COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS

DEPARTMENT OF ENVIRONMENTAL PROTECTION

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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

November 28, 2025

In the Matter of **Matthew Haney, Trustee of the** **Gooseberry Island Trust and** **SN Trust**	**OADR Docket No. WET-2023-016** **DEP File No.: Superseding** **Determination of Applicability** **0 Punkhorn Point Road/** **Gooseberry Island** **Mashpee, MA**

RECOMMENDED FINAL DECISION

INTRODUCTION

Matthew Haney, Trustee of the Gooseberry Island Trust and the SN Trust ("the Petitioner"), seeks to build a bridge across the shallow channel that separates Gooseberry Island from Punkhorn Point on the mainland in the Town of Mashpee, Massachusetts ("the Site"). To that end, the Petitioner has filed this appeal with MassDEP's Office of Appeals and Dispute Resolution ("OADR") challenging a Superseding Determination of Applicability ("SDA") that MassDEP's Southeast Regional Office ("the Department") issued to the Petitioner on November 28, 2023, pursuant to the Massachusetts Wetlands Protection Act ("MWPA"), G.L. c. 131, § 40, and the Wetlands Regulations at 310 CMR 10.00, which determined that the Site is a protected wetlands area, and as such, it is necessary for the Petitioner to obtain a wetlands permit known as an Order of Conditions ("OOC") from the Town of Mashpee Conservation Commission ("MCC") pursuant to the MWPA and the Wetlands Regulations authorizing the Petitioner's construction of a bridge on the Site ("the proposed Project"). The MCC has previously made the same determination in response to the Petitioner's Request for a Determination of Applicability ("RDA"). The Petitioner contends that he does not need an OOC to construct the bridge because construction of the bridge purportedly is exempt from the requirements of the MWPA and the Wetlands Regulations. Specifically, the Petitioner contends that: (1) the MWPA exempts from its reach any project authorized by a special act of the Massachusetts Legislature enacted prior to January 1, 1973; and (2) Section 1 of Chapter 134 of the Acts 1908 ("the 1908 Statute") authorized the Petitioner's predecessor in title to the real property at the Site, Theodore H. Tyndale, to construct a bridge on the Site.

The parties have filed cross-motions for summary decision contending that based on the undisputed material facts and as a matter of law they are entitled to a Final Decision in their favor in the appeal. Based on the detailed reasons discussed below, I recommend that the Department's Commissioner issue a Final Decision: (1) denying the Petitioner's motion for summary decision on all issues, (2) granting the Department's motion for summary decision on all issues, (3) affirming the SDA, and (4) dismissing this appeal.

BACKGROUND

The Proposed Project

The proposed Project consists of a 200-foot timber bridge extending between 0 Punkhorn Point Road on the mainland and Gooseberry Island. The bridge is designed for single-lane vehicle access and has a curb width of 10 feet and a design width of 11 feet. It will consist of 14 span sections elevated 5 feet above the salt marsh by pile supports with three 14-inch pilings placed every 14.2 feet, as well as timber abutments on each end. The bridge will involve 53 pilings in total.[1] A driveway will also be constructed from the east end of the bridge onto Gooseberry Island. The proposed Project is illustrated in a set of plans titled Access Driveway Plan at Gooseberry Island, last revised on April 28, 2014 ("2014 Plan"). Wetlands Resource areas within 100 feet of the Site include Land Under the Ocean, Coastal Beach/Tidal Flat, Land Containing Shellfish, Salt Marsh, Coastal Dune, Bordering Vegetated Wetland, Coastal Bank, and Land Subject to Coastal Storm Flowage. The Petitioner and the Department agree that the proposed Project would require the filing of a Notice of Intent ("NOI") if it is not statutorily exempt from complying with the MWPA and the Department has jurisdiction to regulate it.

The 1908 Statute

The 1908 Statute provides: "Theodore H. Tyndale, his associates and assigns, are hereby authorized to build and maintain in the town of Mashpee . . . a bridge from Gooseberry island in Popponesset bay to the mainland lying westerly therefrom . . . subject to the provisions of chapter ninety-six of the Revised Laws and in accordance with such plans as may be approved by the board of harbor and land commissioners." The Board of Harbor and Land Commissioners approved a set of plans for that bridge on December 22, 1909 ("1909 Plan"). The 1909 Plan depicts a 69-foot-long and 12-foot-wide bridge with 30 pilings.[2]

Gooseberry I

The Gooseberry Island Trust and the SN Trust ("the Trusts") submitted an NOI to the MCC for the construction of a timber bridge between Gooseberry Island and the mainland on

[1] There are 39 pilings supporting the span sections, 6 pilings at the ends of the abutments, and 8 pilings in the wing walls.

[2] While the 1909 Plan does not list elevations, there have presumably been changes to the topography and/or sea level that explain why the bridge would have needed to be only 69 feet in 1909 but would need to be 200 feet today.

March 12, 2014. The plan for the bridge was the 2014 Plan. On February 11, 2015, the MCC issued an OOC denying the project for failure to meet the performance standards for activities in Salt Marsh. The Trusts appealed to the Department, and on June 30, 2015, the Department issued a Superseding Order of Conditions ("SOC") upholding the MCC's denial.

The Trusts appealed the SOC to OADR. During the course of the proceedings, the Trusts withdrew the project plans and submitted new plans proposing a steel bridge instead of a timber bridge ("Revised Plan"). The Department supported the Revised Plan and requested that it be accepted and approved pursuant to Wetlands Policy 91-1 ("Plan Change Policy"), which allows the consideration of new plans without needing to file a new NOI if the new plans do not significantly modify the project configuration and do not result in increased impacts to wetlands resource areas. The MCC and two intervenor groups opposed the Revised Plan. In <u>In the Matter of Gooseberry Island Trust and SN Trust</u> ("<u>Gooseberry I</u>"), OADR Docket No. WET-2015-016, Recommended Final Decision (June 16, 2017), 2017 WL 2843059, adopted as Final Decision (June 22, 2017), 2017 WL 2843039, I held that (1) the Trusts had waived their objections to the SOC by withdrawing the original plans and submitting the Revised Plan during the appeal, and (2) the Revised Plan could not be accepted under the Plan Change Policy because it was substantially different from the original proposal and would increase impacts to Salt Marsh and Land Containing Shellfish. Accordingly, I upheld the Department's SOC. At no point during <u>Gooseberry I</u> did the Trusts mention the 1908 Statute.

The Department's then-Commissioner issued a Final Decision adopting my Recommended Final Decision in <u>Gooseberry I</u> on June 22, 2017. The Trusts appealed the Final Decision to the Superior Court, which upheld the Final Decision. <u>Haney v. Department of Environmental Protection</u>, Massachusetts Superior Court, No. 2017-00340, dated July 29, 2019

(Cannone, J.). The Petitioner then appealed to the Appeals Court, which upheld the Superior Court's decision. Haney v. Department of Environmental Protection, 100 Mass. App. Ct. 1105 (2021).

History of the Present Proceedings

On October 19, 2021, the Petitioner informed the Department that he believed his bridge project was exempt from complying with the MWPA. The Department replied on October 29, 2021, informing the Petitioner that if he believed an exemption applied, he should file an RDA with the MCC. The Petitioner filed an RDA with the MCC for the proposed Project as depicted in the 2014 Plan on June 29, 2023, claiming an exemption from complying with the MWPA under the 1908 Statute. In response, the MCC issued a positive Determination of Applicability ("DOA") on August 14, 2023, determining that the proposed Project would require the filing of an NOI. On August 24, 2023, the Petitioner appealed the DOA to the Department. The Department issued a positive SDA on November 28, 2023, upholding the MCC's determination that the proposed Project would require the filing of an NOI. The Petitioner appealed the SDA to OADR on December 8, 2023.

On March 8, 2024, the parties filed a joint motion to stay, stating that the Petitioner intended to file an NOI with the MCC for the proposed Project. I granted the stay on March 11, 2024. On July 12, 2024, the parties filed a joint motion to lift the stay, stating that the Petitioner had determined it was "not practicable" to file an NOI and wished to proceed with the appeal. I lifted the stay on July 15, 2024. A Pre-Hearing Conference was held on September 19, 2024, at which the Issues for Adjudication in the appeal were discussed. The parties also indicated that they intended to resolve the issues on cross-motions for summary decision. I issued a Pre-

Hearing Conference Report and Order on September 25, 2024, in which I established the Issues for Adjudication in the appeal as follows:

1. Whether the Petitioner's exemption claim that the 1908 Statute exempts construction of a bridge on the Site from the permitting requirements of the MWPA and the Wetlands Regulations is barred by the doctrine of res judicata because the Petitioner did not make that exemption claim in the prior litigation of Gooseberry I?

2. If the Petitioner's exemption claim is not barred by the doctrine of res judicata, did the Department correctly determine that the Petitioner's proposed construction of a bridge on the Site does not meet the requirements of any exemption specified in the MWPA and that, therefore, the proposed Project requires the filing of an NOI with the MCC pursuant to the MWPA and Wetlands Regulations requesting an OOC authorizing the proposed Project?
   a. Whether the proposed Project was authorized by a special act prior to January 1, 1973?
   b. If the proposed Project was authorized by a special act prior to January 1, 1973, is the project exempt from the requirements of the MWPA and the Wetlands Regulations?

3. Whether the Department maintained jurisdiction over the Petitioner's request for an SDA as of November 28, 2023, when MassDEP issued the SDA?

The Petitioner filed a motion for summary decision on October 25, 2024. The Department filed an opposition to the Petitioner's motion and its own motion for summary decision on November 25, 2024. The Petitioner filed an opposition to the Department's motion on December 14, 2024.

STANDARD OF REVIEW

A motion for summary decision in an administrative appeal is akin to motion for summary judgment made in court in a civil suit that "is . . . designed to avoid needless [evidentiary] adjudicatory hearings" in administrative appeals. In the Matter of Michael Gleason, OADR Docket No. WET-2017-019, Recommended Final Decision (December 4, 2019), 2019 WL 8883856, *5, adopted as Final Decision (January 7, 2020), 2020 WL 2616480; Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, 9 Mass. App. Ct.

775, 785-86 (1980) ("administrative summary judgment procedures" are appropriate to resolve administrative appeals without an adjudicatory hearing "when the papers or pleadings filed [in the case] . . . conclusively show . . . that [a] hearing can serve no useful purpose"). The Adjudicatory Proceeding Rules at 310 CMR 1.01(11)(f) govern the bringing of motions for summary decision in administrative appeals. This summary decision rule provides in relevant part that:

> [a]ny party [to an administrative appeal] may move with or without supporting affidavits[3] for a summary decision in the moving party's favor upon all or any of the issues that are the subject of the . . . appeal. . . . The decision sought shall be made if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a final decision in its favor as a matter of law.

Gleason, 2019 WL 8883856, *5. "'This standard mirrors the standard set forth in Rule 56' . . . governing [summary judgment motions in] civil suits in Massachusetts trial courts." Id.

In sum, "[a] party seeking a summary decision [pursuant to 310 CMR 1.01(11)(f)] must demonstrate that there is no genuine issue of material fact and that the party is entitled to a final decision as a matter of law." Gleason, 2019 WL 8883856, *5. "If the moving party meets this

[3] Under 310 CMR 1.01(11)(f), "[affidavits] [s]upporting [or] opposing [a motion for summary decision] shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence in Massachusetts courts, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." This evidentiary standard is different from the "substantial evidence" standard governing the admissibility of evidence in evidentiary adjudicatory hearings ("hearings") in administrative appeals before OADR. "Substantial evidence" is defined by G.L. c. 30A, § 1(6) as "such evidence as a reasonable mind might accept as adequate to support a conclusion" and allows the admissibility of hearsay evidence in hearings if the hearsay evidence "contains sufficient indicia of reliability and probative value." In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision on Reconsideration (November 4, 2014), 2014 WL 6633667, *4 n.4, adopted as Final Decision on Reconsideration (November 7, 2014), citing, School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 16-18 (1996) (un-contradicted letters written by physicians who treated female teachers during their pregnancies constituted reliable hearsay and had probative value to support teachers' sex discrimination claims against defendant school committee); Embers of Salisburg, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 530 (1988) (transcript of minor's sworn criminal trial testimony that she consumed alcohol at bar while as a minor constituted reliable hearsay and had probative value to support suspension of bar owner's liquor license for serving alcohol to minors).

burden, the opposing party 'may not rest upon the mere allegations or denials of [its] pleading, but must respond, by affidavits or as otherwise provided in 310 CMR 1.01, setting forth specific facts showing that there is a genuine issue for hearing on the merits.'" Id.; 310 CMR 1.01(11)(f); cf. Mass. R. Civ. P. 56(e); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991) (summary judgment properly awarded to defendant); Cabot Corp. v. AVX Corp., 448 Mass. 629, 636-37 (2007) (same).

DISCUSSION

The Petitioner and the Department address three issues in their motions for summary decision. First, they address whether the Petitioner is barred from invoking a statutory exemption from the MWPA by the doctrine of res judicata when he did not raise that argument in Gooseberry I. Second, they address whether, if the Petitioner is not barred from claiming a statutory exemption from the MWPA, the proposed Project is actually statutorily exempt from complying with the MWPA due to the 1908 Statute. Third, they address whether the Department lost jurisdiction to regulate the proposed Project when it did not issue its SDA within 70 days of the Petitioner's request.

I. Res Judicata

The term "res judicata" includes both claim preclusion and issue preclusion. The Department argues only that claim preclusion applies here, not issue preclusion. Therefore, I will address only the elements of claim preclusion.

"'Claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and prevents relitigation of all matters that were or could have been adjudicated in the action. This is based on the idea that the party to be precluded has had the incentive and opportunity to litigate the matter fully in the first lawsuit. The invocation of claim preclusion requires three elements: (1) the identity or privity of the parties to the present and prior actions, (2) identity of the cause of action, and (3) prior final judgment on the merits.'" Santos v. U.S. Bank National Association, 89 Mass. App. Ct. 687, 692 (2016); In the Matter of James Rodriguez, OADR Docket No. WET-2018-012, Recommended Final Decision (September 23, 2020), 2020 WL 6715068, *4, adopted as Final Decision (October 2, 2020), 2020 WL 6715067.

"Moreover, it is not necessary that the prior adjudication have been before a court. Rather, if the proponent for preclusion proves that the elements for preclusion are met, '[a] final order of an administrative agency in an adjudicatory proceeding . . . precludes relitigation of the same issues between the same parties, just as would a final judgment of a court of competent jurisdiction.'" Kobrin v. Board of Registration in Medicine, 444 Mass. 837, 844 (2005).

1. **Identity or privity of the parties to the present and prior actions**

As stated previously, the Petitioner in this case is Matthew Haney in his capacity as trustee of the Gooseberry Island Trust and the HN Trust. The Petitioners in Gooseberry I were the Gooseberry Island Trust and the HN Trust. The Department was also involved in both Gooseberry I and the present proceedings. Given that Mr. Haney is acting on behalf of the Gooseberry Island Trust and the HN Trust, there is identity or privity of the parties to the present and prior actions.[4]

2. **Identity of the cause of action**

"Res judicata applies to claims that derive from the 'same transaction or series of connected transactions.'" Baby Furniture Warehouse Store, Inc. v. Meubles D & F Ltee, 75 Mass. App. Ct. 27, 34 (2009). "A 'transaction' generally 'connotes a natural grouping or

[4] The MCC is also a party to the present proceedings as well as to Gooseberry I, and two intervenor groups were also parties to Gooseberry I.

common nucleus of operative facts' . . . ." Laramie v. Philip Morris USA Inc., 488 Mass. 399, 411 (2021). "What factual grouping constitutes a 'transaction' is to be determined pragmatically, giving weight to such factors as 'whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations.'" Mancuso v. Kinchla, 60 Mass. App. Ct. 558, 571 (2004). Additionally, "claim preclusion will apply even though a party is prepared in a second action to present different evidence or legal theories to support his claim or seeks different remedies." Charlette v. Charlette Bros, Foundry, Inc., 59 Mass. App. Ct. 34, 44 (2003).

Here, both Gooseberry I and the present case arise from the Petitioner's attempt to build a bridge between Gooseberry Island and the mainland. In Gooseberry I, the Petitioner sought an order stating that the bridge complied with or could be conditioned to comply with the MWPA, and in the present case, he is seeking a determination that the proposed Project is exempt from complying with the MWPA. In either case, the result would be that the MWPA would not prohibit the Petitioner from constructing his desired bridge. Additionally, the project plans for the proposed bridge in Gooseberry I and the proposed Project are identical; both projects use the 2014 Plan. Furthermore, the Petitioner filed the RDA two years after the Appeals Court dismissed his appeal in Gooseberry I, a relatively short amount of time. The Petitioner's filing of an NOI and his filing of an RDA are closely related in time, space, origin, and motivation. Even if they do not constitute the exact same transaction, they clearly comprise a series of connected transactions.

The Petitioner additionally could have raised the statutory exemption argument in Gooseberry I, and had the opportunity and motivation to do so. The purpose of the OOC and SOC process is to protect the interests of the MWPA. See 310 CMR 10.05(6)(b) ("The Order of

Conditions shall impose such conditions as are necessary to meet the performance standards . . . 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 . . . . The Order shall prohibit any work or any portion thereof that cannot be conditioned to meet said standards."); 310 CMR 10.05(7)(i) ("[T]he Department shall issue a Superseding Order for the protection of the interests identified in M.G.L. c. 131, § 40. . . . The Superseding Order shall prohibit any work or any portions thereof that cannot be conditioned to protect such interests."). Inherent in this process is the idea that the project is required to comply with the MWPA in the first place. OOCs and SOCs cannot regulate activities that are not required to comply with the MWPA. If the Petitioner had successfully argued during Gooseberry I that his bridge project was statutorily exempt from complying with the MWPA, I would have had no choice but to vacate the Department's SOC. However, the Petitioner did not make that argument in Gooseberry I and cannot do so here.

To sum up, there is identity of the cause of action in the present and prior actions.

3. Prior final judgment on the merits

A "Final Decision on the merits" following "an adjudicatory hearing at which witnesses testified and documentary evidence was presented" constitutes a final judgment on the merits for purposes of claim preclusion. Rodriguez, 2020 WL 6715068, *8. Gooseberry I involved a "one day evidentiary Adjudicatory Hearing" at which the parties "presented witnesses and documentary evidence." Gooseberry I, 2017 WL 2843059, *3. I issued a Recommended Final Decision on June 16, 2017, affirming the Department's SOC denying the original proposed project, which was then adopted as a Final Decision by the Commissioner on June 22, 2017. In response to the Petitioner's appeals, both the Superior Court and the Appeals Court affirmed the Final Decision. Accordingly, there was a final judgment on the merits in the prior action.

4. **Petitioner's other arguments against res judicata**

The Petitioner argues that I should not apply res judicata here despite the requirements being met. He first argues that applying claim preclusion here would prevent property owners from filing more than one NOI or RDA. This concern is unfounded. Claim preclusion applies to matters that were or could have been raised in a prior proceeding and which the party had an opportunity and incentive to raise. Property owners are free to file additional NOIs or RDAs, but they may not raise arguments that were equally applicable to the first filing and that they did not raise in those proceedings.

The Petitioner argues that applying claim preclusion here would run afoul of Wetlands Policy 88-3, which addresses multiple NOI filings for the same or similar projects on the same property. The Petitioner's citation to Wetlands Policy 88-3 is misplaced for multiple reasons. First, Policy 88-3 states in its very first sentence, "From time to time, the Department receives revised Notices of Intent involving the same or very similar project for which a request for a Superseding Order of Conditions or an Adjudicatory Hearing *is pending*." (Emphasis supplied.) The Petitioner did not file his RDA while his request for an SOC or adjudicatory hearing was pending. Rather, he filed it after the SOC was issued and an adjudicatory hearing upholding the SOC concluded. Second, Policy 88-3 does not apply in this case because "Policy 88-3 addresses multiple filings of notices of intent, not multiple requests for determinations of applicability or multiple hybrid filings of notices of intent and determination requests." In the Matter of National Amusements, Inc., Docket No. 98-043, Ruling on Motion to Dismiss and Order to Show Cause (December 11, 1998), 1998 WL 952092, *2. Third, Policy 88-3 contemplates that "applicants resolve their differences with the Department or the Conservation Commission." In this case, the

Petitioner filed an RDA for the exact same project that was previously denied without addressing any of the issues raised by the MCC or the Department.

The Petitioner also asserts that he cannot be precluded from claiming the statutory exemption because he is claiming that the proposed Project is immune from the MWPA and immunity provides freedom from suit, not just freedom from litigation. The Petitioner is correct that statutory immunity provides freedom from suit. CP 200 State, LLC v. CIEE, Inc., 488 Mass. 847, 850 (2022) ("legislatively created immunities . . . create a right to be free from suit"). However, the Petitioner is not being sued. His claim of "immunity" from the MWPA is not a claim of immunity as that term is used in a legal context. Thus, even if res judicata does not apply to a claim of immunity, the Petitioner has not actually claimed immunity.

The Petitioner additionally asserts that the Department is estopped from asserting res judicata under the doctrine of promissory estoppel. He cites to the Department's October 29, 2021 letter, which stated, "If Mr. Haney, as trustee for the Gooseberry Island Trust (GIT), believes an exemption to build a bridge to Gooseberry Island applies, then he should file a Request for Determination of Applicability, pursuant to 310 CMR 10.05(3), with the Mashpee Conservation Commission to determine if any exemption applies to his proposed project."

"Promissory estoppel requires '(1) a representation intended to induce reliance on the part of a person to whom the representation is made; (2) an act or omission by that person in reasonable reliance on the representation; and (3) detriment as a consequence of the act or omission.'" Columbia Plaza Associates v. Northeastern University, 493 Mass. 570, 585 (2024). "A promissory estoppel claim 'is equivalent to a contract action, and the party bringing such an action must prove all the necessary elements of a contract other than consideration.'" Id. "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Sea Breeze Estates, LLC v. Jarema, 94 Mass. App. Ct. 210, 215 (2018).

The biggest flaw in the Petitioner's promissory estoppel argument is that the Department's letter made no promise of any kind. All it did was inform the Petitioner that if he would like to claim an exemption from the MWPA, he would need to file an RDA with the MCC first before the Department would consider it. It made no representations regarding whether the Department would accept the Petitioner's claimed exemption. Accordingly, the letter did not form a contract and the doctrine of promissory estoppel does not apply.

The Petitioner argues that the Department's argument does not comply with 310 CMR 10.05(6)(d), which states, "an Order of Conditions, Order of Resource Area Delineation, or Notification of Non-significance shall be valid for three years from the date of its issuance." The Petitioner does not expound upon this argument. I see no inconsistency between the Department's argument and the quoted regulation.

Finally, the Petitioner argues that applying claim preclusion would be inconsistent with the statement in Gooseberry I that "the Petitioners' Revised Project Plan cannot be reviewed and approved in this appeal, but must be submitted to the MCC for review pursuant to a new NOI." Gooseberry I, 2017 WL 2843059, *27. That sentence was stating that the Plan Change Policy did not apply to the Revised Plan, and if the Petitioner wanted to go forward with the Revised Plan he would need to file a new NOI with the MCC. The Petitioner chose not to do that and instead filed an RDA for the 2014 Plan. Thus, that sentence is inapplicable to these proceedings.

All the elements of claim preclusion are satisfied here, and the Petitioner has not raised any argument that would defeat its application. The Petitioner could have argued that his bridge project had a statutory exemption from the MWPA in Gooseberry I, but did not. Accordingly, the

Petitioner is barred by the doctrine of res judicata from claiming a statutory exemption from the MWPA in this case.

II. **Statutory Exemption**

The MWPA provides, "[t]he provisions of this section shall not apply to . . . any project authorized by special act prior to January first, nineteen hundred and seventy-three." The 1908 Statute provides: "Theodore H. Tyndale, his associates and assigns, are hereby authorized to build and maintain in the town of Mashpee . . . a bridge from Gooseberry island in Popponessett bay to the mainland lying westerly therefrom . . . subject to the provisions of chapter ninety-six of the Revised Laws and in accordance with such plans as may be approved by the board of harbor and land commissioners." The Petitioner claims that he is an assign of Mr. Tyndale for purposes of this statute. The Department argues that the undisputed facts do not establish that the Petitioner is an assign of Mr. Tyndale under the 1908 Statute, but assumes in its motion that he is. I likewise will assume that the Petitioner is an assign of Mr. Tyndale for purposes of the 1908 Statute.[5]

The Department argues that the proposed Project cannot take advantage of the 1908 Statute to claim an exemption from the MWPA because it is very different from the project portrayed in the 1909 Plan. The Department argues that the word "project" in the phrase "any project authorized by special act" refers to a specific plan, and a later plan which deviates from the original plan cannot claim the same statutory exemption. The Department cites to Department of Environmental Quality Engineering v. Hingham, 15 Mass. App. Ct. 409 (1983), to support its argument. In that case, the Appeals Court held that the word "project" in the MWPA does not include "general authorizations." Id., 412. Rather, it refers to "a definite plan," and

[5] As explained infra, this fact is immaterial to the outcome of this case.

"future work . . . not contemplated in concrete terms at the time the special act was passed" cannot claim a statutory exemption from the MWPA. Id., 411-12. According to the Department, this means that a project may only claim a statutory exemption from the MWPA if it has the same definite plan as the project approved by the legislature.

I hold that the Department's interpretation of the word "project" in the MWPA is reasonable and accord it deference.[6] Thus, for the Petitioner to claim a statutory exemption for the proposed Project, it must have the same definite plan as the project approved by the legislature.[7] The Department argues that the definite plan approved by the 1908 Statute is the 1909 Plan and that the 2014 Plan differs substantially from the 1909 Plan. I agree with the Department. The 1909 Plan contemplates a 69-foot-long and 12-foot-wide wooden bridge with 30 pilings, while the 2014 Plan contemplates a 200-foot-long and 11-foot-wide wooden bridge with 53 pilings. Although the widths of the 1909 Plan and the 2014 Plan are similar, the 2014 Plan is nearly three times as long and contains nearly twice as many pilings as the 1909 Plan. The Petitioner claims that the 2014 Plan falls within the footprint of the 1909 Plan, but a simple comparison of the two plans shows this to be incorrect, as the 2014 Plan is 131 feet longer than the 1909 Plan. Accordingly, the proposed Project is not the same as the project approved by the 1908 Statute, and the Petitioner therefore cannot claim a statutory exemption from the MWPA

[6] As the Presiding Officer in the appeal, I owe deference to MassDEP's reasonable interpretation of environmental statutes, regulations, and policies it is responsible for enforcing, including the MWPA and the Wetlands Regulations. In the Matter of Pioneer Valley Energy Center, LLC ("PVEC"), OADR Docket No. 2011-010, Recommended Final Decision (September 23, 2011), 2011 WL 6019097, *8, adopted by Final Decision (November 9, 2011), 2011 WL 6019096; Prysmian, 2024 WL 4920921, *3.

[7] I need not consider the extent, if any, to which a project may differ from the definite plan approved by the legislature and still constitute the "same" project because it would not change the outcome of this case.

under the 1908 Statute.

III. Jurisdiction

The MWPA provides, "[u]pon receipt of such request the department shall make the determination requested and shall by written order issued within seventy days of receipt of such request and signed by the commissioner or his designee, impose such conditions as will contribute to the protection of the interests described herein." G.L. c. 131, § 40. In Novak v. Department of Environmental Protection, Massachusetts Superior Court, No. 942511, dated September 1, 1995 (Sosman, J.), 1995 WL 1146156, *7 n.11, the Superior Court noted that "existing precedent [was] uncertain" regarding whether this seventy-day limit is jurisdictional. The Petitioner argues that this uncertainty was cleared up in Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich, 449 Mass. 859, 866 (2007), in which the Supreme Judicial Court stated, "the timing provisions in the [MWPA] are obligatory, and a local community is not free to expand or ignore them." However, the Court in Oyster Creek Preservation was interpreting a different provision of the MWPA than the one being raised here. The provision being interpreted in Oyster Creek Preservation stated, "if a [local conservation] commission, after holding such a hearing has failed within twenty-one days therefrom to issue an order . . . any person aggrieved by said commission's . . . failure to act . . . may . . . within ten days from said commission's . . . failure to act, request the [DEP] to determine whether the area on which the proposed work is to be done is significant [to interests protected by the act]." This provision concerns the timing requirement for a *local conservation commission* to issue an order, not the Department. In fact, at one point the Court quotes the provision at issue in this case but specifically omits the words "issued within seventy days" from its quotation, demonstrating that its ruling was not intended to apply to the seventy-day limit. Oyster Creek Preservation, 449 Mass. at 865.

Two agency decisions issued since Novak clarify that the seventy-day limit is not jurisdictional. In In the Matter of Peter Van Rosbeck and Karen Von Rosbeck, Trustees, Spring Hill Trust, Docket No. 96-031, Final Decision (June 25, 1996), 1996 WL 402900, *3, the Department's then Commissioner specifically held that the seventy-day limit was directory, not jurisdictional: "Failure to issue the Superseding Order within 70 days also does not support a tolling of the appeal period, since the 70-day review period is not jurisdictionally significant. Both M.G.L. c. 131, §40, thirteenth, and 310 CMR 10.05(7)(f) provide that the Department 'shall' issue a Superseding Order of Conditions within 70 days after a request for it is filed. However, as neither the statute nor the regulations specifies any remedy for failure to issue the Superseding Order within the 70-day time period, the time period is directory, rather than mandatory, and the failure does not divest the Department of jurisdiction over the proposed project." Additionally, in In the Matter of Keith Quakenbush, Docket No. DEP-07-22, Recommended Final Decision (February 27, 2007), 2007 WL 1074649, *4 n.6, the Presiding Officer stated that "DEP's failure to issue a superseding order within the prescribed time period does not render the order invalid."

The seventy-day limit for the Department to act in the MWPA is directory, not jurisdictional. Accordingly, the Department maintained jurisdiction over the proposed Project despite issuing the SDA more than seventy days after the Petitioner's request.

CONCLUSION

Based on the undisputed material facts and as a matter of law, the Department is entitled to a Final Decision in its favor in the appeal because: (1) the Petitioner is barred by the doctrine of res judicata from claiming a statutory exemption to complying with the MWPA; (2) even if res judicata does not apply, the proposed Project is not statutorily exempt from complying with the MWPA; and (3) the Department did not lose jurisdiction over the proposed Project even though it issued its SDA more than seventy days after the Petitioner's request. Accordingly, I recommend that the Department's Commissioner issue a Final Decision denying the Petitioner's motion for summary decision on all issues, granting the Department's motion for summary decision on all issues, affirming the SDA, and dismissing this appeal.

Salvatore M. Giorlandino

Date: <u>November 28, 2025</u>

Salvatore M. Giorlandino
Chief Presiding Officer

SERVICE LIST

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Legal representative:	None
Applicant:	Same as Petitioner
Legal representative:	Same as Petitioner
Conservation Commission:	Town of Mashpee Conservation Commission c/o Andrew R. McManus, Conservation Agent Daniel Kent, Assistant Conservation Agent Stacy Ducharme, Administrative Secretary 16 Great Neck Road North Mashpee, MA 02649 e-mail: amcmanus@mashpeema.gov dkent@mashpeema.gov sducharme@mashpeema.gov conservation@mashpeema.gov
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