

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

April 10, 2024

In the Matter of
Mary Rahal and Pathways
Association, Inc.

OADR Docket No. WET-2017-009
DEP File No. SE 16-2237
Dennis, MA

RECOMMENDED FINAL DECISION

This appeal arises out the issuance by the Massachusetts Department of Environmental Protection ("Department") to Mary Rahal and Pathways Association, Inc. ("Applicants") of a March 2, 2017, Superseding Order of Conditions ("SOC") pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 ("MWPA"), and the Wetlands Regulations at 310 CMR 10.00, *et seq.* The SOC authorizes the Applicants to build a stairway along a right of way to allow foot traffic to access Cape Cod Bay in Dennis, Massachusetts ("Project"). Brian S. Hickey and Mary P. Hickey (collectively "Petitioners") appealed to the Department's Office of Appeals and Dispute Resolution ("OADR"),¹ arguing that the Department erred in issuing the SOC authorizing the Project because it will have "adverse effects on the stability of the coastal bank" that it will cross in contravention of 310 CMR 10.30(6).

¹ OADR is an independent, neutral, quasi-judicial office within the Department responsible for advising the Department's Commissioner in the adjudication of such an appeal. The Commissioner is the final decision-maker in the appeal unless she designates another final decision-maker in the appeal pursuant to 310 CMR 1.01(14)(b).

An adjudicatory hearing was held in this matter on May 21, 2019 (“the Hearing”), before the prior Presiding Officer in the appeal. I was appointed Presiding Officer in the appeal on September 22, 2023. On March 8, 2024, I issued a Tentative Recommended Final Decision (“TRFD”) pursuant to 310 CMR 1.01(14)(a) and (14)(c) recommending that the Department's Commissioner issue a Final Decision in the appeal affirming the SOC with the agreed modifications set forth on page 22 below and removing the bottom landing, and directing the Department to prepare a Final Order of Conditions consistent with the Final Decision for the Commissioner’s signature. I issued the TRFD after listening to the audio recording of the Hearing and reviewing the Department’s Basic Documents,² briefing of the parties, the sworn pre-filed direct and rebuttal testimony that the Parties’ respective witnesses presented at the Hearing, and Hearing exhibits and citing guidance documents,

Under 310 CMR 1.01(14)(a) the Parties “ha[d] seven [business] days from the receipt of the [TRFD] to file objections to the [TRFD] and supporting arguments with [OADR].” On March 19, 2024, the Petitioner filed objections to the TRFD which I address below on page 34. The Applicants submitted a response on March 27, 2024 and the Department submitted its response on March 29, 2024. Both the Applicant and the Department rejected the Petitioners’ objections and supported the TRFD.

After considering the Petitioners’ objections to the TRFD, I continue to recommend that the Department's Commissioner issue a Final Decision in the appeal affirming the SOC with the agreed modifications set forth on page 22 below, and removing the bottom landing, and directing

² "Basic Documents" are those documents in the official file of the Department program that was involved in the decision, order, or determination that is on appeal. Basic Documents generally include (1) all submissions used by the Department in reaching the decision, order, or determination and (2) all documents constituting the Department's decision, order, or determination. Basic Documents do *not* include internal deliberations of the Department. The Department's Basic Documents are admissible and probative as "the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." G.L. c. 30A, § 11(2); 310 CMR 1.01(8)(a); see also Mass. Guide Evid. 201(b)(2).

the Department to prepare a Final Order of Conditions consistent with the Final Decision for the Commissioner's signature. .

I. Facts.

The Petitioners own a beachfront lot in the town of Dennis. Hickey v. Pathways Assoc., Inc., 472 Mass. 735, 736 (2015). Shore Drive runs along the waterfront parallel to Cape Cod Bay. Id. The Petitioners' lot is bounded on one side by a twenty-foot right of way that extends south from Cape Cod Bay, along the length of the lots, to Shore Drive ("ROW"). Id. Mary Rahal, one of the Applicants, has rights to the ROW in fee.³ Id. at 765. The Petitioners also have easement rights to the ROW. Id. at 748.

The ROW is a Coastal Bank that is a vertical buffer against storm damage. Perry, ¶ 5, Bullet 1. It is oriented north-south and contains predominantly loose sand fill on the slope. Id. The slope is moderately vegetated. Id. A natural footpath has arisen on the slope over the years, and due to that foot traffic, the footpath contains less vegetation than the area around it. Id. The lack of vegetation in that area has caused gullyng as the topography of the slope directs water into the footpath. Id.

A. The Notice of Intent and Order of Conditions.

The Applicants have "endeavored for several years to build a stairway within the [ROW] to ease the passage of its members across the coastal bank." Hickey v. Zoning Bd. of Appeals of Dennis, 100 Mass. App. Ct. 1102 (2021). To that end, on November 18, 2015, the Applicants filed a Notice of Intent ("NOI") with the Dennis Conservation Commission ("the Commission") seeking to construct "an elevated stairway and landings along [the ROW] and over [the] coastal bank down to [the] coastal beach on Cape Cod Bay" ("Stairway"). NOI, p. 2 (produced with the

³ The Petitioners dispute this in their Objections to the TRFD.

Department's Basic Documents). The Commission approved the proposed Project on March 3, 2016. Appeal Notice, Exhibit A.

B. The Superseding Order of Conditions.

Following the Commission's decision, the Petitioners timely requested on March 15, 2016 that the Department issue an SOC rejecting the proposed Project. Appeal Notice, Exhibit B. As part of this process, the Department required the Applicants to submit an Environmental Notification Form to the Executive Office of Energy and Environmental Affairs ("EEA") pursuant to the Massachusetts Environmental Policy Act ("MEPA"), G.L. c. 30, §§ 61-62K.

On August 19, 2016, the EEA Secretary issued a MEPA Certificate determining that the Applicants were not required to submit an Environmental Impact Report ("EIR") for the proposed Project. MEPA Certificate, p. 3 (produced with the Department's Basic Documents). However, the MEPA Certificate stated, in part, that the Applicants "should present alternatives [to the Project] to [the Department] for evaluation and consideration during the SOC process." Id.

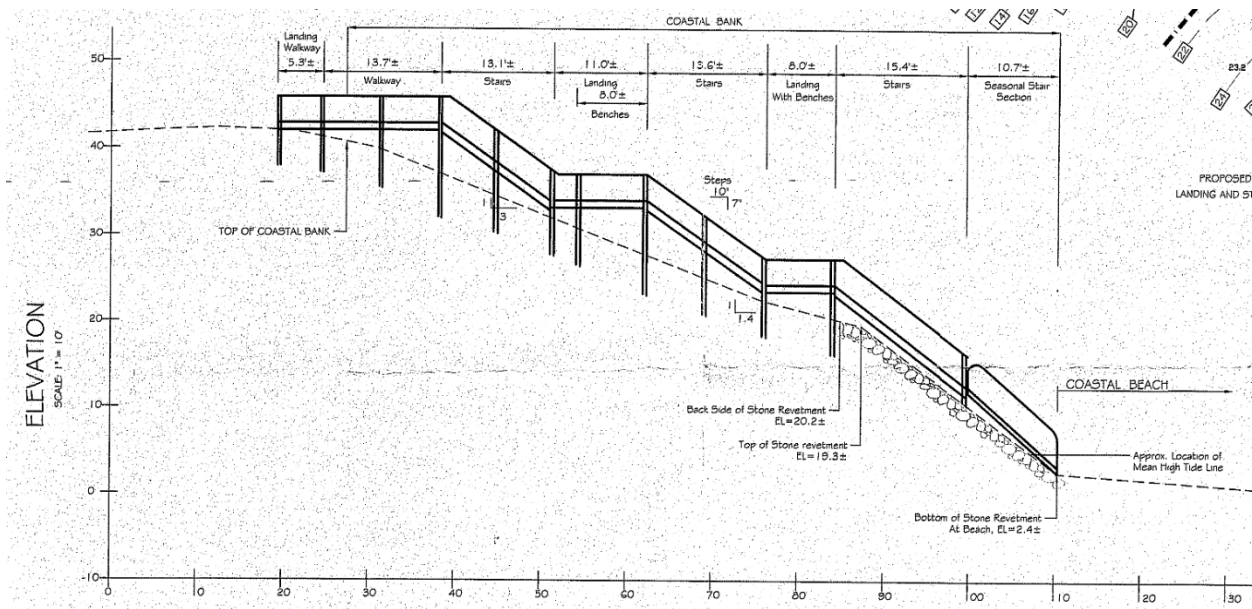
Following the issuance of the MEPA Certificate, the Applicants submitted to the Department a new plan that made some changes to the Stairway, although they did not present to the Department multiple "alternatives." Hearing, 1:50.⁴ It is not clear in the record precisely what changes were made to the proposed Project in the course of the Department's review, but the landings were changed to incorporate cantilevered benches and the walkway was reduced to four feet wide. Hearing, 1:50-1:52.

⁴ References to the recording of the Hearing are given as "Hearing, [hh:mm]." As there is no transcript available of the proceedings, the time is identified as close as possible to when the relevant answer was provided. Accordingly, the relevant audio is within 60 seconds before or after the time given.

On March 2, 2017, the Department completed its review and determined that "the [proposed] [P]roject as conditioned herein adequately protects the interests of the" MWPA. SOC, p. 1. The proposed Project as approved allows a permanent Stairway that is approximately 80 feet in horizontal length that traverses from the top of the Coastal Bank to approximately halfway down the existing revetment, a vertical descent of approximately 32 feet, to 10 feet above sea level. Site Plan (Dec. 5, 2016). At the bottom of that stairway, a removable, aluminum staircase will be attached to allow access down the remaining 10 feet of the revetment to approximately 2 feet above sea level. Id. The aluminum staircase will be removed during the offseason and stored in upland areas. SOC, p. 13.

The Stairway itself will be wood constructed and supported with posts embedded into the ground approximately every six to eight feet until the Stairway reaches the revetment. See Site Plan. Posts will also be placed at the bottom of the wooden stairs. Id. The aluminum staircase, when attached, will rest on the sand. Id. The Stairway is approximately 55 inches in width, consisting of two 6-inch railings and 43 inches of walkable space. Id. There are four benches along the Stairway: two on either side of the first approximately 5.3 feet of the Stairway, one on the east side of the Stairway between approximately 32.1 horizontal feet and 40.1 horizontal feet, and one on the west side of the Stairway between approximately 56.7 horizontal feet and 64.7 horizontal feet. Id. The benches themselves add approximately 18 inches of width to the Stairway. Hearing, 1:51. The lowest approximately 23.4 horizontal feet of the Stairway is located within a FEMA-mapped velocity zone.⁵ Id. The Site Plan has a cross-section of the Stairway that illustrates the slope:

⁵ A "velocity zone" or "V zone" is an area "where waves and fast-moving water can cause extensive damage during the base flood event. In V zones, wave heights are larger than 3 feet." Federal Emergency Management Agency, Coastal Hazards & Flood Mapping: A Visual Guide, https://www.fema.gov/sites/default/files/documents/fema_coastal-glossary.pdf (last accessed Oct. 10, 2023).



The SOC contains several special conditions relevant to the issues in this matter:

1. This Order approves... the construction of a four (4) foot wide by 91 foot long stairway, and the construction of three (3) landings with benches.
2. To allow sunlight to penetrate below the walkway the individual stair planks located over vegetated portions of the Coastal Bank are to be placed at least 3/4" apart, and the landings and benches shall incorporate a deck material that provides a greater degree of light penetration such as perforated aluminum, fiberglass, or plastic grates....
4. No heavy construction equipment, cranes, vehicles, or barges are permitted on the Coastal Bank or Coastal Beach.
5. As specified in the construction notes on the above referenced plan, the construction of the stairway, including the installation of pilings, in and over the Coastal Bank shall be completed using hand tools....
7. The set of seasonal aluminum stairs closest to the Coastal Beach shall be stored in a suitable upland location []above the mean high water line and landward of the Coastal Bank or upon the permanent portion of the stairway. Said storage shall be in conformance with any applicable local, state or federal requirements.

SOC, p. 13.

II. Procedural History.

This matter is just the latest in extensive litigation between and among the Petitioners, the Applicants, and others. The procedural history of this matter is intertwined with several of those other cases, and as such, it is important to discuss the nature and outcome of those cases first.

A. The Bylaw Appeal.

At the time that the Commission issued its Order of Conditions, the Petitioners also filed an appeal under the Dennis wetlands bylaw with the Barnstable Superior Court challenging the Commission's approval of the Project under that bylaw. Hickey v. Town of Dennis Conservation Comm'n, Barnstable Superior Court, Docket No. 1672CV00210 ("Bylaw Appeal"). On July 27, 2017, the Superior Court issued a final judgment in the Bylaw Appeal affirming the Commission's approval of the proposed Project pursuant to the Dennis wetlands bylaw. The Petitioners appealed that judgment to the Massachusetts Appeals Court. On July 27, 2018, the Appeals Court issued a decision in Hickey v. Conservation Commission of Dennis, 93 Mass. App. Ct. 655 (2018), affirming the Superior Court's judgment.

B. The ZBA Appeal.

The Petitioners also brought litigation in the Massachusetts Land Court appealing the decision of the Dennis Zoning Board of Appeals permitting the proposed Project. See Hickey v. Oliveira, Land Court Docket No. 16 MISC 000218 ("ZBA Appeal"). The Petitioners alleged in that litigation that the Dennis Zoning Board of Appeals erred in not requiring the Applicants to obtain a variance prior to building the Stairway. That case was dismissed on January 17, 2017, although the dismissal was reversed in Hickey v. Zoning Board of Appeals of Dennis, 93 Mass. App. Ct. 390 (2018). A final judgment for the Petitioners vacating the Zoning Board of Appeals' decision was entered by the Land Court on January 13, 2020. On appeal from that final judgment, the Appeals Court "reversed, and the matter [was] remanded for entry of a new

judgment affirming the decision of the board." Hickey v. Zoning Bd. of Appeals of Dennis, 100 Mass. App. Ct. 1102 (2021) (Mass. App. Ct. R. 23.0 decision). The Land Court entered a judgment affirming the Zoning Board of Appeals on August 19, 2021.

C. The Loiselle Easement Case.

In other litigation brought by the Petitioners against the Applicants, the Supreme Judicial Court found that the Applicants had rights to the ROW. Hickey v. Pathways Association, Inc., 472 Mass. 735, 761 (2015). In Loiselle v. Hickey, 25 LCR 431 (Jun. 30, 2017) ("Loiselle Easement Case"), the plaintiffs (most of whom were defendants in the Supreme Judicial Court case and who had easement rights to the ROW) sought declaratory judgment to determine the scope of those rights. The Land Court found that their rights were "limited to the use [of the ROW] solely for the purpose of exercising their Colonial Ordinance Rights." Loiselle v. Hickey, 25 LCR 431, 445 (2017).

The Appeals Court affirmed, stating that "while the access ways provide the inland owners the right to gain access to the disputed flats, they may gain such access only to exercise the rights reserved by the Colonial Ordinance." Loiselle v. Hickey, 93 Mass. App. Ct. 644, 653-54 (2018). The court left "to another day resolution of the scope of the inland owners' rights to use the access ways themselves." Id.

D. The Pathways Easement Case.

Following the Loiselle Easement Case, the Petitioners brought Hickey v. Pathways Association, Inc., Land Court Docket No. 16 MISC 000123 ("Pathways Easement Case"), to "determine whether the easement right claimed by Applicant is any broader than the limited and specified right to gain access to the waters of Cape Cod Bay" as determined in Loiselle v. Hickey, 93 Mass. App. Ct. 644 (2018). Opposition to Motion to Lift Stay, p. 1. Ultimately, the

Land Court determined that the Applicants have the right to use the ROW "only for egress to and from the waters of Cape Cod Bay." Judgment, 16 MISC 000123, p. 3 (Feb. 12, 2020).

E. The West Side Owners Case.

On September 24, 2020, the Petitioners filed Hickey v. West Side Owners Association, Inc., Land Court Docket No. 20 MISC 000400 ("WSOA Case"). In that case, the Petitioners alleged that they owned a 1/13 fee interest in the ROW (in addition to easement rights) and that the defendants, who allegedly owned the remaining fee interest in the ROW, would unduly interfere with the Petitioners' rights if they used the ROW without restriction, including for beach access. In the course of the case, the Land Court determined that, given that the ROW is registered land, neither the Petitioners nor the Defendants, in fact, owned a fee interest in the ROW, because their interests had not been registered and certificates of title had not issued. The WSOA Case was dismissed without prejudice on April 26, 2023.

F. The procedural history of this matter.

With that context, I turn to this matter. The Petitioners timely filed this appeal of the SOC on March 16, 2017. Appeal Notice, p. 1. On March 23, 2017, the Petitioners requested a stay of this appeal under 310 CMR 1.01(6)(h) due to the pendency of the Bylaw Appeal, which the prior Presiding Officer granted. On July 26, 2017, the Petitioners filed a Motion to Dismiss or in the Alternative for Summary Decision, arguing that the decision in the Loisel Easement Case prohibited the Project. See Petitioner's Mot. to Dismiss, p. 1 (Jul. 26, 2017). The Applicants and the Department opposed that motion. However, the prior Presiding Officer did not act on the motion, as the Bylaw Appeal was still pending. On October 12, 2017, the Presiding Officer

ordered that the stay would remain in place pending the resolution of the Bylaw Appeal. At no time did the Petitioners press their Motion to Dismiss after the stay was lifted.⁶

On August 7, 2018, the Applicants requested to lift the stay because the Appeals Court affirmed the judgment in the Bylaw Appeal. The Petitioners opposed that motion. The Petitioners argued, in part, that a decision in the pending Pathways Easement Case adverse to the Applicants might preclude the Project. On October 3, 2018, the prior Presiding Officer entered an order lifting the stay and ordering the Petitioners to show cause why this matter should not be dismissed for lack of standing. In response to that Order, the Petitioners, Applicants, and Department filed pre-filed testimony and briefing. The prior Presiding Officer determined that the matter would proceed a Hearing, and that Hearing was held on May 21, 2019.

This appeal was again stayed after the Hearing, on March 5, 2020, pending the resolution of the ZBA Appeal and the Pathways Easement Case. On October 20, 2020, the prior Presiding Officer required the Parties to also report on the status of WSOA Case. On June 14, 2023, the prior Presiding Officer entered an order vacating the stay and putting the case back on track for issuance of an RFD. I was substituted as Presiding Officer on September 22, 2023.

III. Witnesses Who Testified at the Hearing.⁷

A. The Petitioner's Witnesses.

1. Robert Perry.

Robert Perry is a registered professional civil engineer in Massachusetts. Perry PFT, ¶ 1 (Nov. 1, 2018). He has more than 30 years of experience designing, permitting, and inspecting

⁶ Even though this motion was never acted on, it would likely not have succeeded. The Loiselle case concerned the scope of the Petitioners and the Applicants' rights to the ROW. However, the Department lacks the jurisdiction to adjudicate disputes over property rights. Tindley v. Dept. of Environmental Quality Engineering, 10 Mass. App. Ct. 623 (1980).

⁷ The Petitioners offered with their Objections to the TRFD the Affidavit of Edward A. Rainen. For the reasons discussed starting on page 34, I do not consider Mr. Rainen's testimony as substantive evidence in this RFD.

coastal engineering structures on Cape Cod, including stairways. Id. at ¶ 2. I find him qualified "by knowledge, skill, experience, training, or education" to render expert testimony in this matter. See Matter of Jon L. Bryan, OADR Docket No. DEP-04-767, Recommended Final Decision (July 25, 2005), 2005 MA ENV LEXIS 50, *9; Mass. Guide Evid. 702.

2. Robert W. Golledge, Jr.

Robert Golledge is the principal of Golledge Strategies & Solutions, LLC, an environmental consulting firm. Golledge PFT, ¶ 1 (Feb. 11, 2019). From 1986 to 1995 he worked for the Department as Director of the Division of Wetlands and Waterways and Section Chief of the Wetlands Protection Program. Id. at ¶ 2. From 1996 to 2001, he worked for the Department as Chief of Staff and Regional Director. From 2003 to 2006 he was Commissioner of the Department, and in 2006 served as Secretary of the Executive Office of Energy and Environmental Affairs. Id. at p. 14. I find him qualified "by knowledge, skill, experience, training, or education" to render expert testimony in this matter. See Bryan, 2005 MA ENV LEXIS 50 at *9; Mass. Guide Evid. 702.

B. The Applicant's Witnesses.

1. Lenore White.

Lenore White is the owner and president of Wetland Strategies, Inc. White PFT, ¶ 1 (Dec. 5, 2018). She has been a Professional Wetlands Scientist since 1997 and a wetlands consultant since October 2005. Id. She was previously employed by the Department as a senior employee within the Division of Wetlands and Waterways. Id. I find her qualified "by knowledge, skill, experience, training, or education" to render expert testimony in this matter. See Bryan, 2005 MA ENV LEXIS 50 at *9; Mass. Guide Evid. 702.

C. The Department's Witnesses.

1. Mark Bartow.

Mark Bartow is an Environmental Analyst with the Department. Bartow PFT, ¶ 1 (Jan. 9, 2019). He is assigned to the Wetlands and Waterway Program and has been with the program since March 2008. Id. In that time, he has prepared approximately 200 superseding determinations of applicability and superseding orders of conditions. Id. I find him qualified "by knowledge, skill, experience, training, or education" to render expert testimony in this matter. See Bryan, 2005 MA ENV LEXIS 50 at *9; Mass. Guide Evid. 702.

IV. Issues for Adjudication.

On March 26, 2019, the prior Presiding Officer entered an order identifying the issues for adjudication in this appeal as follows:

1. Whether the Petitioners have standing to appeal the SOC; and
2. If the Petitioners have standing, whether the Department properly issued the SOC approving the walkway at issue.

V. Analysis.

A. The applicable standard of review.

1. The burden of proof.

As the party challenging the Department's issuance of the SOC, the Petitioners have the burden of proof in this *de novo* appeal to produce credible evidence from a competent source to support its positions. Matter of David A. Bosworth Co., Inc., OADR Docket No. WET-2015-015, Recommended Final Decision (Feb. 17, 2016), 2016 MA ENV LEXIS 12, *23-24, Adopted as Final Decision (Mar. 14, 2016); see also 310 CMR 10.03(2); 310 CMR 10.05(7)(j)2.b.iv; 310 CMR 10.05(7)(j)2.b.v.; 310 CMR 10.05(7)(j)3.a.; 310 CMR 10.05(7)(j)3.b. Specifically, the Petitioners are required to present "credible evidence from a competent source in support of each

claim of factual error [made against the Department], including any relevant expert report(s), plan(s), or photograph(s)." 310 CMR 10.05(7)(j)3.c. "A 'competent source' is a witness who has sufficient expertise to render testimony on the technical issues on appeal." Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (Aug. 11, 2010), 2010 MA ENV LEXIS 89, at 36-37, adopted by Final Decision (Aug. 19, 2010), 2010 MA ENV LEXIS 31. Whether the witness has such expertise depends "[on] whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony." Comm. v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted). See, e.g. Matter of Carulli, Docket No. 2005-214, Recommended Final Decision (Aug. 10, 2006) (dismissing claims regarding flood control, wetlands replication, and vernal pools for failure to provide supporting evidence from competent source), Adopted as Final Decision (Oct. 25, 2006); Matter of Indian Summer Trust, Docket No. 2001-142, Recommended Final Decision (May 4, 2004) (insufficient evidence from competent source showing that interests under MWPA were not protected), Adopted as Final Decision (June 23, 2004).

2. Standard of review.

As the Presiding Officer in this appeal, my review of the Parties' evidence in support of their respective positions is *de novo*, meaning that my review is anew, irrespective of any prior determination of the Department in issuing the SOC. Matter of Kazokas, OADR Docket No. WET-2017-022, Recommended Final Decision (Aug. 29, 2018), 2018 MA ENV LEXIS 67, *9, Adopted as Final Decision (Sep. 18, 2019), 2019 MA ENV LEXIS 93.

Under 310 CMR 1.01(13)(h), "[t]he weight to be attached to any evidence in the record [rests] within the sound discretion of the Presiding Officer...." Matter of Kane Built, Inc., OADR Docket No. 2017-037, Recommended Final Decision (December 18, 2018), 2017 MA ENV LEXIS 77, *17, Adopted as Final Decision (January 17, 2019), 2019 MA ENV LEXIS 8. G.L. c.

30A, § 10, "guarantees a party certain procedural rights in adjudicatory hearings at the administrative level, before the case reaches the judicial branch." Space Bldg. Corp. v. Comm'r of Revenue, 413 Mass. 445, 450 (1992). Among these is the right to a "full and fair" adjudicatory proceeding. G.L. c. 30A, § 10. Accordingly, OADR must conduct all adjudicatory proceedings in a neutral, fair, and timely manner based on the governing law and the facts of the case. Matter of Tennessee Gas Pipeline Company, LLC, OADR Docket No. 2016-020, Recommended Final Decision (Mar. 22, 2017), 2017 MA ENV LEXIS 34, *9, Adopted as Final Decision (Mar. 27, 2017), 2017 MA ENV LEXIS 38, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7); see also Mass. R. Prof. C. 1.0(p) (definition of "tribunal").

Accordingly, as the Presiding Officer, I am "responsible ... for independently adjudicating [this] appeal[l] and [issuing a Recommended Final Decision] to MassDEP's Commissioner that is consistent with and in the best interest of the [MWPA, the Wetlands] Regulations, and MassDEP's policies and practices." Matter of Francis P. and Debra A. Zarette, Trustees of Farm View Realty Trust, OADR Docket No. WET 2016-030, Recommended Final Decision (Feb. 20, 2018), 2018 MA ENV LEXIS 7, *16, Adopted as Final Decision (Mar. 1, 2018), 2018 MA ENV LEXIS 6. As a corollary, it is well settled that "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 [the 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." Matter of Algonquin Gas Transmission, LLC, OADR Docket No. WET-2016-025, Recommended Final Decision (Oct. 16, 2019), 2019 MA ENV LEXIS 106, *15, Adopted as Final Decision, (Oct. 24, 2019), 2019 MA ENV LEXIS 104. Additionally, "[t]he

Presiding Officer [responsible for adjudicating the administrative appeal] is not bound by MassDEP's prior orders or statements [in the case]...." Id. at *15-*16 (citations omitted).

B. The regulatory framework.

1. Standing.

Under 310 CMR 10.05(7)(j)2.a., "Any applicant, landowner, aggrieved person if previously a participant in the permit proceedings, conservation commission, or any ten residents [group] may request review of a Reviewable Decision by filing an Appeal Notice...." Standing "is not simply a procedural technicality." Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975). 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. Comm'r of Ins., 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").

In Save the Bay, the Supreme Judicial Court emphasized the practical importance of standing:

Whether a party is properly before a tribunal to invoke its judicial powers affects the good order and efficiency with which the matter proceeds. We emphasize that the Department in these hearings was engaged in adjudicatory proceedings wherein the legal rights and duties were to be determined and that therefore appropriate limitations could properly be placed on those persons to intervene.... The multiplicity of parties and the increased participation by persons whose rights are at best obscure will, in the absence of exact adherence to requirements as to standing, seriously erode the efficacy of the administrative process. We do not say that increased citizen participation is bad. On the contrary, such interest ensures full review of all issues. However, to preserve orderly administrative processes and judicial review thereof, a party must meet the legal requirements necessary to confer standing.

Save the Bay, 366 Mass. at 672.

A landowner may have standing under the Wetlands Regulations. Under 310 CMR 10.04(Landowner), a "landowner" is "the owner of record of land or an interest in land that is subject of a Reviewable Decision." "The term 'landowner' as used in 310 CMR 10.05(4)(a) includes owners of property rights such as easements and rights of way." Matter of John Sloan, Docket No. DEP-06-864, Recommended Final Decision (June 15, 2007), 2007 MA ENV LEXIS 42, *1-*2. The term necessarily means the same in 310 CMR 10.05(7)(j)2.a. Easement rights are therefore sufficient to confer standing.

To have standing as an "aggrieved party" in a wetlands permit appeal, one must be:

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 M.G.L. c. 131, § 40.

310 CMR 10.05(7)(j)2.b.iii.; 310 CMR 10.04. The Appeal Notice is required to include sufficient facts to demonstrate status as a person aggrieved. 310 CMR 10.05(7)(j)2.b.iii.

For standing, it is not necessary to prove the claim of particularized injury by a preponderance of the evidence. Matter of Gordon, Docket WET No. 2009-048, Recommended Final Decision, (Mar. 3, 2010), 2010 MA ENV LEXIS 114, *10, adopted by Final Decision (Mar. 5, 2010), 2010 MA ENV LEXIS 13. "Rather, the plaintiff must put forth credible evidence to substantiate his allegations. In this context, standing becomes, then, essentially a question of fact for the trial judge." Marashlian v. Zoning Bd. Of Appeals of Newburyport, 421 Mass. 719, 721 (1996); accord Butler v. City of Waltham, 63 Mass. App. Ct. 435, 440 (2005) (supporting evidence must only be credible on its face); Cent. St., LLC v. Zoning Bd. of Appeals, 69 Mass. App. Ct. 487, 493 (2007) (reversing trial judge's finding that there was no standing because the

plaintiff's evidence was credible on its face, regardless of whether there was other evidence that detracted from its weight).

To show aggrievement, a party must only set forth evidence demonstrating a possibility that the injury alleged could result from the allowed activity. Gordon, 2010 MA ENV LEXIS 114 at *10-*11; cf. Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20, 37 (2006) (plaintiff's case appealing zoning decision cannot consist of "unfounded speculation to support their claims of injury"). But the possibility of injury must be more than an "allegation of abstract, conjectural, or hypothetical injury." Matter of City of Boston Pub. Wks. Dept., OADR Docket Nos. WET-2019-021 and 022, Recommended Final Decision (Mar. 17, 2021), 2021 MA ENV LEXIS 12, *16, Adopted as Final Decision (Mar. 31, 2021), 2021 MA ENV LEXIS 13 (citation omitted).

2. The Wetlands Protection Act.

The MWPA protects several categories of land and bodies of water ("Areas Subject to Protection"),⁸ and those protections are implemented by the Wetlands Regulations at 310 CMR § 10.00, *et seq.* The regulations restrict most activities that will "remove, fill, dredge or alter" Areas Subject to Protection.⁹ 310 CMR 10.02(2)(a). The regulations also restrict activities within defined "buffer zones"¹⁰ that "will alter an Area Subject to Protection." 310 CMR 10.02(2)(b). "The provision for a 'buffer zone' does not appear in G. L. c. 131, § 40, and is a creation of the [D]epartment in aid of its administrative implementation of the Wetlands Protection Act."

⁸ The MWPA pertains to "any bank, riverfront area, freshwater wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean or on any estuary, creek, river, stream, pond, or lake, or any land under said waters or any land subject to tidal action, coastal storm flowage, or flooding...." G.L. 131, § 40; see also 310 CMR 10.02(1).

⁹ "Areas Subject to Protection" are also referred to as "Resource Areas." See 310 CMR 10.02.

¹⁰ A "buffer zone" is defined as "that area of land extending one hundred (100) feet horizontally outward from the boundary of any area specified in 310 CMR 10.02(1)(a)."

Southern New England Conference Assoc. of Seventh-Day Adventists v. Burlington, 21 Mass. App. Ct. 701, 704 n. 3 (1986).

If a developer wishes to perform regulated activities in an Area Subject to Protection or a buffer zone, the developer must first file a Notice of Intent with the local conservation commission. See 310 CMR 10.05(4). The Department issues a file number for the notice of intent, which indicates only that the notice meets the "minimum submittal requirements contained in the General Instructions." 310 CMR 10.05(4)(c).

Upon receiving a Notice of Intent, the conservation commission must hold a public hearing within 21 days. 310 CMR 10.05(5)(a). Within 21 days after the close of the public hearing, if the conservation commission determines that the activities proposed will affect an area significant to one or more of the interests identified in the MWPA, then the conservation commission must issue an Order of Conditions. 310 CMR 10.06(a)2. The Order of Conditions must:

impose such conditions as are necessary to meet the performance standards set forth in 310 CMR 10.21 through 10.60 for the protection of those areas found to be significant to one or more of the interests identified in M.G.L. c. 131, § 40 and the Stormwater Management Standards provided in 310 CMR 10.05(6)(k) through (q). The Order shall prohibit any work or any portion thereof that cannot be conditioned to meet said standards.

310 CMR 10.05(6)(b).

After the conservation commission issues an Order of Conditions, the applicant; the owner, if not the applicant; any person aggrieved by the Order of Conditions; any owner of land abutting the land on which the work is to be done; any ten residents of the city or town where the land is located; or the Department may request that the Department issue a Superseding Order of Conditions. 310 CMR 10.05(7)(a) and (b). Generally, after reviewing

the Notice of Intent, the Order, any informal meeting or site inspection, and any other additional plans, information, or documentation submitted under 310 CMR 10.05(7)(f) or (g), the Department shall issue a Superseding Order for the protection of the interests identified in M.G.L. c. 131, § 40. The Superseding Order shall impose such conditions as are necessary to meet the performance standards set forth in 310 CMR 10.21 through 10.60 and stormwater standards set forth at 301 CMR 10.05(6)(k) for the protection of those interests. The Superseding Order shall prohibit any work or any portions thereof that cannot be conditioned to protect such interests. The Department may issue a Superseding Order which affirms the Order issued by the conservation commission.

310 CMR 10.01(7)(i). Following the issuance of a Superseding Order of Conditions, an "applicant, landowner, aggrieved person if previously a participant in the permit proceedings, conservation commission, or any ten residents of the city or town where the land is located, if at least one resident was previously a participant in the permit proceeding may request review" of the Superseding Order of Conditions by OADR. 310 CMR 10.05(7)(j)2.a.

3. Coastal Banks.

A "Coastal Bank" is "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." 310 CMR 10.30(2). "Coastal banks are likely to be significant to storm damage prevention and flood control." 310 CMR 10.30(1). "[B]ecause of their height, [they] provide a buffer to upland areas from storm waters are significant to storm damage prevention and flood control." Id. Because of this important function, the Wetlands Regulations seek to minimize "disturbances to a coastal bank which reduce its natural resistance to wind and rain erosion." Id.

4. Land Subject to Coastal Storm Flowage.

LSCSF is somewhat unique in that it "is a resource area identified in the statute but without any regulatory performance standards." Matter of Schindler, OADR Docket No. WET-2011-024 and 026, Recommended Final Decision (Dec. 5, 2011), 2011 MA ENV LEXIS 135,

*6, Adopted as Final Decision (Dec. 27, 2011), 2011 MA ENV LEXIS 134. Nevertheless, for work on LSCSF, a project may not "have an adverse effect by increasing erosion, decreasing the volume or changing the form of any such coastal beach or an adjacent or downdrift coastal beach." 310 CMR 10.27(3).

5. The Massachusetts Environmental Policy Act.

MEPA "sets forth a broad policy of environmental protection in [the] Commonwealth by directing [all State agencies] to 'review, evaluate, and determine the impact on the natural environment of all works, projects or activities conducted by them and . . . use all practicable means and measures to minimize *damage to the environment*.'" Ten Persons of the Commonwealth v. Fellsway Dev. LLC, 460 Mass. 366, 368 (2011) (emphasis supplied); Matter of Palmer Renewable Energy, LLC ("PRE"), OADR Docket No. 2021-010, Recommended Final Decision (September 30, 2022), 2022 MA ENV LEXIS 39, *116-17, adopted as Final Decision (November 28, 2022), 2022 MA ENV LEXIS 35.¹¹ MEPA defines "damage to the environment" as:

any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth and shall include but not be limited to . . . destruction of . . . wetlands air pollution Damage to the environment[,] [however,] shall not be construed to include any insignificant damage to or impairment of such resources.

G.L. c. 30, § 61 (emphasis supplied); PRE, 2022 MA ENV LEXIS 39 at *117.

MEPA and the MEPA Regulations at 301 CMR 11.00 "establish a process to ensure that State permitting agencies [such as the Department] have adequate information on which to base their permitting decisions, and that environmental impacts of the project are avoided or minimized." Matter of Tennessee Gas Pipeline Company, LLC, OADR Docket No. 2016-020,

¹¹ The Final Decision in PRE is currently on appeal in Suffolk Superior Court. See Palmer Renewable Energy, LLC v. Massachusetts Department of Environmental Protection, C.A. 2284CV02926.

Recommended Final Decision (March 22, 2017), 2017 MA ENV LEXIS 34, at *79, n. 28, adopted as Final Decision (March 27, 2017), 2017 MA ENV LEXIS 38; PRE, 2022 MA ENV LEXIS 39 at *117-18. “Pursuant to MEPA, a project proponent requiring a permit from a State agency files an environmental notification form (ENF) with the [EEA] Secretary . . . who determines whether the project meets the [MEPA] review threshold requiring an . . . [Environmental Impact Report (“EIR”)].” Id. “If so, and after submission of a final environmental impact report (FEIR) and opportunity for review by the public, the [EEA] Secretary certifies whether the FEIR has complied with MEPA” Id. A Certification by the EEA Secretary that the FEIR complies with MEPA means that the project’s proponent has adequately described the environmental impacts [of the proposed project] and addressed mitigation” as required by MEPA. Id. However, the Certification “does not constitute final approval or disapproval of a particular project, which ultimately is left to [the] permitting agenc[y].” Id. The permitting agency “retains [its] authority to fulfill its statutory and regulatory obligations in permitting or reviewing [the] Project that is subject to MEPA review” Id.

C. The Petitioners' standing.

The Applicants and the Department challenge whether the Petitioners have standing to challenge the SOC. The Applicants argue that the Petitioners fail to demonstrate that they are "persons aggrieved" by the SOC. The Department argues that "a landowner does not have the right to appeal a superseding order under 310 CMR I 0.05(7)(j)2.a." Department Response to Order to Show Cause, p. 2. The Department's argument is belied by the fact that 310 CMR 10.05(7)(j)2.a. specifically states that "[a]ny... landowner... may request review of a Reviewable Decision by filing an Appeal Notice."

Here, it is uncontroverted that the Petitioners had, prior to filing their Appeal Notice, easement rights over the ROW.¹² Hickey, 472 Mass. at 748. They therefore have standing. See 310 CMR 10.05(7)(j)2.a. Given that the Petitioners have standing as landowners, I do not need to reach the issue of whether they have standing as aggrieved persons.

D. Agreed modifications to the Superseding Order of Conditions.

Before considering the Petitioners' objections to the Walkway, it is important to note that in their post-Hearing brief, the Applicants agreed to several modifications to the SOC to meet some of the Petitioners' concerns. Specifically, the Applicants agreed to reduce the size of the railings to 2 in. × 4 in. Applicants Post-Hearing Brief, p. 2. The Applicants also agreed to reduce the number of benches from four to two. Id. The first bench they have agreed to remove is the bench at the top of the Stairway on the eastern side. Id. at p. 9. The second is the lowest bench immediately above the revetment. Id.

The Applicants also agreed to amend the SOC to include a monitoring and maintenance plan. Id. at p. 6. Such a plan will directly address the Petitioners' stated concerns about gulying and erosion and allow the Petitioners to address any issues before they have an impact on the ROW. These conditions will help guarantee that the Project will "have no adverse effects on the stability of the coastal bank." 310 CMR 10.30(6).

E. The Superseding Order of Conditions.

Because of the revetment at the toe of the Coastal Bank, the Coastal Bank here is not significant to storm damage prevention or flood control as a sediment source to the coastal beach. Thus, only 310 CMR 10.30(6), (7), and (8) might apply to the Project, because the

¹² It appears that the Petitioners do not have a fee interest in the ROW. See Order of Dismissal for Lack of Subject Matter Jurisdiction, Hickey v. West Side Owners Assoc., Land Court Docket No. 20 MISC 000400 (Apr. 26, 2023) ("As the parties have not registered their claimed interests in the fee of the disputed right of way, the parties do not own the respective fee interests in the disputed right of way that they claim to own...."). This is the issue raised in the Petitioners' newest Land Court case.

Coastal Bank is significant to storm damage prevention or flood control as a vertical buffer to storm waters. Bartow PFT, ¶ 6. However, the existence of the revetment also means that 310 CMR 10.30(7) does not apply. *Id.* at ¶ 8. 310 CMR 10.30(8) also does not apply because the Project is not within a habitat for rare vertebrate or invertebrate species. *Id.* at ¶ 9. Accordingly, the only regulation applicable to this project is 310 CMR 10.30(6): the Project "shall have no adverse effects on the stability of the coastal bank." Bartow PFT, ¶¶ 7, 10. The Petitioners raise several objections to the merits of the Project under this subsection; I take each in turn.

1. Prevention and mediation of gullying.

The Petitioners argue that a portion of the Coastal Bank "above the armored section of the coastal bank, where the proposed walkway has been staked in the field, shows signs of gullying and sparse and or degraded vegetative cover." Petitioner Response, p. 4 (quoting Golledge PFT, ¶ 9). Accordingly, "the Project needs to be designed to reduce impacts to the minimum necessary to access Cape Cod Bay." *Id.* at p. 5 (citing Golledge PFT, ¶¶ 12, 13). Mr. Perry testified that, "[w]ith the introduction of a new source of intense shade caused by the [Stairway], the land beneath the [Stairway] will experience difficulty establishing vegetation and the gully, which is directly below the [Stairway], will worsen." Perry, ¶ 5, Bullet 1.

Mr. Golledge testified on behalf of the Petitioners that "although the SOC required that the landings be constructed of translucent materials to allow some sunlight to penetrate below the landings, the landings are not required to access Cape Cod Bay and must be eliminated to" avoid destabilization of the Coastal bank, protect the Coastal Bank, and meet the performance standards. Golledge PFT, ¶ 14.

The Applicants' wetlands expert, Ms. White, opined, to the contrary, that "[t]he conditions imposed by the SOC require the applicant to allow sunlight to penetrate to the bank to protect the stability of the Coastal Bank." White PFT, ¶ 4. She also observed that the

construction of the Stairway will minimize foot traffic, allowing vegetation to grow in the gully.
Id. at p. 4.

Although this case involves a stairway and not a pier (I discuss the limited applicability of the Department's guidelines below starting on page 29), several observations in the Department's "Small Docks and Piers Guidance" ("SD&PG") are useful to analyzing the proposed Project. A structure should "avoid[] 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, and orientating the pier as close as possible to a north-south orientation." SD&PG, p. 15. To that end,

[p]lanks should be spaced at least 3/4 inch apart to permit light penetration. Alternate spacing may be used if the deck material used provides a similar or greater degree of light penetration (such as perforated aluminum, fiberglass, or plastic grates; any such grates should contain an anti-slip texture integrally moulded to the top surface to provide for safety).

Id. at p. 17. Additionally, "[i]f placing the pier over wetlands vegetation cannot be avoided, the pier should be orientated as close to a north-south orientation as possible (consistent with site constraints and environmental and navigational considerations). Research indicates a north-south orientation is least likely to adversely affect aquatic vegetation through shading." Id.

I agree with the Applicants that the proposed Project will not adversely affect the vegetation. First, the proposed Project adheres to the guidance in the SD&PG. The second special condition requires that the planks be 3/4 in. apart, and the Stairway is oriented in a north-south direction. Site Plan; SOC, p. 13. Second, the second special condition specifically requires sunlight-penetrating materials that will promote vegetation growth and hinder gullying. Id. Third, the Petitioners have not provided any evidence that the use of sunlight-penetrating materials is

insufficient to promote the growth of vegetation under the Stairway. I therefore find that the preponderance of evidence favors the Applicants.

2. Width of the Stairway.

Mr. Golledge testified that to minimize the impact to the Coastal Bank,

the walkway design needs to 1) be reduced in width to the minimum necessary to access Cape Cod Bay, 2) the landings and benches eliminated, 3) portions of the walkway located above the vegetated Coastal Bank be, at a minimum, 2 feet above the Coastal Bank (guidance references 1:1 ratio of width of walkway to elevation above bank, e.g. 3 foot wide walkway located 3 feet above vegetated bank), 4) eliminate risers on the walkway, 5) where the foot path meets the proposed walkway, contours should be modified to ensure that no concentrated flow or runoff further gullies and erodes the Coastal Bank, thus protecting the banks stability.

Golledge PFT, ¶ 13. Minimizing the width of the walkway, Mr. Golledge testified, will "protect the unarmored Coastal Bank and avoid degrading its stability." Golledge PFT, ¶ 14. Mr. Perry, the Petitioners' other expert witness, concurred with Mr. Golledge by testifying that "The staircase width is reduced to approx[imately] 3 ft. at the bottom where the stair facility transitions to a seasonally deployed, narrow aluminum segment. In the interest of minimizing impacts, the entire stair width can be more consistent at 42 in. with the lower segment." Perry, ¶ 5, Bullet 3. Mr. Golledge concurred with Mr. Perry's testimony. Golledge PFT, ¶ 17.

The Applicants prefer a four-foot width¹³ "because the walkway is for use by all the members of the Pathways Neighborhood Association rather than one home...." Applicants Post-Hearing Brief, p. 2. The Applicants have agreed to decrease the width of the handrails to 2 in. × 4 in. Applicants Post-Hearing Brief, p. 2. This would reduce the total width of the Stairway to 51 inches. There is nothing in the Petitioners' expert testimony that explains how a width of 55

¹³ The total width of the Stairway is 55 inches. Minus the widths of the two railings, the walkable portion of the Stairway is 48 inches.

inches (or the reduced 51 inches) causes a materially adverse effect on the Coastal Bank, nor do the Petitioners' experts explain why a width of 55 inches is materially different from a width of 48 inches. I therefore conclude that the preponderance of the evidence favors the Applicants.

3. Monitoring and maintenance.

Mr. Golledge testified that the "SOC did not require a specific Coastal Bank stabilization and monitoring plan to ensure that any impacts from the proposed activities and alterations do not degrade the Coastal Bank and lead to storm damage." Golledge PFT, ¶ 18. The Applicants have conceded to the inclusion of a monitoring and maintenance plan in a Final Order of Conditions, and the stability of the Coastal Bank will be served by the inclusion of that condition.

4. The lowest landing.

Mr. Golledge and Mr. Perry both expressed concern that the lowest landing "is within the FEMA-mapped velocity zone and directly adjacent to the top of the existing stone revetment."

Perry PFT, ¶ 5, Bullet 2; see Golledge PFT, ¶ 16. Mr. Golledge testified that:

[w]ave and energy intensity within the Velocity Zone will cause significant impact to the landing directly adjacent to the top of the armoring. The landing in this location, as proposed, has not been designed to "break away" during significant storm events within the Velocity Zone, and as such will cause added strain and destabilize both the armored portion of the Coastal Bank and the vegetated portion of the Coastal Bank - decreasing the banks' ability to prevent storm damage....

Golledge PFT, ¶ 16. He further discussed this concern in his testimony: the landing is approximately 50% in the Velocity Zone, which has the potential for one- to three-foot waves.

Hearing, 1:13. The danger is that a sufficiently violent storm could cause scouring and failure of the Stairway. Id.

Mr. Golledge opined that steps would be better able to handle the intense energy. Hearing 1:14. The velocity zone has a potential for waves up to three feet. Id. This would transfer significant energy to the landing due to the force of the water pushing up from underneath. Id. That energy could cause scouring possibly leading to the failure of the armored structure. Id. Steps would have much less potential to cause storm damage because the water would be able to flow through the angled stairs instead of pressing against a flat landing. Id. The Applicants did not directly address this argument in Ms. White's testimony. See White PFT.

Here, I agree with the Petitioners that stairs are a better alternative. This is not a significant change to the design, as the Applicants have already agreed to remove the bench at the bottom of the Stairway. Removing the landing and replacing it with stairs will address the Petitioners' concern and provide a more stable Stairway. The eight-foot horizontal distance covered by the bottom landing can be added to either the top walkway or the 11-foot middle landing, or the slope of the stairs can be adjusted. How exactly to accomplish this is a decision best left to the Applicants' engineers.

5. The remaining decks and benches.

Mr. Golledge testified that "the landings and benches [must be] eliminated." Golledge PFT, ¶ 13. Mr. Perry testified that the mid-slope deck should "be changed to a step-aside landing of a much smaller practical dimension." Perry PFT, ¶ 5, Bullet 4. The landing as proposed, he testified, will "have direct adverse impacts to vegetation from shading, from the initial work effort, from ongoing erosion from wind and concentrated runoff within the existing gully, leading to progressive erosive impacts to the Coastal Bank." Id.

On this point, the Petitioners have not met their burden of proof. In particular, the second special condition requires the landings to "incorporate a deck material that provides a greater degree of light penetration such as perforated aluminum, fiberglass, or plastic grates." SOC, p.

13. There will therefore be no adverse impact on vegetation. The Petitioners have also not provided evidence that the work to build the landings will have an effect different from the remainder of the Project. Lastly, as I found above, based on the evidence from the Applicants' expert, the special conditions will promote the growth of vegetation and slow erosion. The remaining two benches do not violate 310 CMR 10.30(6).

6. Compliance with the Massachusetts Building Code.

Mr. Perry testified that the Applicants' proposal "Fail[s] to design and adequately consider loading, will have negative long-term impacts on the coastal bank, leading to destabilization of the bank and the revetment segment on locus and to the revetments on both sides of locus." Perry PFT, ¶ 5, Bullet 5. He opined that the project as proposed does not comply with the Massachusetts Building Code and that it will destabilize the Coastal Bank. In response, Ms. White, for the Applicants, testified that "Perry further states that the Project has not been designed to be stable and uses PSI numbers which are not site specific." White PFT, p. 3. Ms. White's testimony on this issue appears to have merit because the Petitioners failed to present any data from the site showing what load the beach can hold, nor is there any analysis showing if and to what degree the design will destabilize the Coastal Bank.

Nevertheless, I make no finding here regarding whether the Applicants' proposed Project complies with the Massachusetts Building Code. In determining whether to issue an SOC under the MWPA and the Wetlands Regulations authorizing the construction of a proposed structure in a protected wetlands area, the Department is not called on to assess whether the proposed structure is sound from an engineering perspective. Instead, the Department determines whether the proposed structure will be detrimental to protected wetlands areas and can be authorized with conditions to minimize wetlands impacts. For the reasons explained in detail in this decision, I

have determined that the Applicants' proposed Project can be authorized under the SOC and the Wetlands Regulations.¹⁴

7. Compliance with the guidance for barrier beaches.

Mr. Golledge testified for the Petitioners that the Department's "Guidelines for Barrier Beach Management in Massachusetts" ("GBBMM"), "Small Docks and Piers Guide" ("SD&PG"), and "Applying the Massachusetts Coastal Regulations" ("AMCR") impose:

impact minimization requirements and Coastal Bank performance standards [requiring that the] walkway design needs to 1) be reduced in width to the minimum necessary to access Cape Cod Bay, 2) the landings and benches eliminated 4, 3) portions of the walkway located above the vegetated Coastal Bank be, at a minimum, 2 feet above the Coastal Bank (guidance references 1:1 ratio of width of walkway to elevation above bank, e.g. 3 foot wide walkway located 3 feet above vegetated bank), 4) eliminate risers on the walkway, 5) where the foot path meets the proposed walkway, contours should be modified to ensure that no concentrated flow or runoff further gullies and erodes the Coastal Bank, thus protecting the banks stability.

Golledge PFT, ¶¶ 10, 13. Specifically, Mr. Golledge cites to GBBMM, Appendix I, p. 217; SD&PG, p. 12 Matrix, p. 13 Matrix, and pp. 18-21; and AMCR, Coastal Bank §§ 2.27-2.32, Land Subject to Coastal Storm Flowage §§ 2.37-2.42, and Coastal Bank §§ 3.41, 3.42, 3.51, 3.52-3.55, 4.43, and 4.44. I have reviewed these sections as part of my analysis.

The Department's guidance documents do not supplant the Wetlands Regulations. Hearing, 1:25; see Smith v. Winter Place, LLC, 447 Mass. 363, 368 (2006); Dahill v. Police Dep't of Boston, 434 Mass. 233, 239 (2001); Matter of Roofblok Limited, OADR Docket No. 2006-047 and 048, Final Decision on Reconsideration (Jul. 22, 2010), 2010 MA ENV LEXIS

¹⁴ While I make no finding here regarding whether the Applicants' proposed Project complies with the Massachusetts Building Code, the Applicants should be mindful of General Condition No. 3 that appears in every SOC issued by the Department authorizing proposed work in a protected wetlands area. General Condition No. 3 provides that the SOC "does not relieve the [project proponent] . . . of *the necessity* of complying with all other applicable, federal, state, or *local statutes, ordinances, bylaws, or regulations* ." (emphasis supplied).

257, *14. They are intended to guide the public on how to meet performance standards under the Wetlands Regulations for proposed work in protected wetlands areas. Hearing, 1:25. That said, guidelines promulgated by the Department are granted substantial deference, as they constitute the Department's interpretation of the Wetlands Regulations. See Smith v. Winter Place, LLC, 447 Mass. 363, 368 (2006); Dahill v. Police Dep't of Boston, 434 Mass. 233, 239 (2001); Matter of Roofblok Limited, OADR Docket No. 2006-047 and 048, Final Decision on Reconsideration (Jul. 22, 2010), 2010 MA ENV LEXIS 257, *14.

I agree with the Applicants and the Department that some of the guidance documents the Petitioners cited in opposition to the proposed Projects are not directly applicable. GBBMM deals with barrier beaches, which this area is not.¹⁵ This is not a case involving a small dock or pier, which is addressed in SD&PG. That said, these documents are illustrative of how to approach projects such as the Applicants' proposed Project, and provide useful direction. In applying the guidance to the Applicants' proposed Project, it is apparent that the Department applied the guidance most pertinent to the proposed Project in issuing the SOC.

The GBBMM guidance provides that "Boardwalks and walkways should be elevated a minimum of 2 feet from grade with spacing in-between the planking sufficient to allow the passage of sunlight." GBBMM, Appendix I, p. 217. Here, along almost the entire length of the Stairway (except along the revetment where vegetation is less of a concern), it is elevated two feet above the ground. Site Plan; AMCR, Coastal Bank, p. 3-51.

The SD&PG guidance provides that "Pilings should normally be installed by pile driving or auguring." SD&PG, p. 20. Special condition 5 of the SOC requires that "the construction of

¹⁵ A "barrier beach" is "a narrow strip of beach and dunes separated from the mainland by a marsh, bay, river, or any other water body." GBBMM, p. 11.

the stairway, including the installation of pilings, in and over the Coastal Bank shall be completed using hand tools." SOC, p. 13. This meets that guidance.

The SD&PG states that seasonal ramps should be "stored at a suitable upland location." SD&PG, p. 21. Special condition 7 of the SOC explicitly requires that the removable aluminum stairs "be stored in an upland location." SOC, p. 13.

The AMCR guidance states that elevated stairways, such as the one proposed here by the Applicants, are "preferred to at-grade pathways on a coastal bank for pedestrian traffic because they typically minimize the trampling of vegetation, reduce the erosion of the bank sediments, and maintain one general location for access." AMCR, Coastal Bank, p. 3-51. The existing walkway illustrates the potential for damage to the vegetation, as it has contributed to the observed gullying. Perry, ¶ 5, Bullet 1. The Project here is therefore a stairway in accordance with the AMCR guidance.

The AMCR guidance provides that stairways should not "impact the growth of stabilizing vegetation" and should also maintain stabilizing vegetation. AMCR, Coastal Bank, pp. 3-51, 3-53. Special condition 2 of the SOC comports with the AMCR guidance because it promotes the growth of vegetation under the Stairway as discussed above. SOC, p. 13.

The AMCR guidance further provides that stairways should be "constructed no wider than necessary." AMCR, Coastal Bank, p. 3-51. As discussed above, the width of the stairway is adequate to meet the Applicants' needs.

The AMCR guidance states that stairways should be "designed without risers in the stairs to reduce shading." AMCR, Coastal Bank, p. 3-51. The proposed Project comports with the AMCR guidance because the Site Plan for the proposed Project indicates that the proposed stairs do not have risers. Site Plan.

The AMCR guidance provides that a Department SOC authorizing a proposed stairway should include and implement monitoring and maintenance activities, AMCR, Coastal Bank, p. 3-52; AMCR, p. 4-44, and the stairway should be "monitored for adverse effects." AMCR, Coastal Bank, p. 3-51. As discussed above on page 26, the Applicants have agreed to implement a monitoring program.

The AMCR guidance next provides that a Department SOC authorizing a proposed stairway should also consider the "types of activities that are associated with the site preparation, such as removing vegetation, demolition, filling, grading, and compacting soils" and the type of construction activities to be undertaken on the site. AMCR, Coastal Bank, p. 3-51 – 3-52. The SOC approving the Applicants' proposed Project includes and implements sensible restrictions on the construction including limiting heavy equipment and mandating the use of hand tools. SOC, p. 13.

The AMCR guidance states that the stairway should consider the reflection of wave energy in the Velocity Zone. AMCR, Coastal Bank, p. 4-43. I addressed this issue above on page 26 above where I indicated that the Applicants' proposed Project properly considered the Velocity Zone. In sum, the provisions of the Department's guidance documents discussed above provide further support for the Department's SOC approving the Applicants' proposed Project.

8. Alternatives analysis.

As previously noted above, the EEA Secretary stated in the August 19, 2016, MEPA Certificate that the Applicants "should present alternatives to MassDEP for evaluation and consideration during the SOC review process." The Petitioners argue that the Applicants failed to present any alternatives during the SOC permitting process before the Department and, as such, the SOC improperly approved the Applicants' proposed Project. Petitioners Post-Hearing Brief, pp. 13-14. The Department disputes the Petitioners' claim, contending that the modified plans

that the Applicants submitted in support of the SOC constituted the necessary alternative and, in any event, the MEPA Certificate did not create legally binding obligations. Department Post-Hearing Brief, p. 6. The Department also argues that it "complied with this requirement by approving a smaller project in the SOC than existed in the local Order of Conditions, resulting in few wetlands impacts. Hearing, 1:48:15. This revised plan, approved by the SOC, complied with the MEPA Certificate requirement that an alternative minimizing impacts to wetland resource areas be considered. [Hearing,] 1:48:25." Department Post-Hearing Brief, pp. 6-7. Additionally, the Department considered and required modifications to the proposed Project that ensured that the Project imposed no adverse effects on the Coastal Bank. Hearing, 1:48. I find that the Department and the Applicants adequately considered alternatives.

VI. The Petitioners' Response to the TRFD.

On March 19, 2024, the Petitioners submitted their objections to the TRFD. The Petitioners' objections argue in the main that the Applicants' construction of the stairway may exceed their easement rights. Objections, p. 2. The Petitioners argue that this is in part because the Applicants do not have the approval of all easement holders, including the Petitioners. *Id.* at p. 4. Thus, the Petitioners conclude, the SOC approving the proposed Project should be vacated or the matter should be stayed pending the outcome of the latest litigation among the Petitioners and the Applicants. Objection, p. 13. They also argue that the Applicants failed to provide a substantive alternatives analysis, *id.* at p. 8, and that the SOC fails to include conditions to respond to impacts to the Coastal Bank. *Id.* at p. 9. I take the last two points first.

A. The alternatives analysis was sufficient.

As discussed above starting on page 32, the Department adequately considered alternatives. The Petitioners object that the proposed Project should not include any benches because the Appeals Court has held that the purpose of the ROW is solely for "direct access to

the ocean" and that the presence of benches on the stairway will inevitably tempt the Pathways members to spend more time on the Stairway than is absolutely necessary to access the beach. Objections, p. 8. While stated in the language of alternatives analysis, the Petitioners are really arguing that the Project as proposed will overburden the Applicants' easement. As a question of property rights, I cannot make this determination. Tindley, 10 Mass. App. Ct. at 626. I therefore see no basis to change my recommendation of the TRFD that the Department's Commissioner issue a Final Decision in the appeal affirming the SOC with the agreed modifications set forth on page 22 above and removing the bottom landing, and directing the Department to prepare a Final Order of Conditions consistent with the Final Decision for the Commissioner's signature.

B. The Applicants already agreed to a maintenance and monitoring program.

The Petitioners' next objection is that a Final Order "should include conditions to respond to impacts to the Coastal Bank or to the revetment from the Project." Objections, p. 11. They ask to include conditions such as annual monitoring reports with biannual photographs, a time limit to request a Certificate of Compliance, the imposition of penalties in the event of noncompliance with the reporting conditions, and perpetual conditions to be put in a Certificate of Compliance. Id. at pp. 11-12.

The Petitioners did not request these specific conditions in their pre- or post-hearing briefing, in their expert testimony, or at the Hearing. Neither Mr. Golledge nor Mr. Perry explain why those specific conditions are required above and beyond the maintenance and monitoring program that the Applicants agreed to as discussed on page 22. Indeed, the Petitioners' papers requested a "maintenance and monitoring program" and the Applicants agreed. Moreover, I agree with the Department that "the proposed conditions [are] unnecessary because the SOC (along with the [TRFD]) already contains the conditions required to protect Coastal Bank."

Department Response, p. 7. The Petitioners cannot at this late stage move the goalposts, and I decline to alter my recommendations in the TRFD.

C. The Petitioners' arguments regarding the ownership of the ROW do not justify altering my recommendations to the Commissioner.

The Petitioners argue that the Applicants do not have an interest in the ROW and that they lack permission to build the Stairway from the Petitioners—the allegedly true owners of the fee to the ROW. The Applicants, unsurprisingly, strenuously disagree, pointing to the Appeal Court's conclusion that "As the incorporated association representing inland owners who hold easements allowing them to use Hickey Way for access, Pathways is a proper party to seek approval to build a walkway in order that such access rights can be used." Applicants Response to Petitioners Objections, p. 1 (quoting Hickey, 93 Mass. App. Ct. at 659). The Petitioners concede that I lack the authority to adjudicate property disputes, see Objections, p. 6; Tindley, 10 Mass. App. Ct. at 626, but claim that the SOC should nevertheless be vacated because the Applicants lack even a colorable claim of title. Objections, p. 6. Because the Applicants demonstrated a colorable claim of title at the time of the Adjudicatory Hearing, I disagree with the Applicants' objection.

In support of their Objections to the TRFD, the Petitioners have attempted to present new evidence, specifically, the sworn Affidavit of Edward A. Rainen. Attorney Rainen is a Massachusetts attorney and Land Court Examiner. Aff. Rainen, ¶¶ 1, 3 (Mar. 19, 2024). He has served as an expert witness in numerous real estate-related matters throughout the Commonwealth. Id. at ¶ 5. Attorney Rainen was hired by the Petitioners in May 2023 and conducted a title examination of the ROW. Id. at ¶ 8. The conclusion of his review is "that Pathways Associates [sic], Inc., does not have any ownership in" the ROW. Id. at ¶ 11. In September 2023, James R. Julian, whom Attorney Rainen has concluded was the actual owner of

the ROW,¹⁶ conveyed his interest to Attorney Rainen as Trustee of the X-Way Trust, which has the Petitioners, in their capacity as trustees of the 104 Shore Drive Realty Trust, as its beneficiaries. Id. at ¶ 11. The net result, Attorney Rainen and the Petitioners allege, is that the Applicants do not have any interest in the ROW, and that the X-Way Trust owns the fee interest in the ROW.

In order to register the deed to Attorney Rainen as trustee and repair what the Petitioners contend is an incorrect chain of title, Attorney Rainen testified that he "filed this month", meaning March 2024, "with the Land Court as Subsequent Complaint number 24 SBQ 000647 03 001."¹⁷ Id. at ¶ 10. The Petitioners state in their Objections that in light of the "direction from the Land Court in [the WSOA Case] in April 2023, Petitioners anticipate a decision in the *pending* Land Court case concerning ownership of the way in question in the normal course." Objections, p. 5 (emphasis added).

Both Attorney Rainen's affidavit and the Petitioners' Objections to TRFD suggest that the Subsequent Complaint was currently pending in Land Court prior to when the Petitioners' Objections to the TRFD were filed on March 19, 2024. However, in my initial review of Mr. Rainen's affidavit, I noted that the copy of the Subsequent Complaint provided with the Petitioners' Objections was undated. In my review of the online Land Court docket on March 20,

¹⁶ Attorney Rainen's argument, in brief, is as follows: the developers of the lots at issue in Hickey, 472 Mass. at 748, did not convey their fee interest in the ROW to the owners of the abutting parcels. The developer's descendants conveyed their interest in the remaining developable land (including fee to the ROW) to the Nobscusset Realty Trust in 1951. That trust then conveyed its interest in fee to the ROW to Julian and Donald G. Cattanach in October 1982. However, the Barnstable County Registry erroneously concluded that the ROW had been previously conveyed to the owners of the abutting parcels, and therefore excluded it from the grantees' certificate of title. Cattanach conveyed his fee interest in the ROW to Julian in July 1993, and Julian conveyed his entire interest in fee to the ROW to Attorney Rainen by deed on September 29, 2023. See Objections Ex. 2, Addendum to Subsequent Petition to Amend Certificate of Title.

¹⁷ The purpose of a Subsequent Complaint (also called an S-petition) is to amend an existing certificate of title. Brown v. Kalicki, 90 Mass. App. Ct. 534, 542 (2016) (citing Arno v. Commonwealth, 457 Mass. 434, 441 (2010)).

2024, I was unable to find the Subsequent Complaint with the docket number indicated.

Accordingly, I issued an order on March 20, 2024 stating:

Mr. Rainen testifies [in his Affidavit] that the Subsequent Complaint was “filed this month.” Rainen Affidavit, ¶ 10. However, the Petition to Amend Certificate of Title and addendum are undated, and I am unable to locate the Subsequent Complaint on masscourts.org. Please provide evidence that the case was filed, the date that it was filed, and the names of all parties to the case by the end of business today.

In response to my March 20 Order, the Petitioners filed with OADR on the same day a copy of the complaint and docket showing that the Subsequent Complaint was filed March 20, 2024, *after* the Petitioners filed their Objections to the TRFD.

If the Subsequent Complaint was in fact “pending” prior to the Petitioners filing of their Objections to the TRFD that might have militated in favor of a stay of proceedings pending the outcome of the Land Court litigation. However, there is a substantive basis for rejecting the Petitioners’ objection to the TRFD grounded in the Subsequent Complaint: the Petitioners filed the affidavit of Attorney Rainen and raised an entirely new legal theory (that the Applicants lack even a colorable claim of title) *after the issuance of the TRFD*. They then filed the Subsequent Complaint *after* filing their Objections to the TRFD. This is despite Attorney Rainen having been involved in the dispute since at least May 2023 and having been conveyed the purported fee interest in September 2023—nearly six months before I issued the TRFD. See Aff. Rainen, ¶¶ 8, 12. No explanation is given why there was such a significant delay between the conveyance of Julian's interest in September 2023 and the filing of Subsequent Complaint.

In sum, the Petitioners have offered new evidence despite not requesting to reopen the evidence. See 310 CMR 1.01(14)(e). The purpose of a tentative recommended final decision is to give the parties the opportunity to point out where in the record the new Presiding Officer may have missed pertinent information. See 310 CMR 1.01(14)(a). It is not to expand the record and

relitigate the matter. Given that the evidence was closed in 2021, I do not consider Attorney Rainen's testimony in this RFD except as discussed here.

This matter has been pending for over seven years and through multiple stays. At the end of the day, the Department's mission is to "protect and enhance the Commonwealth's natural resources... to provide for the health, safety, and welfare of all people." Massachusetts Department of Environmental Protection, <https://www.mass.gov/orgs/massachusetts-department-of-environmental-protection> (last accessed Mar. 22, 2024). It is not mere materiel in the Petitioners and the Applicants' protracted legal fracas; appeals to OADR are not to be arbitrarily stayed and restarted based on whom the parties believe to have the upper hand at any given time. Cf. 310 CMR 1.01(5)(a)3. (stays may be entered to avoid unnecessary expenditure of Department resources or "for other good cause"). The Department is correct that another stay would be "an inordinate waste of [its] administrative resources." Department Response, p. 4.

Moving this matter to a conclusion will not resolve who has rights to the ROW and the scope of those rights. That dispute seems far from over. But that is not a reason to forego the Department's Commissioner issuing a Final Decision in this appeal where the Applicants have demonstrated a colorable claim of title when the evidence was open, as found in the Pathways Easement Case. For all of the reasons given in this section, I reject the Petitioners' Objections to the TRFD.

VII. Conclusion.

For the foregoing reasons, I recommend that the Department's Commissioner issue a Final Decision in this matter affirming the SOC with the agreed modifications set forth on page

22 above and removing the bottom landing, and directing the Department to prepare a Final Order of Conditions consistent with the Final Decision for the Commissioner's signature.



Date: April 10, 2024

Patrick M. Groulx
Presiding Officer

NOTICE OF RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to MassDEP's Commissioner for her 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 may file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party may communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

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