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|  | COMMONWEALTH OF MASSACHUSETTS  EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  **DEPARTMENT OF ENVIRONMENTAL PROTECTION**  ONE WINTER STREET, BOSTON, MA 02108 |
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**OFFICE OF APPEALS AND DISPUTE RESOLUTION**

September 21, 2015

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In the Matter of OADR Docket No. WET-2015-004

# Daniel and Laurie DaRosa Mattapoisett, MA

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**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

The Mattapoisett Conservation Commission (“Petitioner” or “Commission”) has appealed to the Office of Appeals and Dispute Resolution (“OADR”) the Superseding Order of Conditions (“SOC”) issued by the Massachusetts Department of Environmental Protection’s Southeast Regional Office (“DEP”). The SOC was issued pursuant to the Wetlands Protection Act, G.L. c. 131 § 40, and the Wetlands Regulations, 310 CMR 10.00.

In issuing the SOC, DEP determined that the Commission had sufficient information under 310 CMR 10.05(6)(c) to render a decision on the merits of the Applicants’, Daniel and Laurie DaRosa (“DaRosas”), Notice of Intent for their project to build a residential pier from their property at 3 Goodspeed Island, Mattapoisett, Massachusetts (the “Property” or “site”). The pier would be built on the Wetlands Resource Areas of Coastal Beach, Land Under the Ocean, and Land Containing Shellfish. Even though the pier would partially lie on Coastal Beach, it is undisputed in this appeal that the pier would comply with the performance standards for Coastal Beach in 310 CMR 10.27.

After determining that the Commission had sufficient information to issue a decision on the merits of the Notice of Intent, DEP found that the project complied with the performance standards for Land Under the Ocean, 310 CMR 10.25, and Land Containing Shellfish, 310 CMR 10.34. DEP therefore issued the SOC approving the proposed pier.

The Commission appealed the SOC to OADR. The parties filed affidavits and cross motions for summary decision. After reviewing the administrative record and hearing the parties’ arguments on the summary decision motions, I find the DaRosas’ motions for summary decision should be allowed. There is no genuine issue of material fact that the Commission had sufficient information to render a decision on the merits of the proposed pier. There is also no genuine issue of material fact that the pier complies with the performance standards for Land Under the Ocean and Land Containing Shellfish. As a consequence, I recommend that the DEP Commissioner issue a Final Decision affirming the SOC and approving the proposed pier under the Wetlands Protection Act and Regulations.

REGULATORY FRAMEWORK

*SOC Appeal Process.* This decision arises in an adjudicatory proceeding for a Wetlands permit appeal, filed under the Wetlands Protection Act and the Regulations, 310 CMR 10.05(7)(j), and the Adjudicatory Proceeding Rules, 310 CMR 1.01. Wetlands jurisdiction exists because the DaRosas proposed work in two Wetlands Resource Areas at issue here: Land Under the Ocean, 310 CMR 10.25, and Land Containing Shellfish, 310 CMR 10.34. The DaRosas were thus required to file a Notice of Intent with the Conservation Commission, showing that the proposed work in the Resource Areas complied with, or could be conditioned to comply with, the performance standards for those areas. 310 CMR 10.02 (discussing jurisdiction over Resource Areas and need to file Notice of Intent); 310 CMR 10.25 (performance standards for Land Under the Ocean); 310 CMR 10.34 (performance standards for Land Containing Shellfish).

*Land Under the Ocean.* Land Under the Ocean is the land “extending from the mean low water line seaward to the boundary of the municipality's jurisdiction and includes land under estuaries.” 310 CMR 10.25(2). “Land under the ocean is likely to be significant to the protection of marine fisheries and, where there are shellfish, to protection of land containing shellfish. Nearshore areas of land under the ocean are likely to be significant to storm damage prevention, flood control, and protection of wildlife habitat.” 310 CMR 10.25(1). In this appeal, it is undisputed that the Land Under the Ocean is significant to the interests of storm damage prevention and flood control. “Nearshore areas of land under the ocean help reduce storm damage and flooding by diminishing and buffering the high energy effects of storms. Submerged bars dissipate storm wave energy. Such areas provide a source of sediment for seasonal rebuilding of coastal beaches and dunes.” Id. “When nearshore areas of land under the ocean are significant to storm damage prevention or flood control, the bottom topography of such land is critical to the protection of those interests.” Id.

The performance standards implicated by this appeal are found at 310 CMR 10.25(5) and (6), and they provide the following:

(5) Projects not included in *310 CMR 10.25(3)* or 10.25(4) [like the project in this case] which affect nearshore areas of land under the ocean shall not cause adverse effects by altering the bottom topography so as to increase storm damage or erosion of coastal beaches, coastal banks, coastal dunes, or salt marshes.

(6) Projects not included in *310 CMR 10.25(3)* which affect land under the ocean shall if water-dependent be designed and constructed, using best available measures, so as to minimize adverse effects, and if non-water-dependent, have no adverse effects, on marine fisheries habitat or wildlife habitat caused by:

(a) alterations in water circulation;

(b) destruction of eelgrass (*Zostera marina*) or widgeon grass (*Rupia maritina*) beds;

(c) alterations in the distribution of sediment grain size;

(d) changes in water quality, including, but not limited to, other than natural fluctuations in the level of dissolved oxygen, temperature or turbidity, or the addition of pollutants; or

(e) alterations of shallow submerged lands with high densities of polychaetes, mollusks or macrophytic algae.

*Land Containing Shellfish.* Land Containing Shellfish is “land under the ocean, tidal flats, rocky intertidal shores, salt marshes and land under salt ponds when any such land contains shellfish.” 310 CMR 10.34(2). “Land containing shellfish is, under 310 CMR 10.34(3), significant to the protection of marine fisheries as well as to the protection of the interest of land containing shellfish.” 310 CMR 10.34(1). “Shellfish are a valuable renewable resource. The maintenance of productive shellfish beds not only assures the continuance of shellfish themselves, but also plays a direct role in supporting fish stocks by providing a major food source. The young shellfish in the planktonic larval stage that are produced in large quantities during spring and summer are an important source of food for the young stages of marine fishes and many crustaceans.” 310 CMR 10.34(1).

It is undisputed in this appeal that the site is significant to the protection of land containing shellfish and therefore to the protection of marine fisheries. As a consequence, the following performance standards in 310 CMR 10.34(4), (5), and (6) apply to the project:

(4) Except as provided in *310 CMR 10.34(5)*, any project on land containing shellfish shall not adversely affect such land or marine fisheries by a change in the productivity of such land caused by:

(a) alterations of water circulation,

(b) alterations in relief elevation,

(c) the compacting of sediment by vehicular traffic,

(d) alterations in the distribution of sediment grain size,

(e) alterations in natural drainage from adjacent land, or

(f) changes in water quality, including, but not limited to, other than natural fluctuations in the levels of salinity, dissolved oxygen, nutrients, temperature or turbidity, or the addition of pollutants.

(5) Notwithstanding the provisions of *310 CMR 10.34(4)*, projects which temporarily have an adverse effect on shellfish productivity but which do not permanently destroy the habitat may be permitted if the land containing shellfish can and will be returned substantially to its former productivity in less than one year from the commencement of work, unless an extension of the Order of Conditions is granted, in which case such restoration shall be completed within one year of such extension.

(6) In the case of land containing shellfish defined as significant in *310 CMR 10.34(3)(b)* (*i.e.*, those areas identified on the basis of maps and designations of the Shellfish Constable), except in Areas of Critical Environmental Concern, the issuing authority may, after consultation with the Shellfish Constable, permit the shellfish to be moved from such area under the guidelines of, and to a suitable location approved by, DMF, in order to permit a proposed project on such land. Any such project shall not be commenced until after the moving and replanting of the shellfish have been commenced.

BACKGROUND

The DaRosas filed a Notice of Intent proposing the construction of a 4 x 245 foot residential pier at the site. One hundred and eighty three feet of the pier would extend from the mean high water line into Mattapoisett Harbor. The pier would be pile supported and L shaped—the bottom of the L would be a 45 foot perpendicular float extension at the pier’s seaward end. Fifty three feet of the pier would be constructed on the Coastal Beach Resource Area. See 310 CMR 10.27. The remainder of the pier would be constructed on Resource Areas of Land Under the Ocean and Land Containing Shellfish. See 310 CMR 10.25 and 10.34. The direct impacts to Land Under the Ocean and Land Containing Shellfish include the proposed construction of 34 pilings, occupying 34 square feet.

Filed with the DaRosas Notice of Intent was a substantial amount of information relating to the pier, its construction, and its environmental impacts. Additional information was later provided, in response to the Commission’s inquires and requests. Much of the information was from the DaRosas’ consulting experts.

After a number of public hearings and receiving information from the DaRosas and their experts, including additional information requested by the Commission, the Commission requested the DaRosas to fund a peer review consultant under G.L. c. 44 § 53G. The Commission requested the funding to enable it “to hire an independent consultant to review all the materials and advise the Commission on conditioning the project.” R. 143.[[1]](#footnote-1)

The DaRosas declined to fund the peer reviewer, believing that the project was not complex and that their consultants had provided more than enough information for the Commission to render a decision on the merits without additional assistance from a peer reviewer. As a consequence, the Commission denied the DaRosas’ request for an Order of Conditions approving the project. It denied the project based on the Commission’s position that it had insufficient information under G.L. c. 131 § 40, 310 CMR 10.05(7)(h), and 310 CMR 10.05(6)(c). The Commission asserted that neither its membership nor its staff have the expertise to meaningfully review the documentation submitted by the DaRosas and their experts to determine whether the project would comply with the performance standards or could be conditioned to comply with those standards.

The DaRosas appealed the Commission’s decision to DEP, requesting DEP to issue an SOC approving the project. DEP agreed with the DaRosas’ assertion that they had submitted sufficient information to the Commission to enable it to determine whether the proposed pier would comply with the applicable performance standards. DEP then determined that the proposed pier complied with the performance standards and it issued the SOC approving the project.

The Commission appealed the SOC decision to OADR. The parties filed affidavits and motions for summary decision. The Commission filed affidavits from the following witnesses:

1. Dino D. Fiscaletti. Fiscaletti is a registered professional engineer employed with GZA Environmental, Inc. He has over 30 years of experience in structural engineering, consulting engineering, and technical review involving marine and waterfront structures. He holds BS and MS degrees in civil and environmental engineering.
2. William T. Nicholson. Nicholson has been employed as the Water and Sewer Superintendent for the Town of Mattapoisett for the past 34 years. He is a certified water works operator and waste collection operator. He holds a BS degree in marine resources.

1. William F. Madden. Madden is a registered professional engineer. He has been the owner and principal civil engineer of G.A.F. Engineering, Inc. since 1989. He has over 36 years of experience practicing as an engineer, including work on docks and piers and marina expansions. He holds a BS degree in civil engineering.
2. Jerome J. Cura. Cura is a Senior Scientist at Woods Hole Group. He has over 30 years of experience in oceanography and coastal science, including intertidal and subtidal habitats. He holds a BA and MS degrees in biology and a PhD in biological oceanography.
3. Elise Leduc. Leduc has been employed as a Coastal Scientist at Woods Hole Group since 2012. She holds a BA in maritime studies and an MS in environmental management, with an emphasis on coastal environment management.

The DaRosas filed affidavits from the following individuals:

1. David Davignon. Davignon is a licensed professional civil engineer. He has over 20 years of experience in site design, wetlands permitting, and environmental permitting. He holds a BS in Civil Engineering.
2. Stanley Humphries. Humphries is a Senior Coastal Geologist with LEC Environmental Consultants. He is a coastal scientist and geologist with more than 30 years of experience in a number of areas including environmental permitting, coastal wetlands and waterways resource evaluation, and wetlands resource area creation and restoration.
3. Eric J. Cederholm. Cederholm is a licensed professional structural engineer. He is employed by Transition Engineering, Inc. He has over 29 years of experience in structural consulting and technical review with respect to different structures including buildings, walls, and piers. He holds a BS degree in civil engineering.
4. Pamela Neubert. Neubert is employed as a senior marine ecologist at Stantec Consulting Services. She holds a doctorate degree in marine biology. She has performed numerous eelgrass and shellfish studies in southeastern Massachusetts for over 18 years. She is a benthic marine ecologist and invertebrate taxonomist with expertise in ecological impact assessment of marine near shore and off shore environments.

After the parties filed their affidavits and summary decision pleadings I held hearings during which the parties elaborated upon their arguments.

BURDENS OF PROOF AND STANDARD OF REVIEW

This is a de novo appeal brought by the Commission. See Matter of Soursourian, Docket No. WET 2013-028, Recommended Final Decision (June 13, 2014) (discussing de novo nature of appeals), adopted by Final Decision (June 19, 2014). As the party bringing this appeal, the Commission has the burden of going forward and is required to present “credible evidence from a competent source in support of each claim of factual error, including any relevant expert report(s), plan(s), or photograph(s).” 310 CMR 10.05(7)(j)3.c; Matter of Jodi Dupras, Docket No. WET-2012-026, Recommended Final Decision (July 3, 2013), adopted by Final Decision (July 12, 2013). “A ‘competent source’ is a witness who has sufficient expertise to render testimony on the technical issues on appeal.” Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), adopted by Final Decision (August 19, 2010). Whether the witness has such expertise depends “[on] whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony.” Commonweatlh v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted); see e.g. Pittsfield Airport Commission, supra, (petitioner’s failure to submit expert testimony in appeal challenging Department’s Commissioner’s issuance of 401 Water Quality Certification Variance to Pittsfield Airport Commission fatal to petitioner’s claims because Variance was “detailed and technical . . . requiring expert testimony on issues . . . implicated by the Variance,” including . . . (1) wetland replication, restoration, and enhancement, (2) mitigation of environmental impacts to streams, and (3) stormwater discharge and treatment[,] [and (4)] . . . runway safety and design”); Dupras, supra, (petitioner not qualified to interpret technical data involving Shellfish Suitability Areas).

***Standard for Summary Decision.*** The Adjudicatory Proceeding Rules, [310 CMR 1.01](http://web2.westlaw.com/find/default.wl?tc=-1&docname=310MADC1.01&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=1012167&tf=-1&findtype=L&fn=_top&mt=208&vr=2.0&pbc=8DB11364&ordoc=0362730218)(11)(f), provide for the issuance of summary decision where the pleadings together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law. See e.g. Matter of Papp, Docket No. DEP-05-066, Recommended Final Decision, (November 8, 2005), adopted by Final Decision (December 27, 2005); Matter of Lowes Home Centers Inc. Docket No. WET-09-013, Recommended Final Decision (January 23, 2009), adopted by Final Decision (February 18, 2009). A motion for summary decision in an administrative appeal is similar to a motion for summary judgment in a civil lawsuit. See Matter of Lowe’s Home Centers, Inc., supra. (citing Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, [9 Mass. App. Ct. 775](http://socialaw.gvpi.net/sll/lpext.dll/sll/sjcapp/sjcapp-2323990#sjcapp-9-32-mass-46--32-app-46--32-ct-46--32-775), 785-86 (1980)).

**DISCUSSION**

**I. The Commission Had Sufficient Information To Describe The Site, The Work, And The Effect Of The Work On The Interests Identified In The Wetlands Act**

The Wetlands Regulations specify that the information submitted by the applicant to the Commission with the Notice of Intent must be “sufficient to describe the site, the work or the effect of the work on the interests identified in M.G.L. c. 131, § 40 . . . .” 310 CMR 10.05(6)(c); see also G.L. c. 131 § 40, 310 CMR 10.05(7)(h); Matter of Silva, Docket No. WET 2008-002 and 003, Recommended Final Decision (May 23, 2008), adopted by Final Decision (June 20, 2008). Conservation commissions may request additional information from applicants when necessary. Matter of Silva. When a commission issues a denial for lack of information it must “specify the information which is lacking and why it is necessary.” 310 CMR 10.05(6)(c); see Matter of Diamond Hill Corporation, Docket #99-018, Recommended Final Decision, (December 12, 2000), adopted by Final Decision (January 5, 2001) (specifying missing information and why it was necessary).

When there is an appeal from a denial based upon insufficient information the determination whether the Commission was correct must be based solely on “the information submitted to the conservation commission.” 310 CMR 10.05(7)(h). If it is determined that the applicant submitted insufficient information, DEP shall affirm the denial and instruct the applicant to re-file with the conservation commission and include the appropriate information. Id. If DEP determines that sufficient information was submitted, it shall proceed to review the merits of the project and decide whether to issue a Superseding Order denying or approving the project on its merits. At that stage, review is de novo and may be based upon additional information that was not before the Commission. Likewise, on the appeal of the SOC to OADR, once it is determined that the Commission had sufficient information, the appeal is de novo and information that was not before the Commission may be considered. Matter of Silva, supra.; Matter of Terrill, Docket No. 05-293, Recommended Final Decision (July 13, 2010), adopted by Final Decision (January 7, 2011).

DEP’s Wetlands Program Policy 08-1 “Lack of Information Necessary for Conservation Commission Decisions” provides that in reviewing the sufficiency of the information DEP should assess the reasonableness of the scope of work outlining the "information which is lacking and why it is necessary, . . . the proponent's submission, the degree to which the application involves technical or complex questions, the need for an outside consultant to address those questions, the capability of a typical commission to perform a meaningful review of the submission without an outside consultant, and other pertinent factors.” See Matter of Norton Youth Soccer League, Docket No. 95-035, Final Decision (May 22, 1996) (the missing information must be so critical that the Commission was unable to assess the impact of the work on the wetlands and consequently cannot appropriately condition the work to protect the interests of the Act).

Here, the Commission found there was insufficient information because the DaRosas decided not to fund a peer review of the project. Although the DaRosas submitted substantial information from their consultants, the Commission argued that it lacked the expertise among its members and staff to meaningfully evaluate the project and information submitted by the DaRosas. The Commission stated that it did “not contest the adequacy of the information provided to it, but rather stresses the fact that the application involves technical and/or complex questions outside of the capability of the Commission.” R., pp. 13-14. The Commission’s position is not persuasive for several reasons.

***The DaRosas’ Provision of Information.*** The Notice of Intent included substantial information, including information from the DaRosas’ consultants, the Massachusetts Division of Marine Fisheries (“DMF”), and the Massachusetts Division of Fisheries & Wildlife, Natural Heritage and Endangered Species Program (“NHESP”). R. pp. 17-69. DMF noted that the project site was within a mapped shellfish habitat for quahog and supports a recreational quahog fishery. DMF recommended that the separation between the substrate and the pier’s float stop and base of the wave attenuator be increased to at least 30 inches. It also recommended the use of alternative pier materials that are not chemically treated to avoid negative impacts on the marine environment. R, p. 162. In addition, NHESP determined that the project did not occur within Estimated Habitat of Rare Wildlife or Priority Habitat, and as a consequence the project did not have to be reviewed for compliance with the Wetlands Regulations rare wildlife species provisions, 310 CMR 10.37 and 10.59. R., p. 164. The U.S. Army Corps of Engineers also approved the project, concluding that the project would have only minimal individual or cumulative environmental impacts on waters of the United States, including wetlands.

Several public hearings were held. Throughout that process, there was a robust exchange of information from the DaRosas in response to the Commission’s questions and concerns. After the Commission received several comments, including comments from DEP and DMF, the project plans were revised to: (1) increase the separation between the bottom of the pier’s float and the existing harbor grade from 24” to 30”, (2) increase the minimum separation distance between the bottom of the wave fence (wave attenuator) and the existing harbor grade from 17” to 30”, (3) alter the project to include construction materials without chemical treatments, (4) increase the pier deck elevation to have a minimum clearance of 48” between the bottom of the pier deck and the mean high water level, and (5) provide access to the construction area from the DaRosas’ existing driveway. Davignon Aff., Ex. A.[[2]](#footnote-2) The depth of the water at the float end will be 6.4’ at mean high water and 2.4’ at mean low water. Davignon Aff., ¶ 16.

The project narrative with the Notice of Intent included a detailed construction methodology focused on mitigating impacts. With respect to Land Containing Shellfish, the DaRosas proposed to have all shellfish relocated under the supervision of the Mattapoisett Shellfish Officer, pursuant to 310 CMR 10.34(6). A barge would be used to install the pilings within two hours of high tide to avoid grounding of the barge on the ocean floor.

In response to comments and questions from the Commission and members of the public, the DaRosas provided additional information from a number of qualified consultants addressing erosion and sediment transport, eelgrass and shellfish habitat, and the structural integrity of the pier and the wave attenuator. Davignon Aff., ¶¶ 23-27, R. 29, 85-128. The DaRosas’ consulting experts, Davignon, Humphries, Cederholm, and Neubert, provided information to the Commission.

The Commission’s claims of insufficient information in response to the abundance of information discussed above are unpersuasive.

***Land Under the Ocean.*** With respect to Land Under the Ocean Resource Area, the Commission’s desire for more information pertained to the structural integrity of the pier. The Commission was concerned that the pier would cause adverse impacts to the interest of storm damage prevention under 310 CMR 10.25. The concern was that in a bad storm the pier would break apart and collide with the sewer line near Eel Pond, causing it to rupture. R., pp. 13-14. The Commission claimed it did not have the expertise to evaluate this potential event. That assertion is without merit for a number of reasons.

First, the DaRosas directly addressed this concern with substantial information from their consultants showing the relative implausibility of the scenario because of the locations of the pier and sewer line. Their licensed professional structural engineer analyzed the project and the sewer line impact scenario and provided a report to the Commission. R., p. 107. The seaward end of the pier would be 870 feet east (or almost three football fields) and 310 feet north of the Eel Pond West inlet. In order to strike and rupture the sewer line, a piece of the pier would have to break off, and then travel 925 feet and 70 degrees southwesterly to be in the vicinity of the inlet. Because the sewer line is buried, it would also have to be exposed at the time the piece of the pier struck it. Davignon Aff., ¶ 30. Davignon also pointed out that the pier would be relatively protected, lying at the northerly end of the harbor and protected from all storm events, except those storms coming from the south. Davignon Aff., ¶ 31. It was not necessary to have a peer reviewer’s assistance to understand the DaRosas’ persuasive analysis of the sewer line rupture theory.

Second, the Commission’s concern relative to the pier’s structural integrity and the sewer line is not relevant to the interest of storm damage prevention for Land Under the Ocean.[[3]](#footnote-3) Instead the storm damage interest is focused on the “[n]earshore areas of land under the ocean [because they] help reduce storm damage and flooding by diminishing and buffering the high energy effects of storms. Submerged bars dissipate storm wave energy. Such areas provide a source of sediment for seasonal rebuilding of coastal beaches and dunes.” 310 CMR 10.25(1). The performance standards therefore prohibit adverse impacts that “alter[] the bottom topography so as to increase storm damage or erosion of coastal beaches, coastal banks, coastal dunes, or salt marshes.” 310 CMR 10.25(1). The DaRosas’ expert, Stan Humphries, addressed the storm damage prevention interest in 310 CMR 10.25. His report to the Commission demonstrated that the pier and its alteration of 34 square feet would not cause adverse effects by adversely impacting the bottom topography to increase storm damage or erosion of coastal beaches or banks. R., p. 87. The Commission did not claim a lack of information or expertise to analyze that point.

Third, the Commission is in fact a highly qualified group of professionals, with significant experience in engineering, hydrogeology, coastal geology, and environmental permitting. They did not need the requested peer review consultant. For example, one member, Peter Newton, is a hydrogeologist with over 20 years of experience performing and managing water resource projects. Another member, Thomas Copps, is a licensed Professional Engineer who has substantial education and experience in coastal engineering. His education includes a masters degree in coastal and oceanographic engineering and a masters of science degree in mechanical engineering. His professional experience and publications have focused on coastal engineering, including seawall design, beach nourishment, coastal structures, shoreline evolution, wave refraction, storm recession, coastal sediments, sediment transport, sediment transport and scour effects from piers See Petitioner’s Response to Applicant’s Motion to Supplement the Record to Include the Qualifications and Experience of Commission Members, Exhibit A (April 29, 2015).

Fourth, the Commission’s argument is undermined by its history in reviewing and approving other piers. In fact, this project is similar to 12 other private piers the Commission permitted within the last 15 years in Mattapoisett Harbor. Davignon Aff., ¶ 37. In none of those permitting matters did the Commission utilize an outside peer reviewer or request the applicants to fund an outside peer reviewer. Davignon Aff., ¶ 41. Since 2007, 4 similar piers have been approved along the western shore of the Harbor, off Mattapoisett Neck Road, proximate to the West Inlet to Eel Pond, where the sewer line is located. Davignon Aff., ¶ 28.

In light of the above, there is no genuine issue of material fact that the Commission had sufficient information or required a peer reviewer relative to Land Under the Ocean.

***Land Containing Shellfish.*** With respect to Land Contain Shellfish the Commission did not identify what specific information was lacking and why it was necessary or why a peer reviewer was necessary for the review. That in itself is a fatal flaw with the Commission’s position. In addition, the DaRosas’ experts addressed the relevant concerns. The reports to the Commission demonstrated that the pier would be constructed in conformity with DEP’s docks and piers guidelines and would not adversely alter water circulation or distribution of sediment grain size because the separation between the bottom of the float and the wave attenuator from the substrate would be 30 inches and the bottom topography would not be altered. In addition, there is no eelgrass or habitat for eelgrass. R., pp. 87, 109. Further, there would be no changes in water quality because the project would not involve the use of chemical treatments. Also, the area is not a high density area for polychaetes, mollusks or macrophytic algae, and the separation of 30 inches would in any event prevent adverse impacts to such areas if they existed. Id. Last, there is no genuine dispute that there was sufficient information to determine whether the project could satisfy 310 CMR 10.34(5) and (6), which generally allow temporary impacts or the transfer of shellfish to another location to avoid impacts during construction.

The Commission has not offered any evidence or explanation regarding how the above information concerning Land Containing Shellfish was lacking and why additional information was necessary. There is therefore no genuine issue of material fact that the Commission had sufficient information or required a peer reviewer relative to Land Containing Shellfish. Matter of Pioneer Valley Energy Center, LLC, Docket No. 2011-002, Recommended Final Decision (July 6, 2011), adopted by Final Decision (July 28, 2011) (broad conclusory statements unsupported by an appropriate factual basis are insufficient to survive summary decision). The DaRosas’ motion for summary decision on this issues should therefore be allowed.

**II. The Project Complies With The Performance Standards**

Having determined that the Commission had sufficient information to describe the site, the work, and the effect of the work on the interests protected under the Act, I address whether the project complies with the performance standards in the Wetlands Regulations.

1. **The Project Complies With The Performance Standards For Land Under The Ocean**

The Commission asserts that the project will adversely impact the interests of storm damage prevention for Land Under the Ocean. The Commission’s argument is premised on its concern that the pier will break apart in a severe storm and rupture the sewer line near Eel Pond. As discussed previously, however, that concern is not germane to the interest of storm damage prevention articulated in the Wetlands Regulations for Land Under the Ocean. See supra. at pp. 14-15; 310 CMR 10.25. On the other hand, the DaRosas submitted substantial evidence demonstrating that the project will not adversely impact the storm damage interests for Land Under the Ocean. Davignon Aff.; Humphries Aff. The Commission did not offer any evidence in rebuttal. As a consequence, there is no genuine issue of material fact that the project will comply with the performance standards in 310 CMR 10.25. The DaRosas’ motion for summary decision on this issue should therefore be allowed.[[4]](#footnote-4)

1. **The Project Complies With The Performance Standards For Land Containing Shellfish**

The Commission presented evidence that the subtidal area immediately offshore at the site is a significant shellfish habitat and that individuals and Herring gulls fish for quahogs immediately east of the site. The Commission conceded, however, that it did not present any evidence that the project would adversely impact the wetlands interests protected by Land Containing Shellfish. See 310 CMR 10.34. In contrast, the DaRosas presented substantial evidence from their experts that the project would not adversely impact the interest of the Wetlands Act and Regulations for Land Containing Shellfish. See supra. at pp. 11-13; Davignon Aff.; Neubert Aff. The testimony was generally that there would be no adverse impacts to Eelgrass or its habitat, because neither exists at the site, and there would be no adverse impacts to shellfish or other marine biological resources.

As a consequence of the above, there is no genuine issue of material fact that the project will comply with the performance standards in 310 CMR 10.34. The DaRosas’ motion for summary decision on this issue should therefore be allowed.

**CONCLUSION**

The DaRosas’ motions for summary decision should be allowed. There is no genuine issue of material fact that the Commission had sufficient information to render a decision on the merits of the proposed pier. There is also no genuine issue of material fact that the pier complies with the performance standards for Land Under the Ocean and Land Containing Shellfish. I therefore recommend that the DEP Commissioner issue a Final Decision affirming the SOC and approving the proposed pier under the Wetlands Protection Act and Regulations.

## NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner’s Final Decision is

subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a

motion to renew or reargue this Recommended Final Decision or any part of it, and no party

shall communicate with the Commissioner’s office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

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Timothy M. Jones

Presiding Officer

**SERVICE LIST**

In The Matter Of: Daniel and Laurie DaRosa

Docket No. WET-2015-004 File No. SE 44-1228

Mattapoisett

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1. “R” refers to the record compiled before the Mattapoisett Conservation Commission. It is 214 pages long and was filed by the Commission’s attorney with OADR on March 30, 2015. It is part of the administrative record in this proceeding. With regard to that record, the DaRosas’ June 5, 2015, motion for reconsideration regarding certain parts of that record is allowed. [↑](#footnote-ref-1)
2. “Aff.” refers to affidavit. [↑](#footnote-ref-2)
3. The pier’s structural integrity is more appropriately considered under the Massachusetts Waterways Act, G.L. c. 91 and the Waterways Regulations at 310 CMR 9.00. [↑](#footnote-ref-3)
4. The Commission raises various conclusory questions and statements concerning the methodology for constructing the pier, without providing any factual basis and related expert opinions establishing a nexus to, or adverse impact on, the performance standards for Land Under the Ocean. As a consequence, those questions and assertions are insufficient to create a genuine issue of material fact. See [Matter of Karen McNiff, Trustee Chocoura Realty Trust](http://www.lexis.com/research/retrieve?_m=805e83cc7f9fef750a38205fae5c5e36&docnum=2&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzB-zSkAA&_md5=ec402a09b5718827b8929bddd50f1b12), Docket No. WET-2011-016, Recommended Final Decision (July 25, 2013), adopted by Final Decision (July 31, 2013); Matter of Pioneer Valley Energy Center, LLC, Docket No. 2011-002, Recommended Final Decision (July 6, 2011), adopted by Final Decision (July 28, 2011) (conclusory testimony is insufficient); Matter of Jody Reale, Docket No. 2010-012, Recommended Final Decision (July 8, 2010), adopted by Final Decision (July 13, 2010) (unsupported expert testimony does not sustain the burden of going forward); Matter of Town of Falmouth Dept. of Public Works, Docket No. 93-032, Decision and Order on Motion to Dismiss (September 2, 1994) (if wetland impacts are so abstract, speculative or conjectural, dismissal is appropriate). [↑](#footnote-ref-4)