COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

October 16, 2019

In the Matter of
Algonquin Gas Transmission LLC

OADR Docket Nos. 2017-011, 012
Waterways Application No. W16-4600

Weymouth, MA

RECOMMENDED FINAL DECISION ON ISSUES 2 THROUGH 6

I. INTRODUCTION

In these consolidated appeals, a Ten Residents Group ("TRG") and the Town of Weymouth ("Weymouth") (collectively "the Petitioners") challenge a Written Determination ("the Determination ") issued by the Boston Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") to Algonquin Gas Transmission, LLC ("the Applicant"), pursuant to the Massachusetts Public Waterfront Act, G.L. c. 91 ("Chapter 91" or "c. 91"), and the Waterways Regulations, 310 CMR 9.00. The Determination authorized the Applicant's proposed construction of a natural gas compressor station ("the proposed Project" or "the compressor station") in the Weymouth Fore River Designated Port Area on filled tidelands of the Fore River at 6 & 50 Bridge Street in Weymouth ("the Project Site"). Determination at 1. This Recommended Final Decision ("RFD") on Issues 2 through 6 should be read together with the Recommended Interlocutory Decision ("RID") which I issued on November 21, 2018. The RID is incorporated in its entirety into this RFD. Together, these

two recommended decisions constitute my Recommended Final Decision in these matters. The RID is attached as an appendix to this decision.

After holding an adjudicatory hearing and reviewing the administrative record in this proceeding, I recommend that the Department's Commissioner issue a Final Decision incorporating the Recommended Interlocutory Decision[1] and finding that (a) the proposed Project does not violate 310 CMR 9.35; (b) the proposed Project is not required to serve a proper public purpose; (c) the proposed Project's internal infrastructure components are accessory uses; (d) the license term should be reduced to coincide with the license term for the HubLine;[2] and (e) the TRG has failed to state a claim for relief with regard to air pollution and noise. In sum, the Petitioners have failed to offer persuasive evidence demonstrating that the proposed Project does not conform to the requirements of the applicable waterways regulations.

II. PROCEDURAL HISTORY

After issuing the RID, I set a date for the hearing on the remaining issues and set a schedule for the parties to file their witnesses' pre-filed testimony. See Order Setting Schedule for Filing Pre-Filed Testimony and Memoranda of Law on Issues 2-6, November 28, 2018. I conducted the evidentiary adjudicatory hearing ("Hearing") on February 6 and 7, 2019.

[1] Subsequent to the date I used the RID, Algonquin obtained a ruling from the Federal District Court that local zoning requirements are preempted by the Natural Gas Act. See Memorandum and Order, Algonquin Gas Transmission, LLC v. Town of Weymouth, Civil Action No. 18-10871-DJC (D.Mass.) (February 11, 2019).

[2] The HubLine is Algonquin's I-10 pipeline. It runs under the Fore River Basin, outer Boston Harbor and Massachusetts Bay between Weymouth and Beverly, where it connects to a pipeline operated by Maritimes and Northeast. The HubLine is the subject of Waterways License No. 9541.

III. WITNESSES[3]

The following witnesses submitted pre-filed written testimony and were available for cross-examination at the adjudicatory hearing.

For the TRG:

1. Frank Singleton. Mr. Singleton is a resident of Weymouth and currently serves on the city's Conservation Commission. He holds an undergraduate degree in biology and a Master's Degree in environmental health. He has fifty years of environmental code enforcement experience, including as Director of Environmental Health for the Greenwich, Connecticut Health Department; Director of Health for the Chelsea, Massachusetts Department of Health; and Director of Health for the Lowell Health Department. He is a member of the ISO-New England Consumer Liaison group.[4] Singleton PFT at ¶ 1.

2. Rebecca Haugh. Ms. Haugh is a member of Weymouth's Town Council and has served in this role for almost five years. She was previously the President of the North Weymouth Civic Association and has been engaged in projects and development in North Weymouth for over ten years. She holds a Bachelor's degree in economics. Haugh PFT at ¶ 1.

For the Town of Weymouth:

1. Mary Ellen Schloss. Ms. Schloss is the Conservation Administrator for the Town of Weymouth, a position she has held since 2004. In this role, she implements the Massachusetts

[3] Throughout this RFD, the witnesses' Pre-Filed Direct Testimony will be referred to as "[Witness] PFT at ¶; Pre-Filed Rebuttal Testimony will be referred to as "[Witness] PFR at ¶ ". The Hearing Transcript will be referred to as "Tr. 1 at [page: line(s)].

[4] ISO New England is an independent not-for-profit company authorized by the Federal Energy Regulatory Commission ("FERC") to perform grid operation, market administration and power system planning for the region covering Connecticut, Massachusetts, Rhode Island, Vermont, New Hampshire and part of Maine. The Consumer Liaison Group ("CLG") is a "[f]orum for the exchange of information between ISO New England and electricity consumers in New England." https://www.iso-ne.com/committees/industry-collaborations/consumer-liaison. The CLG meets four times a year and its meetings are open to the public.

Wetlands Protection Act and the Weymouth Wetlands Protection Ordinance; engages in open space planning, special Town projects, and coordination with other Town departments on projects or issues involving wetlands or water resources or open space. She has assisted in drafting Conservation Restrictions. Prior to her employment with Weymouth, she was an Environmental Planner for the Metropolitan Area Planning Council from 1990 to 1998. She holds a Master of Science degree in Urban and Environmental Policy and Environmental Engineering. Schloss PFT at ¶¶ 1-6

2. Eric Schneider. Mr. Schneider is the Principal Planner for the Town of Weymouth. He has held this position for four years. Previously he was a Land Planner in the private sector. His work focuses on zoning, subdivision control, economic development and long-range master planning. His responsibilities include reading and interpreting data in various forms, including maps and charts. He holds a Bachelor of Arts degree in Political Science and a Master of City and Regional Planning. Schneider PFT at ¶¶ 1-5.

3. John Hinckley, Q.E.P. Mr. Hinckley is employed by GeoInsight, Inc. as an Associate/Air Compliance Specialist. He has 20 years of permitting, modeling, management and public speaking experience. He has extensive experience with gas projects, including those involving natural gas, landfill gas, and biogas from anaerobic digestion. He holds a Bachelor of Science degree in Natural Resources and a Master of Science degree in Environmental Science & Engineering. Hinckley PFT at ¶¶ 1, 4-6.

For Algonquin:

1. Joseph Bruno. Mr. Bruno is the Area Manager for Field Operations for Enbridge. He has been employed by Enbridge and its predecessors for ten years. He is responsible for

managing a field staff responsible for Enbridge operations in the Westwood operating area, which includes Massachusetts and Rhode Island. His responsibilities at the compressor station would include staffing, operations, and management. He holds a Bachelor of Science degree in electrical engineering. Bruno PFT at ¶¶ 1-4.

2. Mark A. Costa. Mr. Costa is a water resources and civil engineer with Vanasse Hangen Brustlin, Inc. ("VHB"). He holds a Bachelor of Science in Civil/Environmental Engineering and is a registered professional civil engineer in Massachusetts with 11 years of professional experience. He focuses on hydrology, hydraulics, stormwater management, and climate change for a wide range of land development, energy, and transportation improvements projects. For the proposed Project he is responsible for the grading, stormwater management and erosion control design, and analysis of Federal Emergency Management Agency Special Flood Hazard Areas,[5] sea level rise, climate change and coastal hydraulics. Costa PFT at ¶¶ 1-3.

3. Franklin S. Gessner. Mr. Gessner was the Principal Projects Manager, Rights-of-Way and Land Department, for the Atlantic Bridge project. It was his responsibility to manage acquisition of real property rights needed by Algonquin. He was employed by Algonquin or its parent companies from 1970 until he retired in 2017. He holds a Bachelor of Business Administration. Gessner PFT at ¶¶ 2-4.

4. Richard C. Paquette, Jr. Mr. Paquette holds a Bachelor of Science in Wildlife Biology and a Master of Science in Environmental Studies. He has been employed at TRC Environmental

[5] Special Flood Hazard Areas are "The land area covered by the floodwaters of the base flood is the Special Flood Hazard Area (SFHA) on NFIP maps. The SFHA is the area where the National Flood Insurance Program's (NFIP's) floodplain management regulations must be enforced and the area where the mandatory purchase of flood insurance applies. The SFHA includes Zones A, AO, AH, A1-30, AE, A99, AR, AR/A1-30, AR/AE, AR/AO, AR/AH, AR/A, VO, V1-30, VE, and V." https://www.fema.gov/special-flood-hazard-area

Corporation since 2002; he is currently a Senior Project Manager. Mr. Paquette oversees environmental permitting for energy projects throughout the Northeastern United States. For the Atlantic Bridge Project, his work has included planning and executing biological resource surveys, analyzing environmental constraints, agency consultation, permit application preparation, and mitigation development. Paquette PFT at ¶¶ 1-3.

5. Kenneth Shutter. Mr. Shutter is a Professional Engineer who has been employed by Enbridge and its predecessors for 38 years. He currently is a Senior Specialist, Technical Services, with responsibilities including serving as a compression subject matter expert and maintaining company specifications and processes as they relate to interstate pipeline facilities. He previously was the Manager of the Compression Design group responsible for the design of the proposed compressor station. Shutter PFT at ¶¶ 1-2.

For MassDEP:

1. Frank Taormina. Mr. Taormina works as a Regional Planner for the Department; he has held this position since 2014. Previously he worked in the Department of Planning and Community Development for Salem, Massachusetts for eleven years, three years as a City Planner and Conservation Agent, and eight years as a City Planner and Harbor Coordinator. Mr. Taormina holds a Bachelor's degree in geography with a concentration in Economic and Environmental Planning, and a Master's degree in Regional Planning. His duties for the Department include reviewing c. 91 license and permit applications, primarily for complex projects, and drafting Written Determinations and License/Permit conditions. Mr. Taormina additionally offers guidance to applicants on permitting requirements, participates in policy development, conducts field inspections and participates with the Massachusetts Office of

Coastal Zone Management in the review processes for Municipal Harbor Planning and Designated Port Area ("DPA") boundaries. In his time with the Department, he has drafted fifty-seven c. 91 licenses, including seventeen for projects located in a DPA. Taormina PFT at ¶¶ 1-5.

2. Ben Lynch. Mr. Lynch was the Section Chief of the Waterways Regulation Program for the Department from 2002 until he retired in July 2019. He had been employed in the Waterways Regulation Program since 1995. He holds a Bachelor's degree and a Master's degree in Landscape Architecture. He was responsible for reviewing, approving, and ratifying each c. 91 License. During his tenure with the Department, he reviewed and approved over 5,000 c. 91 licenses, approximately 4,800 of those for water-dependent projects, including projects in the Fore River Designated Port Area. Lynch PFT at ¶¶ 1-3.

IV. BACKGROUND

A. The Project Site

The Project Site is 12.3 acres in size, of which approximately 9.8 acres consist of previously authorized filled tidelands, 0.4 acres consist of flowed tidelands, and 2.1 acres of uplands outside of c. 91 jurisdiction. Determination at 1. Existing facilities near the Project Site include a Massachusetts Water Resources Authority ("MWRA") sewage pumping station immediately adjacent to the north; the Braintree Weymouth Sewage Interceptor leading across the Fore River to the Deer Island wastewater treatment plant; an electric generating facility (Fore River Energy Center) to the south; the Applicant's existing Metering & Regulating ("M&R") station to the west; and the HubLine, also to the west. Id. The project site is located in the

Weymouth Fore River Designated Port Area ("DPA").[6] Chapter 91 Waterways License Application – (Transmittal No. X267645), December 8, 2015 at § 1.1.1 ("Application").

The Site is located on a peninsula of land in North Weymouth that extends into the Fore River. Bridge Street runs west to east and bisects the peninsula. Schloss PFT at ¶ 8. The project site is located north of Bridge Street and directly adjacent to the King's Cove recreational parcel ("King's Cove Park"), which runs along the east side of the peninsula. The King's Cove Park includes a pathway, vegetation, trees, a lookout, and informal gathering spots along a portion of the peninsula overlooking King's Cove and the Fore River. The project site and the King's Cove Park are both located on what is generally referred to as the "North Parcel" due to the parcel's location north of Bridge Street. Id. at ¶ 9. The land located to the south of Bridge Street (Assessors' Parcel ID 6-64-1), which includes the Lovell's Grove recreation parcel and an electric generating facility owned by Calpine Fore River Energy Center LLC, is generally referred to as the "South Parcel." The Lovell's Grove recreational parcel includes a lawn, trees, vegetation, a walking path and water access for fishing and emergency access. Id. at ¶ 10.

As part of the permitting process for the electric generating station on the South Parcel, the developer, Sithe Edgar Development, LLC ("Sithe") which owned both the North and South Parcels at the time, entered into a Host Community Agreement ("HCA") with Weymouth, pursuant to which Sithe created the King's Cove Park and Lovell's Grove Park and agreed to convey a perpetual Conservation Restriction ("CR") to the Town. Id at ¶¶ 12-14. Sithe also

[6] The Commonwealth of Massachusetts established ten DPAs to promote and protect water-dependent industrial uses. "State policy seeks to preserve and enhance the capacity of the DPAs to accommodate water-dependent industrial uses and prevent significant impairment by non-industrial or nonwater-dependent types of development, which have a far greater range of siting options." https://www.mass.gov/service-details/czm-port-and-harbor-planning-program-designated-port-areas

agreed to pay the Town $25,000 a year to defray the costs of maintaining and improving the parks. The CR was granted to the Town in 2007 by Sithe's successor in title, Fore River Development, LLC. Id. at ¶ 19. In addition to the two parks, the CR grants to the Town and members of the public a perpetual easement to utilize an access roadway, parking area, and pedestrian walkway. Id. at ¶ 23.

Although Algonquin had planned to acquire the land subject to the CR and comply with the provisions of the CR, see Application at p. 2-1, Algonquin notified MassDEP in June, 2016 that it had modified its land acquisition plan to exclude the 2.9 acre King's Cove parcel, but was "committed to meet[ing] all applicable provisions of the [CR]. Schloss PFT at Ex. F (Correspondence from Michael Tyrell to Frank Taormina, June 6, 2016). Those provisions pertain to the access roadway, parking area, and pedestrian walkway, which are not subject to the CR. Schloss PFT at ¶ 26.

On November 28, 2016, Algonquin acquired approximately 15.91 acres of property on the peninsula from Calpine Fore River Energy Center, LLC, successor in title to Fore River Development, LLC. Paquette PFT at ¶ 6; Gessner PFT at ¶ 8. Approximately 12.3 acres are filled tidelands and 3.6 acres are flowed tidelands extending into the Fore River on the west side of the peninsula. Paquette PFT at ¶ 7. As part of that transaction, Calpine reserved to itself a non-exclusive 75-foot wide, approximately 1.2 acre "West Waterfront Easement" along the Fore River shoreline of the peninsula, together with a 20-foot wide access route from the internal loop road to the West Waterfront Easement. Paquette PFT ¶ 22; Gessner PFT ¶ 18; Schloss Ex. H. Calpine has the right under its easement agreement with Algonquin to assign the easement to

Weymouth for future public access to, and potential recreational use of, the waterfront. Gessner PFT at ¶ 18 (quoting ¶ 2 of the Re-Executed Reserved Easements Agreement, Schloss Ex. H).

Algonquin will use approximately 7.9 acres of its property to construct the compressor station. Paquette PFT at ¶ 8. The project area includes 5.2 acres of filled private tidelands within Chapter 91 jurisdiction and 2.7 acres of upland outside of Chapter 91 jurisdiction. Paquette PFT at ¶ 9, Paquette Ex. 2 (depicting compressor station project area and features, as well as King's Cove Park, the West Waterfront Easement, and the location of the Historic Low Water mark).The project site does not include filled Commonwealth Tidelands. [7]

B. <u>The Compressor Station Project</u>

In addition to the two new buildings containing the natural gas-fired compressor unit and offices for personnel, electrical motor control centers, a control room, security system, garage bays, parts storage, compressed air system and an emergency generator, the proposed Project includes parking spaces, an internal roadway, underground utilities, and a 6,200 square foot stormwater basin. <u>Application</u> at p. 1-2, § 1.1.1; RID at p. 15. It is undisputed that no activities, structures or operations of the project will be located in waterways or flowed tidelands of the Fore River or King's Cove. Paquette PFT at ¶ 12; Lynch PFT at ¶ 5. Additionally, there are no recreational boating facilities, town landings, traditional fishing areas, or known swimming locations at the peninsula bounded by the Fore River and King's Cove north of Bridge Street. Paquette PFT at ¶ 20. No project construction is proposed in areas shown on MassGIS maps as

[7] The TRG made a serious attempt at the Hearing and in its closing brief to have me reconsider and reject the jurisdictional determination made by MassDEP's expert witness, Mr. Taormina. However, the TRG failed to present any expert testimony that would rebut the presumptive Historic Low Water Mark, and in the absence of such expert testimony there is no evidentiary basis for reversing MassDEP's determination. <u>See</u> <u>Matter of Paul J. Armstrong</u>, OADR Docket No. 2009-032, 19 DEPR 48, Recommended Final Decision (February 17, 2012), adopted by Final Decision (March 12, 2012)(party presented "unusually compelling, site specific evidence, backed by expert testimony").

suitable for shell fishing, and as Mr. Singleton testified at the hearing, all shell fishing is prohibited in the area by state marine fisheries agencies due to biological contamination and has been prohibited for decades. Tr. at 16:15-17:22.

No building associated with the compressor station will be located in a coastal high hazard area, i.e. FEMA Zone V or Zone VE.[8] Costa PFT at ¶ 7. To mitigate potential storm surge and inundation impacts over the next 50 years, grade elevation at the Project site will be raised over 5 feet from the elevation of existing grade of 12-14 feet based upon the North American Vertical Datum of 1988 (NAVD 88). Costa PFT at ¶ 10. The area beneath the proposed compressor station buildings, and the courtyard area between the two buildings, will be raised to an approximate elevation of 19 feet (NAVD 88). Id. at ¶ 11. The finished floor elevations of the buildings will be at 19.5 feet (NAVD 88), and grade around the buildings will slope away gradually. Id. at ¶ 12. Algonquin accounted for sea level rise in its planning. Id. at ¶ 13-14.

V. ISSUES FOR ADJUDICATION

As discussed above, the issues addressed in this RFD are Issues for Resolution 2 through 6, set forth below. They were determined at the pre-hearing conference based on the parties' pleadings, including the Appeal Notices and the Pre-Hearing Conference Statements, and discussions at the conference.

[8] Flood zone VE means "[a]reas subject to inundation by the 1-percent annual-chance flood event with additional hazards due to storm-induced velocity wave action." https://www.fema.gov/zone-ve-and-v1-30. The V-Zone is also known as a Coastal High Hazard Area, considered an "area of special flood hazard extending from offshore to the inland limit of a primary frontal dune along an open coast and any other area subject to high velocity wave action from storms or seismic sources. The coastal high hazard area is identified as Zone V on Flood Insurance Rate Maps (FIRMs). Special floodplain management requirements apply in V Zones including the requirement that all buildings be elevated on piles or columns." https://www.fema.gov/coastal-high-hazard-area

2. Does the Project comply with the standards to preserve water-related public rights, pursuant to 310 CMR 9.35?

3. Does the Project serve a proper public purpose in accordance with 310 CMR 9.31(2)(a)?

   a. If the Project is presumed to serve a proper public purpose, is the presumption rebutted in accordance with 310 CMR 9.31(3) and 310 CMR 9.32 through 310 CMR 9.37?

4. Does 310 CMR 9.32 prohibit siting the project's "accessory uses" (internal roadway, parking spaces, underground utilities, stormwater basin and fill) in a Designated Port Area absent a finding that such uses are accessory to a water-dependent industrial use?

5. Is a license term of 30 years permissible for the project?

6. Do the Petitioners' claims relating to air pollution and noise state claims for which relief can be granted in this proceeding?

VI. STATUTORY & REGULATORY FRAMEWORK

The regulatory context of this case was recently described in Matter of The Landing Group, Inc., Docket No. 2014-025, 2015 MA ENV LEXIS 85 (October 27, 2015), adopted by Final Decision, 2015 MA ENV LEXIS 84 (October 29, 2015):

"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." Boston Waterfront Development Corporation v. Commonwealth, 378 Mass. 629, 631 (1979). Since the Magna Carta, the land below the high water mark has been impressed with public rights designed to protect the free exercise of navigation, fishing, and fowling in tidal waters. Id. at 632; Arno v. Commonwealth, 457 Mass. 434, 449 (2010). Thus, "[a]t common law, private ownership in coastal land extended only as far as mean high water line. Beyond that, ownership was in 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." Opinion of the Justices, 365 Mass. 681, 684 (1974).

"In the 1640's, faced with an underdeveloped coastline and a need for wharves to promote commerce in the colonies, 'the colonial authorities took the extraordinary step of extending private titles to encompass land as far as mean low water line,' i.e., to include tidal flats." Arno, 457 Mass. at 449 (quoting Opinion of the Justices, 365 Mass. at 685). However, "this ownership always had strings attached," Boston Waterfront, supra at 637, because the Colonial Ordinance of 1641-1647, which authorized the transfer of title to private individuals, "expressly specifie[d] that the public [was] to retain the rights of fishing, fowling and navigation" in the area between the high and low water marks, otherwise known as tidal flats." Arno, (quoting Opinion of the Justices, supra at 685).

This body of law that retains public access rights is generally known as the public trust doctrine. Matter of Boston Boat Basin, Docket No. 2012-008 and 009, Recommended Final Decision (October 18, 2013), Adopted by Final Decision (November 14, 2014). Under the public trust doctrine the Commonwealth holds tidelands in trust for public use. See Boston Waterfront, 378 Mass. at 629; Arno, 457 Mass. at 449. Tidelands generally include flowed tidelands below the high water mark and filled tidelands below the historic high water mark. See 310 CMR 9.02. The traditional uses of tidelands, called water-dependent uses, include fishing, fowling, and navigation. Moot v. Department of Environmental Protection, 448 Mass. 340, 342 (2007); Fafard v. Conservation Comm'n of Barnstable, 432 Mass. 194, 198 (2000). The legislature delegated authority to the Department under Chapter 91 to "preserve and protect" the public's rights in tidelands by allowing only water-dependent uses or another proper public

purpose. G.L. c. 91, § 2; See Fafard, 432 Mass. at 200. The Department is not authorized, however, to relinquish public rights; only the legislature may do that, and only under prescribed circumstances in furtherance of its fiduciary role. Moot, 448 Mass. at 352; Opinion of the Justices, 383 Mass. at 905. The regulations that govern this case are the Waterways Regulations, 310 CMR 9.00.

VII. BURDEN OF PROOF AND STANDARD OF REVIEW

At the evidentiary adjudicatory hearing ("Hearing"), the Petitioners had the burden of proving by a preponderance of credible evidence that the Determination does not meet the requirements of the Waterways Regulations for each of the issues addressed in this RFD. In the Matter of Renata Legowski, OADR Docket No. 2011-039, Recommended Final Decision (October 25, 2012), 2012 MA ENV LEXIS 128, at 7-8 (party challenging Chapter 91 determination has burden of proof), adopted as Final Decision (November 5, 2012), 2012 MA ENV LEXIS 131. The ultimate resolution of factual disputes depends on where the preponderance of the evidence lies. Matter of Town of Hamilton, DEP Docket Nos. 2003-065 and 068, Recommended Final Decision (January 19, 2006), adopted by Final Decision (March 27, 2006).

As for the relevancy, admissibility, and weight of evidence that the Petitioners, the Applicant, and the Department introduced in the Hearing, this is governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):

> [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 in the record will rest within the sound discretion of the Presiding Officer. . . ."

My review of the project is *de novo*. In the Matter of Woods Hole, Martha's Vineyard & Nantucket Steamship Authority, OADR Docket No. 2016-025, Recommended Final Decision (March 27, 2017), adopted by Final Decision (April 13, 2017). See In the Matter of Francis P. and Debra A. Zarette Trustees of Farm View Realty Trust, 25 DEPR 24, Recommended Final Decision, February 20, 2018, adopted by Final Decision, March 1, 2018, quoting In the Matter of John Soursourian, OADR Docket No. WET-2013-028, Recommended Final Decision (2014), 2014 MA ENV LEXIS 49 at 36, adopted as Final Decision, 21 DEPR 63, 2014 MA ENV LEXIS 47 (2014) ("'[t]he Presiding Officer [responsible for adjudicating the administrative appeal] is not bound by MassDEP's prior orders or statements [in the case], and instead is responsible…for independently adjudicating [the] appeal and [issuing a Recommended Final Decision] to MassDEP's Commissioner that is consistent with and in the best interest of the [applicable law and regulations], and MassDEP's policies and practices").

VIII. DISCUSSION AND FINDINGS

A. THE PROPOSED PROJECT COMPLIES WITH 310 CMR 9.35 AND PRESERVES PUBLIC RIGHTS IN THE TIDELANDS

1. Claims of Significant Interference

Ordinarily in a waterways appeal, the parties challenging a c. 91 finding by MassDEP assert that a project will significantly interfere with the public's rights in the waterways and tidelands by physically obstructing access. Here, the Petitioners allege that the compressor station's noise, odors and potential safety hazards will significantly interfere with those rights by

deterring the public from using the tidelands and waterways. The foundation of both the TRG's and Weymouth's claim is that the mere presence of the compressor station will eliminate public rights of access. Among the hazards alleged are those from flooding, storm surge, and ignition of a gas leak from the compressor station. Additionally, Weymouth claims that the proposed Project does not provide for any on-foot passage. The Petitioners allege, therefore, that the proposed Project fails to comply with 310 CMR 9.35 because it does not protect the public's rights in the tidelands. Algonquin and MassDEP dispute these claims, arguing that the proposed Project complies with the regulation. Algonquin asserts that the project maintains existing access and is not required to provide any new access because the proposed Project is a water-dependent facility on private tidelands.

The performance standards for preserving water-related public rights are contained in 310 CMR 9.35, and provide that "the project shall preserve any rights held by the Commonwealth in trust for the public to use tidelands, Great Ponds and other waterways for lawful purposes; and shall preserve any public rights of access that are associated with such use." 310 CMR 9.35(1). MassDEP is directed to assess whether a proposed project will significantly interfere with those public rights. Subsection (2) applies to rights in the waterways, and requires that "[t]he project shall not significantly interfere with public rights of navigation which exist in all waterways." 310 CMR 9.35(2)(a). MassDEP shall find this standard is not met if the project will, among other things, impair in any other substantial manner the ability of the public to pass freely upon the waterways and to engage in transport and loading/unloading activities. 310 CMR 9.35(2)(a)j.

310 CMR 9.35(3) prescribes the rules that govern protection of public rights in the tidelands. Subsection (a) pertains to public rights of fishing and fowling, including the right to seek and take any fish, shellfish, fowl, or floating marine plants, and directs that the project shall not significantly interfere with these rights. Subsection (b) pertains to public rights of on-foot passage, and provides that "the project shall 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…." If the project site includes filled tidelands, then "the project shall include reasonable measures to provide on-foot passage on such lands for the public in the exercise of its rights therein, in accordance with the following provisions…." 310 CMR 9.35(3)(b)(2). This requirement is limited to non-water dependent use projects and water-dependent use projects on filled Commonwealth tidelands. 310 CMR 9.35(3)(b)(2)a. and b. The compressor station is a water dependent use project on filled private tidelands, therefore the requirement to provide additional on-foot passage does not apply to this project.[9]

2. Interference caused by Fear of an Accident, Air Emissions, Noise and Odors

a. Community Concerns. The TRG offered the testimony of Rebecca Haugh to support their contention that the proposed Project will violate 310 CMR 9.35 by eliminating public rights of access in the tidelands. She included affidavits from 52 community members as an exhibit to her rebuttal testimony, attesting to use of the King's Cove Park. The affidavits are identical typed forms, signed by the affiants and notarized. Many of them contain additional,

[9] Weymouth disagrees with this interpretation of the regulation, arguing that on-foot passage must be provided with any project sited on tidelands, whether the tidelands are private or Commonwealth. Weymouth Supplemental Memorandum at p. 2. The plain language of the regulation is to the contrary. A project shall not significantly interfere with public rights of passage, but is only required to include reasonable measures to provide on-foot passage if the project is a non-water dependent use project or if it is a water-dependent use project on filled Commonwealth tidelands. 310 CMR 9.35(b)2.a and 310 CMR 9.35(b)2.b.

hand-written statements by the affiant. For example, one resident of Braintree stated "This is a good spot for fishing", but he did not say whether he currently fishes there or how the compressor station would substantially interfere with any fishing activities. The affidavits assert that the emissions, noise and odor from the compressor station will substantially affect their use of the park, change the benefits of passive recreation they currently enjoy, and negatively impact their use and enjoyment of the conservation land. Haugh PFR Ex. C. Ms. Haugh opined that given the proximity of these recreational activities to the adjacent King's Cove, the proposed Project "poses a substantial obstacle to the public's ability to fish or fowl in the waterway adjacent to the project site"). Haugh PFT at ¶ 5. The community members did not mention any physical obstruction that would be created by the proposed Project.

Ms. Haugh also submitted, as part of her rebuttal testimony, the Health Impact Assessment prepared as part of the air permitting for the project. Haugh PFR Ex. E. According to interviews with community members, the presence of the compressor station when in operation may depress levels of physical activity in both King's Cove and Lovell's Grove, and during construction, residents "feared physical risks to health from pollution and dust, among other environmental factors…." Haugh Ex. E at p. 151. Neither Algonquin nor the Department cross-examined Ms. Haugh at the hearing.

Ms. Haugh also testified that she and others are concerned that construction of the compressor station will result in a force majeure event that induces Calpine to close the public park. Haugh PFT at ¶ 7.[10] She asserts that approval of the compressor station violates the

[10] The MOA between Weymouth and Calpine contains a "force majeure" clause. See Haugh PFT Ex. A. A force majeure clause is a contract provision that relieves the parties from performing their obligations when certain circumstances beyond their control arise, making performance impossible, illegal, inadvisable or commercially impracticable. The clause Ms. Haugh references defined "force majeure" as "any supervening cause beyond the

Massachusetts Energy Facility Siting Board's ("EFSB") previous decision authorizing the power generating station and the Memorandum of Agreement ("MOA") between the Town and the station's operator. Id at ¶ 20. Haugh PFT at ¶4 and Exhibit A. Specifically, she testified that "the Applicant must not be allowed to disclaim ownership of the public park while simultaneously constructing a project adjacent to the public park that induces the owner of the public park [Calpine] to abandon the maintenance of the public park and to seek excusal from its obligations under the MOA under a force majeure clause." Id. at ¶ 7. She contends that constructing the compressor station knowing it will result in the closure of a public park is not a force majeure event. Id.

On behalf of Weymouth, Ms. Schloss testified that "due to odor, aesthetic impacts and safety concerns, residents may be less inclined to utilize these park areas." Schloss PFT at ¶ 32. Mr. Schneider offered into evidence comments from approximately 71 community members to demonstrate that the construction of the compressor station will directly impede the public's use of the tidelands. Schneider PFR at ¶ 5; Schneider PFR Ex. B. The comments were submitted to Weymouth Mayor Robert Hedlund in response a post on Facebook dated January 8, 2019 which stated:

> Would you help us prove the natural gas companies wrong?
>
> While there have been several recent developments in our compressor station fight and more likely soon (update to follow), I am requesting your immediate help in our fight. In our appeal of the state's waterways permit, we gave the DEP hearings officer our arguments and evidence. Including, the proposed compressor station will reduce people's use the existing Kings Cove conservation area because of the risk to public safety from the proposed compressor station. We also

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reasonable control of the affected party, including without limitation requirement of statute or regulation; action of any court, regulatory authority or public authority having jurisdiction; storm, flood, fire earthquake, explosion, civil disturbance, labor dispute, or act of God or the public enemy."

> said an accidental release of flammable gas would be potentially lethal to anyone on the Kings Cove parcel or within 1,000 feet for the release. This risk would deter many people from using this public land.
>
> In response, the natural gas companies scoffed. They also wrote to DEP saying we had no data to support this claim.
>
> Well, can you help us out?
>
> Would you please send us an email to <NoCompressor@weymouth.ma.us> to help?
>
> In the email, tell the natural gas companies whether you would use Kings Cove if the natural gas companies built a compressor station there?
>
> Would you use Kings Cove at all?
>
> If you knew you could die or suffer third-degree burns if an accident occurred at the compressor station, would you use Kings Cove less often, the same, or more often?
>
> Please email <NoCompressor@weymouth.ma.us> by Sunday, January 13 as we have to file your emails with DEP the next day, January 14.
>
> ***PLEASE FEEL FREE TO SHARE WIDELY AND FREQUENTLY***

Schneider PFR Ex. A. The primary concerns expressed in the responses were noise, toxic emissions and fear of an explosion with its resultant consequences. On cross-examination at the hearing, Mr. Schneider acknowledged that he did not conduct any scientific polling or survey to determine what impact the compressor station might have, and he confirmed that he is not a behavioral scientist, and was not holding himself out as an expert regarding how risk may affect people's behavior. Tr. at 138:10-21. Weymouth argues in its closing brief that these comments document the impact of the compressor station project on the public's ability to recreate in this area. Final Brief of the Town of Weymouth on Issues 2-6 at p. 20.

While I do not doubt the sincerity of the statements attached to Ms. Haugh's and Mr. Schneider's pre-filed testimony, including those contained in the HIA, I find these statements to be unreliable hearsay testimony that does not satisfy the Petitioners burden of proof. As Algonquin correctly stated in its Closing Brief at pp.14-15, the comments cannot be considered an objective or scientific survey of public opinion; rather, they represent responses to overtly biased prompts from the Petitioners. Not a single community member who submitted a comment testified at the Hearing, and therefore they were unavailable for cross-examination by MassDEP or Algonquin on their submission. Hearsay evidence may be admissible in an adjudicatory hearing. The Supreme Judicial Court has held that "[s]ubstantial evidence may be based on hearsay alone if that hearsay has 'indicia of reliability.'" Covell v. Dep't of Soc. Servs., 439 Mass. 766, 785-86 (2003) (sufficient indicia of reliability was found where the hearsay was detailed and consistent and there was an absence of motive or reason to make false allegations); accord Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 530, 517 N.E.2d 830 (1988) ("Factors to be considered [in determining whether there is sufficient indicia of reliability] include independence or possible bias of the declarant, the type of hearsay materials submitted, whether statements are sworn to, whether statements are contradicted by direct testimony, availability of the declarant, and credibility of the declarant."). Analyzing the potential risk of error in the decision, the court stated that "[r]eliance on hearsay that is anonymous, uncorroborated, or contradicted by other evidence will create particular risk of error. . . . On the other hand, reliance on hearsay from known, disinterested parties that is factually detailed, is given under penalty of law, or fits a recognized hearsay exception, will be relatively unlikely to result in error." Id. at 628-29 (reliance on police report was appropriate but reliance

on newspaper article was not because it contained the "kind of unattributed, multi-level, and conclusory hearsay evidence" and the impact of such evidence "turns on the weight" that was given to the article).

Considering the factors above, I find the community comments to be unreliable and they do not satisfy the Petitioners' burden of proving that the proposed Project will substantially interfere with the public's rights in the tidelands based on its mere presence. As well, Ms. Schloss's conclusion lacks a factual foundation in her testimony, and is not, therefore, probative of the claim.

b. Interference with Navigation

As noted above at p. 10, no activities, structures or operations of the project will be located in waterways or flowed tidelands of the Fore River or King's Cove. Paquette PFT at ¶ 12; Lynch PFT at ¶ 5. MassDEP determined that the compressor station will not physically obstruct anyone from accessing the waterway from the public way to the shoreline. Tr. at 525:16-20. Nevertheless, Mr. Singleton testified that navigation is at risk should an explosion occur adjacent to and directly under the Fore River Bridge. Singleton PFT at ¶ 8. "Damage to the bridge controls by an explosion or fire caused by storm damage on exposed high-pressure gas equipment on the surface of the compressor station location could render the Bridge unable to open or close to allow the passage of the continual stream of oil and gasoline vessels needed to maintain the storage of these products for distribution." Id. Mr. Singleton admitted on cross-examination that he did not conduct any study or do any analysis to determine the probability of damage to the bridge from a storm event or storm damage. Tr. at 33:5-9. I find this testimony insufficient to establish that the compressor station project will interfere with rights of navigation

in violation of 310 CMR 9.35(2). It consists of speculation and conjecture and is therefore insufficient to meet the TRG's burden of going forward on this claim. In the Matter of Sawmill Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), 2015 MA ENV LEXIS 63, at 84, adopted as Final Decision (July 7, 2015), 2015 MA ENV LEXIS 62 (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").

c. Interference Resulting from an Ignition of Natural Gas

John Hinckley testified in support of Weymouth's contention that the compressor station will interfere with the public's ability and desire to fish, fowl and stroll on the existing conservation parcels. In his opinion, the operation of the compressor station will pose a risk to public safety. Weymouth Memorandum of Law at p. 5. Mr. Hinckley and his company, GeoInsight, Inc., conducted a threat zone study to evaluate the effects of an explosion at a pipe located in the center of the compressor station. The Threat Zone Study is attached to Mr. Hinckley's PFT as Exhibit C. A threat zone study "estimates the aerial extent of vapor threat zones and thermal radiation threat zones corresponding to a hypothetical gas leak at a facility." [11] Hinckley PFT at ¶ 10, 13. In his opinion, knowledge of the potential threat to human health provided by the results of a threat zone model can be used to evaluate people's willingness to recreate on the nearby conservation and recreation parcels. Hinckley PFR at ¶ 6.

[11] The "vapor threat zone" is the area downwind from a natural gas leak where the concentration in the methane from the leak equals or exceeds the lowest concentration at which it will ignite (the LEL). The "thermal radiation threat zone" is the area where the heat from the ignition of the gas leak within the vapor threat zone can do bodily harm. Hinckley PFT at ¶¶ 13 and 14.

To conduct the study, Mr. Hinckley used the United States Environmental Protection Agency's ALOHA[12] air dispersion model, which provides a best-guess estimate of the transport and dispersion of gas, and the threat zone plot that it generates is a ballpark estimate. Tr. 67:9-17. He parameterized the model using information from National Transportation Safety Board ("NTSB") accident reports to develop values for pipe pressure, pipe length, pipe diameter, pipe temperature, pipe roughness and gas leak duration; weather data from Logan Airport; aerial photography; and ALOHA Model default values. Hinckley PFT at ¶ 12; Hinckley Ex. C. Mr. Hinckley used the following assumptions in his model: (1) A pipe ruptures at the approximate center of the compressor station (the location is depicted as a black cross on Figures 4, 5 and 6 in Ex. C); (2) the rupture evacuates a 4,000-foot section of pipeline (based on the length of a segment of the I-9 pipeline south of the facility to the bank of the Fore River); (3) the pipe is 24" in diameter (based on the actual diameter of the I-9 pipeline south of the project site); (4) the gas pressure in the pipe is 800 pounds per square inch (based on a reasonable estimate from parameters in the NTSB reports); (5) the leak occurs in summertime conditions at midday or midnight; (6) movement of the methane plume is not significantly affected by the influence of terrain, structures, and vegetation; (7) the accident does not occur during a "thermal inversion", a weather condition where a layer of warm air occurs above a layer of cool air; (8) the methane plume can travel in any direction, and will travel in the direction of the prevailing wind at the time of the accident; (9) the leak is stopped within two minutes; (10) the methane leak generates 14 tons of methane; and (11) the methane plume is ignited somewhere in the threat zone.

[12] ALOHA is an acronym for Areal Locations of Hazardous Atmospheres. "It is a computer program designed especially for use by people responding to chemical releases, as well as for emergency planning and training. ALOHA models key hazards – toxicity, flammability, *thermal radiation* (heat), and *overpressure* (explosion blast force) – related to chemical releases that result in toxic gas dispersions, fires and/or explosions." ALOHA Users Manual, February 2007, at p. 11. Applicant's Hearing Ex. 1, Tr. at 101:15-16.

Hinckley PFT Ex. C at pp. 5-6 and Figures 1-7. Mr. Hinckley and his GeoInsight team evaluated 20 scenarios, see Ex. C, Table 3, and tried to err on the conservative side, i.e. not overestimating impacts, by modeling a leak lasting only 2 minutes, while the NTSB report described a leak lasting 55 minutes and a leak at a compressor station in northeast Pennsylvania lasted two hours before it was ended. Tr. 86:2-14.

Based on a review of the modeling, Mr. Hinckley and his team drew the following conclusions: (a) a methane plume could travel in any direction but would most likely be carried in an easterly direction by a prevailing westerly wind; (b) a plume of methane at a flammable concentration could extend approximately 1,000 to 4,600 feet downwind of the origin of the leak; (c) there is a 17% chance that at any given time, the vapor threat zone would be flammable along a section of Route 3A which extends over the Fore River Bridge; (d) there is a 12.9% chance that at any given time the vapor threat zone would be flammable in the residential areas to the south, southeast, east and northeast of the compressor station; (e) if ignited, thermal radiation would emanate in all directions and potentially extend up to approximately 1,000 feet from the origin of the leak; (f) if ignited, thermal radiation would be at least 2 kW/sq. meter at the Kings Cove and Lovell's Grove recreation areas, a residential area southeast of the compressor station straddling Route 3A, the Fore River Bridge, and a.33-mile section of Route 3A, the MWRA facility, and the Calpine Electric Generating Plant. Hinckley PFT at ¶15A-15F. Based on these conclusions, if the modeled accidental release at the compressor station is ignited, then people in these areas would suffer impacts ranging from pain less than second degree burns to second degree burns to death. Hinckley PFT at ¶15G.

Based on the threat zone modeling, Mr. Hinckley determined that the threat zone included the entirety of the north parcel, and, as a result, he opined that the compressor station will impede the public's use of this land. Hinckley acknowledged that the risk he described in his testimony is low, but with the very high consequences noted above. He believes MassDEP should consider threat zone modeling in its review "because the incineration of coastal tidelands, public park facilities and users thereof is a real possibility that necessarily interferes with the public's access in a manner that is just as real and objectively identified as a physical barrier thereto." Hinckley PFR at para. 12. In Mr. Hinckley's opinion, "an accidental release at the facility [of methane] could produce flammable emissions, which, if ignited could injure or kill individuals on surrounding properties." Hinckley PFT at ¶ 3. Id. This testimony was not contradicted by Algonquin or MassDEP. Based on this evidence presented, Weymouth avers that the project does not comply with the performance standards in 310 CMR 9.35.

Algonquin attempted to undermine Mr. Hinckley's modeling by questioning certain limitations of the ALOHA model regarding terrain and wind. See Tr. at pp. 87-97. In response, Mr. Hinckley acknowledged the limitations but explained that they did not alter his conclusions, because he took a conservative approach in reaching his conclusions. See Tr. at pp. 87-97. I found Mr. Hinckley to be a credible witness and I credit his testimony that if an accidental release of gas from the compressor station were ignited, the impacts to both people and the tidelands would be significant. He noted, as do I, that Algonquin conducted a threat zone study of its own to evaluate the impact of an accident on nearby structures. See Algonquin Memorandum of Law, Ex. 2 (FERC Environmental Assessment, pp. 2-120 to 2-121). Algonquin

did not, however, evaluate the impact of an accident on humans or compare the thermal radiation level in their threat zone model to human health impact standards. Tr. 109:1-4

Despite crediting Mr. Hinckley's testimony that an accidental release, if ignited, would have catastrophic consequences, I find, nevertheless, that the weight of this evidence is diminished by the following factors. First, Mr. Hinckley did not evaluate any new risk posed by the proposed compressor station that does not already exist at the site with the existing pipeline. In fact, his model used the size and pressure of an existing pipeline – the I-9 – as parameters in the model. Second, he did not model or evaluate the probability of his modeled accidental release of natural gas occurring. Third, he did not model the probability of an accidental release of natural gas being ignited. It is undisputed that the consequences of such an event would be catastrophic. And while accidents of this type are relatively rare, they do happen.[13] But there is no evidence in the record that the compressor station presents additional risk above what already exists at the site with its network of natural gas pipelines. Fourth, while he opines that the compressor station will deter and impede the public's use of the conservation land, he did not base that opinion on any scientific study or any personal expertise in human behavior, which he admitted he does not have. Nor did he conduct any scientific polling or surveying to measure the impact of a threat model on the public's behavior. Tr. 106:19-23. Because he lacks the expertise on which to base his ultimate opinion that the compressor station could impact a person's ability and desire to recreate on the tidelands, his opinion on this question amounts to speculation and conjecture. "Speculation, even by an expert witness, is not 'proof from a competent source.'

[13] At the hearing, Weymouth and Algonquin agreed to stipulate that malfunctions occur. See Tr. 368:6-19. They did not stipulate that accidents occur. Mr. Bruno also agreed that the probability of an incident is low but is not zero. Tr. 397:15-17; Tr. 401:1-5.

Matter of Wannie, 2 DEPR at 205-06 (testimony by petitioners' wetland scientist that an area "may" qualify as isolated land subject to flooding "if" it contained the requisite water volume amounted to speculation and failed to sustain burden of going forward) .” In the Matter of Hoosac Wind Project (enXco, Inc., 2007 MA ENV LEXIS 8, Ruling on Motion for Partial Directed Decision (March 7, 2007); Sawmill, supra. Additionally, Weymouth has not provided any legal support for its claim that alleged interference of this type is legally cognizable under Chapter 91. Accordingly, I find that Weymouth has failed to present sufficient credible evidence in support of its position.

B. THE PROJECT IS NOT REQUIRED TO SERVE A PROPER PUBLIC PURPOSE BECAUSE IT IS LOCATED ENTIRELY ON FILLED PRIVATE TIDELANDS; EVEN IF THE PROJECT SITE INCLUDES COMMONWEALTH TIDELANDS, THE PROJECT IS PRESUMED TO SERVE A PROPER PUBLIC PURPOSE AND THE PETITIONERS HAVE NOT REBUTTED THAT PRESUMPTION.

In the Determination, MassDEP found that the project is presumed to serve a proper public purpose in accordance with 310 CMR 9.31(2). Determination, Finding 7. The Petitioners alleged in their appeals that (a) the presumption is inapplicable to non-water dependent use projects and (b) if there is a presumption because the project is found to be water-dependent, then the presumption is rebutted and overcome because the basic requirements of 310 CMR 9.31(1) have not been met. TRG Notice of Claim at pp. 35-36; TRG Pre-hearing Statement at p. 12; Weymouth Notice of Claim at pp. 16-17. In the RID, I found that the compressor station is considered to be water-dependent.

During the course of this proceeding, evidence was presented that the project site does not, in fact, contain Commonwealth Tidelands, but only filled Private Tidelands.[14] Algonquin requested two administrative corrections to the text of the findings in the Determination, one of which concerned tidelands acreage. See Paquette PFT at ¶ 11, Paquette Ex. 4 (Email message from Richard Paquette to Frank Taormina, May 25, 2017). The Applicant and MassDEP assert therefore, that because the project area contains no Commonwealth Tidelands, the project is not required to meet the proper public purpose requirement of 310 CMR 9.31(2). As discussed below, the evidence supports a finding that the project area does not include Commonwealth

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[14] Tidelands subject to Chapter 91 licensing are classified as being 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 [Waterways] [R]egulations [at 310 CMR 9.02] establish a presumption that tidelands are Commonwealth tidelands if they are seaward of the historic low water mark or 100 rods [1,650 feet] seaward of the historic high water mark, unless there is conclusive evidence that the tidelands are unconditionally free of any proprietary state interest." Matter of NYFA, 2011 MA ENV LEXIS 119, at 13 (emphasis supplied). 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] [i]n 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.

310 CMR 9.02 (definition of "historic low 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]." Matter of NYFA, 2011 MA ENV LEXIS 119, at 13-14. "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 14.

Tidelands, but even if it did, the Petitioners have failed to rebut the presumption that the project serves a proper public purpose.

Chapter 91 establishes MassDEP's responsibilities to preserve and protect public trust rights in tidelands by ensuring that tidelands are used only for water-dependent uses or another proper public purpose. M.G.L. c. 91, §§ 2, 14, and 18. The regulation at 310 CMR 9.31(2) provides that:

> No license or permit shall be issued by the Department for any project on tidelands or Great Ponds, except for water-dependent use projects located entirely on private tidelands, unless said project serves a proper public purpose which provides greater benefit than detriment to the rights of the public in said lands.

(emphasis added). Therefore, if the compressor station will be located entirely on private tidelands, then the proper public purpose requirement does not apply. If it were to apply because the project site was not limited to filled private tidelands, then 310 CMR 9.31(2) (a) provides that for water-dependent use projects, MassDEP shall presume 310 CMR 9.31(2) is met. The presumption may be overcome "only if: (a) the basic requirements specified in 310 CMR 9.31(1) have not been met." 310 CMR 9.31(3). The basic requirements the Petitioners allege have not been met are the requirements at 310 CMR 9.31(1)(d) that the project complies with the applicable standards to preserve water-related public rights, according to the provisions of 310 CMR 9.35, and the requirement at 310 CMR 9.31(1)(f) that the project complies with applicable standards governing engineering and construction of structures, according to the provisions of 310 CMR 9.37.[15]

[15] 310 CMR 9.37, as applicable to the Petitioners' claims, provides:
Engineering and Construction Standards
(1) All fill and structures shall be designed and constructed in a manner that:

A. The Project Site Does Not Contain Commonwealth Tidelands

As noted above, the project area was determined to be located entirely on filled Private Tidelands. Algonquin's c. 91 license application delineated the jurisdictional historic High and Low Water Marks based on a prior license plan, No. 8449, which was issued before MassDEP commissioned a mapping project to establish presumptive Historic High and Low Water Marks. The Final Report of that project was issued on June 9, 2009. See Hearing Exhibit TRG 5 (Massachusetts Chapter 91 Mapping Project, Final Report). During his technical review of the application, Mr. Taormina asked the Applicant to replace the Historic High and Low Water Marks depicted in its initial license plans with the presumptive lines developed through the mapping project. Paquette PFT, Ex. 4. Based on instructions from Mr. Taormina, Algonquin revised its license plans using the presumptive lines and resubmitted them to MassDEP. Id.; see also Tr. at pp. 474-487. The TRG argues at pp. 12 of its Closing Brief that MassDEP's suggestion to Algonquin to move the Historic Low Water Line is "not reliable and should be reversed or vacated…." This argument is without merit. As a threshold matter, the TRG offered no testimony to rebut the presumptive line. Nor did they establish that there was error in MassDEP's instruction to Algonquin. Rather, the evidence demonstrates that determining the Historic Low Water mark boundaries may have been challenging in some instances, but where they were determined, it was done "with confidence and mapped with certainty that it was the most reliable source of the historic low water mark…." Tr. at 490:14-23 – 491:1-4. While the

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(a) is structurally sound, as certified by a Registered Professional Engineer;
(b) complies with applicable state requirements for construction in flood plains, in accordance with the State Building Code, 780 CMR and as hereafter may be amended, and will not pose an unreasonable threat to navigation, public health or safety, or adjacent buildings or structures, if damaged or destroyed in a storm; and
(c) does not unreasonably restrict the ability to dredge any channels.

presumptive line is rebuttable, there is no evidence in the record that rebuts the presumptive line at the project site. As MassDEP's Commissioner indicated in Matter of Paul Armstrong, 19 DEPR 48, Final Decision (March 12, 2012), the 2006 Chapter 91 Mapping Project "significantly advances public policy by providing a clear, predictable and well-grounded delineation of chapter 91 jurisdiction." It is the "exceptional instance" where a party presents "unusually compelling, site-specific evidence, backed by expert testimony" to rebut a presumptive line. There is no basis here for reversing the jurisdictional determination. I find that the project site is located on filled Private Tidelands; no portion of the project will be constructed on Commonwealth Tidelands.

B. Even if the project contained Commonwealth Tidelands, the Petitioners failed to overcome the presumption that the project serves a proper public purpose.

Weymouth asserts two reasons why the proposed Project does not serve a proper public purpose. First, they aver that the proposed Project does not conform to the standards governing the preservation of water-related public rights as required by 310 CMR 9.35 because it does not provide the requisite level of public access. Second, they assert that the proposed Project cannot be constructed in a manner that will not pose an unreasonable threat to navigation, public health or safety, or adjacent buildings or structures, if damaged or destroyed in a storm. Weymouth's Memorandum of Law at p. 12. A storm resulting in an accidental release as described by Mr. Hinckley would pose grave danger to public safety in the vicinity of the proposed Project. Weymouth argues that the site will become inaccessible during and after a Category 2 hurricane and completely submerged after a Category 4 hurricane. The TRG makes a similar claim. Weymouth's first claim is addressed above in the analysis of Issue 2, at p. 17.

Both the TRG and Weymouth aver that the compressor station project fails to meet the basic requirements of 310 CMR 9.31(1)f because it fails to comply with the requirements of 310 CMR 9.37 relating to the applicable standards governing engineering and construction of structures. They rely on the testimony of Frank Singleton and Eric Schneider. Mr. Singleton testified that siting the compressor station in a hurricane flood inundation zone will result in damage to the compressor station and a risk of harm to people in its vicinity. He testified that the project is located within the Hurricane Surge Inundation Zone, as depicted in the Hurricane Surge Inundation Map prepared by the US Army Corps of Engineers ("USACOE"), FEMA, NOAA and MassGIS dated 2013 ("the Hurricane Surge Inundation Map"). He opined, therefore, that there are risks to the public and critical public infrastructure from placing above ground pipeline structures on the site. Singleton PFT at ¶ 6-7; Singleton Exhibit 2 (Massachusetts Hurricane Evacuation Study Hurricane Surge Inundation Mapping, March 2013, Weymouth). He testified that he observed flooding conditions at the North Parcel on January 4, 2018 during a storm called a "bomb cyclone", which caused street flooding in the area of Boston's waterfront. Singleton PFR at ¶ 6. On that day, the M&R station on the North Parcel was close to being flooded and the adjacent Lovell's Grove Park was flooded. Id.

This testimony is not persuasive for the following reasons. On cross-examination at the Hearing, Mr. Singleton acknowledged that the Hurricane Surge Inundation Map does not account for the fill that will be brought into the project site to increase the elevation of some of the compressor station's components. Tr. at 27:1-5. He also acknowledged that the Hurricane Surge Inundation Map depicts the worst-case storm, and not any given storm, Tr. 25:2-9, and does not provide the likelihood of flooding from any given storm. He admitted that even with the

conditions at the project site on January 4, 2018 as bad as those reported in Boston, neither the M&R station nor the site for the proposed compressor station was flooded. Tr. at 39:2-19. Finally, he admitted that the project site on January 4, 2018 did not contain the fill that will be added to the site to elevate the compressor station buildings. Tr. at 39:20-24-40:1-5.

Mr. Schneider also testified regarding the project site's location in a Hurricane Surge Inundation Zone, stating that it will become inaccessible during and after a Category 2 hurricane, and completely submerged during a Category 4 hurricane. Schneider PFT, Ex. A. He noted that only 3 of the 147 compressor stations located along the Atlantic Coast are located in an area that would be inundated with three feet of water during a Category 4 hurricane and only one of those three would be subject to flooding greater than three feet. Schneider PFT at ¶ 10. On cross-examination, Mr. Schneider acknowledged that the maps on which he relied for his opinion show worst-case scenarios, and not what would happen during any given storm. Tr. at 132:14-16. He also admitted that he does not have any expertise regarding what flooding is expected to come from hurricanes, and that the maps do not predict what will occur in any one hurricane. Tr. at 133:11-24. He did not analyze the likelihood that the compressor station site would be subjected to a hurricane of Category 2 or higher. Tr. at 143:15-16. I find his testimony, therefore, to be too speculative to be persuasive. In addition, a fact sheet co-published by FEMA, the USACOE, and NOAA regarding the Storm Surge Inundation Maps states that they do not establish flood risk zones or flood elevations, and their purpose is not to support regulatory requirements. Costa PFT at ¶ 16.[16] I find that neither the TRG nor Weymouth presented sufficient credible evidence to

[16] Mr. Costa also references a "White Paper" corresponding to the Fact Sheet. The "White Paper", regarding differences between flood insurance rate maps ("FIRMs") and the Storm Surge Inundation Maps ("SSIMs"), is available at the following web link: https://www.fema.gov/media-library-data/1508774636839-7ae4bd0c74316ac37ef5ca80a4441fd8/SSIMs_vs_FIRMs_Comparison_and_Overview.pdf

sustain their claims on this issue. Even if they had, the credible testimony presented by Mr. Costa, Mr. Bruno, and Mr. Shutter amply demonstrates that the compressor station project is designed to protect navigation, public health and safety, and adjacent buildings or structures, if subjected to, or damaged or destroyed in a storm. This testimony was neither rebutted by any Petitioner witness nor compromised on cross-examination at the Hearing. Based on the foregoing, I find that the Petitioners have failed to rebut the presumption that the project serves a proper public purpose.

C. THE PROPOSED INTERNAL ROADWAY, PARKING SPACES, UNDERGROUND UTILITIES, STORMWATER BASIN AND FILL ARE ACCESSORY USES THAT MAY BE SITED IN A DPA PURSUANT TO 310 CMR 9.32(1)(B).

Weymouth alleged in its Notice of Claim that the Determination violated c. 91 by permitting the construction and operation of non-accessory facilities, including underground utilities, parking, a roadway, and a stormwater basin without making any finding that these are accessory uses to a water-dependent industrial use. Weymouth Notice of Claim at p. 14, Section F. Weymouth asserts that MassDEP is required to make an explicit finding that the project's parking spaces and internal roadway are accessory to the compressor station. Weymouth's Final Brief at p. 21; Weymouth Memorandum of Law at pp. 12-14. MassDEP admitted at the Hearing that it did not make an explicit finding that these uses were accessory to the water-dependent industrial use, because, in its view, no such finding was necessary. MassDEP Memorandum of Law at p. 7-8. I disagree with MassDEP's assertion that no such finding was necessary.

The regulation at 310 CMR 9.32(1) states:

> The Department has determined that in certain situations fill or structures categorically do not meet the statutory tests for approval under M.G.L. c. 91 or are otherwise not in keeping with the purposes of 310 CMR 9.00.

> Accordingly, a project shall be eligible for a license only if it is restricted to fill or structures which accommodate the uses specified below, within the geographic areas specified in 310 CMR 9.32(1)(a) through (e).

In a DPA, fill and structures that can be approved are limited to "fill or structures for any water dependent industrial use, and accessory uses thereto, provided that…in the case of parking, where the use cannot reasonably be located above the high water mark, and is not located within a water dependent use zone; and…when parking is limited to persons employed by or doing business with the water-dependent industrial use over flowed tidelands." 310 CMR 9.32(1)(b)1.b. and 310 CMR 9.32(1)(b)1.c.(emphasis added). An "accessory use" is defined as "a use determined to be accessory to a water-dependent use, in accordance with the provisions of 310 CMR 9.12(3)." 310 CMR 9.02 Definitions (emphasis added). 310 CMR 9.12(3) provides that MassDEP may determine a use to be accessory to a water-dependent use if it finds that the use is "customarily associated with and necessary to accommodate a principal water-dependent use." 310 CMR 9.12(3)(a)(emphasis added). MassDEP can only make such a finding if the use is (1) "integral in function to the construction or operation of the water-dependent use in question or provides related goods and services primarily to persons engaged in such use and (2) commensurate in scale with the operation of the water-dependent use in question." 310 CMR 9.12(3)(a)1. The language of 310 CMR 9.02 clearly requires MassDEP to make a finding and a determination before it can approve a use as an "accessory use", and it must do so in accordance with 310 CMR 9.12(3).

Weymouth did not present any testimony on this issue, and on that basis I could consider the claim waived. Nonetheless, the Town argues that MassDEP licensed the parking spaces and roadway without any finding that these uses were water-dependent industrial or accessory uses.

Weymouth Memorandum of Law at p. 13. The Town did not offer arguments regarding the stormwater basin or the underground utilities. Weymouth acknowledges that in this *de novo* proceeding I can make the required findings and determine whether these components of the project are accessory uses. Id. at 14.[17] I agree with Weymouth that MassDEP was required to make these findings and determination, and I have evaluated the evidence in the record to make the necessary findings and determination.

Algonquin offered the testimony of Mr. Bruno to support a finding that the internal roadway and parking spaces are integral in function to the operation of the compressor station. Bruno PFT at ¶¶ 27-29. He testified that the driveway and parking are necessary to allow for regular vehicular access and vehicular access during inclement weather. Bruno PFT ¶ 27, 29. Vehicular access is necessary because the compressor station will be regularly staffed and visited by various personnel and technicians, some of which require heavy equipment in order to perform maintenance and testing. Bruno PFT ¶ 27. The compressor station will have parking for approximately ten vehicles, which is reasonably required to support the operation of the compressor station. Bruno PFT ¶ 28. The driveway and parking are customarily associated with and necessary to accommodate a compressor station, are integral in function to the compressor station, and commensurate in scale with the operation of the compressor station. Bruno PFT ¶ 29. This testimony was not rebutted by the TRG or Weymouth. Neither the TRG nor Weymouth cross-examined Mr. Bruno on this testimony at the Hearing.

[17] Weymouth disagrees with my finding that the compressor station is itself deemed to be water-dependent as an ancillary facility and has expressly reserved its right to argue in any appeal of the Final Decision in this case that these uses are not permitted accessory uses. See Weymouth Memorandum of Law at p. 14; Weymouth Supplemental Memorandum at p. 10.

Based on this undisputed testimony, I find that the internal roadway and parking spaces are (1) "integral in function to the construction or operation of the water-dependent use in question or provides related goods and services primarily to persons engaged in such use and (2) commensurate in scale with the operation of the water-dependent use in question." I find, therefore, that they are "accessory uses" to the water-dependent use. This finding supports a determination that the internal roadway and parking spaces are permissible pursuant to 310 CMR 9.32. Because there was no testimony to support the claim that the stormwater basin and underground utilities are prohibited accessory uses, I find that Weymouth waived this claim.

D. A 30-YEAR LICENSE TERM IS PERMISSIBLE, BUT AS AN ANCILLARY FACILITY, THE COMPRESSOR STATION'S C.91 LICENSE SHOULD BE COTERMINOUS WITH THE C. 91 LICENSE FOR THE HUBLINE.

The Determination approved a c. 91 license term of 30 years for the project. The parties disagree on the propriety of this determination. The Petitioners dispute that a 30-year license term is mandated by the regulations or prior MassDEP practice. Although the TRG did not challenge the license term in its Notice of Claim challenging the Determination, the TRG nevertheless argues [without citation to any legal authority] that the project should be reviewed under the Massachusetts State Hazard Mitigation and Climate Adaptation Plan because the site life expectation is limited by climate change. TRG Memorandum of Law at p. 13. Weymouth argues that where an ancillary facility is licensed separately from its underlying principal use, the ancillary facility should be allowed for only as long as the principal use is permitted. Final Brief of the Town of Weymouth on Issues 2-6 at p. 21. Weymouth reasons that because the compressor station is deemed to be water-dependent only by virtue of its status as an ancillary

facility,[18] upon expiration of the HubLine's license in 2032[19] the compressor station would convert to a non-water dependent use and would be prohibited in a DPA. Id. at 23. "The Department cannot site the compressor station in the jurisdictional area without the HubLine. Yet, by permitting the compressor station's license to extend beyond the HubLine's license, the Department has done just that." Id. Algonquin asserts that the Petitioners fail to state a claim on this issue, Applicant's Closing Brief at pp. 31-32, and further asserts that the regulation mandates a 30 year term. Applicant's Memorandum of Law at p. 21. MassDEP maintains that the term is permissible, and issuing a c. 91 license with a 30-year term is standard MassDEP practice. I agree with Weymouth that the 30 year license term is too long for the following reasons.

310 CMR 9.15(1)(a) provides that all c. 91 licenses issued by MassDEP shall contain a condition stating the term for which the license is in effect. "All licenses shall be in effect for a fixed term not to exceed 30 years, unless otherwise deemed appropriate by [MassDEP] in accordance with 310 CMR 9.15(1)(b) through (1)(d)(emphasis added). Waterways licenses can be renewed. 310 CMR 9.25(2) provides that MassDEP may renew a license upon written application of the licensee and in accordance with the procedures for amendments of licenses found in 310 CMR 9.24.[20]

[18] Weymouth does not concede that the compressor station is an ancillary facility, and specifically reserves its rights on this issue. Final Brief of the Town of Weymouth on Issues 2-6 at pp. 14-18.

[19] The HubLine is subject to Waterways License No. 9541.

[20] 310 CMR 9.24 sets forth the following process:
(1) Upon written request by the licensee accompanied by appropriate plans, the Department may amend a license and associated written determination to authorize a structural alteration or change in use not defined as substantial in accordance with 310 CMR 9.02, or to delineate a reconfiguration zone within a marina in accordance with 310 CMR 9.39(1)(b), or to renew a term of license in accordance with 310 CMR 9.25(2). A written request may also be made to amend a permit. No license or permit shall be amended unless the project, as modified, complies with the applicable provisions of 310 CMR 9.00 wherever feasible.
(2) The Department shall review the request for amendment and determine whether the proposed changes are so

At the hearing, MassDEP offered the testimony of Mr. Taormina and Mr. Lynch to support the 30-year term. Mr. Taormina testified that "the default term" for a waterways license is 30 years. Taormina PFT at ¶ 19. He stated that MassDEP is not required to co-terminate all licenses on a project site. Id. at ¶ 20. Mr. Lynch, who reviewed over 4,800 license applications during his 24 years of experience in the Waterways Regulation Program, testified that since 1990 it has been MassDEP's standard practice to issue waterways licenses with 30 year terms. Lynch PFT at ¶ 3, 12. In fact, he stated that in his experience, water-dependent licenses "almost always obtain a 30-year term." Tr. at 575: 1-3. However, he also testified on cross-examination at the hearing that MassDEP is not required to issue a license for a term of 30 years. Tr. at 544:18-21.

To support Algonquin's position that a 30-year term is appropriate, Mr. Costa testified that the project has been designed to mitigate storm surge and inundation impacts for the next 50 years. Costa PFT at ¶ 10.

As I noted in the RID, this licensing proceeding presents a unique situation and no party has presented any applicable legal precedent on this issue for the circumstances of this licensing procedure. Here, the compressor station, an ancillary facility to a water-dependent industrial

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significant as to require a new license or permit application or are appropriate for consideration of an amendment to the existing license or permit.
(3) If the Department determines that the proposed changes are appropriate to allow consideration of an amendment, notice shall be provided in accordance with the requirements of 310 CMR 9.13(1), and to any intervenor on the original license application to the maximum reasonable extent.
(4) The Department may, at its discretion, conduct a public hearing on the request for amendment. Any such hearing shall be conducted in accordance with the requirements of 310 CMR 9.13(3).
(5) Any person who would otherwise have the right to an adjudicatory hearing pursuant to 310 CMR 9.17 may appeal the issuance of any amendment within 21 days of the date of its issuance, in accordance with the procedures set forth at 310 CMR 9.17.
(6) The amended license and accompanying plan shall be recorded within 60 days of the date of issuance in accordance with the procedures set forth in 310 CMR 9.18.
(7) Notwithstanding the procedures for amendment described above, the Department may issue in writing, at the request of the licensee, clarification and corrections regarding any license or permit previously issued.

infrastructure crossing facility [the HubLine], is only deemed to be water-dependent because it is ancillary to a water-dependent industrial facility, and is being licensed many years after the HubLine was licensed. The Salem Lateral project involved licensing an ancillary facility, but in that case a single application was submitted for the Salem Lateral Pipeline and the ancillary facility, an M&R Station, and the ancillary facility was licensed at the same time as the principal water-dependent facility, not in a separate proceedings years later. See Hearing Transcript, August 2, 2018, at pp. 29-30 (Cross-examination testimony of Mr. Taormina). MassDEP has not provided any evidence that it has licensed any other ancillary facility separately from its licensing of the principal facility. I find the situation presented here to be without precedent. Absent any evidence of a licensing proceeding with analogous facts, I do not find there to be a regular practice for MassDEP to rely upon.

In sum, I find the arguments of MassDEP and Algonquin regarding the 30 year license term to be unpersuasive. Weymouth's reasoning supports a better practice under these circumstances. The undisputed evidence presented in the first part of this adjudicatory proceeding established that the HubLine has functioned for years without the compressor station. The compressor station, on the other hand, has no purpose as proposed other than to enable movement of natural gas into the HubLine. Without the HubLine, there is no need for the compressor station. As a matter of policy, it makes sense to unify the two facilities' license terms.

Moreover, 310 CMR 9.15(1) does not mandate a 30-year term, but only allows it. In fact, the regulation sets 30 years as the upper limit for a waterways license unless MassDEP determines a longer term is appropriate. While Algonquin designed the project for a fifty-year

life, this does not dictate the license term. Rather, it is a prudent business decision. My research has not found any cases addressing the "not to exceed" language in 310 CMR 9.15(1). But it is clear from the words of the regulation that it sets a ceiling, not a floor. MassDEP is authorized by this language to set an appropriate term based on the circumstances of the project being reviewed. Particularly where a project presents an anomalous situation, there is no "usual practice". It may be that 99 out of 100 applications for water-dependent uses fall within the scope of MassDEP's usual practice. This is not one of them.

In the event the HubLine is not relicensed in 2032, the compressor station would no longer be an ancillary facility; it would be a non-water dependent use in a DPA decoupled from the principal use that made it water-dependent. In the unique circumstances of this licensing proceeding, my recommendation is to align the license for the compressor station with the license for the HubLine. In that way, upon application for renewal, the principal use and the ancillary use can be reviewed together as a single project and MassDEP will have the opportunity to evaluate whether the facility as a whole continues to meet the performance standards of 310 CMR 9.00. MassDEP argued during the first portion of this adjudicatory proceeding that once it determined that the proposed compressor station was ancillary to the HubLine, the compressor station itself was considered a part of that already-determined-to-be water-dependent-industrial infrastructure crossing facility. See RID p. 44. As I stated in the RID, "the Department was not required to make a separate finding of water-dependency for the compressor station because as an ancillary facility, it is considered part and parcel of the HubLine, the water-dependent industrial infrastructure crossing facility to which it is ancillary (emphasis added). RID at 45. Algonquin may wish to avoid the "burden" of a relicensing

procedure under 310 CMR 9.24 for the compressor station, see Algonquin's Memorandum of Law at p. 21, but aligning the license terms is the best way for MassDEP to determine that relicensing the entire facility – the HubLine, the M&R station and the compressor station – is appropriate.

I find that a 30-year term is permissible, but for the reasons stated above, I recommend that the license term for the compressor station be reduced to a term that coincides with the license term for the HubLine, and expire on September 26, 2032.

E. CLAIMS RELATING TO AIR POLLUTION AND NOISE DO NOT STATE CLAIMS FOR RELIEF WHICH CAN BE GRANTED IN THIS PROCEEDING[21]

The TRG alleges that "the noise, odors and safety concerns for the proposed compressor station will also reduce maritime recreation and public access in violation of the interest of 310 CMR 9.55(1()a)," TRG Notice of Claim at p. 24, citing statements made by Algonquin in Resource Report 9 at p. 9-4 ("Operation of the new compressor units will have small, long-term impacts on air quality") and Resource Report 11 at p. 11-18 ("…an odorant called Mercaptan is injected into the natural gas for safety reasons per USDOT Code. Mercaptan creates a recognizable odor, often compared to rotten eggs…."). TRG Notice of Claim at p. 21. In their Pre-hearing Statement, the TRG stated that it "expects to prove at the Hearing on the appeal that the proposed Project will cause unpleasant odors that will create a public health and safety risk, affect the public's right to recreate on tidelands and affect public access, maritime recreation and navigation." Pre-hearing Statement of the TRG at pp. 3-4. Similarly, the TRG stated that it "expects to prove at the Hearing on the appeal that the proposed Project will cause excessive

[21] Weymouth has elected not to bring a claim relating to air emissions and noise in this hearing. See Weymouth Memorandum of Law at p. 15.

noise…[that] will …affect the public's right to recreate on the tidelands, including the adjacent park and affect public access, maritime recreation and navigation." Id. at p. 4.

The TRG acknowledges that it cannot litigate the project's compliance with the Air Pollution Control regulations in this c. 91 proceeding,[22] and they express no intention to prove here that the odors and noise will violate the air pollution control regulations. They assert, however, that they can litigate the effects air pollution and noise may have on the interests protected by 310 CMR 9.35(3)(b). They claim that because of the odors and noise, people will no longer use the King's Cove recreation area. See Closing Brief of the Ten Residents Group at pp. 18-27. The TRG asserts that it has alleged claims that raise core c. 91 licensing issues and does not seek independent review in this case of matters that are regulated by another MassDEP program, but there is no other way to read the Notice of Claim. They seek a review of claims that are specifically within the subject areas covered by MassDEP's air pollution control regulations, specifically 310 CMR 7.09 and 310 CMR 7.10.

I find that the TRG has failed to state a claim for which relief could be granted in this proceeding. The claims are precluded by the clear precedents of Matter of Massachusetts Highway Department, Docket No. 94-072, Decision and Order on Motion to Dismiss, 2 DEPR 15 (December 23, 1994); Matter of Cambridge Research Park, LLC, Docket No. 2000-02, Decision on Motions in Limine, Partial Dismissal and Partial Summary Decision, 2000 MA

[22] The project's compliance with the Air Pollution Regulations was recently adjudicated in Algonquin's and the Department's favor in the six separate appeals brought by the TRG, Weymouth, and other municipalities challenging the Air Permit issued by the Department for the project. The Petitioners' appeal of the MassDEP Commissioner's Final Decision upholding the Air Permit is currently pending before the U.S. Court of Appeals for the First Circuit in Boston.

ENV LEXIS 77 (July 31, 2000); and Matter of IKEA Property, Inc., DEP Docket No. 04-669, Ruling on Motion to Dismiss, 2005 MA ENV LEXIS 6 (March 10, 2005).

CONCLUSION

I recommend that the Department's Commissioner issue an Final Decision adopting the RID and making the following additional findings: (a) the compressor station project does not violate 310 CMR 9.35; (b) the compressor station project is not required to serve a proper public purpose; (c) the project's internal infrastructure are accessory uses; (d) the license term should be reduced to coincide with the license term for the HubLine; and (e) the Ten Residents Group has failed to state a claim for relief with regard to air pollution and noise.

and approve the c. 91 license for the project.

Date: 10/16/2019

Jane A Rothchild
Presiding Officer

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his consideration. 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.

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

SERVICE LIST

IN THE MATTER OF: **ALGONQUIN GAS TRANSMISSION LLC**

Docket Nos. 2017-011 & 2017-012 **Weymouth**

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