COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS

DEPARTMENT OF ENVIRONMENTAL PROTECTION

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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

December 30, 2025

In the Matter of Massachusetts Electric Company

OADR Docket Number: WET-2024-027
DEP File No. 230-0346
Monterey, Massachusetts

RECOMMENDED FINAL DECISION

Michael Vatis ("Petitioner") has filed this appeal with the Office of Appeals and Dispute Resolution ("OADR")[1] challenging the issuance by the Western Regional Office of the Massachusetts Department of Environmental Protection ("Department") of a Superseding Order of Conditions ("SOC") dated September 13, 2024, pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 ("MWPA"), and the Wetlands Regulations, 310 CMR 10.00 *et seq.* The SOC approves the extension of an electric distribution line involving the installation of wooden utility poles and associated anchors, tree removal, and selective tree trimming ("Proposed Project"). The electric line would power a home built by Jennifer Johnson and Martin Mraz ("Intervenors").[2] The SOC reverses an Order of Conditions ("OOC") issued by the Monterey Conservation Commission ("Commission") denying the Proposed Project. The Petitioner seeks to vacate the SOC.

[1] OADR is an independent, quasi-judicial office in the Department which is responsible for advising its Commissioner in resolving all administrative appeals of Department Permit Decisions, Environmental Jurisdiction Determinations, and Enforcement Orders.

[2] The Intervenors' Motion to Intervene pursuant to 310 CMR 1.01(7) was allowed on November 26, 2024.

In this appeal, the Petitioner, as the party challenging the SOC, has the burden of proof, specifically proving at an evidentiary adjudicatory hearing ("Hearing") through wetlands expert witnesses that the Department erred in issuing the SOC. In that regard, the Petitioner offered Pre-Filed Testimony ("PFT") from himself and Karen Allen. In response, the Department, Applicant, and Intervenors filed a Joint Motion to Strike much of the PFT of both the Petitioner and Ms. Allen. I granted most of the Joint Motion to Strike. The Department then filed a Motion to Dismiss the appeal for Failure to Sustain a Case pursuant to 310 CMR 1.01(11)(e), also known as a Motion for Directed Decision. <u>See</u> <u>In the Matter of King's Grant Water Company, Inc.</u>, OADR Docket Nos. 2020-023, 2020-026, 2020-035, 2020-038, Recommended Final Decision (January 8, 2024), 2024 WL 1516283, *5, adopted as Final Decision (February 13, 2024), 2024 WL 1516280. I have reviewed the remaining PFT and those documents produced by the Department at the outset of the appeal and determined that the Petitioner has failed to carry his burden of going forward. 310 CMR 10.03(2). I therefore recommend that the Department's Commissioner issue a Final Decision dismissing this appeal and affirming the SOC.

I. <u>Issues for Adjudication.</u>

On December 2, 2024, I held a Pre-Hearing Conference with the parties. While the Parties did not agree on how to formulate the issues, the Parties agreed that the Petitioner's statement of the issues, in substance, matched that of the Department and the Applicant. I therefore adopted the issues as set forth by the Department and the Applicant. Following the Pre-Hearing Conference, issued a Pre-Hearing Conference Report and Order setting forth the Issues for Adjudication as follows:

1. Whether the Petitioner has standing to bring his claims.
2. Did the Department appropriately determine that the project qualifies as a Limited Project under 310 CMR 10.53(3)(d).

3. Did the Department appropriately exercise its discretion pursuant to 310 CMR 10.53(3)(d) by not requiring the Applicant to utilize an alternative route.

4. If the proposed Project does not qualify as a limited project under 310 CMR 10.53(3)(d), does the Project, as conditioned by the Superseding Order, meet the performance standards for:

a. Buffer Zone for Bank (inland), 310 CMR 10.54(4);

b. Buffer Zone for Bordering Vegetated Wetland, 310 CMR 10.55(4); and

c. Riverfront Area, 310 CMR 10.58.

II. Witnesses.

As the Department has brought a Motion for Directed Decision, I consider only the PFT offered by the Petitioner. See 310 CMR 1.01(11)(e).

A. Michael Vatis.

Mr. Vatis is the Petitioner. He owns a property that directly abuts the site of the Proposed Project on the western end of Cronk Road. Vatis PFT, p. 1.[3] He testifies to the background of the Proposed Project, id., and the proceedings before the Commission. Id. at p. 8.

B. Karen Allen.

Ms. Allen is a former owner of a separate property that abuts the site of the Proposed Project. Allen PFT, p. 1. She owned that property until December 2024. Id. She testifies to a number of matters, including the history of the Proposed Project site, the flora and fauna that populate the Proposed Project site, and conversations with agents of the Applicant. Id. at pp. 1-2, 4.

[3] Citations to Pre-Filed Testimony are given as "[Witness] PFT, ¶ [paragraph]". Citations to the Pre-Hearing Memorandum are given as "[Party] Memo., p. [page number]".

III. Facts.

The Intervenors' home is located at 198 Sandisfield Road, Monterey, Massachusetts ("Property"). Appeal Notice, p. 1. The purpose of the Proposed Project is to provide the Property with electric service, which it currently lacks.[4] NOI, p. 25 (produced by the Department at the outset of the appeal).

The Proposed Project will occur within (1) Riverfront Area to Rawson Brook, (2) Bank to Rawson Brook, and (3) Buffer Zone to Bordering Vegetated Wetland ("BVW"). NOI, p. 3. The Proposed Project will involve the installation of 10 new wooden utility poles, seven new anchors, and associated overhead wires. Id. at p. 25. Seven of the poles will be placed in the Buffer Zone and/or Riverfront Area. Letter from LEC Environmental Consultants, Inc., to Mary Grover, p. 7 (July 12, 2024) ("RFI Response 2") (produced by the Department at the outset of the appeal). The Applicant also proposes to remove 23 trees, 9 of which are within the Buffer Zone and/or Riverfront Area. NOI, p. 25. The Proposed Project includes mitigation measures including erosion and sedimentation control to avoid runoff into the BVW and Rawson Brook. Id.

The NOI explains that the Applicant has sought to minimize the numbers of poles in the Buffer Zone and Riverfront Area. Those poles "within Riverfront Area and have been spaced as far from the brook as feasible . . . [and] pole spacing has been maximized to the extent practicable." Id. at p. 26. Upon completion of the Proposed Project, "all contours will be restored and disturbed areas will be vegetatively restored (i.e., seeded)." Id. at p. 27. The estimated cost of the Proposed Project is $87,000. RFI Response 2.

As part of its NOI, the Applicant evaluated five alternatives for the Proposed Project. Letter from LEC Environmental Consultants, Inc., to Mary Grover, pp. 4-6 (April 4, 2024) ("RFI

[4] The Petitioner noted that because it "is a public utility, [the Petitioner] is obligated to connect any customer within its territory to electricity." Letter from LEC Environmental Consultants, Inc., to Monterey Conservation Commission, p. 1 (December 28, 2023) (produced by the Department at the outset of the appeal).

Response 1") (produced by the Department at the outset of the appeal). These alternatives include the following:

1. The "No Build" option (meaning electric service is not provided to the Property). RFI Response 1, p. 5. The Applicant rejected this alternative because this would leave the Property without electricity. Id.

2. Building overhead wires along the north and west of Sandisfield Road. RFI Response 1, p. 5. The Applicant rejected this alternative because it would increase the number of poles required and increase the extent of tree trimming in Riverfront Area. Id. The cost of this alternative is estimated to be $174,000. RFI Response 2, p. 7.

3. Building overhead wires along the east and south sides of Cronk Road and Sandisfield Road. RFI Response 1, p. 5. The Applicant rejected this alternative because it would alter more Riverfront Area. Id. The cost of this alternative is estimated to be $142,000. RFI Response 2, p. 7.

4. Burying wires along Cronk Road and Sandisfield Road. RFI Response 1, p. 5. The Applicant rejected this alternative because it would alter significantly more Riverfront Area. Id. at pp. 5-6. The cost of this alternative is estimated to be $820,000. RFI Response 2, p. 7.

5. Building overhead wires along Sandisfield Road to the south and east. RFI Response 1, p. 6. The Applicant rejected this alternative because it lacks the property rights to do so, as it is outside of the Applicant's service territory.[5] Id. The cost of this alternative is estimated to be $136,940. RFI Response 2, p. 7.

[5] That area is instead serviced by Eversource.

IV. Procedural History.

A. Prior proceedings.

On August 31, 2023, the Applicant filed a Notice of Intent ("NOI") with the Commission. See NOI, p. 1; SOC Request (February 22, 2024) ("SOC Request"), p. 1 (produced by the Department at the outset of the appeal). On February 8, 2024, the Commission issued the OOC denying the Proposed Project under the MWPA and the Wetlands Regulations. OOC, p. 9 (produced by the Department at the outset of the appeal).

On February 22, 2024, the Applicant filed an SOC Request with the Department seeking the issuance of an SOC. SOC Request, p. 1. Following two site visits, the Department issued an SOC allowing the Proposed Project on September 13, 2024. SOC, p. 1 (produced by the Department at the outset of the appeal). The SOC found, in part, that the Proposed Project is a Limited Project under 310 CMR 10.53(3)(d).[6] The Petitioner timely appealed the SOC to OADR.

B. The Joint Motion to Strike.

In accordance with the Amended Pre-Hearing Conference Report and Order that I issued on December 2, 2024, the Petitioner filed Mr. Vatis' PFT and Ms. Allen's PFT on January 3, 2025.[7] On January 22, 2025, the Applicant, the Department, and the Intervenors filed a Joint Motion to Strike portions of Mr. Vatis's and Ms. Allen's PFT.[8]

The Joint Motion to Strike sought, in part, to strike hearsay statements in the PFT. On January 22, 2024, I issued an order to the Parties informing the Petitioner that in responding to the Motion to Strike, the Petitioner was required to point to evidence in the record of "indicia of

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[6] A "Limited Project" is defined on page 8 below.

[7] The Petitioner had disclosed in the Parties' Joint Status Report of November 8, 2024, that he intended to submit PFT from a wetland scientist, although he ultimately declined to do so.

[8] "A party may move to strike, or the Presiding Officer may strike from a pleading any insufficient allegation or defense or any redundant, irrelevant, immaterial, impertinent or scandalous matter; and from any testimony material which is unduly repetitious, irrelevant or otherwise inadmissible pursuant to 310 CMR 1.01(13)(h)." 310 CMR 1.01(11)(c).

reliability" supporting the hearsay statements. See Covell v. Dep't of Soc. Servs., 439 Mass. 766, 785-86 (2003) (hearsay admissible in administrative agency hearing where it has sufficient indicia of reliability by being detailed and consistent and there is an absence of motive or reason to make false allegations).

The Petitioner filed an Opposition to the Motion to Strike on February 7, 2025. I reviewed the Motion to Strike and the Petitioner's Opposition to the Motion to Strike and issued an Order on the Motion to Strike on February 10, 2025, striking significant portions of the PFT offered by the Petitioner and Ms. Allen on the basis of irrelevance, impertinence, the improper inclusion of settlement discussions, offering opinion testimony without a proper foundation, and hearsay unsupported by indicia of reliability. Addendum 1 (page 23) lists the portions of Mr. Vatis's PFT that remains in the record after the Order on the Motion to Strike. Addendum 2 (page 24) lists the portions of Ms. Allen's PFT that remains in the record after the Order on the Motion to Strike.

C. The Motion for Directed Decision.

On February 18, 2025, the Department filed a Motion to Dismiss the appeal for Failure to Sustain Case ("Motion for Directed Decision"). The Motion for Directed Decision seeks directed decision on Issues for Adjudication 2, 3, and 4, and argues that, as much of the Petitioner's PFT was stricken, the Petitioner is unable to meet his burden of going forward. The Applicant filed a Response to the Motion for Directed Decision the same day stating that it "agrees with the Department's position and supports the dismissal of this matter for the reasons set forth in the Department's Motion." The Intervenors have not filed a Response supporting or opposing the Motion for Directed Decision. The Petitioner filed an Opposition to the Motion for Directed Decision on March 4, 2025. The Petitioner makes several arguments in support of Issues for

Adjudication 2 and 3, discussed below starting at page 13, and asks to withdraw his appeal on Issue for Adjudication 4.

V. The Applicable Standards.

A. The standard for dismissal for failure to sustain a case.

Under 310 CMR 1.01(11)(e),

> Upon the petitioner's submission of prefiled testimony, or at the close of its live direct testimony if not prefiled, any opposing party may move for the dismissal of any or all of the petitioner's claims, on the ground that upon the facts or the law the petitioner has failed to sustain its case; or the Presiding Officer may, on the Presiding Officer's own initiative, order the petitioner to show cause why such a dismissal of claims should not issue.

As recent Final Decisions of the Department have stated:

> "Dismissal [of an appeal pursuant to 310 CMR 1.01(11)(e)] for failure to sustain a case, also known as a directed decision, is appropriate when a party's direct case - generally, the testimony and exhibits comprising its prefiled direct testimony - presents no evidence from a credible source in support of its position on the identified issues." In the Matter of Thomas Vacirca, Jr., OADR Docket No. WET-2016-017, Recommended Final Decision (April 11, 2017), [2017 WL 1656467], adopted as Final Decision, (April 18, 2017), [2017 WL 1656463]. In essence, a directed decision should be entered against the petitioner in the appeal when the petitioner does not have a reasonable likelihood of prevailing on its claims in the appeal because the petitioner's evidentiary submissions are deficient as a matter of law. Id.

In the Matter of James Valis, OADR Docket No. 2021-015, Recommended Final Decision (July 7, 2022), 2022 WL 3147139, *2, adopted as Final Decision (July 25, 2022), 2022 WL 3147141.

A Motion for Directed Decision is akin to a motion for directed verdict under Mass. R. Civ. P. 50(a). Accordingly, when assessing a motion for directed verdict, I review the evidence in the light most favorable to the non-movant. King's Grant, 2024 WL 1516283, *15, 2024 WL 1516280; Enrich v. Windmere Corp., 416 Mass. 83, 84-85 (1993); see Poirier v. Plymouth, 374 Mass. 206, 212 (1978); Chase v. Roy, 363 Mass. 402, 404 (1973).

B. <u>The burden of going forward.</u>

As the party challenging the Department's issuance of the SOC, the Petitioner has the burden of proof in this *de novo* appeal to produce credible evidence from a competent source to support his positions. In the Matter of David A. Bosworth Co., Inc., OADR Docket No. WET-2015-015, Recommended Final Decision (February 17, 2016), 2016 WL 1235261, *8, adopted as Final Decision (March 14, 2016), 2016 WL 1235263; 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. This is referred to as the "burden of going forward." See In the Matter of Diamond Dev. Realty Trust, OADR Docket No. WET-2018-016, Recommended Final Decision (April 2, 2019), 2019 WL 4735457, *5, adopted as Final Decision (April 8, 2019), 2019 WL 4735456; 310 CMR 10.03(2). Specifically, the Petitioner is 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.ii.; see also 310 CMR 10.03(2). "A 'competent source' is a witness who has sufficient expertise to render testimony on the technical issues on appeal." In the Matter of Pittsfield Airport Comm'n, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 WL 3427461, *11, adopted as Final Decision (August 19, 2010), 2010 WL 3427460. 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. In the Matter of Carl Carulli, OADR Docket No. DEP-06-071, Recommended Final Decision (August 10, 2006), 2006 WL 4211673, *4-*7, adopted as Final Decision (October 25, 2006) (dismissing claims regarding flood control, wetlands replication, and vernal pools for failure to provide supporting evidence from competent source); In the Matter of Indian Summer

Trust, Docket No. 2001-142, Recommended Final Decision (May 4, 2004), 2004 WL 3973695, *2 (insufficient evidence from competent source showing that interests under MWPA were not protected), adopted as Final Decision (June 23, 2004).

C. The Massachusetts Wetlands Protection Act.

1. The MWPA generally.

The MWPA's statutory mandate is to protect wetlands areas and to regulate activities affecting those areas in a manner that promotes the following eight interests: (1) protection of public and private water supply; (2) protection of ground water supply; (3) flood control; (4) storm damage prevention; (5) prevention of pollution; (6) protection of land containing shellfish; (7) protection of fisheries; and (8) protection of wildlife habitat. G.L. c. 131, § 40; 310 CMR 10.01(2); see In the Matter of Kristen Kazokas, OADR Docket No. WET-2017-022, Recommended Final Decision (August 29, 2018), 2018 WL 9847851, *3, adopted as Final Decision (September 18, 2019), 2019 WL 5209254, quoting Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 224 n. 6 (2010). The Resource Areas at issue in this matter are BVW, Bank, and Riverfront Area. BVWs "are areas where ground water discharges to the surface and where, under some circumstances, surface water discharges to the ground water." 310 CMR 10.55(1). A Bank is "the portion of the land surface which normally abuts and confines a water body." 310 CMR 10.54(2)(a). "Riverfront Area is the area of land between a river's mean annual high water line and a parallel line measured horizontally." 310 CMR 10.58(2)(a). The Proposed Project will take place largely in the Buffer Zone to BVW and Bank, which is the area within 100 feet of the BVW.[9] 310 CMR 10.02(2)(b).

[9] A project in the Buffer Zone (other than certain "minor activities" defined in 310 CMR 10.02(2)(b)) is subject to regulation under the MWPA and requires the filing of a Notice of Intent. 310 CMR 10.02(2)(b); In the Matter of Robert J. Cote, OADR Docket No. WET-2017-014, Recommended Final Decision (August 9, 2018), 2018 WL 6040705, *3, adopted as Final Decision (August 28, 2018), 2018 WL 6040704. Activities in the Buffer Zone do not have to meet the performance standard of the Resource Area. Kazokas, 2018 WL 9847851 at *5. If the Department determines that the proposed activity in the Buffer Zone will alter the Area Subject to Protection, "the applicant has a lighter burden and need demonstrate only that the work 'will contribute to the protection of the interests identified

2. Limited Projects, 310 CMR 10.53.

310 CMR 10.53(3) allows a conservation commission (or the Department in the case of an SOC Request) to allow certain, narrowly defined "Limited Projects" that are exempt from the performance standards of 310 CMR 10.54 through 10.58 and 10.60. Most relevant here, 310 CMR 10.53(3)(d) allows for the:

> construction . . . of . . . overhead public utilities such as electrical distribution or transmission lines . . . in accordance with the following general conditions and any additional conditions deemed necessary by the issuing authority:
>
> 1. the issuing authority may require a reasonable alternative route with fewer adverse effects for a local distribution or connecting line not reviewed by the Energy Facilities Siting Council;
>
> 2. best available measures shall be used to minimize adverse effects during construction;
>
> 3. the surface vegetation and contours of the area shall be substantially restored; and
>
> 4. all sewer lines shall be constructed to minimize inflow and leakage.

When reviewing an SOC Request, the Department has wide discretion whether to allow a project as a Limited Project:

> In determining whether to exercise its discretion to approve the limited projects listed in 310 CMR 10.53(3), the Issuing Authority shall consider the following factors: the magnitude of the alteration and the significance of the project site to the interests identified in M.G.L. c. 131, § 40, the availability of reasonable alternatives to the proposed activity, the extent to which adverse impacts are minimized, and the extent to which mitigation measures, including replication or restoration, are provided to contribute to the protection of the interests identified in M.G.L. c. 131, § 40.

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in [the act]' as determined by the issuing authority." Id.; New England Wind, 457 Mass. at 225, citing 310 CMR 10.02(2)(b), 310 CMR 10.03(1)(a)(3).

310 CMR 10.53(3). In the Matter of Town of Amesbury, OADR Docket No. WET-2009-051, Recommended Final Decision (March 18, 2010), 2010 WL 1782308, *8, adopted as Final Decision (April 1, 2010), 2010 WL 1782307, explains that:

> [t]he limited project provision requires only that MassDEP "consider" the identified factors. Indeed, "DEP must consider these factors, but the regulation does not mandate a particular outcome. 'Consider' is not defined, but, given its ordinary meaning, means that the factors are to be thought about and taken into account." In the Matter of Town of Rockport Department of Public Works, Docket No. 2003-018, 2007 WL 2262816, Remand Decision (July 17, 2007) (MassDEP "considered" the criteria when it was "aware of alternatives explored by the town, it identified the extent of wetlands alteration, and it reviewed the proposed mitigation, both the replication of bordering vegetated wetlands and the creation and protection of vernal pool habitat").

"Limited project review is, in the words of the regulation, an exercise in discretion." Hobbs Brook Farm Property Co. Ltd. P'ship v. Conservation Comm'n of Lincoln, 65 Mass. App. Ct. 142, 147 (2005). The "limited project provision . . . allows the Department in specified circumstances to waive otherwise applicable performance standards and simply 'impose such conditions as will contribute to the interests identified'" in the MWPA. In the Matter of Hobbs Brook Farm Co., LP, OADR Docket No. 2001-080, Ruling on Motion to Stay (April 29, 2002), 2002 WL 1005098, *2, quoting 310 CMR 10.53(3). "Rather than apply the performance standards as such, the Department ensures that the interests identified in the Act will be protected through the imposition of other appropriate conditions . . . ." In the Matter of David H. Carls and Gary F. Snerson, Trustees, Annex Realty Trust, OADR Docket No. 89-302, Decision on Motion to Dismiss for Lack of Subject Matter Jurisdiction and Scheduling Order (July 16, 1996), 1996 WL 449244, *7.

VI. Analysis.

I turn to the Issues for Adjudication. The Department has not moved for Directed Decision on the first Issue for Adjudication, whether the Petitioner has standing. I therefore assume that he does. I then find that for each of the remaining Issues for Adjudication, the Petitioner has not met his burden of going forward and grant Directed Decision to the Department. I conclude by recommending that the Commissioner issue a Final Decision dismissing the appeal and affirming the SOC.

A. Issue for Adjudication 1: The Department does not challenge whether the Petitioner has proved that he has standing.

The Department's Motion for Directed Decision does not address Issue for Adjudication 1, whether the Petitioner has standing, observing that "whether the Petitioner has sufficiently established standing is meaningless if he has failed to sustain a case substantively." Motion for Directed Decision, p. 3. The Petitioner also does not address this Issue in either his PFT or his Opposition to the Motion for Directed Decision. I therefore do not address it and assume for the purposes of this Recommended Final Decision that the Petitioner has standing to bring his claims.[10]

B. Issue for Adjudication 2: The Petitioner presented no competent evidence that the Department abused its discretion in determining that the Proposed Project qualifies as a Limited Project under 310 CMR 10.53(3)(d).

The Petitioner has the burden of offering competent evidence that the Department abused its discretion in determining that the Proposed Project qualifies as a "Limited Project." In order to do so, the Petitioner must show that the Department failed to identify the magnitude of the Proposed Project, was not aware of any alternatives, or was not aware of proposed mitigation measures. See Rockport DPW, 2007 WL 2262816 at *15.

The Department argues that the Petitioner fails to meet his burden of going forward because he misapplies the definition of a "Limited Project." Motion for Directed Decision, p. 3. In response, the Petitioner makes five arguments regarding Issue for Adjudication 2: (1) the

[10] Because I find for the Department on each of the other Issues for Adjudication, whether the Petitioner has standing is ultimately moot. If I were to find that the Petitioner lacked standing, I would still recommend that the Commissioner issue a Final Decision affirming the SOC, as I do here.

magnitude of the Proposed Project is too great to qualify as a Limited Project because the Proposed Project "requires the removal of a significant number of trees and significant 'trimming' of trees in protected Resource Areas [and] the erection of eight utility poles and transmission lines,"[11] (2) the OOC found that the Proposed Project did not qualify as a Limited Project, (3) impacts to the interests identified in the MWPA cannot be minimized through mitigation measures, (4) "the project will place utility poles treated with hazardous preservative chemicals within and directly adjacent to protected resource areas," and (5) "there are at least two reasonable alternatives to the Applicant's proposed project." Petitioner Memorandum, pp. 3, 6-7. The portions of the Petitioner's PFT that were not stricken and the documents produced by the Department at the outset of the appeal, viewed in the light most favorable to the Petitioner, do not meet the Petitioner's burden of going forward.

1. The Petitioner has not shown that the Department failed to consider the magnitude of the Proposed Project in determining that the Proposed Project qualifies as a Limited Project.

The Petitioner argues that the Department failed to adequately "consider . . . the magnitude of the alteration . . . ." Petitioner Opposition, p. 3; Petitioner Memorandum, p. 7. The Department must merely "th[ink] about and take[] into account" the relevant information. Rockport DPW, 2007 WL 2262816 at *15. The Petitioner has offered no competent evidence that the Department failed to consider the magnitude of the Proposed Project. The Department is not required to undertake any specific actions in "considering" whether a project qualifies as a Limited Project.

The documents that the Department reviewed included information about the magnitude of the Proposed Project. In particular, the NOI includes a description of the Proposed Project and

[11] According to the Petitioner, the number of poles in the Riverfront Area is actually 7, as one of the poles was found to not be in Riverfront Area. RFI Response 2, p. 7.

a brief alternatives analysis. See NOI, p. 26. The magnitude of the Proposed Project is also described in detail in the two letters from the Petitioner responding to the Department's Information Requests. See RFI Response 1; RFI Response 2. The Petitioner has not shown that the Department did not consider this material.

The Petitioner also argues that in order to adequately consider the information in the record, the Department is required to "explain its decision." Petitioner Opposition, p. 4. However, the Department set forth its reasoning in the SOC. See SOC, pp. 1-2, 16-17. That said, nothing in the Wetlands Regulations requires that the Department provide further explanation other than its ultimate decision.[12] The Petitioner has not shown that the Department failed to consider the magnitude of the Proposed Project and in applying its wide discretion. See Hobbs Brook Farm, 65 Mass. App. Ct. at 147 (Limited Project review is an exercise of discretion).

2. The Petitioner has not shown that the Department failed to consider the alternatives to the Proposed Project in determining that the Proposed Project qualifies as a Limited Project.

The Petitioner argues that the Proposed Project is not a Limited Project because there are "at least two reasonable alternatives to the Applicant's proposed project."[13] Petitioner Memorandum, p. 7. The burden is on the Petitioner to demonstrate that the Department was not aware of the existence of the alternatives. See Rockport DPW, 2007 WL 2262816 at *15.

Even taking the evidence in the light most favorable to the Petitioner, the Department was aware of the various alternatives. Two letters from LEC Environmental Consultants, Inc., to the Commission, one dated December 28, 2023, and the other dated January 10, 2024 (both

[12] The Petitioner cites Massachusetts Inst. of Tech. v. Dep't of Pub. Utilities, 425 Mass. 856, 871 n. 39 (1997), for the proposition that the Department must provide written reasons for its decision. However, MIT was applying G.L. c. 30A, § 11(8), which pertains to adjudicatory hearings before administrative agencies (such as this appeal). Id. at 871-72. The MIT case therefore does not apply to the Department's review of the SOC Request.

[13] The Petitioner alleges that the Department "appears to contend that because it has the discretion to order an alternative route, its decision not to require an alternative is unreviewable." Petitioner Opposition, p. 3. The Department's Motion for Directed Decision does not make this argument, but rather focuses on the Department's broad discretion in determining whether an alternative is appropriate.

produced by the Department at the outset of the appeal), identify the various alternatives described above on page 5, and indicate that the Applicant's engineers considered and rejected them. LEC Environmental Consultants again described the five alternatives in RFI Response 1, pp. 4-6, and RFI Response 2, pp. 5-7. The Petitioner has not met his burden of producing competent evidence that the Department was unaware of the alternatives.

3. The Petitioner has offered no competent evidence that the Department failed to consider mitigation efforts in determining that the Proposed Project is a Limited Project.

The Petitioner argues that the Department failed to consider "the impossibility of adequately minimizing adverse impacts to the interests identified in the Act through mitigation measures . . . ." Petitioner Memorandum, p. 6. Again, the burden is on the Petitioner to show that the Department was unaware of the proposed mitigation plans. The Petitioner develops no further argument in support of this contention other than this one statement. There is also no PFT from a wetlands expert retained by the Petitioner discussing mitigation efforts and supporting his positions in the appeal.

The Applicant provided the Department with the detail of its mitigation measures: "due to the minimal alteration, re-seeding of disturbed areas with a native seed mix is appropriate mitigation." RFI Response 1, p. 9. The Petitioner offers no evidence that the Department did not consider this statement in its determination that the Proposed Project is a Limited Project. Moreover, the Department imposed its own mitigation requirements in the SOC specifically directing the Applicant to "erect five (5) bird and/or bat boxes, or another equally viable wildlife habitat feature, for the purposes of enhancing wildlife habitat within Riverfront Area." SOC, Condition 36. This demonstrates that the Department specifically considered mitigation measures.

The only evidence in the record that discusses mitigation measures and supports the Petitioner's position is in the OOC, where the Commission finds that "the applicant failed to provide mitigation measures, including replication or restoration . . . ." OOC, p. 16. But this is the only statement regarding mitigation. The Petitioner cannot rely on this conclusory sentence to meet its burden. See In the Matter of 518 South Ave. LLC, OADR Docket No. WET-2019-028, Recommended Final Decision (May 8, 2020), 2020 WL 3058248, *11-*12, adopted as Final Decision (May 11, 2020), 2020 WL 3058251 (not crediting "conclusory, unsupported statements and opinions"). The OOC is not competent evidence that the Department failed to consider mitigation efforts in determining that the Proposed Project is a Limited Project.

4. The Petitioner has offered no competent evidence regarding the effects of chemicals to treat the proposed utility poles.

The Petitioner argues that the Proposed Project does not qualify as a Limited Project because "the project will place utility poles treated with hazardous preservative chemicals within and directly adjacent to protected resource areas . . . ." Petitioner Memorandum, p. 7. However, the Petitioner's PFT contains no expert testimony regarding the preservative chemicals on the utility poles or attesting to whether the preservative chemicals are in fact hazardous.[14] There is no competent evidence in support of the Petitioner's argument in the record.

5. The fact that the Commission found that the Proposed Project did not qualify as a Limited Project is not competent evidence that the Department abused its discretion in finding that the Proposed Project does qualify as a Limited Project.

Lastly, the Petitioner argues that the OOC found that the Proposed Project did not qualify as a Limited Project, and that this is competent evidence that the Department abused its discretion in finding that the Proposed Project is a Limited Project. See Petitioner Opposition,

[14] The evidence that the Petitioner did proffer regarding the chemical treatment of the utility poles and the effect on the wetlands was not competent and stricken.

pp. 2-3. However, the mere fact that the OOC found that the Proposed Project is not a Limited Project is not evidence that the Department erred in making a different finding, as the Department's review of the SOC Request is *de novo*. In the Matter of Brian Corey, OADR Docket No. WET-2016-023, Recommended Final Decision (February 28, 2018), 2018 WL 2002973, *4 (review of an SOC Request by the Department is *de novo*), adopted as Final Decision (March 15, 2018), 2018 WL 2002972.

Moreover, the OOC's conclusion that the Proposed Project does not qualify as a Limited Project is stated in a conclusory manner. OOC, p. 16. The Petitioner cannot rely on these conclusory opinions to meet its burden. See 518 South Ave. LLC, 2020 WL 3058248 at *11-*12. The OOC is not competent evidence that the Department abused its discretion.

In sum, based on the record before me, the Petitioner has not shown that the Department was unaware of the magnitude of the Proposed Project, the various alternatives that the Applicant proposed, or the Applicant's proposed mitigation plan. See Rockport DPW, 2007 WL 2262816 at *15. The Petitioner has not shown that the Department abused its discretion and therefore does not meet his burden of going forward on Issue for Adjudication 2 and I grant directed decision to the Department on that Issue.

C. Issue for Adjudication 3: The Petitioner presented no evidence that the Department abused its discretion under 310 CMR 10.53(3)(d) by not requiring the Applicant to utilize an alternative route.

Under 310 CMR 10.53(3)(d)1., when a limited project includes the construction of overhead utilities, "the issuing authority may require a reasonable alternative route with fewer adverse effects for a local distribution or connecting line . . . ." The Petitioner prefers either the route going east on Sandisfield Road and connecting to a pole owned by Eversource (identified as alternative 5 above) or the route going west on Sandisfield Road and connecting to an existing utility pole owned by the Applicant (identified as alternative 2 above) and believes that the

Department should have chosen one of those alternatives. However, the Department correctly notes that the use of the word "may" in the regulation gives the Department discretion whether to require a reasonable alternative route. Motion for Directed Decision, p. 4; see Provencal v. Commonwealth Health Ins. Connector Auth., 456 Mass. 506, 513 (2010) ("The use of the word "may" denotes a discretionary power."). The Petitioner has not provided competent evidence that the Department abused its discretion in approving the Proposed Project instead of choosing one of the alternatives.

The Petitioner has no PFT from a wetlands expert supporting his belief that alternatives 2 and 5 are superior. The Petitioner therefore points to the OOC and correspondence from the Commission to support his position that his preferred alternatives to the Proposed Project are superior. See Petitioner Opposition, p. 8; OOC, p. 16; Letter from Commission to Mary Grover, p. 2 (April 19, 2024) (produced by the Department at the outset of the appeal). However, these documents do not explain why the Department abused its discretion in finding that the Proposed Project qualifies as a Limited Project. Instead, these documents offer only conclusory opinions that the other two alternatives are superior. The Petitioner cannot rely on these conclusory opinions to meet his burden. See In the Matter of 518 South Ave. LLC, 2020 WL 3058248 at *11-*12.

The Petitioner also argues that the Department chose the Applicant's preferred alternative on the basis of cost alone. Petitioner Memorandum, p. 8. If the Department had considered only cost, it might have violated 310 CMR 10.58(4)(c)1.a.ii., which specifies that "[h]igher or lower costs taken alone will not determine whether an alternative is practicable." However, the Petitioner offers no evidence that the Department's decision was based solely on cost. I therefore reject this argument.

The Petitioner has not offered evidence to support why his preferred alternatives are superior to the Proposed Project such that the Department abused its discretion by not choosing an alternative. Neither his PFT nor Ms. Helen's PFT nor the documents produced by the Department and created by the Commission support the Petitioner's argument. The Petitioner has therefore failed to meet his burden of going forward on Issue for Adjudication 3, and I grant directed decision to the Department on that Issue.

D. Issue for Adjudication 4: I deny the Petitioner's request to withdraw his appeal on Issue for Adjudication 4 and find that he has not met his burden of going forward.

Issue for Adjudication 4 asks whether, assuming that the Proposed Project is not a Limited Project, the Proposed Project meets the performance standards of 310 CMR 10.54(4),[15] 310 CMR 10.55(4);[16] and 310 CMR 10.58.[17] The Petitioner concedes that because I struck much of the testimony in the Petitioner's PFT, he is "not be able to sustain his case on [Issue for Adjudication 4]." Opposition to Motion for Directed Decision, p. 4. He "therefore move[d] to withdraw his appeal on this one issue (while reserving his right to appeal the Presiding Officer's decision on the Motion to Strike)." Id. at pp. 4-5.

A Presiding Officer may "permit any party to amend or withdraw its notice of claim or other pleading upon conditions just to all parties." 310 CMR 1.01(6)(e). "'The allowance of an appeal's withdrawal is therefore discretionary' by the Presiding Officer." In the Matter of George Thibeault, OADR Docket No. WET-2021-035, Recommended Final Decision (June 12, 2023), 2023 WL 12027484, *3, adopted as Final Decision (January 8, 2025), 2025 WL 439047, quoting

[15] 310 CMR 10.54(4) is the general performance standard applicable to work performed in or around Bank.

[16] 310 CMR 10.55(4) is the general performance standard applicable to work performed in or around BVW.

[17] 310 CMR 10.58 includes the performance standards for work performed in Riverfront Area.

In the Matter of Robert Busby, Requester, OADR Docket No. 96-039, Final Decision - Order of Dismissal (January 7, 1997), 1997 WL 71992, *3.

I deny the Petitioner's request to withdraw his appeal on Issue for Adjudication 4. To prevail on Issue for Adjudication 4, the Petitioner must have prevailed on Issue for Adjudication 2 and shown that the Proposed Project does not qualify as a Limited Project under 310 CMR 10.53(3)(d). The Petitioner's failure to meet his burden of going forward on Issue for Adjudication 2 means that the Petitioner necessarily cannot meet his burden of going forward on Issue for Adjudication 4. Withdrawing his argument does not change that outcome and is unnecessary. Moreover, it is more efficient for the Parties for a Recommended Final Decision to address each of the grounds raised by the Department in its Motion for Directed Decision on their merits, especially where withdrawing Issue for Adjudication 4 offers no procedural benefit to the Petitioner.

As discussed above, the Petitioner has not met his burden of showing that the Department abused its discretion in treating the Proposed Project as a Limited Project. But even assuming that the Petitioner had met his burden, he has failed to meet his burden on Issue for Adjudication 4.

The Petitioner offers two arguments in support of Issue for Adjudication 4: (1) the scientific studies in the Petitioner's PFT "demonstrate that the project will inevitably adversely impair these Resource Areas," Petitioner Memorandum, p. 10, and (2) reasonable alternatives exist that would eliminate or at least greatly minimize the adverse impact on Riverfront Area. Id. The references to studies in the Petitioner's PFT were stricken and I do not consider them. Without them, the Petitioner offers no testimony from a competent source demonstrating that the Proposed Project fails to meet the performance standards of 310 CMR 10.54(4), 310 CMR 10.55(4), and 310 CMR 10.58.

As to the Petitioner's second argument, as discussed above, the Petitioner has provided no evidence the Department abused its discretion in approving the Proposed Project as opposed to the other alternatives that the Applicant analyzed. Even if he had, it would not logically follow that the Proposed Project did not meet the applicable performance standards.[18] I therefore find that the Petitioner has not met his burden of going forward on Issue for Adjudication 4, and I grant directed decision to the Department on that Issue.

VII. Conclusion.

For the foregoing reasons, the Department's Motion for Directed Decision is granted for the Department on Issues for Adjudication 2, 3, and 4. Issue for Adjudication 1 is therefore moot. I recommend that the Department's Commissioner issue a Final Decision dismissing this appeal and affirming the SOC.

Date: December 30, 2025

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 the 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.

[18] It is conceivable, for example, that the Department could approve a project as a Limited Project that nevertheless complies with the applicable performance standards.

ADDENDUM 1

The following portions of the Pre-Filed Testimony of Michael Vatis remain in the record following my Order on the Joint Motion to Strike:

- The first paragraph of page 1.
- The second and third paragraphs of page 1, but for background purposes only.
- The first paragraph of page 3, starting with "which form a beautiful canopy over the road" to the end of the paragraph.
- The sentence "We also frequently see in this area foxes, rabbits, bobcats, bears, and coyotes." on page 3
- The sentence "Again, the impact of such deforestation and loss of habitat would directly affect me and my family." on page 6.
- The sentence "This may not matter to some people, but to us this would be a grievous loss, and one that directly corresponds to interests protected by the Wetlands Act and regulations." on page 6.
- The sentences "Of course, everyone is entitled to receive electrical power. But an added cost to one household should not be the single or overriding factor in choosing the route of power lines." on page 7.
- The first two full sentences of page 8.
- The first two sentences of the first full paragraph on page 8.
- The first sentence of the last paragraph on page 8.
- The sentence at the bottom of page 8 starting with "A DPU Publication" through the end of the quote at the top of page 9 (ending with "Department involvement.").
- The phrase "But this surely is not an adequate reason to reject an alternative as 'unreasonable'" on page 9.

ADDENDUM 2

The following portions of the Pre-Filed Testimony of Karen Allen remain in the record following my Order on the Joint Motion to Strike:

- The beginning of the first paragraph on page 1 through the sentence ending with “the 2nd CC meeting.” on page 2.
- The first, third, and fourth sentences of the first full paragraph on page 2.
- The fifth, sixth, and eighth sentences of the last full paragraph on page 2.
- The parenthetical “(per National Grid's supplied information to our Conservation Commission)” on page 3.
- The first sentence of the first full paragraph of page 4.
- The first six sentences of the second full paragraph on page 4 (starting with “Within the past two years” through “NG said nothing in their defense.”).
- The second sentence of the first full paragraph on page 5.
- The first sentence of the second full paragraph on page 5.
- The first sentence of the first full paragraph on page 6.
- The third full paragraph on page 6, but for background purposes only.
- The first sentence of the last full paragraph on page 6.

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