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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**

December 21, 2015

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In the Matter of OADR Docket No. 2014-018

# Elizabeth Maher Harwich, MA

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**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

The Petitioner, Charlene E. McLaughlin (“McLaughlin”), and the Intervener, the Town of Harwich (“Town”), challenge the Draft Waterways License issued to Elizabeth Maher (“Maher”) by the Massachusetts Department of Environmental Protection (“DEP”) pursuant to the Waterways statute, G.L. c. 91, and regulations, 310 CMR 9.00. The license allows Maher to construct a pier, ramp, and float (collectively “proposed pier”) on her property at 48 Harbor Road, on Wychmere Harbor, Harwich, MA (“the Property”). The Town and McLaughlin, respectively, own piers approximately 69 and 103 feet away from the proposed pier. The proposed pier would lie in between those two piers. The Town pier is to the south of the proposed pier location and the McLaughin pier is to the north. McLaughlin claims that the proposed pier will significantly interfere with access to and from the pier on her property. Likewise, the Town asserts that the proposed pier will significantly interfere with the ability of approximately seven commercial fishing boats to access slips they lease from the Town on the north side of the Town pier.

The parties presented written testimony and exhibits and cross examined witnesses in an evidentiary adjudicatory hearing. After reviewing the administrative record and applicable law I find that neither the Town nor McLaughlin have proven by a preponderance of the evidence that the proposed pier will significantly interfere with the claimed rights of access. There is substantially more than enough room for McLaughlin to travel to and from her pier without any significant interference. And although the fishing boats that use the nearest two slips on the Town pier may at times have to maneuver slightly more to access the slips during the three months out of the year that the Maher pier is in the water, that additional maneuvering does not constitute a significant interference. As a consequence, I recommend that the DEP Commissioner issue a Final Decision affirming the Draft Waterways License.

This Recommended Final Decision follows a Tentative Decision that I issued on December 4, 2015. I issued that Tentative Decision pursuant to 310 CMR 1.01(14)(a) and (c) because the Presiding Officer who conducted the adjudicatory hearing is no longer available to issue a Recommended Final Decision. After I issued the Tentative Decision, the parties had 7 business days to file objections to the decision. None were filed. The absence of objections is another reason why the Commissioner should adopted this Recommended Final Decision, which is similar in all material respects to the Tentative Decision.[[1]](#footnote-1)

REGULATORY FRAMEWORK

Rights of access in certain waterways are governed by G.L. c. 91 and the implementing regulations, 310 CMR 9.00. "The obligation to preserve the public trust and to protect the public's interest . . . has been delegated by the Legislature to [DEP], which, as charged in G. L. c. 91, § 2, 'shall act to preserve and protect the rights in tidelands of the inhabitants of the commonwealth by ensuring that the tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose'" Moot v. Department of Entl. Protection, 448 Mass. 340, 342-43 (2007). "General Laws c. 91 governs, among other things, water-and nonwater-dependent development in tidelands [and Great Ponds] and the public's right to use those lands. . . ." Id.

This appeal concerns the regulatory requirement in 310 CMR 9.36(2) that a structure not significantly interfere with one’s travel in the water to and from their property. In particular, the regulation provides in pertinent part the following:

(2) Private Access to Littoral or Riparian Property -- The project shall not significantly interfere with littoral or riparian property owners' right to approach their property from a waterway, and to approach the waterway from said property, as provided in [M.G.L. c. 91, § 17](https://advance.lexis.com/document/?pdmfid=1000516&crid=195fab89-dfcd-447a-99a2-f63ab74f4f0d&pddocfullpath=%2Fshared%2Fdocument%2Fadministrative-materials%2Furn%3AcontentItem%3A576G-KMX0-00FG-V2V6-00000-00&pddocid=urn%3AcontentItem%3A576G-KMX0-00FG-V2V6-00000-00&pdcontentcomponentid=232350&pdteaserkey=sr1&ecomp=_thhk&earg=sr1&prid=9b320db3-82e2-45b0-baa6-2345fbd6a4d0). In evaluating whether such interference is caused by a proposed structure, the Department may considerthe proximity of the structure to abutting littoral or riparian property and the density of existing structures. In the case of a proposed structure which extends perpendicular to the shore, the Department shall require its placement at least 25 feet away from such abutting property lines, where feasible. (emphasis added)

A significant interference must be greater than a mere inconvenience or increase in difficulty in access. See Matter of Legowski, Docket No. 2011-039, Recommended Final Decision (October 25, 2012), adopted by Final Decision (November 5, 2012) (citing Matter of Abdelnour, Docket Nos. 88-138, 88-358, 88-359, 88-360, 88-361, 90-270, Final Decision: Part I (November 22, 1994) (it is not a significant interference to the right to approach one's littoral property when a proposed pier would cause an abutting property owner to make one additional tack with a sailboat); Matter of Squeek Realty Trust, Docket No. 2008-137, -138, -140, & -141, Recommended Final Decision (July 2, 2010), adopted by Final Decision (July 7, 2010) ("[d]ifficulty in docking a recreational boat does not … equate to being totally cut off from water access to one's property.")). Significant interference must be supported by evidence greater than anecdotal or conclusory statements. Id.

In determining whether interference is significant, the Department may consider whether and the degree to which the interference is experienced by the public in general or a single abutter, and the "difficulty in adjustments [to a vessel's course] by existing users." Matter of Oliveira, Docket No. 2010-017, Recommended Final Decision (January 7, 2011), adopted by Final Decision (January 7, 2011), citing Matter of Stanley A. Sylvia, Docket No. 95-110, Final Decision (February 4, 1997). In other words, measuring the significance of interference may include an examination of who is experiencing the interference, the expected frequency of the interference, and the extent or type of the interference. For example, merely having to navigate around a dock is not significant interference, particularly when the dock is an impediment to just one abutting property, and such property owner has an alternative navigation route. See Matter of Stanley A. Sylvia, Docket No. 95-110, Final Decision (February 4, 1997) (pier blocked access route to waterway for one neighboring property owner, but owner had viable alternative route of access). On the other hand, significant interference has been shown when there was evidence that a significant number of boating trips, taken by both residents and the general public, would be impeded by a proposed pier more than 200 feet in length. Matter of Oliveira, Docket No. 2010-017, Recommended Final Decision (January 7, 2011), adopted by Final Decision (January 7, 2011).

BACKGROUND

Wychmere Harbor has a significant commercial fishing presence with a number of commercial fishing boats using the Town pier. Rendon PFT[[2]](#footnote-2), p. 2. There are also several residential piers or docks in the harbor. The Maher proposed pier would be 85 feet long and in a T shape, with the top of the T consisting of a float at the seaward end. The license would permit the proposed pier on only a seasonal basis, allowing it from May 31 through September 5 each year. After that period it must be removed annually. In 2009, the Harwich Waterways Committee approved the proposed pier under its local bylaws.[[3]](#footnote-3) Rendon Rebuttal PFT, pp. 1-2.

The Town pier is approximately 122 feet long by 24 feet wide. It primarily serves commercial fishing vessels. Rendon PFT, p. 2. There are seven commercial slips located on the north side of the Town pier. Each slip is assigned on an annual basis to a commercial fishing vessel for its exclusive use. The south side of the pier is used to load and offload catch, equipment, and fuel by many of the 45 commercial fishing vessels that us the Town pier and which range in length from 24 to 50 feet long. Rendon PFT, p. 2. The Town pier also serves as access to a public float at the west end of the pier, where many recreational mooring permit holders and visiting boats load and offload passengers and equipment. There are 141 moorings in Wychmere inner harbor and 50 in the outer harbor. Rendon PFT, p. 3.

The parties presented written pre-filed direct and rebuttal testimony and exhibits. At the adjudicatory hearing they cross examined the witnesses against them. The following witness testified for McLaughlin:

1. Thomas E. Leach. Leach is the former Harbor Master for the Town of Harwich.
2. Roger Tessier. Tessier is the captain of a commercial vessel that docks at the Town pier.
3. George A. McLaughlin, III. Mr. McLaughlin testified as a resident of the abutting property at 54 Harbor Road, Harwich, MA.
4. Charlene E. McLaughlin. Ms. McLaughlin testified as the owner of the abutting property at 54 Harbor Road, Harwich, MA.

The following witness testified for the Town of Harwich:

1. John C. Rendon. Rendon is employed as the Harbormaster for the Town of Harwich. He is a 1988 graduate of the United States Coast Guard Academy, holding a Commission and a BS degree in Mathematics. He has substantial maritime experience, including serving as a Coast Guard Commander, Deputy Harbormaster for the Town of Chatham, from 2008 until 2012. He also holds a 100 Gross Ton Merchant Marine Master License.

The following witnesses testified for Maher:

1. David Lyttle. Lyttle is a principal at Ryder and Wilcox, Surveyors and Engineers. He is a professional land surveyor with an associate’s degree in civil engineering. He has extensive experience designing and permitting docks and piers within Barnstable County, and specifically the Town of Harwich.
2. Elizabeth Maher. Maher testified as the owner of the Property.

The following witnesses testified for DEP:

1. Gregory J. DeCesare. DeCesare has been employed with DEP for approximately 20 years. For approximately ten of those years he has worked in DEP’s Wetlands and Waterways Program. He holds a United States Coast Guard issued Merchant Marine Credential with a Master, Near Coastal up to 100 Ton classification, and a Commercial Assistance Towing endorsement. He holds state and federal commercial fishing permits and has spent much time at sea, year round, commercial fishing for groundfish, tuna, and lobster. He also conducts sport fishing charters. He frequently operates commercial fishing vessels similar to those at issue in this appeal, possessing 36 and 31 foot commercial fishing boats. He has maneuvered similar size boats in harbors of Maine, Massachusetts, Rhode Island, Connecticut, and New York. He holds a BS degree in biology.
2. David E. Hill. Hill has been employed with DEP since 2000, mostly in the Waterways program. He holds a BS degree in natural resource conservation. He has handled approximately 1,246 Waterways licensing matters, mostly with respect to the licensing of piers. He considers himself a “competent boater” and has completed a U.S. Power Squadron training course. His experience is primarily with smaller boats. In his experience he has witnessed on hundreds of occasions the navigation of commercial and recreational vessels while approaching and departing locations at residential and commercial piers and marinas.

BURDENS OF PROOF AND STANDARD OF REVIEW

This is a de novo appeal pursued by the Petitioner and Intervener. 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 parties challenging DEP's decision to grant the license, McLaughlin and the Town had the burden of going forward by producing credible evidence in support of their position.  Matter of Pioneer Valley Energy Center, LLC, Docket No. 2011-010, Recommended Final Decision (September 23, 2011), adopted by Final Decision (November 9, 2011). Upon meeting this requirement, the ultimate resolution depends on where a preponderance of the evidence lies. Id.

“A party in a civil case having the burden of proving a particular fact [by a preponderance of the evidence] does not have to establish the existence of that fact as an absolute certainty. . . . [I]t is sufficient if the party having the burden of proving a particular fact establishes the existence of that fact as the greater likelihood, the greater probability.” Massachusetts Jury Instructions, Civil, 1.14(d).

The relevancy, admissibility, and weight of evidence that the parties seek to introduce are governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):

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

 Under [310 CMR 1.01(13)(h)](https://advance.lexis.com/document/?pdmfid=1000516&crid=195fab89-dfcd-447a-99a2-f63ab74f4f0d&pddocfullpath=%2Fshared%2Fdocument%2Fadministrative-materials%2Furn%3AcontentItem%3A576G-KMX0-00FG-V2V6-00000-00&pddocid=urn%3AcontentItem%3A576G-KMX0-00FG-V2V6-00000-00&pdcontentcomponentid=232350&pdteaserkey=sr1&ecomp=_thhk&earg=sr1&prid=9b320db3-82e2-45b0-baa6-2345fbd6a4d0), "[t]he weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. . . .".

**DISCUSSION**

The parties focused their evidence and argument on whether the Maher pier would significantly interfere with the ability of seven commercial fishing boats to travel to and from their leased slips on the north side of the Town pier and the ability of the McLaughlins to travel to and from their pier. At issue is whether the proposed pier would violate 310 CMR 9.36(2), which prohibits docks or piers from significantly interfering with a littoral or riparian property owner’s right to travel to and from their property via the waterway.[[4]](#footnote-4) 310 CMR 9.36(2).

***Interference With The McLaughlin Pier****.* The McLaughlin pier is north of the proposed pier location by approximately 103 feet. Maher PFT, p. 1. The direct testimony filed by McLaughlin was narrow, conclusory, duplicative, and only marginally probative of the issues identified for adjudication. Leach’s direct testimony was extremely narrow and limited. He testified that the dock “creates a dangerous obstacle for boats who use the town pier and for the boats moored in that area.” He added that the “shallowness of Wychmere Harbor and the prevailing winds from the southwest, along with a large amount of moorings and an active harbor with commercial vessels and pleasure boats makes Wychmere Harbor difficult to navigate under existing conditions. . . . In my opinion, the addition of the proposed dock from the Maher property will make a bad situation worse, potentially damage an historic active shellfish bed, and like result in boats colliding.” Leach PFT, p. 2. Leach’s failure to identify specifically how the proposed pier would interfere with McLaughlin’s access to and from her pier significantly detracts from its probative value, leaving it with only very little evidentiary weight.

Further, the administrative record includes an unsigned draft affidavit that McLaughlin had submitted to Leach for his signature. That draft significantly varies from the affidavit that Leach ultimately signed. Transcript, pp. 21-24, 26-28, 76-77. The affidavit that Leach ultimately signed omits language from the draft stating that the proposed pier would “pose a severe navigation hazard for boats in general in Wychmere Harbor and specifically for Maher’s abutter, Charlene McLaughlin.” The omission of this language from the affidavit signed by Leach indicates he does not agree that the proposed pier would pose a significant navigation hazard for McLaughlin.

Leach’s testimony contains other inconsistencies that detract from its weight. At the adjudicatory hearing, under the guise of redirect examination Leach elaborated upon his testimony and changed it, asserting that the proposed pier will have an “impact” and there would be “some restriction” on the McLaughlins’ access rights. Transcript, pp. 54-55, 69-70. But when he was the Town’s Harbormaster Leach had actually advocated that the proposed pier be closer to the McLaughlin pier. Likewise, the current Habormaster, Rendon, testified that the proposed pier will not significantly interfere with the McLaughlin pier, and in fact he believed the proposed pier should be moved closer to the McLaughlin pier. Transcript, pp. 21-22, 166-68; Rendon PFT, ¶ 33 and Rebuttal PFT, ¶¶ 19, 29. Given these issues, including the above inconsistencies with Leach’s testimony, I find it is entitled to almost no probative value.

The Tessier testimony that was submitted by McLaughlin was equally narrow and conclusory, lacking a factual basis. It also failed to identify specifically how the proposed pier would interfere with the McLaughlin’s access to and from their pier. Tessier testified only that the Maher pier would “pose a severe navigation hazard for boats in general in Wychmere Harbor and specifically for Maher’s abutter, Charlene McLaughlin.” Tessier PFT. His remaining testimony was virtually identical to Leach’s testimony: “The shallowness of Wychmere Harbor and the prevailing winds from the southwest, along with a large amount of moorings and an active harbor with commercial vessels and pleasure boats makes Wychmere Harbor difficult to navigate under existing conditions. In my opinion, the addition of the proposed dock from the Maher property will make a bad situation worse and likely result in boats colliding.” Tessier PFT. Mr. McLaughlin and Ms. McLaughlin repeated almost verbatim this narrow, conclusory testimony from Tessier and Leach. Because the testimony from these witnesses was conclusory and duplicative, I find that it has almost no probative value regarding whether the proposed pier will significantly interfere with McLaughlin’s access to and from her pier.

Hill testified for DEP and concluded that the proposed pier would not significantly interfere with McLauglin’s access to and from her pier. Hill PFT, p. 5. He testified that the distance between the two piers is approximately 100 feet, well over the presumed regulatory setback of 25 feet from the property line. If those setbacks are followed, there would be approximately 50 feet between piers. Hill PFT, p .5. Based upon the actual separation of over 100 feet and Hill’s observations of the McLaughlin’s pier and its use in relation to the proposed pier location, Hill concluded that the Maher proposed pier will not significantly interfere with McLaughlin’s ability to approach and depart her property via the waterway. Hill PFT, p. 7.

For the above reasons, I find that McLaughlin did not prove by a preponderance of the evidence that the proposed pier will significantly interfere with McLaughlin’s access to and from her pier.

*Interference With The Town Pier.* The Town pier lies to the south of the proposed pier location. On the north side of the Town pier are usually 4 to 7 commercial fishing vessels docked in boat slips. Rendon PFT, p. 3. The boat slips are separately framed by wood piles that have been driven vertically into the ocean floor to form rectangular slips extending northward from the Town pier. Of those boat slips the closest slip pile is approximately 69 feet away from the end of the proposed pier. Rendon PFT, p. 4. The remaining piles and slips are generally significantly farther away, extending out towards the center of the harbor beyond the end of the proposed pier.

The Town provided testimony purportedly showing that the proposed pier would interfere with the seven slips on the north side of the Town pier. Five of the seven commercial vessels that operate from the Town pier range between 34 and 40 feet in length. Rendon PFT, p. 4. Their maneuverability is limited by their wide beam, single screw engine (one propeller), exterior rigging, and topside cabin, which can act as a sail and catch the wind, making it difficult to maneuver. The wind generally blows out of the south to southwest.

Presently the vessels on the north side of the town pier access their slips by backing into them from the north. Rendon testified that the proposed pier would reduce the space for the vessels to back in, particularly during strong winds. In his opinion the proposed location of the Maher pier will “impair the safe movement of vessels to and from the Town pier.” Rendon PFT, p. 5. He believes it will “significantly” restrict the vessels’ navigability. Id. He advocated moving the Maher pier closer to the McLaughlin pier by approximately 25 feet to allow more room for navigation for the commercial fishing vessels on the north side of the Town pier while still allowing enough room for navigation by the McLaughlins. That would increase the distance from the closest point on the Town pier from 69 feet to 94 feet. Rendon PFT, p. 6, 8.

Leach also testified at the hearing that the proposed pier would interfere with access to the north side of the Town pier. He testified that there situation is “compromised” and that it is going to be a “routine tight problem.” Transcript, p. 58-62.

While Rendon and Leach believe that the proposed pier will interfere with the commercial fishing vessels approaching the north side of the Town pier, they provided little factual support for that position. Rendon did not support his testimony with any evidence from the commercial fishermen who use the slips. There is also no evidence that he attempted to navigate a boat to and from the slips on the Town pier’s north side to assess personally the circumstances.

In addition, Rendon’s testimony suggests that he improperly seeks to impose a different standard for significant interference because the boats at the Town pier are commercial fishing vessels. Rendon believes that the commercial fishing boats should not have to perform multiple point turns to dock. Rendon Rebuttal PFT, p. 8. In fact, he acknowledges that the boat operators are capable of maneuvering to avoid the Maher pier but he argues that is not a “justification for creating an interference that does not now exist, for the sake of a single private recreational boat, particularly where there is room to move the Maher pier further north without interfering with the use of the McLaughlin pier.” Rendon Rebuttal PFT, p. 5. Rendon’s testimony is also based upon the incorrect statement that the Maher pier does not have a three month seasonal limitation. Rendon Rebuttal PFT, 7.

I discount the weight of Rendon’s testimony for reasons in addition to those discussed above. In particular, much of his testimony is premised upon the belief that the proposed pier could be moved farther to the north. Rendon Rebuttal PFT. But Rendon’s desire to move the proposed pier north was not supported by any evidence showing that the proposed new location would be sufficiently deep. He admitted that he had no such evidence. Transcript, p. 189. In fact, the Applicant’s witness testified that the pier could not be moved further north because the water depth would be insufficient, posing a threat to underlying shellfish beds. Lyttle PFT, p. 3.

In addition to the above factors that detract from the weight of Rendon’s testimony, the c. 91 license plan itself (dated July 10, 2014) shows that the proposed pier would generally not lie in the path of travel of the vessels travelling to and from the slips at the Town pier. With the exception of one or two of the inner most slips, the Town pier slips extend out towards the center of the harbor beyond the end of the proposed pier. And even the inner most slip appears accessible without significant interference from the proposed pier. This finding is corroborated by testimony from DEP’s expert boater, DeCesare, who has substantial experience operating commercial boats. DeCesare testified that the proposed Maher pier would not significantly interfere with public rights of navigation or substantially impair the ability of the commercial fishing vessels berthed on the north side of the Town pier to pass freely on the waterway and engage in normal loading and unloading activities. DeCesare PFT, p 4. He testified that the boats docked in the two inner slips, the ones closest to the Maher pier, may need to adjust the way they choose to navigate into and out of their slips because there will be less space. But he testified that the reduction in space will not prevent or substantially interfere with their ability to use the slips. DeCesare PFT, p. 5. He testified this is normal, i.e., that boat operators have to adjust their course of action when berthing due to many variables—wind, current, depth, other boats, visibility, etc. The proposed pier might require some additional maneuvering or multiple point turns. DeCesare PFT, p. 5. DeCesare credibly testified that commercial fisherman who will have to perform that maneuvering are, or should be, experienced, professional operators, who are capable of such maneuvers.

DEP’s other expert witness, Hill, testified that when he conducted a site visit he observed commercial fishing vessels arriving to and departing from the Town pier slips at issue. Based upon those observations he opined that neither vessel chose a course that came remotely close to the location of the proposed pier. Hill PFT, pp. 4, 7-9. Hill also persuasively explained that the proposed pier will not cause a significant interference when there are strong winds from the southwest, which the Town’s expert believed could blow commercial fishing vessels into the proposed Maher pier. He explained that the Maher pier will be in place only from May 31 to September 5 of each year, when the winds are generally consistent and not severe. Moreover, he elaborated, Wychmere Harbor is a very sheltered harbor. It is a circular shaped waterbody, approximately 750 to 1,000 feet in diameter. It is exposed to the open ocean water by only a long narrow channel to Nantucket Sound. The channel is approximately 750 feet long and 100 feet wide. As a consequence, the potential for significant wave action is very minimal. Hill therefore concluded that the proposed pier would comply with the regulations and not significantly interfere with the commercial fishing vessels that would use the Town pier. Hill PFT, pp. 4, 7-9.

For all the above reasons, I greatly discount the weight and persuasiveness of testimony from the Town and McLaughlin asserting that the proposed pier will significantly interfere with use of the Town pier. Instead, I am persuaded by the evidence to the contrary. I find that there is almost no creditable evidence demonstrating that the proposed pier will significantly interfere with access to and from the boat slips on the north side of the Town pier. While the boats travelling to or from the two inner most slips on the pier may have to do some extra maneuvering—such as a multiple point turn—in some circumstances during the three months out of the year that the proposed pier will be in place, that does not rise to the level of a significant interference. As DeCesare testified, having to perform some maneuvering in a busy well protected harbor for three months out of the year is not uncommon.

In support of their positions in the case, both the Town and McLaughlin mistakenly rely upon the decision in Matter of Oliveira, Docket No. 2010-017, Recommended Final Decision (January 7, 2011), adopted by Final Decision (January 7, 2011). They focus on the fact that the proposed pier will only serve one property, and they argue that it will interfere with multiple users of the harbor. That focus is misplaced. In Oliveira the proposed pier was over 200 feet long and there was firsthand evidence from numerous witnesses showing that the pier would directly intersect a course of travel and area of usage by many individuals who frequently use the area. That course of travel and area of usage would have been eliminated, requiring an alternative course of travel that was substantially different and difficult under some circumstances. There was no such evidence in this case, only persuasive evidence that one or two boats accessing the inner most slips on the Town pier might have to maneuver a bit more to access the slips.

**CONCLUSION**

For all the above reasons, I find that McLaughlin and the Town failed to prove by a preponderance of evidence that the Applicant’s proposed pier will significantly interfere with access to and from the north side of the Town pier, the McLaughlins’ ability to access their property, or the ability of the public to pass freely upon the waterways and to engage in transport or loading/unloading activities under 310 CMR 9.35(2)(a)(1)(j). As a consequence, I recommend that DEP’s Commissioner issue a Final Decision affirming the Draft Waterways License issued to Maher.

## NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. 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: Elizabeth A. Maher

Docket No. 2014-018 File No. W13-3970

Harwich

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| Representative | Party |
| James B. Stinson, Esq.  72 Route 28  P.O. Box 665  West Harwich, MA 02671  [stinsonlaw@verizon.net](mailto:stinsonlaw@verizon.net)  Charles M. Sabatt  540 Main Street, Suite 8  Hyannis, MA 02601  [cms@sabattlaw.com](mailto:cms@sabattlaw.com)  Drew W. Hoyt  Hoyt Porro LLP  1600 Providence Highway  Walpole, MA 02081  [dhoyt@hoytporro.com](mailto:dhoyt@hoytporro.com) | APPLICANT  Elizabeth Maher |
| Joel E. Faller  The McLaughlin Brothers, P.C.  One Washington Mall, 16th Floor  Boston, MA 02108  [lawyers@mclaughlinbrothers.com](mailto:lawyers@mclaughlinbrothers.com) | PETITIONER  Charlene E. McLaughlin |
| John J. Goldrosen, Esq.  Kopelman and Paige, P.C.  101 Arch Street  12th floor  Boston, MA 02110  [jgoldrosen@k-plaw.com](mailto:jgoldrosen@k-plaw.com) | INTERVENER  Town of Harwich |
| David Bragg  Mass DEP Office of General Counsel  One Winter Street  Boston, MA 02108  [david.bragg@state.ma.us](mailto:Dana.muldoon@state.ma.us) | DEPARTMENT |
| David Hill  MassDEP – Southeast Regional Office  20 Riverside Drive  Lakeville, MA 02347  [David.hill@state.ma.us](mailto:David.hill@state.ma.us) | ANALYST |
| Date: December 21, 2015 |  |

1. The Presiding Officer who presided over the Hearing participated in the Commonwealth’s 2015 Early Retirement Incentive Program, and consequently retired from State service on July 1, 2015. She was unable to issue a Recommended Final Decision before her departure. The Chief Presiding Officer assigned this appeal to me to resolve. The parties jointly requested that I proceed with issuing a Tentative Decision in the case pursuant to 310 CMR 1.01(14)(a) and (c). Under 310 CMR 1.01(14)(a) Tentative Decisions may be issued under certain circumstances, including when “the hearing was conducted by a Presiding Officer other than the one who will write the recommended decision and the recommended decision will be adverse to a party other than the Department.” Under 310 CMR 1.01(14)(c), “a tentative decision shall be made by a substitute Presiding Officer upon the record [in the appeal]” when the Presiding Officer who had adjudicatory responsibility for the appeal is unavailable. Following the issuance of a Tentative Decision, “[t]he parties . . . have seven days from the receipt of the tentative decision to file objections to the decision and supporting arguments with the [Office of Appeals and Dispute Resolution].” 310 CMR 1.01(14)(a). [↑](#footnote-ref-1)
2. “PFT” refers to pre-filed written testimony. [↑](#footnote-ref-2)
3. When it approved it at that time the dock was to be 80 feet long and 76 feet from the Town pier. It was also stipulated that the Maher boat was to be parked on the north side of their pier. [↑](#footnote-ref-3)
4. The prior Presiding Officer in the case had designated an additional issue to be adjudicated under 310 CMR 9.35(2)(a)(1)(j). Under that provision, a project shall not significantly interfere with public rights of navigation which exist in all waterways. Such rights include the right to conduct any activity which entails the movement of a “boat, vessel, float, or other watercraft; the right to conduct any activity in involving the transport or the loading/unloading of persons or objects to or from any such watercraft, and the natural derivatives thereof.” Also, a project shall not impair in any “substantial manner the ability of the public to pass freely upon the waterways and to engage in transport or loading/unloading activities.” 310 CMR 9.35(2)(a)(1)(j). There was, however, almost no evidence specifically addressed to this provision and issue. Generally, the only probative evidence was from Hill and DeCesare, who both testified that the provision would not be violated by the proposed pier. Given that and given that the standard is materially similar—whether there is significant interference—I find that the proposed pier will not violate 310 CMR 9.35(2)(a)(1)(j) and I focus this decision on whether there was significant interference under 310 CMR 9.36(2). [↑](#footnote-ref-4)