

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

**December 29, 2023**

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In the Matter of  
Brockton Power Co., LLC

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OADR Docket No. 2011-026  
File No. W207973  
Brockton, MA

**RECOMMENDED FINAL DECISION ON SECOND REMAND**

**INTRODUCTION**

The Massachusetts Clean Air Act (“MCAA”) authorizes the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) to adopt regulations “to prevent pollution or contamination of the atmosphere.” G.L. c. 111, § 142A. In accordance with its authority under the MCAA, MassDEP has promulgated the Air Pollution Control Regulations at 310 CMR 7.00 (“APC Regulations”) which set forth an air permitting program pursuant to which a person (“applicant”)<sup>1</sup> may apply for, and receive, an air permit from MassDEP known as a Comprehensive Plan Approval (“CPA”). A CPA authorizes the emission of various types and

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<sup>1</sup> The APC Regulations at 310 CMR 7.00 define “person” as:

any individual, public or private partnership, association, firm, syndicate, company, trust, corporation, department or instrumentality of the federal or state government, political subdivision of the commonwealth, authority, bureau, agency, law enforcement agency, fire fighting agency, or any other entity recognized by law as the subject of rights and duties.

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amounts of air pollution from a proposed or existing facility (“the proposed project”) located on a specific site identified in the CPA application. 310 CMR 7.02(5).

A CPA is also “an air pollution control permit or approval issued by MassDEP pursuant to a ‘cooperative federalism’ regulatory system with the federal government, which is responsible for enforcing the federal [Clean Air Act (“CAA”).” In the Matter of Palmer Renewable Energy, LLC, OADR Docket No. 2021-010 (“PRE”), Recommended Final Decision (September 30, 2022), 2022 MA ENV LEXIS 39, \*34, adopted as Final Decision (November 28, 2022), 2022 MA ENV LEXIS 35, citing, City of Quincy v. Massachusetts Department of Environmental Protection, 21 F.4<sup>th</sup> 8 (1<sup>st</sup> Cir. 2021), 2021 U.S. App. LEXIS 37304, \*3-6. “Under this ‘cooperative federalism’ regulatory system, MassDEP, in enforcing Massachusetts statutory and regulatory air pollution control requirements ‘is in fact acting pursuant to the federal CAA [and] . . . [u]nder its authority, [MassDEP] has issued [the APC] [R]egulations governing the control of air pollutants, including regulations regarding the issuance of air permits for stationary sources of air pollution [emitting from a proposed facility located at a specific site].’” Id.

If MassDEP approves a CPA Application, MassDEP generally issues a Draft CPA to the CPA applicant which will become a Final CPA if no administrative appeal is filed of the Draft CPA with MassDEP’s Office of Appeals and Dispute Resolution (“OADR”). OADR is an independent, neutral, quasi-judicial office within MassDEP whose Presiding Officers are responsible for advising MassDEP’s Commissioner in the adjudication of such an appeal.<sup>2</sup> MassDEP’s Commissioner is the final decision-maker in the appeal unless she designates

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<sup>2</sup> A description of OADR appears in Addendum No. 1 at p. 56 below.

another final decision-maker in the appeal pursuant to 310 CMR 1.01(14)(b).

If an appeal is filed with OADR challenging a Draft CPA, the CPA applicant is typically aligned with MassDEP seeking a Recommended Final Decision from the Presiding Officer and a Final Decision from MassDEP's Commissioner affirming the Draft CPA and ordering MassDEP to issue a Final CPA to the CPA applicant authorizing the proposed project. However, MassDEP, as a governmental entity, is always responsible for representing the public interest in the appeal to ensure that a CPA is properly issued pursuant to the APC Regulations. Hence, if material information is brought to MassDEP's attention during the appeal demonstrating that there is no reasonable likelihood of the CPA applicant being able to go forward with the proposed project approved by a Draft CPA, MassDEP must withdraw its support of the Draft CPA and request that the Presiding Officer issue a Recommended Final Decision in the appeal recommending that MassDEP's Commissioner issue a Final Decision in the appeal vacating the Draft CPA, denying the CPA application for the proposed project, and dismissing the appeal of the Draft CPA as moot. This is the situation presented in this appeal.

Here, MassDEP issued a Revised Draft CPA to Brockton Power Co., LLC ("BP") in May 2017 authorizing its construction and operation of a 350-megawatt ("MW") combined cycle natural gas fired electric generating facility ("the proposed Power Plant") on a 13.2-acre parcel of land in the Oak Hill Industrial Park in southeastern Brockton ("the Brockton Site").<sup>3</sup> The

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<sup>3</sup> MassDEP previously issued a Draft CPA ("the Original Draft CPA") to BP in 2011 authorizing the proposed Power Plant at the Brockton Site, which the Petitioners challenged by bringing this appeal. In the Matter of Brockton Power Co., LLC, OADR Docket Nos. 2011-025 & 026, Recommended Final Decision (July 29, 2016) ("2016 RFD"), 2016 RFD, 2016 MA ENV LEXIS 66, \*2-10, 19-256, adopted by MassDEP Commissioner's Interlocutory Decision (March 13, 2017) ("2017 Interlocutory Remand Decision"), 2017 MA ENV LEXIS 21. The Revised Draft CPA came about later in May 2017 after MassDEP's then Commissioner, Martin J. Suuberg, issued an Interlocutory Remand order in March 2017 adopting all the findings and rulings of my 2016 RFD affirming the Original Draft CPA but remanding the matter to MassDEP to determine whether its approval of the proposed Power Plant at the Brockton Site comported with EEA's recently issued 2017 EJ Policy. 2017 Interlocutory Remand Decision, 2017 MA ENV LEXIS 21, \*3-7, 10-15; MassDEP Commissioner's Second Interlocutory Remand Decision (November 21, 2021) ("2021 Second Interlocutory Decision"), at pp. 3-4. MassDEP subsequently

Brockton Site is within five miles of Environmental Justice communities (“EJ Populations”) whose residents are low-income, minority, and/or English Isolated within the ambit of Chapter 8 of the Acts of 2021 (“the 2021 Climate Act”) and the 2021 Environmental Justice Policy of the Massachusetts Executive Office of Energy and Environmental Affairs (“EEA”) (“EEA’s 2021 EJ Policy”), governing the regulatory actions of all EEA agencies, including those of MassDEP. However, there is no reasonable likelihood of BP being able to go forward with the proposed Power Plant as approved by Revised Draft CPA because the Brockton Site is no longer available for the facility as a result of its acquisition by another entity (“the Developer”) two years ago in December 2021 who, as of more than one year ago in September 2022, was in the process of building a large commercial warehouse there. See below, at pp. 15-24, 35-39, 45-48. BP has presented no evidence and valid legal basis demonstrating that it can still proceed with the proposed Power Plant on the Brockton Site as approved by the Revised Draft CPA with the Developer owning the Brockton Site and constructing a large commercial warehouse there. Id. Accordingly, MassDEP has properly withdrawn its support of the Revised Draft CPA and declined to commit any more of its valuable and limited publicly funded resources to further consider BP’s CPA application for the proposed Power Plant, including resuming the resource-intensive Health Impact Assessment (“HIA”) Study that in November 2021 MassDEP’s then Commissioner, Martin J. Suuberg (“former Commissioner Suuberg”),<sup>4</sup> ordered be performed of

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conducted the required review and issued the Revised Draft CPA in May 2017 setting forth its determination that its approval of the proposed Power Plant at the Brockton Site comported with EEA’s 2017 EJ Policy. 2017 Interlocutory Remand Decision, 2017 MA ENV LEXIS 21, \*10-14; 2021 Interlocutory Remand Decision, at pp. 3-4. The Petitioners then challenged the determination in this appeal. 2021 Interlocutory Decision, at p. 5.

<sup>4</sup> Former Commissioner Suuberg served as MassDEP’s Commissioner from January 2015 to January 2023.

the proposed Power Plant (“Nov. 2021 HIA Study Order”). Id.

Former Commissioner Suuberg issued the Nov. 2021 HIA Study Order, not knowing material information that there was no reasonable likelihood of BP of being able to go forward with the proposed Power Plant as approved by the Revised Draft CPA because of BP’s failure to disclose prior to the Order’s issuance that the Brockton Site was no longer available for the facility as a result the Developer’s plans to acquire the Brockton Site and build a large commercial warehouse there. See below, at pp. 25-39, 45-48. It was the Petitioners who brought this material information to light in mid-December 2021, one month after former Commissioner Suuberg’s issuance of the Nov. 21 HIA Study Order, when the Petitioners obtained documents revealing that: (1) for more than one year prior to issuance of the Nov. 2021 HIA Study Order, since June 29, 2020, BP no longer had an option to purchase the Brockton Site from the then owner of the Brockton Site because the Developer had executed a Purchase and Sale Agreement (“P & S”) with the latter to purchase the Brockton Site; (2) for more than one year after executing the P & S, from June 29, 2020 to December 7, 2021, the Developer had conducted an extensive land use review of the Brockton Site to determine the feasibility of constructing a large commercial warehouse there; and (3) on December 7, 2021, several weeks after issuance of the Nov. 2021 HIA Study Order, the Brockton Planning Board approved the Developer’s Site Plan for construction of a large commercial warehouse on the Brockton Site. Id.<sup>5</sup>

The Petitioners also subsequently obtained documents during the period of mid-December 2021 through February 2022 revealing material information that: (1) on December 13, 2021, less than one week after the Brockton Planning Board had approved its Site Plan for

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<sup>5</sup> As of mid-December 2021, when the Petitioners brought this material information to light, MassDEP had already expended considerable efforts in planning to develop an HIA Study for the proposed Power Plant. See below, at pp. 30-35.

construction of the large warehouse on the Brockton Site, the Developer acquired the Brockton Site by Quitclaim Deed; and (2) the Quitclaim Deed was recorded with the Plymouth County Registry of Deeds on January 10, 2022. Id. This material information and the fact, as previously noted above, that as of more than one year ago in September 2022, the Developer was in the process of building a large commercial warehouse at the Brockton Site, provides further proof that there is no reasonable likelihood of BP being able to proceed with the proposed Power Plant as approved by the Revised Draft CPA due to the Brockton Site is no longer being available for the facility.

In summary, as a result of there being no reasonable likelihood of BP being able to go forward with the proposed Power Plant as approved by the Revised Draft CPA due to the Brockton Site no longer being available for the facility, I recommend that MassDEP Commissioner Bonnie Heiple (“Commissioner Heiple” or “MassDEP’s Commissioner”) issue a Final Decision in this appeal that: (1) vacates the Revised Draft CPA, (2) denies BP’s CPA application for the proposed Power Plant, and (3) dismisses this appeal as moot. Such a Final Decision is also warranted for the following additional reasons.

First, BP’s inability to go forward with the proposed Power Plant as approved by Revised Draft CPA due to the Brockton Site no longer being available for the facility is material information that BP should have disclosed prior to and after issuance of the Nov. 2021 HIA Study Order. See below, at pp. 25-39. BP was required to disclose this material information as a CPA applicant pursuant to the APC Regulations and as a litigant in this appeal pursuant to the good faith filing requirement of the Adjudicatory Proceeding Rules at 310 CMR 1.01(4)(b). Id. BP’s failure to disclose this material information prior to and after issuance of the Nov. 2021 HIA Study resulted in the expenditure for naught of a considerable amount of valuable: (1) pro

bono private legal services of the Petitioners' legal counsel; and (2) publicly funded agency resources of MassDEP to lay the groundwork for an HIA Study of the proposed Power Plant. Id.

Lastly, a Final Decision in this appeal by MassDEP's Commissioner vacating the Revised Draft CPA, denying BP's CPA application for the proposed Power Plant, and dismissing this appeal as moot is also warranted because of BP's refusal to comply with my November 4, 2022 Order directing BP to unconditionally withdraw its CPA application for the proposed Power Plant after BP's inability to go forward with the proposed Power Plant as approved by the Revised Draft CPA due to the Brockton Site no longer being available for the facility was revealed by the Petitioners and their documentation and MassDEP's investigation of the Brockton Site. See below, at pp. 39-49. I issued the Order because BP's unconditional withdrawal of its CPA application for the proposed Power Plant would have brought this appeal to a prompt and just conclusion and prevented the expenditure of any more private and public resources in this appeal. Unfortunately, BP chose to defy the Order by contending without any valid legal basis that MassDEP is required to continue with its CPA permit review of the proposed Power Plant, including resuming the resource intensive HIA Study of the power proposed Plant, notwithstanding there is no reasonable likelihood of BP being able to go forward with the proposed Power Plant as approved by the Revised Draft CPA because the Brockton Site is no longer available for the facility.

## **DISCUSSION**

### **I. UNDER THE APC REGULATIONS A CPA IS A SITE-SPECIFIC AIR PERMIT ISSUED BY MassDEP AUTHORIZING THE EMISSION OF AIR POLLUTANTS FROM A FACILITY LOCATED ON A SPECIFIC SITE IDENTIFIED IN THE CPA APPLICATION**

BP does not dispute that the Developer acquired the Brockton Site two years ago in December 2021 and that as of more than one year ago in September 2022, the Developer was

in the process of constructing a large commercial warehouse on the Brockton Site. Nevertheless, BP contends that the Developer's acquisition of the Brockton Site and subsequent construction of a large commercial warehouse on the Brockton Site has no impact on the previously issued Revised Draft CPA authorizing BP's construction and operation of the proposed Power Plant on the Brockton Site. BP's claim is without merit. As discussed below, the Revised Draft CPA is no longer valid because under the APC Regulations a CPA is a site-specific air permit issued by MassDEP authorizing the emission of air pollutants from a proposed facility located on a specific site identified in the CPA application and if that site is no longer available for the proposed facility, the CPA is no longer valid and must be vacated.

**A. The APC Regulations at 310 CMR 7.02(5)(c)4 and 6**

The APC Regulations that confirm that MassDEP's issuance of a CPA is site specific include 310 CMR 7.02(5)(c)4 and 6. These Regulations respectively require that a CPA application contain "a description of the proposed [facility], *site information*, plans, specifications, drawings illustrating the design of the facility" and "[a]dditional information [as] . . . request[ed] by the Department including [an] air dispersion modeling [study of the proposed facility]." (emphasis supplied). This is critical information that MassDEP must review as part of the CPA application process, especially to ensure that the emissions from the proposed facility located on the specific site identified in the CPA application will not exceed air pollution control standards and thresholds, including the National Ambient Air Quality Standards ("NAAQS").

The NAAQS are health-based standards established by the United States Environmental Protection Agency ("USEPA") pursuant to the federal CAA that are designed to preserve public health and protect sensitive populations, including persons suffering from asthma or



cardiovascular disease, children, and the elderly. 42 U.S.C. § 7409(b); 40 C.F.R. Part 50 (2006); 2016 RFD, 2016 MA ENV LEXIS 66, \*41; PRE, 2022 MA ENV LEXIS 39, \*63-64. "[T]he NAAQS . . . are [intended] to cover for air pollutants 'reasonably ... anticipated to endanger public health or welfare,' including [for particulate matter of 2.5 micrometers in diameter ('PM<sub>2.5</sub>')] or less]." City of Brockton, 469 Mass. at 205; 2016 RFD, 2016 MA ENV LEXIS 66, \*39; PRE, 2022 MA ENV LEXIS 39, \*65.

Particulate matter or "PM" as it is commonly referred: (1) "is . . . found in the air, including dust, dirt, soot, smoke, and liquid droplets"; (2) "can be suspended in the air for long periods of time [and] [s]ome particles are large or dark enough to be seen as soot or smoke"; and (3) "[o]the[r] [particles] are so small that individually they can only be detected with an electron microscope." PRE, 2022 MA ENV LEXIS 39, \*65. Due to their small size, particles less than 2.5 micrometers in diameter ("PM 2.5") or 1/30<sup>th</sup> of the average width of human hair, are believed to pose the greatest health risks because they can lodge deeply into human lungs. PRE, 2022 MA ENV LEXIS 39, \*65. These particles are produced from all types of combustion activities, including from the operation of motor vehicles and power plants, wood burning, and certain industrial processes. Id.

"The NAAQS are expressed as ambient pollutant concentrations, measured in micrograms per cubic meter (µg/m<sup>3</sup>) [volume of air], and averaged over a specified period of time, usually twenty-four hours or one year." City of Brockton, 469 Mass. at 205, n. 19; PRE, 2022 MA ENV LEXIS 39, \*66-67. "In setting the NAAQS, the [US]EPA relies on criteria developed by [US]EPA staff that [is to] 'accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare' from the pollutant . . . and recommendations of the [USEPA's] Clean Air Scientific Advisory Committee,

a seven-member, independent scientific review committee." City of Brockton, 469 Mass. at 205, citing, 42 U.S.C. §§ 7408(a)(2), 7409(d)(2); 2016 RFD, 2016 MA ENV LEXIS 66, \*41-42; PRE, 2022 MA ENV LEXIS 39, \*67. "The [US]EPA reviews and, if necessary, revises the NAAQS every five years." City of Brockton, 469 Mass. at 205, citing, 42 U.S.C. § 7409(d)(1); 2016 RFD, 2016 MA ENV LEXIS 66, \*42; PRE, 2022 MA ENV LEXIS 39, \*66-67.

"In Massachusetts, [MassDEP], in the course of the [air] permitting process for new emission sources, enforces [the] NAAQS in part [through Appendix A of the APC Regulations] by comparing total level of expected criteria pollutant (the sum of the background concentration and expected emissions from the new source) with the NAAQS." City of Brockton, 469 Mass. at 205-06, citing, G.L. c. 111, § 142D; 310 CMR 7.00; 2016 RFD, 2016 MA ENV LEXIS 66, \*42; PRE, 2022 MA ENV LEXIS 39, \*67. Air quality that satisfies the NAAQS is presumptively protective of public health but this presumption can be rebutted and even overcome, by the opponents of a proposed facility requiring an air permit from MassDEP under the APC Regulations presenting reliable data demonstrating that the NAAQS are not protective enough of public health and/or that permitting the proposed facility would have a disparate or disproportionate discriminatory impact on a protected class of persons in violation of Massachusetts and/or federal anti-discrimination laws. City of Brockton v. Energy Facilities Siting Board, 469 Mass. 196, 207 (2014); PRE, 2022 MA ENV LEXIS 39, \*64-65, 111-16.

As noted above, MassDEP's determination of whether the emissions from a proposed facility will comply with the NAAQS is based on the CPA applicant's air dispersion modeling study. This study must be based on the proposed facility's projected air emissions from the specific site identified in the CPA application, the actual emissions from other facilities located near the proposed facility, and the background emissions ascertained from on-site or nearby air

pollution monitors. For these reasons, the location of the proposed facility must be certain, not speculative, for the CPA applicant to demonstrate compliance with the NAAQS as part of the CPA approval process.

**B. The APC Regulations at 310 CMR 7.00: Appendix A(8)(b), Additional Conditions for Approval**

Further proof that a CPA is site specific is found in the APC Regulations at 310 CMR 7.00: Appendix A(8)(b), Additional Conditions for Approval ("Appendix A(8)(b)"). Appendix A(8)(b) is that part of the APC Regulations that pursuant to the federal CAA "se[ts] forth the Massachusetts preconstruction review program for [proposed] stationary sources of air pollution[,]" including new energy generating facilities such as the proposed Power Plant. 2016 RFD, 2016 MA ENV LEXIS 66, \*171-72. Appendix A(8)(b) requires a CPA applicant to submit with its CPA application:

an analysis of *alternative sites*, sizes, production processes, and environmental control techniques for [the] proposed new or modified [facility] . . . demonstrat[ing] to [MassDEP's] satisfaction that [the] benefits of the proposed [facility] significantly outweigh the environmental and social costs imposed as a result of its *location*, construction, or modification."

2016 RFD, 2016 MA ENV LEXIS 66, \*173 (emphasis supplied). As Appendix A(8)(b) makes clear, the CPA applicant must submit as part of the CPA application an analysis demonstrating that "[the] benefits of the proposed [facility subject to the CPA] outweigh [its] environmental and social costs [] as a result of [among other things, the facility's] *location* . . . ." 2016 RFD, 2016 MA ENV LEXIS 66, \*177-88 (emphasis supplied). This demonstration must be based on several factors, including "an analysis of *alternative sites* . . . for [the] proposed [facility]." *Id.* (emphasis supplied). Here, BP performed an alternative sites study for the proposed Power Plant during the prior permitting proceedings before the Commonwealth's Energy Facilities Siting Board ("EFSB) which it relied on in its CPA application for the proposed Power Plant.

Exhibit 1 to Parties' Second Joint Status Report of January 14, 2022 ("Parties' Jan. 2022 Status Report");<sup>6</sup> 2016 RFD, 2016 MA ENV LEXIS 66, \*180-88. In its alternative sites study, BP unequivocally represented to the EFSB (and later to MassDEP) that the Brockton Site was best suited for the proposed Power Plant and not at alternative locations in Everett, Bellingham, and Dracut. Consequently, BP is judicially estopped from claiming otherwise now to prevent the vacating of the Revised Draft CPA.<sup>7</sup>

Specifically, BP represented that the Brockton Site was the optimum location to build the proposed Power Plant because of its: (1) affordability; (2) "proximity to transmission lines, natural gas supply, treated wastewater from the City of Brockton's wastewater treatment plant" for cooling the facility's power generating apparatus, and "potable water from [Brockton's] municipal supply"; (3) "appropriate zoning"; (4) "compatible adjoining land uses"; and (5) "adequate size." Exhibit 1 to the Parties' Jan. 2022 Status Report (BP's 2007 EFSB Site Submittal, a pp. 3-2 through 3-4 and 3-8 through 3-9); 2016 RFD, 2016 MA ENV LEXIS 66, \*185-86. BP also explained in detail its reasons for rejecting alternative sites in Everett, Bellingham, and Dracut for the proposed Power Plant. *Id.*, at pp. 3-4 through 3-8.

The Everett Site is a 5.2-acre parcel of land that in 1998 had been approved by the EFSB for the construction and operation of a 350-MW natural gas power plant. Exhibit 1 to the Parties' Jan. 2022 Status Report (BP's 2007 EFSB Site Submittal, a pp. 3-4 through 3-6). This

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<sup>6</sup> Exhibit 1 to the Parties' Jan. 2022 Status Report is a copy of BP's 2007 EFSB Site Submittal.

<sup>7</sup> The doctrine of judicial estoppel "is an equitable doctrine that precludes a party from asserting a position in one legal proceeding that is contrary to a position it had previously asserted in another proceeding." In the Matter of FTO Realty Trust, OADR Docket No. WET-2015-024RM, Recommended Final Decision After Remand (October 19, 2018), 2018 MA ENV LEXIS 65, \*85-88, adopted as Final Decision (October 29, 2018), 2018 MA ENV LEXIS 64, citing, Blanchette v. School Committee of Westwood, 427 Mass. 176, 184 (1998). The doctrine of judicial estoppel applies to the quasi-judicial proceedings before OADR in the adjudication of administrative appeals. FTO Realty Trust, 2018 MA ENV LEXIS 65, \*85-94 (judicial estoppel doctrine barred appellant in administrative appeal on remand to OADR from Superior Court from asserting claims in the remand proceedings before OADR that were "inconsistent with, i.e., mutually exclusive of, [the] positions it ha[d] taken" earlier in the appeal prior to its remand).

facility was never built because the parcel was sold to Tractabel, an importer of liquefied natural gas (“LNG”), that “was focused on the fuel supply business rather than the power generation business.” Id. BP rejected the Everett Site for the proposed Power Plant because although this location “had many of the same advantages [as the Brockton Site,] including proximity to natural gas supply and transmission interconnections, and compatible land uses,” the location “lacked an available source of water and as a result, the [proposed Power Plant] would have to rely on air cooling rather than the more efficient wet cooling.” Id.; 2016 RFD, 2016 MA ENV LEXIS 66, \*186, 197-202, 238-55. “The [Everett] [S]ite was also small, and owned by [BP’s] competitor, ‘and thus would not likely . . . be available to [BP].’” Id.

The Bellingham Site is a 156-acre parcel of land that in 1999 was approved by the EFSB for the construction and operation of a 700-MW and later 525-MW natural gas power plant. Exhibit 1 to the Parties’ Jan. 2022 Status Report (BP’s 2007 EFSB Site Submittal, a pp. 3-6 through 3-7). This facility was never built because Dunkin’ Donuts Northeast purchased the parcel in 2004 and subsequently built a large warehouse in the center of the property that served as a central distribution facility for the company. Id. BP rejected the Bellingham Site for the proposed Power Plant because the location’s water availability constraints precluded BP from installing more energy efficient wet mechanical cooling towers for the proposed Power Plant. Id.; 2016 RFD, 2016 MA ENV LEXIS 66, \*186-87, 197-202, 238-55. BP also rejected the Bellingham Site because “[t]he placement of the [large warehouse/central distribution] facility [by Dunkin’ Donuts Northeast in the center of the property] *effectively preclude[d] the use of this site for [the proposed Power Plant].*” BP’s 2007 EFSB Site Submittal, at p. 8 (emphasis supplied). By this same reasoning BP can no longer proceed with the proposed Power Plant on the Brockton Site as approved by the Revised

Draft CPA. Specifically, the Developer's construction of a large commercial warehouse on the Brockton Site has "effectively preclude[d]" BP of any meaningful prospect of building and operating the proposed Power Plant on the Brockton Site.

The Dracut Site is a 450-acre parcel of land that in 2000 was approved by the EFSB as a power generating facility. Exhibit 1 to the Parties' Jan. 2022 Status Report (BP's 2007 EFSB Site Submittal, a p. 3-8). BP rejected Dracut Site for the proposed Power Plant because although it had "the same advantages as the Brockton [S]ite, including proximity to natural gas pipelines, transmission lines and a water zone, industrial use, sufficient size, and compatible land uses, . . . it would be more costly [for BP] to locate the proposed Power Plant at the [Dracut] [S]ite because of higher acquisition costs and water/wastewater infrastructure costs." 2016 RFD, 2016 MA ENV LEXIS 66, \*187-88.

In sum, with the Brockton Site having been acquired by the Developer two years ago in December 2021 who, as of more than one year ago in September 2022, was in the process of building a large commercial warehouse there, it no longer qualifies as an available site for constructing and operating the proposed Power Plant. Moreover, the Revised Draft CPA authorizing the proposed Power Plant on the Brockton Site is not transferrable to another location.<sup>8</sup> Put another way, a CPA applicant who does not have a reasonable likelihood of being able to proceed with a proposed facility approved by the CPA on the specific site identified in the CPA application cannot simply go to another location and build the proposed facility there based on the CPA issued for the original site.<sup>9</sup> In this situation, the CPA is no

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<sup>8</sup> The non-transferability of the Revised Draft CPA was confirmed under oath in a September 2022 Affidavit that Thomas Cushing, the Air Permit Chief in MassDEP's Southeast Regional Office, submitted in this appeal after visiting the Brockton Site. See below, at pp. 45-48.

<sup>9</sup> Id.

longer valid and the CPA applicant must file a new CPA application seeking authorization for the proposed facility on the different location.<sup>10</sup>

**C. The APC Regulations at 310 CMR 7.02(3)(i), Public Comment Procedures, and 310 CMR 7.00: Appendix A (9), Public Participation**

Lastly, the APC Regulations at 310 CMR 7.02(3)(i), Public Comment Procedures, and 310 CMR 7.00: Appendix A (9), Public Participation, also support that a CPA is site specific. Under these Regulations, MassDEP must provide a 30-day public comment period on a proposed CPA. Identifying the specific site of the proposed facility subject to the CPA prior to the public comment period is critical for the public to have a meaningful opportunity to provide comments supporting or opposing MassDEP's issuance of the CPA. Here, MassDEP provided the required 30-day public comment period on the proposed Power Plant and based on public comments it received during that period, MassDEP made changes to the conditions in the Original Draft CPA authorizing the proposed Power Plant prior to issuing it to BP.

**II. UNDER THE APC REGULATIONS A CPA APPROVING A PROPOSED PROJECT MUST BE VACATED, THE CPA APPLICATION FOR THE PROPOSED PROJECT MUST BE DENIED, AND ANY PENDING ADMINISTRATIVE APPEAL OF THE CPA MUST BE DISMISSED AS MOOT IF THE CPA APPLICANT DOES NOT HAVE A REASONABLE LIKELIHOOD OF BEING ABLE TO PROCEED WITH THE PROPOSED PROJECT**

As discussed above, the APC Regulations make clear that a CPA is a site-specific air permit issued by MassDEP authorizing the emission of air pollutants from a proposed facility located on a specific site identified in the CPA application. Hence, a reasonable construction of the APC Regulations is that if the specific site identified in the CPA application is no longer available for a proposed facility, then the CPA applicant no longer has a reasonable likelihood of being able to proceed with the proposed facility and as such the CPA must be vacated, the

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<sup>10</sup> Id.

CPA application for the proposed facility must be denied, and any pending administrative appeal of the CPA must be dismissed as moot. As discussed below, this reasonable construction of the APC Regulations is supported by several Final Decisions of the USEPA's Environmental Appeals Board ("EAB") in administrative appeals of air permits issued by the USEPA or State agencies under the federal CAA in which the air permit recipients ("the permittees") during the appeals no longer had a reasonable likelihood of being able to proceed with the proposed projects authorized by the appealed air permits for various reasons. These reasons included the specific site identified in the air permit application for the proposed facility approved by the air permit no longer being available for the facility, the same situation presented here where the Brockton Site is no longer available for the proposed Power Plant.

**A. The EAB Final Decisions in Administrative Appeals that Support the Vacating of the Revised Draft CPA Approving the Proposed Power Plant, the Denial of BP's CPA Application for the Proposed Power Plant, and the Dismissal of this Appeal as Moot**

**1. In re W. Suburban Recycling & Energy Ctr. L.P., 8 E.A.D. 192, 1999 EPA App. LEXIS 39 (E.P.A. March 10, 1999) ("WSRE")**

In WSRE, the Illinois Environmental Protection Agency ("IEPA") issued an air permit to a permittee authorizing the latter's proposed construction of a resource recovery facility on a specific site comprised of several real properties in the Villages of Summit and McCook, Illinois. 1999 EPA App. LEXIS 39, \*1-4. The permittee appealed the air permit to the EAB contending that 12 provisions of the air permit were improper. Id. During the appeal, the EAB learned from several community organizations that the permittee had sold several real properties comprising part of the proposed project site which put into question whether the permittee was going forward with the proposed resource recovery facility. Id. As a result, the EAB "questioned whether the proposed resource recovery facility was still a viable project" and based



on that concern, the EAB “issued [a] Show Cause Order to provide [the permittee] an opportunity to counter the inference suggested by the [real] property transfers that [the permittee] had abandoned its plans to construct the facility as described in its [air] permit application.” 1999 EPA App. LEXIS 39, \*4-5. The EAB also issued the Show Cause Order “to be assured that a commitment of the [EAB’s] time and resources on the merits [of the permittee’s appeal of the 12 provisions in the air permit] would not be rendered moot by [permittee’s] subsequent failure to construct [the proposed resource recovery facility].” 1999 EPA App. LEXIS 39, \*5.

The permittee thereafter failed to provide an adequate response to the EAB’s Show Cause Order. 1999 EPA App. LEXIS 39, \*5-14. Specifically, the permittee filed a one-page response that “[failed to] to [address] . . . the items identified in the [EAB’s] Show Cause Order, and simply in a summary fashion “[moved] to voluntarily withdraw its [appeal] . . . and accept the [air] permit as issued by the IEPA.” 1999 EPA App. LEXIS 39, \*5-6. The IEPA opposed the permittee’s motion to voluntarily withdraw its appeal of the air permit as being non-responsive to the EAB’s Show Cause Order and because the permittee “ha[d] completed additional [real] property transfers such that all of the property comprising the proposed project site ha[d] . . . been sold [with] [t]he final [real] property transfer occurring after the date of the Show Cause Order.” 1999 EPA App. LEXIS 39, \*6. For these reasons, the IEPA contended “that there [was] no realistic prospect that [the permittee] [would] commence construction of the proposed resource recovery facility” and “request[ed] that the [EAB] declare that the [air] permit [that the IEPA had] issued to [the permittee] void or, in the alternative, order a remand to [the] IEPA to issue [an] [air] permit denial.” 1999 EPA App. LEXIS 39, \*6-7.

The EAB agreed with the IEPA’s position and denied the permittee’s motion to

voluntarily withdraw its appeal, dismissed the permittee's appeal of the IEPA's permit decision as moot, and remanded the matter to the IEPA for the latter's issuance of a final permit decision denying the air permit because there was no basis for the permittee to continue holding the air permit. 1999 EPA App. LEXIS 39, \*1-2, 11-14. In the EAB's words, these actions were warranted because the permittee had failed to: (1) "provid[e] an assurance that [the proposed] project [would] be completed as described in its permit application"; (2) "affir[m] that it [was] committed to construct the resource recovery facility"; (3) "demonstrate[e] that it ha[d] the means to obtain control over the [real] properties [it had] previously transferred" that was to be the site of the proposed resource recovery facility; and (4) "provid[e] any argument as to why [the EAB] should not treat [the permittee's] Appeal [of the air permit] as moot based on a reasonable inference that [the permittee] [did] not intend, or [was] unable, to construct the [proposed] facility identified in its [air] permit application." 1999 EPA App. LEXIS 39, \*12-13.

**2. In the Matter of Mercer & Atl. Counties Res. Recovery Facility,  
1997 EPA App. LEXIS 54 (E.P.A. June 24, 1997) ("Mercer")**

In Mercer, the New Jersey Department of Environmental Protection ("NJDEP") granted a permittee an extension and modification of an air permit that NJDEP had previously issued to the permittee authorizing its construction of a resource recovery facility in Mercer County, New Jersey. 1997 EPA App. LEXIS 54, \*1.<sup>11</sup> After several environmental advocacy groups appealed the extension to the EAB, the Mercer County Board of Commissioners ("the County Commissioners") "reject[ed] a proposed amendment to the Mercer County Solid Waste Plan, 'which [would have] provided for the financing, construction and operation of the

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<sup>11</sup> Mercer County is comprised of 12 New Jersey municipalities, including Princeton and Trenton, the state capital. <https://www.mercercounty.org/explore/our-towns>

[proposed resource recovery facility].” Id. Undisputedly, the County Commissioners’ action “was to terminate the Facility.” 1997 EPA App. LEXIS 54, \*2-3.

In response to the action taken by the County Commissioners, the EAB issued a Show Cause Order directing the permittee to provide a “detailed and complete statement assessing the current status of the proposed facility and whether or not the facility [would] be constructed.” 1997 EPA App. LEXIS 54, \*5. The permittee responded to the EAB’s Show Cause Order by acknowledging that the County Commissioners’ action “effectively ‘prohibit[ed] the [permittee] from being involved with the construction activities associated with the’ proposed facility.” 1997 EPA App. LEXIS 54, \*5-6. “Nevertheless, [the permittee] contended that the [EAB] should proceed with [adjudication of the petitioners’ appeal of the permit extension] because [the County Commissioners’] action ‘[did] not prohibit another party from constructing a resource recovery facility.’” 1997 EPA App. LEXIS 54, \*6. The permittee claimed, “that although it [would] not be constructing the facility, [the permittee] ‘[was] not precluded from transferring its permits, including the [permit on appeal], to another party that would assume obligations imposed under the permits and go forward with the construction and operation of a resource recovery facility.’” Id. “To [that] end, [the permittee contended] that it ha[d] been negotiating with various entities interested in constructing the facility.” Id.

The EAB rejected the permittee’s request that adjudication of the petitioners’ appeal of the permit extension proceed ruling that “[i]t would be a waste of both the [EAB’s] and the parties’ time and resources to review this matter if the facility [would] no longer be built.” 1997 EPA App. LEXIS 54, \*8. The EAB also ruled that “there is a substantial possibility that the issues raised in the [appeal] . . . may be moot . . . .” Id. For these reasons, the EAB remanded

the matter to the NJDEP for the latter to “make [a] . . . determination as to whether, given the fact that [the permittee was] no longer authorized to construct the facility, the . . . permit extension should be reconsidered,” specifically, “given the change in circumstances since the permit extension was granted, . . . whether the extension [was] still ‘justified.’” 1997 EPA App. LEXIS 54, \*9.

**3. In the Matter of New York Power Authority,  
1 E.A.D. 825, 1983 EPA App. LEXIS 6 (“NYPA”)**

In NYPA, the USEPA’s Region II issued an air permit to the New York Power Authority (“NYPA”) authorizing its construction of a new 700 MW (coal and refuse-fired) steam electric generating plant (“the proposed facility”) on a site in Staten Island, New York. 1983 EPA App. LEXIS 6, \*1. Several administrative appeals challenging the air permit were filed with the USEPA’s EAB, including an appeal brought by the New York City Department of Environmental Protection (“NYCDEP”). Id.

During the pendency of the appeals, New York’s Governor informed the NYPA that he would not execute a contract with the NYPA for New York State to purchase power generated from the proposed facility. 1983 EPA App. LEXIS 6, \*2. This action by the Governor was fatal to the NYPA’s ability to obtain financing to construct the proposed facility as approved by the air permit issued by USEPA. Id. Nevertheless, the NYPA requested that the EAB continue with its adjudication of the appeals of the air permit. Id. The NYPA made this request in response to the EAB’s inquiry regarding “what [the NYPA] thought the chances were that the project would be built and whether it intended to withdraw its [air permit] application [for the proposed facility].” Id. In response, the NYPA confirmed that it had indefinitely postponed work on the proposed facility “but was completely silent on whether the project had any chance of being built.” 1983 EPA App. LEXIS 6, \*3. “In the light of this silence” and the indefinite

postponement of work on the proposed facility, the EAB concluded that “there [was] no realistic prospect that construction of the project would [take place]” and that “[u]nder these circumstances, the permit [authorizing the NYPA’s construction of the project] should be denied.” *Id.* As a result of making these findings, the EAB “remanded [the matter] to the [USEPA] Regional Administrator for the purpose of issuing a final permit decision denying the [air] permit [for the proposed facility]. . . .” 1983 EPA App. LEXIS 6, \*5.

**B. MassDEP’s Construction of the APC Regulations Governing the Vacating of CPA is Consistent with MassDEP’s Wetlands Permit Policy Governing the Vacating of a Wetlands Permit When the Permittee No Longer Has a Reasonable Likelihood of Being Able to Proceed With the Proposed Project Approved by a Permit**

The EAB Final Decisions discussed above more than support MassDEP’s reasonable construction of the APC Regulations that if the specific site identified in a CPA application is no longer available for a proposed facility approved by a CPA, then the CPA applicant no longer has a reasonable likelihood of being able to proceed with the proposed facility and as such the CPA must be vacated, the CPA application for the proposed facility must be denied, and any pending administrative appeal of the CPA must be dismissed as moot. This reasonable construction of the APC Regulations by MassDEP is consistent with MassDEP’s permit policy in at least one another environmental program it enforces, specifically, the Wetlands Protection Program. As discussed below, MassDEP’s Wetlands Permit Policy requires the vacating of a Wetlands Permit authorizing a proposed project in protected wetlands areas if the permittee no longer has a reasonable prospect of going forward with the project.

The Massachusetts Wetlands Protection Act (“MWPA”), G.L. c. 131, § 40, “establishes Statewide minimum wetlands protection standards” enforced by MassDEP through its Wetlands Regulations at 310 CMR 10.00 in its permitting of proposed projects in protected Wetlands

areas, “[but] local communities are free to impose more stringent requirements [governing such proposed projects] by enacting local Wetlands Protection Bylaws.” In the Matter of Boston Environmental Corporation, OADR Docket Nos. WET-2013-033 & 034, Recommended Final Decision (November 29, 2017), 2017 MA ENV LEXIS 70, \*3-4, adopted as Final Decision (December 7, 2017), 2017 MA ENV LEXIS 69, citing, Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich, 449 Mass. 859, 866 (2007); Healer v. Department of Environmental Protection, 73 Mass. App. 714, 716 (2009). “[MassDEP] lacks jurisdiction to review decisions of local conservation commissions made pursuant to local Wetlands Protection Bylaws and Regulations” approving or rejecting proposed projects; such decisions must be appealed to Massachusetts Superior Court pursuant to the Certiorari Statute, G.L. c. 249, § 4. In the Matter of Hyde Development, LLC, OADR Docket No. WET-2020-006, Final Decision (October 22, 2020), 2020 MA ENV LEXIS 84, \*1-2. “As a result, a [Superseding Order of Conditions (“SOC” or “Wetlands Permit”)] issued by the Department under the MWPA [and the Wetlands Regulations] approving proposed work in protected wetlands areas cannot preempt a timely decision of a local conservation commission denying approval of the proposed work based ‘on provisions of a local bylaw that are more protective than the [MWPA].’” Boston Environmental Corporation, 2017 MA ENV LEXIS 70, \*4. “This deference to local regulation is supported by both General Condition No. 3 that appears in every SOC issued by the Department and the automatic stay provision of [the Adjudicatory Proceeding Rules at] 310 CMR 1.01(6)(h) . . . .” Id.

General Condition No. 3 provides that the SOC “does not relieve the [applicant or project proponent] . . . of *the necessity* of complying with all other applicable, federal, state, or *local statutes, ordinances, bylaws, or regulations.*” Id., \*4-5; Hyde Development, LLC, 2020 MA

ENV LEXIS 84, \*2-3 (emphasis supplied). The automatic stay provision of 310 CMR 1.01(6)(h) provides that “the Presiding Officer *shall stay* administratively any appeal [filed with OADR] of a superseding determination or order of conditions issued under [the MWPA] when the determination or order is denied under a local wetlands bylaw and the denial is appealed to court.” Boston Environmental Corporation, 2017 MA ENV LEXIS 70, \*5 (emphasis supplied).<sup>12</sup> The rule has long been in wetlands permit appeals before OADR that “if a [proposed] project is denied under a local wetlands bylaw, and ‘[the] denial . . . become[s] final . . . either because it is not appealed [to Superior Court] or because on appeal the denial is affirmed [by the Court], there remains no doubt that . . . [t]his forecloses [the project proponent’s ability to comply] with . . . General Condition [No.] 3 and, . . . therefore, . . . the project cannot [proceed].” In the Matter of Howard Fafard, OADR Docket Nos. 96-040, 96-044, Final Decision (December 4, 1996), 1996 MA ENV LEXIS 122, \*6-7; Boston Environmental Corporation, 2017 MA ENV LEXIS 70, \*5; Hyde Development, LLC, 2020 MA ENV LEXIS 84, \*3.

In sum, “[a] final local wetlands bylaw denial [of a proposed project] thus makes. . . further project review under the [MWPA] and [the Wetlands] Regulations, [a] . . . futile academic exercise[e], and as a result, (1) “an appeal before OADR challenging an SOC [issued pursuant to the MWPA and the Wetlands Regulations either approving or denying] the same project should be dismissed as moot in accordance with [the Adjudicatory Proceeding Rules at] 310 CMR 1.01(5)(a)2;”<sup>13</sup> and (2) “[the] SOC approving a project ‘must [also] be vacated in the

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<sup>12</sup> The Adjudicatory Proceeding Rules at 310 CMR 1.01(5)(a)3 and 310 CMR 1.01(5)(a)15.d grant the Presiding Officer discretion to stay the proceedings in a wetlands permit appeal “where the failure to previously obtain a final decision required under another law would result in an unnecessary expenditure of the Department’s administrative resources, or for other good cause.”

<sup>13</sup> 310 CMR 1.01(5)(a)2 provides in relevant part that “[t]he Presiding Officer may, on the Presiding Officer’s own initiative or on a party’s motion where appropriate . . . dismiss appeals for . . . mootness, . . . or where the record

final decision dismissing the appeal as moot, since the final local wetlands bylaw denial establishes that the project [cannot] be built as conditioned and [cannot] comply with General Condition 3 if it were built.” Howard Fafard, 1996 MA ENV LEXIS 122, \*6-7 (Final Decision issued vacating SOC approving proposed project and dismissing appeal of SOC as moot because local wetlands bylaw denial of proposed project was not appealed to Superior Court); Boston Environmental Corporation, 2017 MA ENV LEXIS 70, \*3-5 (Final Decision issued vacating SOC approving proposed project and dismissing appeal of SOC as moot because local wetlands bylaw denial of proposed project was affirmed by the Superior Court and the Court’s judgment was final); See also Hyde Development, LLC, 2020 MA ENV LEXIS 84, \*2-3 (Final Decision issued dismissing appeal of SOC denying proposed project as moot because local wetlands bylaw denial of proposed project was not appealed to Superior Court); In the Matter of Maria Bombara, Trustee, Buttermilk Bay Realty Trust Associates by its Successor in Interest, Somerset Savings Bank, OADR No. 88-190, Final Decision (July 20, 1995), 1995 MA ENV LEXIS 164, \*6-10 (Final Decision vacating SOC approving proposed project and dismissing appeal of SOC as moot because the owner had failed to pursue a local septic system permit for the proposed

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discloses that the proposed project [or] activity has been denied by a local, state or federal agency or authority pursuant to law other than that relied on by the Department in the decision appealed from, and such denial has become final.”

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project rendering it futile).

**III. A CPA APPLICANT’S INABILITY TO GO FORWARD WITH A PROPOSED PROJECT APPROVED BY A CPA IS MATERIAL INFORMATION THAT THE CPA APPLICANT MUST DISCLOSE AS PART OF THE CPA PERMITTING PROCESS AND IN AN ADMINISTRATIVE APPEAL OF A DRAFT CPA APPROVING THE PROJECT**

**A. The Mandatory Disclosure Requirement of the APC Regulations**

The APC Regulations bar a CPA applicant from:

- (1) “mak[ing] any false, inaccurate, incomplete, or misleading statements in any application, record, report, plan, design, statement or document which [is] . . . submi[tted] to the Department pursuant to . . . 310 CMR 7.00”;<sup>14</sup> and
- (2) “mak[ing] any false, inaccurate, incomplete, or misleading statements in any record, report, plan, file, log, or register which [it] is required to keep pursuant to . . . 310 CMR 7.00.”<sup>15</sup>

The APC Regulations also require “[a]ny person providing information [on behalf of a CPA applicant] required to be submitted to the Department pursuant to . . . 310 CMR 7.00 [to] make the following certification”:

I certify that I have personally examined the foregoing [document] and am familiar with the information contained in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including possible fines and imprisonment.”<sup>16</sup>

As reflected by their provisions, the APC Regulations discussed above are intended to prevent a CPA applicant from obtaining a CPA from MassDEP based on “false, inaccurate, incomplete, or misleading statements” to MassDEP. As a result, it is reasonable to construe

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<sup>14</sup> 310 CMR 7.01(2)(a).

<sup>15</sup> 310 CMR 7.01(2)(b).

<sup>16</sup> 310 CMR 7.01(2)(b).

these APC Regulations as also having a mandatory disclosure requirement requiring a CPA applicant to disclose information to MassDEP that is material to its determination of whether to grant or deny the requested CPA for a proposed project to prevent the CPA applicant from obtaining a CPA from MassDEP based on “misrepresentation by omission.” To construe these APC Regulations as not having such a mandatory disclosure requirement would allow a CPA applicant to withhold material information from MassDEP to mislead it into granting the requested CPA, a result not intended by the APC Regulations.

Given that under the APC Regulations a CPA is a site-specific air permit issued by MassDEP as discussed above, it is logical that the lack of a reasonable likelihood of a CPA applicant being able to go forward with a proposed facility approved by a CPA on the specific site identified in the CPA application is material information that the CPA applicant must disclose to MassDEP as part of the CPA permitting process. Logically it also follows that the CPA applicant’s failure to disclose such material information is an additional ground for vacating a Draft CPA approving a proposed project, denying the CPA applicant’s CPA application for the proposed project, and the dismissal as moot of a pending administrative appeal challenging the Draft CPA. As discussed in the next section below, the CPA applicant must also disclose this material information as a litigant in an administrative appeal challenging a Draft CPA because it is material to the Presiding Officer’s and MassDEP Commissioner’s adjudication of the appeal.

**B.     The Mandatory Disclosure Requirement of the Good Faith Filing Requirement of the Adjudicatory Proceeding Rules at 310 CMR 1.01(4)(b)**

The Adjudicatory Proceeding Rules at 310 CMR 1.00 govern the adjudication of administrative appeals before OADR, including this appeal of the Revised Draft CPA. 310 CMR 1.01(1)(a). These Rules, which are patterned after the Massachusetts Rules of Civil Procedure

(“Mass. R. Civ. P”) governing the adjudication of civil suits in Massachusetts trial courts,<sup>17</sup> include the good faith filing requirement of 310 CMR 1.01(4)(b).

The good faith filing requirement of 310 CMR 1.01(4)(b) mandates that:

*[all] [p]apers filed [by a party in an administrative appeal before OADR] shall be signed and dated by the party on whose behalf the filing is made or by the party’s authorized representative [and] [t]his signature shall constitute a certification that the signer has read the document and believes the content of the document is true and accurate, and that the document is not interposed for delay. . . .*

(emphasis supplied).<sup>18</sup> The purpose of the good faith filing requirement of 310 CMR 1.01(4)(b) is to prohibit the parties in an appeal from asserting frivolous claims and to ensure that their claims have a reasonable factual and legal basis.

It is possible for a party’s claims to have a reasonable factual and legal basis when initially made in an appeal but later no longer having such a basis due to changed circumstances. If a party’s claims in an appeal are no longer viable due to changed circumstances, this is material information impacting the Presiding Officer’s and MassDEP Commissioner’s adjudication of the appeal, and as such, it is reasonable to construe the good faith filing requirement of 310 CMR 1.01(4)(b) as requiring the party to disclose it in the appeal. This mandatory disclosure requirement is fully consistent with the mandate of the Adjudicatory Proceeding Rules that the Presiding Officer and MassDEP’s Commissioner “constru[e] [the

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<sup>17</sup> See Mass. R. Civ. P. 1. The Massachusetts Rules of Civil Procedure govern adjudication of civil suits or proceedings in Massachusetts trial courts such the Superior Court, the Housing Court, the Probate and Family Court in proceedings seeking equitable relief, the Juvenile Court in proceedings seeking equitable relief, the Land Court, the Boston Municipal Court, and District Courts in Boston and other Massachusetts municipalities.

<sup>18</sup> By comparison, Mass. R. Civ. P. 11(a)(1) provides that:

Every pleading of a party represented by an attorney [filed in a Massachusetts Trial Court governed by the Mass. R. Civ. P.] shall be signed by at least one attorney who is admitted to practice in this Commonwealth in the attorney’s name. . . . Parties who are not represented by an attorney shall sign their pleadings . . . . The signature of any attorney to a pleading constitutes a certificate that the attorney has read the pleading; that to the best of the attorney’s knowledge, information, and belief there is a good ground to support it; and that it is not interposed for delay. . . .

Rules in a manner] to secure a just and speedy determination of [the] appeal”<sup>19</sup> and “to take any action authorized by M.G.L.

c. 30A to conduct a just, efficient[,] and speedy adjudicatory appeal,” including the Presiding Officer’s issuance of a “[written] fair and impartial recommended [final] decision [in the appeal] for consideration by [MassDEP’s] Commissioner.”<sup>20</sup> Put another way, to construe the good faith filing requirement of 310 CMR 1.01(4)(b) as not having such a mandatory disclosure requirement would allow a party in an appeal to withhold material information from the Presiding Officer and MassDEP’s Commissioner to mislead them into adjudicating the appeal in their favor. This, in essence, would enable a party to obtain a favorable adjudication of an appeal via misrepresentation by omission, an unjust result wholly inconsistent with the mandate of the Adjudicatory Proceeding Rules that administrative appeals before OADR be adjudicated in a just manner. 310 CMR 1.01(1)(b), 1.01(5)(a).

In the context of an administrative appeal of a Draft CPA, changed circumstances requiring mandatory disclosure of material information in the appeal pursuant to the good faith filing requirement of 310 CMR 1.01(4)(b) include where the CPA applicant no longer has a reasonable likelihood of proceeding with the proposed project approved by the Draft CPA because this is material information impacting the Presiding Officer’s and the MassDEP Commissioner’s adjudication of the appeal. Specifically, such a circumstance warrants the Presiding Officer’s issuance of a Recommended Final Decision and the MassDEP Commissioner’s issuance of a Final Decision in the appeal vacating the Draft CPA, denying the

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<sup>19</sup> 310 CMR 1.01(1)(b). By comparison, Mass. R. Civ. P. 1 provides that Massachusetts trial court judges in civil suits or proceedings governed by the Mass. R. Civ. P. (see n. 17, at p. 27 above) and the parties in those matters “should [] contru[e], administe[r], and emplo[y] [the Mass. R. Civ. P.] to secure the just, speedy, and inexpensive determination of every action and proceeding.”

<sup>20</sup> 310 CMR 1.01(5)(a).

CPA application for the proposed project approved by the Draft CPA, and dismissing the appeal as moot.

The Adjudicatory Proceeding Rules at 310 CMR 1.01(10)(c) authorize the Presiding Officer to “impose appropriate sanctions” on a party in an appeal for having failed to comply with the good faith filing requirement of 310 CMR 1.01(4)(b). The range of appropriate sanctions that the Presiding Officer may assess against the party “include, without limitation”:

- (1) taking designated facts or issues as established against the party;<sup>21</sup>
- (2) prohibiting the party from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;<sup>22</sup>
- (3) striking the party’s pleadings in whole or in part;<sup>23</sup>
- (4) dismissing the party from the appeal;<sup>24</sup> and
- (5) issuing a Recommended Final Decision recommending that MassDEP’s Commissioner issue Final Decision against the party.<sup>25</sup>

Thus, a CPA applicant in an administrative appeal of a Draft CPA who violates the good faith filing requirement of 310 CMR 1.01(4)(b) by failing to disclose that it lacks the ability to go forward with the proposed project that was approved by the Draft CPA faces a specter of sanctions under 310 CMR 1.01(10). These sanctions “include, without limitation” the issuance of a Recommended Final Decision by the Presiding Officer and a Final Decision by MassDEP’s Commissioner in the appeal vacating the Draft CPA, denying the CPA applicant’s CPA application for the proposed project, and dismissing the appeal as moot.

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<sup>21</sup> 310 CMR 1.01(10)(a).

<sup>22</sup> 310 CMR 1.01(10)(b).

<sup>23</sup> 310 CMR 1.01(10)(d).

<sup>24</sup> 310 CMR 1.01(10)(f).

<sup>25</sup> 310 CMR 1.01(10)(g).

**C. BP's Failure to Comply with the Mandatory Disclosure Requirements of the APC Regulations and the Good Faith Filing Requirement of 310 CMR 1.01(4)(b)**

Here, as discussed in detail below, BP failed to comply with the mandatory disclosure requirements of the APC Regulations and the good faith filing requirement of 310 CMR 1.01(4)(b) by failing to disclose prior to and after issuance of former Commissioner Suuberg's Nov. 2021 HIA Study Order that there was no reasonable likelihood of BP being able to go forward with the proposed Power Plant as approved by the Revised Draft CPA because the Brockton Site was no longer available for the facility. BP's failure to disclose this material information was not inadvertent and resulted in the expenditure of a considerable amount of valuable: (1) private pro bono legal services of the Petitioners' legal counsel; and (2) publicly funded agency resources of MassDEP to lay the groundwork for an HIA Study of the proposed Power Plant, a facility that would never be. More private and public resources would have gone for naught if not for the Petitioners having learned of and bringing to light BP's inability to go forward with the proposed Power Plant as approved by the Revised Draft CPA due to the Brockton Site no longer being available for the facility.

**1. The Origins of the Nov. 2021 HIA Study Order: The May 2019 Oral Argument of the Parties' Respective Legal Counsel Before Former Commissioner Suuberg**

In May 2019, pending before former Commissioner Suuberg was my Recommended Final Decision on Remand ("RFD on Remand") which recommended that he issue a Final Decision in this appeal affirming the Revised Draft CPA as being compliant with EEA's 2017 EJ Policy.<sup>26</sup> My RFD on Remand had made this recommendation based: (1) on a preponderance of the voluminous evidence presented by the Parties at the September 2015 Hearing and October

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<sup>26</sup> See n. 3, at pp. 3-4 above.

2017 Remand Hearing that I had conducted in the appeal, (2) the requirements of EEA's 2017 EJ Policy, and (3) the statutory and regulatory requirements governing MassDEP's issuance of CPAs. 2021 Interlocutory Decision, at pp. 5-6.

To assist him in determining whether to adopt my RFD on Remand as his Final Decision in the appeal, former Commissioner Suuberg heard oral argument from the Parties' respective legal counsel.<sup>27</sup> At the oral argument, BP and MassDEP supported my RFD on Remand and requested that former Commissioner Suuberg adopt it as his Final Decision in the appeal. However, the Petitioners took the opposite view.

The focus of the Petitioners' opposition to my RFD on Remand was their contention that former Commissioner Suuberg should not issue a Final Decision in the appeal but instead remand the matter to MassDEP to perform an HIA Study of the proposed Power Plant utilizing the data on the Massachusetts Department of Public Health's ("MDPH") Massachusetts Environmental Public Health Tracking Website ("MEPH Tracking Website").<sup>28</sup> 2021 Interlocutory Decision, at 9-13. The Petitioners contended that such an HIA Study was necessary to determine whether the emissions from the proposed Power Plant would result in discriminatory disparate impacts on nearby residents. *Id.* BP and MassDEP disagreed, supporting my finding in the RFD on Remand that an HIA Study of the proposed Power Plant was unnecessary because BP had presented sufficient evidence in the September 2015 Hearing and October 2017 Remand Hearing consistent with the statutory and regulatory requirements governing MassDEP's issuance of CPAs and requirements of EEA's 2017 EJ Policy

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<sup>27</sup> The Adjudicatory Proceeding Rules at 310 CMR 1.01(14)(a) provide that "[MassDEP's] Commissioner shall have the discretion to allow or order the parties to argue orally before the Commissioner."

<sup>28</sup> <https://matracking.ehs.state.ma.us>.

demonstrating that emissions from the proposed Power Plant would not result in discriminatory disparate impacts on nearby residents. Id.

**2. Former Commissioner Suuberg’s Issuance of the Nov. 2021 Study Order and MassDEP’s Expenditure of Significant Publicly Funded Agency Resources Thereafter to Comply with the Order**

On November 12, 2021, former Commissioner Suuberg issued a Second Interlocutory Remand Decision granting the Petitioners’ request that the matter be remanded to MassDEP for the purpose of having an HIA Study performed of the proposed Power Plant the results of which he would consider with the other evidence in the Administrative Record of the appeal in determining whether the emissions from the proposed Power Plant would result in discriminatory disparate impacts on nearby residents in violation of EEA’s recent 2021 EJ Policy, which was issued after the 2021 Climate Act’s enactment and replaced EEA’s 2017 EJ Policy. 2021 Interlocutory Remand Decision, at pp. 1-3, 6-13. As discussed below, MassDEP immediately began taking actions to comply with the Nov. 2021 HIA Study Order after it was issued by former Commissioner Suuberg, and while MassDEP was doing so, BP was aware, but failed to disclose, in violation of the mandatory disclosure provisions of the APC Regulations and the good faith filing requirement of 310 CMR 1.01(4)(b), that there was no reasonable likelihood of BP being able to go forward with the proposed Power Plant as approved by the Revised Draft CPA because the Brockton Site was no longer available for the facility.

In his Nov. 2021 HIA Study Order, former Commissioner Suuberg ordered that “[the] Department [was] to develop a proposed plan and schedule for conducting the HIA Study of the proposed Power Plant . . . after providing the Petitioners and [BP] with a reasonable opportunity to provide input and suggestions for the proposed plan and schedule.” 2021 Interlocutory Remand Decision, at p. 12. “The Department [was also to] seek the cooperation and assistance



of MDPH in connection with the planning and implementation of the HIA Study of the proposed Power Plant” and “[its] proposed plan and schedule for conducting the HIA Study of the proposed Power Plant [was to] include a specific recommendation as to determine whether principal responsibility for conducting the HIA Study should be placed upon [BP] or rest with the Department.” 2021 Interlocutory Remand Decision, at p. 12.

Under the Nov. 2021 HIA Study Order, “[t]he Department [was to file] its proposed plan and schedule for the HIA Study of the proposed Power Plant . . . [within] 120 days [after issuance] . . . of [the 2021] Interlocutory Remand Decision”: by March 14, 2022. *Id.*, at p. 13. Within 30 days thereafter, the Petitioners and BP were to file any comments on MassDEP’s proposed plan and schedule. *Id.* After receiving their comments, I was to “thereafter issue an order recommending a specific plan and schedule for the HIA Study of the proposed Power Plant, for consideration and approval” by MassDEP’s former Commissioner, who “[would] then issue specific authorization and direction for the conduct of the HIA Study of the proposed Power Plant, culminating in the preparation of an HIA Report which [would] be filed and served upon all [the] Parties . . . .” *Id.* After the HIA Report was filed and served upon all the Parties, I “[was to] establish a schedule for further proceedings in the appeal, aimed at facilitating the issuance of a Final Decision in this appeal [by MassDEP’s former Commissioner] as expeditiously as possible.” *Id.*

Following the issuance of the Nov. 2021 HIA Study Order, MassDEP “set up an internal group of Department employees [led by MassDEP’s Deputy Commissioner for Operations] to discuss the process of conducting [an] HIA [Study] for the proposed power plant and the resources necessary to complete that process.” Parties’ First Joint Status Report of December 14,

2021 (“Parties’ Dec. 2021 Status Report”), at p. 3.<sup>29</sup> This group included MassDEP’s Assistant Commissioner for the Bureau of Air and Waste (“BAW”), which administers MassDEP’s air permitting program, and several BAW staff involved in the process of potentially hiring a consultant to assist MassDEP in developing the proposed HIA plan and schedule. *Id.*, at p. 4. A staff member from MassDEP’s Office of Research and Standards also began identifying a technical team to assist in the scoping of the HIA. Parties’ Dec. 2021 Status Report, at p. 4. The Director of MassDEP’s Environmental Justice program was also going to assist in determining the organizations that would be involved in the HIA Study and would also ensure the HIA process complied with EEA’s and MassDEP’s Environmental Justice Policies and requirements.” *Id.* Air Program staff in MassDEP’s Southeast Regional Office from which the Original Draft CPA and the Revised Draft CPA had been issued, were also involved in the planning process for the HIA Study of the proposed Power Plant. *Id.* MassDEP also contacted MDPH to request advice and assistance in the HIA process and planned to coordinate with MDPH on the next steps in the HIA Study process if MassDEP retained a consultant to assist MassDEP in developing the proposed HIA plan and schedule. *Id.*

On December 2, 2021, 20 days after issuance of the Nov. 2021 HIA Study Order, the Parties, through their respective counsel, “met via video conference . . . to discuss the . . . proposed plan and schedule for conducting an HIA,” including “the Department’s potential use of consultants to assist in the planning and scoping of the HIA and the need for the process to be transparent and meet the requirements of the [Nov. 2021 HIA Study Order].” *Id.*, at p. 3. “At

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<sup>29</sup> The Parties’ Dec. 2021 Status Report was one of three Joint Status Reports that the Parties filed with OADR in response to my November 12, 2021 Order requiring the Parties to file Joint Status Reports with OADR on December 14, 2021, January 14, 2022, and February 14, 2022 setting forth the actions that had been taken to have an HIA Study performed of the proposed Power Plant. As discussed above, at pp. 35-39, several days prior to the Parties’ filing of their initial Dec. 2021 Status Report, BP’s failure to disclose prior to and after issuance of the Nov. 2021 HIA Study Order that there was no reasonable likelihood of BP being able to go forward with the proposed Power Plant on the Brockton Site as authorized by the Revised Draft CPA first came to light.

that time, both [BP] and the Petitioners agreed that the Department should conduct the HIA rather than have [BP] conduct the HIA.” Id. BP took this position notwithstanding that it was aware, but failed to disclose, in violation of the mandatory disclosure provisions of the APC Regulations and the good faith filing requirement of 310 CMR 1.01(4)(b), that was no reasonable likelihood of BP being able to go forward with the proposed Power Plant as approved by the Revised Draft CPA due to the Brockton Site no longer being available for the facility.

**3. The Petitioners’ Discovery of the Brockton Site No Longer Being Available for the Proposed Power Plant as Approved by the Revised Draft CPA**

On December 13, 2021, 31 days after issuance of the Nov. 2021 HIA Study Order, the Parties, through their respective counsel, met for a second time via video conference, originally to continue their initial discussions of December 2, 2021 regarding MassDEP’s performance of the HIA Study of the proposed Power Plant. Parties’ Dec. 2021 Status Report, at p. 3. Instead, “[t]he focus of the discussion on the December 13th conference call was the newly-discovered [material] information and documentation” that the Petitioners had obtained from a Brockton City Council member and the Petitioners’ counsel had shared with MassDEP’s and BP’s respective counsel on the previous date, December 12, 2021, evidencing that there was no reasonable likelihood of BP being able to go forward with the proposed Power Plant as approved by the Revised Draft CPA due to the Brockton Site no longer being available for the facility. Id., at pp. 3-8.

Specifically, the newly discovered material information and documentation that the Petitioners’ counsel shared with MassDEP’s and BP’s respective counsel on December 12, 2021 evidenced the Developer’s intention to purchase the Brockton Site and build a large commercial warehouse there. Id., at p. 4. This newly discovered material information and documentation

revealed that the Developer's purchase of the Brockton Site had been in the works for more than one year prior to the issuance of the Nov. 2021 HIA Study Order: since June 29, 2020, when the Developer executed the P & S to purchase the Brockton Site from the prior Brockton Site Owner. Id., at pp. 5-6. Prior to the execution of this P & S, BP had had an option to purchase the Brockton Site, which ceased to exist prior to or when the Developer executed the P & S with the prior Brockton Site Owner.

After executing the P & S, the Developer did not acquire the Brockton Site until one and one-half (1.5) years later, on December 13, 2021, after conducting an extensive land use review of the Brockton Site to determine the feasibility of constructing a large commercial warehouse there and obtaining the Brockton Planning Board's Site Plan approval to build the facility there. Given the one and one-half (1.5) years that passed prior to the Developer's acquisition of the Brockton Site, BP knew or should have known during that time that the Brockton Site was no longer available to locate the proposed Power Plant as approved by the Revised Draft CPA. This is reflected by the following events that occurred during that time period as evidenced by the documentation that the Petitioners had obtained.

Paragraph 4.1 of the P & S provided that the Developer could at its expense, "conduct an investigation of the [Brockton Site], which [could] include an examination of . . . , conformance of the [Brockton Site] to applicable laws, rules, zoning, health[,], and other codes and regulations, conduct engineering, and other inspections, site evaluations and such other evaluations, inspections test borings, soil tests, percolation tests and tests as [the Developer] desire[d]." Petitioners' Exhibit A to Parties' Dec. 2021 Status Report (P & S, ¶ 4.1). The Developer was to complete this investigation of the Brockton Site within 90 days of the P & S's execution, by September 27, 2020. Id.

Paragraph 4.1 of the P & S also provided that “[f]ollowing the initial 90-day [investigation] period [the Developer would] have an additional 9-month period for the purpose of obtaining the necessary permits [from the City of Brockton] to construct and use at least a 160,000 square foot one-story industrial building [on the Brockton Site]” and that the Developer’s purchase of the Brockton Site “[was] contingent upon [the latter’s] obtaining [those necessary] permits and approvals [from the City of Brockton].” Id.

On September 24, 2020, the Developer executed a First Amendment to the P & S with the prior Brockton Site owner that extended the 90-day investigation period from September 27, 2020 to October 9, 2020. Petitioners’ Exhibit C to Parties’ Dec. 2021 Status Report (First Amendment to P & S, ¶ 2). The 90-day investigation period concluded on October 9, 2020 and “the [additional] 9-month period for [the Developer] to obtain the necessary permits [from the City of Brockton] to construct and use at least a 160,000 square foot one-story industrial building [on the Brockton Site commenced and would] en[d] on July 9, 2021.” Petitioners’ Exhibit B to Parties’ Dec. 2021 Status Report (Second Amendment to P & S, at pp. 1-2). Under Paragraph 4.1 of the P & S Agreement, the Closing Date for the sale of the Brockton Site to the Developer would be within 30 days after July 9, 2021 or by August 9, 2021.

On May 6, 2021, the Developer executed a Second Amendment to the P & S with the prior Brockton Site owner that extended the July 9, 2021 Closing Date by six (6) months to February 9, 2022. Exhibit B to Parties’ Dec. 2021 Status Report (Second Amendment to P & S, at pp. 1-2). The Second Amendment to the P & S provided that the six (6) month extension of the Closing Date was necessary because the COVID-19 pandemic had caused the Developer “[to] experience[e] scheduling delays in the permitting and approval process with the City of

Brockton” regarding the Developer’s desire to construct and use at least a 160,000 square foot one-story industrial building on the Brockton Site. Id.<sup>30</sup>

At or about the same time the Second Amendment to the P & S was executed, the Developer filed an Application for the Brockton Site Plan Review with the Brockton Planning Board containing “detailed plans for the construction of a new warehouse on the [Brockton] Site, on the very same location where [BP] claim[ed] it expect[ed] to construct [and operate the proposed] power plant” which MassDEP had approved in the Original Draft CPA and later in the Revised Draft CPA and “for which [BP] continue[d] to seek [a final CPA] from the Department” in this appeal. Parties’ Dec. 2021 Status Report, at p. 6; Petitioners’ Exhibits D and E to Parties’ Dec. 2021 Status Report. On December 7, 2021, the Brockton Planning Board approved the Developer’s Application for Site Plan Review and issued a Site Plan approval for construction of the warehouse on the Brockton Site. Parties’ Dec. 2021 Status Report, at p. 6.

On December 13, 2021, the same day that the Parties’ respective counsel met for a second time via video conference as discussed above and unbeknownst to the Petitioners and MassDEP at the time, the Developer acquired the Brockton Site from the prior Brockton Site owner by Quitclaim Deed. Third Joint Status Report of the Parties, February 14, 2022 (“Parties’ Feb. 2022 Status Report”), at pp. 1-3; Exhibit 1 to Parties’ Feb. 2022 Status Report. This Quitclaim Deed was later recorded with the Plymouth County Registry of Deeds on January 10, 2022. Exhibit 1 to Parties’ Feb. 2022 Status Report. Within the next eight months, by at least September 2022, as evidenced by MassDEP’s documentation, the Developer commenced

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<sup>30</sup> When the Second Amendment to the P & S was executed on May 6, 2021, the Commonwealth and the rest of the United States had been through the throes of the COVID-19 Pandemic for more than one year: since March 2020. The COVID-19 Pandemic officially ended on May 11, 2023. <https://www.cdc.gov/coronavirus/2019-ncov/your-health/end-of-phe.html#:~:text=The%20federal%20COVID%2D19%20PHE,to%20align%20with%20data%20changes>.

construction of the warehouse pursuant to the Brockton Planning Board's Site Plan Review approval.<sup>31</sup> This construction was documented by MassDEP's Southeast Regional Office and brought to the Petitioners' and BP's attention in September 2022.<sup>32</sup>

**IV. BP'S UNREASONABLE REFUSAL TO VOLUNTARILY WITHDRAW ITS CPA APPLICATION FOR THE PROPOSED POWER PLANT AFTER THE PETITIONERS' DISCOVERY OF BP'S INABILITY TO GO FORWARD WITH THE PROPOSED POWER PLANT ON THE BROCKTON SITE AS APPROVED BY THE REVISED DRAFT CPA**

In accordance with the mandatory disclosure requirements of APC Regulations and the good faith filing requirement of 310 CMR 1.01(4)(b) discussed above, prior to issuance of the Nov. 2021 HIA Study Order BP should have disclosed that BP no longer had the ability to go forward with the proposed Power Plant as approved by the Revised Draft CPA due to the Brockton Site no longer being available for the facility, and for the same reason, voluntarily withdrawn its CPA application for the proposed Power Plant. Had BP done this, it would have brought the litigation of this appeal to a quick and just end with the Revised Draft CPA being vacated, BP's CPA application for the proposed Power Plant denied, and the Petitioners' appeal of the Revised Draft CPA being dismissed as moot. Undisputedly, BP failed to do this, causing former Commissioner Suuberg's significant efforts in first deliberating whether to issue the Nov. 2021 HIA Study Order and then issuing the Order to be for naught. It also caused to be for naught all the significant efforts of the Petitioners' private pro bono counsel in seeking and obtaining the Nov. 2021 HIA Study Order and MassDEP staff in complying with the Order.

Following the Petitioners' December 12, 2021 revelation of the material information discussed above evidencing BP's inability to go forward with the proposed Power Plant as approved by the Revised Draft CPA and, at the very least, after the Developer acquired the

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<sup>31</sup> See n. 8, at p. 14 above; and pp. 45-48 below.

<sup>32</sup> *Id.*

Brockton Site on December 13, 2021 and began building the large commercial warehouse there, BP had multiple opportunities to do right by withdrawing its CPA application for the proposed Power Plant. However, as discussed below, BP refused to do so, contending without any valid legal basis that MassDEP was required to continue with its CPA permitting review of the proposed Power Plant, including resuming the resource intensive HIA Study of the facility, even though there is no reasonable likelihood of BP being able to go forward with the facility as approved by the Revised Draft CPA due to the Brockton Site no longer being available for the facility.

**A. BP's Refusal to Withdraw Its CPA Application for the Proposed Power Plant in Making Meritless Claims in the Parties' Dec. 2021 Status Report**

First, as reported by the Petitioners in the Parties' Dec. 2021 Report, BP's counsel's response to the Petitioners' counsel's December 12, 2021 revelation of the newly discovered material information and documentation evidencing BP's inability to go forward with the proposed Power Plant on the Brockton Site as approved by the Revised Draft CPA was "that he had not been previously aware" that the Brockton Site was in the process of being sold to the Developer for development of a warehouse on the Brockton Site. Parties' Dec. 2021 Report, at pp. 6, 9. Nevertheless, BP's counsel advocated on behalf of BP "that the process [for MassDEP to perform an HIA Study of the proposed Power Plant] should [continue] and be implemented and completed expeditiously . . . ." Parties' Dec. 2021 Report, at pp. 8-9.

Regardless of what BP's counsel knew prior to the Petitioners' revelation of the material information and documentation discussed above revealing BP's inability to go forward with the proposed Power Plant on the Brockton Site as approved by the Revised Draft CPA, it is undisputable that prior to and after issuance of the Nov. 2021 HIA Study Order, *BP knew* this material information, but failed to disclose it. At a minimum, as of December 13, 2021, when



the Developer acquired the Brockton Site by Quitclaim Deed following the Brockton Planning Board's December 7, 2021 approval of the Developer's Site Plan for construction of the large warehouse on the Site, BP knew that it would not be able to proceed with the proposed Power Plant on the Brockton Site as approved by the Revised Draft CPA.

Also cutting against BP's claim that it could still proceed with the proposed Power Plant on the Brockton Site notwithstanding that it had been sold to the Developer who was in the process of building a large commercial warehouse there, is that no one made a certification on behalf of BP pursuant to the APC Regulations at 310 CMR 7.01(2)(b) discussed above certifying the claim as being "true, accurate, and complete." It is reasonable to posit that the lack of such a certification evinces the meritless nature of BP's claim given that 310 CMR 7.01(2)(b) provides "that there are significant penalties for submitting false information [to MassDEP in connection with a CPA application], including possible fines and imprisonment."

**B. BP's Refusal to Withdraw Its CPA Application for the Proposed Power Plant in Opposing MassDEP's Motion to Stay Its Performance of the HIA Study of the Proposed Power Plant**

As the Petitioners aptly noted in the Parties' Dec. 2021 Status Report, the Petitioners' revelation of the material information and documentation evidencing BP's inability to go forward with the proposed Power Plant on the Brockton Site as approved by the Revised Draft CPA "[was] of major significance, and . . . fundamentally undermine[d] and eliminate[d] the continued viability of [BP's] CPA Application" before MassDEP and ability to obtain a Final CPA in this appeal for the proposed Power Plant. Parties' Dec. 2021 Report, at pp. 6-7.

Additionally, "[g]iven the considerable time, effort, and public resources of the Department that [would be] required to be deployed . . . to plan and conduct [an HIA of the proposed Power Plant], with requested assistance from [MDPH ], and input from the [Petitioners] and other

interested stakeholders, . . . it would [have been] irresponsible and wasteful to continue with the significant endeavor of planning for a HIA to assess the health impact of [the proposed] power plant, in light of the [newly discovered material] information” and documentation at issue. Id., at p. 7. For these reasons, I issued an Order on March 22, 2022 granting MassDEP’s Motion to Stay its performance of an HIA Study of the proposed Power Plant.

The Petitioners supported MassDEP’s Motion to Stay but BP opposed the Motion, contending that there was no regulatory requirement mandating that BP had to show ownership or control of the Brockton Site to obtain a final CPA from MassDEP authorizing BP’s construction and operation of the proposed Power Plant on the Brockton Site. Id., at p. 2. BP asserted that claim even though it was aware that the basis of MassDEP’s decision to halt its CPA permit review and the HIA Study of the proposed Power Plant was that there was no reasonable likelihood of BP being able to go forward with the proposed Power Plant as approved by the Revised Draft CPA because the Brockton Site was no longer available for the facility as a result of the Developer having acquired it and proceeding to build a large commercial warehouse there. Also, once again no one made a certification on behalf of BP pursuant to the APC Regulations at 310 CMR 7.01(2)(b) discussed above certifying as being "true, accurate, and complete" BP’s claim that it could still proceed with the proposed Power Plant on the Brockton Site notwithstanding the Developer’s ownership of the Brockton Site and plans to build a large commercial warehouse there. The lack of such a certification further evinces the meritless nature of BP’s claim given the serious consequences that could befall a CPA applicant under 310 CMR

7.01(2)(b) for submitting false information to MassDEP during the CPA permit review process.

**C. BP's Refusal to Withdraw Its CPA Application for the Proposed Power Plant in Responding to the Presiding Officer's March 22, 2022 Orders**

My March 22, 2022 Order staying MassDEP's performance of an HIA Study of the proposed Power Plant also directed BP to file a legal memorandum by April 5, 2022, demonstrating cause why I should not issue a Recommended Final Decision on Second Remand recommending that MassDEP's Commissioner issue a Final Decision rescinding the Revised Draft CPA and dismissing the Petitioners' appeal of the Revised Draft CPA as moot. March 22<sup>nd</sup> Orders, at p. 6. I ordered BP to include with its legal memorandum "an Affidavit from [BP's] Manager or another duly authorized [BP] representative . . . explaining in detail why [BP had]":

- (1) failed to disclose prior to the issuance of the Nov. 2021 HIA Study Order that the prior Brockton Site owner intended to convey the Site to the Developer who intended to build a large commercial warehouse at the Site;
- (2) failed to disclose prior to the filing of Parties' First Joint Status Report on December 14, 2021 that the prior Brockton Site owner had conveyed the Brockton Site the day before to the Developer by Quitclaim Deed who intended to build a large commercial warehouse on the Site; and
- (3) failed to disclose prior to the filing of Parties' Third Joint Status Report on February 14, 2022 that on December 13, 2021 the prior Brockton Site owner had conveyed the Brockton Site to the Developer by Quitclaim Deed that had been recorded with the Plymouth County Registry of Deeds on January 10, 2022.

March 22<sup>nd</sup> Orders, at pp. 6-7.

In response, on April 4, 2022 BP filed: (1) a Memorandum in Response to the Order to Show Cause ("BP's Memorandum") and (2) the Affidavit of R. Robert Popeo, Jr. ("Mr. Popeo, Jr.'s Affidavit"). March 22<sup>nd</sup> Orders, at p. 6. Both filings were problematic for the following reasons.

First, BP's Memorandum re-asserted BP's meritless claim that MassDEP was required to continue with its CPA permitting review of the proposed Power Plant, including resuming the resource-intensive HIA Study of the facility notwithstanding that there was no reasonable likelihood of BP being able to go forward with the proposed Power Plant as approved by the Revised Draft CPA because the Brockton Site had been sold to the Developer who was in process of building a large commercial warehouse there. In re-asserting its meritless claim, however, BP did not deny that the Developer had acquired the Brockton Site in December 2021 and was in process of constructing a large commercial warehouse there.

In his Affidavit on behalf of BP, Mr. Popeo Jr. stated that he spoke for BP as its legal counsel even though he was employed by Cashman Dredging and Marine Contracting Co., LLC ("CDMCC") as an in-house counsel.<sup>33</sup> Moreover, as reflected by the Administrative Record of this appeal, at no time since this appeal's filing appeal in 2011 has Mr. Popeo, Jr. ever appeared as counsel for BP in this appeal.

Mr. Popeo, Jr.'s Affidavit also did not explain the nature of his association with BP,<sup>34</sup> or in what capacity he had been an attorney for BP. For instance, he did not state in his Affidavit how he has represented BP for purposes of developing the proposed Power Plant project or for any other purpose, other than the preparation of his Affidavit in response to my March 2022 Orders. He also did not state whether he had conducted any investigation of the

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<sup>33</sup> An in-house counsel:

is an attorney who is employed by a company and handles its in-house legal affairs. In-house counsel represents the entity in a particular case or legal proceeding and receives a full-time salary from the company. Also known as house counsel, inside counsel, or corporate counsel.

[https://www.law.cornell.edu/wex/in-house\\_counsel](https://www.law.cornell.edu/wex/in-house_counsel).

<sup>34</sup> However, Public Records on file at the Massachusetts Secretary of State's Office revealed that CDMCC's Manager was Jay Cashman ("Mr. Cashman") who was also BP's Manager.

knowledge possessed by BP's Manager, Mr. Cashman,<sup>35</sup> or any of BP's business agents, to provide him with a good-faith factual basis for asserting under oath what BP reportedly knew or did not know regarding the Brockton Site's conveyance to the Developer and the latter's intent to construct a large commercial warehouse on the Brockton Site.

In his Affidavit, Mr. Popeo, Jr. claimed a lack of knowledge on the part of BP regarding the Brockton Site's conveyance to the Developer. He claimed as such notwithstanding:

(1) BP's status as a highly sophisticated business entity that pursued the development of a complex project such as the proposed Power Plant; (2) BP ceasing to have an option to purchase the Brockton Site prior to or when the Developer executed a P & S on June 29, 2020 to purchase the Brockton Site; and (3) the extensive land use review of the Brockton Site that the Developer had conducted of the Brockton Site during the one and one-half (1.5) years preceding its purchase of the Brockton Site in December 2021 to determine the feasibility of constructing a large commercial warehouse there. Regardless of what he knew, Mr. Popeo, Jr. did not deny that the Developer had acquired the Brockton Site in December 2021 and that the latter was in process of constructing a large commercial warehouse there. He also did not certify on behalf of BP pursuant to the APC Regulations at 310 CMR 7.01(2)(b) discussed above as "true, accurate, and complete" BP's claim that it could still proceed with the proposed Power Plant on the Brockton Site as approved by the Revised Draft CPA notwithstanding the Developer's ownership of the Brockton Site and plan to build a large commercial warehouse there.

**D. BP's Refusal to Withdraw Its CPA Application for the Proposed Power Plant After the Filing of the September 2022 Cushing Affidavit**

On September 21, 2022, Thomas Cushing, the Chief of the Air Permit Program in MassDEP's Southeast Regional Office which had issued the Original Draft CPA and the

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<sup>35</sup> See n. 34, at p. 44 above.

Revised Draft CPA to BP, filed an Affidavit with OADR which included recent photographs that he had taken on September 2 and 16, 2022 confirming that a large commercial warehouse was in the process of being built on the Brockton Site. Affidavit of Thomas A. Cushing, September 21, 2022 (“Mr. Cushing’s Affidavit”), ¶¶ 1-4; and Exhibits 1A through D and 2A through B attached to Mr. Cushing’s Affidavit. By virtue of his position in MassDEP’s Southeast Regional Office and his having provided extensive testimony in the two evidentiary adjudicatory hearings that I have conducted in this appeal, Mr. Cushing has demonstrated significant expertise of MassDEP CPA air permitting requirements and personal knowledge of MassDEP’s permitting of the proposed Power Plant at issue in this appeal. Mr. Cushing’s Affidavit, ¶¶ 1-2.

In his Affidavit, Mr. Cushing stated that “[o]n September 2 and 16, 2022, [he] drove to the [Brockton] Site to observe any activity taking place at the [Brockton] Site” and that on both dates “[he] observed several pieces of heavy equipment moving earth and materials around the [Brockton] Site.” Mr. Cushing’s Affidavit, ¶ 4. He stated that he “also observed several large steel beams put permanently in place [on the Brockton Site] to create the framework of a building” and that “[i]t appeared to [him] that the construction of an industrial building, consistent with that of a warehouse, was taking place at the Site.” *Id.* He stated that “[t]his industrial building extended over much of [the Brockton Site where] the proposed Brockton Power Facility [would have been located].” *Id.* He stated that “[he] took four (4) photographs of what [he] observed at the [Brockton] Site on September 2, 2022 and two (2) photo[graph]s of what [he] observed at the Site on September 16, 2022” and that “[t]hese photo[graph]s depict the construction activity [that was taking place at the [Brockton] Site on September 2 and 16,

2022 respectively], including an individual in a lift, and framework installed.” *Id.*; Exhibits 1A through D and 2A through B attached to Mr. Cushing’s Affidavit.

In his Affidavit, Mr. Cushing also debunked BP’s meritless claim that MassDEP was required to continue with its CPA permitting review of the proposed Power Plant, including resuming the resource-intensive HIA Study of the facility notwithstanding that there was no reasonable likelihood of BP being able to go forward with the proposed Power Plant as approved by the Revised Draft CPA due to the Brockton Site having been sold to the Developer who was in process of building a large commercial warehouse on the Brockton Site. Specifically, Mr. Cushing stated that the Revised Draft CPA “would allow construction of the [proposed Power Plant] *only on the [Brockton] Site*” and that the Revised Draft CPA’s authorization of construction of the proposed Power Plant “*is not transferable* to construction of the [facility] at another location.” Mr. Cushing’s Affidavit, ¶ 3 (emphasis supplied). Mr. Cushing’s opinion was quite sound and supported by the APC Regulations discussed above, at pp. 7-15, confirming that a CPA is a site-specific air permit issued by MassDEP authorizing a proposed facility on the specific site identified in the CPA application and if that site is no longer available for the facility, the CPA’s approval of the facility cannot be transferred to another location.

In response, BP did not present the Affidavit of an air permitting expert refuting Mr. Cushing’s opinion and certifying pursuant to the APC Regulations at 310 CMR 7.01(2)(b) discussed above as being “true, accurate, and complete” BP’s claim that it could still proceed with the proposed Power Plant on the Brockton Site as approved by the Revised Draft CPA notwithstanding the Developer’s ownership of the Brockton Site and construction of a large commercial warehouse there. BP also did not present the Affidavit of any other individual

refuting what Mr. Cushing had observed at the Brockton Site and the photographs he included in his Affidavit confirming the construction of the large commercial warehouse taking place on the Brockton Site on September 2 and 16, 2022. Mr. Cushing's Affidavit, ¶ 4; and Exhibits 1A through D and 2A through B attached to Mr. Cushing's Affidavit.

**E. BP's Refusal to Withdraw Its CPA Application for the Proposed Power Plant After Being Ordered to Do So By the Presiding Officer on November 4, 2022**

Mr. Cushing's Affidavit and photographs of the Brockton Site as well as BP's failure to refute his Affidavit provided further evidence of there being no reasonable likelihood of BP being able to go forward with the proposed Power Plant as approved by the Revised Draft CPA due to the Brockton Site's acquisition by the Developer who was in the process of constructing a large commercial warehouse there. As a result, in an effort to bring this appeal to a prompt and just conclusion and prevent the expenditure of any more private and public resources in this appeal, I issued an Order on November 4, 2022 ("November 4<sup>th</sup> Order") directing BP to unconditionally withdraw its CPA application for the proposed Power Plant by November 14, 2022. My November 4<sup>th</sup> Order put BP on notice that if it failed to withdraw its CPA application for the proposed Power Plant by the November 14<sup>th</sup> deadline, that "[would] constitute [BP's] continued pursuit of its meritless claim in the appeal" in violation of the good faith filing requirement of 310 CMR 1.01(4)(b) "that it [could] still go forward with . . . the proposed Power Plant pursuant to the Revised Draft CPA notwithstanding that the [Brockton] Site on which the facility was approved to be located is no longer available [for the facility]." November 4, 2022 Order, at pp. 14-15.

Undisputedly, BP refused to comply with my November 4<sup>th</sup> Order by refusing to withdraw its CPA application for the proposed Power Plant and contending once again without



any valid legal basis that MassDEP is required to continue with its CPA permit review of the proposed Power Plant, including resuming the resource intensive HIA Study of the power proposed Plant, notwithstanding there is no reasonable likelihood of BP being able to go forward with the proposed Power Plant as approved by the Revised Draft CPA because the Brockton Site is no longer available for the facility. BP's response to my November 4<sup>th</sup> Order constituted another violation of the good faith filing requirement of 310 CMR 1.01(4)(b) and is an additional ground for the MassDEP Commissioner's issuance of a Final Decision in the appeal: (1) vacating the Revised Draft CPA; (2) denying BP's CPA application for the proposed Power Plant; and (3) dismissing this appeal as moot.

### **CONCLUSION**

For the better part of the past decade (since July 1, 2015) I have served as the Presiding Officer in this appeal.<sup>36</sup> During this time, I have conducted two evidentiary Adjudicatory Hearings ("Hearings") lasting over the course of multiple days at which the Parties presented a total 15 expert witnesses and hundreds of pages of documentary evidence in support of their respective positions in the appeal on whether MassDEP properly issued the Original Draft CPA and later Revised Draft CPA authorizing BP's construction and operation of the proposed Power Plant on the Brockton Site. Based on a preponderance of the testimonial and documentary evidence presented in the Hearings and the governing regulatory and statutory requirements, I issued three detailed and lengthy decisions from 2016 to 2019 recommending that MassDEP's then Commissioner issue a Final Decision in this appeal upholding the Original Draft CPA and later the Revised Draft CPA.

However, there has been a dramatic turn of events in this appeal warranting my

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<sup>36</sup> I assumed adjudicatory responsibility for this appeal on July 1, 2015 after the prior Presiding Officer retired from State service.

recommending to MassDEP Commissioner Heiple at this time that she issue a Final Decision in this appeal vacating the Revised Draft CPA, denying BP's CPA application for the proposed Power Plant, and dismissing the Petitioners' appeal of the Revised Draft CPA as moot, which the Petitioners and MassDEP support but BP opposes. As explained in detail above, the dramatic turn of events warranting Commissioner Heiple's issuance of such a Final Decision are the following.

First, there is no reasonable likelihood of BP being able to go forward with the proposed Power Plant as approved by the Revised Draft CPA because the Brockton Site, the location specifically identified in BP's CPA application for the facility, is no longer available for the facility as a result of the Developer's acquiring it two years ago in December 2021 who, as of more than one year ago in September 2022, proceeding to build a large commercial warehouse there. BP has presented no evidence and a valid basis demonstrating that it can still proceed with the proposed Power Plant on the Brockton Site as approved by the Revised Draft CPA notwithstanding the Developer's ownership of the Brockton Site and construction of a large commercial warehouse there.

Second, in violation of the mandatory disclosure requirements of the APC Regulations and the good faith filing requirement of 310 CMR 1.01(4)(b), BP failed to disclose prior to and after issuance of the Nov. 2021 HIA Study Order that it no longer had the ability to go forward with the proposed Power Plant as approved by Revised Draft CPA due to the Brockton Site no longer being available for the facility. This was material information that BP was required to disclose pursuant to the APC Regulations and the good faith filing requirement of 310 CMR 1.01(4)(b) and its failure to disclose it prior to and after issuance of the Nov. 2021 HIA Study Order resulted in the expenditure of a considerable amount of valuable: (1) pro bono private

legal services of the Petitioners' legal counsel; and (2) publicly funded agency resources of MassDEP to lay the groundwork for an HIA Study of the proposed Power Plant that all went for naught. Id.

Lastly, BP refused to withdraw its CPA application for the proposed Power Plant after its inability to go forward with the facility on the Brockton Site as approved by the Revised Draft CPA was exposed by the Petitioners, causing an unwarranted delay in the final adjudication of this appeal and the expenditure of more private pro bono legal resources of the Petitioners and publicly funded resources of MassDEP to address BP's groundless claims. BP even refused to withdraw its CPA application for the proposed Power Plant after I issued an Order on November 4, 2022 directing BP to do so. In refusing to withdraw its CPA application for the proposed Power Plant, BP continued to violate the good faith filing requirement of 310 CMR 1.01(4)(b) by pressing its groundless claim that MassDEP is required to continue with its CPA review of the proposed Power Plant, including resuming the resource intensive HIA Study of the power proposed Plant, notwithstanding there is no reasonable likelihood of BP being able to go forward with the proposed Power Plant as approved by the Revised Draft CPA because the Brockton Site is no longer available for the facility.

In conclusion, the MassDEP Commissioner's issuance of a Final Decision in this appeal: (1) vacating the Revised Draft CPA; (2) denying BP's CPA application for the proposed Power Plant; and (3) dismissing this appeal as moot, would be more than justified.

The Petitioners have proposed that the Final Decision should also impose "some other and further sanction . . . on [BP], as a punishment" for having failed to disclose its inability to go forward with the proposed Power Plant as approved by the Revised Draft CPA prior to and after issuance of the Nov. 2021 HIA Study Order, and refusing to withdraw its CPA application for

the proposed Power Plant after its inability to go forward with the facility was exposed by the Petitioners. Petitioner Residents' Reply to Applicant's Response to Directive to Submit An Unconditional Withdrawal of its Air Permit Application, November 22, 2022 ("Petitioners' Reply"), at pp. 6-7. In doing so, the Petitioners acknowledged that the remedial measures set forth in 310 CMR 1.01(10) to address BP's improper actions did not expressly authorize the Presiding Officer and MassDEP's Commissioner to order BP to pay the Petitioners' "reasonable attorneys' fees and litigation costs" and that such an award "[made] as a matter of first impression" in the appeal would likely result in protracted litigation in the Massachusetts courts that would further delay final adjudication of this appeal. *Id.*, at p. 7. As a result, the Petitioners proposed that the MassDEP Commissioner's Final Decision in the appeal:

include . . . an order and judgment that requires [BP], and each of [BP's] managers and controlling members, to include in or with any application(s) that any of them may make in the future, for any kind of permit for which the Department is the permitting authority, in connection with any future project whatsoever, an express and unambiguous acknowledgement that [BP] was sanctioned in this proceeding for deliberately violating the requirement of good faith in its filings . . . ."

*Id.*, at p. 8. Because the Petitioners' proposal goes to MassDEP's environmental enforcement discretion and the making of MassDEP permitting policy, it would be inappropriate for me, a quasi-judicial official in the appeal, to take a position on the proposal. As such, I take no position on the proposal and refer it to MassDEP's Commissioner, the Final Decision-Maker in this appeal and MassDEP's chief environmental policymaker, to determine whether to adopt the Petitioners' proposal if she issues a Final Decision in the appeal adopting this Recommended

Final Decision on Second Remand.

*Salvatore M. Giorlandino*

**Date: December 29, 2023**

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Salvatore M. Giorlandino  
Chief Presiding Officer

**NOTICE-RECOMMENDED FINAL DECISION**

This decision is a Recommended Final Decision of the Chief 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/or 14(e), and may not be appealed to Superior Court pursuant to 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 and no other person directly or indirectly involved in this administrative appeal shall neither (1) file a motion to renew or reargue this Recommended Final Decision or any part of it, nor (2) communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

## **SERVICE LIST**

### **In The Matter Of:**

**Brockton Power Co., LLC, Docket Nos. 2011-025 & 026  
File No. W207973  
Brockton**

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**In the Matter of Brockton Power, LLC,**

OADR Docket No. 2011-026,

Recommended Final Decision on Second Remand

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## **ADDENDUM NO. 1**

### **OADR DESCRIPTION**

The Office of Appeals and Dispute Resolution (“OADR”) is a quasi-judicial office within the Massachusetts Department of Environmental Protection (“the Department” or “MassDEP”) which is responsible for advising the Department’s Commissioner in resolving all administrative appeals of MassDEP Permit decisions and enforcement orders in a neutral, fair, timely, and sound manner based on the governing law and the facts of the case. In the Matter of Tennessee Gas Pipeline Company, LLC, OADR Docket No. 2016-020 (“TGP”), Recommended Final Decision (March 22, 2017), 2017 MA ENV LEXIS 34, at 9, adopted as Final Decision (March 27, 2017), 2017 MA ENV LEXIS 38, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7); See also Mass. R. Prof. C. 1.0(p) (definition of “tribunal”). MassDEP’s Commissioner is the final agency decision-maker in these appeals. TGP, 2017 MA ENV LEXIS 34, at 9, citing, 310 CMR 1.01(14)(b). To ensure its objective review of MassDEP Permit decisions and enforcement orders, OADR reports directly to MassDEP’s Commissioner and is separate and independent of MassDEP’s program offices, Regional Offices, and Office of General Counsel (“OGC”). TGP, 2017 MA ENV LEXIS 34, at 9.

OADR staff who advise MassDEP’s Commissioner in resolving administrative appeals are Presiding Officers. Id. Presiding Officers are senior environmental attorneys at MassDEP appointed by MassDEP’s Commissioner to serve as neutral hearing officers in administrative appeals. Presiding Officers are the equivalent of environmental administrative law judges who have significant authority under the Adjudicatory Proceeding Rules at 310 CMR 1.01 to adjudicate appeals, including the authority to issue Orders “to secure [the] just and speedy determination of every [administrative] appeal.” 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(13)(d)-(13)(f). This authority includes fostering settlement discussions between the parties in administrative appeals and resolving appeals by conducting pre-hearing conferences with the parties; ruling on dispositive motions; conducting evidentiary Adjudicatory Hearings (quasi-judicial/civil courtroom trial type proceedings), which includes the authority to establish prior to the Hearings, the number of witnesses that the parties may offer at the Hearings and to exclude witnesses whose testimony would be duplicative, irrelevant, or otherwise unnecessary; and issuing Recommended Final Decisions on appeals to MassDEP’s Commissioner. TGP, 2017 MA ENV LEXIS 34, at 9-10, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(13)(d)-(13)(f), 1.01(14)(a), 1.03(7). MassDEP’s Commissioner, as the agency’s final decision-maker, may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision issued by a Presiding Officer in an appeal. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(b). Unless there is a statutory directive to the contrary, the Commissioner’s Final Decision can be appealed to Massachusetts Superior Court pursuant to G.L. c. 30A, § 14. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(f).