

Commonwealth of Massachusetts  
Executive Office of Energy & Environmental Affairs

## Department of Environmental Protection

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August 9, 2019

In the Matters of  
Liatsos, Pinchin, and Southwick

Docket Nos. WET-2016-005, 006, 007  
File Nos. SE 043-2787, SE 043-2786,  
SE 043-2785  
Mashpee

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### **FINAL DECISION AFTER REMAND**

I have reviewed the Recommended Final Decision After Remand (“RFDAR”) that the Presiding Officer issued on March 25, 2019 following my Interlocutory Remand Decision (“IRD”) of May 25, 2017. As explained below, I issue this Final Decision After Remand adopting those portions of the RFDAR: (1) finding that Project III complies with the Performance Standards for work or activities in Coastal Bank as set forth in the Wetlands Regulations at 310 CMR 10.30(4) and (6)<sup>1</sup> and (2) recommending denial of approval of Project III for failure to comply with the Performance Standards for work or activities in Coastal Beach as set forth in the Wetlands Regulations at 310 CMR 10.26(3).<sup>2</sup> I do not adopt the portion of the

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<sup>1</sup> See RFDAR, at pp. 69-71.

<sup>2</sup> See RFDAR, at pp. 43-69.

RFDAR recommending denial of Project III based on the argument that part of Project III is a prohibited Coastal Engineering Structure.<sup>3</sup>

These consolidated appeals were brought by 12 residents of Mashpee, Massachusetts and the trustees of the New Seabury Condominium Trust 1A, the association of unit owners of the Tidewatch Condominiums located at 94 Shore Drive West, Mashpee (collectively “the Petitioners”). The appeals originally challenged the Superseding Orders of Conditions (“SOC”) that the Massachusetts Department of Environmental Protection’s Southeast Regional Office (“MassDEP”) issued to Michael and Dawn Southwick; Kenneth Liatsos Trust and Gloria Liatsos Trust; and David and Glenys Pinchin (collectively “the Applicants”). The SOC approved the Applicants’ project at their abutting oceanfront properties located at 118, 124, and 126 Shore Drive West, Mashpee (“the Site”). The SOC was issued pursuant to the Wetlands Protection Act, G.L. c. 141 § 30, and the Wetlands Regulations, 310 CMR 10.00. The appeals concern the protected wetlands resource areas of Coastal Beach and Coastal Bank. See 310 CMR 10.02, 10.27, 10.30.

***Project I.*** The project that was approved by MassDEP’s Southeast Regional Office in the original SOC proposed excavation of the Coastal Bank to decrease its steep slope and to create a void for installation of large sand-filled coir envelopes and fiber rolls (“Project I”). The Bank

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<sup>3</sup> See RFDAR, at:

- (1) p. 6, n.2;
- (2) pp. 6-7 (the two “Recommendation” paragraphs describing the pile arrays as Coastal Engineering Structures);
- (3) pp. 24-43 (Section I of the Discussion Section);
- (4) p. 69 (the last paragraph of Section II of the Discussion Section); and
- (5) p. 72 (the Conclusion Section).

risers at a very steep angle from the beach to a height of approximately 30 feet. Project I was also designed to include 256, 12 foot-diameter, 15 foot-long round wooden pilings installed vertically 10 feet deep into the ground in two horizontal rows parallel to and at the toe of the Coastal Bank. The coir envelopes and fiber rolls in the Coastal Bank would be buried with sand nourishment, and regular sand nourishment and planting of vegetation at the top of the new Coastal Bank would be required pursuant to the SOC.

After holding an adjudicatory hearing, the Presiding Officer issued a Recommended Final Decision (“RFD”) on December 13, 2016 recommending that I issue a Final Decision vacating the SOC and denying Project I, after finding that Project I was a Coastal Engineering Structure that was designed to alter wave, tidal, or sediment transport processes to protect a building constructed after 1978 from the effects of those processes, namely coastal erosion. The Presiding Officer also recommended denying Project I because it failed to comply with the Performance Standards for Coastal Bank and Coastal Beach. See 310 CMR 10.30(4) and 310 CMR 10.27(3).

As part of my review of the RFD to issue a Final Decision, I informed the parties on January 17, 2017 that I would treat the RFD as a Tentative Decision pursuant to 310 CMR 1.01(14)(a) and directed the parties to file legal memoranda stating whether I should issue a Final Decision adopting, modifying, or rejecting the RFD. Thereafter, the Applicants and MassDEP filed legal memoranda urging me to issue a Final Decision rejecting the RFD and affirming the SOC’s approval of Project I. The Petitioners filed a legal memorandum urging me to adopt the RFD as my Final Decision rejecting the SOC’s approval of Project I.

After I considered the RFD, the Administrative Record, and the parties’ legal memoranda in response to the Tentative Decision, I declined to adopt the RFD as my Final Decision.

Instead, I issued an Interlocutory Remand Decision (“IRD”) in which I rejected the Presiding Officer’s finding in the RFD that “Project [I] is a prohibited Coastal engineering structure under 310 CMR 10.30(3).” IRD, at pp. 4-10. However, I also ruled that “the record [did] not convince me that . . . Project [I] either complie[d] or fail[ed] to comply with the Performance Standards for Coastal Bank (310 CMR 10.30(4) and (6) and Coastal Beach (310 CMR 10.27) . . . .” IRD, at pp. 2-3, 10-13.

With respect to my ruling on the Performance Standards issue, I stated in the IRD that the Administrative Record was ambiguous regarding whether Project I complied with the applicable Performance Standards for Coastal Bank and Coastal Beach. IRD, at pp. 10-13. As a result, I remanded the matter to “[MassDEP] and the Presiding Officer for further review of the proposed Project [I], specifically, for a determination of whether . . . Project [I] either complie[d] or fail[ed] to comply with the Performance Standards for Coastal Bank (310 CMR 10.30(4) and (6)) and Coastal Beach (310 CMR 10.27).” IRD, at p. 11. The IRD directed that MassDEP complete further review and issue an amended SOC, “setting forth [MassDEP’s] findings regarding whether . . . Project [I] complie[d] or fail[ed] to comply with the Performance Standards . . . .” IRD, at p. 11. The IRD also directed the Applicants and the Petitioners to file responsive testimony in support of their positions on the amended SOC and that the Presiding Officer conduct an adjudicatory hearing if necessary to resolve any challenge to the amended SOC by the Petitioners and/or the Applicants. IRD, at pp. 11-13.

***Project II.*** On remand, MassDEP’s Southeast Regional Office issued an Amended SOC that: (1) denied the timber pile array component of Project I (the proposed 12-inch timber pile anchors) for failing to comply with the Performance Standards for Coastal Beaches at 310 CMR 10.27(3) and (2) substituted the timber pile array with posts of different size and configuration

and changes to the wrap around the coir envelopes and monitoring requirements (“Project II”). Supplemental Prefiled Testimony of James Mahala, dated August 17, 2017, at pp. 3-4. The Applicants responded with written expert testimony objecting to the SOC amendments that significantly altered the pile array component of Project I (creating Project II) and other requirements. RFDAR, at p. 5. MassDEP responded with testimony rebutting the Applicants’ objections to Project II and the Amended SOC. *Id.* The Petitioners filed testimony and a brief opposing Project II, asserting that it was still a Coastal Engineering Structure and that it still did not comply with the Performance Standards. *Id.*

***Project III.*** The Applicants and MassDEP’s Southeast Regional Office then engaged in extended settlement discussions, after requesting and receiving a lengthy stay of the adjudicatory proceedings. MassDEP and the Applicants reached a settlement agreement after MassDEP agreed to the Applicants’ proposed alterations to the project, leading to Project III. RFDAR, at p. 5. The settlement was embodied in a proposed Final Order of Conditions and a Monitoring and Maintenance Plan. *Id.*

The Petitioners opposed Project III, contending that it remained a prohibited Coastal Engineering Structure and failed to comply with the Performance Standards. *Id.* The Petitioners argued “that the IRD did not address whether the pile array *component* of Project I was a coastal engineering structure.” *Id.* (emphasis added).

## **DISCUSSION**

### **I. THE STANDARD OF REVIEW GOVERNING THE MassDEP COMMISSIONER’S REVIEW OF A PRESIDING OFFICER’S RECOMMENDED FINAL DECISION**

The standard of review governing my review of a Recommended Final Decision issued by a Presiding Officer in an administrative appeal of a MassDEP permit decision or enforcement

order was previously set forth in my IRD, at pp. 3-4. The standard of review also governs my review of the Presiding Officer's RFDAR at the present time and is as follows.

MassDEP's Commissioner, as the agency's final decision-maker in an administrative appeal of a MassDEP permit decision or enforcement order, may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision issued by a Presiding Officer in an appeal. 310 CMR 1.01(14)(b). Unless there is a statutory directive to the contrary, the Commissioner's Final Decision can be appealed to Massachusetts Superior Court pursuant to G.L. c. 30A, § 14. 310 CMR 1.01 (14)(f).

As the final decision-maker in administrative appeals, it is well settled that MassDEP's Commissioner "determines 'every issue of fact or law necessary to the [final] decision[,] [and] . . . may adopt, modify, or reject a [Presiding Officer's] recommended [final] decision, with a statement of reasons.'" Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 231 (2010). "[T]he commissioner's interpretation of [the governing] regulations [and statutes]," and not that of the Presiding Officer, "is conclusive at the agency level, and is the only interpretation that is entitled to deference by a reviewing court" on judicial review pursuant to G.L. c. 30A, § 14. Id., at 457 Mass. at 228.

It is also well settled that that MassDEP's Commissioner may reject a Presiding Officer's findings of fact, including credibility assessments, provided the Final Decision "[contains] a considered articulation of the reasons underlying that rejection." Morris v. Board of Registration in Medicine, 405 Mass. 103, 111(1989), citing, Vinal v. Contributory Retirement Appeal Board, 13 Mass. App. Ct. 85, 99-102 (1982); New England Wind, supra, 457 Mass. at 231.

Here, in reviewing the RFDAR in this case, I reached my own conclusions based on my expertise and evaluation of the evidence as introduced at the Remand Hearing conducted by the

Presiding Officer.<sup>4</sup> My evaluation of the evidence and findings are set forth in detail in Sections II and III below.

## **II. COASTAL ENGINEERING STRUCTURE ANALYSIS OF THE RFDAR**

I do not adopt that part of the RFDAR which again addresses the Coastal Engineering Structure issue. See p. 2, n.3 above. The Petitioners argued on Remand that an ambiguity existed in the IRD and that the pile array on its own should be evaluated. I do not agree with the RFDAR's characterization of the IRD in both the text of pp. 5 and 6 and in n.2, at p. 6. Also, contrary to the Petitioners' and RFDAR's interpretation, MassDEP and the Applicants did not agree at the Remand Hearing with Petitioners that the IRD's treatment of the piles as a Coastal Engineering Structure created an "ambiguity." Specifically, the Applicants asserted that "[I] did not remand the question of whether this project, including the timber pile anchors, is subject to the Coastal Engineering Structure prohibitions at 310 CMR 10.30(3)." Applicants Post-Hearing Brief, dated September 24, 2018, at p. 3. MassDEP added that "[I] remanded the matter for the limited purpose of determining whether the Project 'either complies or fails to comply with the Performance Standards for Coastal Bank (310 CMR 10.30(4) and (6) and Coastal Beach (310 CMR 10.27)', intentionally omitting any mention of 310 CMR 10.30(3), the provision of the regulations related to [Coastal Engineering Structures] . . . ." Department of Environmental Protection's Post-Hearing Brief, dated October 9, 2018, at p. 8. I agree with the Applicants and

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<sup>4</sup> The Supreme Judicial Court has ruled that when a final agency decision-maker relies on his or her expertise to evaluate the evidence introduced at the adjudicatory hearing, the decision-maker "must put in the record the basis for that expertise." D'Amour v. Board of Registration in Dentistry, 409 Mass. 572, 585 (1991). In issuing the IRD, I noted for the record at p. 4, n.1 of the IRD my experience of over 30 years working in environmental and natural resource agencies at the state and federal level, both as a lawyer and manager, administering and enforcing environmental legal requirements, including nearly 20 years with various MassDEP offices. I note that experience again in issuing this Final Decision After Remand.

MassDEP regarding what I intended in issuing the IRD.

The RFDAR concluded that the pilings themselves are Coastal Engineering Structures by, among other reasons, reiterating arguments I did not adopt in the Presiding Officer's initial RFD which applied to the entire project, and then treating the piles as a separate project. In treating the piles as a separate project, the RFDAR rejected the Applicants' argument that the purpose of the pilings was to "anchor" the coir envelopes, RFDAR, at pp. 23-43, while still acknowledging that under proper conditions "pilings or posts may be used as anchors of as part of a soft solution . . . ." RFDAR, at p. 35.

The project under review in this Remand is the entire project. In the IRD, I directed the parties and the Presiding Officer to focus on whether the project as a whole met the Performance Standards for Coastal Bank and Coastal Beach. In the IRD, I expressly declined to adopt the Presiding Officer's finding that the pilings *and* the coir rolls and envelopes in the proposed Project I constituted a Coastal Engineering Structure. The IRD described Project I as including "installation of 256, 12 inch diameter 15 foot pilings vertically 10 feet deep in two horizontal rows parallel to the Coastal Bank." IRD, at pp. 1-2.

An analysis that now attempts to revisit that Coastal Engineering Structure analysis for only one component (the piles proposed for anchors) of the project is inconsistent with the direction that I provided in the IRD and the approach to be taken by MassDEP in evaluating this type of project.

Anchoring is and has been recognized as an important element of the type of bioengineering project under review. In a publication that CZM developed with MassDEP's input, CZM has stated that "[t]he anchoring system is critical to the success of the project" and that "[a] professional is needed to determine the appropriate number and type of anchors for the

site.” Massachusetts Office of Coastal Zone Management StormSmart Properties Fact Sheet 4: Bioengineering – Coir Rolls on Coastal Banks, dated December, 2013 (“StormSmart Properties Fact Sheet 4”), at p. 6.<sup>5</sup> In the IRD at pp. 9-10, I took Administrative Notice of this publication pursuant to 310 CMR 1.01(1)(a)<sup>6</sup> and noted that it was prepared by CZM with the Department’s input to “provid[e] coastal property owners with important information on a range of shoreline stabilization techniques than can effectively reduce erosion and storm damage while minimizing impacts to shoreline systems.” StormSmart Properties Fact Sheet 4, at p. 1. I also noted that this publication makes clear that:

Under the Massachusetts Wetlands Protection Act, new hard structures are typically prohibited on all beaches and dunes. On Coastal Banks, hard structures are only allowed when necessary to protect buildings permitted before August 10, 1978, and only if no other alternative is feasible. In many cases coir roll projects and other non-structural alternatives are therefore the only options for reducing erosion and storm damage on coastal properties.

Furthermore, the record on Remand, in several places, acknowledges that there can be different approaches to anchoring coir roll and envelope projects. For instance, MassDEP’s wetlands expert witness at the Remand Hearing, James Mahala (“Mr. Mahala”) testified that “[he] ha[s] observed similar projects in the field that used smaller diameter pilings or 4 inch by 4 inch timber posts placed 4-5 feet on center that can meet the performance standards.”

Supplemental Prefiled Testimony of James Mahala, dated August 17, 2017, at p. 10. He also testified, and in support included an exhibit to his testimony, that he had “reviewed several other

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<sup>5</sup> <http://www.mass.gov/eea/docs/czm/stormsmart/properties/ssp-factsheet-4-coir-rolls.pdf>.

<sup>6</sup> Under 310 CMR 1.01(1)(a), “[MassDEP’s] Commissioner may take any action that a Presiding Officer is authorized to take under 310 CMR 1.01.” 310 CMR 1.01(13)(l) authorizes a Presiding Officer “[to] take [Administrative] [N]otice of any fact which may be judicially noticed by the courts . . . .”

sand-filled coir envelope and geotextile coastal bank stabilization projects where pile anchors were not incorporated into the design or smaller diameter posts were utilized.” Id.<sup>7</sup>

The transcript of the Remand Hearing even includes a discussion about whether the use of pilings, at the appropriate height and spacing, could avoid adverse impacts. Transcript of Remand Adjudicatory Hearing, dated June 28, 2018 at pp. 131-134.

For all of the above reasons, I do not adopt the Coastal Engineering Structure analysis in the RFDAR.

### **III. COASTAL BEACH AND COASTAL BANK PERFORMANCE STANDARDS**

The balance of RFDAR analyzed Project III with respect to Coastal Beach and Coastal Bank Performance Standards. See RFDAR, at pp. 43-71.

The RFDAR concluded that Project III did not comply with the Performance Standards for Coastal Beach, but did comply with the Performance Standards for Coastal Bank. RFDAR, at pp. 43-71. Based on the evidence presented at the Remand Hearing, and the information and analysis provided in the RFDAR, I adopt those conclusions except for the last paragraph of Section II on p. 69 of the RFDAR, which, again, states that the piles are a Coastal Engineering Structure.

### **DECISION**

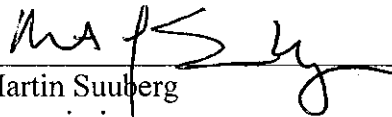
In conclusion, for the reasons detailed above, I adopt the RFDAR, except the portions of the RFDAR recommending denial of Project III based on the Presiding Officer’s finding that part of Project III is a prohibited Coastal Engineering Structure. See p. 2, n.3 above. I also vacate the

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<sup>7</sup> Exhibit 1 to that testimony included pictures of projects and, in figures 2 and 3, described the diameter, spacing and elevation of posts. Figures 1 and 4 described projects with no pilings or posts.

original Superseding Order of Conditions for this Project and deny the proposed Final Order of Conditions.

The parties to this proceeding are notified of their right to file a motion for reconsideration of this decision, pursuant to 310 CMR 1.01(14)(d). The motion must be filed with the Case Administrator and served on all parties within seven business days of the postmark date of this decision. A person who has the right to seek judicial review may appeal this decision to the Superior Court pursuant to M.G.L. c. 30A, section 14(1). The complaint must be filed in the Court within thirty days of receipt of this decision.

  
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Martin Suuberg  
Commissioner

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Docket Nos. WET-2016-005  
WET-2016-006  
WET-2016-007

File Nos. SE 43-2787  
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SE 43-2785  
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Date: August 9, 2019