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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**

**April 9, 2020**

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In the Matter of  
Kevin Dwan

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OADR Docket No. WET-2019-015  
Nahant, MA

**RECOMMENDED FINAL DECISION**

A residents group (“Petitioners”) filed this appeal concerning the real property at 211 Willow Road, Nahant, Massachusetts (“the Property”). The Property is a two-plus-acre waterfront peninsula that extends roughly north into the Atlantic Ocean, with coves on the east and west sides of the peninsula. The Petitioners challenge a Superseding Order of Conditions (“SOC”) that the Massachusetts Department of Environmental Protection’s Northeast Regional Office (“MassDEP”) issued to the Property owner and Applicant, Kevin Dwan (“Dwan”), pursuant to the Wetlands Protection Act, G.L. c. 131 § 40, and the Wetlands Regulations, 310 CMR 10.00. The SOC approved the Applicant’s proposed construction of a pier, seasonal gangway, and seasonal floating dock off the western coast of the Property’s peninsula (“the Project”).

The Petitioners argue that the Project does not comply with applicable wetlands performance standards at 310 CMR 10.25 because they assert that it fails to use best available measures to minimize impacts on an eelgrass bed (*Zostera marina*). The Petitioners contend that one way for the Project to avoid and minimize impacts on eelgrass is to locate it on the opposite,

eastern side of the Property, where they believe there will be less eelgrass impacts. Petitioners' Memorandum of Law, p. 2. They also contend that there are several Project design changes that should be employed to reduce eelgrass impacts. Dwan and MassDEP disagree with the Petitioners. They contend that there is no eelgrass bed near the Project site, and even if there were, Dwan has employed best available measures to minimize impacts on eelgrass beds.

After holding an adjudicatory hearing and reviewing the entire administrative record, I agree with MassDEP and Dwan. A preponderance of the evidence demonstrates that if there were an eelgrass bed near the Project that could possibly be impacted, Dwan has proposed best available measures to minimize impacts on eelgrass. In sum, there are no feasible alternative locations on the Property to locate the Project and the Project's component parts and design include best available measures to minimize impacts. I therefore recommend that MassDEP's Commissioner issue a Final Decision adopting this decision and affirming the SOC.<sup>1</sup>

### **BACKGROUND**

The peninsula on the Property lies between two coves: Curlew Cove on the west side (also the leeward side) and Joseph's Beach, which lies seaward to the east side. Bass Rock, a barren, rocky outcropping lies at roughly the end of the peninsula and divides the two coves, providing some shelter to Curlew Cove from wave and storm impacts. Dwan PFT<sup>2</sup>, ¶¶ 1-3, 7; Exs. 8 and 28. The Project is proposed for the western, leeward side, in Curlew Cove ("Project site").

The Project would be located in the Wetlands Resource Areas of Land Under the Ocean ("LUO"), 310 CMR 10.25, and Rocky Intertidal Shores, 310 CMR 10.31. LUO is at issue

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<sup>1</sup>The Petitioners did not press their claim concerning Rocky Intertidal Shores with evidence or argument prior to, during, or after the adjudicatory hearing. It has been abandoned and waived, and thus should be dismissed. 310 CMR 1.01(5)(a)(15)f, (11)(a)(2)f.

<sup>2</sup> "PFT" is the acronym for Pre-filed Testimony.

because of the Petitioners' assertions that the Project is not designed with best available measures to minimize impacts on an eelgrass bed.

Eelgrass is a submerged aquatic vegetation that is valued for its rich wildlife and marine fisheries habitat. It is the dominant seagrass species of north temperate oceans and a critical natural resource in coastal ecosystems. Novak PFT, ¶ 9. Eelgrass tends to grow in shallower waters where it can form extensive beds that stabilize sediments and attenuate wave energy, as well as improve water quality and clarity through direct trapping of suspended particles, nutrient uptake, and retention of organic matter. Eelgrass beds form the basis of many coastal food webs and provide critical habitat for ecologically and economically important fish and shellfish species. Eelgrass beds also support a wide range of fish, invertebrates, and other wildlife. Id. at ¶12. Waterfowl, wading birds, and shore birds depend on the rich food resources found in eelgrass beds. Novak PFT, ¶¶ 9-10. It has been estimated that up to fifty percent of all eelgrass habitat has been lost in the past century and the prospects for recovery are low. Id.

Nearby the proposed Project site is an indisputably large, concentrated, and continuous eelgrass bed in Curlew Cove ("Curlew Cove bed"). That concentrated and continuous area of eelgrass generally lies no closer than 20 feet from where the Project would be located. Neubert PFT, ¶ 42; Exs. 16, 17. Between that area and the site, and proximate to the site, are small patches of eelgrass growing in varying density and size. There are two relatively small patches of eelgrass located roughly in the footprint of the proposed floating dock, lying mostly near the perimeter of the dock. They are approximately 20 and 30 feet from the large continuous, eelgrass bed in Curlew Cove. Each patch is approximately one square foot in area. Neubert PFT, ¶ 42; Exs. 16 and 17; Tr<sup>3</sup>, pp. 260, 311, 312.

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<sup>3</sup> "Tr." refers to the transcript of the adjudicatory hearing.

Whether that area of more dispersed eelgrass and patches that lies near the Project site is a part of the larger eelgrass bed in Curlew Cove is a source of major disagreement in this appeal. That is because eelgrass beds, as discussed in detail below, as opposed to isolated eelgrass sprigs, blades, or patches, that may not be a part of the bed, are not explicitly protected in the Wetlands Regulations at 310 CMR 10.25. The hotly disputed issue is: what constitutes the edge, or outer perimeter, of an eelgrass bed, specifically the large eelgrass bed in Curlew Cove? The Petitioners contend that isolated patches of eelgrass near the site are part of the Curlew Cove eelgrass bed. The Applicant and MassDEP disagree, believing they are isolated small patches, and, in any event, Dwan has used best available measures to minimize adverse impacts on any eelgrass bed.

The Project's physical size has been significantly reduced since its inception in an effort to reduce potential impacts. The original Notice of Intent proposed construction of a 77.5 x 6 foot fixed pier supported by 12 piles and anchored to the mainland at the top of an existing manmade seawall. At its seaward end the pier connects to a narrower 45 foot-long removable articulating gangway, which would access a 50 x 8 foot removable floating dock supported by 4 piles. The gangway and floating dock are required to be removed from October through April of every year. The total square footage of that initial proposal for the Project was approximately 1,000 square feet with a direct alteration of approximately 9 square feet of wetland resource areas for installation of piles: LUO = 4 square feet for the floating dock piles; and Rocky Intertidal Shore = 5 square feet for the piles supporting the fixed pier.

When the Project was before the Nahant Conservation Commission ("Commission") Dwan reduced its size in response to concerns raised by the Commission and others. The floating dock was reduced from 50 x 8 feet to 30 x 8 feet, a 40% reduction in the area. The

floating dock was later reduced even more to 25 x 8 feet, a 50% reduction from the initial size. Nilson PFT, ¶ 45. The number of piles anchoring the float was reduced from 4 to 2, reducing direct impacts from 4 to 2 square feet. The pier was extended from 77.5 feet to 85 feet, in order to place the floating dock in sufficiently deep water and reduce possible LUO impacts. Nilson PFT, ¶ 40; Exs. 5, 6, 7. The pier width was reduced from 6 feet to 4 feet. Overall square footage of the Project was reduced from its original 1,045 square feet to 675 square feet, a 35% reduction. Several special conditions were also added to protect eelgrass, and on September 13, 2018, the Commission issued an Order of Conditions (“OOC”) approving the Project.

The Petitioners appealed the OOC to MassDEP, seeking an SOC denying the Project. After reviewing the Project and conducting two site visits, MassDEP issued an SOC approving the Project, which included the construction of an 85 foot long by 4 foot wide steel and timber pier; a 45 foot long by 3 foot wide aluminum gangway; an 8 by 25 foot floating dock (anchored by two pilings), and twelve 10-inch diameter concrete-filled steel piles.

The SOC includes many special and general conditions designed to facilitate protection of eelgrass, such as the following:

1. Pre- and post-construction eelgrass surveys, eelgrass monitoring surveys for 2 years following completion during the peak growing season, and mitigation for any eelgrass damage discovered during the course of the surveys. SOC, Special Conditions 22-43.
2. Retention of an environmental construction monitor, who must file a daily report indicating the day’s activities, best management practices employed, and any non-compliance with the best management practices. SOC, Special Condition 42.
3. A minimum depth of water for the floating dock. SOC, Special Condition 44.

4. Restrictions on the size of the vessel that may be used at the floating dock. SOC, Special Condition 45.
5. Permanent relinquishment of Dwan's existing boat mooring in Nahant Harbor. SOC, Special Condition 47.
6. Seasonal removal of the float and gangway for 7 months of each calendar year (October through April). SOC, Special Condition 48.

The Petitioners appealed the SOC here, to the Office of Appeals and Dispute Resolution. Several witnesses submitted pre-filed testimony before the adjudicatory hearing, and they were available for cross examination at the hearing. The witnesses for the Petitioners were:

1. Alyssa Novak. Novak has a BS degree in biology, an MS in environmental science, and a PhD in Natural Resource and Earth Sciences-Oceanography. She concentrates in coastal ecology with a specialization in seagrasses. She is employed as a Research Assistant Professor in the Department of Earth and Environment at Boston University and an Adjunct Scientist at the Center for Coastal Studies, Provincetown, Massachusetts.
2. David G. Conlin. Conlin is a member of the Residents Group who resided near the Property for 27 years. He testified as a fact witness about his experience and observations in the area as a longtime boater and resident.

The witnesses for the Applicant were:

1. Pamela Neubert. Neubert holds a PhD in coastal ecology and biological diversity. She is employed as an Associate Vice President for Marine Science at AECOM Technical Services, Inc. She has substantial experience in eelgrass and shellfish ecology, studies, and surveys in Massachusetts, having worked previously for a

number of other coastal consulting and research entities, including Woods Hole Oceanographic Institution.

2. Andrew R. Nilson. Nilson is a professional civil engineer with more than fifteen years of experience in marine engineering. He holds a BS degree in civil engineering. He is employed as a professional engineer at Childs Engineering Corporation, Bellingham, Massachusetts.
3. Brad Holmes. Holmes is the principal and owner of Environmental Consulting & Restoration, LLC. He holds a BS degree in wildlife and fisheries biology and an MS degree in environmental engineering. He is a professional wetlands scientist with more than twenty years of experience in wetlands delineation and wetlands permitting.
4. Kevin Dwan. Dwan is Trustee of the 211 Willow Road Realty Trust, the Property owner. He testified based upon his experiences as a longtime resident and boater in the area.

The witness for MassDEP was:

1. Wayne Lozzi. Lozzi has been employed with MassDEP since 1990, presently as an Environmental Analyst III. He holds a BA degree in environmental studies.

### **REGULATORY FRAMEWORK**

**LUO.** Land under the ocean means 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). It is undisputed in this appeal that the LUO area at issue is significant to the protection of marine fisheries and land containing shellfish and because it is a near nearshore area is also

significant to storm damage prevention, flood control, and protection of wildlife habitat. 310 CMR 10.25(1).

“Land under the ocean provides feeding areas, spawning and nursery grounds and shelter for many coastal organisms related to marine fisheries. Nearshore areas of land under the ocean help reduce storm damage and flooding by diminishing and buffering the high energy effects of storms. Submerged bars dissipate storm wave energy. . . . Nearshore areas of land under the ocean also provide important food for birds. For example, waterfowl feed heavily on vegetation (such as eelgrass, widgeon grass, and macrophytic algae) and invertebrates (such as polychaetes and mollusks) found in estuaries and other shallow submerged land under the ocean.” 310 CMR 10.25(1).

When, as here, nearshore areas or other land under the ocean is significant to the protection of marine fisheries or wildlife habitat, the following “factors are critical to the protection of such interests: (a) water circulation; (b) distribution of sediment grain size; (c) water quality; (d) finfish habitat; and (e) important food for wildlife.” 310 CMR 10.25(1). The provision of the performance standards at issue in this appeal is 310 CMR 10.25(6). For water dependent structures, like the Project, the regulation provides in pertinent part the following:

Projects . . . which affect land under the ocean shall if water-dependent be designed and constructed, using best available measures, so as to minimize adverse effects, and if non-water-dependent, have no adverse effects, on marine fisheries habitat or wildlife habitat caused by:

- (a) alterations in water circulation;
- (b) destruction of eelgrass ( Zostera marina) or widgeon grass ( Rupia maritina) beds;
- (c) alterations in the distribution of sediment grain size;
- (d) changes in water quality, including, but not limited to, other than natural fluctuations in the level of dissolved

oxygen, temperature or turbidity, or the addition of pollutants; or  
(e) alterations of shallow submerged lands with high densities of polychaetes, mollusks or macrophytic algae.  
(emphasis added)

***Rocky Intertidal Shores.*** Rocky Intertidal Shores means naturally occurring rocky areas, such as bedrock or boulder-strewn areas between the mean high water line and the mean low water line. 310 CMR 10.31(2).

“Rocky shore environments are habitats for macroalgae and marine invertebrates and provide protection to and food for, larger marine organisms such as crabs, lobsters, and such fish species as winter flounder, as well as a number of birds. Most marine plants and animals found in rocky shore environments are uniquely adapted to survive there and cannot survive elsewhere. Harbor seals also use rocky intertidal shores, such as rock outcroppings or isolated shores of small islands, as haul out areas.” 310 CMR 10.31(1).

“When a proposed project involves the filling, removing or altering of a rocky intertidal shore, the issuing authority shall presume that such shore is significant to the interests specified above. This presumption may be overcome only upon a clear showing that a rocky intertidal shore does not play a role in storm damage prevention, flood control, protection of marine fisheries or wildlife habitat, and where there are shellfish, protection of land containing shellfish and if the issuing authority makes a written determination to such effect.” 310 CMR 10.31(1).

When, as here, a rocky intertidal shore is determined to be significant to storm damage prevention, flood control, or protection of wildlife habitat the form and volume of exposed intertidal bedrock and boulders are critical to the protection of those interests.” 310 CMR 10.31(1). And, when, as here, a rocky intertidal shore is significant to the protection of marine

fisheries or wildlife habitat, water circulation and water quality are critical to the protection of those interests. 310 CMR 10.31(1).

The relevant performance standard in 310 CMR 10.31(3) provides in pertinent part that when a Rocky Intertidal Shore is determined to be significant to storm damage prevention, flood control, or protection of wildlife habitat, “any proposed project 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). Further, “any proposed project 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. 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.” 310 CMR 10.31(4).

***MassDEP Small Dock and Pier Guidance.*** MassDEP’s Small Dock and Pier Guidance (p. 15), provides that “Pile supported piers constructed in inland and certain wetland resource areas (salt marsh, salt ponds, and those portions of Land Under the Ocean containing eelgrass) need to be constructed in such a manner as to have no adverse effect on plant productivity. This requirement is met by avoiding such vegetation where possible; placing the pier decking at an adequate height above the high water mark; limiting pier length and width; providing spacing between deck planking, to a north-south orientation.” (emphasis added) The guidance later emphasizes: “Avoidance is especially critical over existing or historically present eelgrass beds and in Land Containing Shellfish.” MassDEP’s Small Dock and Pier Guidance, p. 16 (emphasis added)

“When there is no alternative to building over eelgrass beds, floats (or if no floats, the seaward end of the pier) should be at least four (4) feet from the bottom at low tide. It should be noted that eelgrass beds are ephemeral and historic eelgrass should be considered, even if not currently present, in order to prevent the exclusion of future eelgrass bed expansion or colonization.” *Id.*, at 16 (emphasis added).

These guidelines dovetail with MassDEP’s requirement in 310 CMR 10.25 that best available measures be used to mitigate adverse impacts on eelgrass beds: avoid where possible, especially with present and historical eelgrass beds, and then employ the specific design measures to reduce impacts from shading. The “avoidance” guidance must be applied in consideration of the clear implication in 310 CMR 10.25 that water dependent projects may result in adverse effects to eelgrass, but those effects must be minimized using best available measures. In contrast, non-water dependent projects must have no adverse effect.<sup>4</sup> The guidance provides recommendations on how minimization of adverse effects may be accomplished.

**CZM.** The Massachusetts Office of Coastal Zone Management (“CZM”) has issued Habitat Policies that must be considered by MassDEP with respect to projects that relate to eelgrass. MassDEP’s Coastal Wetlands Regulations (310 CMR 10.21 through 10.37) provide in pertinent part that the coastal wetlands regulations are “intended to be consistent with and form a part of the Commonwealth’s Coastal Zone Management Program . . . [embodied in] 301 CMR 21.00.” 310 CMR 10.22. And, [t]he interpretation and application of 310 CMR 10.21 through 10.37 shall be consistent with the policies of 301 CMR 20.00: *Coastal Zone Management*

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<sup>4</sup> The favoritism for water dependent projects originated primarily from the Commonwealth’s historical protection of public access to the waterfront for commerce. The applicable regulations do not distinguish between commercial and recreational projects, nor do they account for community access, like that which exists in Nahant Harbor about 170 feet away from the Project site via boat, or a five minute walk. See *Matter of Landing Group, Inc.*, Docket No. 2014-028, Recommended Final Decision (October 27, 2015), adopted by Final Decision (October 29, 2015); Conlin PFT, ¶ 16.

*Program* to the maximum extent permissible under M.G.L. c. 131, § 40.” 310 CMR 10.22. The Wetlands Regulations add that “M.G.L. c. 21A, § 2 establishes the CZM policies as part of 301 CMR 20.00, and [MassDEP] recognizes these policies as state environmental policy, which [MassDEP] will carry out in accordance with M.G.L. c. 21A, § 2. Specifically, 301 CMR 20.99: *Severability*, Coastal Hazards Policy #1, and #2, Energy Policy #1, Habitat Policy #1, Ocean Resources Policy #1, Ports and Harbors Policy #1, #2 and #3, Protected Areas Policy #1 and Water Quality Policy #1 and #2 are applicable to the administration of M.G.L. c. 21A, § 2, but the provisions of the more specific regulations contained in the following [coastal wetlands] sections shall govern, unless the Secretary [of the Executive Office of Energy and Environmental Affairs], pursuant to the conflict resolution procedures of M.G.L. c. 21A, 301 CMR 20.00 of the CZM Regulations, has resolved any conflict and has determined that the CZM policies should or should not apply.” 310 CMR 10.22 (emphasis added). G.L. c. 21A § 2 includes the broad duties of the Secretary for the Executive Office of Energy and Environment Affairs

Summarizing the above provisions, MassDEP is charged with: “carry[ing] out,” or applying, CZM policies when it interprets and implements MassDEP Coastal Wetlands Regulations unless those policies conflict with implementation of the Coastal Wetlands Regulations. CZM’s Habitat Policies Nos. 1 and 2 are relevant to applying the LUO eelgrass performance standard in 310 CMR 10.25.

Habitat Policy #1 requires the: “[p]rotect[ion] of coastal, estuarine, and marine habitats—including . . . eelgrass beds . . . to preserve critical wildlife habitat and other important functions and services including nutrient and sediment attenuation, wave and storm damage protection, and landform movement and processes.” Pet. Ex. 1 (Coastal Zone Management Policy Guide at 24) (emphasis added).

Habitat Policy #1 also provides in pertinent part: “Submerged aquatic vegetation can be rooted or otherwise attached to the seabed or free-floating and is often “migratory” in the sense that its spatial distribution can change markedly over time. As a general rule, areas of the ocean where certain types of [submerged aquatic vegetation] (particularly eelgrass beds) have occurred historically may retain high recolonization potential, and thus may be considered to be viable habitat for purposes of this policy.” Habitat Policy #2 echoes and compliments Habitat Policy #1 by requiring the restoration of degraded or former habitats in coastal and marine areas.

The Petitioners assert that the above Habitat Policies #1 and #2 are controlling with “the force of law” because the coastal wetlands regulations contain no provisions regarding “the meaning of ‘eelgrass beds’ that conflicts with what is in the CZM policies. The regulations leave ‘eelgrass beds’ undefined. Petitioners’ Reply Memorandum of Law, pp. 4-5. The Petitioners contend that Habitat Policy #1 “suggests” that where eelgrass beds have occurred historically they should be protected. Petitioners’ Reply Memorandum of Law, p. 5.

The Petitioners argument is overly broad. Instead, the CZM policies require the “protection” of eelgrass “beds” and they specify that “as a general rule, areas of the ocean where certain types of SAV (particularly eelgrass beds) have occurred historically may retain high recolonization potential, and thus may be considered to be viable habitat for purposes of this policy.” The “may” qualifiers invoke a discretionary standard allowing the determination that such areas may be considered viable habitat, which presumably would result in the discretionary decision whether to afford the same level of protection that 310 CMR 10.25 affords actual eelgrass beds, certainly not greater protection than beds receive. The policies do not specify the degree of “protection” for eelgrass beds nor do they set forth requirements with respect to eelgrass beds that may have occurred historically, which “may” be considered viable habitat

because they “may” have a high recolonization potential. Given this lack of specificity in the policies, I am obligated to apply the more specific provision in 310 CMR 10.25, which requires that water dependent projects protect eelgrass beds with the best available measures to minimize adverse effects on the beds. The policies’ recognition that historic eelgrass beds may retain high recolonization potential and viable habitat means that those historic beds and their recolonization and habitat potential should be considered in applying the performance standard in 310 CMR 10.25(1) that water dependent projects employ best available measures to minimize adverse impacts on eelgrass beds.

**DMF.** The Massachusetts Division of Marine Fisheries (“DMF”) Technical Report TR-43, includes Technical Guidelines for the Delineation, Restoration, and Monitoring of Eelgrass (*Zostera marina*) in Massachusetts Coastal Waters, p. 2 (October 2010). According to DMF, the technical guideline documents, such as TR-43, represent DMF’s “general recommendations” for eelgrass “delineations, restoration/mitigation, and monitoring associated with coastal alteration projects in Massachusetts waters.” TR-43, p. 1. TR-43 is “intend[ed] [for] local, state, and federal resource and permitting agencies, and also project applicants and consultants, as a guide in the design and review of eelgrass monitoring and restoration/mitigation projects.” TR-43, p. 1.

TR-43 (p. 2) provides information on how to locate and delineate the edge of an eelgrass bed, stating:

In many cases the edge of the bed is difficult to determine as eelgrass is often patchy and less dense at the edge. To account for this transition area we define the edge of the bed as having two points; 1) the distance to the end of the continuous meadow and 2) the distance to the last shoot (Short et al 2006). GPS coordinates should be recorded for all points defining the edge of the bed.

In addition to TR-43, DMF has provided specific guidance letters for this project. In two letters from 2017 and 2018 commenting on the Project, DMF noted that “it is very common for the edge of a bed to fluctuate shoreward and seaward based on site-specific conditions in a given year.” Letter from DMF to Nahant Conservation Commission (November 18, 2017). The 2018 letter from DMF stated that “[t]he edge of an eelgrass bed can vary naturally from year to year, shifting deeper or shallower based on environmental and physiological conditions.” Letter from DMF to Nahant Conservation Commission (July 2, 2018). DMF added in the 2018 letter that it “strongly recommends that piers and floats not be permitted near an eelgrass meadow if suitable habitat (sand, silt, or gravelly sediment) is present, especially if the area was mapped as eelgrass historically.” After describing methods for surveying eelgrass, the 2018 letter stated that the “edge of the bed is where eelgrass is no longer present at any density.”

The 2017 DMF letter also provided that MassDEP’s “earliest maps show eelgrass growing right up to the tow of the rocky intertidal region. This is also evident in historic Google Earth imagery. The edge of the bed appears to recede seaward between 2012 and 2014 . . . In July 2017, Marine Fisheries mapped the bed at the project site using side-scan sonar and found the eelgrass extent to be similar to MA DEP’s map in 2012, even though it is very common for the edge of a bed to fluctuate shoreward and seaward based on site specific conditions in a given year.”

### **THE BURDEN OF PROOF**

As the party bringing this de novo appeal, the Petitioners had the burden of going forward by producing credible evidence from a competent source in support of their position. 310 CMR 10.03(2); see Matter of Town of Freetown, Docket No. 91-103, Recommended Final Decision (February 14, 2001), adopted by Final Decision (February 26, 2001) (“the Department has

consistently placed the burden of going forward in permit appeals on the parties opposing the Department's position."). Specifically, the Petitioners were required to present "credible evidence from a competent source in support of each claim of factual error, including any relevant expert report(s), plan(s), or photograph(s)." 310 CMR 10.05(7)(j)3.c. So long as the initial burden of production or going forward is met, which it was, the ultimate resolution of factual disputes depends on where the preponderance of the evidence lies. Matter of Town of Hamilton, DEP Docket Nos. 2003-065 and 068, Recommended Final Decision (January 19, 2006), adopted by Final Decision (March 27, 2006).

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

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

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

Under 310 CMR 1.01(13)(h), "[t]he weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. . . ."

## **DISCUSSION**

***Eelgrass Bed.*** Because 310 CMR 10.25 and related guidance and interpretive documents place a higher level of protection on eelgrass beds, as opposed to eelgrass that is not part of a bed<sup>5</sup>, the parties have focused considerable argument and effort on litigating whether the eelgrass found growing near and within the footprint of the floating dock is part of the large Curlew Cove eelgrass bed. The Curlew Cove bed is indisputably a large, continuous, and dense eelgrass bed. That area of dense, continuous eelgrass growth lies no closer than approximately 20 feet (roughly 6 meters) from the proposed location for the floating dock. Neubert PFT, ¶ 42; Exs. 16, 17. The question is where is the outer perimeter of that bed?

Landward of that edge of the continuous, dense meadow in the Curlew Cove bed there are two small eelgrass patches roughly within the outer perimeter of the footprint of the floating dock, and other sporadic patches farther away but outside the continuous meadow. Neubert PFT, ¶ 42; Ex. 16; Tr., p. 260; Novak PFT, Figure 5. Dwan argues that this eelgrass is not part of the Curlew Cove bed because the outer perimeter of the bed, Dwan contends, is “the edge of the continuous, dense eelgrass meadow.” Dwan’s Post-Hearing Memorandum of Law, p. 19. Dwan’s eelgrass expert, Neubert, testified that an eelgrass bed or meadow is “an area on the seafloor that is densely vegetated with a continuous, thick cover of vegetation.” Neubert PFT, ¶ 28; Tr., pp. 307, 312. Eelgrass beds can also be characterized as patchy within the bed or along its outside perimeter. Neubert believes that patches or sprigs of eelgrass that are separated from a bed by more than one meter (3.3 feet) are generally not considered to be part of the bed. Tr., pp. 241, 309, 312. Thus, Neubert does not believe that the two eelgrass patches within the footprint of the floating dock are a part of the Curlew Cove bed. One is approximately 20 feet away from the continuous eelgrass zone and the other is approximately 30 feet away. Tr., p.

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<sup>5</sup> See infra. at pp. 7-13.

311-312. Both patches are approximately one square foot in size. Neubert PFT, ¶ 42; Exs. 16 & 17; Tr., p. 260.

Dwan does not dispute that MassDEP's 1995 eelgrass study shows a large eelgrass bed into which the floating dock would have encroached at that time. However, subsequent MassDEP mapping in 2001, 2006, and 2012 does not depict a continuous, dense zone of eelgrass in the footprint of the Project, with the exception of a corner of the floating dock adjacent to the dense, continuous zone depicted in 2006. Novak PFT, ¶ 14; Ex. ID-7, Tr., pp. 389-90.

Dwan asserts that it should be no surprise that there has not been landward growth of the Curlew Cove bed since 1995 because, he contends, the conditions on the ocean floor near the Project are not conducive to eelgrass growth. Neubert PFT, ¶ 50; Exs. 17 and 18. According to Dwan's expert, Neubert, the sediment in the area of the floating dock is not conducive to eelgrass growth; sediment samples from the continuous, dense meadow in Curlew Cove are significantly finer and contain areas of organic mud, in contrast to the conditions within and proximate to the Project footprint. In addition, significantly greater wave energy in the nearshore area of the Project site renders it less conducive to eelgrass growth. Neubert concludes that these factors combine to make the area proximate to the Project site less conducive to eelgrass growth, which explains why the bed depicted in the area in 1995 has not reemerged since then. Neubert PFT, ¶ 50; Exs. 17 and 18.

The Petitioners argue that their consultant confirmed with a recent survey that the Project is sited in an eelgrass bed. Petitioners' Memorandum of Law, p. 7; Petitioners' Reply Memorandum of Law, p. 12. The Petitioners contend that all four surveys performed in this matter have found eelgrass in the location of the pier's float. Reply Memorandum of Law, p. 12. They add that Dwan's 2017 and 2018 surveys demonstrate there are and have historically been

eelgrass beds in the area of the Project. They argue it is “incontrovertible that the bed and surrounding habitat will be harmed by the Project as proposed.” Petitioners’ Memorandum of Law, p. 7. They contend that Dwan consultant’s 2017 survey (“2017 survey”) identified an eelgrass bed at -3 feet mean low water in the same location as the float. Petitioners’ Memorandum of Law, p. 7. According to that survey “[t]he eelgrass growth was dominant and [sic] this area and easily identifiable.” *Id.* (citing Environmental Consulting & Restoration, LLC, Shellfish and Eelgrass Survey (Sept. 15, 2017)). They argue that the different survey results evidence that the eelgrass bed fluctuates naturally from year to year, “and could just as easily advance toward the shore, further beneath the location of the Project.” Petitioners’ Memorandum of Law, p. 11. Dwan responds that the 2017 Survey was only a rough, preliminary investigation of the area based upon imprecise information, measurements, data, and observations. Holmes PFT, ¶¶ 7, 11, 12, 13.

The parties’ disagreement over whether there is an eelgrass bed within or near the Project footprint arises primarily out of fluctuations in the growth of eelgrass patches over the years in the area near the Project site; imprecise measurements by Dwan’s and the Petitioners’ experts; and disagreement over what precisely constitutes “the site” and an eelgrass “bed.”<sup>6</sup> In earlier studies it was not clear precisely where the project would be located. The parties’ most recent studies which were performed after this appeal was filed are based upon the most precise measurements and data concerning the location of eelgrass and where the Project is proposed. Holmes PFT, ¶¶ 7, 11, 12, 13 (the 2017 survey was a preliminary, imprecise investigation conducted before the Project site was chosen and more precise analyses were performed in 2018 and 2019); Exs. 24 and 25; Tr., pp. 328-331, 337-339, 341, 348-349. I therefore give them

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<sup>6</sup> I also find that the Petitioners’ repeated accusations of deception and misrepresentation by Dwan’s consultants are without merit.

substantially more weight, as opposed to the initial, preliminary studies, in 2017 for example, which were estimates and therefore less precise.

Even Novak, the Petitioners' expert, recently performed studies and analyzed data that failed to identify any more than the two small undisputed patches in the vicinity of the dock. Novak PFT, Figure 5; Tr., pp. 64, 75-76. But Novak believes that those two small patches are part of the large Curlew Cove bed. She considers the edge of an eelgrass bed as having two points: the edge of the continuous meadow and the last sprig. Novak PFT, ¶ 18. She considers eelgrass sprigs as far as 100 meters (328 feet, or 28 feet longer than a standard American football field) away from the continuous meadow to be part of an eelgrass bed. Tr., p. 71. As a consequence she believes that the large Curlew Cove eelgrass bed extends to the two patches of eelgrass within the footprint of the floating dock at the site; thus, she believes that the Project will adversely impact an eelgrass bed as a consequence of shading and disturbance to the ocean floor. Novak PFT, ¶¶ 20, 24; Figure 5; Tr., pp. 99-101.

Novak's approach to delineating the edge of the eelgrass bed is not without a valid scientific foundation. In fact, it is derived from the DMF guidance document discussed above, TR-43 (p. 2), which is based upon scientific literature. TR-43 provides information on how to locate and delineate the edge of an eelgrass bed, stating:

In many cases the edge of the bed is difficult to determine as eelgrass is often patchy and less dense at the edge. To account for this transition area we define the edge of the bed as having two points; 1) the distance to the end of the continuous meadow and 2) the distance to the last shoot (Short et al 2006). GPS coordinates should be recorded for all points defining the edge of the bed.

This guidance, however, is of little aid in delineating the Curlew Cove eelgrass bed perimeter. The parties' experts disagreed on its reliability and how to interpret the provision. That is not surprising, as the plain language of the guidance is far from clear. As discussed

above, Novak interprets the guidance quite literally and liberally, contending that “distance to last shoot” means that a dense, continuous bed does not terminate at the edge of continuous, uniform growth, and indeed, perhaps not even close to the edge of continuous, uniform growth. Instead, it could mean that the bed extends as far as one hundred meters, or more, away from that edge if a shoot were found at that point. That interpretation has merit; eelgrass bed growth can fluctuate over time, expanding and contracting, depending upon a variety of factors. But at what point is it determined that the remote “last shoot” has no connection to a distant eelgrass bed that is perhaps 100 or 200, or more, meters away, or perhaps not even that far away? Indeed, as Dwan points out, this sets up a purported delineation standard with no reasonable, predictable, and reliable result. More objective criteria are needed.

The Petitioners argue alternatively that even if no eelgrass beds are proximate to the Project site, the project is still problematic because it is undisputed that an historic eelgrass bed from 1995 existed within the Project site, and in 2006 an historic bed was adjacent to where a corner of the floating dock will be located. They add their belief that the level of protection afforded eelgrass beds must be equally provided to historical eelgrass beds that are not currently present in order to sufficiently protect fisheries and wildlife habitat. Petitioners’ Memorandum of Law, p. 15. The Petitioners assert that this is consistent with the CZM Habitat Policies and MassDEP Small Docks and Piers Guidance, which, they claim, make recolonization and rehabilitation a goal. Petitioners’ Memorandum of Law, pp. 7, 15. The Petitioners contend that the natural fluctuations of the eelgrass bed is not only reflected in the Dwan’s expert surveys but also in the MassDEP mapping, which “shows the edge of the eelgrass growth in the cove shifting

over time, from shoreward of the Project's float in 1995 and 2006 to just seaward of the float in 2001 and 2012.<sup>7</sup> Petitioners' Memorandum of Law, p. 11; Revised NOI, Appendix at 7.

The Petitioners' argument is overly broad, exceeding the guidance and interpretive documents. The Small Dock and Pier Guidance provides that "eelgrass beds are ephemeral and historic eelgrass should be considered, even if not currently present, in order to prevent the exclusion of future eelgrass bed expansion or colonization." (emphasis added) The CZM eelgrass Habitat Policies Nos. 1 and 2 are not materially different. They recognize that historic eelgrass beds may retain high recolonization potential and viable habitat, which means that those historic beds and their recolonization and habitat potential should be considered in applying the performance standard in 310 CMR 10.25(1) that water dependent projects employ best available measures to minimize adverse impacts on eelgrass beds.

As discussed below, Dwan has given sufficient consideration to the historic eelgrass bed. More to the point, Dwan has also given sufficient consideration to designing and locating the Project with respect to any eelgrass beds that the Petitioners contend are near the Project site. That is, even assuming the Petitioners have correctly argued that the two small patches of eelgrass within the footprint of the floating dock are party of the Curlew Cove bed, Dwan has satisfied the performance standards because the Project is designed using best available measures

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<sup>7</sup> The parties' citation and discussion of Matter of Karp, Docket No. 98-138, Remand Decision (February 26, 2001) does not assist in resolving whether the sporadic, small areas of eelgrass near the Project location are part of the Curlew Cove bed. While the Administrative Law Judge stated that he would "apply . . . the generally accepted meaning of eelgrass bed," he failed to articulate that generally accepted meaning with sufficient precision to be helpful in this appeal. He simply stated: "[The generally accepted meaning] describes the way eelgrass naturally occurs, which varies from small clumps of sporadically spaced eelgrass to much larger colonies." That is not helpful here in determining whether sparse small patches near the floating dock are part of the Curlew Cove bed which lies approximately 20 feet away at its closest point. Moreover, whether there were eelgrass beds near the project in that case was never seriously contested because the applicant's first consultant, who did not complete a report of his survey, died during the litigation and his replacement's survey was very limited in scope, particularly compared to the petitioners' survey. Moreover, the site was quite different from the Project site here; the percentage of eelgrass coverage near the project ranged from the applicant's low estimate of 30%, based on an inadequate survey, and the petitioners estimate of 90%. Here, there are only two small, sparse patches approximately one square foot each are located in the area proximate to the project.

to minimize adverse effects on the alleged eelgrass bed. It is therefore unnecessary to resolve the disagreement over how to define the edge of an eelgrass bed and whether an eelgrass bed exists at the Project site.

***Minimize Adverse Effects Using Best Available Measures.*** “The performance standard for land under the ocean distinguishes between types of projects, recognizing that water-dependent projects cannot be located away from the water, and thus the standard is less stringent than the no adverse effect [prohibition] for nonwater-dependent projects.” Matter of Christopher Bryant/Greenport Consulting, Inc., Docket No. WET 2011-007, Recommended Final Decision (July 27, 2011), adopted by Final Decision (September 2, 2011). Water dependent projects must utilize best available measures to minimize adverse effects on eelgrass beds.

Minimize means: “to achieve the least amount of adverse effect that can be obtained using the best available measures or best practical measures, whichever is referred to in the pertinent section.” 310 CMR 10.23. Best available measures are: “the most up-to-date technology or the best designs, measures or engineering practices that have been developed and that are commercially available.” Id.

The scope of impact minimization with best available measures is dictated by the project purpose. Karp, supra. As articulated in Karp, “though not stated explicitly in the performance standards for work in land under the ocean, an applicant's project purpose plays a role in determining what constitutes the best available measure to minimize the project's adverse effects. When the Regulations require that a project be ‘designed and constructed using best available measures’ to minimize eelgrass destruction, they necessarily mean that different construction or design options that would achieve the applicant's basic purpose must be reviewed to see if any of them would have less effect on eelgrass. In order to determine what options should be considered

in this review, the applicant's project purpose should be conceived of broadly so as to maximize the number (and value) of options considered under the best available measures standard.” In Karp, the administrative law judge defined the ocean-front inn’s “general project purpose [a]s to have a dock that extends into deeper water. The issue then is what is the best available measure to achieve that purpose and minimize the destruction of eelgrass.” Karp, supra.

The Project purpose here is similar to that in Karp: construction of a pier in sufficiently deep water to allow Dwan’s ingress and egress from the Property from May through September. The Petitioners primary argument is that Dwan should have located the Project on the eastern, seaward side of the cove, an area with less eelgrass that is farther away from the Curlew Cove bed. They contend MassDEP failed to require Dwan to assess alternative locations that might be less detrimental to eelgrass. Petitioners’ Memorandum of Law, p. 17. They rely upon Dwan’s 2017 survey which noted only “sparse eelgrass growth” on the eastern side, in comparison to the eelgrass found on the western side. Petitioners’ Memorandum of Law, p. 17. They add that eelgrass growth on the eastern side is further offshore than the proposed location. Petitioners’ Reply Memorandum of Law, p. 16.

A preponderance of the evidence demonstrates that Dwan sufficiently considered the eastern side, but it is not a feasible alternative for the project purpose. During the beginning stages of the Project, Dwan considered siting it on the eastern side of the peninsula and his expert evaluated that alternative. Dwan PFT, ¶¶ 7-8, 34, 50; Nilson PFT, ¶¶ 22, 55; Ex. 28. Eelgrass was found to be present on both sides of Bass Rock. A preponderance of the evidence demonstrates that the eastern side was eliminated as a feasible option for two central reasons: The eastern side is exposed to the brunt of coastal storms and severe wave action, whereas the western side is in somewhat of a protected cove. Second, there are several large offshore rock

outcroppings below mean low water in the vicinity of where the pier would be located, making it infeasible, difficult, and dangerous both to construct and utilize a pier in that area. Dwan PFT, ¶¶ 3-5, 7-8, 34, 50; Nilson PFT, ¶¶ 22, 55; Ex. 28; Tr., pp. 163-64, 187-94, 376-377, 385-88, 411-417; Ex. 7, Appendix G. Moreover, the eastern side presents concerns similar to those the Petitioners raised for the western side, namely that MassDEP's historical eelgrass survey from 1995 indicates that siting the project on that side would also likely put it in the asserted pre-1995 historic eelgrass bed. Nilson PFT, ¶ 18; Ex. 8.

The Petitioners also contend that the SOC improperly allows elements of the Project that are not in compliance with recommendations in the Small Pier and Dock Guidance. Petitioners' Memorandum of Law, p. 18. They assert that the SOC fails to ensure that the minimum distance between the float and the ocean bottom at mean low water meets the four foot separation guidance, and instead allows a clearance of just 34 inches. Petitioners' Memorandum of Law, p. 18.

Dwan and his experts persuasively responded to the Petitioners, pointing out that the lowest structural element of the float will be 36 inches above the bottom at mean low tide, doubling the minimum height recommended in the Small Dock and Pier Guidance for floats. Nilson PFT, ¶¶ 37, 41; Ex. 23; Ex. 8; Tr., pp. 394-96; Guidance, p. 15. Further, in accord with the Small Dock and Pier Guidance, the dock is oriented almost exactly in a north-south direction, as recommended in the guidance, to minimize blockage of sunlight. Holmes PFT, ¶ 26; Ex. 9.

Dwan adds that when his boat is tied to the floating dock it will be at 4 feet above the bottom at mean low water. Nilson PFT, ¶¶ 24-27, 41. The 4 foot *recommendation* in the guidance is for eelgrass beds; here, there are two isolated patches of eelgrass that could be affected. Dwan Memorandum of Law, p. 20. Dwan and his consultants considered alternatives

that would have put the floating dock farther out in deeper water, but that would have put it precariously close to more substantial eelgrass associated with the Curlew Cove bed. Presently, the length of the entire structure is designed to place the dock in an optimal location, one that is deep enough to allow docking of vessels and provide sufficient clearance over the bottom at mean low water, but also remaining a sufficient distance from the continuous, dense eelgrass meadow and most historic dense eelgrass mapping, with the exception of the 1995 study. Novak PFT, Figure 5; Hearing Ex. ID-7; Exs. 6-8.

The Project is in compliance with the remaining recommendations in the Small Dock and Pier Guidance to the extent feasible and practicable. The Small Dock and Pier Guidance provides that “[t]ypical small docks and piers in Massachusetts are 3 feet wide.” SDP Guidance, p. 17. Here, no part of the pier, putting aside the floating dock, would be over submerged aquatic vegetation, and thus impacts from shading are not at issue. Nevertheless, Dwan reduced the pier width from 6 to 4 feet. Nilson PFT, ¶ 42; Holmes PFT, ¶ 26; Exs. 10 and 23.

The floating dock’s length was reduced during the permitting process from 50 feet to 25 feet, the minimum length required to permit safe berthing. Dwan Memorandum of Law, p. 17; Nilson, ¶ 45. The floating dock’s north-south orientation coincides with the Small Dock and Pier Guidance to reduce shading. The Petitioners have not countered with any evidence that the floating dock could be feasibly reduced any further in size.

Dwan also contends that the Small Dock and Pier guidance to apply the minimum spacing between piers of 20 times the diameter of the pilings for water circulations is neither feasible or desirable. Dwan Memorandum of Law, p. 18. Here, the pier design is for 12 10-inch steel piles separated by 16 feet (19.2 times the diameter of the pile), which is within 8 inches of the guidance recommendation, an immaterial 4%. Dwan Memorandum of Law, p. 18; Nilson

PFT, ¶ 37; Holmes PFT, ¶¶ 10-11; Tr., pp. 394-96. Compliance with the standard recommended in the guidance would mean either eliminating piles, extending the pier, or shortening the pier, none of which are feasible. A shorter pier would not provide sufficient depth for the floating dock and moored boat. A longer pier would place the float closer to the eelgrass bed. Eliminating piles would compromise the structure. Id.

The pier is designed with cross braces at six pairs of piles. The four cross braces closest to shore will be above mean high water. The two sets of cross braces farthest from shore are partially below mean high water because of the need to step the pier down in height toward the water line. Dwan Memorandum of Law, p. 19; Nilson PFT, ¶ 37; Ex. 10. The guidance recommends no cross bracing below mean high water. Dwan's consultants testified that is not feasible from an engineering perspective for the two most seaward cross braces. Dwan Memorandum of Law, p. 19; Nilson PFT, ¶ 37. The Petitioners offered no evidence to counter that.

Dwan contends the planks on the pier, gangway, and float will be spaced at one inch, exceeding the three-quarter-inch recommended by the guidance for the penetration of light to reach subaquatic vegetation. Dwan concedes that approximately 65% the float will be supported by opaque floatation units which will filter some light from reaching subaquatic vegetation. Dwan asserts, without rebuttal from the Petitioners that this will allow adequate light penetration and is unavoidable. In any event, Dwan points out, no eelgrass beds will be adversely impacted by the proposed location of the floating dock. Dwan Memorandum of Law, pp. 19-20; Nilson PFT, ¶ 38; Holmes PFT, ¶ 26.

Dwan and his experts assert persuasively that in addition to minimizing impacts, the Project will provide a positive benefit to the eelgrass habitat in Curlew Cove that results from

Dwan's relinquishment of his mushroom mooring about 170 feet away from the Project site in Nahant Harbor. Ex. 12; SOC Condition 47. Mushroom moorings often result in damage to eelgrass as a consequence of the chain attached to the anchor being repeatedly dragged across the bottom from movement caused by currents, tides, waves, and wind. Ex. 21; Tr., p. 321; Nilson PFT, ¶ 56; Neubert PFT, ¶ 64; Tr., pp. 351-52. The existing mooring also results in shading impacts of approximately 200 square feet. Nilson PFT, ¶ 29.

### **CONCLUSION**

A preponderance of the evidence demonstrates that if the two patches of eelgrass near the Project site were part of an eelgrass bed that could possibly be impacted, Dwan has proposed best available measures to minimize impacts on eelgrass. In sum, there are no feasible alternative locations on the Property to locate the Project and the Project's component parts and design include best available measures to minimize impacts. I therefore recommend that MassDEP's Commissioner issue a Final Decision adopting this decision and affirming the SOC.

### **NOTICE- RECOMMENDED FINAL DECISION**

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party

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

Date: April 9, 2020

A handwritten signature in black ink, appearing to be 'T. Jones', written over a horizontal line.

Timothy M. Jones  
Presiding Officer

## **SERVICE LIST**

In The Matter Of:

Kevin Dwan

Docket No. WET-2019-015

File No. NE 047-542  
Nahant

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Date: April 9, 2020