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

February 20, 2018

In the Matter of
Francis P. and Debra A. Zarette,
Trustees of Farm View Realty Trust

OADR Docket No. WET-2016-030
DEP File No. SE-32-2242
Harwich, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

In this appeal, Gwynne and David Daks (“the Petitioners”) challenge a Superseding Order of Conditions (“SOC”) that the Southeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to Francis P. and Debra A. Zarette, Trustees of Farm View Realty Trust (“the Applicants”) on October 5, 2016, pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 (“MWPA”), and the Wetlands Regulations, 310 CMR 10.00 et seq. (“the Wetlands Regulations”). The SOC approved the Applicants’ proposed Project at their real property located on the Herring River at 11 Harbor Way in Harwich, Massachusetts (“the Applicants’ Property”). Specifically, the SOC approved “the Reconstruction of a fish house[,] including: [1] [the] removal of an existing building and pilings, deck, timber bulkheads, fish trap poles, concrete, and rocks; and [2] the

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installation of a new pile supported building, wash-over bulkhead/wave barrier, loading dock, stairs, ramp, split rail fence, native plantings, salt marsh restoration areas, driveway enhancements, installation of a water line and hydrant, and designation of a path for pedestrian passage.” SOC, at p. 8. The purpose of the proposed Project is “for the installation of a shellfish nursery system [at the Applicants’ Property] that [will] involv[e] the propagation of shellfish seed stock utilizing a series of shallow holding tanks located in the building [at the Property] that [will] be supplied with circulating seawater pumped from the [Herring River] below using upweller pumps submersed in the [R]iver directly below the building.” Pre-filed Direct and Rebuttal Testimony of Pamela Neubert, Ph.D., January 20, 2017, ¶ 10; Pre-filed Direct and Rebuttal Testimony of Roger P. Michniewicz, P.E., January 20, 2017, ¶ 6.¹ The Harwich Conservation Commission (“the HCC”) had previously approved the proposed Project pursuant to the MWPA and the Wetlands Regulations, and the Town of Harwich’s Wetlands Protection By-law.²

The Petitioners contend that their real property at 18 Harbor Way in Harwich (“the

¹ As discussed below, at p. 4, Dr. Neubert and Mr. Michniewicz were the Applicants’ expert witnesses at the evidentiary Adjudicatory Hearing that I conducted to resolve this appeal.

² In issuing its SOC, the Department only affirmed that aspect of the HCC’s approval of the proposed Project under the MWPA and the Wetlands Regulations because the Department lacks jurisdiction to review decisions of local conservation commissions under local Wetlands Protection Bylaws and Regulations. Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich, 449 Mass. 859, 866-67 (2007); Healer v. Department of Environmental Protection, 73 Mass. App. 714, 716 (2009); In the Matter of John Walsh and Walsh Brothers Building Co., Inc., Memorandum and Order Denying Petitioners’ and Harwich Conservation Commission’s Joint Motion to Proceed (September 10, 2013), 2013 MA ENV LEXIS 92, at 10; Order Granting Petitioners’ Renewed Motion to Proceed (September 18, 2014); Recommended Remand Decision (April 23, 2015), 2015 MA ENV LEXIS 35; Decision Adopting Recommended Remand Decision (June 2, 2015), 2015 MA ENV LEXIS 34. Decisions of local conservation commissions approving or rejecting proposed activities in protected wetlands areas pursuant to local wetlands protection bylaws are generally appealable to the Superior Court pursuant to the Certiorari Statute, G.L. c. 249, § 4. Id. Here, the Petitioners appealed to Barnstable Superior Court, the HCC’s approval of the proposed Project under the Harwich Wetlands Protection By-law and their appeal remains pending before the Court. See Daks v. Harwich Conservation Commission, Barnstable Superior Court, C.A. No. 1672CV00260. In response to a Motion filed by the Applicants and the HCC that was not opposed by the Petitioners, the Superior Court on June 9 and 29, 2017, “stayed the [the proceedings in the case] in [their] entirety until a [Final] [D]ecision [is issued] in [this] administrative appeal [of the SOC].” See Superior Court’s Docket Entries from June 9, 2017 through June 29, 2017.

Petitioners' Property") abuts the Applicants' Property and request that the SOC be vacated, contending that the SOC is invalid for numerous reasons discussed below, at pp. 16-67. In response, the Applicant and the Department dispute the Petitioners' claims and request that the SOC be affirmed, contending that: (1) the Petitioners lack standing to challenge the SOC; and (2) the Department properly issued the SOC pursuant to the MWPA and the Wetlands Regulations. See below, at pp. 10-67.

I conducted an evidentiary Adjudicatory Hearing ("Hearing") to resolve the Petitioners' appeal of the SOC.³ Per the standard practice of the Office of Appeals and Dispute Resolution ("OADR"), the Hearing was digitally recorded.⁴ At the Hearing, the parties were represented by legal counsel and presented witnesses and documentary evidence in support of their respective positions in the case. A total of eight witnesses filed sworn Pre-filed Testimony ("PFT") on behalf of the parties for the Hearing in support of the parties' respective positions in the case. The parties' respective witnesses were as follows.

The Petitioners' witnesses were:

- (1) the Petitioner David Daks ("Mr. Daks"),⁵
- (2) Timothy M. Mannherz ("Mr. Mannherz"), a resident of 24 Harbor Way in Harwich;⁶ and

³ The Hearing included my conducting a view of the Applicants' Property ("the Site Visit") with the parties and their respective legal counsel and wetlands experts pursuant to 310 CMR 1.01(5)(a)14 and 310 CMR 1.01(13)(j) to assist me in "[my] understanding of the evidence that ha[d] been . . . presented" by the parties in the appeal. In accordance with 310 CMR 1.01(5)(a)14 and 310 CMR 1.01(13)(j), the parties "point[ed] out objects [at] or features [of the Applicants' Property] that [could] . . . assist [me] in understanding [the] evidence [that was presented in the Hearing by the parties]." In accordance with the same rules, I "rel[ied] on the . . . observations [that I made] during [the Site Visit] as evidence to the same extent permissible as if observed in the hearing room."

⁴ Following the Hearing, OADR's Case Administrator made the digital recording available to the parties for downloading from the internet, which they relied on in drafting and filing their respective Closing Briefs in the case.

⁵ Pre-filed Testimony of David Daks, December 21, 2016 ("Mr. Daks' PFT").

⁶ Affidavit of Timothy M. Mannherz, January 20, 2017 ("Mr. Mannherz's PFT").

- (3) Paul J. Shea ("Mr. Shea"), a Professional Wetlands Scientist and private environmental consultant with more than 30 years of experience in the wetlands field.⁷

The Applicants' witnesses were:

- (1) William Crowell ("Mr. Crowell"), an attorney who has practiced law in Harwich for nearly 40 years with a concentration in Real Estate Law, Municipal Law, and Probate Law;⁸
- (2) Ted Lucas ("Mr. Lucas"), a resident of West Chatham, Massachusetts, "[with] personal of knowledge of the business and physical operations" that have taken place at the Applicants' Property during the past 50 years;⁹
- (3) Roger P. Michniewicz ("Mr. Michniewicz"), a Professional Engineer ("P.E."), with nearly 50 years of experience in the civil and geotechnical engineering field;¹⁰ and
- (4) Dr. Pamela Neubert ("Dr. Neubert"), a marine scientist and private environmental consultant with more than 20 years of experience working in estuarine and deep-sea habitats and conducting ecological impact assessments of coastal and offshore marine environments.¹¹

The Department's witness was Mark N. Bartow ("Mr. Bartow"), an Environmental Analyst in the Wetlands and Waterways Program of the Department's Southeast Regional Office with nearly 30 years of experience in the environmental field.¹²

At the Hearing all of the witnesses listed above except Mr. Crowell for the Applicant were available for cross-examination under oath by the parties' opposing counsel.¹³ Only three

⁷ Pre-filed Testimony of Paul J. Shea, December 21, 2016 (Mr. Shea's Direct PFT I"); Affidavit of Paul J. Shea In Opposition to [Applicants'] Motion to Dismiss for Lack of Standing, February 1, 2017 ("Mr. Shea's Direct PFT II"); Rebuttal Testimony of Paul J. Shea, February 10, 2017 ("Mr. Shea's Rebuttal PFT").

⁸ Affidavit of William D. Crowell, January 20, 2017 ("Mr. Crowell's PFT").

⁹ Affidavit of Ted Lucas, February 13, 2017 (Mr. Lucas' PFT").

¹⁰ Pre-filed Direct and Rebuttal Testimony of Roger P. Michniewicz, P.E., January 20, 2017 ("Mr. Michniewicz's PFT").

¹¹ Pre-filed Direct and Rebuttal Testimony of Pamela Neubert, Ph.D., January 20, 2017 ("Dr. Neubert's PFT").

¹² Pre-filed Testimony of Mark Bartow, January 25, 2017 ("Mr. Bartow's PFT").

witnesses were cross-examined: the Applicants' witnesses, Mr. Lucas and Mr. Michniewicz, and the Department's witness, Mr. Bartow.¹⁴

As discussed in detail below, based upon the testimonial and documentary evidence that the parties' respective witnesses presented at the Hearing and the applicable law, I find that:

- (1) the Petitioners have standing to challenge the SOC as "person[s] aggrieved" by the SOC pursuant to 310 CMR 10.04; and
- (2) the Department properly issued the SOC approving the proposed Project pursuant to the MWPA and the Wetlands Regulations.

Accordingly, I recommend that the Department's Commissioner issue a Final Decision affirming the Department's SOC.¹⁵

STATUTORY AND REGULATORY FRAMEWORK

The purpose of the MWPA and the Wetlands Regulations is to protect wetlands and to

¹³ At the Pre-Screening (Pre-Hearing) Conference that I conducted with the parties and in the subsequent Pre-Screening Conference Report and Order that I issued in the case, the parties were informed that the Adjudicatory Proceeding Rules governing resolution of this appeal at 310 CMR 1.01(12)(f); 310 CMR 1.01(13)(h)3 mandate that "[i]f a witness is not available for cross-examination at the [Adjudicatory Hearing], the [Pre-filed] written testimony of the witness shall be excluded from the record unless the parties agree otherwise." At the Hearing, Mr. Crowell was not available for cross-examination by the Petitioners' counsel and consequently his PFT was excluded from the Administrative Record, after the Petitioners declined to stipulate to the PFT remaining in the record.

¹⁴ The Petitioners contend that since the Applicants and the Department did not cross-examine the Petitioners' witnesses Mr. Daks, Mr. Mannherz, and Mr. Shea, the facts set forth in their respective PFT are "unchallenged facts" that I must accept in adjudicating this appeal. See Petitioners' Closing Brief, at p. 2. I reject the Petitioners' contention because the facts set forth in the PFT of the Petitioners' witnesses are not "unchallenged facts," but rather facts that were challenged by the Applicant and the Department through the PFT of their respective witnesses. As the Presiding Officer in this appeal, it is my role to analyze the testimony of the witnesses (both PFT and cross-examination testimony) and accord their testimony the probative value that it is due. G.L. c. 30A, § 11(2); 310 CMR 1.01(13)(h)(1). Moreover, "[t]he weight [that I] attac[h] to any evidence in the record . . . rest[s] within [my] sound discretion [as] . . . Presiding Officer. . . ." 310 CMR 1.01(13)(h).

¹⁵ My issuance of this Recommended Final Decision ("RFD") was delayed as a result of a written complaint that was filed with the Department against the Applicants on May 25, 2017 by a purported abutter to the Applicants' Property, contending that the Applicants had performed work at the Property during the pendency of this appeal in violation of 310 CMR 10.05(7)(j)2g and the SOC. See below, at pp. 58-67. The HCC and the Department separately investigated the Applicants' actions resulting in the HCC bringing an enforcement action against the Applicants, to which the Department deferred. *Id.* While the Applicants' violation of 310 CMR 10.05(7)(j)2g and the SOC was unfortunate, it does not warrant a Final Decision in the Petitioners' favor vacating the SOC. *Id.*

regulate activities affecting wetlands areas in a manner that promotes the following eight statutory interests:

- (1) protection of public and private water supply;
- (2) protection of ground water supply;
- (3) flood control;
- (4) storm damage prevention;
- (5) prevention of pollution;
- (6) protection of land containing shellfish;
- (7) protection of fisheries; and
- (8) protection of wildlife habitat.

G.L. c. 131, § 40; 310 CMR 10.01(2); In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 6-7, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77; In the Matter of Webster Ventures, LLC, OADR Docket No. WET-2014-016 (“Webster Ventures I”), Recommended Final Decision (February 27, 2015), 2015 MA ENV LEXIS 14, at 10-11, adopted as Final Decision (March 26, 2015), 2015 MA ENV LEXIS 10; In the Matter of Elite Home Builders, LLC, OADR Docket No. WET-2015-010, Recommended Final Decision (November 25, 2015), adopted as Final Decision (December 17, 2015), 22 DEPR 202, 204 (2015); In the Matter of Sunset City, Inc., OADR Docket No. WET-2016-016, Recommended Final Decision (March 31, 2017), 2017 MA ENV LEXIS 35, at 9-10, adopted as Final Decision (April 21, 2017), 2017 MA ENV LEXIS 33.

The MWPA and the Wetlands Regulations provide that “[n]o person shall remove, fill,

dredge[,] or alter¹⁶ any [wetlands] area subject to protection under [the MWPA and Wetlands Regulations] without the required authorization, or cause, suffer or allow such activity” G.L. c. 131 § 40, ¶ 32; 310 CMR 10.02(2)(a); Vecchione, 2014 MA ENV LEXIS 76, at 7; Webster Ventures I, 2015 MA ENV LEXIS 14, at 11-12; Elite Home Builders, 22 DEPR at 204; Sunset City, 2017 MA ENV LEXIS 35, at 10. “Any activity proposed or undertaken within [a protected wetlands] area[,] . . . which will remove, dredge or alter that area, is subject to Regulation under [the MWPA and the Wetlands Regulations] and requires the filing of a Notice of Intent (“NOI”)” with the permit issuing authority. 310 CMR 10.02(2)(a). A party must also file an NOI for “[a]ny activity . . . proposed or undertaken within 100 feet of [any protected wetlands]” described as “the Buffer Zone” by the Regulations, “which, in the judgment of the [permit] issuing authority, will alter [any protected wetlands].” 310 CMR 10.02(2)(b).

The “[permit] issuing authority” is either the local Conservation Commission when initially reviewing the applicant’s proposed work in a wetlands resource area protected by the MWPA and the Wetlands Regulations, or the Department when it assumes primary review of the proposed work or review on appeal from a local Conservation Commission decision. Healer v.

¹⁶ The Wetlands Regulations at 310 CMR 10.04 define “alter” as “chang[ing] the condition” of any wetlands area subject to protection under the MWPA and the Wetlands Regulations. Examples of alterations include, but are not limited to, the following:

- (a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas;
- (b) the lowering of the water level or water table;
- (c) the destruction of vegetation;
- (d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water.

310 CMR 10.04. “Dredge” is defined as “deepen[ing], widen[ing], or excavat[ing], either temporarily or permanently” a protected wetlands area, and “[f]ill means to deposit any material [in a protected wetlands area] so as to raise an elevation, either temporarily or permanently.” Id.

Department of Environmental Protection, 73 Mass. App. Ct. 714, 717-19 (2009). Under the MWPA, a local Conservation Commission may issue an Order of Conditions authorizing or precluding proposed activities in protected wetlands areas and “[is] allowed to ‘impose such conditions as will contribute to the protection of the interests described [in MWPA and the Wetlands Regulations]’” and to require that “‘all work shall be done in accordance’ with the conditions they might impose. . . .” Id.

Orders of Condition, including any findings and wetlands delineations forming the basis of the Orders, are valid for three years from the date of the Orders’ issuance. 310 CMR 10.05(6)(d). However, any “[SOC issued by the Department] shall supersede the prior order of [conditions of] the conservation commission [issued pursuant to the MWPA and the Wetlands Regulations]. . . and all work shall be done in accordance with the [Department’s SOC] ,” Id., unless the Commission has properly denied the proposed project pursuant to a local Wetlands Protection Bylaw that is more protective than the MWPA. Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich, 449 Mass. 859, 866 (2007). This is the case because the MWPA “establishes Statewide minimum wetlands protection standards, [but] local communities are free to impose more stringent requirements” by enacting local Wetlands Protection Bylaws. Oyster Creek, 449 Mass. at 866; Healer, 73 Mass. App. At 716. As a result, an SOC issued by the Department under the MWPA 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].” Oyster Creek, 449 Mass. at 866. However, this issue is not present in this case, because both the HCC and the Department approved the proposed Project pursuant to the MWPA and the Wetlands

Regulations.

“[W]hen it receives an SOC request, ‘[t]he Department [conducts] a de novo review of [the proposed] Project [at issue],’ meaning that the review of the Project starts anew, and that the Department makes a determination independent of any local conservation commission determination regarding whether the Project should be authorized pursuant to the MWPA and the Wetlands Regulations.” In the Matters of Richard Cuda and Town of Orleans Board of Selectmen, OADR Docket Nos. WET-2015-012 and WET-2016-014 (“Cuda”), Recommended Final Decision (December 13, 2017), at 40, adopted as Final Decision (January 8, 2018), citing, In the Matter of Chappaquonsett Realty Trust, OADR Docket No. 1988-222, Order of Dismissal and Grant of Motion to Intervene (July 19, 1989), 7 MELR 1421, 1426 (1989). “Indeed, in issuing an SOC affirming a local conservation commission’s approval of a proposed Project, the Department is not required by either the MWPA or the Wetlands Regulations “[to] adopt conditions identical to those adopted by [the] conservation commission.” Id. “[T]he Department’s de novo review authority [also] carries over to an administrative appeal of an SOC filed with OADR. During the pendency of the administrative appeal before OADR, the Department ‘is [not] precluded from changing its position [on the SOC because] . . . its [primary] obligation [is] to defend the interests of the [MWPA].’” Cuda, at 40-41, citing, In the Matter of John Soursourian, OADR Docket No. WET-2013-028, Recommended Final Decision (2014), 2014 MA ENV LEXIS 49, at 34-36, adopted as Final Decision, 2014 MA ENV LEXIS 47 (2014). “Hence, if during the pendency of an administrative appeal, ‘[the Department] becomes convinced’ based on a different legal interpretation of applicable regulatory standards, new evidence, or error in its prior determination, ‘that the interests of [MWPA] require it to take a different position from one that it had adopted previously [in issuing the SOC],’ the

Department is authorized to, and should change its position.” *Id.* Additionally, “[t]he Presiding Officer [responsible for adjudicating the administrative appeal] is not bound by MassDEP’s prior orders or statements [in the case], and instead is responsible . . . for independently adjudicating [the] appeal[] and [issuing a Recommended Final Decision] to MassDEP’s Commissioner that is consistent with and in the best interest of the [MWWA, the Wetlands] Regulations, and MassDEP’s policies and practices.” *Soursourian*, 2014 MA ENV LEXIS 49, at 36.

FINDINGS

I. THE PETITIONERS HAVE STANDING TO CHALLENGE THE SOC AS “PERSON[S] AGGRIEVED” BY THE SOC PURSUANT TO 310 CMR 10.04

As discussed above, the Applicants and the Department contended at the Hearing, that Petitioners lacked standing to challenge the SOC in this appeal. As discussed in detail below, I reject the Applicants’ and the Department’s position based the applicable law and the evidence introduced at the Hearing.

A. The Jurisdictional Nature of Standing

Standing “is not simply a procedural technicality.” *Save the Bay, Inc. v. Department of Public Utilities*, 366 Mass. 667, 672 (1975); *In the Matter of Webster Ventures, LLC*, OADR Docket No. 2015-014 (“*Webster Ventures II*”), Recommended Final Decision (June 3, 2016), 2016 MA ENV LEXIS 27, at 19-20, adopted as Final Decision (June 15, 2016), 2016 MA ENV LEXIS 32; *In the Matter of Thomas Vacirca, Jr.*, OADR Docket No. WET-2016-017, Recommended Final Decision (April 11, 2017), 2017 MA ENV LEXIS 22, at 18-19, adopted as Final Decision (April 18, 2017), 2017 MA ENV LEXIS 28. Rather, it “is a jurisdictional prerequisite to being allowed to press the merits of any legal claim.” *R.J.A. v. K.A.V.*, 34 Mass. App. Ct. 369, 373 n.8 (1993); *Ginther v. Commissioner of Insurance*, 427 Mass. 319, 322 (1998)

("[w]e treat standing as an issue of subject matter jurisdiction [and] . . . of critical significance"); see also United States v. Hays, 515 U.S. 737, 115 S.Ct.2431, 2435 (1995) ("[s]tanding is perhaps the most important of the jurisdictional doctrines"); Webster Ventures II, 2016 MA ENV LEXIS 27, at 19.

Under 310 CMR 10.05(7)(j)2(a), certain individuals or entities may, within 10 business days after an SOC's issuance, file an appeal with the OADR challenging the SOC, including "[an] aggrieved person [who] previously [participated] in the permit proceedings." Under the regulation, "[p]reviously participating in the permit proceeding" means:

- (1) the submission of written information to the conservation commission prior to the close of the [commission's] public hearing;
- (2) requesting an action by the Department that would result in [the SOC]; or
- (3) providing written information to the Department prior to issuance of [the SOC].

See also 310 CMR 10.04 (definition of "person aggrieved").

Here, the parties do not dispute that the Petitioners previously participated in permit proceedings by submitting comments to the HCC when it initially reviewed the proposed Project, and then to the Department by requesting an SOC overturning the HCC's Order of Conditions approving the Project. Thus, the only issue regarding the Petitioners' standing is whether the Petitioners are "person[s] aggrieved" by the SOC within the meaning of 310 CMR 10.04 and 10.05(7)(j)2(a).

The Wetlands Regulations at 310 CMR 10.04 define a "person aggrieved" as:

any person who because of an act or failure to act by the issuing authority may suffer an injury in fact which is different either in kind or magnitude from that

suffered by the general public and which is within the scope of the interests identified in [MWPA]. . . .

“A ‘person aggrieved’ as that term is used in the MWPA must assert ‘a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest. . . . Of particular importance, the right or interest asserted must be one that the statute . . . intends to protect.” Webster Ventures I, 2015 MA ENV LEXIS 14, at 15; Vacirca, 2017 MA ENV LEXIS 22, at 28-29; In the Matter of Ronald and Lois Enos, OADR Docket No. WET-2012-019, Recommended Final Decision (February 22, 2013), 2013 MA ENV LEXIS 21, at 16-17, adopted as Final Decision (March 22, 2013), 2013 MA ENV LEXIS 20; In the Matter of Norman Rankow, OADR Docket No. WET-2012-029, Recommended Final Decision (August 6, 2013), 2013 MA ENV LEXIS 45, at 26-27, adopted as Final Decision (August 12, 2013), 2013 MA ENV LEXIS 79; In the Matter of Town of Southbridge Department of Public Works, OADR Docket No. WET-2009-022, Recommended Final Decision, at p. 4 (September 18, 2009), adopted as Final Decision (October 14, 2009); In the Matter of Onset Bay Marina, OADR Docket No. 2007-074, Recommended Final Decision (January 30, 2009), 16 DEPR 48, 50 (2009), adopted as Final Decision (April 1, 2009); Compare, Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20, 27-28 (2006) (definition of “person aggrieved” under G.L. c. 40B).

“To show standing, [however,] a party need not prove by a preponderance of the evidence [at the evidentiary Adjudicatory Hearing in the appeal] that his or her claim of particularized injury is true.” Webster Ventures I, 2015 MA ENV LEXIS 14, at 16; Vacirca, 2017 MA ENV LEXIS 22, at 29-30; In the Matter of Edward C. Gordon and 129 Racing Beach Trust, OADR Docket No. WET-2009-048, Recommended Final Decision (March 3,

2010), 2010 MA ENV LEXIS 114, at 10, adopted as Final Decision (March 5, 2010), 2010 MA ENV LEXIS 13, citing, Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005); Enos, 2013 MA ENV LEXIS 21, at 16-17; Rankow, 2013 MA ENV LEXIS 45, at 27-28. As the Massachusetts Appeals Court explained in Butler:

[t]he “findings of fact” a judge is required to make when standing is at issue . . . differ from the “findings of fact” the judge must make in connection with a trial on the merits. Standing is the gateway through which one must pass en route to an inquiry on the merits. When the factual inquiry focuses on standing, therefore, a plaintiff is not required to prove by a preponderance of the evidence that his or her claims of particularized or special injury are true. “Rather, the plaintiff must put forth credible evidence to substantiate his allegations. [It is i]n this context [that] standing [is] essentially a question of fact for the trial judge.”

63 Mass. App. Ct. at 441; Webster Ventures I, 2015 MA ENV LEXIS 14, at 16-17; Vacirca, 2017 MA ENV LEXIS 22, at 30-31; see also In the Matter of Hull, Docket No. 88-22, Decision on Motion for Reconsideration of Dismissal, 6 MELR 1397, 1407 (July 19, 1999) (party must state sufficient facts which if taken as true demonstrate the possibility that injury alleged would result from the allowed activity); Enos, 2013 MA ENV LEXIS 21, at 17-18; Rankow, 2013 MA ENV LEXIS 45, at 28-29; compare Standerwick, 447 Mass. at 37 (plaintiffs’ case appealing zoning decision cannot consist of “unfounded speculation to support their claims of injury”).

To summarize, in order to demonstrate that they were “person[s] aggrieved” by the SOC, the Petitioners were required to put forth a minimum quantum of credible evidence at the Hearing in support of their claim that the proposed Project will or might cause them to suffer an injury in fact, which will be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interest protected by the MWPA and the Wetlands Regulations. 310 CMR 10.04; Webster Ventures I, 2015 MA ENV LEXIS 14, at 17-18; Vacirca, 2017 MA ENV LEXIS 22, at 31-32; Gordon, 2010 MA ENV

LEXIS 114, at 11 and cases cited; Enos, 2013 MA ENV LEXIS 21, at 17-18; Rankow, 2013 MA ENV LEXIS 45, at 29. If the Petitioners met that threshold, their appeal of the SOC would proceed “to [the] inquiry on the merits” regarding whether the Department properly issued the SOC. Butler, 63 Mass. App. Ct. at 441.

B. The Petitioners Demonstrated Standing to Appeal the SOC

At the Hearing, the Applicants and the Department contended that the Petitioners lacked standing to challenge the SOC because they purportedly “failed to present any credible evidence . . . at the Hearing to support their claim that the proposed Project will or might cause them to suffer an injury different in kind or magnitude from the general public.” Applicants’ Closing Brief, at pp. 6-10; Department’s Closing Brief, at pp. 3-7. I reject the Applicants’ and the Department’s contention because, as discussed below, the Petitioners satisfied the minimal evidentiary threshold for proof of standing by demonstrating through the testimony from their expert witness, Mr. Shea, that the proposed Project might harm protected wetlands areas and cause unique harm to the Petitioners’ Property, which abuts the Applicants’ Property on Harbor Way in Harwich. Based on Mr. Shea’s testimony I make the following findings regarding the Petitioners’ standing to challenge the SOC.

The Applicants’ Property contains 8,700 square feet of land (less than one quarter acre of land)¹⁷ and is low-lying real property located within a coastal 100-year flood zone and Land Subject to Coastal Storm Flowage (“LSCSF”), a protected wetlands area.¹⁸ Mr. Shea’s Direct PFT I, ¶ 15; Mr. Shea’s Direct PFT II, ¶ 4. The Applicants’ Property is subject to regular inundation during storm events and storm surges, Spring Tides, and full moon cycle tides

¹⁷ One acre is approximately 43,560 square feet.

¹⁸ The nature of LSCSF is discussed below at pp. 54-56.

(including Super Moon tides). Mr. Shea's Direct PFT I, ¶ 15; Mr. Shea's Direct PFT II, ¶ 4. Groundwater at the Applicants' Property is very close to the existing grade. Mr. Shea's Direct PFT I, ¶ 15.

The proposed Project at the Applicants' Property is for a commercial aquaculture enterprise that will include the daily use of the Property, with commercial trucks entering and leaving the Property on a regular basis. Mr. Shea's Direct PFT II, ¶ 5. The proposed Project includes four employee parking spaces located directly adjacent to the Herring River. Mr. Shea's Direct PFT II, ¶ 5. Over 50% of the Applicants' Property (4,434 square feet) will be covered with gravel driveway and parking areas. Mr. Shea's Direct PFT II, ¶ 5.

The entrance, driveway, front yard, and garage area of the Petitioners' Property is located at the Property's southern property line and adjacent to the Applicants' Property. Mr. Shea's Direct PFT II, ¶ 8. The Petitioners' Property has a rise in topography forming a Coastal Bank, a protected wetlands area, with its seaward edge facing the Applicants' Property.¹⁹ Mr. Shea's Direct PFT I, ¶ 16. The proposed Project's plan to pack down dirt on the Applicants' Property to create parking and driveway areas, utilizing a crushed shell surface, and to provide for truck traffic (both for the proposed facility workers and visitors/customers), might decrease the ability of the ground on the Applicants' Property to absorb stormwater runoff coming downgradient from the adjacent Belmont condominium and Harbor Way (an asphalt road) and from coastal flowage and inundation (storm events and tidal action). Mr. Shea's Direct PFT I, ¶ 17; Mr. Shea's Direct PFT II, ¶¶ 6, 8. This compaction and saturation of soils on the Applicants'

¹⁹ The nature of Coastal Bank is discussed below, at pp. 30-33.

Property might increase the risk of flooding impacts to the Petitioners' Property. Mr. Shea's Direct PFT I, ¶ 18; Mr. Shea's Direct PFT II, ¶¶ 6, 8.

Increased truck and other vehicular traffic on Harbor Way going to and from the Applicants' Property might erode the seaward edge of Harbor Way, which now drops off from asphalt to dirt. Mr. Shea's Direct PFT I, ¶ 19. If erosion occurs, this might cause a swale effect allowing increased water volumes to flow in the direction towards the Petitioners' Property, resulting in possible negative erosion impacts to the Coastal Bank on the Petitioners' Property. Mr. Shea's Direct PFT I, ¶ 19. Erosion of the Coastal Bank on the Petitioners' Property will reduce the Coastal Bank's ability to serve as a natural protective feature against the impacts from coastal storm events and coastal flooding events. Mr. Shea's Direct PFT I, ¶ 19.

In sum, the Petitioners presented a minimum quantum of credible evidence at the Hearing in support of their claim that the proposed Project will or might cause them to suffer an injury in fact, which will be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interest protected by the MWPA and the Wetlands Regulations. 310 CMR 10.04; Webster Ventures I, 2015 MA ENV LEXIS 14, at 17-18; Vacirca, 2017 MA ENV LEXIS 22, at 31-32; Gordon, 2010 MA ENV LEXIS 114, at 11 and cases cited; Enos, 2013 MA ENV LEXIS 21, at 17-18; Rankow, 2013 MA ENV LEXIS 45, at 29. As a result, the Petitioners may proceed through the "standing . . . gateway . . . to [the] inquiry on the merits" regarding whether the Department properly issued the SOC. Butler, 63 Mass. App. Ct. at 441.

II. THE DEPARTMENT PROPERLY ISSUED THE SOC

My finding that the Petitioners have standing to challenge the SOC does not mean that they prevail on the merits of their substantive claims challenging the Department's SOC

authorizing the proposed Project. See below, at pp. 17-67. My finding only means that the Petitioners have standing based on the much lower evidentiary threshold that only required them to put forth a minimum quantum of credible evidence in support of their claim that the proposed Project would or might cause them to suffer an injury in fact, which would be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interests protected by the MWPA and the Wetlands Regulations. 310 CMR 10.04; Webster Ventures I, 2015 MA ENV LEXIS 14, at 17-18; Vacirca, 2017 MA ENV LEXIS 22, at 31-32; Gordon, 2010 MA ENV LEXIS 114, at 11 and cases cited; Enos, 2013 MA ENV LEXIS 21, at 17-18; Rankow, 2013 MA ENV LEXIS 45, at 29. However, to successfully challenge the SOC, the Petitioners had the higher burden of proving by a preponderance of credible evidence through the sworn testimonial and documentary evidence of their witnesses that the Department erred in issuing the SOC approving the proposed Project. Webster Ventures I, 2015 MA ENV LEXIS 14, at 13-14, 31-37. As explained below, they did not meet their burden because a preponderance of the evidence introduced at the Hearing demonstrated that the Department properly issued the SOC to the Applicants approving the proposed Project.

A. The Department Properly Determined Pursuant To 310 CMR 10.58(6)(i) That Portions Of The Proposed Project Are Subject To Jurisdiction Under G.L. c. 91 And Exempt From The Requirements Of 310 CMR 10.58 Governing Proposed Activities In Riverfront Area

The Applicants' Property is located within Riverfront Area, a wetlands area protected by the MWPA and the Wetlands Regulations at 310 CMR 10.58, and as such, any activities at the Property that will impact Riverfront Area must satisfy the Performance Standards under 310

CMR 10.58(4)²⁰ unless the activities are exempt or “grandfathered” from regulation pursuant to 310 CMR 10.58(6). Under 310 CMR 10.58(6)(i):

[s]tructures and activities subject to a M.G.L. c. 91 waterways license or permit, or authorized prior to 1973 by a special act [of the Massachusetts Legislature], are exempt, provided the structure or activity is subject to jurisdiction and obtains a license, permit, or authorization under [the Department’s Waterways Regulations at] 310 CMR 9.00.

The Applicants, through one of their expert witnesses: Mr. Michniewicz, presented probative evidence that the majority of the proposed Project is exempt from the Riverfront Area Performance Standards pursuant to 310 CMR 10.58(6)(i). Mr. Michniewicz’s PFT, ¶ 21. The Department’s expert witness, Mr. Bartow, corroborated Mr. Michniewicz’s testimony. Mr. Bartow’s PFT, ¶¶ 11-25. Based on their testimony, I make the following findings.

In 1930, the Massachusetts Department of Public Works (“DPW”) issued a Chapter 91 Waterways License (#1213) (“the 1930 c. 91 License”) to a prior owner of the Applicants’ Property for a 20 feet by 40 feet fish house building with an attached 4 foot by 20 foot loading dock area on the Herring River. Mr. Michniewicz’s PFT, ¶ 21; Exhibit E to Mr. Michniewicz’s PFT. The License Plan for the 1930 c. 91 License (“the 1930 License Plan”) indicates that the Mean High Water (“MHW”) line was located approximately 45 feet or more landward of the face of the fish house shown on the License Plan. Mr. Michniewicz’s PFT, ¶ 21; Exhibit E to Mr. Michniewicz’s PFT.

In connection with the proposed Project, Mr. Michniewicz’s firm prepared a plan entitled “Sketch Plan SKC-5”, which superimposed the Historic MHW line from the 1930 License Plan on the proposed Project Site Plan. Mr. Michniewicz’s PFT, ¶ 21; Exhibit E to Mr.

²⁰ “Performance Standards” are “th[e] requirements established by [the Wetlands Regulations] for activities in or affecting [specific wetlands areas protected by MWPA].” 310 CMR 10.04. The Performance Standards appear at 310 CMR 10.25 through 10.35 and 10.37, and 310 CMR 10.54 through 10.60. *Id.*

Michniewicz's PFT. Mr. Michniewicz's Sketch Plan SKC-5 indicates that the MWH line was located 45 feet or more landward of the existing fish house structure. Mr. Michniewicz's PFT, ¶ 21; Exhibit E to Mr. Michniewicz's PFT. Accordingly, under 310 CMR 10.58(6)(i), any proposed work at the Applicants' Property that is located seaward of this Historic MHW line is exempt from the Riverfront Regulations and any proposed work that is located landward of this Historic MHW line is not exempt. Mr. Michniewicz's PFT, ¶ 21; Exhibit E to Mr. Michniewicz's PFT. As shown on Mr. Michniewicz's Sketch Plan SKC-5, the proposed Project's building and pilings, deck, loading dock, stairs, ramp, and bulkhead are located either on filled tidelands or below MHW, and, as a result, they are subject to Chapter 91 licensing requirements and exempt from the Riverfront Area Performance Standards pursuant to 310 CMR 10.58(6)(i). Mr. Bartow's PFT, ¶ 17.

In response, the Petitioners, through the testimony of their expert witness, Mr. Shea, contend that no portion of the proposed Project is exempt from the Riverfront Area Performance Standards pursuant to 310 CMR 10.58(6)(i) for several reasons.

First, the Petitioners contend that the proposed Project is not a structure or activity subject to a Chapter 91 license or permit because the 1930 c. 91 License "is no longer in force or effect and has not been for decades." Mr. Shea's Direct PFT I, ¶¶ 25, 31. Mr. Shea testified that the 1930 c. 91 License was for a different building that the Applicants purportedly "ha[d] acknowledged was destroyed decades ago and was never rebuilt in accordance with the License." Mr. Shea's Direct PFT I, ¶ 27. He testified that the 1930 c. 91 License authorized a very different structure than the one authorized by the SOC and from the fish house structure that presently exists on the Applicants' Property. Mr. Shea's Direct PFT I, ¶ 27. He also testified that the structure authorized by the 1930 c. 91 License was for a structure that was in a different

location, on a different arrangement of pilings, of a different size and height, and for a different use than the one that exists on the Applicants' Property at the present time. Mr. Shea's Direct PFT I, ¶ 27. Mr. Shea also testified that "the structure licensed in 1930 did not include the large loading dock and ramp running from the structure in the water to the upland area of the [Applicants' Property]." Mr. Shea's Direct PFT I, ¶ 27.

Second, as a fallback position, the Petitioners through Mr. Shea contend that "[e]ven if . . . there was a licensed structure at the [Applicants' Property], that license could not possibly be applicable to the building proposed by the [Applicants]" because the latter "ha[ve] stated [their] intention to totally demolish the existing structure [and] [w]hen that demolition is complete, . . . [there will be] [no] 'pre-existing structure' that will be deemed 'remodeled' or 'altered' or 'added on to.'" Mr. Shea's Direct PFT I, ¶ 29.

I do not find the Petitioners' contentions persuasive because by its terms the exemption in 310 CMR 10.58(6)(i) does not require that proposed structures and activities be subject to an existing c. 91 License; the exemption only requires that the proposed structures and activities "[are] subject to [c. 91] jurisdiction and [the project proponent] obtains a [c. 91] license, permit, or authorization" Moreover, there is no requirement in 310 CMR 10.58(6)(i) that the project proponent obtain the c. 91 license prior to asserting the exemption in the regulation. Nevertheless, the Department was mindful of the regulation's requirement that the Applicants apply for such a c. 91 license because Special Condition No. 3 of the SOC states that "[p]rior to the start of work, the project proponent must apply for and complete the c. 91 licensing process." SOC, Special Condition No. 3; Mr. Bartow's PFT, ¶ 18. The evidence in the Administrative Record notes that the Applicants have applied for a c. 91 License for the proposed structures and activities at issue.

B. The Department Properly Determined That Portions Of The Proposed Project Not Subject To Jurisdiction Under G.L. c. 91 Are Authorized by 310 CMR 10.58(5)

The Department determined that the remaining components of the proposed Project, including portions of driveway enhancements, installation of a subsurface water line, removal of debris, and the planting of native plants are not subject c. 91 jurisdiction because these components will be located outside the area of filled tidelands and landward of the MHW mark. Mr. Bartow's PFT, ¶ 20. This area that is outside c. 91 jurisdiction includes the existing gravel parking area, two piles of abandoned fish poles, and rocks on the Applicants' Property. Mr. Bartow's PFT, ¶ 22. The Department further determined that the proposed Project work in this area is authorized by 310 CMR 10.58(5), which provides that "[n]otwithstanding the [Performance Standards for activities in Riverfront Area in] 310 CMR 10.58(4)(c) and (d), the [Department] may allow work to redevelop a previously developed riverfront area, provided the proposed work improves existing conditions." 310 CMR 10.58(5) defines "redevelopment" as "[the] replacement, rehabilitation[,], or expansion of existing structures, improvement of existing roads, or reuse of degraded or previously developed areas." The regulation also provides that "[a] previously developed riverfront area contains areas degraded prior to August 7, 1996 by impervious surfaces from existing structures or pavement, absence of topsoil, junkyards, or abandoned dumping grounds." 310 CMR 10.58(5).

Here, the Department determined pursuant to 310 CMR 10.58(5) that the area at the Applicants' Property outside c. 91 jurisdiction is a degraded area dating back prior to August 7, 1996 by impervious surfaces from existing structures or pavement, absence of topsoil, and abandoned debris or material. Mr. Bartow's PFT, ¶¶ 20-25. The Petitioners did not present any persuasive evidence refuting the Department's determination. Moreover, the Department's

determination was supported by Mr. Michniewicz's persuasive testimonial and documentary evidence at the Hearing, which was corroborated by Mr. Bartow. Based on this evidence, I find that the Department properly determined pursuant to 310 CMR 10.58(5) that the area outside c. 91 jurisdiction is a degraded area dating back prior to August 7, 1996 by impervious surfaces from existing structures or pavement, absence of topsoil, and abandoned debris or material, for the following reasons.

First, the area lacks a great degree of topsoil due to the size of an existing densely compacted sand and gravel driveway at the site. Mr. Michniewicz's PFT, ¶ 22. The area also has a relatively impervious existing gravel driveway and parking area due to a very high groundwater table and the densely compacted nature of the soils. Mr. Michniewicz's PFT, ¶ 22. The area also has abandoned fish trap poles, timber bulkhead debris, and concrete debris. Mr. Michniewicz's PFT, ¶ 22. Additionally, the existing fish house has been present at the site for many years as evidenced in the 1930 License Plan, and a Google Earth aerial photograph which shows that the existing driveway and parking area have remained unchanged since the time the oldest available photograph was taken in April 1995. Mr. Michniewicz's PFT, ¶ 22; Exhibit I to Mr. Michniewicz's PFT. A MassGIS photograph taken of the area in 1994²¹ also evidences the absence of topsoil dating back prior to August 7, 1996. Mr. Bartow's PFT, ¶ 22; Exhibit 2 to Mr. Bartow's PFT.

²¹ A "Geographic Information System" or "GIS" is:

is a computer system capable of capturing, storing, analyzing, and displaying geographically referenced information; that is, data identified according to location. Practitioners also define a GIS as including the procedures, operating personnel, and spatial data that go into the system.

In the Matter of Jodi Dupras, OADR Docket No. WET-2012-026, Recommended Final Decision (July 3, 2013), 2013 MA ENV LEXIS 40, at 37, adopted as Final Decision (July 12, 2013), 2013 MA ENV LEXIS 61; Vecchione, 2014 MA ENV LEXIS 76, at 21, "MassGIS" is the Commonwealth agency that has created a comprehensive, statewide database of spatial information for mapping and analysis supporting environmental planning and management." Dupras, 2013 MA ENV LEXIS 40, at 37-38; Vecchione, 2014 MA ENV LEXIS 76, at 21.

Second, the impact to the Riverfront Area from the installation of the subsurface water line and the placement of a one inch thick surface layer of crushed stone or shells in the existing driveway and parking areas will be de minimus (negligible) because: (1) the subsurface water line will be located below grade following its installation and any impact to the area will be brief (the short period of time it will take to install the line) and will result in no long term impacts; and (2) the proposed placement of the surface material in the driveway and parking areas will not diminish their stability, but rather, will help stabilize them, particularly where sandy soil is exposed to the surface. Mr. Michniewicz's PFT, ¶ 22; Mr. Bartow's PFT, ¶ 25.

Lastly, in accordance with the requirement of 310 CMR 10.58(5) that proposed work in a degraded area in Riverfront Area improve existing conditions, the proposed work here will improve the existing conditions in the Riverfront Area because, as discussed above, the placement of the surface material in the driveway will stabilize the existing driveway and parking areas where the sandy soil is exposed to the surface. Mr. Michniewicz's PFT, ¶ 22; Mr. Bartow's PFT, ¶ 25. The work will also improve the existing conditions because the mitigation that the Applicants have proposed for the proposed Project is in excess of the required 2:1 ratio as set forth in 310 CMR 10.58(5)(g), and includes a 9.4 % reduction in the area of the existing driveway and parking areas. Mr. Michniewicz's PFT, ¶ 22. Existing conditions will also be improved by the planting of 570 square feet of Salt Marsh at the site, the planting of additional salt-tolerant plants in areas located adjacent to the parking area at the site, and the upgrading of existing Salt Marsh at the site by the removal of fish trap poles and old timber bulkhead debris

from the Salt Marsh. Mr. Michniewicz's PFT, ¶ 22.

C. The Department Properly Determined That The Applicant's Stormwater Management Report Is Sufficient Under 310 CMR 10.05(6)(k)-(6)(q)

As noted above, flood control and storm damage prevention are two of the eight statutory interests the MWPA and the Wetlands Regulations are intended to advance. "Stormwater runoff from rainfall and snow melt "represents the single largest source responsible for water quality impairments in the Commonwealth's rivers, lakes, ponds, and marine waters." Elite Home Builders, 22 DEPR at 205, citing, Massachusetts Stormwater Handbook (2008), Vol. I, ch. 1, p. 1; Sunset City, 2017 MA ENV LEXIS 35, at 22-24. "New and existing development typically adds impervious surfaces and, if not properly managed, may alter natural drainage features, increase peak discharge rates and volumes, reduce recharge to wetlands and streams, and increase the discharge of pollutants to wetlands and water bodies." Id. As a result, the Department has adopted stormwater regulations as part of the Wetlands Regulations at 310 CMR 10.05(6)(k)-(6)(q) to "address water quality (pollutants) and water quantity (flooding, low base flow and recharge) by establishing standards that require the implementation of a wide variety of stormwater management strategies[,] ... includ[ing] environmentally sensitive site design and low impact development [("LID")] techniques to minimize impervious surface and land disturbance, source control and pollution prevention, structural [stormwater Best Management Practices ("BMPs")], construction period erosion and sedimentation control, and the long-term operation and maintenance of stormwater management systems." Id.

The Department's stormwater regulations at 310 CMR 10.05(6)(k) provide in pertinent part that:

[e]xcept as expressly provided, stormwater runoff from all industrial, commercial, institutional, office, residential and transportation projects that are subject to

regulation under [the MWPA] including site preparation, construction, and redevelopment and all point source stormwater discharges from said projects within [a wetlands] Area Subject to Protection under [the MWPA] or within the Buffer Zone shall be provided with stormwater [BMPs] to attenuate pollutants and to provide a setback from the receiving waters and wetlands in accordance with the [10] Stormwater Management Standards as [set forth in 310 CMR 10.05(6)(k)1-(k)10 and] further defined and specified in the Massachusetts Stormwater Handbook

These 10 Stormwater Management Standards include Standard No. 7 (310 CMR 10.05(6)(k)7), which provides that:

[a] redevelopment project is required to meet the following Stormwater Management Standards only to the maximum extent practicable: Standard 2, Standard 3, and the pretreatment and structural stormwater best management practice requirements of Standards 4, 5 and 6. Existing stormwater discharges shall comply with Standard 1 only to the maximum extent practicable. A redevelopment project shall also comply with all other requirements of the Stormwater Management Standards and improve existing conditions.

The Massachusetts Stormwater Handbook defines “redevelopment projects . . . to include the . . . [d]evelopment, rehabilitation, expansion and phased projects on previously developed sites, provided the redevelopment results in no net increase in impervious area.” Massachusetts Stormwater Handbook, Vol. I, ch., 1, p. 20. Here, notwithstanding the Petitioners’ assertions to the contrary, the proposed Project is a redevelopment project within the aegis of Stormwater Management Standard No. 7 because the SOC approved “the Reconstruction of a fish house[,] including: [1] [the] removal of an existing building and pilings, deck, timber bulkheads, fish trap poles, concrete, and rocks; and [2] the installation of a new pile supported building, wash-over bulkhead/wave barrier, loading dock, stairs, ramp, split rail fence, native plantings, salt marsh restoration areas, driveway enhancements, installation of a water line and hydrant, and designation of a path for pedestrian passage.” SOC, at p. 8. The issue is whether the Applicants

submitted a sufficient Stormwater Management Report²² to demonstrate the proposed Project's compliance with the requirements of the Stormwater Management Standards applicable to a redevelopment project as set forth Standard No. 7.

As discussed above, Stormwater Management Standard No. 7 provides that a redevelopment project need only comply with a majority of the Standards (Nos. 1 through 6) "only to the maximum extent practicable." Stormwater Management Standards Nos. 1-6 respectively provide as follows:

- (1) **Standard No. 1:** "No new stormwater conveyances (e.g. outfalls) may discharge untreated stormwater directly to or cause erosion in wetlands or waters of the Commonwealth."
- (2) **Standard No. 2:** "Stormwater management systems shall be designed so that the post-development peak discharge rates do not exceed pre-development peak discharge rates. This Standard may be waived for discharges to land subject to coastal storm flowage as defined in 310 CMR 10.04. . . ."
- (3) **Standard No. 3:** "Loss of annual recharge to groundwater shall be eliminated or minimized through the use of environmentally sensitive site design, low impact development techniques, stormwater [BMPs], practices, and good operation and maintenance. At a minimum, the annual recharge from the post-development site shall approximate the annual recharge from pre-development conditions based on soil type. This Standard is met when the stormwater management system is designed to infiltrate the required recharge volume as determined in accordance with the Massachusetts Stormwater Handbook. . . ."
- (4) **Standard No. 4:** "Stormwater management systems shall be designed to remove 80% of the average annual post-construction load of Total Suspended Solids (TSS). This standard is met when:
 - (a) Suitable practices for source control and pollution prevention are identified in a long-term pollution prevention plan, and thereafter are implemented and maintained;
 - (b) Structural stormwater best management practices are sized to

²² A copy of the Applicants' Stormwater Management Report is attached to Mr. Michniewicz's PFT as Exhibit F.

capture the required water quality volume as determined in accordance with the Massachusetts Stormwater Handbook; and

(c) Pretreatment is provided in accordance with the Massachusetts Stormwater Handbook.”

(5) **Standard No. 5:** “For land uses with higher potential pollutant loads, source control and pollution prevention shall be implemented in accordance with the Massachusetts Stormwater Handbook to eliminate or reduce the discharge of stormwater runoff from such land uses to the maximum extent practicable. . . .”

(6) **Standard No. 6:** “. . . . [S]tormwater discharges near or to any . . . critical area require the use of the specific source control and pollution prevention measures and the specific structural stormwater [BMPs] determined by the Department to be suitable for managing discharges to such areas, as provided in the Massachusetts Stormwater Handbook. A discharge is near a critical area if there is a strong likelihood of a significant impact occurring to said area, taking into account site-specific factors. . . .”

As also discussed above, Stormwater Management Standard No. 7 requires that a redevelopment project comply with the remaining Stormwater Management Standards Nos. 8-10, which respectively provide as follows:

(8) **Standard No. 8:** “A plan to control construction related impacts including erosion, sedimentation and other pollutant sources during construction and land disturbance activities (construction period erosion, sedimentation and pollution prevention plan) shall be developed and implemented.”

(9) **Standard No. 9:** “A long-term operation and maintenance plan shall be developed and implemented to ensure that the stormwater management system functions as designed.”

(10) **Standard No. 10:** “All illicit discharges to the stormwater management system are prohibited.”

The Petitioners, through their expert witness, Mr. Shea, contended at the Hearing that the Applicants’ Stormwater Management Report is insufficient and does not demonstrate the proposed Project’s compliance with the applicable Stormwater Management Standards. Mr.

Shea's PFT I, ¶¶ 39-61. I disagree based on the testimony of the Applicants' expert witness, Mr. Michniewicz, which demonstrated the proposed Project's compliance with the applicable Stormwater Management Standards. Mr. Michniewicz's PFT, ¶¶ 23-24.

As Mr. Michniewicz testified at the Hearing, "[s]tormwater refers to stormwater that results from rainfall and snowmelt on a particular property" and that:

Stormwater Management Reports are prepared for the purpose of management of stormwater (rain and snow) that falls on a particular site. The purpose of the Report is to describe how stormwater at the Site is proposed to be intercepted, collected, maintained onsite, and percolated into the ground at the Site to prevent stormwater runoff from flowing into adjacent wetland resource areas to the maximum extent possible.

Mr. Michniewicz's PFT, ¶ 23. Mr. Michniewicz testified that the site elevation and location characteristics of the Applicants' Property are not conducive to the installation of any traditional stormwater management design facilities such as formal infiltrative drainage structures (buried precast concrete catch basins and infiltrative drainage structures set in the soil) or vegetated rain gardens or swales for the following reasons. Mr. Michniewicz's PFT, ¶¶ 23-24.

First, the Applicants' Property consists primarily of an unpaved gravel driveway and parking area that is very low lying, whose surface is situated very close to the groundwater table. Mr. Michniewicz's PFT, ¶ 23. Much of the existing gravel driveway and parking area at the Applicants' Property is heavily compacted as a result of small and large fish hauling trucks having been present at the Property in the past. Mr. Michniewicz's PFT, ¶ 23. The soils located directly under the parking area surface remain wholly or partially saturated due to the shallowness of the groundwater table, the proximity of the parking area surface to MHW, and

due to frequent inundation of the entire parking area by coastal storm events and high moon tides. Mr. Michniewicz's PFT, ¶ 23.

Mr. Michniewicz testified that surficially installed vegetated rain gardens are not an option at the Applicants' Property to accommodate stormwater runoff at the Property due to the high ground water and saturated nature of the soils at the Property and the fact that the Property is routinely inundated with seawater on a regular basis due to extreme high tide events. Mr. Michniewicz's PFT, ¶ 24. He testified that rain gardens are constructed as shallow vegetated depressions created at the ground surface to capture and temporarily store stormwater runoff until it can percolate through the surface of the rain garden into the soil below. Mr. Michniewicz's PFT, ¶ 24. He testified that due to the compact nature of the existing surficial soils at the Applicants' Property and the very shallow groundwater table at the Property, rain gardens were not considered for the proposed Project because they would have stored stagnant water within the rain garden area for extended periods of time due to the very limited volume of available void space in the underlying soil at the Property, which made it incapable of efficiently receiving percolated water. Mr. Michniewicz's PFT, ¶ 24. In addition, any rain gardens installed at the Applicants' Property would have been inundated with seawater on a regular basis due to high tide events where seawater would remain stagnant in the ponded area following such an event. Mr. Michniewicz's PFT, ¶ 24. Such a condition would have created a breeding ground for mosquitos, contrary to the policy and efforts of the Cape Cod Mosquito Control Project to prevent the creation of such habitats. Mr. Michniewicz's PFT, ¶ 24.

As for "improving existing conditions" at the Applicants' Property as Stormwater Management Standard No. 7 requires, the proposed Project calls for a reduction of the size of the gravel parking area at the Property and the planting of additional salt tolerant vegetation in the

perimeter areas of the Applicants' Property as mitigation. Mr. Michniewicz's PFT, ¶ 24.

Additionally, no filling or changes to the existing grades at the Applicants' Property will take place as a result of the proposed Project. Mr. Michniewicz's PFT, ¶ 23.

D. The Department Properly Determined That The Proposed Project Will Not Alter The Coastal Bank On The Applicants' Property

A Coastal Bank is a wetlands resource area protected by the MWPA and the Wetlands Regulations at 310 CMR 10.30 that is critical to flood control and storm damage prevention.

The Wetlands Regulations at 310 CMR 10.30(2) define a Coastal Bank as:

the seaward face or side of any elevated *landform*, other than a coastal dune, which lies at the landward edge of a coastal beach, land subject to tidal action, or other wetland.

(emphasis supplied). A "landform" is "[a] discernible natural landscape that exists as a result of wind, water or geological activity." Rankow, 2013 MA ENV LEXIS 45, at 30-31.

"When a proposed project involves dredging, removing, filling, or altering a coastal bank, the [permit] issuing authority shall presume that the area is significant to storm damage prevention and flood control." 310 CMR 10.30(1). "This presumption may be overcome only upon a clear showing that a [C]oastal [B]ank does not play a role in storm damage prevention or flood control, and if the [permit] issuing authority makes a written determination to such effect."

Id. If the Coastal Bank is determined to be significant to storm damage prevention or flood control, the Performance Standards that govern proposed work or activities in the Bank depend on whether the Bank either: (1) supplies sediment to Coastal Beaches, Coastal Dunes, or Barrier Beaches (310 CMR 10.30(1)-10.30(5); or (2) is a vertical buffer to storm waters (310 CMR 10.30(6)-10.30(8)).

In this case, the Petitioners, through their expert witness, Mr. Shea, contended at the

Hearing that the SOC is invalid because the Department purportedly failed to recognize that Coastal Bank exists on the Applicants' Property and that the Bank would be altered by the proposed Project in violation of the Performance Standards at 310 CMR 30.30(3), 30.30(4), 30.30(6), and 30.30(7).²³ Mr. Shea's Direct PFT I, ¶ 64. I reject the Petitioners' claim based on the persuasive testimony of the Applicants' expert witness, Mr. Michniewicz, which was corroborated by the Department's expert witness, Mr. Bartow.

While it is true that in issuing the SOC, the Department did not identify the existence of Coastal Bank on the Applicants' Property,²⁴ this is not fatal to the SOC's issuance because in accordance with the Department's de novo review authority as discussed above at pp. 9-10, Mr.

²³ The Performance Standards in 310 CMR 10.30(3) and 10.30(4) govern proposed work or activities in a Coastal Bank that has been determined to be significant to storm damage prevention or flood control because it supplies sediment to Coastal Beaches, Coastal Dunes, or Barrier Beaches, and the Performance Standards in 310 CMR 10.30(6) and 10.30(7) apply if the Coastal Bank is a vertical buffer to storm waters. These Performance Standards respectively provide as follows.

310 CMR 10.30(3) provides that a new or modified bulkhead, revetment seawall, groin, or other coastal engineering structure may be constructed on a Coastal Bank provided that the structure is necessary to prevent storm damage to buildings constructed prior to August 10, 1978 or re-constructed after when 310 CMR 10.30 was promulgated if:

- (a) the new or modified coastal engineering structure has been designed and constructed to minimize, using best available measures, adverse effects on adjacent or nearby coastal beaches due to changes in wave action; and
- (b) the applicant demonstrates that no method of protecting the building other than the proposed coastal engineering structure is feasible.

310 CMR 10.30(3)(a)-(3)(b). The Performance Standards in 310 CMR 10.30(3)(c) authorize "protective planting designed to reduce erosion"

310 CMR 10.30(4) provides that "[a]ny project on a [C]oastal [B]ank or within 100 feet landward of the top of a [C]oastal [B]ank, other than a structure permitted by 310 CMR 10.30(3) shall not have an adverse effect due to wave action on the movement of sediment from the [C]oastal [B]ank to coastal beaches or land subject to tidal action."

310 CMR 10.30(6) provides that "[a]ny project on . . . a [C]oastal [B]ank or within 100 feet landward of the top of [the] . . . [B]ank shall have no adverse effects on the [Bank's] stability"

310 CMR 10.30(7) provides that "[b]ulkheads, revetments, seawalls, groins or other coastal engineering structures may be permitted on . . . a [C]oastal [B]ank except when [the] [B]ank is significant to storm damage prevention or flood control because it supplies sediment to coastal beaches, coastal dunes, and barrier beaches."

²⁴ Mr. Bartow's PFT, ¶ 5; Applicants' Closing Brief, at p. 16.

Bartow acknowledged at the Hearing the SOC should have also listed Coastal Bank as a wetlands resource area that existed at the Property. He also agreed with and adopted Mr. Michniewicz's testimony that the proposed Project will not alter the Coastal Bank at the Applicants' Property, which must be proven to trigger the Performance Standards in 310 CMR 30.30. Mr. Bartow's PFT, ¶ 27; Mr. Michniewicz's PFT, ¶ 25.

Mr. Michniewicz testified that the proposed Project's Existing Conditions Plan "indicates that a Coastal Bank . . . is located at the western edge of the [Applicants' Property] that extends northerly up onto the adjacent . . . property [owned by the Belmont Condominium Trust]." Mr. Michniewicz's PFT, ¶ 25. He testified, "[h]owever, [that] the bottom of [this Coastal Bank] is located beyond the northern edge of the parking area at the [Applicants' Property] and no work is proposed on the Coastal Bank as part of the [proposed] Project other than the planting of additional salt tolerant plantings." Mr. Michniewicz's PFT, ¶ 25. He testified that "[t]he Coastal Bank . . . is well vegetated and is not acting as a sediment source [for Coastal Beaches, Coastal Dunes, or Barrier Beaches] because the [B]ank is well vegetated and no bank-sourced sediment was observed to be emanating from this area onto the Project site," and "[c]onsequently, th[e] [B]ank is acting only as a vertical buffer to coastal storm waters for storm damage prevention and flood control due to its height and slope." Mr. Michniewicz's PFT, ¶ 25. He testified that "[t]here is no activity proposed on the Coastal Bank at [issue], and there is no other activity proposed at the [Property] that will act to destabilize [the] . . . Bank . . . or prevent it from serving its purpose as presently exists." Mr. Michniewicz's PFT, ¶ 25.

In response, the Petitioners failed to present any probative evidence effectively refuting Mr. Michniewicz's testimony that the proposed Project will not alter the Coastal Bank at the Applicants' Property, which is a pre-condition to triggering the Performance Standards in 310

CMR 30.30. As such, I find that the proposed Project will not alter Coastal Bank at the Applicants' Property.

E. The Department Properly Determined That The Proposed Project Will Not Be Located Within Rocky Intertidal Shores

Rocky Intertidal Shores are a wetlands resource area protected by the MWPA and the Wetlands Regulations at 310 CMR 10.31 that “are likely to be significant to storm damage prevention, flood control, protection of marine fisheries and wildlife habitat and where there are shellfish, protection of land containing shellfish.” 310 CMR 10.31(1). The Wetlands Regulations at 310 CMR 10.31(2) define Rocky Intertidal Shores as “naturally occurring rocky areas, such as bedrock or boulder-strewn areas between the mean high water line and the mean low water line.”

“When a proposed project involves the filling, removing or altering of a [R]ocky [I]ntertidal [S]hore, the [permit] issuing authority shall presume that [the] [S]hore is significant to the interests [of storm damage prevention, flood control, protection of marine fisheries and wildlife habitat and where there are shellfish, protection of land containing shellfish].” 310 CMR 10.31(1). “This presumption may be overcome only upon a clear showing that a [R]ocky [I]ntertidal [S]hore does not play a role in [the advancement of these interests] and if the [permit] issuing authority makes a written determination to such effect.” *Id.*

If a Rocky Intertidal Shore is determined to be significant to storm damage prevention, flood control, or protection of wildlife habitat, the Performance Standards require that “any proposed project [in the Shore] shall be designed and constructed, using the best practical measures, so as to minimize adverse effects on the form and volume of exposed intertidal bedrock and boulders.” 310 CMR 10.31(3). If a Rocky Intertidal Shore is determined to be

significant to the protection of marine fisheries or wildlife habitat, the Performance Standards require that “any proposed project [in the Shore] 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 water circulation and water quality.” 310 CMR 10.31(4). “Water quality impacts include, but are not limited to, other than natural fluctuations in the levels of dissolved oxygen, temperature or turbidity, or the addition of pollutants.”

At the Hearing, the Petitioners, through their expert witness, Mr. Shea, contended that the SOC is invalid because the proposed Project purportedly will be located within a Rocky Intertidal Shore on the Applicants’ Property and fails to comport with the Performance Standards of 310 CMR 10.31(3) and 10.31(4). Mr. Shea’s Direct PFT I, ¶ 65. I reject the Petitioners’ claim based on persuasive testimony of the Applicants’ expert witnesses, Dr. Neubert and Mr. Michniewicz, and the Department’s expert witness, Mr. Bartow. Based on their testimony, I find that the proposed Project will not be located in Rocky Intertidal Shore, and thus, the Performance Standards of 310 CMR 10.31(3) and 10.31(4) do not apply for the following reasons.

First, the Applicants’ Property does not have any naturally occurring bedrock or boulder-strewn areas. Dr. Neubert’s PFT, ¶ 22. “The concrete and rip rap rocks under the [existing] fish house [at the Applicants’ Property] were anthropogenically²⁵ placed at some time in the past, perhaps many decades ago.” Dr. Neubert’s PFT, ¶ 22. “[Several] small rocks mixed with bricks and submerged timbers [are] located in the intertidal zone along the river bed at the [Applicants’ Property], but . . . are smaller than 10 inches in diameter which is the generally accepted geological definition of a boulder” Mr. Michniewicz’s PFT, ¶ 26. “A boulder is considered

²⁵ “Anthropogenic” means “of, relating to, or resulting from the influence of human beings on nature.” “Anthropogenic.” Merriam-Webster.com, Merriam-Webster, www.merriam-webster.com/dictionary/anthropogenic.

to be a rock fragment greater than 10 inches in diameter as defined by the Wentworth Classification [S]ystem.” Mr. Bartow’s PFT, ¶ 29.²⁶

Second, “[w]hether the rip rap stones [at the Applicants’ Property] were naturally or anthropogenically placed, the [proposed] Project does not intend to remove or alter these rocks,” and as a result, “[t]he Project will have no adverse impacts to Rocky Intertidal Shores as this [MWPA] resource area does not exist within the [Property].” Dr. Neubert’s PFT, ¶ 32.

Lastly, during the course of the Department’s SOC review, Mr. Bartow inspected the Applicants’ Property and determined that Rocky Intertidal Shores are not present at the Property. Mr. Bartow’s PFT, ¶¶ 28-32. His inspection took place on May 25, 2016, beginning at 9:30 a.m., approximately one half hour after the low tide had occurred at the Property. Mr. Bartow’s PFT, ¶ 30. At that time, he viewed the intertidal zone (the area between the Mean High and Mean Low Water lines) and did not observe any naturally occurring rocky areas, including bedrock or boulder-strewn areas constituting Rocky Intertidal Shores under 310 CMR 10.31(2). Mr. Bartow’s PFT, ¶ 30.

F. The Department Properly Determined That The Proposed Project Satisfies The Performance Standards For Work Or Activities In Salt Marsh Pursuant To 310 CMR 10.32(3) and 10.32(5)

Salt Marsh is a wetlands resource protected by the MWPA and the Wetlands Regulations at 310 CMR 10.32 that is significant to protection of marine fisheries, wildlife habitat, and land containing shellfish. 310 CMR 10.32(1). Salt Marsh is also significant to the prevention of pollution and “[is] likely to be significant to storm damage prevention and [the protection of]

²⁶ The Wentworth Classification System is named after Chester K. Wentworth, a geologist, who in 1922 developed a system to measure sediment grain sizes. <http://www.planetary.org/multimedia/space-images/charts/wentworth-1922-grain-size.html>. The United States Geological Survey follows the Wentworth Classification’s System’s definition of a boulder by defining the term as “any loose rock (sediment) larger than 256 millimeters (10 inches).” <https://geomaps.wr.usgs.gov/parks/misc/glossaryb.html>.

ground water supply.” Id. The Wetlands Regulations at 310 CMR 10.32(2) define Salt Marsh as:

a coastal wetland that extends landward up to the highest high tide line, that is, the highest spring tide of the year, and is characterized by plants that are well adapted to or prefer living in, saline soils. Dominant plants within salt marshes typically include salt meadow cord grass (*Spartina patens*) and/or salt marsh cord grass (*Spartina alterniflora*), but may also include, without limitation, spike grass (*Distichlis spicata*), high-tide bush (*Iva frutescens*), black grass (*Juncus gerardii*), and common reedgrass (*Phragmites*). A salt marsh may contain tidal creeks, ditches and pools.

“When a proposed project involves the dredging, filling, removing or altering of a [S]alt [M]arsh, the [permit] issuing authority shall presume that [the Salt Marsh] is significant to the [protection of marine fisheries, wildlife habitat, land containing shellfish, and ground water supply, and to the prevention of pollution and storm damage].” 310 CMR 10.32(1). “This presumption may be overcome only upon a clear showing that a [S]alt [M]arsh does not play a role in the protection of marine fisheries or wildlife habitat, prevention of pollution, ground water supply, or storm damage prevention, and if the [permit] issuing authority makes a written determination to such effect.” Id.

When a Salt Marsh is determined to be significant to the protection of marine fisheries, the prevention of pollution, storm damage prevention, or protection of ground water supply, the Performance Standards that govern work or activities in Salt Marsh include those set forth in 310 CMR 10.32(3) and 10.32(5).

310 CMR 10.32(3) provides that:

[a] proposed project in a [S]alt [M]arsh, on lands within 100 feet of a [S]alt [M]arsh, or in a body of water adjacent to a [S]alt [M]arsh shall not destroy any portion of the [S]alt [M]arsh and shall not have an adverse effect on the productivity of the [S]alt [M]arsh. Alterations in growth, distribution and composition of [S]alt [M]arsh vegetation shall be considered in evaluating

adverse effects on productivity. [However,] 310 CMR 10.32(3) shall not be construed to prohibit the harvesting of salt hay.

310 CMR 10.32(5) provides that “[n]otwithstanding the provisions of 310 CMR 10.32(3), a project which will restore or rehabilitate a [S]alt [M]arsh, or create a [S]alt [M]arsh, may be permitted in accordance with 310 CMR 10.11 through 10.14, 10.24(8), and/or 10.53(4).”

Here, the Petitioners, through their expert witness, Mr. Shea, contended at the Hearing that the SOC is invalid because the Department purportedly erred in determining that the proposed Project satisfies the Performance Standards under 310 CMR 10.32(3) and 10.32(5) for work or activities in Salt Marsh. Mr. Shea’s Direct PFT I, ¶ 72. I reject the Petitioners’ claim based on persuasive testimony of the Applicants’ expert witnesses, Dr. Neubert and Mr. Michniewicz, and the Department’s expert witness, Mr. Bartow. Based on their testimony, I find that the Department properly determined that the proposed Project satisfies the Performance Standards in 310 CMR 10.32(3) and 10.32(5) for work or activities in Salt Marsh for the following reasons.

Although approximately 533 square feet of Salt Marsh is present on the Applicants’ Property between the northeasterly edge of the gravel parking area and the northeasterly property line where existing fish trap poles and old bulkhead timbers and debris are presently located, the Salt Marsh is not located within the proposed Project’s footprint. Mr. Michniewicz’s PFT, ¶ 27; Dr. Neubert’s PFT, ¶ 23. As a result, the proposed Project will not have an adverse impact to the Salt Marsh. *Id.* Moreover, the proposed Project calls for the removal of the existing debris on the Applicants’ Property and creating and restoring up to 822 square feet of Salt Marsh. Mr. Michniewicz’s PFT, ¶ 27; Mr. Bartow’s PFT, ¶ 33. Approximately 570 square feet of additional Salt Marsh will be created north and south of the proposed loading dock at the Applicants’

Property and approximately 252 square feet of Salt Marsh is to be restored by the removal of the existing fish trap poles and old bulkhead timbers and debris from the Salt Marsh located north of the proposed loading dock. Mr. Michniewicz's PFT, ¶ 27; Mr. Bartow's PFT, ¶ 33. In sum, the proposed Project's activities relating to Salt Marsh will neither destroy any portion of the Salt Marsh nor have any adverse effect on the Salt Marsh's productivity. Mr. Michniewicz's PFT, ¶ 27; Mr. Bartow's PFT, ¶ 33.

G. The Department Properly Determined That The Proposed Project Satisfies The Performance Standards For Work Or Activities In Land Under The Ocean Pursuant to 310 CMR 10.25(5) and 10.25(6)

Land Under the Ocean ("LUO") is a wetlands resource area protected by the MWPA and the Wetlands Regulations at 310 CMR 10.25 that is defined as "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). Under the Wetlands Regulations, LUO "is likely to be significant to the protection of marine fisheries and . . . land containing shellfish." 310 CMR 10.25(1). Additionally, "[n]earshore areas of [LUO] are likely to be significant to storm damage prevention, flood control, and protection of wildlife habitat." *Id.*

When LUO or nearshore areas of LUO are determined to be significant to the protection of marine fisheries, protection of wildlife habitat, storm damage prevention, or flood control, the Performance Standards that govern work or activities in these areas include those set forth in 310 CMR 10.25(5) and 310 CMR 10.25(6).

310 CMR 10.25(5) provides that:

Projects not included in 310 CMR 10.25(3) or (4) which affect nearshore areas of [LUO]²⁷ shall not cause adverse effects by altering the bottom topography so as to

²⁷ 310 CMR 10.25(3) governs projects involving "[i]mprovement dredging for navigational purposes affecting [LUO]" and 310 CMR 10.25(4) governs projects involving "[m]aintenance dredging for navigational purposes affecting [LUO]."

increase storm damage or erosion of coastal beaches, coastal banks, coastal dunes, or salt marshes.

310 CMR 10.25(6) provides that “

Projects not included in 310 CMR 10.25(3) which affect [LUO] 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 (*Ruppia maritima*) 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.

Here, the Petitioners asserted in their Appeal Notice in a conclusory fashion that the SOC is invalid because the Department purportedly “failed to recognize that the proposed Project will alter . . . [LUO]” Petitioners’ Appeal Notice, ¶ 33. They repeated the same assertion in their Pre-Hearing Statement filed for the Pre-Screening (“Pre-Hearing”) Conference at which I established the Issues for Resolution in the Appeal. Petitioners’ Pre-Hearing Statement, at pp. 2, 4. At the Pre-Hearing Conference, the Petitioners’ claim was given more specificity by my adoption of the following Issue for Resolution in the Appeal: “Did the Department properly conclude that the proposed Project satisfies the Performance Standards for proposed activities in [LUO] as set forth in 310 CMR 10.25(5) and (6)?” Pre-Screening (“Pre-Hearing”) Conference Report and Order (“Conf. Rept. & Order”), Issue for Resolution No. 2f. At the Hearing,

however, the Petitioners failed to address this issue.

At the Hearing, the Petitioners, through their expert witness, Mr. Shea, asserted in a conclusory fashion and without citing to any specific Performance Standards a new claim that “the Performance Standards associated with [LUO] have not been met” by the proposed Project because the Project purportedly does not further the MWPA interest of pollution prevention. Mr. Shea’s Direct PFT I, ¶ 68. Specifically, the Petitioners asserted that “[t]he impact of pollution from the [proposed] Project (particularly pollutants from trucks and cars parking and traveling within the commercial parking, loading and driveway areas [on the Applicants’ Property]) to [LUO] ha[d] not been properly addressed by the [A]pplicant[s]” Mr. Shea’s Direct PFT I, ¶ 68. I reject this new claim for the following reasons.

First, as described above, the claim was not an Issue for Resolution in the Appeal that I established at the Pre-Hearing Conference. The purpose of the Pre-Hearing Conference was to “narrow[w] the [I]ssues [for Resolution in the Appeal]” and to set forth those Issues in the Pre-Hearing Conference Report and Order (“Conf. Rept. & Order”) that I issued following the Conference. 310 CMR 10.05(7)(j)7.g. At the Hearing, the Petitioners, the parties with the burden of proving that the Department issued the SOC in error, were required to establish through their expert witness “the legal and factual basis for [their] position on the [Issues for Resolution in the Appeal that I] identified in the [Conf. Rept. & Order].” 310 CMR 10.05(7)(j)3b. In short, the Petitioners could not assert new claims at the Hearing for adjudication.

As for resolution of the Issue that I established at the Conference and the Petitioners failed to address at the Hearing: whether the proposed Project complies with the Performance Standards for proposed activities in LUO as set forth in 310 CMR 10.25(5) and 10.25(6), I find

pursuant to 310 CMR 10.05(7)(j)3b that the Petitioners waived the Issue by failing to address it at the Hearing. I also find that the proposed Project complies with the Performance Standards for proposed activities in LUO as set forth in 310 CMR 10.25(5) and 10.25(6) based on the persuasive and un-refuted testimony of the Applicants' expert witness, Dr. Neubert, and the Department's expert witness, Mr. Bartow. Based on their testimony, I make the following findings.

The components of the proposed Project located within the LUO include the pilings that support the existing fish house and the low profile timber bulkhead. Mr. Bartow's PFT, ¶ 37. The proposed Project includes the removal of the existing fish house and its pilings, and replacing the pilings with new pilings in LUO. Mr. Bartow's PFT, ¶ 37; Dr. Neubert's PFT, ¶ 24. The removal and replacement of the pilings will not alter the bottom topography of the LUO in violation of the Performance Standards of 310 CMR 10.25(5) because no dredging or fill is proposed. Mr. Bartow's PFT, ¶¶ 37-38; Dr. Neubert's PFT, ¶ 24. Indeed, dredging and the jetting of piles,²⁸ which could alter bottom topography, are expressly prohibited by Special Conditions Nos. 6 and 9 of the SOC. Mr. Bartow's PFT, ¶ 38. Special Condition No. 6 provides that "[d]redging (including but not limited to the effects of prop wash)²⁹ is neither proposed in the [Applicants' NOI for the proposed Project], nor permitted by [the SOC]," and Special Condition No. 9 provides that "[j]etting of piles is prohibited" and that "[new] piles shall be mechanically driven to refusal or a depth of least 12 [feet] below grade."

The proposed Project also satisfies the Performance Standards of 310 CMR 10.25(6)

²⁸ A pile that is "jet-pile[d]" is "a pile placed in position by means of a jet of water under high pressure acting at the toe of the pile to form a space for settling of the pile." <https://www.merriam-webster.com/dictionary/jet-pile>

²⁹ "Prop wash" is "[a] current of water or air created by the action of a propeller or rotor." https://en.oxforddictionaries.com/definition/us/prop_wash.

because there will be no in-water work other than placing pilings, and as a result, there will be no increases in height or velocity of waves from the Project that will impact the shore. Dr.

Neubert's PFT, ¶ 24. Sediment transport processes will also not be affected as there is no plan to remove or place sediment within LUO as the structure will be rebuilt in the same location where it currently exists. Dr. Neubert's PFT, ¶ 24. Water circulation will also not be affected. Dr. Neubert's PFT, ¶ 24. Additionally, the proposed pilings will not release contaminants because they will not contain harmful creosote materials.³⁰ Dr. Neubert's PFT, ¶ 24.

The Performance Standards of 310 CMR 10.25(6) will also be met because the proposed Project will not adversely affect marine productivity. Dr. Neubert's PFT, ¶ 24. As discussed above, the proposed Project does not call for in-water construction other than the placement of pilings. Dr. Neubert's PFT, ¶ 24. Moreover, the proposed shellfish aquaculture facility at the Applicants' Property is intended to increase marine productivity locally, which will benefit the Town of Harwich and other Towns across Cape Cod. Dr. Neubert's PFT, ¶ 24.

The proposed Project also satisfies the Performance Standards of 310 CMR 10.25(6)

³⁰ "Creosote":

is the name used for a variety of products that are mixtures of many chemicals. . . . Coal tars are by-products of the carbonization of coal to produce coke or natural gas. Coal tar creosotes are distillation products of coal tar, and coal tar pitch is a residue produced during the distillation of coal tar. Coal tar pitch volatiles are compounds given off from coal tar pitch when it is heated. Coal tar creosote, coal tar, coal tar pitch, and coal tar pitch volatiles are rarely formed in nature. Coal tar creosote, coal tar, and coal tar pitch are mixtures of similar compounds. . . . Coal tar creosote is a thick, oily liquid that is typically amber to black in color. It is easily set on fire and does not dissolve easily in water. Coal tar and coal tar pitch are the by-products of the high-temperature treatment of coal to make coke or natural gas. They are usually thick, black or dark brown liquids or semisolids with a smoky or aromatic odor. . . . Coal tar creosote is the most widely used wood preservative in the United States. . . . The major chemicals in coal tar creosote, coal tar, and coal tar pitch that can cause harmful health effects are polycyclic aromatic hydrocarbons (PAHs), phenol, and cresols. Coal tar pitch volatiles vary depending on the makeup of the coal tar product that is being heated. About 300 chemicals have been identified in coal tar creosote, but as many as 10,000 other chemicals may be in this mixture. . . .

<https://www.atsdr.cdc.gov/phs/phs.asp?id=64&tid=18>.

because a Shellfish Survey that Dr. Neubert performed at the Applicants' Property demonstrated that there are no eelgrass (*Zostera marina*) or widgeon grass (*Ruppia maritima*) beds present at the Property.³¹ Dr. Neubert's PFT, ¶ 24. Also, there will be no alterations in the distribution of sediment grain size because there will be no dredging or fill activities. Dr. Neubert's PFT, ¶ 24. The proposed Project will also not change water quality, dissolved oxygen, temperature, or turbidity. Dr. Neubert's PFT, ¶ 24. Further, no additional pollutants will result from the proposed Project as the only in-water activities planned are to place pilings. Dr. Neubert's PFT, ¶ 24. There will be no alteration of shallow submerged lands, except in an area where concrete padding is proposed to be removed and replaced with Salt Marsh habitat, which will benefit the ecology of the Herring River. Dr. Neubert's PFT, ¶ 24. Lastly, the proposed Project has been designed with specific time of year ("TOY") restrictions to avoid impact to anadromous/catadromous fish species that were adopted in Special Condition No. 11 of the SOC. Dr. Neubert's PFT, ¶ 24. Special Condition No. 11 provides that:

[a]s recommended by the [Commonwealth's] Division of Marine Fisheries³² . . . two (2) time of year (TOY) restrictions shall be observed for all water silt producing work . . . [This] work, including the installation of piles, removal of the existing concrete pad in [the] Herring River, and bulkhead, shall not occur between January 15 through June 30, and from September 1 through November 15 of any year.

In conclusion, the proposed Project will have no adverse impacts to LUO, and has the potential for benefiting the ecology of the Herring River through Salt Marsh restoration and culturing of shellfish seed stock. Dr. Neubert's PFT, ¶ 24.

³¹ Dr. Neubert's Shellfish Survey is discussed in detail below, at pp. 47-54, in connection with the Petitioners' claim that the proposed Project does not satisfy the Performance Standards in 310 CMR 10.34(4) and 10.34(5) for work or activities in Land Containing Shellfish.

³² The Commonwealth's Division of Marine Fisheries ("DMF") is a state agency that "works to preserve the [Commonwealth's] natural resources and exercises responsibility over the Commonwealth's marine and freshwater fisheries, wildlife species, plants, and natural communities, as well as the habitats that support them." <https://www.mass.gov/orgs/departments-of-fish-and-game>.

H. The Department Properly Determined That The Proposed Project Satisfies The Performance Standards For Work or Activities in LUO, Ponds, Streams, Rivers, Lakes, or Creeks that Underlie an Anadromous/Catadromous Fish Run Pursuant To 310 CMR 10.35(3).

“Anadromous Fish” are “fish that enter fresh water from the ocean to spawn, such as alewives, shad and Salmon” and “Catadromous Fish” are “fish that enter salt water from fresh water to spawn, such as eels.” 310 CMR 10.35(2). An “Anadromous/Catadromous Fish Run” is “that area within estuaries, ponds, streams, creeks, rivers, lakes or coastal waters, which is a spawning or feeding ground or passageway for anadromous or catadromous fish and which is identified by [DMF] or has been mapped on the Coastal Atlas of the Coastal Zone Management Program. . . .” 310 CMR 10.35(2). An Anadromous/Catadromous Fish Run also “include[s] those areas which have historically served as fish runs and are either being restored or are planned to be restored at the time the [NOI] is filed.” 310 CMR 10.35(2).

“The banks of and [LUO], ponds, streams, rivers, lakes or creeks that underlie an [A]nadromous/[C]atadromous [F]ish [R]un are [wetlands resource areas protected by the MWPA and the Wetlands Regulations at 310 CMR 10.35] and significant to protection of marine fisheries.” 310 CMR 10.35(1). “When a proposed project involves the dredging, filling, removing or altering of a bank of a fish run, or [LUO], or under a pond, stream, river, lake or creek which is a fish run, the [permit] issuing authority shall presume that such bank or land is significant to the protection of marine fisheries.” *Id.* This presumption is rebuttable and may be overcome only upon a clear showing that [the] bank or land [at issue] does not play a role in the protection of marine fisheries, and if the [permit] issuing authority makes a written determination to that effect.” *Id.*

When the bank or land at issue are determined to be significant to the protection of

marine fisheries, the Performance Standards that govern work or activities in these areas are set forth in 310 CMR 10.35(3). 310 CMR 10.35(3) provides that any work or activities within the bank or land at issue “shall not have an adverse effect on the [A]nadromous or [C]atadromous fish run by”:

(a) impeding or obstructing the migration of the fish, unless DMF has determined that such impeding or obstructing is acceptable, pursuant to its authority under M.G.L. c. 130, § 19;

(b) changing the volume or rate of flow of water within the fish run; or

(c) impairing the capacity of spawning or nursery habitats necessary to sustain the various life stages of the fish.

At the Hearing, the Petitioners, through their expert witness, Mr. Shea, contended that the SOC is invalid because the Department purportedly failed to recognize that the proposed Project will take place in an area that underlies an Anadromous/Catadromous Fish Run. Mr. Shea’s Direct PFT I, ¶¶ 62, 66, 69. I reject the Petitioner’s claim based on the persuasive testimony of the Applicants’ expert witness, Dr. Neubert, which was corroborated by the Department’s expert witness, Mr. Bartow.

Undisputedly, the Department did not state in the SOC that the proposed Project will take place in an area that underlies an Anadromous/Catadromous Fish Run. Mr. Bartow’s PFT, ¶¶ 5, 44. Its failure to do so is not fatal to the SOC’s issuance because in accordance with its de novo review authority as discussed above at pp. 9-10, Mr. Bartow acknowledged at the Hearing that the SOC should have also listed Anadromous/Catadromous Fish Run as a wetlands resource area that exists at the Applicants’ Property. *Id.* He also agreed with and adopted Dr. Neubert’s persuasive testimony that the proposed Project will take place in area that underlies an

Anadromous/Catadromous Fish Run and satisfies the Performance Standards of 310 CMR 10.35(3). Mr. Bartow's PFT, ¶¶ 5, 43-44.

Dr. Neubert testified that as part of their NOI filing with the HCC for the proposed Project, the Applicants received a letter from DMF dated January 14, 2015 informing the Applicants that the Herring River is: (1) a spawning habitat for winter flounder *Pseudopleuronectes americanus*; and (2) a diadromous fish passage and migration habitat for alewife (*Alosa pseudoharengus*), blueback herring (*Alosa aestivalis*), tomcod (*Microgadus tomcod*), white perch (*Morone americana*), and American eel (*Anguilla rostrata*). Dr. Neubert's PFT, ¶ 25; Exhibit C to Dr. Neubert's PFT. Dr. Neubert testified that "[i]n order to protect winter flounder spawning and development [and] diadromous fish passage of both adults and juveniles," DMF recommended TOY restrictions, which the Department adopted in Special Condition No. 11 of the SOC previously discussed above. Dr. Neubert's PFT, ¶ 25; Exhibit C to Dr. Neubert's PFT. DMF also recommended that the bulkhead (a vertical timber structure) called for in the proposed Project as a sill to enable Salt Marsh regeneration be either: (1) removed entirely because Salt Marsh "is growing on [each] side of [the Applicants'] [P]roperty without waive attenuation structures" or (2) redesigned "utiliz[ing] a lower profile structure that is . . . more biologically-friendly" to the fish habitat than "sills used in living shoreline projects." Exhibit C to Dr. Neubert's PFT. In making these recommendations, however, DMF also remarked that "[the proposed] [P]roject represents an improvement to the current habitat conditions at [the Applicants' Property] by removing debris and replanting [S]alt [M]arsh." Dr. Neubert's PFT, ¶ 25; Exhibit C to Dr. Neubert's PFT.

At the Hearing, the Petitioners, through their expert witness, Mr. Shea, admitted that

“[t]he Project can meet the [P]erformance Standards . . . in 310 CMR 10.35(3)[,] . . . if the Project adheres to all conditions set by [DMF].” Mr. Shea’s Direct PFT I, ¶ 66. In response, Dr. Neubert testified that “[t]he [proposed] Project will adhere to the set TOY restrictions as provided by MA DMF and [Mass]DEP SOC Special Condition No, 11, and therefore will have no adverse impacts to Fish Runs.” Dr. Neubert’s PFT, ¶ 26. Mr. Bartow corroborated Dr. Neubert’s testimony that Special Condition No. 11 of the SOC incorporates the TOY restrictions that DMF recommended be implemented for the proposed Project. Mr. Bartow’s PFT, ¶ 44.

With respect to DMF’s recommendation that the bulkhead called for in the proposed Project as a sill to enable Salt Marsh regeneration be either removed entirely or redesigned “utiliz[ing] a lower profile structure that is . . . more biologically-friendly” to the fish habitat, Mr. Bartow testified on cross-examination by the Petitioners’ counsel at the Hearing that the bulkhead elevation was reduced during the HCC review stage of the Project. He also testified that the bulkhead was designed to allow tidal fluctuations, which will benefit the fish habitat.

In response, the Petitioners failed to present any probative evidence effectively refuting Dr. Neubert’s and Mr. Bartow’s testimony. Accordingly, the Department’s determination that the proposed Project satisfies the Performance Standards of 310 CMR 10.35(3) stands.

I. The Department Properly Determined That The Proposed Project Satisfies The Performance Standards For Work or Activities in Land Containing Shellfish Pursuant To 310 CMR 10.34(4) and (5)

Land Containing Shellfish is a wetlands resource area protected by the MWPA and the Wetlands Regulations at 310 CMR 10.34 that is defined as “[LUO], tidal flats, rocky intertidal shores, salt marshes[,], and land under salt ponds when any such land contains shellfish.” 310 CMR 10.34(2). Shellfish are defined as including the following species:

Bay scallop (*Argopecten irradians*); Blue mussel (*Mytilus edulis*); Ocean quahog

(Arctica islandica); Oyster (*Crassostrea virginica*); Quahog (*Mercenaria merceneria*); Razor clam (*Ensis directus*); Sea clam (*Spisula solidissima*); Sea scallop (*Placopecten magellanicus*); Soft shell clam (*Mya arenaria*).

310 CMR 10.34(2). Under the Wetlands Regulations, “Land containing shellfish is . . . significant to the protection of marine fisheries as well as to the protection of the [MWPA] interest of land containing shellfish.” 310 CMR 10.34(1).

The Performance Standards that govern work or activities in Land Containing Shellfish include those set forth in 310 CMR 10.34(4) and 10.34(5), which respectively provide as follows.

310 CMR 10.34(4) provides that “[e]xcept 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.

310 CMR 10.34(5) provides that “[n]otwithstanding 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.”

The Petitioners, through their expert witness Mr. Shea, contended at the Hearing that the SOC is invalid because “[t]he impacts [of the] proposed [Project] . . . to Land Containing Shellfish, and to marine wildlife habitat, and marine wildlife species [were] not . . . properly addressed by the [A]pplicant[s].” Mr. Shea’s Direct PFT I, ¶ 70. I reject the Petitioners’ claim based on the persuasive testimony of the Applicants’ expert witness, Dr. Neubert, which was corroborated by the Department’s expert witness, Mr. Bartow.

On August 14, 2015, Dr. Neubert performed a shellfish habitat assessment (“Shellfish Survey”) as part of the Applicants’ NOI filing for the proposed Project. Dr. Neubert’s PFT, ¶ 13. Prior to conducting the Shellfish Survey, Dr. Neubert consulted with Amy Usowski, the HCC’s Conservation Agent, to confirm that Dr. Neubert’s planned assessment would satisfy the Town of Harwich’s shellfish habitat assessment requirements. Dr. Neubert’s PFT, ¶ 13. This is the standard protocol that Dr. Neubert had followed in the past for other shellfish surveys she conducted in Harwich. Dr. Neubert’s PFT, ¶ 13. Dr. Neubert took photographs during her Shellfish Survey of the following and included them in Exhibit B of her PFT:

- (1) Photograph A: View of the existing fish house at the Applicants’ Property;
- (2) Photograph B: Fringing Salt Marsh north of proposed Project site depicting rotting logs that will be removed as part of the Project, benefiting the Salt Marsh habitat; and
- (3) Photograph C: Fringing Salt Marsh adjacent to the existing concrete pad that will be removed and the Salt Marsh habitat restored as part of the proposed Project, benefiting the environment.

Dr. Neubert’s PFT, ¶ 13; Exhibit B to Dr. Neubert’s PFT.

Dr. Neubert performed her Shellfish Survey within and around the area where the

existing fish house currently is located at the Applicants' Property. Dr. Neubert's PFT, ¶ 14. She installed shellfish sampling stations in a grid pattern, as approved by the HCC's Conservation Agent. Dr. Neubert's PFT, ¶ 14. Dr. Neubert's investigation included surveying the waterfront area along transects set perpendicular and parallel to include the proposed Project footprint and areas outside the footprint at 10 foot intervals starting from the Mean High Water mark out to 80 feet into the Herring River. Dr. Neubert's PFT, ¶ 14. Dr. Neubert observed sediment/bottom surface at each location. Dr. Neubert's PFT, ¶ 14. A total of 40 stations were surveyed for the presence of shellfish and sediment type. Dr. Neubert's PFT, ¶ 14.

A long handled rake with one-quarter inch mesh screen around the basket to capture juvenile stages of shellfish and other non-commercially important species was used to dig into the substrate where wading was feasible. Dr. Neubert's PFT, ¶ 15. In areas too deep to sample with a shellfish rake SCUBA certified, scientific divers from Dr. Neubert's environmental consulting firm who were familiar with the flora and fauna of Cape Cod and New England collected shellfish samples underwater. Dr. Neubert's PFT, ¶ 15. An approximate volume of substrate of 1-cubic foot was processed through to determine abundance of shellfish at each of the station locations. Dr. Neubert's PFT, ¶ 15.

During the course of her Shellfish Survey, Dr. Neubert determined that the area under the existing fish house at the Applicants' Property did not contain soft sediment suitable for shellfish habitat. Dr. Neubert's PFT, ¶ 16. This area was comprised of concrete and non-natural rock (rip rap) with gravel. Dr. Neubert's PFT, ¶ 16. The concrete and rocks were studied to determine if they had American oysters (*Crassostrea virginica*) and no oysters were observed. Dr. Neubert's PFT, ¶ 16. Dr. Neubert's Shellfish Survey also did not find any eelgrass present within the

surveyed footprint, which was consistent with the Department's Mapping available via the internet through the MassGIS website. Dr. Neubert's PFT, ¶ 17.

Forty (40) stations were assessed for shellfish abundance at the Applicants' Property. Dr. Neubert's PFT, ¶ 17. Five transects were aligned parallel and eight transects perpendicular to the shoreline. Dr. Neubert's PFT, ¶ 17. The first transect parallel to the shoreline was referenced as zero (0) and each parallel transect was related to as 10, 20, 30, and 40 feet, respectively. Dr. Neubert's PFT, ¶ 17. These transect configurations revealed the following regarding shellfish habitat. Dr. Neubert's PFT, ¶ 17.

The area under the existing fish house, from the first transect out to 20 feet toward the Herring River was comprised of broken concrete debris and unsuitable habitat for shellfish, and no shellfish were present. Dr. Neubert's PFT, ¶ 17.

At the 10 foot transect line, one quahog was sampled from the southern-most sample locations of the eight sample locations, but was outside the limits of the proposed Project. Dr. Neubert's PFT, ¶ 17.

The 20 foot transect line was beyond the area with concrete debris and had less coarse sand and gravel than the 10 foot transect line and was mixed with soft mud, with a thin black layer at the surface. Dr. Neubert's PFT, ¶ 17. Thirteen quahogs were sampled from eight locations along the 20 foot transect, only eight of which were within the replacement piling area. Dr. Neubert's PFT, ¶ 17.

At 30 feet from the starting transect, the sediment was largely soft sandy mud, with a thin black, organic layer, but mixed with sand and gravel. Dr. Neubert's PFT, ¶ 17. This transect and other transects sampled beyond 30 feet into the Herring River were outside the footprint of the

proposed Project. Dr. Neubert's PFT, ¶ 17. Twenty-six quahogs were sampled from the eight shellfish station locations along the 30 foot transect. Dr. Neubert's PFT, ¶ 17.

At the 40 foot transect, 40 quahogs were collected from the eight shellfish station locations. Dr. Neubert's PFT, ¶ 17. Sediment in this area was the same as along the 30 foot transect. Dr. Neubert's PFT, ¶ 17.

Quahogs observed in the Shellfish Survey ranged in size from juvenile to adult. Dr. Neubert's PFT, ¶ 19. Other organisms observed included a variety of polychaete worms, Atlantic slipper limpets (*Crepidula fornicata*), and two chitons (*Polyplacophora*) attached to broken concrete. Dr. Neubert's PFT, ¶ 19. Quahogs were more abundant toward the center of the Herring River along transects beyond the seaward most extent of the proposed Project where the sediment consistency was softer and sandier mixed with mud when compared to the nearshore transects observed under the existing fish house. Dr. Neubert's PFT, ¶ 19. Water depth was 6 to 10 feet deep at approximately MLW. Dr. Neubert's PFT, ¶ 19. At two subtidal sample locations where small rocks and pebbles were found beyond the 20 foot sampling transect, outside of the proposed Project footprint, juvenile blue mussels (*Mytilus edulis*) were observed. Dr. Neubert's PFT, ¶ 19. These are commonly occurring species in Cape Cod estuarine waters. Dr. Neubert's PFT, ¶ 19.

As a result of her Shellfish Survey, Dr. Neubert concluded that the proposed Project will not cause any adverse impacts to shellfish habitat, and, accordingly satisfied the Performance Standards of 310 CMR 10.34(4) as set forth above. Dr. Neubert's PFT, ¶¶ 24, 27-30. Mr. Bartow corroborated Dr. Neubert's finding. Mr. Bartow's PFT, ¶ 46. Specifically, the proposed Project will neither alter water circulation nor alter relief elevation because the only in-water work is to replace pilings. Dr. Neubert's PFT, ¶¶ 24, 29; Mr. Bartow's PFT, ¶ 46. Additionally,

sediment consistency under the existing fish house at the Applicants' Property will be improved with renovation and removal of the broken concrete padding. Dr. Neubert's PFT, ¶ 29.

Sediment in the Herring River also will not be altered because there is no dredging or fill proposed as part of the proposed Project. Dr. Neubert's PFT, ¶¶ 24, 29. There will be no alterations in natural drainage from adjacent land. Mr. Bartow's PFT, ¶ 46. Lastly, the proposed Project will likely improve water quality through the replication and restoration of up to 822 square feet of Salt Marsh, and the planting of native plants. Mr. Bartow's PFT, ¶ 46; Dr. Neubert's PFT, ¶ 24.

The proposed Project also complies with the Performance Standards of 310 CMR 10.34(5). Mr. Bartow's PFT, ¶ 46; Dr. Neubert's PFT, ¶ 28. As noted above, 310 CMR 10.34(5) provides that proposed work or activities in Land Containing Shellfish are not required to meet the Performance Standards of 310 CMR 10.34(4) if the work or activities "temporarily have an adverse effect on shellfish productivity but . . . do not permanently destroy the habitat[,] [provided that] . . . 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 [authorizing the work] is granted, in which case such restoration shall be completed within one year of such extension." Based on his evaluation of: (1) Dr. Neubert's Shellfish Survey, (2) information contained in the Department's proposed Project file, and (3) his observations during his site inspection of the Applicants' Property, Mr. Bartow determined that the proposed Project area will be returned substantially to its former productivity in less than one year following installation of the replacement pilings. Mr. Bartow's PFT, ¶ 49.

I also find that the proposed Project is protective of Land Containing Shellfish in conformance with the Performance Standards of 310 CMR 10.34(4) and 10.34(5) because of the

requirements of the SOC's Special Condition No. 12. This Special Condition provides that "[p]rior to the commencement of construction and at the discretion of the Harwich Shellfish Constable, and under [the Constable's] supervision, the [A]pplicant[s] may be required to purchase seed shellfish and seed adjacent areas," and that "[t]he quantity of seed shall be reasonably determined and approved by the . . . Constable."

J. The Proposed Project Will Be Located in Land Subject To Coastal Storm Flowage And The Department Properly Determined That The Project Furthers The MWPA Interests Of Flood Control And Storm Damage Prevention

Land Subject to Coastal Storm Flowage ("LSCSF") is "land subject to any inundation caused by coastal storms up to and including that caused by the 100-year storm, surge of record or storm of record, whichever is greater." 310 CMR 10.04. "Under the Wetlands Regulations, LSCSF is 'likely to be significant to [the MWPA interests of] flood control and storm damage prevention.'" Rankow, 2013 MA ENV LEXIS 45, at 17. "Although there are no Performance Standards in the Wetlands Regulations for LSCSF, the [wetlands] permit issuing authority may only authorize activities in LSCSF if the issuing authority determines that the proposed activities will not interfere with the MWPA interests of flood control and storm damage prevention." Id.

At the Hearing, the Petitioners, through their expert witness, Mr. Shea, contended that the SOC is invalid because the Department purportedly failed to recognize that the proposed Project will take place in LSCSF and that "[t]he Project will . . . negatively impact LSCSF" Mr. Shea's Direct PFT I, ¶¶ 62, 67. In response, the Department does not dispute that the SOC omitted LSCSF as a wetlands resource present at the Applicants' Property. Mr. Bartow's PFT, ¶¶ 5, 52-54. However, the Department's omission is not fatal to the SOC's issuance because in accordance with its de novo review authority as discussed above at pp. 9-10, Mr. Bartow

acknowledged at the Hearing that the SOC should have also listed LSCSF as a wetlands resource that exists at the Applicants' Property. Mr. Bartow's PFT, ¶¶ 5, 52-54. At the Hearing, Mr. Bartow also provided persuasive testimony that the proposed Project's presence in LSCSF will further the MWPA interests of flood control and storm damage prevention. Mr. Bartow's PFT, ¶¶ 5, 52-54. His testimony was corroborated by the Applicants' expert witness, Mr. Michniewicz. Mr. Michniewicz's PFT, ¶ 28. Based on Mr. Bartow's and Mr. Michniewicz's testimony, which the Petitioners did not effectively refute at the Hearing, I find that the proposed Project will be located in LSCSF and further the MWPA interests of flood control and storm damage prevention for the following reasons.

The Applicants' Property is situated below the Base Flood Elevation ("BFE") of Elevation ("EL.") 13 as determined by the Federal Emergency Management Agency ("FEMA"),³³ and the existing grade over most of the Property is situated below EL. 3, approximately 10 feet below the BFE. Mr. Bartow's PFT, ¶ 52; Mr. Michniewicz's PFT, ¶ 28. No changes to the existing grades are proposed at the Applicants' Property, and the area of the existing gravel driveway and parking area at the Property is proposed to be reduced in size as part of the proposed Project's mitigation. Mr. Bartow's PFT, ¶ 53; Mr. Michniewicz's PFT, ¶ 28. An existing, at-grade, 280 square foot cast-in-place concrete pad located adjacent to the Herring River will be removed and replaced with Salt Marsh as mitigation. Mr. Bartow's PFT,

³³ FEMA is responsible for furthering the U.S.'s ability to "sustain and improve [the nation's] capability to prepare for, protect against, respond to, recover from[,] and mitigate all hazards." <https://www.fema.gov/about-agency>. "The FEMA Flood Map Service Center (MSC) is the official public source for flood hazard information produced in support of the National Flood Insurance Program (NFIP)." <https://msc.fema.gov/portal>. FEMA Flood Zone Designations "are geographic areas that the FEMA has defined according to varying levels of flood risk. These zones are depicted on a community's Flood Insurance Rate Map (FIRM) or Flood Hazard Boundary Map. Each zone reflects the severity or type of flooding in the area." <https://snmapmod.snco.us/fmm/document/fema-flood-zone-definitions.pdf>. "Coastal areas with a 1% or greater chance of flooding and an additional hazard associated with storm waves" are designated by FEMA as "VE." *Id.* "These areas have a 26% chance of flooding over the life of a 30-year mortgage" on real property located in such areas. *Id.*

¶ 54; Mr. Michniewicz's PFT, ¶ 28. The proposed Project also calls for the installation of approximately 570 square feet of Salt Marsh as mitigation in the intertidal area. Mr. Bartow's PFT, ¶ 54; Mr. Michniewicz's PFT, ¶ 28. In short, the proposed Project furthers the MWPA interests of flood control and storm damage prevention because there will be an improvement to these interests. Mr. Bartow's PFT, ¶ 54; Mr. Michniewicz's PFT, ¶ 28.

K. The Applicants Did Not Fail To Obtain Or Apply For All Obtainable Permits, Variances, And Approvals Required by the Harwich Zoning Bylaws For The Proposed Project In Accordance With 310 CMR 10.05(4)(e)

The MWPA provides that:

No [NOI for a proposed project] shall be [filed with a local conservation commission] before all permits, variances, and approvals required by local by-law with respect to the proposed activity, *which are obtainable at the time of such [NOI], have been obtained*, except that such [NOI] may be [filed], at the option of the applicant, after the filing of an application or applications for said permits, variances, and approvals; provided, that such notice shall include any information submitted in connection with such permits, variances, and approvals which is necessary to describe the effect of the proposed activity on the environment. . . .

(emphasis supplied). The Wetlands Regulations at 310 CMR 10.05(4)(e) explain this requirement of the MWPA by providing that:

[t]h[e] requirement [in MWPA] to obtain or apply for all obtainable permits, variances and approvals required by local by-law with respect to the proposed activity *shall mean only those which are feasible to obtain at the time the [NOI] is filed*. Permits, variances, and approvals required by local by-law may include, among others, zoning variances, permits from boards of appeals, permits required under floodplain or wetland zoning by-laws and gravel removal permits. They do not include, among others, building permits under the State Building Code, M.G.L. c. 23B, § 16, or subdivision control approvals under the State Subdivision Control Law, M.G.L. c. 41, §§ 81K through 81GG, which are issued by local authorities

(emphasis supplied).

The Petitioners contended at the Hearing that 310 CMR 10.05(4)(e) bars the proposed Project because the Project purportedly "requires zoning relief from Harwich and thus the

underlying [NOI] for the . . . Project should never have been accepted [by the HCC] for review pursuant to [the MWPA] and 310 CMR 10.05(4)(e).” Petitioners’ Appeal Notice, ¶ 27; See also Petitioners’ Pre-Hearing Memorandum, at pp. 12-13; Petitioners’ Closing Brief, at pp. 17-18, 42-46. I reject the Petitioners’ claim for the following reasons.

First, undisputedly, the HCC approved the NOI; it did not reject the NOI pursuant to the MWPA and 310 CMR 10.05(4)(e) for failure to obtain or apply for all necessary zoning permits, variances, and approvals required by the Town of Harwich’s Zoning Bylaws. Mr. Bartow’s PFT, ¶ 57. Under the provisions of 310 CMR 10.05(4)(f), which follow those of 310 CMR 10.05(4)(e), the HCC’s approval of the NOI is evidence of its determination on the issue “concerning the applicability or obtainability of such [zoning] permit[s], variance[s], or approval[s]”³⁴ and its determination is entitled to deference by the Department. In the Matter of George T. Collins, OADR Docket No. WET-2016-008, Recommended Final Decision (July 28, 2016), 2016 MA ENV LEXIS 40, at 19-20, adopted as Final Decision (August 9, 2016), 2016 MA ENV LEXIS 39 (“responsibility to accept or reject [an NOI] based upon obtaining other local approvals [is] squarely upon the local conservation commission, to which the [Department] will defer”). The Department’s deference to the HCC’s determination on this issue has a rational basis because a local conservation commission, as a municipal body, should be the entity to determine: (1) whether other local municipal permits, variances, or approvals are required for a

³⁴ 310 CMR 10.05(4)(f) provides that:

[i]f the [wetlands permit] issuing authority rejects [an NOI] because of a failure to obtain or apply for all permits, variances and approvals required by local by-law, it shall specify in writing the permit, variance or approval that has not been applied for. A ruling by the municipal agency within whose jurisdiction the issuance of the permit, variance or approval lies, or by the town counsel or city solicitor, concerning the applicability or obtainability of such permit, variance or approval shall be accepted by the issuing authority. *In the absence of such a ruling, other evidence may be accepted.*

(emphasis supplied).

proposed project proffered by an NOI and (2) whether the project should be rejected pursuant to 310 CMR 10.05(4)(e) for failure to obtain those municipal permits, variances, or approvals.

Moreover, General Condition No. 3 of the Department's SOC approving the proposed Project makes clear that the Applicants "[are] not relieve[d] [from] . . . the necessity of complying *with all other applicable* federal, state, or *local statutes, ordinances, bylaws, or regulations.*"

(emphasis supplied). Put another way, the proposed Project cannot go forward unless the Applicants have obtained all other necessary approvals under federal, state, and/or local statutes, ordinances, bylaws, or regulations.

Lastly, the Petitioners' claim fails because they failed to present any expert witness testimony at the Hearing supporting the claim and specifying in detail the zoning permits, variances, or approvals that are purportedly required for the proposed Project under the Town of Harwich's Zoning Bylaws. The claim rests entirely on legal argument of the Petitioners' counsel setting forth his interpretation of local zoning requirements, which is not evidence.

III. THE APPLICANTS' VIOLATION OF 310 CMR 10.05(7)(j)2g AND THE SOC DURING THE PENDENCY OF THIS APPEAL DOES NOT WARRANT A FINAL DECISION IN THE PETITIONERS' FAVOR

The Wetlands Permit Appeal Regulations at 310 CMR 10.05(7)(j)2g, provide that "[n]o work [authorized by an SOC] shall be undertaken until all administrative appeal periods [for the SOC] have elapsed, or if such an appeal has been taken, until all procedures before the Department have been completed." The same directive appears in General Condition No. 8 of the SOC authorizing the proposed Project. A violation of this directive can result in the imposition of sanctions pursuant to 310 CMR 1.01(10), which authorizes the imposition of sanctions against "a party [who] fails to . . . comply with orders issued" Possible sanctions

under 310 CMR 1.01(10) include, without limitation:

- (a) taking designated facts or issues as established against the party being sanctioned;
- (b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;
- (c) denying summarily late-filed motions or motions failing to comply with requirements of 310 CMR 1.01(4);
- (d) striking the party's pleadings in whole or in part;
- (e) dismissing the appeal as to some or all of the disputed issues;
- (f) dismissing the party being sanctioned from the appeal; and
- (g) issuing a final decision against the party being sanctioned.

On May 25, 2017, attorney Dennis E. McMahon, Sr. ("Mr. McMahon"), who resides at 30 Harbor Way in Harwich, which is purportedly in the vicinity of the Applicants' Property, filed a written complaint against the Applicants with the Department's Southeast Regional Office, contending that the Applicants had violated 310 CMR 10.05(7)(j)2g and the SOC by performing work at the Applicants' Property during the pendency of this appeal. Mr. McMahon's complaint against the Applicants was not brought to my attention until June 16, 2017. *Id.* In response to the complaint, on June 20, 2017 and in accordance with 310 CMR 1.01(5)(a)3 and 310 CMR 10.05(7)(j)2g, I issued an Order Staying Proceedings in this appeal, including the issuance of my RFD, pending: (1) the Department's review of Mr. McMahon's complaint against the Applicants; and (2) a further Order of the Presiding Officer. June 2017 Stay Order, at p. 4; July 2017 Order, at pp. 3-4.

On July 19, 2017, the Department filed a response to my June 2017 Stay Order stating that "no wetlands related enforcement action [by the Department against the Applicants was]

necessary” and that I should issue an RFD affirming the SOC based on its review of: (1) the HCC’s February 1, 2017 Emergency Certification to the Applicants pursuant to 310 CMR 10.06 authorizing them to immediately perform certain work at the Applicants’ Property that had been authorized by the SOC;³⁵ (2) the HCC’s May 15, 2017 Enforcement Order directing the Applicants to file with the HCC an After- the-Fact NOI seeking approval for work that the Applicants had performed that had not been authorized by the HCC’s February 1, 2017 Emergency Certification; and (3) Mr. McMahon’s May 25, 2017 complaint letter to the Department. Department’s July 19, 2017 Response to June 20, 2017 Order Staying Proceedings, at p. 1.

The HCC’s February 1, 2017 Emergency Certification pursuant to 310 CMR 10.06 “[had given] the [Applicants] permission to drive 8 new pilings [at the Applicants’ Property] and support the [existing fish house] structure with steel beams” in order to stabilize it so that it would not collapse. HCC’s OOC (September 5, 2017), Decision, Special Condition No. 1; HCC’s May 15, 2017 Enforcement Order to Applicants. “[The] work that [the Applicants performed] in excess of the Emergency Certification was the installation of a total of 10 new pilings along the periphery of the structure, along with 9 new helical piles underneath the loading dock.” HCC’s OOC (September 5, 2017), Decision, Special Condition No. 2. The Applicants

³⁵ 310 CMR 10.06 provides in relevant part that:

Unless authorized by a Severe Weather Emergency Declaration issued by the [Department’s] Commissioner pursuant to 310 CMR 10.06(8), any person requesting permission to do an emergency project shall specify why the project is necessary for the protection of the health or safety of the citizens of the Commonwealth and what agency of the Commonwealth or subdivision thereof is to perform the project or has ordered the project to be performed. If the project is certified to be an emergency by the [local] conservation commission or the Commissioner, the certification shall include a description of the work which is to be allowed and shall not include work beyond that necessary to abate the emergency. A site inspection shall be made prior to certification. . . .

310 CMR 10.06(1).

also installed “[a] water line . . . on the property without permission, and the loading dock was rebuilt in an area larger than what had previously been there.” Id.

To facilitate my understanding of its July 19, 2017 response to my June 2017 Stay Order, on July 21, 2017 I issued an Order directing the Department to file a Supplemental Response to my June 2017 Stay Order indicating whether the Applicants had performed work at the Applicants’ Property authorized by SOC during the pendency of this appeal, and if so, why sanctions should not issue against the Applicants pursuant 310 CMR 1.01(10) given the express prohibition in 310 CMR 10.05(7)(j)2g and General Condition No. 8 of the SOC that “[n]o work [authorized by an SOC] shall be undertaken until all administrative appeal periods [for the SOC] have elapsed, or if such an appeal has been taken, until all procedures before the Department have been completed.” July 2017 Order, at pp. 4-5.

On July 31, 2017, the Department filed a Supplemental Response to my June 2017 Stay Order in which it stated that “[i]ndeed, all of the work carried out by the Applicant[s] [was] subject to the SOC, including work that was authorized under [the HCC’s February 1, 2017] Emergency Certification that was issued . . . during the pendency of this appeal.” Department’s Supplemental Response to July 21, 2017 Order Staying Proceedings, at p. 1. The Department stated that “[t]he enforcement related question ultimately concern[ed] work carried out in excess of that approved by the [HCC’s] Emergency Certification” and that “[t]he [HCC’s] May 15[, 2017] letter described the additional work as (i) driving 10 new timber pilings instead of 8; (ii) installation of a water line; (iii) removal of old timber pilings under the building; and (iv) installation of a new deck and supporting helical pilings.” Id. The Department stated that “[a]lthough that additional work [was] also subject to the pending SOC, the [HCC] exercised its enforcement authority and required [the Applicants to file] an after the fact [NOI with the HCC]

for that work,” which the Applicants filed with the HCC on June 19, 2017. Id. The Department stated that the “Project Description” at pp. 1 and 2 of the Applicants’ After-the-Fact NOI “detail[ed] the Applicant[s] . . . reasons for carrying out work to support the dilapidated [existing fish house at the Applicants’ Property] beyond the scope of the [HCC’s] Emergency Certification.” Id. These reasons were the following.

First, the Applicants drove 10 new timber pilings instead of the eight because “[d]uring the installation of the piles to the north of the fish house[,] the [Applicants’] contractor was unable to get the required pile loading capacity. . . This caused the site structural engineer to instruct the contractor to install an additional pile to the north and south in order to achieve the pile loading capacity necessary to support the building. . . .” Project Description of Applicants After-the-Fact NOI, at p. 2.

Second, the Applicants installed the water line because “the water service [had been] installed by the Town up to the property line” and that “[the Applicants] decided that water service to the fish house was needed” Id. They installed the water line by “[hand digging] a shallow trench in the driveway to the hand rail where the water spigot [was] located.” Id. They asserted that “[t]he work to dig the shallow trench was solely in the drive-way and did not infringe upon any wetland plants and did not seem at the time to be a detriment to wildlife as it would be underground.” Id.

Third, the Applicants removed old timber pilings under the existing fish house at the Applicants’ Property because “[t]here was a need for free access under the structure to float [in the place] the steel beams” authorized by the HCC’s Emergency Certification to support the structure. Id. They also asserted that “[t]here was also a structural need for the floor to be incorporated into the design to resist the lateral forces due to wind and wave energy,” and that

“[t]here was a need for space for the construction crew to be able to perform the work safely [due to] 1). the rotted nature of the old piles, 2). the potential that they still contained creosote, 3). the added turbulence they were causing that was affect[ing] [LUO] and Land Containing Shellfish, [4).] the adverse effect they were causing to water quality, and [5).] the footprint they occupied in [LUO] and Land Containing Shellfish.” Id.

Lastly, the Applicants installed a new deck and supporting helical pilings because “[w]hile the installation of the first two [steel] beams [under the existing fish house] was pretty straight forward[,] the third steel beam located landward of the first two steel beams presented a very difficult situation” requiring “[t]he contractor . . . to remove part of the existing loading dock so that [the contractor] could swing the third steel beam in from the front of the building.” Id. The Applicants asserted that “[d]uring the removal [of] the section of loading dock that was in [the contractor’s] way, the rest of the loading dock became unstable creating a safety hazard to the [construction] crew.” Id. As a result, “[t]he deck needed to be re-constructed because it was integral to the structural capacity for the building to resist wind and wave generated loading.” Id.

The Department also stated in its July 31, 2017 Supplemental Response to my June 2017 Stay Order “that under the circumstances of this case, it [was] not at all clear whether sanctions [against the Applicants], such as those enumerated under 310 CMR 1.01(10), would serve a useful purpose [because a] preponderance of the evidence adduced in this appeal [of the SOC] demonstrate[d] that the proposed [P]roject complies with applicable regulations and performance standards, although the additional work performed outside the authority of the [HCC’s] Emergency Certification should have awaited the conclusion of this appeal.” Id.

The Petitioners, however, were not as forgiving as the Department regarding the imposition of sanctions; the Petitioners urged the imposition of sanctions on the Applicants,

specifically my issuance of an RFD in favor of the Petitioners vacating the SOC, because in the Petitioners' view the Applicants "[had] built out the [proposed] Project under the guise of the [HCC's] emergency authorizations" in defiance of "[of] a host of state and local regulatory requirements," including 310 CMR 10.05(7)(j)2g. Response of Petitioners to Briefing Order and Order Continuing Stay of Proceedings (July 31, 2017), at pp. 8-9. The Petitioners also requested sanctions against the Department "for failure to halt [the Applicants'] unlawful actions." Id., at p. 9. In the alternative, the Petitioners requested that I expand my June 2017 Stay Order "to require the [Applicants] to remove all work unauthorized under the [HCC's] Emergency [Certification]" Id., at p. 9.

In response to my inquiry, on October 3, 2017, the HCC informed me that on September 5, 2017 the HCC had issued an OOC approving the Applicants' After-the-Fact NOI ("the HCC's September 2017 OOC") for the work that the Applicants had performed in excess of the HCC's February 1, 2017 Emergency Certification. Correspondence of HCC's Counsel to OADR (October 3, 2017). The HCC also filed a copy of the HCC's September 2017 OOC with OADR. Id.

The HCC's September 2017 OOC "approve[d] the work completed [by the Applicants that was] in excess of what [the HCC had] allowed under [its] [February 1, 2017] Emergency Certification" except for the water line, "which [the HCC did] not allo[w] to be in service at [that time]." HCC's OOC (September 5, 2017), Decision, Special Condition No. 2. The HCC "note[d] [in the OOC] that the [existing] fish house structure which was altered pursuant to the Emergency Certification [was] also part of the [proposed] Project which . . . the [HCC and the Department had approved and] currently under appeal [before OADR]." HCC's OOC (September 5, 2017), Decision, Special Condition No. 1; HCC's May 15, 2017 Enforcement

Order to Applicants. The HCC also noted that in approving the Applicants' After-the-Fact NOI, the HCC had "issue[d] a total of \$3,600.00 in fines [against the Applicants and required them to provide] 6 years . . . of shellfish mitigation (30 bushels [of shellfish planting per] year for 6 years to be added to the Herring River system with assistance and guidance of the Town [of Harwich's] Natural Resource Director)" HCC's OOC (September 5, 2017), Decision.

On October 3, 2017, the HCC also informed me that no party had filed an SOC with the Department seeking to challenge the HCC's September 2017 OOC. Correspondence of HCC's Counsel to OADR (October 3, 2017). This was confirmed by the Department on October 12, 2017. [Department's] Response to OADR Sept. 27, 2017 Order. The ten business day deadline for an aggrieved party to request an SOC from the Department or for the Department to initiate an SOC review of the HCC's September 2017 OOC pursuant 310 CMR 10.05(7)(a)-(7)(d) expired on September 19, 2017.

Based on the record before me, the Applicants violated 310 CMR 10.05(7)(j)2g and the SOC by performing work at the Applicants' Property during the pendency of this appeal that went beyond the HCC's February 1, 2017 Emergency Certification. The Applicants' violation, however, while unfortunate, does not warrant a Final Decision in the Petitioners' favor vacating the SOC approving the proposed Project for several reasons.

First, the Petitioners' request for sanctions for the Applicants' violation is moot or was waived by the Petitioners because they did not seek an SOC from the Department challenging the HCC's September 2017 OOC approving the Applicants' After-the-Fact NOI ("the HCC's September 2017 OOC") for the work that the Applicants had performed in excess of the HCC's February 1, 2017 Emergency Certification. The Department also did not initiate a unilateral SOC review of the HCC's September 2017 OOC, which it could have done pursuant to 310

CMR 10.05(7)(a)-(7)(b). As a result, further review of the Applicants' violation of 310 CMR 10.05(7)(j)2g and the SOC approving the proposed Project is foreclosed in this proceeding.

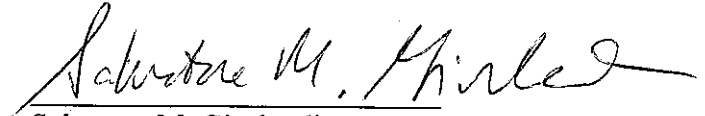
Even if the Petitioners' request for sanctions is not moot or was not waived, they still do not prevail in their quest for sanctions because the Department properly addressed the Applicants' violation of 310 CMR 10.05(7)(j)2g and the SOC approving the proposed Project in deferring to the HCC's Enforcement Action against the Applicants for violating the HCC's February 1, 2017 Emergency Certification. As discussed above, the HCC's Enforcement Action included requiring the Applicants to file an After-the-Fact NOI for the work that the Applicants performed that was not authorized by the HCC's February 1, 2017 Emergency Certification; assessing a \$3,600.00 civil administrative penalty against the Applicants; and requiring the Applicants to provide six years of shellfish mitigation, specifically, 30 bushels of shellfish planting per year for six years. With the exception of their explanation for installing a water line at their Property, the Applicants offered sound emergency public safety reasons as discussed above for all of the work that they performed that was in excess of the HCC's February 1, 2017 Emergency Certification. With respect to the Applicants' installation of the water line, which in my view, did not constitute an emergency action, the HCC appropriately addressed that issue by including a provision in its September 2017 OOC prohibiting the Applicants from operating the water line.

CONCLUSION

For the reasons discussed in detail above, I recommend that the Department's

Commissioner issue a Final Decision affirming the SOC approving the proposed Project.

Date: 02/20/18


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 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/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 his sole discretion, directs otherwise.

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