the Jetty as a fishing spot.<sup>177</sup> The Applicant contends that the footprint of the Project is not frequently used for fishing,<sup>178</sup> although it agrees that the Jetty is used for fishing.<sup>179</sup> The Department does not opine on the historic use of the beach or the Jetty for fishing. I find the Petitioner's witnesses credible and find that the area of the proposed Project on the beach, including the Jetty, has been historically used for fishing by the public as a traditional fishing area. As a result, the question presented here regarding the Applicant's proposed Project is whether the structures approved in the Draft License will either: (1) "pos[e] a substantial obstacle to the public's ability to fish or fowl in waterway areas adjacent to the project site"; or (2) "resul[t] in the elimination . . . of a traditional fishing or fowling location used extensively by the public." 310 CMR 9.35(3)(a).<sup>180</sup>

Turning to its arguments that the proposed Project will result in substantial interference with fishing, the Petitioner first argues that the Draft License prevents the public from fishing except between dawn and dusk.<sup>181</sup> The Applicant does not address this argument, but the Department argues that "the Draft License does not restrict the right of the public to pass freely

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<sup>176</sup> Petitioner Memo., p. 13; Petitioner Br., p. 15; H. Jenkins, ¶ 28; L. Jenkins PFT, ¶ 13; M. Jenkins PFT, ¶ 15.

<sup>177</sup> Fenton PFT, ¶¶ 9A, 13; MacLeod PFT, ¶¶ 45.

<sup>178</sup> Harold PFT, ¶ 7 ("Fishermen use the jetty. I have never seen a fisherman fish off of the beach, or cast a line in the water in the area of the proposed dock. They fish off of the most Northern point of the jetty where the channel is."). The Petitioner does not challenge this testimony.

<sup>179</sup> Grady PFT, ¶ 26; Harold PFT, ¶ 7.

<sup>180</sup> See also In the Matter of Webster Ventures, LLC, OADR Docket No. 2015-014, Recommended Final Decision (June 3, 2016), 2016 WL 3632236, \*42, adopted as Final Decision (June 15, 2016), 2016 WL 3632244.

<sup>181</sup> Petitioner Memo., p. 13-14; Petitioner Brief, p. 15.

beneath the Project at any time for the purposes of fishing, fowling, and navigation.”<sup>182</sup> The Draft License includes Special Condition 1, which requires that the Applicant allow for public passage for fishing, fowling, and navigation at any time, and requires the Applicant to post a sign informing the public of its Public Trust Rights.<sup>183</sup> Special Condition 2 allows the public to “pass on foot, *for any purpose* and from dawn to dusk, within the area of the subject property lying seaward of the high water mark.”<sup>184</sup> I read Special Condition 2 as being *in addition* to the public’s existing rights to traverse under the Pier to fish and fowl at any time of the day preserved under Special Condition 1. The Department is therefore correct that the proposed Project does not significantly interfere with fishing.

The Petitioner next argues that “the Project may provide five feet of access from the bottom of the structure to where the existing grade meets the mean High Water Mark, [but] this clearance is insufficient when talking about practical access with the equipment needed to fish.”<sup>185</sup> The Applicant agrees that the Pier has five-foot clearance at mean high water and but contends that this space provides clear access to the Jetty.<sup>186</sup> The Department contends that the five-foot clearance at the mean High Water Mark complies with 310 CMR 9.35(3)(b)1.<sup>187</sup>

The Petitioner is particularly concerned that fishermen would be unable to transport fishing rods (which it contends are on average “over six feet long”<sup>188</sup>) and that fishermen would

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<sup>182</sup> Department Memo., p. 12.

<sup>183</sup> Department Brief, p. 14, citing Draft License, p. 6 (see footnote **Error! Bookmark not defined.**).

<sup>184</sup> Draft License, p. 6 (emphasis supplied).

<sup>185</sup> Petitioner Memo., p. 14.

<sup>186</sup> Applicant Memo., p. 8; Grady PFT, ¶ 9.

<sup>187</sup> “[I]f the project site includes flowed private tidelands, the project shall allow continuous, on-foot, lateral passage by the public in the exercise of its rights therein, wherever feasible; any pier, wharf, groin, jetty, or other structure on such tidelands shall be designed to minimize interference with such passage, either by maintaining at least a five-foot clearance above the ground along the high water mark.” 310 CMR 9.35(3)(b)1.

<sup>188</sup> *Id.*

be too tall to walk under the five-foot clearance of the Pier.<sup>189</sup> I do not find this argument persuasive. First, the clearance under the Pier will often be greater than five feet other than at high tide.<sup>190</sup> Second, members of the public will be able to pass beneath the Project to reach the Jetty for purposes of fishing and fowling at any time.<sup>191</sup> Third, fishermen can simply duck and angle their rods horizontally in order to pass under the Pier.

The Petitioner lastly argues that the length of the Pier “will be a major deterrent to the public to exercise their right to fish.”<sup>192</sup> It contends that the fact that the structure is over 200 feet long and the presence of “private property” and “no trespassing” signs “will certainly deter a significant portion of the public from fishing from the South Jetty or the eastern side of the [Pier].”<sup>193</sup> The Petitioner offers testimony from its witnesses in support of this contention.<sup>194</sup> I also find this argument unpersuasive. First, the Petitioner’s witnesses testify to what the reaction of the general public might be, but this assertion is not supported with specific testimony and is therefore entitled to little weight. Second, the Draft License requires the Applicant to post signs informing the public of its rights to pass under the Pier.<sup>195</sup> Under these circumstances, the presence of the Pier will not result in a significant interference to fishermen.

The Petitioner has not demonstrated that the presence of the Pier will pose a substantial obstacle to the public’s ability to fish or fowl in the area of the Project or that it will eliminate a traditional fishing or fowling location used extensively by the public. I therefore find that the

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<sup>189</sup> Id.

<sup>190</sup> Harper PFT, ¶ 33.

<sup>191</sup> Harper PFT, ¶ 34; Draft License, Special Condition 1.

<sup>192</sup> Petitioner Memo., p. 15; Petitioner Brief, p. 15..

<sup>193</sup> Petitioner Memo., p. 15; Petitioner Brief, p. 15.

<sup>194</sup> See MacLeod PFT, ¶ 41; Petit PFDT, ¶¶ 20, 21; M. Jenkins PFT, ¶ 16; Fenton PFT, ¶ 15; H. Jenkins PFT, ¶¶ 38-39.

<sup>195</sup> Draft License, p. 6, Special Condition 1.

Petitioner has failed to meet its burden to show that the proposed Project will significantly interfere with public rights of fishing and fowling.<sup>196</sup>

**E. The Petitioner has not met its burden to show that the Project fails to comply with the public passage requirements of 310 CMR 9.35(3)(b).**

Under 310 CMR 9.35(3)(b), the Project may “not significantly interfere with public rights to walk or otherwise pass freely on private tidelands for purposes of fishing, fowling, navigation, and the natural derivatives thereof . . . .” As the Project is in flowed tidelands, it must “allow continuous, on-foot, lateral passage by the public in the exercise of its rights therein, wherever feasible,” and as it is a pier, it must “be designed to minimize interference with such passage [by the public], either by maintaining at least a five-foot clearance above the ground along the high water mark or by providing a stairway for the public to pass laterally over such structures.” 310 CMR 9.35(b)(3)1. In short, this regulation ensures that the public has a means of freely passing from the west side of the Pier to the east side and back for the purposes of exercising its Public Trust Rights. See, e.g., Webster Ventures, 2016 WL 3632236 at \*43.

The Petitioner argues that “the Project does not allow continuous, on-foot, lateral passage by the public to exercise these rights.”<sup>197</sup> The Petitioner explains as follows:

Members of the public who are currently able to pass freely on foot will no longer be able to pass freely under the structure, may not feel comfortable passing under the structure, or no longer know they have the right to pass under the structure due to the presence of the pier as a visible barrier and the “private property” and “no trespassing” signs that have been posted by the Applicant on its property boundary. The Project has not been designed to minimize interference with such public passage.<sup>198</sup>

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<sup>196</sup> I do not consider the Petitioner’s argument that the “Project will impair the public’s right ‘to protect habitat and nutrient source areas in order to have fish, . . . available to be sought and taken’ as the proposed float will be located right in the middle of an eddy where fish feed and are often present and sighted.” Petitioner Memo., p. 14. I struck the portion of Heather Jenkins’ PFT pertaining to the eddy (which is the location of the alleged habitat), and therefore the Petitioner has no evidence in support of this argument.

<sup>197</sup> Petitioner Memo., p. 16.

<sup>198</sup> Petitioner Brief, p. 16.

I disagree with the Petitioner. The Petitioner does not support its statement that members of the public will “no longer be able to pass freely under” the Pier.<sup>199</sup> The Department notes that the Draft License requires that the Pier “maintain[] at least five feet of clearance at the mean high water mark.”<sup>200</sup> The Applicant notes also that “the pilings are spaced fifteen feet (15’) apart, and, given the shallow water in the cove, the public can easily walk under the pier to the [J]etty.”<sup>201</sup> This is sufficient space for members of the public to pass underneath the Pier.

The Petitioner then asserts that members of the public will not feel comfortable passing under the structure or know that they have the right to pass under the structure because of “private property” and “no trespassing” signs.<sup>202</sup> I give less weight to the witnesses’ statements about what the general public would think but treat their testimony as a description of the effect the signs would have on themselves. Nevertheless, Special Condition 1 requires that the Applicant allow for public passage for fishing, fowling, and navigation at any time, and requires the Applicant to post a sign informing the public of its Public Trust Rights.<sup>203</sup> These conditions are sufficient to protect the Public Trust Rights and put the public on notice of those rights. I therefore find that the Petitioner has not met its burden to show that the Project fails to comply with the public passage requirements of 310 CMR 9.35(3)(b).

**F. The Petitioner has not met its burden to show that the Project fails to provide commensurate compensation to the public for any interference with its broad rights to use Commonwealth tidelands pursuant to 310 CMR 9.35(4).**

Under 310 CMR 9.35(4), “Any water-dependent use project which includes fill or structures for private use of Commonwealth tidelands or Great Ponds shall provide compensation

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<sup>199</sup> Id.

<sup>200</sup> Department Brief, p. 14, citing Harper PFT, ¶ 36; Grady PFT, Ex. 20.

<sup>201</sup> Applicant Memo., p. 9, citing Grady PFT, ¶ 9.

<sup>202</sup> See MacLeod PFT, ¶ 41; Petit PFDT, ¶¶ 20, 21; M. Jenkins PFT, ¶ 16; Fenton PFT, ¶ 15; H. Jenkins PFT, ¶¶ 38-39.

<sup>203</sup> Department Brief, p. 14, citing Draft License, p. 6 (see footnote **Error! Bookmark not defined.**).

to the public for interfering with its broad rights to use such lands for any lawful purpose.” The Petitioner argues that the Applicant has not “provided commensurate compensation to the public for interference with its broad rights to use Commonwealth tidelands.”<sup>204</sup> The Applicant argues that it has, as does the Department.<sup>205</sup>

The Department identifies the compensation that the public will receive, including that “the Draft License require[s] the Applicant to maintain public access beneath the Project and to display signs announcing public rights.”<sup>206</sup> The Department will also “assess a fee on the Applicant for each square yard of Commonwealth Tidelands occupied the Project.”<sup>207</sup> Similar conditions have been found to constitute commensurate compensation. See In the Matter of Rick Brooks, DEP Docket No. 2005-009, Ruling on Legal Issues (May 16, 2007), 2007 WL 1661024, \*4-\*6. The Petitioner has provided no metric by way of expert testimony for determining what commensurate compensation should be, and I defer to the Department’s expertise in determining what compensation is commensurate. I therefore find that the Petitioner failed to meet its burden to show that the Project fails to provide commensurate compensation to the public pursuant to 310 CMR 9.35(4).

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<sup>204</sup> Petitioner Memo., p. 17. The Petitioner also argues that the “Applicant has provided no evidence of compensation besides simply concluding that adequate compensation has been provided.” Petitioner Brief, p. 17. This misplaces the burden of proof; the burden is on the Petitioner to demonstrate that the compensation was not commensurate. Jimary, 2018 WL 6040709 at \*4.

<sup>205</sup> Applicant Brief, pp. 18-19; Department Brief, pp. 16-17.

<sup>206</sup> Department Brief, p. 16.

<sup>207</sup> Department Brief, p. 16, citing Draft License, p. 4.

**G. The Petitioner has not met its burden to show that the proposed Project fails to comply with the requirement of 310 CMR 9.37(1)(b) that the proposed Project not “pose an unreasonable threat to navigation, public health or safety, or adjacent buildings or structures, if damaged or destroyed in a storm.”**

Under 310 CMR 9.37(1), “structures shall be designed and constructed in a manner that: . . . (b) . . . will not pose an unreasonable threat to navigation, public health or safety, or adjacent buildings or structures, if damaged or destroyed in a storm . . . .” There is no case law that defines what it means for a structure to pose an “unreasonable threat” in this context.<sup>208</sup> Neither the Petitioner nor the Applicant offers a definition of “unreasonable threat.” The Department contends that an “unreasonable threat” is one that “is unique or greater than the threat posed by other structures or boats located elsewhere in Scituate Harbor.”<sup>209</sup> This definition is a reasonable interpretation of the Waterways Regulations and therefore I defer to it. In the Matter of Algonquin Gas Transmission, LLC, OADR Docket No. 2017-011, 2017-012, Recommended Final Decision (December 20, 2024), 2024 WL 6068035, \*14, adopted as Final Decision (June 6, 2025), 2025 WL 1859171 (“My legal determinations . . . are based on the governing legal requirements with deference to MassDEP’s reasonable interpretation of environmental statutes, regulations, and policies it is responsible for enforcing, including c. 91 and the Waterways Regulations . . .”).

The Waterways Regulations acknowledge that there is an inherent danger in locating structures in tidelands and therefore seek to “protect the public health, safety, and general

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<sup>208</sup> Three cases mention 310 CMR 9.37(1)(b) and the language regarding unreasonable threats: In the Matter of Entergy Nuclear Operations, Inc. and Entergy Nuclear Generation Co., OADR Docket No. 2015-009, Recommended Final Decision (February 5, 2016), 2016 WL 921973, \*32, adopted as Final Decision (February 25, 2016), 2016 WL 903463; In the Matter of Algonquin Gas Transmission, LLC, OADR Docket No. WET-2016-025, Recommended Final Decision (October 16, 2019), 2019 WL 5693699, \*16-17, adopted as Final Decision (October 24, 2019), 2019 WL 5693698; and In the Matter of City of Boston Public Works Dept. Long Island Bridge Reconstruction Project Locus: Quincy/Boston, OADR Docket No. 2023-054, Recommended Final Decision (November 7, 2024), 2024 WL 5398366, \*28, adopted as Final Decision (January 7, 2025), 2025 WL 439046. None of these cases discuss the meaning of the phrase “unreasonable threat.”

<sup>209</sup> Department Brief, p. 19.

welfare as it may be affected by any project in tidelands.” 310 CMR 9.01(2)(c). Wave action and heavy winds along the shore, especially when aggravated by storms, can put pressures on structures that are unique to their location along a waterway.<sup>210</sup> To succeed on its claim, therefore, a petitioner must demonstrate that the nature of the proposed structure would pose a danger that is heightened or unique from that posed by a typical structure of its kind in a similar area.

The Petitioner offers two arguments: “[1] the proposed Project will pose an unreasonable threat to navigation, public safety, and adjacent buildings and structures if damaged or destroyed in a storm, [and] [2] that storm conditions likely to damage it will occur more frequently than either the Department or Applicant seem to acknowledge or comprehend.”<sup>211</sup> The Applicant and the Department both disagree.<sup>212</sup>

The Petitioner’s first argument relies primarily on the testimony of Mr. Whitney to contend that the Pier poses an “unreasonable threat.” While Mr. Whitney did not conduct a structural review of the Project,<sup>213</sup> he testifies that the proposed Project site is in a FEMA AE Flood Zone (“AE Zone”).<sup>214</sup> An AE Zone is an “area[] that would be affected by the 1% annual chance flood event.”<sup>215</sup> During such a flooding event, the elevation of the ocean would raise to just 6 inches below the bottom of the proposed timber pier’s lowest horizontal structural members.<sup>216</sup> In Mr. Whitney’s view, there is a high likelihood of a storm equivalent to that of the

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<sup>210</sup> See Harper PFT, ¶ 41.

<sup>211</sup> Petitioner Memo., p. 18; Petitioner Brief, p. 18.

<sup>212</sup> Applicant Memo., pp. 10-13; Applicant Brief, pp. 19-20.

<sup>213</sup> Hearing, 2:21.

<sup>214</sup> Whitney PFT, ¶ 16.

<sup>215</sup> *Id.* at ¶ 17.

<sup>216</sup> *Id.* at ¶ 20.

January 2015 Winter Storm Juno (“Juno”) during the term of the Draft License.<sup>217</sup> During Juno, 2-foot-high waves impacted the proposed Project site.<sup>218</sup> Mr. Whitney believes that similar conditions “could damage the timber pier by uplift and sideways and up and down forces impacting the timber structure and potentially separating timber components from the pier.”<sup>219</sup> They could also cause the float to “float free of the piles and be carried away by the waves.”<sup>220</sup>

The Petitioner has shown that the Pier (including the timbers and the float) would be subjected to breaking wave conditions that could damage the Pier during a flooding event.<sup>221</sup> But the Petitioner has not shown that the threat posed if the Pier is damaged is specifically *unreasonable* or “is unique or greater than the threat posed by other structures or boats located elsewhere in Scituate Harbor.” For example, the Petitioner states that “the substantial size of the float, at 10’ x 20’ feet, that in and of itself would pose an unreasonable threat to navigation, public health or safety, or adjacent buildings and structures.”<sup>222</sup> It does not explain how, if the float was to break free and float further into Scituate Harbor, it would pose a danger that is different from a similar structure. The Petitioner has not shown that it could impede navigation, as there is 1,100 feet of beach to the west where the float would most likely be pushed. There is also no evidence that the float is constructed in a way that would cause damage to buildings beyond that which would be expected if it was struck by a similar structure. The Petitioners have therefore not shown that the float poses an unreasonable threat to navigation, public health or safety, or adjacent buildings or structures, if damaged in a storm. Similarly, the Petitioner does

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<sup>217</sup> *Id.* at ¶ 29.

<sup>218</sup> *Id.* at ¶ 32.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at ¶¶ 27, 32.

<sup>221</sup> *See id.* at ¶¶ 27, 29, 32.

<sup>222</sup> Petitioner Memo., p. 19.

not demonstrate that if the timber of the permanent Pier was to break free, that it would present a threat to public health or safety other than what would be expected from a typical pier.

In response to the Petitioner’s argument that the Pier would be subjected to breaking waves during a storm, the Department argues in part that the Scituate Conservation Commission issued an Order of Conditions (“OOC”) under the Massachusetts Wetlands Protection Act and the Wetlands Regulations at 310 CMR 10.00, *et seq.*, requiring that the floats, ramps, and gangways be removed from October 30 to April 15.<sup>223</sup> The Department observes that the storms that Mr. Whitney listed in his testimony all occurred between these dates, suggesting that there is minimal danger of the float or ramp breaking free during this storm season.<sup>224</sup> The Petitioner responds that the OOC cannot be relied upon because its conditions can be amended or removed,<sup>225</sup> and “[i]f such a condition was indeed relevant to the decision issuing a [D]raft License for this Project, it should have been included as a condition in the [D]raft License but was not.”<sup>226</sup> The Petitioner’s concern is addressed by adding as a Special Condition to the Draft License that the floats, ramps, and gangways be removed from October 30 to April 15 to minimize danger to the surrounding area if the Pier or the float is damaged during a storm.

I am further persuaded by the other arguments of the Applicant and the Department. The Applicant argues that the Pier is “over-engineered” with the intent of maximizing the structure’s stability by using larger cap beams and stringers and spacing the deck boards to reduce the absorption of wave energy.<sup>227</sup> The Petitioner has not refuted this testimony. The Department

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<sup>223</sup> Department Brief, p. 18; Harper PFT, Ex. 9, p. 15, Special Condition 22. Special Condition 22 specifies that it will “survive the issuance of a Certificate of Compliance.”

<sup>224</sup> Department Brief, p. 18.

<sup>225</sup> Petitioner Brief, p. 21.

<sup>226</sup> Id.

<sup>227</sup> Armstrong PFT, ¶ 10 (“For the proposed dock in this case, piles would be driven to a minimum depth of fifteen feet (15'), two (2) 4" by 10" cap beams would be used instead of the industry standard of 4" by 8", and 4" by 12"

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argues that the Pier will also be protected by the Jetty immediately to its east.<sup>228</sup> Mr. Whitney agreed.<sup>229</sup> In sum, the Petitioner has not shown that the Project poses an unreasonable threat of damage to nearby structures.<sup>230</sup>

I now turn to the Petitioner's second argument, that the storm conditions will occur more frequently than the Department or the Applicant anticipate. Mr. Whitney testifies that storms, including Nor'easters, cause elevated waters and wave conditions during multiple tidal cycles.<sup>231</sup> In his view, there is a 9.2% annual chance of a storm equivalent to Juno that caused significant wave action and flooding in the area.<sup>232</sup> This estimate equates to a 94.4% chance that such a storm will occur during the 30-year term of the Draft License.<sup>233</sup> The Department and the Applicant do not dispute these points.

Even assuming that storms with elevated waters and wave conditions are more frequent than the Department or the Applicant acknowledge, this fact does not help the Petitioner meet its burden. More frequent storms do not necessarily cause a structure to become unreasonably threatening. If anything, more frequent and more severe storms would cause *all* of the structures in Scituate Harbor to become more threatening, suggesting that the threshold for an "unreasonable" threat would be commensurately increased. Where the Petitioner has not shown that the Pier is uniquely or a greater than the threat than other structures, the fact that it will be

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stringers instead of the 4" by 10" standard, 1 inch spacing between the deck boards to allow for water flow, and cross braces placed as low as possible on the piles for maximum stability.”).

<sup>228</sup> Department Memo., p. 18.

<sup>229</sup> Hearing, 2:26-2:27.

<sup>230</sup> While I agree with the Department that “[t]he mere fact that a project exists in a flood zone does not mean it cannot be licensed and constructed in compliance with [Chapter 91] and the Waterways Regulations,” Department Memo., p. 17, the Petitioner’s argument is not that the mere fact that the Project is in Zone AE is justification for prohibiting it.

<sup>231</sup> Whitney PFT, ¶ 28.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at ¶ 29.

subjected to more storms makes it proportionally no more dangerous than the other water-dependent structures in the area. I therefore find that the Petitioner has failed to meet its burden to demonstrate that the proposed Project poses an unreasonable threat to navigation, public health or safety, or adjacent buildings or structures, if damaged or destroyed in a storm.

**VI. Conclusion.**

For the foregoing reasons, I find that the Petitioner has failed to meet its burden of proof that the Department failed to properly issue the Draft License. With respect to Issue 7, consistent with the Department's reliance on the condition in the OOC to support its position that the proposed Project will not result in an unreasonable threat, I recommend that the Commissioner uphold the Draft License with the addition of a Special Condition that the floats, ramps, and gangways be removed from October 30 to April 15 annually.

**Date:** February 10, 2026



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Patrick M. Groulx  
Presiding Officer

## **NOTICE OF RECOMMENDED FINAL DECISION**

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d) and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party may file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party may communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

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