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EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

August 28, 2020

In the Matter of
Onset Bay II Corporation

OADR Docket No. 2012-034
DEP Waterways Application No. W07-193

RECOMMENDED FINAL DECISION

INTRODUCTION

In this appeal, Connor E. Comrie, Louise Flanders, Jim Kallstrom, Dave Moezelaar, Donna Tramontozzi, and Frank Tramontozzi (collectively "the Intervenors")[1] challenge a draft c. 91 License that the Massachusetts Department of Environmental Protection ("MassDEP" or "Department") issued to Onset Bay II Corporation, predecessor in interest to BOBM, Inc. ("the Applicant") in June 2015 ("the Draft June 2015 c. 91 License") pursuant to G.L. c. 91 ("Chapter 91" or "c. 91") and the Department's c. 91 Regulations at 310 CMR 9.00. The Draft June 2015 c. 91 License authorized the Applicant's proposed Revised Project to expand its existing marina facility on Onset Bay in Wareham, Massachusetts ("Wareham") after the Department had rejected the Applicant's Original Project to expand the marina in June 2012. The Intervenors

[1] The Intervenors are referred to as such because they were not original parties to the appeal when it was filed in June 2012 and became parties thereafter. See below, at pp. 13, 21.

request the Draft June 2015 c. 91 License be vacated because it purportedly violates G.L. c. 91, the Department's c. 91 Regulations at 310 CMR 9.00, and other environmental regulatory requirements for a multitude of reasons discussed below, at pp. 2-4, 43-97. The Applicant and the Department dispute the Intervenors' claims, contending that the Department properly issued the Draft June 2015 c. 91 License approving the proposed Revised Project, and as such, it should be affirmed. See below, at pp. 43-97. The Applicant also challenges the Intervenors' standing to challenge the Draft June 2015 Draft c. 91 License. Id., at pp. 33-43.

I conducted an evidentiary Adjudicatory Hearing ("Hearing") to resolve the Intervenors' claims against the Draft June 2015 c. 91 License. The Hearing was recorded by a stenographer/certified court reporter at the Intervenors' expense and the transcript of the Hearing that the stenographer/certified court reporter prepared of the Hearing was filed as part of Administrative Record in the case. The Issues for Resolution ("the Issues") at the Hearing as agreed to by the Parties at the Pre-Hearing Conference that I conducted with the Parties well in advance of the Hearing,[2] were the following:

1. Whether each of the Intervenors has standing as an "aggrieved person" pursuant to 310 CMR 9.02 and 9.17(1)(b) to challenge the Draft June 2015 c. 91 License that the Department issued to the Applicant?

2. If at least one Intervenor has standing as an "aggrieved person" pursuant to 310 CMR 9.02 and 9.17(1)(b) to challenge the Draft June 2015 c. 91 License:

    a. Whether, under 310 CMR 9.14(2) and (3), prior to issuance of the Draft June 2015 Draft License the Department was required to require the Applicant to file a new c. 91 Application seeking approval of the proposed

[2] As discussed below, at pp. 13-30, the proceedings in this case have been stayed for extended periods of time on three occasions to: (1) foster settlement discussions in the case; (2) cure the Applicant's non-compliance with the notice requirements of 310 CMR 9.13(1)(a)1-7 regarding the proposed Revised Project; and (3) address the Applicant's and the Department's concerns regarding former Department staff member John Simpson testifying at the Hearing as the Intervenors' expert witness in opposition to the Draft June 2015 c. 91 License.

Revised Project, or hold a new public hearing on the Project, or issue a detailed new Written Determination on the Project, after having previously held a public hearing and issued a Written Determination denial of a c. 91 license for the Original Project?

b. Whether the proposed Revised Project significantly interferes with Intervenors' littoral rights in violation of 310 CMR 9.36?

c. Whether the plan for the proposed Revised Project fails to accurately set forth the extended property and littoral lines consistent with the definitions of Project Shoreline and Project Site set forth in 310 CMR 9.02 and 310 CMR 9.11(3)(c)(1)?

d. Whether 310 CMR 9.14(3) required the Department in this case to determine that the proposed Revised Project "serves a proper public purpose which provides greater benefits than detriments to the public's rights in tidelands", and if so, whether the Department has made that finding?

e. Whether, pursuant to 310 CMR 9.35(1), the interference with certain water-related public rights resulting from the proposed Revised Project have been mitigated "to the greatest extent deemed reasonable by the Department" and whether "the overall public trust in waterways is best served"?

f. Whether the proposed Revised Project significantly interferes with the line of sight for navigation pursuant to 310 CMR 9.35(2)(a)(1)(c)?

g. Whether the proposed Revised Project alters an established course of vessels pursuant to 310 CMR 9.35(2)(a)(1)(d)?

h. Whether the proposed Revised Project interferes with access to adjoining areas by extending substantially beyond the projection of existing structures pursuant to 310 CMR 9.35(2)(a)(1)(e)?

i. Whether the proposed Revised Project prevents the public from passing freely on the waterway pursuant to 310 CMR 9.35(2)(a)(1)(j)?

j. Whether the proposed Revised Project is inconsistent with the Town of Wareham's Harbor Management Plan pursuant to 310 CMR 9.34?

k. Whether a prior settlement between the Applicant and the Intervenor Frank Tramontozzi ("Mr. Tramontozzi") bars the Applicant from having

filed the application for the proposed Revised Project?

l. Whether the Applicant's revised plan for the proposed Revised Project significantly interferes with the Intervenors' rights to navigate by sail in violation of 310 CMR 9.36(1); 9.36(2) and 9.36(3)?

m. Whether the proposed revised project violates the Massachusetts Ocean Sanctuary Act ("MOSA"), including (1) whether the Department failed to make a legal finding required by the MOSA Regulations at 302 CMR 5.08(4), and Department Regulations at 310 CMR 9.33(1)(f); and (2) whether the issuance of the Draft June 2015 c. 91 License violates the requirements of 310 CMR 9.33(1)(f), given the written comments and rulings by the Department of Conservation and Recreation ("DCR") of non-compliance with MOSA in letters dated December 22, 2006 and May 24, 2007 regarding the Original Project?

At the Hearing, all of the Parties were represented by legal counsel and presented witnesses in support of their respective positions in the case. The witnesses were cross-examined by opposing counsel on the sworn Pre-filed Testimony ("PFT") that the witnesses had filed prior to the Hearing.

The Intervenors, the Parties with the burden of proof on all of the Issues,[3] presented testimonial, documentary, and photographic evidence from three witnesses at the Hearing:

(1) Intervenor Louise Flanders ("Ms. Flanders");[4]

(2) John Simpson ("Mr. Simpson"), a c. 91 expert with more than 30 years of work experience in the c. 91 field, including 13 years as a staff member of the Department's c. 91 Program (1986 to 1999);[5] and

(3) Intervenor Mr. Tramontozzi.[6]

[3] See below, at pp. 30-33.

[4] Pre-filed Direct Testimony of Louise Flanders ("Ms. Flanders' Direct PFT"); Rebuttal Testimony of Louise Flanders ("Ms. Flanders' Rebuttal PFT").

[5] Pre-filed Direct Testimony of John Simpson ("Mr. Simpson's Direct PFT"); Pre-filed Rebuttal Testimony of John Simpson ("Mr. Simpson's Rebuttal PFT").

[6] Pre-filed Direct Testimony of Frank A. Tramontozzi, PE ("Mr. Tramontozzi's Direct PFT"); Rebuttal Testimony of Frank A. Tramontozzi, PE ("Mr. Tramontozzi's Rebuttal PFT").

Intervenor Connor E. Comrie ("Mr. Comrie") filed sworn PFT in support of the Intervenors' claims in the appeal prior to the Hearing but failed to appear at the Hearing for cross-examination, and as a result, his PFT was stricken from the Administrative Record of the appeal in accordance with the Adjudicatory Proceeding Rules at 310 CMR 1.01(12)(f) and 310 CMR 1.01(13)(h).[7] Intervenors Jim Kallstrom ("Mr. Kallstrom"), Dave Moezelaar ("Mr. Moezelaar"), and Donna Tramontozzi ("Ms. Tramontozzi") did not file any sworn PFT in support of their claims in the appeal, and as a result, their claims were dismissed.[8]

In rebuttal to the Intervenors' claims at the Hearing, the Applicant presented testimonial, documentary, and photographic evidence from four witnesses at the Hearing:

(1) Christopher Foster ("Mr. Foster"), the Marina Manager at Brewer Plymouth Marine in Plymouth, Massachusetts, an entity affiliated with the Applicant;[9]

(2) Greg Glavin ("Mr. Glavin"), the Applicant's General Manager;[10]

(3) Stanley Humphries ("Mr. Humphries"), Coastal Geologist with more than 39 years of experience in various environmental areas including c. 91 policy, regulation, and permitting;[11] and

(4) William Madden, P.E. ("Mr. Madden"), a Registered Professional Engineer with more than 37 years of civil engineering experience in the planning, design, and permitting of projects, including c. 91 permitting.[12]

[7] See below, at pp. __.

[8] See below, at pp. __.

[9] Pre-filed Direct Testimony of Christopher Foster ("Mr. Foster's Direct PFT").

[10] Amended Pre-filed Direct Testimony of Gregory T. Glavin ("Mr. Glavin's Direct PFT").

[11] Revised Pre-filed Direct Testimony of Stanley M. Humphries ("Mr. Humphries' Direct PFT").

[12] Amended Pre-filed Direct Testimony of William F. Madden ("Mr. Madden's Direct PFT").

In rebuttal to the Intervenors claims at the Hearing, the Department presented testimonial, documentary, and photographic evidence from one witness at the Hearing: David Hill ("Mr. Hill"), an Environmental Engineer in the Wetlands and Waterways Program of the Department's Southeast Regional Office who was principally involved in the Department's review and approval of the proposed Revised Project as reflected in the Draft June 2015 c. 91 License. Pre-filed Direct Testimony of David E. Hill ("Mr. Hill's Direct PFT"), ¶¶ 1-45. Mr. Hill is highly experienced in the c. 91 licensing area; since 2000, he has reviewed for the Department approximately 1,400 c. 91 License applications involving water dependent projects, including proposed improvements or development of public and private marinas and 900 proposed c. 91 projects located in Cape Cod Bay, Cape Cod, and the Cape and Island Ocean Sanctuaries. Mr. Hill's Direct PFT, ¶ 5. He also has more than 40 years of familiarity with Onset and the waters of Onset Bay where the Applicant's marina is located, including 14 years as a resident of the area, three of them as a resident of Onset Center. Id., ¶¶ 5, 28. "[He] ha[s] personally navigated the waters in and around Onset Bay" on a number of occasions. Id., ¶ 28. "[He is] primarily experienced in [navigating] canoes, kayaks, small sail boats, and small motorized vessels." Id., ¶ 4. "In both his work [at the Department] and personal experience [he] ha[s] witnessed, on hundreds of occasions, the navigation of commercial and recreational vessels while approaching and departing berthing locations at residential piers, town piers[,] and marinas and vessels navigating in channels, harbors, bays[,] and other water bodies." Id. "[He] ha[s] also observed and participated in [marine] recreational activities, (i.e. boating, fishing, swimming, water skiing and tubing) . . . ." Id.

As discussed in detail below, based on a preponderance of the evidence presented by the

Parties at the Hearing and the governing statutory and regulatory requirements, I find that the Department properly issued the Draft June 2015 c. 91 License approving the proposed Revised Project. Accordingly, I recommend that the Department's Commissioner issue a Final Decision affirming the Draft June 2015 c. 91 License and directing the Department to issue a Final c. 91 License to the Applicant approving the proposed Revised Project.

STATUTORY AND REGULATORY FRAMEWORK

"Throughout history, the shores of the sea have been recognized as a special form of property of unusual value[,] and therefore subject to different legal rules from those which apply to inland property." Navy Yard Four Associates, LLC v. Department of Environmental Protection, 88 Mass. App. Ct. 213, 218 (2015) ("NYFA"), citing, Boston Waterfront Development Corporation v. Commonwealth, 378 Mass. 629, 631 (1979);[13] In the Matter of The Landing Group, Inc., OADR Docket No. 2014-028, Recommended Final Decision (October 27, 2015), 2015 MA ENV LEXIS 85, at 3, adopted as Final Decision (October 29, 2015) ; In the Matter of Jimary Realty Trust, OADR Docket No. 2016-015, Recommended Final Decision (August 23, 2018), 2018 MA ENV LEXIS 51, at 6-7, adopted as Final Decision (August 14, 2018), 2018 MA ENV LEXIS 50. "Under common law, private ownership in coastal land could historically extend only landward of the mean high water mark." NYFA, 88 Mass. App. Ct. at 218. "Seaward of the high water mark, ownership remained with 'the Crown [and eventually the Massachusetts Bay Colony, followed by the Commonwealth,] but subject to the rights of the

[13] The Appeals Court's decision in NYFA affirmed the November 22, 2011 Final Decision of the Department's Commissioner in an administrative appeal that the petitioner in that case filed with the Department's Office of Appeals and Dispute Resolution challenging the Department's denial of the petitioner's request that tidelands at its property be categorized as "Private Tidelands" instead of "Commonwealth Tidelands." 88 Mass. App. Ct. at 214-17. The Commissioner's Final Decision adopted the Recommended Final Decision of the Presiding Officer who adjudicated the administrative appeal. See In the Matter of Navy Yard Four Associates, LP, Docket No. 2010-062, Recommended Final Decision (November 21, 2011), 2011 MA ENV LEXIS 119, adopted as Final Decision (November 22, 2011), 2011 MA ENV LEXIS 122 ("Matter of NYFA").

public to use the coastal waters for fishing and navigation.'" Id. "This changed, however, with the Colonial Ordinance of 1641-1647, which authorized the transfer of title to property between the high and low water marks — the tidal flats — to private parties, though this title has always had 'strings attached.'" Id. "While '[g]reater public rights exist in submerged lands, the land lying seaward of the low water mark,' both tidal flats and submerged lands are referred to collectively as 'tidelands,' and '[a]ll tidelands below [the historic] high water mark are subject to [the public trust doctrine].'" Id.

Under the Public Trust Doctrine, "the Commonwealth holds tidelands in trust for the use of the public for, traditionally, fishing, fowling, and navigation." Boston Edison Company v. Massachusetts Water Resources Authority, 459 Mass. 724, 735 (2011). Chapter 91 and the c. 91 Regulations at 310 CMR 9.00 (also known as the Waterways Regulations) "represent the modern embodiment of the public trust doctrine, and 'govern . . . water[-dependent] and nonwater-dependent development in tidelands and the public's right to use those lands.'" NYFA, 88 Mass. App. Ct. at 218. "As such, those parties seeking to put tidelands to either water-[dependent] or nonwater-dependent use [within the meaning of the Waterways Regulations at 310 CMR 9.12][14]. . . must first obtain a license [from the Department] pursuant to [Chapter 91]." Id.

Tidelands subject to Chapter 91 licensing are classified as being either "Commonwealth

[14] As part of the Chapter 91 Licensing process, the Department is required to determine whether the proposed project sought to be approved by the License is water-dependent or nonwater-dependent in accordance with the Waterways Regulations at 310 CMR 9.12. Under 310 CMR 9.12(1), "[t]he Department shall classify as a water-dependent use project any project which consists entirely of: (a) uses determined to be water-dependent in accordance with 310 CMR 9.12(2); and/or (b) uses determined to be accessory to a water-dependent use, in accordance with 310 CMR 9.12(3)" Any project not falling under those provisions "shall be classified as a nonwater-dependent use project." 310 CMR 9.12(1). Under 310 CMR 9.12(2)(a) "[t]he Department shall determine a use to be water-dependent upon a finding that [the] use requires direct access to or location in tidal or inland waters, and therefore cannot be located away from said waters." In making this determination, the Department "shall find to be water-dependent [certain] uses," including "***marinas***, boat basins, channels, storage areas, ***and other commercial or recreational boating facilities***" 310 CMR 9.12(2)(a)1. (emphasis supplied).

Tidelands" or "Private Tidelands" as defined by 310 CMR 9.02.

Commonwealth Tidelands are:

> tidelands held [1] by the Commonwealth, or [2] by its political subdivisions or a quasi-public agency or authority, in trust for the benefit of the public; or [3] tidelands held by a private person by license or grant of the Commonwealth subject to an express or implied condition subsequent that it be used for a public purpose.

310 CMR 9.02 (definition of "Commonwealth Tidelands"). "The [Waterways] [R]egulations [at 310 CMR 9.02] establish a presumption that tidelands are Commonwealth tidelands if they are seaward of the ***historic low water mark*** or 100 rods [1,650 feet] seaward of the ***historic high water mark***, unless there is conclusive evidence that the tidelands are unconditionally free of any proprietary state interest." Matter of NYFA, 2011 MA ENV LEXIS 119, at 13 (emphasis supplied). The historic low water mark ("HLWM") is defined as:

> the low water mark which existed prior to human alteration of the shoreline by filling, dredging, excavating, impounding or other means[,] [and] [i]n areas where there is evidence of such alteration by fill, the Department [is required to] make its determination of the position of the historic low water mark in the same manner as described in 310 CMR 9.02: Definitions: Historic High Water Mark.

310 CMR 9.02 (definition of "historic low water mark"). The historic high water mark ("HHWM") is:

> the high water mark which existed prior to human alteration of the shoreline by filling, dredging, excavating, impounding, or other means[,] [and] [i]n areas where there is evidence of such alteration by fill, the Department [is required to] presume the historic high water mark is the farthest landward former shoreline which can be ascertained with reference to topographic or hydrographic surveys, previous license plans, and other historic maps or charts, which may be supplemented as appropriate by soil logs, photographs, and other documents, written records, or information sources of the type on which reasonable persons are accustomed to rely in the conduct of serious business affairs. [This] . . . presumption may be overcome by a clear showing that a seaward migration of such shoreline occurred solely as a result of natural accretion not caused by the

> owner or any predecessor in interest. For Great Ponds, the historic high water mark is synonymous with the natural high water mark.

310 CMR 9.02 (definition of "historic high water mark").

Private Tidelands are:

> tidelands held by a private person subject to an easement of the public for the purposes of navigation and free fishing and fowling and of passing freely over and through the water. . . .

Id. (definition of "Private Tidelands"). "The [Waterways] [R]egulations [at 310 CMR 9.02] establish a presumption that tidelands are [P]rivate [T]idelands if they are landward of the [HLWM] or . . . 100 rods (1,650 feet) seaward of the [HHWM]." Matter of NYFA, 2011 MA ENV LEXIS 119, at 13-14. "Generally, [P]rivate [T]idelands include the area between the high and low water mark, where public rights are more limited than on Commonwealth tidelands." Id., at 14.

"[T]o carry out its statutory obligations [under Chapter 91] and the responsibility of the Commonwealth for effective stewardship of trust lands," the Department promulgated the Waterways Regulations at 310 CMR 9.00. 310 CMR 9.01(2). Jimary Realty Trust, 2018 MA ENV LEXIS 51, at 10. "The general purposes served by [the Waterways Regulations]," include:

> (a) [the] protect[ion] and promot[ion] [of] the public's interest in tidelands, Great Ponds, and non-tidal rivers and streams in accordance with the public trust doctrine, as established by common law and codified in the Colonial Ordinances of 1641-47 and subsequent statutes and case law of Massachusetts;
>
> (b) [the] preserv[ation] and protect[ion] [of] the rights in tidelands of the inhabitants of the Commonwealth by ensuring that the tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose; [and]
>
> (c) [the] protect[ion] [of] the public health, safety, and general welfare as it

> may be affected by any project in tidelands, great ponds, and non-tidal rivers and streams . . . .

310 CMR 9.01(2)(a)-2(c); Jimary Realty Trust, 2018 MA ENV LEXIS 51, at 10-11.

PRIOR PROCEEDINGS

I. THE DEPARTMENT'S JUNE 2012 DENIAL OF THE APPLICANT'S ORIGINAL PROJECT

This appeal commenced in July 2012 when the Applicant challenged the Department's June 15, 2012 denial of the Applicant's Original Project for expansion of its marina. The Department had c. 91 regulatory jurisdiction over the Original Project because the Project sought new construction on flowed Commonwealth tidelands of Onset Bay. Department's June 15, 2012 Determination Denial, at p. 1.

The Original Project had sought c. 91 authorization to "expand [the Applicant's] existing marina by constructing and maintaining a pile held floating dock system with tie-off piles." Id. "The proposed dock [would] extend seaward approximately 174 feet from the end of the existing gas dock [at the Applicant's marina], [would] accommodate 29 new boat slips, and [would] include a fuel dock and sanitary pump-out facility." Id. The 29 new boat slips would be in addition to the existing 99 boat slips for vessels and 34 moorings at the Applicant's marina. Id. "Upon completion [of the expansion of the Applicant's marina], the overall pier and float system [at the facility] would extend approximately 750 feet seaward from the mean high water shore line into Onset Bay." Department's June 15, 2012 Determination Denial, at p. 1.

The Department reviewed the Original Project as a water dependent use project pursuant to 310 CMR 9.12(2) after "determin[ing] that the use of flowed Commonwealth tidelands within Onset Bay to provide a public boating facility [constituted] a water dependent use" in accordance

with the regulation.[15] Id. As a result of its review, the Department denied the Original Project because the proposed 174 foot seaward extension of the floating dock system at the Applicant's marina, which represented a 30% increase in the length of the existing docking facility at the marina, failed to satisfy the following c. 91 licensing requirements. Id., at pp. 3-4.

First, the proposed 174 foot seaward extension would have impaired the line of sight required for navigation by vessels which traversed to and from the areas of Pleasant Harbor and East River and Onset Town Pier in violation of 310 CMR 9.35(2)(a)1.c and this problem would have been exacerbated during the boating season when large vessels occupied the Onset Bay marina slips. Id., at p. 3.

Second, the proposed 174 foot seaward extension would have required the alteration of an established course of vessels in violation of 310 CMR 9.35(2)(a)1.d because smaller and non-motorized vessels traversing between Pleasant Harbor and the mouth of the East River in Onset Bay would have been forced further seaward of their customary route due to the marina expansion. Id., at 4. The diversion of boats further into the bay would have led to more congested navigation routes and create unsafe conditions by forcing small boats to navigate in waters being utilized by much larger vessels. Id.

Third, the proposed 174 foot seaward extension would have interfered with access to adjoining areas by extending substantially beyond the projection of existing structures adjacent to the site in violation of 310 CMR 9.35(2)(a)1.e. Id., at p. 4. According to the Department, the existing floating dock system at the Applicant's marina already extended more than 330 feet further seaward from the adjacent residential pier to the east and the floats at the Point

[15] The provisions of 310 CMR 9.12(2) are discussed above, at p. 8, n. 14, and below, at pp. 44-45.

Independence Yacht Club to the west in Onset Bay. Id. Small vessels navigating along the northern shoreline of Onset Bay would have been forced out approximately 800 feet from the shoreline to clear the proposed marina expansion in order to access adjoining areas and facilities. Id.

Lastly, the proposed 174 foot seaward extension would have impaired the ability of the public to pass freely upon the waterways in violation of 310 CMR 9.35(2)(a)1.j because the design of the proposed floating dock at the Applicant's marina provided no alternative other than navigating around the structures. Id.

II. THE FIRST ORDER STAYING PROCEEDINGS IN APPEAL

After the Applicant filed this appeal challenging the Department's denial of the Original Project, Mr. Kallstrom, Mr. Moezelaar, Ms. Tramontozzi, and Mr. Tramontozzi (collectively "the Original Intervenors") intervened in the appeal seeking affirmance of the Department's denial. Thereafter, the Applicant and the Department commenced discussions to attempt a resolution of the appeal by: (1) the Applicant's submittal of an amended c. 91 License application seeking approval of the proposed Revised Project to expand the Applicant's marina, and (2) the Department's issuance of a Waterways License approving the Project. See Order Staying Proceedings (February 3, 2014) ("First Stay Order"), at pp. 1-2. To facilitate the appeal's resolution and to safeguard any objections that the Original Intervenors might have to the Department's issuance of a c. 91 License to the Applicant approving the proposed Revised Project, I stayed the proceedings in the appeal pending conclusion of the public comment period

on and the Department's review of the proposed Revised Project. First Stay Order, at p. 2.

Under the First Stay Order, the Parties were to perform the following actions:

(a) Within 7 business days after the Department completed its review of the proposed Revised Project, the Applicant was to file a copy of the Department's determination with the Office of Appeals and Dispute Resolution ("OADR"),[16] where this appeal is pending for adjudication; and

(b) Within 30 calendar days after the Applicant's filing of the Department's determination on the proposed Revised Project, the Applicant and the Original Intervenors were to file a Statement with OADR indicating whether they accepted the Department's determination or would challenge it in this appeal.

First Stay Order, at pp. 2-3.

III. THE APPLICANT'S OCTOBER 2014 AMENDED c. 91 LICENSE APPLICATION AND REVISED PROPOSED PROJECT PLAN

In October 2014, the Applicant filed with the Department an amended c. 91 License application and revised proposed Project Plan seeking approval of the proposed Revised Project. Second Order Staying Proceedings (April 20, 2016) ("Second Stay Order"), at p. 3. The proposed Revised Project differed from the Original Project as follows:

(1) the proposed pier extension into Onset Bay from the Applicant's marina was reduced from 174 feet to 55 feet;

(2) the proposed number of increased dock slips at the Applicant's marina was reduced from 29 to 14; and

(3) an elevated 20 foot long by 6 foot high bridge was to be constructed at the

[16] "OADR is a quasi-judicial office within the Department which is responsible for advising the Department's Commissioner in resolving all administrative appeals of Department Permit decisions and enforcement orders in a neutral, fair, timely, and sound manner based on the governing law and the facts of the case". In the Matter of Tennessee Gas Pipeline Company, LLC, OADR Docket No. 2016-020, Recommended Final Decision (March 22, 2017), 2017 MA ENV LEXIS 34, at 9, adopted as Final Decision (March 27, 2017), 2017 MA ENV LEXIS 38. OADR staff who advise the Department's Commissioner in resolving administrative appeals are Presiding Officers, senior environmental attorneys at the Department appointed by the Commissioner to serve as neutral hearing officers in appeals. Id.

> Applicant's marina to allow small boating vessels to navigate through the marina docking facility instead of around the proposed additional docks.

Mr. Hill's Direct PFT, ¶ 8.

On October 14, 2014, the Department provided written notice to the Applicant acknowledging its receipt of the Applicant's amended c. 91 License and revised proposed Project Plan seeking approval of the proposed Revised Project. Id. The Department's notice informed the Applicant that "[p]ursuant to [the notice requirements of] 310 CMR 9.13(1)(a),[17] the

[17] 310 CMR 9.13(1)(a) provides that "[p]ublic notice [of a c. 91 license application] shall be issued by the Department but distributed and published by the applicant." The regulation also provides that "[t]he date of the public notice and, when required, the date of the public hearing, shall be determined by the Department." The regulation also requires "[t]he applicant [for a c. 91 license] [to provide] notice of [its] license or permit application as described in 310 CMR 9.13(1)(c), by first class mail, return receipt, and provide proof of such notification to the Department, to" certain parties, including:

> 1. the municipal official, the planning board, the conservation commission, and the harbormaster, if any, in the city or town where the project is located; . . . .
>
> 4. [the Commonwealth's Office of Coastal Zone Management ("CZM")], if the project is located within the coastal zone; [the Commonwealth's Department of Conservation and Recreation ("DCR")], if the project is located in an Ocean Sanctuary; and the [Commonwealth's] Department of Fish and Game; . . . [and]
>
> 6. all landowners and easement holders of the project site and abutters thereto, as identified pursuant to 310 CMR 9.11(3)(b)1 . . . .

310 CMR 9.13(1)(c) requires the notice to include certain information, including:

> 1. the name and address of the applicant and the applicant's representative, if any;
>
> 2. a description of the location of the project, including whether it is located in an . . . an Ocean Sanctuary;
>
> 3. a description of the project including a listing of uses and the Department's determination of water-dependency;
>
> 4. for any water-dependent use project for which the Department decides to hold a hearing, the time, place and location of the public hearing and the date on which the public comment period ends;
>
> 5. for other water-dependent use projects, a statement that within 30 days of the notification date of a license application or within 15 days of the notification date of a permit application, written comments will be accepted, and that a public hearing may be held upon request by the municipal official; . . . [and]

Applicant [was] required to concurrently provide [a copy of the Department's] notification, along with a copy of the project site plans submitted with the Waterways License Application, to the appropriate municipal officials, regulatory agencies and abutters to the project for their review and comment . . . ." Second Stay Order, at pp. 3-4. The Department's notice also directed "[t]he applicant [to] send the notice . . . by Certified mail . . . and notify the Department when completed." Id., at p. 4.

IV. THE DEPARTMENT'S ISSUANCE OF THE DRAFT JUNE 2015 c. 91 LICENSE APPROVING THE PROPOSED REVISED PROJECT

The public comment period on the proposed Revised Project was from October 31, 2014 to November 30, 2014. Mr. Hill's Direct PFT, ¶ 12. Believing that the Applicant had complied with the notice requirements of 310 CMR 9.13(1)(a)1-7 as set forth above regarding the Project, the Department reviewed the Project and approved it on June 30, 2015 by issuing the Draft June 2015 c. 91 License to the Applicant. Second Stay Order, at p. 4.

On July 19, 2015, the Applicant filed a copy of the Draft June 2015 c. 91 License with OADR and indicated that it would not challenge the License in this appeal. Id. On August 18, 2015, the Original Intervenors filed a Statement with OADR indicating that they intended to challenge the Draft June 2015 c. 91 License in this appeal for a number of reasons, including that the Applicant had failed to comply with the notice requirements of 310 CMR 9.13(1)(a)1-7

> 7. a statement that a municipality, ten citizen group or any aggrieved person that has submitted written comments before the close of the public comment period may appeal and that failure to submit written comments will result in the waiver of any right to an adjudicatory hearing; . . . .

regarding the proposed Revised Project. Second Stay Order, at pp. 4-6.

V. THE SECOND ORDER STAYING PROCEEDINGS IN APPEAL

The Applicant and the Department disputed the Original Intervenors' contention that the Applicant had failed to comply with the notice requirements of 310 CMR 9.13(1)(a)1-7 regarding the proposed Revised Project, but the Department reversed its position on April 11, 2016, several weeks prior to the scheduled May 4, 2016 evidentiary Adjudicatory Hearing ("May 4, 2016 Hearing") to resolve the Original Intervenors' challenge of the Project.[18] Id., at pp. 4-7. At that time, the Department moved to stay the proceedings in the appeal after discovering that the Applicant had failed to comply with the notice requirements of 310 CMR 9.13(1)(a)1-7. Id., at pp. 6-7.

According to the Department, "[p]roper notice was issued by the Department, pursuant to 310 CMR 9.13(1)(a), but was not distributed by the Applicant, pursuant to that section," and "[b]y not sending notice of license to [the individuals or] entities described therein by first class mail, return receipt, and providing proof of such notification to the Department, the Department was not able to fully evaluate the [proposed Revised Project], inasmuch as there may have been additional public comments bearing on the . . . [P]roject that could [have] influence[d] whether the Department would approve, deny or condition the . . . [P]roject differently." Id., at 6. The Department requested that the appeal be stayed so that the Applicant could cure its non-compliance with the notice requirements of 310 CMR 9.13(1)(a)1-7 and the Department could consider potential additional public comments on the proposed Revised Project. Second Stay

[18] The Hearing was scheduled for May 4, 2016 pursuant to a Scheduling Order that I issued to the Parties on October 20, 2015. The May 4, 2016 Hearing date was also confirmed at the Pre-Hearing Conference that I conducted with the Parties on January 26, 2016.

Order, at pp. 7-8. On April 20, 2016, I granted the Department's request by issuing a Second Stay Order, which stayed the proceedings in the appeal, including postponing the scheduled May 4, 2016 Hearing indefinitely, and directed the Applicant to cure its non-compliance with the notice requirements of 310 CMR 9.13(1)(a)1-7 and the Department to consider additional public comments that it received on the proposed Revised Project as a result of the Applicant providing the required notice. Id., at pp. 11-12.

The Second Stay Order also directed that "[i]f the Department receive[d] written comments to the [proposed Revised Project] . . . and the Department's [Draft] June 2015 c. 91 License, from persons other than the [Original] Intervenors entitled to notice pursuant to 310 CMR 9.13(1)(a)1-7 by the Public Comments Deadline, the Department [was to], within 60 days thereafter, review the comments and make a written determination that based on the Comments, the [Draft] June 2015 c. 91 License should either: (1) proceed in its current form; (2) be modified; or (c) be rescinded (meaning that the [proposed Revised Project] . . . would be denied)." Id., at pp. 12-13. "The Department [was to] provide written notice of its determination to all persons and entities entitled to such notice in accordance with the requirements of c. 91 and the Waterways Regulations at 310 CMR 9.00, and file a copy of its determination with OADR within five business days after the date of the determination." Second Stay Order, at p. 13.

The Second Stay Order also directed that "[i]f the Department's written determination [was] that based on the Comments received, the [Draft] June 2015 c. 91 License should proceed in its current form, the determination [was to] inform all persons and entities entitled to such notice in accordance with the requirements of c. 91 and the Waterways Regulations at 310 CMR 9.00 that they [could] challenge the determination by filing with OADR within 30 days after the

date of the determination, a Motion to Intervene in this appeal pursuant to 310 CMR 1.01(7)[19] setting forth their specific objections to the determination . . . ." Id. The Motion to Intervene was to be filed "within 30 days after the date of the determination [and was to] . . . se[t] forth [the proposed intervenor's] specific objections to the determination." Second Stay Order, at p. 14.

The public comment period on the proposed Revised Project to correct the Applicant's failure to provide proper notice to the public of the Project was from May 11, 2016 to June 10, 2016. Mr. Hill's Direct PFT, ¶ 12. On October 12, 2016, the Department provided documentation to OADR demonstrating that:

(1) on May 9, 2016, the Applicant, in accordance with the requirements of the

[19] 310 CMR 1.01(7)(a) provides that:

> [a]ny person not initially a party [to an administrative appeal], who with good cause wishes to intervene in, or participate in [the appeal], . . . shall file a motion for permission to intervene or participate in the [appeal].

Under 310 CMR 1.01(7)(b), "[a] motion [to intervene] shall state the name and address of the person making the motion [and] . . . state":

> 1. why intervention or participation should be allowed;
>
> 2. the relief sought;
>
> 3. the law in support of intervention and of the relief sought; and
>
> 4. the effect of the [administrative appeal] on whomever is making the motion.

The motion to intervene must also allege sufficient facts demonstrating that the person seeking to intervene "[is] substantially and specifically affected by the [administrative appeal] . . . or . . . have the constitutional or statutory right to intervene without showing that they are substantially and specifically affected." 310 CMR 1.01(7)(d). A party claiming that it is substantially and specifically affected by a Department permit decision that is the subject of a pending administrative appeal "must show both (1) a concrete injury that it is likely to suffer as a result of the [Department's permit] decision and (2) a nexus between the relief sought and the subject matter of the [administrative appeal]." In the Matter of City of Marlborough Easterly Wastewater Treatment Facility, Docket Nos. DEP-05-193, DEP-05-194, DEP-05-195, DEP-05-196, Ruling on Motion to Intervene (February 3, 2006), 2006 DALA LEXIS 34, at 4-5. "The party also must show that its interests are 'arguably within the zone of interests to be protected by the statute or regulation in question,' and that 'the relief it seeks would alleviate the harm, or injury, that it alleges.'" Id., at 5.

Second Stay Order had provided written notice to all persons and entities set forth in 310 CMR 9.13(1)(a)1-7 informing them of the proposed Revised Project;[20]

(2) on August 5, 2016 and after the Public Comments Period had closed, the Department issued a determination that based on the Comments that it had received, the Draft June 2015 c. 91 License should proceed in its current form;[21]

(3) on August 5, 2016, the Department provided written notice of its determination to all persons and entities entitled to such notice in accordance with the requirements of c. 91 and the Waterways Regulations at 310 CMR 9.00, and informed those persons and entities "that if [they] [were] not already a party [to this appeal, they could] challenge [the] determination by filing with OADR within 30 days after the date of [the] determination, a Motion to intervene in this appeal pursuant to 310 CMR 1.01(7) setting forth [their] specific objections to [the] determination;"[22]; and

(4) in response to the Department's written notice of August 5, 2016, 42 individuals or entities filed motions seeking to intervene as parties in the case ("the Proposed Additional Intervenors") opposing the proposed Revised Project.

The Applicant opposed all of the Proposed Additional Intervenors' Motions to Intervene in the case, contending that they: (1) "were not entitled to be provided notice [of the proposed Revised Project] in accordance with 310 CMR 9.13(1)(a)1-7"; and (2) "did not either: (i) individually submit comments during the prior Public Comment periods [on the proposed Revised Project]; or (ii) timely file requests to appeal or intervene [in this appeal]." Applicant's

[20] Exhibits A and B to Department's Response to Order on Proposed Intervenors' Motions to Intervene in Appeal (October 12, 2016) ("Department's Response").

[21] Exhibit C to Department's Response. The Public Comment Period was from May 11, 2016 to June 10, 2016. Exhibit D to Department's Response.

[22] Exhibits D and E to Department's Response.

Response to Requests to Intervene (September 16, 2016), at p. 1.

The Department supported in part, and opposed in part, the Proposed Additional Intervenors' Motions to Intervene contending that only three of the 42 Proposed Additional Intervenors: Mr. Comrie, Ms. Flanders, and Bruce Peterson ("Mr. Peterson") should be allowed to intervene in the appeal because they: (1) "[made] allegations that tend[ed] to show that they could be substantially and specifically affected [by this appeal] pursuant to 310 CMR 1.01(7)(d)";[23] and (2) "filed comments [to the proposed Revised Project] within the public comment period." Department's Response to Order On Proposed Intervenors' Motions to Intervene (October 12, 2016), at p. 1.

I agreed with the Department that Mr. Comrie, Mr. Peterson, and Ms. Flanders should be permitted to intervene in the case, but also determined that two other individuals: Jeanne McCarthy ("Ms. McCarthy") and John McCarthy ("Mr. McCarthy") should also be permitted to intervene in the appeal because they satisfied the intervention requirements of 310 CMR 1.01(7). Accordingly, on February 24, 2017, I issued an order that: (1) allowed Mr. Comrie, Mr. Peterson, Ms. Flanders, Ms. McCarthy, and Mr. McCarthy to intervene in the appeal because they satisfied the requirements for intervention pursuant to 310 CMR 1.01(7)(d), and (2) denied the motions of the remaining 37 Proposed Intervenors because they failed to satisfy the requirements for intervention pursuant to 310 CMR 1.01(7)(d). Second Order on Proposed Intervenors' Motions to Intervene in Appeal (February 24, 2017), at pp. 6-7. As a result of my order, Mr. Comrie, Mr. Peterson, Ms. Flanders, Ms. McCarthy, and Mr. McCarthy joined Mr. Kallstrom, Mr. Moezelaar, Ms. Tramontozzi, and Mr. Tramontozzi as the Intervenors in the appeal.

[23] See above, at p. 19, n.19.

VI. THE THIRD ORDER STAYING PROCEEDINGS IN APPEAL

Approximately one month later, on March 27, 2017, I conducted another Pre-Hearing Conference in the appeal, which all of the Parties and their legal counsel were required to attend to determine the appeal's potential settlement by agreement of the Parties and to identify the Issues for Resolution In the Appeal in the event that it was not settled and required a Hearing on July 12, 2017 for its resolution. April 2017 Pre-Screening/Pre-Hearing Conference Report and Order (April 18, 2017) ("April 2017 PHG Conf. Rept. & Order"), at pp. 7-8. All of the Parties, except the recently added Intervenors Ms. McCarthy, Mr. McCarthy, and Mr. Peterson, attended the Pre-Hearing Conference. Id., at p. 8, n.11. Ms. McCarthy and Mr. McCarthy did not attend the Pre-Hearing Conference because they were no longer participating in the appeal as a result of having reached a private settlement with the Applicant prior to the Pre-Hearing Conference. Id. Mr. Peterson failed to appear at the Pre-Hearing Conference without explanation and was dismissed from the appeal. Id.

The Parties who attended the Pre-Hearing Conference, through their respective legal counsel, presented summaries of their respective positions in the appeal, which were far apart from each other making settlement of the appeal unlikely. Id., at p. 8. Although I encouraged the Parties to continue settlement discussions, I nevertheless directed them to submit to me by March 31, 2017 a proposed Joint Statement of Issues for Resolution in the Appeal in the event that the appeal was not settled.[24] I also established a schedule for the Parties to file the sworn PFT of their witnesses for the July 12, 2017 Hearing to resolve the Intervenors' claims against

[24] On March 31, 2017, the Parties filed their proposed Joint Statement of Issues for Resolution in the Appeal, which I adopted and those Issues are the Issues for Resolution in the Appeal. See above, at pp. 2-4.

the Draft June 2015 c. 91 License. Id., at pp. 8-20.

In accordance with the schedule that I established the Pre-Hearing Conference, on May 10, 2017, the Intervenors filed the sworn PFT of their witnesses, including of their c. 91 expert, Mr. Simpson. The Intervenors had retained Mr. Simpson to testify at the July 12, 2017 Hearing in support of their claim that the Department's issuance of the Draft June 2015 c. 91 License approving the proposed Revised Project violated c. 91 and the c. 91 Regulations at 310 CMR 9.00. After reviewing Mr. Simpson's PFT, on May 22, 2017, the Department filed a Request for Guidance expressing concern regarding whether Mr. Simpson had a conflict of interest pursuant to the Massachusetts Conflict of Interest Law, G.L. c. 268A, precluding him from testifying at the Hearing on behalf of the Intervenors because of his prior c. 91 work for the Department.[25] Third Order Staying Proceedings (May 30, 2017), at p. 2. The Applicant expressed the same concern on May 24, 2017 when it filed a motion to stay the proceedings in the appeal, pending the issuance of a written decision by the State Ethics Commission on whether Mr. Simpson had such a conflict of interest. Id.

In response, the Intervenors contended that the Department's and the Applicant's concerns about Mr. Simpson were unfounded, contending that "Mr. Simpson [had] sought, and . . . ha[d] received a formal written opinion, from the State Ethics Commission" stating that no conflict of interest existed. Id. However, neither the Intervenors nor Mr. Simpson had provided the Applicant and the Department with a copy of the written opinion that the State

[25] "The conflict of interest law seeks to prevent conflicts between private interests and public duties, foster integrity in public service, and promote the public's trust and confidence in that service by placing restrictions on what state employees may do on the job, after hours, and after leaving public service . . . ." https://www.mass.gov/service-details/summary-of-the-conflict-of-interest-law-for-state-employees. The conflict of interest law is enforced by the Massachusetts State Ethics Commission. Id.

Ethics Commission purportedly had issued to Mr. Simpson. Third Order Staying Proceedings (May 30, 2017), at p. 2. They also had not provided the Applicant and the Department with the information that Mr. Simpson purportedly provided to the State Ethics Commission that purportedly resulted in its written opinion to Mr. Simpson. Id. As a result, I issued an Order on May 30, 2017 staying the proceedings in the appeal and postponing the July 12, 2017 Hearing indefinitely pending resolution of the Parties' dispute over whether Mr. Simpson had a conflict of interest precluding him from testifying at the Hearing on behalf of the Intervenors. Third Order Staying Proceedings (May 30, 2017), at pp. 2-3. My May 30, 2017 stay order directed the Intervenors to file with OADR by Jun 13, 2017: (1) a true copy of the written opinion that the State Ethics Commission purportedly had issued to Mr. Simpson stating that he did not have a conflict of interest; and (2) an Affidavit from Mr. Simpson setting forth all of the information that he had provided to the State Ethics Commission that purportedly resulted in its written opinion to Mr. Simpson. Id.

On June 5, 2017, the Intervenors and Mr. Simpson complied with my Third Stay Order by filing with OADR an affidavit from Mr. Simpson which included copies of: (1) his April 3, 2017 written request to the State Ethics Commission for an ethics ruling on his planned testimony for the Intervenors; and (2) the State Ethics Commission's April 26, 2017 ruling on his request. Mr. Simpson's April 3, 2017 written request to the State Ethics Commission "explain[ed] why [he] request[ed] advice [from the Commission]." Exhibit 1 to Mr. Simpson's Affidavit. Specifically, he stated the following:

> I am a former [Department] employee. In 1988 I was directly involved in the

> review and rulings on a marina application decision which became final in 1988.
>
> I left state service in 1999.
>
> Now, as a private consultant, I have been retained on behalf of a private party with regard to a new application filed by the successor in interest to that same marina, seeking a new license to expand beyond what was approved in 1988.
>
> My familiarity with the facility from my work in 1988 and 1989 will come into [play] during this new proceeding, but the application is different, with a proposal to expand beyond what was previously licensed.
>
> I would like written confirmation [from the State Ethics Commission] that this new license proceeding is different from the "Particular Matter" in which I was involved while a state employee; and that where the new proceeding is not a "Particular Matter" in which I was involved while employed by the state and that I do not have a conflict. The new application was filed in 2007.

Id.

Mr. Simpson stated in his Affidavit that:

> In response to [his] written request [to the State Ethics Commission], . . . [an attorney for the Commission ("the Commission's legal counsel")] . . . contacted [him], and [they] spoke by phone in a conversation in which [he was] asked [to provide] additional information and to clarify [his] request.

Mr. Simpson's Affidavit, ¶ 5. He also stated that "[f]ollowing [his] conversation [with the Commission's legal counsel,] . . . [the latter] issued a written ruling [on April 26, 2017]" finding that he did not have a conflict of interest precluding him from testifying on behalf of the Intervenors as their expert witness. Id., ¶ 6; Exhibit 2 to Mr. Simpson's Affidavit.

Mr. Simpson included a copy of the Commission's legal counsel's written ruling in his Affidavit to OADR as Exhibit 2. In the ruling, the Commission's legal counsel stated that the ruling was "[based] upon the facts [that Mr. Simpson had] provided [to the Commission's legal counsel which] . . . [counsel] ha[d] not made any independent investigation of those facts." Exhibit 2 to Mr. Simpson's Affidavit. The Commission's legal counsel also stated that "[i]n

addition to the facts that [Mr. Simpson had] provided in [his] request [to the State Ethics Commission], [he] also provided the following facts to [the Commission's legal counsel] during [their] telephone conversation":

> In 2007, the new owner of the marina, which had come under new ownership since 1988, applied for an expansion of the marina. This application is new and separate application from the one filed by the previous owner in 1988, in which [Mr. Simpson] participated. [The Department] denied this 2007 application, but did agree to allow a smaller expansion [of the marina in June 2015].

Exhibit 2 to Mr. Simpson's Affidavit. Based on these facts, the Commission's counsel concluded that "[g]iven that [Mr. Simpson] left [the Department] in 1999, clearly [he] did not participate in any way in the matter regarding the 2007 application," and, as such, "as a former state employee, [he could] participate in this matter as an expert witness" for the Intervenors, who oppose the marina expansion as approved by the Department in the Draft June 2015 c. 91 License, "because [the matter] is in connection with a new particular matter that [Mr. Simpson] did not participate in as a state employee." Id.

The general rule is that a State Ethics Commission determination regarding whether a conflict of interest exists within the meaning of G.L. c. 268A precluding a former state employee such as Mr. Simpson from testifying as a witness in a judicial or quasi-judicial proceeding against his or her former public employer "establishes conclusively" whether such a conflict of interest exists.[26] In the Matter of Douglas Abdelnour, OADR Docket No. 88-138, Memorandum of Decision and Order on Motions In Limine (December 27, 1991), at p. 13. Logically and consistent with the requirements of G.L. c. 268A, this should be the general rule provided the former state employee has provided the State Ethics Commission with all material information

[26] Proceedings before OADR, where this appeal is pending for adjudication are quasi-judicial proceedings. See above at p. 14, n. 16.

pertinent to his or her request for an ethics opinion from the Commission. Here, I did not find the State Ethics Commission's April 26, 2017 favorable ruling to Mr. Simpson to be conclusive because the Applicant and the Department brought to my attention that Mr. Simpson had not provided the Commission with the following material information that was pertinent to his request for an ethics opinion from the Commission:

(1) from 1986-1999, Mr. Simpson served as an Environmental Analyst and the Chief of the Department's Waterways Program, responsible for supervising, reviewing, and making recommendations approving or denying all c. 91 License applications;

(2) Mr. Tramontozzi, one of the Intervenors in this appeal, was one of the parties who appealed to Superior Court the Department's 1988 approval of a c. 91 License that was issued to the prior owner of the marina authorizing the current marina structures;

(3) in 1988, during Mr. Simpson's tenure with the Department, the marina's prior owner filed an application with the Department to expand the marina, which the Department denied and which Mr. Simpson was involved in the denial; and

(4) Mr. Simpson's expert testimony and Mr. Tramontozzi's testimony in this appeal linked the Department's denial of the 1988 expansion application, which Mr. Simpson was involved in, to the Draft June 2015 c. 91 License that resulted from the Applicant's 2007 marina expansion application (as revised in October 2014) and that the Intervenors are challenging in this appeal.

Order Continuing Third Order Staying Proceedings (July 24, 2017), at pp. 5-6, 9-11.

As a result of Mr. Simpson not having disclosed the material information set forth above to the State Ethics Commission, I issued an Order requiring him to disclose that material information to the Commission in a second written ethics opinion request seeking its determination regarding whether a conflict of interest existed within the meaning of G.L.

c. 268A precluding him from testifying as the Intervenors' expert witness at the Hearing. Order Continuing Third Order Staying Proceedings (July 24, 2017), at pp. 9-10. The Order also required Mr. Simpson to include with his second written ethics opinion request to the State Ethics Commission true copies of the following documents:

(1) the Department's December 29, 1988 letter to the marina's prior owner denying the 1988 marina expansion project, which was written during Mr. Simpson's employment with the Department and noted that he was the Department staff member responsible for reviewing that project;

(2) the plan submitted by the marina owner to the Department for 1988 marina expansion project;

(3) the original and revised plans submitted by the marina owner to the Department for the 2007 marina expansion project;

(4) the pre-filed testimony that Mr. Simpson had filed for the Hearing on behalf of the Intervenors in this appeal; and

(5) the pre-filed testimony that Intervenor Mr. Tramontozzi had filed for the Hearing on the behalf of the Intervenors in this appeal.

Id., at p. 10. The Order also required Mr. Simpson to specifically set forth to the State Ethics Commission the differences between 1988 and 2007 marina expansion projects if the Intervenors and he contended the projects were different. Id.

Mr. Simpson complied with my Order and the State Ethics Commission subsequently issued a second written ethics opinion conclusively determining that Mr. Simpson could testify for the Intervenors at the Hearing in opposition to the Draft June 2015 c. 91 License because no conflict of interest within the meaning of G.L. c. 268A existed precluding him from testifying for the Intervenors. Orders (January 16, 2018), at pp. 1-4. At the heart of the Commission's ruling was its determination that the Department's decision in December 1988, during Mr. Simpson's employment with the agency, denying the Applicant's application to expand its marina ("the

December 1988 Permit Decision") was a "separate particular matter" from the Department's June 2012 Permit Decision denying the Original Project for expansion of the Applicant's marina that was the genesis of this appeal by the Applicant in July 2012 and the Department's later issuance of the Draft June 2015 c. 91 License approving the proposed Revised Project. Orders (January 16, 2018), at p. 3. Specifically, the Commission determined that "the matter in which [Mr. Simpson] wish[ed] [to] testify, stemming from the [June] 2012 [Permit] Decision" and the Department's subsequent approval of the Draft June 2015 c. 91 License "[were not] sufficiently connected to the [Department's December 1988 Permit] Decision to trigger [a] . . . conflict of interest[,] . . . prohibiting [him] from testifying as an expert witness [for the Intervenors]" regarding the Department's June 2012 Permit Decision and the Draft June 2015 c. 91 License. Id.

As a result of the Commission's ruling, I issued an Order precluding Mr. Simpson from testifying for the Intervenors regarding the Department's December 1988 Permit Decision, but allowing him to testify for the Intervenors regarding the Department's June 2012 Permit Decision and the Draft June 2015 c. 91 License. Id. Accordingly, I granted the Applicant's motion to strike portions of Mr. Simpson's PFT "refer[ring] to or comment[ing] on the 1988 Waterways License Application and [the December 1988 Permit] Decision" and precluding him from offering any testimony at the Hearing regarding the same subject matter.[27] Id., at pp. 3-4. I also granted the Applicant's motion to strike because the December 1988 Permit Decision and whether the current structures at the Applicant's marina which were licensed in 1988 satisfied the current c. 91 regulatory standards was not relevant to resolution of the principal substantive issue

[27] The Department supported the Applicant's Motion to Strike. Orders (January 16, 2018), at p.4.

for resolution in this appeal: whether the Department properly issued the Draft June 2015 c. 91 License approving the proposed Revised Project. Indeed, in his August 6, 2017 request to the Commission for a further opinion regarding whether a conflict of interest existed within the meaning of G.L. c. 268A precluding him from testifying for the Intervenors, Mr. Simpson stated that "[he] did not seek to link the 1988 license review . . . with the current application" and that "[t]he existing . . . structures are already licensed and are not subject to the current standards." Id. He also stated that "[his] testimony is focused on the [Draft June 2015 c. 91 License]." Id.

FINDINGS

I. BURDEN OF PROOF AND STANDARD OF REVIEW

A. Burden of Proof

At the Hearing, the Intervenors had the burden of proof on all of the Issues for Resolution in the Appeal. In the Matter of Renata Legowski, OADR Docket No. 2011-039, Recommended Final Decision (October 25, 2012), 2012 MA ENV LEXIS 128, at 7-8 (party challenging Chapter 91 determination has burden of proof), adopted as Final Decision (November 5, 2012), 2012 MA ENV LEXIS 131; In the Matter of Webster Ventures, LLC, OADR Docket No. 2015-014 ("Webster Ventures II"), Recommended Final Decision (June 3, 2016), 2016 MA ENV LEXIS 27, at 67-69, adopted as Final Decision (June 15, 2016), 2016 MA ENV LEXIS 32; In the Matter of Jimary Realty Trust, OADR Docket No. 2016-015, Recommended Final Decision (August 3, 2018), 2018 MA ENV LEXIS 51, at 11-12, adopted as Final Decision (August 14, 2018), 2018 MA ENV LEXIS 50. Specifically, they had the burden of proving at the Hearing by a preponderance of the credible evidence through the sworn testimonial and documentary

evidence of competent witnesses, including expert witnesses, that the Department erred in issuing the Draft June 2015 c. 91 License. Id.

It is well settled that "[a] competent source' [of evidence includes] a witness who has sufficient expertise to render testimony on the technical issues on appeal." In the Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 MA ENV LEXIS 89, at 36-37, adopted as Final Decision (August 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." Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted); see e.g. In the Matter of Carulli, Docket No. 2005-214, Recommended Final Decision (August 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 (October 25, 2006); In the 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); In the Matter of Robert Siegrist, Docket No. 2002-132, Recommended Final Decision (April 30, 2003) (insufficient evidence from competent source to show wetlands delineation was incorrect and work was not properly conditioned), adopted as Final Decision (May 9, 2003); Pittsfield Airport Commission, supra, 2010 MA ENV LEXIS 89, at 36-39 (petitioner's failure to submit expert testimony in appeal challenging Department's Commissioner's issuance of 401 Water Quality Certification Variance to Pittsfield Airport Commission fatal to petitioner's claims in appeal because Variance was "detailed and

technical . . . requiring expert testimony on issues . . . implicated by the Variance," including . . . (1) wetland replication, restoration, and enhancement, (2) mitigation of environmental impacts to streams, and (3) stormwater discharge and treatment[,] [and (4)] . . . runway safety and design").

B. Standard of Review

My review of the evidence presented at the Hearing is de novo, meaning that my review is anew, irrespective of any prior determination of the Department in issuing the Draft June 2015 c. 91 License to the Applicant. In the Matter of Woods Hole, Martha's Vineyard & Nantucket Steamship Authority, OADR Docket No. 2016-025, Recommended Final Decision (March 27, 2017), 2017 MA ENV LEXIS 29, at 31, adopted as Final Decision (April 13, 2017), 2017 MA ENV LEXIS 31; Jimary, 2018 MA ENV LEXIS 51, at 12-13. Put another way, as the Presiding Officer responsible for adjudicating the appeal, "[I am] not bound by MassDEP's prior orders or statements [in the case], [but] instead [am] responsible . . . for independently adjudicating [the] appea[l] and [issuing a Recommended Final Decision] to MassDEP's Commissioner that is consistent with [Chapter 91] and . . . [the Waterways] Regulations . . . ." Jimary, 2018 MA ENV LEXIS 51, at 13; Cf, In the Matter of John Soursourian, OADR Docket No. WET -2013-028, Recommended Final Decision (2014), 2014 MA ENV LEXIS 49, at 36, adopted as Final Decision, 2014 MA ENV LEXIS 47 (2014).

As for the relevancy, admissibility, and weight of evidence that was presented at the Hearing was governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h). Under G.L. c. 30A, § 11(2):

> [u]nless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of

> serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

Under 310 CMR 1.01(13)(h), "[t]he weight to be attached to any evidence . . . rest[ed] within the discretion of the Presiding Officer. . . ." Speculative evidence was accorded no weight given its lack of probative value in resolving the issues in the case. In the Matter of Sawmill Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), 2015 MA ENV LEXIS 63, at 84, adopted as Final Decision (July 7, 2015), 2015 MA ENV LEXIS 62 (petitioners' expert testimony "that pharmaceuticals, toxins, and other potentially hazardous material would be discharged from effluent generated by . . . proposed [privately owned wastewater treatment facility] . . . was speculative in nature and not reliable").[28]

II. ONLY TWO OF THE INTERVENORS, MS. FLANDERS AND MR. TRAMONTOZZI, HAVE STANDING AS AN "AGGRIEVED PERSON" PURSUANT TO 310 CMR 9.02 AND 9.17(1)(b) TO CHALLENGE THE DRAFT JUNE 2015 C. 91 LICENSE

A. The Jurisdictional Nature of Standing

Standing "is not simply a procedural technicality." Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975); Webster Ventures II, 2016 MA ENV LEXIS 27, at 19-20. 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. Commissioner of Insurance, 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

[28] Prior to the Hearing, the Intervenors requested that I strike portions of the PFT of the Applicant's witnesses because purportedly the PFT lacked foundation, was unduly repetitive, and/or conclusory. I have declined to strike the PFT in question and accorded it the weight it deserves in accordance with my discretion as the Presiding Officer in the case.

S.Ct.2431, 2435 (1995) ("[s]tanding is perhaps the most important of the jurisdictional doctrines"); Webster Ventures II, 2016 MA ENV LEXIS 27, at 19.

Under 310 CMR 9.17(1)(b), "any person aggrieved by the decision of the Department to grant [a Chapter 91] license . . . who . . . submitted written comments within the public comment period" may file an administrative appeal with OADR challenging the License within 21 days after its issuance. Webster Ventures II, 2016 MA ENV LEXIS 27, at 38. The Waterways Regulations define "person" as "any individual, partnership, trust, firm, corporation, association, commission, district, department, board, municipality, public or quasi-public agency or authority." 310 CMR 9.02.

Here, the parties do not dispute that the Intervenors previously participated in the permitting proceedings. The only issue regarding the Intervenors' standing is whether they are each "[a] person aggrieved by the [Draft June 2015 c. 91 License]" within the meaning of 310 CMR 9.17(1)(b).

The Waterways Regulations at 310 CMR 9.02 define an "aggrieved person" as:

> any person who, because of a decision by the Department to grant a license or permit, 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 public interests protected by M.G.L. c. 91 and c. 21A.

310 CMR 9.02; Webster Ventures II, 2016 MA ENV LEXIS 27, at 38-39. An "aggrieved person" as that term is used in 310 CMR 9.02 and 310 CMR 9.17(1)(b) "must assert 'a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest. . . . Of particular importance, the right or interest asserted must be one that [Chapter 91] . . . intends to protect.'" Webster Ventures II, 2016 MA ENV LEXIS 27, at 39.

"To show standing, [however,] a party need not prove by a preponderance of the

evidence that his or her claim of particularized injury is true." Webster Ventures II, 2016 MA ENV LEXIS 27, at 39, citing, Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005). As the Massachusetts Appeals Court explained in Butler:

> [t]he "findings of fact" a judge is required to make when standing is at issue . . . differ from the "findings of fact" the judge must make in connection with a trial on the merits. Standing is the gateway through which one must pass en route to an inquiry on the merits. When the factual inquiry focuses on standing, therefore, a plaintiff is not required to prove by a preponderance of the evidence that his or her claims of particularized or special injury are true. "Rather, the plaintiff must put forth ***credible evidence*** to substantiate his allegations. [It is i]n this context [that] standing [is] essentially a question of fact for the trial judge."

63 Mass. App. Ct. at 441 (emphasis supplied); Webster Ventures II, 2016 MA ENV LEXIS 27, at 39-40. This "credible evidence" standard to demonstrate standing "has both a quantitative and a qualitative component." Butler, 63 Mass. App. Ct. at 441. Specifically:

> ***[q]uantitatively***, the evidence must provide specific factual support for each of the claims of particularized injury the [party seeking to establish standing] has made[,] . . . [and] ***[q]ualitatively***, the evidence must be of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the [challenged governmental] action. ***Conjecture, personal opinion, and hypothesis are therefore insufficient [to establish standing]*** . . . . [If] the judge determines that the evidence is both quantitatively and qualitatively sufficient . . . [to] establis[h] standing, the inquiry [regarding whether the party has standing] stops [and the party is not] required to persuade the judge that [the party's] claims of particularized injury are, more likely than not, true.

Id., at 441-42 (emphasis supplied).

To summarize, in order to demonstrate that they were each "[a] person aggrieved by the [Draft June 2015 c. 91 License]" within the meaning of 310 CMR 9.17(1)(b), each of the Intervenors was required to put forth at the Hearing a minimum quantum of specific factual evidence that qualitatively a reasonable person could rely upon to conclude that the proposed Revised Project authorized by the Draft June 2015 c. 91 License will or might cause each the

Intervenors to suffer an injury in fact, which will be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interest protected by G.L. c. 91. Butler, 63 Mass. App. Ct. at 441-42; 310 CMR 9.02; 310 CMR 9.17(1)(b); Webster Ventures II, 2016 MA ENV LEXIS 27, at 40-41. Any Intervenor who met that threshold, would be able to proceed through the "[s]tanding . . . gateway . . . to [the] inquiry on the merits" regarding whether the Department properly issued the Draft June 2015 c. 91 License to the Applicant. Butler, 63 Mass. App. Ct. at 441-42; Webster Ventures II, 2016 MA ENV LEXIS 27, at 41. As discussed below, only two of the Intervenors, Ms. Flanders and Mr. Tramontozzi, made it through the standing gateway.

B. The Claims of The Intervenors Mr. Kallstrom, Mr. Moezelaar, And Ms. Tramontozzi Should Be Dismissed for Lack of Standing Because They Failed to File Any PFT In Support of Their Claims

Well in advance of the Hearing, I made the Intervenors aware of their burden of proof on all of the issues for adjudication in the appeal, including whether they had standing to challenge the Draft June 2015 c. 91 License, and how critically important it was for each of them to file sworn PFT in support of their claims and appear at the Hearing for cross-examination. I did so at the several Pre-Hearing Conferences that I conducted with the parties and in the post Pre-Hearing Conference orders that I issued to them.

Here, it is undisputable that the Intervenors Mr. Kallstrom, Mr. Moezelaar, and Ms. Tramontozzi did not file any PFT in support of their claims in the appeal, including their claim that they each have standing to challenge the Draft June 2015 c. 91 License as "[a] person aggrieved." Without any proof demonstrating standing, they cannot proceed any further in their challenge of the Draft June 2015 c. 91 License, and as a result, all their claims in the appeal

should be dismissed for lack of standing. Butler, 63 Mass. App. Ct. at 441-42; 310 CMR 9.02; 310 CMR 9.17(1)(b); Webster Ventures II, 2016 MA ENV LEXIS 27, at 40-41.

The Intervenors Mr. Kallstrom, Mr. Moezelaar, and Ms. Tramontozzi cannot avoid the dismissal of their claims for lack standing due to their failure to file sworn PFT by having the Intervenor Mr. Tramontozzi assert claims on their behalf as he attempted to do in his sworn PFT and cross-examination testimony at the evidentiary adjudicatory hearing[29] because the unique harm element of standing is personal to the party challenging a c. 91 determination and must be demonstrated by the party, not by his or her co-litigant. Put another away, the party, not his or her co-litigant, must present his or her own sworn testimony, which alone or together with other evidence in the record, presents a minimum quantum of specific factual evidence that qualitatively a reasonable person could rely upon to conclude that an activity authorized by the Department pursuant to c. 91 will or might cause the party to suffer an injury in fact, which will be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interest protected by G.L. c. 91. Butler, 63 Mass. App. Ct. at 441-42; 310 CMR 9.02; 310 CMR 9.17(1)(b); Webster Ventures II, 2016 MA ENV LEXIS 27, at 40-41. The Intervenors Mr. Kallstrom, Mr. Moezelaar, and Ms. Tramontozzi failed to do that here, and as a consequence, their claims challenging the Draft June 2015 c. 91

[29] See e.g. Mr. Tramontozzi's Direct PFT, ¶¶ 1-3, where he attempted to assert claims on behalf of the Intervenors Mr. Kallstrom, Mr. Moezelaar, and Ms. Tramontozzi.

License should be dismissed for lack of standing.

C. The Claims of The Intervenor Mr. Comrie Should Be Dismissed for Lack of Standing Because His PFT Was Stricken From the Record For Failure to Appear at the Hearing for Cross-Examination

Well in advance of the Hearing, I also made the Intervenors aware at the several Pre-Hearing Conferences that I conducted with the parties and in the post Pre-Hearing Conference orders that I issued to them of the strict evidentiary adjudicatory hearing attendance requirement for witnesses who file sworn PFT. This strict evidentiary adjudicatory hearing attendance requirement appears in the Adjudicatory Proceeding Rules at 310 CMR 1.01(12)(f) and 310 CMR 1.01(13)(h)3, which mandate that the sworn PFT of any witness who does not appear at an evidentiary adjudicatory hearing for cross-examination "[is to] be excluded from the record unless the parties agree otherwise." These Adjudicatory Proceeding Rules accord no discretion to the Presiding Officer in the administrative appeal to deviate from the strict evidentiary hearing requirement for witnesses who file sworn PFT; if the witness fails to appear at the evidentiary adjudicatory hearing for cross-examination, the Presiding Officer is required to strike the witness's sworn PFT from the record unless all of the parties in the appeal agree to keep the witness's sworn PFT in the record.

Here, it is undisputable that although he filed sworn PFT in support of his claims in the appeal, the Intervenor Mr. Comrie failed to appear at the Hearing for cross-examination and both the Applicant and the Department declined to stipulate to keeping his PFT in the record. As a consequence, his PFT was stricken from the record in accordance with the mandate of 310 CMR 1.01(12)(f) and 310 CMR 1.01(13)(h)3. With his PFT having been stricken from the record, there was no sworn PFT in the record from the Intervenor Mr. Comrie, which alone or together

with other evidence in the record, presented a minimum quantum of specific factual evidence that qualitatively a reasonable person could rely upon to conclude that the expansion of the Applicant's marina as authorized by the Draft June 2015 c. 91 License will or might cause him to suffer an injury in fact, which will be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interest protected by G.L. c. 91. Butler, 63 Mass. App. Ct. at 441-42; 310 CMR 9.02; 310 CMR 9.17(1)(b); Webster Ventures II, 2016 MA ENV LEXIS 27, at 40-41. As a result, the Intervenor Mr. Comrie's claims in the appeal should be dismissed for lack of standing.[30]

D. The Intervenors Ms. Flanders and Mr. Tramontozzi Presented Evidence Demonstrating Standing To Challenge The Draft June 2015 c. 91 License

Prior to the Hearing, the Intervenors Ms. Flanders and Mr. Tramontozzi filed sworn PFT in support of their respective claims. They also appeared at the Hearing for cross-examination on their PFT and were cross-examined by the Applicant's and the Department's respective counsel. Based on my review of the evidence, Ms. Flanders and Mr. Tramontozzi passed the standing hurdle by each presenting in their respective testimony a minimum quantum of specific factual evidence that qualitatively a reasonable person could rely upon to conclude that the proposed Revised Project as authorized by the Draft June 2015 c. 91 License will or might cause each of them to suffer an injury in fact, which will be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public

[30] Mr. Comrie cannot prevent the dismissal of his claims for lack of standing by having his co-litigant, Mr. Tramontozzi, assert claims on his behalf through Mr. Tramontozzi's PFT or cross-examination testimony for the same reasons discussed above at pp. 36-38 regarding why Mr. Kallstrom, Mr. Moezelaar, and Ms. Tramontozzi cannot prevent the dismissal of their claims for lack of standing by having Mr. Tramontozzi assert claims on their behalf in his PFT or cross-examination testimony.

interest protected by G.L. c. 91. Butler, 63 Mass. App. Ct. at 441-42; 310 CMR 9.02; 310 CMR 9.17(1)(b); Webster Ventures II, 2016 MA ENV LEXIS 27, at 40-41.

1. Ms. Flanders' Testimony

Ms. Flanders testified that she "ha[s] been a resident in the Nanumett Heights beach area [of Onset Bay] since January of 2000" and since that time has "utilize[d] the beach and bay on a regular basis throughout the spring, summer[,] and fall." Ms. Flanders' Direct PFT, ¶ 1. She testified that she "swim[s] in the bay, . . . utilize[s] a small inflatable float, kayak, paddleboard, row boat, jet ski, and a small motor boat with [her] fiancé, which is moored just east of the [Applicant's] Marina." Id., ¶ 3; Ms. Flanders' Hearing Exhibit 1. She testified that she "frequently paddle[s] or kayak[s] out to and around Wickets Island [in Onset Bay], and, on occasion, ha[s] even attempted to do yoga on [her] paddleboard [by] . . . try[ing] to balance [on the paddleboard] as waves from the wake of boats threaten to knock [her] into the water." Ms. Flanders' Direct PFT, ¶ 3.

Ms. Flanders testified that "[her] safe navigation . . . when paddling a kayak or paddleboard has been significantly reduced over the years due to the increasing size of vessels traveling in and out of the channel [in Onset Bay] and the length of the [Applicant's] marina as it [presently exists] today." Id., ¶ 7. She testified that "more and more large motorized boats and/or sailboats [have] dropped anchor just outside the mooring field, further inhibiting [her] ability to pass freely, navigate the bay[,] and/or use the multi-use/recreation area." Id. She testified that "[t]he extension of the [Applicant's] dock system [as authorized by the Draft June 2015 c. 91 License] will intensify the interference . . . for small boaters" such as herself. Id.

Ms. Flanders testified that "the challenges of navigating the mooring field and

boat traffic, especially in windy conditions, to get to [her] mooring, it is a risky venture[,] . . . especially with the size of boats coming and going." Id., ¶ 8. She testified that "[her] mooring is located very close to the [Applicant's] marina," and as a result, "[she] not only ha[s] to navigate the large mooring field, but also the boats coming and going from the fuel docks and slips on the east side of the [Applicant's] docks, some of which are quite large as compared to [her] 21 foot boat." Id.

She testified that "[e]xpansion of the docks [of the Applicant's marina] further out into the Bay, with even larger, more massive, taller and longer boats, will significantly increase the interference posed by [the Applicant's marina] to [her] line of sight while navigating." Ms. Flanders' Direct PFT, ¶ 14. She testified that "[t]he boats [at the Applicant's marina] will block [her] vie[w] of key landmarks in the distance, while also blocking a clear view of approaching vessels." Id. She testified that "[t]he interference with [her] line of sight posed by these boats will actually force [her], when paddling small boats, to go even further from shore, out from the new extended end of the [Applicant's marina], to provide [her] a clear and safe view." Id. She testified that "[t]he proposed new docks [at the Applicant's marina] will not only push [her] out 58 more feet, but many more to attempt to get into safer waters." Id.; Ms. Flanders' Hearing Exhibit 3.

Ms. Flanders testified that she "use[s] small boats, kayaks, row boats, windsurfers, paddle boards, canoes, small sailboats and/or jet skis to navigate between Wickets Island and the mainland from the Nanumett Heights Beach to and from the Town Pier and the boat ramp at Broad Cove." Ms. Flanders' Direct PFT, ¶ 23. She testified that "[she has] navigate[d] . . . for many years, with both motorized and non-motorized craft, in the limited open space between the

mooring field and the current . . . docks [at the Applicant's marina]." Id. She testified that "[e]xpansion further seaward of the . . . docks [at the Applicant's marina] will cut off and/or force [her] to alter [her] current navigational route and interfere with [her] access to the adjourning areas . . . ." Id. She testified that "[n]on-motorized uses such as rowing, paddle boarding, kayaking[,] and sailboarding might be forced out completely because of safety concerns and being pushed out even further seaward into more large boat traffic." Id.

Ms. Flanders testified that the proposed bridge or elevated space at the Applicant's marina authorized by the Draft June 2015 c. 91 License was approved as "a means for small watercraft to travel under the docks and through a fairway . . . is not a safe solution and [will] put [her] in harm's way [when] [she] attempt[s] to maneuver around the . . . largest boats [at the Applicant's marina] in tight quarters." Id., ¶ 24. She testified that "[t]he risk absolutely outweighs the benefit should [she] fall off or out of a small craft and end up directly in the path of a boat and/or large spinning propeller that is being buffeted by winds, waves[,] and currents in such a small area." Id. She testified that "[a]small boater would be at high risk of injury if using the proposed bridge and entering that fairway." Id.

2. Mr. Tramontozzi's Testimony

Mr. Tramontozzi testified that for over 30 years (since 1988), he has "own[ed] [real] property at 31 Prospect Street [in Wareham] . . . [and] a pier and floats adjacent to the [Applicant's] [m]arina pier and floats." Mr. Tramontozzi's Direct PFT, ¶ 1. He testified that he "use[s] boats and navigate[s] in and around the [Applicant's] existing [marina] and will be directly affected by an expansion of that facility further into the Bay." Id. He testified that he "owns a power boat, Jet-skis, row boats, and a canoe that he uses in Onset Bay and that he "also

has visitors and friends approach [his property] from the sea by sail, power, rowboats, Jet-skis kayaks, paddleboards, and wind surfers. Id., ¶ 2; Mr. Tramontozzi's Hearing Exhibit 23. He testified that he "navigate[s] between the moorings fields and the structures at [the Applicant's marina]" and he "ha[s] personally owned and operated vessels for well over 40 years and obtained [his] . . . credentials for navigation and boating safety over 40 years ago," from the United States Power Squadrons, a national non-profit boating organization. Mr. Tramontozzi's Direct PFT, ¶ 2.

Mr. Tramontozzi testified that the proposed Revised Project as approved by the Draft June 2015 c. 91 License "[will] interfere with [his] ability to sail a vessel into [his] floats" in the area. Id., ¶ 3. He testified that it is necessary to approach his floats from "[a] west to east direction, because [the water level] east of the floats it is too shallow for a sail boat." Id. He testified that "[t]he approach course begins from south to north, due to the prevailing winds, and then moving to tack easterly at the location closest to [the Applicant's marina's] most seaward structures." Id. He testified that "[p]lacing [the] structures [of the Applicant's marina] further seaward [will] further interfere with [his:] [1] . . . course to sail, kayak, paddle board, and use [of] other boats to gain access to [his] propert[y] from the sea [and] . . .[2] [his] navigation to visit friends in the Point Independence area as well as Broad Cove and the Town Pier where [he] frequent[s] many business establishments in Onset Center." Id., ¶ 4.

III. THE DEPARTMENT PROPERLY ISSUED THE DRAFT JUNE 2015 c. 91 LICENSE APPROVING THE PROPOSED REVISED PROJECT

My finding that Ms. Flanders and Mr. Tramontozzi have standing to challenge the Draft June 2015 c. 91 License does not mean that they prevail on the merits of their substantive claims in the case against the Draft June 2015 c. 91 License. Instead, my finding only means that Ms.

Flanders and Mr. Tramontozzi have standing to challenge the Draft June 2015 c. 91 License as aggrieved persons based on the much lower evidentiary threshold discussed above that did not require them to prove for standing purposes that their "claims of particularized injury [resulting from the Department's issuance of the Draft June 2015 c. 91 License] are, more likely than not, true." Butler, 63 Mass. App. Ct. at 441-42. To successfully challenge the Draft June 2015 c. 91 License on the merits, Ms. Flanders and Mr. Tramontozzi had the higher burden of proving by a preponderance of the evidence through the sworn testimonial and documentary evidence of competent witnesses, including their c. 91 expert witness Mr. Simpson, that the Department erred in issuing the Draft June 2015 c. 91 License. Legowski, 2012 MA ENV LEXIS 128, at 7-8; Webster Ventures II, 2016 MA ENV LEXIS 27, at 67-69; Jimary Realty Trust, 2018 MA ENV LEXIS 51, at 11-12. As explained below, Ms. Flanders and Mr. Tramontozzi failed to meet their burden because based upon a preponderance of the evidence presented at the Hearing and the governing statutory and regulatory c. 91 requirements, the Department properly issued the Draft June 2015 c. 91 License approving the proposed Revised Project.

A. The Provisions of 310 CMR 9.14(2) and 9.14(3) Did Not Require the Applicant to Submit a New c. 91 Application To the Department Seeking Approval For the Proposed Revised Project

At the Hearing, Ms. Flanders and Mr. Tramontozzi contended, through Mr. Simpson, that the Draft June 2015 c. 91 License is invalid because the provisions of 310 CMR 9.14(2)(a) and 9.14(3) required the Applicant to file a new c. 91 License application with the Department seeking approval of the proposed Revised Project after the Department denied the Original Project. Mr. Simpson's Direct PFT, at pp. 3-4. The Applicant and the Department dispute Ms.

Flanders' and Mr. Tramontozzi's claim, contending that a new c. 91 application was not required by 310 CMR 9.14(2) and 9.14(3). I agree for the following reasons.

310 CMR 9.14(2) provides that "[f]or water-dependent use projects[31] the Department may issue a [c. 91] license or permit without issuing a written determination, in accordance with the provisions of 310 CMR 9.31 through 9.50, unless" the Department has:

(1) "conducted a public hearing [on a c. 91 license or permit application], in which case the Department [is to] issue a written determination including proposed [c. 91] license or permit conditions, for public review prior to issuance of the license or permit";[32]

(2) received written comments on the c. 91 license or permit application during the public comment period pursuant to 310 CMR 9.13(4)(c) from a municipality, ten citizen group, and/or any aggrieved person, "in which case the Department may issue a draft license or permit, including proposed license or permit conditions, for public review prior to issuance of the license or permit";[33] or

(3) denied a c. 91 license or permit for a project, "in which case the Department [is to] issue a written determination setting forth the reasons for [the denial]."[34]

As for 310 CMR 9.14.(3), this regulation provides that "[the Department's] written determination shall include a description of the project and a statement of whether the project

[31] In reviewing an application for a c. 91 license, the Department is required by 310 CMR 9.12(1) to determine whether the proposed project sought to be approved by the c. 91 license is a water-dependent use project. Under 310 CMR 9.12(2), the Department is "[required] to determine a use to be water-dependent upon finding that [the] use requires direct access to or location in tidal or inland waters . . . [and] [i]n making this determination," the Department is required by 310 CMR 9.12(2)(a)2 to deem "marinas . . . and other commercial or recreational boating facilities" as water-dependent uses. The c. 91 Regulations at 310 CMR 9.02 define a "marina" as "a berthing area with docking facilities under common ownership or control and with berths for ten or more vessels, including commercial marinas, boat basins, and yacht clubs. A marina may be an independent facility or may be associated with a boatyard." Here, undisputedly: (1) the Applicant's facility which it seeks to expand pursuant to the Draft June 2015 c. 91 License is a "marina" and (2) the Applicant's marina expansion project is a "water-dependent use project" as defined by the c. 91 Regulations.

[32] 310 CMR 9.14(2)(a).

[33] 310 CMR 9.14(2)(b).

[34] 310 CMR 9.14(2)(c).

serves a public purpose which provides greater benefits than detriments to the public in tidelands." 310 CMR 9.14.(3).

In sum, contrary to Ms. Flanders' and Mr. Tramontozzi's contentions, neither 310 CMR 9.14(2) nor 310 CMR 9.14(3) require a party to submit a new c. 91 application to the Department seeking approval of a revised project proposal that the party has presented to the Department during the course of an administrative appeal challenging the Department's rejection of the party's original project proposal. In making this finding, I credit the testimony of the Department's expert witness, Mr. Hill, who testified that "[i]n [his] seventeen plus years with the Department, it has been [his] experience that [proposed c. 91] projects which are appealed [to OADR] are often modified during settlement [discussions during the course of the appeal] and then . . . approved [by the Department] under the pending application [submitted for the original project]." Mr. Hill's Direct PFT, ¶ 11. I have credited Mr. Hill's testimony on this issue because there have been prior administrative appeals of Department c. 91 license determinations, which have been settled on appeal by the Department's issuance a final c. 91 License approving a draft c. 91 License as the final License or with modifications. See e.g. In the Matter of Point Independence Yacht Club, OADR Docket No. 2012-033, Recommended Final Decision (August 15, 2013), 2013 MA ENV LEXIS 46, adopted as Final Decision (August 19, 2013), 2013 MA ENV LEXIS 86 (appeal of draft c. 91 License settled on appeal by Department's issuance final c. 91 License containing additional condition); In the Matter of Allston Brighton Friends of Daly Field, OADR Docket No. 2014-027, Final Decision (April 9, 2015), 2015 MA ENV LEXIS 15 (appeal of draft c. 91 License settled on appeal by Department's issuance of final c. 91 License containing modification of condition appearing in draft c. 91 License). The settlement of these

administrative appeals has been consistent with the general rule that settlements are favored over continued litigation.

B. The Provisions of 310 CMR 9.14(2) and 9.14(3) Did Not Require the Department to Hold a Public Hearing On the Proposed Revised Project and the Department Complied With the c. 91 Public Notice and Comment Requirements In Approving the Project

At the Hearing, Ms. Flanders and Mr. Tramontozzi contended through Mr. Simpson that the Draft June 2015 c. 91 License is invalid because the provisions of 310 CMR 9.14(2) and 9.14(3) required the Department to conduct a public hearing on the proposed Revised Project prior to making its determination whether to approve or reject the Project. The Applicant and the Department dispute Ms. Flanders' and Mr. Tramontozzi's claim, contending that a public hearing was not required by 310 CMR 9.14(2) and 9.14(3). I agree for the following reasons.

First, neither 310 CMR 9.14(2) nor 310 CMR 9.14(3) govern when the Department is required to conduct a public hearing on a c. 91 license or permit application. As Mr. Hill testified for the Department, it is 310 CMR 9.13, which governs when the Department is required to conduct a public hearing on a c. 91 license or permit application prior to making its determination on the project. Mr. Hill's Direct PFT, ¶ 12.

Mr. Hill testified that "[f]or water-dependent use projects [such as the proposed Revised Project], the Waterways Regulations at [310 CMR 9.13(3)(b)] requir[e] a public hearing be held only in situations where [the] municipal official [in the city or town in which the project is located] has requested such [a] hearing during the public comment period." Id. The c. 91 Regulations define the "municipal official in the city or town in which the project is located" as "the mayor of a city, the board of selectmen of a town, or the council of a municipality having a manager-council form of government." 310 CMR 9.02 (definition of

"municipal official"). Undisputedly, the municipal official in the Town of Wareham where the Applicant's marina is located is the Town of Wareham Board of Selectmen.[35] Mr. Hill testified that no comments were received from the Town of Wareham Board of Selectmen on the proposed Revised Project during the first public comment period of October 31, 2014 through November 30, 2014 and the second comment period of May 11, 2016 through June 10, 2016. Mr. Hill's Direct PFT, ¶ 12.

Under 310 CMR 9.13(3)(c), "[t]he Department may [or has the discretion to] conduct a public hearing on a project for which a hearing is not otherwise required." However, the regulation states that "[a]ny person requesting that the Department exercise its discretion to conduct [a] hearing must file a written request [with the Department], including a statement of reasons, within the public comment period [on the c. 91 License application]." Here, Mr. Hill testified that the Department did not receive any requests for a public hearing on the proposed Revised Project from any persons during the two public comment periods on the project. Mr. Hill's Direct PFT, ¶ 12.

Ms. Flanders' and Mr. Tramontozzi's reliance on the Final Decision in the c. 91 administrative appeal of In the Matter of Navy Yard Four Associates, LLP, OADR Docket No. 2010-062, Recommended Final Decision (November 21, 2011), 2011 MA ENV LEXIS 119, adopted as Final Decision (November 22, 2011), 2011 MA ENV LEXIS 122 ("Navy Yard Four Associates") to support their position that the Department was required to hold a public hearing on the proposed Revised Project prior to making a determination on the Project is misplaced because Navy Yard Four Associates did not involve the same circumstances as involved in this

[35] https://www.wareham.ma.us/board-selectmen.

case. Specifically, Navy Yard Four Associates did not involve the Department's approval of a revised c. 91 project during the course of the project proponent's administrative appeal of the Department's denial of the original project as is the case here. Instead, Navy Yard Four Associates involved the proposed amendment to a final c. 91 license that had been issued a number of years earlier.

Lastly, Ms. Flanders' and Mr. Tramontozzi's public hearing claim against the Department also fails because although the Department did not conduct a public hearing on the proposed Revised Project, the Department did solicit public comment on the Project in accordance with the notice requirements of the c. 91 Regulations and the public had more than a reasonable opportunity to comment on the Project. As discussed above, at pp. 17-21, in April 2016, the Department, with my approval, required the Applicant to submit its proposed Revised Project to a second public comment period after the Department discovered that the Applicant had not properly complied with the notice requirements of 310 CMR 9.13(1)(a)1-7 during the first public comment period of October 31, 2014 through November 30, 2014. My April 20, 2016 Second Stay Order not only directed the Applicant to cure its non-compliance with the notice requirements of 310 CMR 9.13(1)(a)1-7, but also directed the Department to review the proposed Revised Project anew after considering any additional public comments that it received on the Project. See pp. 17-21 above. The Applicant cured its non-compliance with the notice requirements of 310 CMR 9.13(1)(a)1-7 and the Department then reviewed and approved the proposed Revised Project anew after reviewing the additional public comments that it had received on the Project. Id. In sum, as Mr. Hill testified, "[f]or the proposed Revised [P]roject, a

new public notice was issued which essentially [brought] the review [of the Project] back to the beginning of the [c. 91 application] application process." Mr. Hill's Direct PFT, ¶ 11.

C. Neither 310 CMR 9.14(2)(a) Nor 310 CMR 9.14(3) Required the Department To Issue a Written Determination for the Proposed Revised Project

At the Hearing, Ms. Flanders and Mr. Tramontozzi contended through Mr. Simpson that the Draft June 2015 c. 91 License is invalid because the Department was required to issue a Written Determination for the proposed Revised Project pursuant to: (1) 310 CMR 9.14(2)(a) setting forth the Department's reasoning for approving the Project; and (2) 310 CMR 9.14(3) setting forth the Department's determination regarding whether the Project serves a public purpose which provides greater benefits than detriments to the public in tidelands. Mr. Simpson's Direct PFT, at pp. 3-4; Mr. Simpson's Rebuttal PFT, ¶ 9.

In making these claims, they contended that "[t]he only reason given" by the Department for approving the proposed Revised Project was in a "brief paragraph" in the Department's June 30, 2015 cover letter to the Applicant including a copy of the Draft June 2015 c. 91 License stating that "the [proposed Revised Project's] expansion [of the Applicant's marina was] less than the [rejected Original Project] . . . ." Mr. Simpson's Direct PFT, at pp. 3-4. They contended that the Department's June 30th cover letter "merely describe[d] [the proposed Revised Project] without any analysis." Id., at p. 4. The Applicant and the Department dispute Ms. Flanders' and Mr. Tramontozzi's claim, contending that neither 310 CMR 9.14(2)(a) nor 310 CMR 9.14(3) required the Department to issue a Written Determination for the proposed Revised Project and that the Department provided sufficient reasons for approving the Project. I agree for the following reasons.

First, as a water-dependent project pursuant to 310 CMR 9.14(2)(a), the proposed

Revised Project was not required to have a Written Determination pursuant to 310 CMR 9.14(3) because, as discussed above, 310 CMR 9.14(2)(a) requires the Department to issue a Written Determination on a proposed c. 91 project only if the Department has "conducted a public hearing [on the project], in which case the Department [is to] issue a written determination including proposed license or permit conditions, for public review prior to issuance of the license or permit." As discussed above, the Department did not conduct a public hearing on the proposed Revised Project because a hearing was not required.

Second, the proposed Revised Project also was not required to have a Written Determination because under 310 CMR 9.31(2)a water-dependent projects are presumed to serve a proper public purpose which provides greater benefit than detriment to the rights of the public. Under 310 CMR 9.31(3)(a) this presumption "may be overcome only if" the opponent of a proposed project demonstrates that "the basic requirements [for a proposed project as] specified in 310 CMR 9.31(1) have not been met."[36] These basic requirements mandate that a proposed project:

> (a) includes only fill and structures for uses that have been categorically determined to be eligible for a license, according to the provisions of 310 CMR 9.32;
>
> (b) complies with applicable environmental regulatory programs of the Commonwealth, according to the provisions of 310 CMR 9.33;
>
> (c) conforms to applicable provisions of a municipal harbor plan, if any, and local zoning law, according to the provisions of 310 CMR 9.34;

[36] If a municipal, state, regional, or federal agency opposes a project, the agency is required by 310 CMR 9.31(3)(b) to make a "clear showing that . . . requirements beyond those contained in 310 CMR 9.00 are necessary to prevent overriding detriment to a public interest which [the] agency is responsible for protecting." If a final Environmental Impact Report "has been prepared [for the project], the presumption may be overcome only if [the] detriment has been identified during the . . . review process [pursuant to the Massachusetts Environmental Policy Act,] M.G.L. c. 30, §§ 61 through 62H . . . ."

(d) complies with applicable standards governing the preservation of water-related public rights, according to the provisions of 310 CMR 9.35;

(e) complies with applicable standards governing the protection of water-dependent uses, according to the provisions of 310 CMR 9.36;

(f) complies with applicable standards governing engineering and construction of structures, according to the provisions of 310 CMR 9.37;

(g) complies with applicable standards governing use and design of boating facilities for recreational or commercial vessels, according to the provisions of 310 CMR 9.38 and 9.39;

(h) complies with applicable standards governing dredging and disposal of dredge materials, according to the provisions of 310 CMR 9.40; and

(i) does not deny access to its services and facilities to any person in a discriminatory manner, as determined in accordance with the constitution of the Commonwealth of Massachusetts, of the United States of America, or with any statute, regulation, or executive order governing the prevention of discrimination.

310 CMR 9.31(1)(a)-(1)(i).

Here, Ms. Flanders and Mr. Tramontozzi did not overcome the rebuttable presumption of 310 CMR 9.31(2)(a) because neither they nor their expert witness, Mr. Simpson, provided specific testimony demonstrating that the proposed Revised Project fails to satisfy any one or more of the basic requirements for a proposed c. 91 project as set forth in 310 CMR 9.31(1). This was in stark contrast to the testimony of the Applicant's expert witnesses, Mr. Madden and Mr. Humphries, who testified that the proposed Revised Project satisfies the basic requirements for a c. 91 project as set forth in 310 CMR 9.31(1). Mr. Madden's Direct PFT, ¶¶ 46.a through 46.i; Mr. Humphries Direct PFT, ¶¶ 16.a through 16.h. Rather than focusing on the particulars of 310 CMR 9.31(1) as they were required to do to overcome the rebuttable presumption of 310 CMR 9.31(2)(a), Ms. Flanders and Mr. Tramontozzi instead made generalized statements

contending that the proposed Revised Project does not serve a proper public purpose which provides greater benefit than detriment to the rights of the public.

For example, Mr. Tramontozzi testified that the proposed Revised Project "does not serve a proper public purpose, [and] in fact[,] it is a detriment to the public's rights" because: (1) "Onset Bay is a relatively shallow body of water with poor flushing capacity, pollution problems and substantial boating traffic, all occurring in a relatively small body of water"; (2) "[t]he Bay [also] supports a number of other water related activities, including recreational and commercial shell fishing, swimming, water skiing, small boat sailing[,] and on-shore viewing opportunities"; and (3) "[t]he [proposed Revised Project will] exacerbate the existing problems of conflicting use, public safety, water quality[,] and aesthetics[,] which currently characterize the Bay and therefore would contravene the public interest . . . ." Mr. Tramontozzi's Direct PFT, ¶ 27. Mr. Simpson added to Mr. Tramontozzi's testimony by testifying that "[t]he [proposed Revised] [P]roject does not serve a public purpose which provides greater benefit than detriment to the public's rights in tidelands" because: (1) the Project calls for the berthing of only one additional vessel; (2) "[e]xtending the . . . [Applicant's marina] by an additional 58.2 feet further into Commonwealth Tidelands [as set forth in the Project]. . . is not justified"; (3) "[t]he moorings which will be displaced by the [Project] are approved annually by [Wareham's] harbor master who can change their location or limit their use"; and (4) the 30 year term of the Draft June 2015 c. 91 License "lacks the flexibility [of] . . . a yearly [license to] review" the marina's operations "and effectively privatizes the use of this area [of Onset Bay] to the benefit of [the Applicant]." Mr. Simpson's Direct PFT, at p. 6.

Assuming for the sake of argument, that Mr. Tramontozzi's and Mr. Simpson's testimony

had any probative value regarding rebutting the presumption of 310 CMR 9.31(2)(a), their testimony was effectively refuted by Mr. Madden's and Mr. Hill's testimony on behalf of the Applicant and the Department respectively demonstrating that the proposed Revised Project serves a proper public purpose which provides greater benefit than detriment to the rights of the public.

Mr. Madden testified that "[the] [p]roper public benefits" for the proposed Revised Project are "provided for in the description and conditions set forth in the Draft [June 2015 c. 91] License [and] consist of [the following]":

> (1) the utilization of available berths for transient use during vacancy;
>
> (2) the use of a sewage disposal system for the pump-out of boating vessel sanitation devices for marina patrons and transient boaters, and the general boating public at no charge;
>
> (3) the dedication of a portion of the access float for the berthing of transient vessels;
>
> (4) the elimination of fifteen (15) moorings within the Applicant's licensed mooring fields;
>
> (5) the installation of a bridge within the float system to provide additional lateral shoreline navigation for kayaks, canoes and small vessels; and
>
> (6) fixed floats that increase the opportunity for the aging boating population to board vessels.

Mr. Madden's Direct PFT, ¶ 45. Mr. Hill corroborated Mr. Madden's testimony by testifying "that public marinas [such as the Applicant's facility] serve an important public purpose by providing access to the waterways of the Commonwealth to the boating public who do not own waterfront property." Mr. Hill's Direct PFT, ¶ 21. He testified that to that end, the proposed Revised Project not only "will provide annual berthing slips to patrons of the [Applicant's]

marina" but also "[t]ransient dockage, fueling[,] and sewage pump-out facilities . . . to the general public." Id. He also testified that although a Written Determination for the Project was not required for the reasons discussed above, "if [he] [was required] to prepare a Written Determination, [he] would have included a statement in the document indicating that the . . . [P]roject serves a proper public purpose which provides greater benefits than detriments to the public's rights in tidelands." Id., ¶¶ 20, 22.

Lastly, Ms. Flanders' and Mr. Tramontozzi's claim that they did not know the Department's reasoning for approving the proposed Revised Project rings hollow because the Department's June 30, 2015 cover letter to the Applicant enclosing a copy of the Draft June 2015 c. 91 License approving the Project, when read together with the Department's June 2012 Written Determination denying the Original Project, provided sufficient notice of its reasons for approving the proposed Revised Project. In the June 30th cover letter, the Department, through Mr. Hill who had reviewed the proposed Revised Project, stated that the "[Original] 29 slip marina expansion [P]roject was initially denied by the Department in its Written Determination dated June 15, 2012" and that thereafter, the Applicant "submitted a revised plan which reduce[d] the scale of the [Original] [P]roject." Department's June 30, 2015 Letter, at p.1. The Department explained that the proposed Revised Project:

(1) reduced the new boat slips at the Applicant's marina from 29 to 14;

(2) included berthing for transient vessels and floats for fueling and sewage pump-out facilities;

(3) would have the floating docks at the Applicant's marina extend approximately 55 feet seaward from the end of the existing fuel dock float which was a 119 foot reduction from the Original Project; and

(4) included a 20 foot wide elevated bridge with six feet of clearance at mean

> high tide to allow small vessels to navigate through the floating dock system.

Id., at pp. 1-2. Assuming for the sake of argument that the Department did not fully explain its reasoning for approving the proposed Revised Project when it issued the Draft June 2015 c. 91 License, that was cured by Mr. Hill's detailed Hearing testimony in this de novo administrative appeal explaining in detail the Department's reasons for approving the Project and refuting Ms. Flanders' and Mr. Tramontozzi's claims contending that the Department erred in approving the Project.

D. 310 CMR 9.11(3)(c)(1) Did Not Require the Project Plan for the Proposed Revised Project to Set Forth Extended Property and Littoral Lines Pursuant to the Definitions of "Project Shoreline" and "Project Site" in 310 CMR 9.02

Ms. Flanders and Mr. Tramontozzi, through Mr. Simpson, contended that the Project Plan for the proposed Revised Project is invalid under 310 CMR 9.11(3)(c)1 because the Plan purportedly fails to set forth extended property and littoral lines in accordance with the definitions of "Project Shoreline" and "Project Site" in 310 CMR 9.02.[37] Mr. Simpson's Direct PFT, at pp. 5-6. Specifically, Mr. Simpson testified that "[t]he lines shown on [the] [Project]

[37] 310 CMR 9.02 defines "Project Shoreline" and "Project Site" respectively as follows.

"Project Shoreline" is defined as "the high water mark, or the perimeter of any pier, wharf, or other structure supported by existing piles or to be replaced pursuant to 310 CMR 9.32(1)(a)4, whichever is farther seaward." 310 CMR 9.32 provides that: "a [proposed] project shall be eligible for a [c. 91] license only if it is restricted to fill or structures which accommodate [certain] uses . . . within the geographic areas specified in [the regulation]." These uses include those set forth in 310 CMR 9.32(1)(a)4: "pile-supported structures located below the high water mark for nonwater-dependent uses which replace or modify existing, previously authorized wharves, piers, pile fields, or other filled or pile-supported structures, in accordance with the provisions of 310 CMR 9.51(3)(a) and (b)."

"Project Site" is defined by 310 CMR 9.02 as "the area owned, controlled, or proposed for development by the applicant in which a project will occur and which is subject to the [c. 91] geographic jurisdiction of the Department . . . ."

[P]lan do not represent a proportional division of the water sheet and are not consistent with traditional methods that determine extended property lines." Id., at p. 5. He testified that "[t]he shoreline on Onset Bay is curved between two points" and as a result, "[p]rojected property lines [in the Project Plan] [s]hould therefore be angled, converging towards the water, with each property only having a proportional allotment, narrowing seaward, based on their percentage of shoreline and a line drawn across the bay from the eastern point to the western point." Id., at p 6. He also testified the Applicant's marina has less than 250 linear feet of shoreline which "further narrows [the] projected lines in the intertidal area and any projection into the Commonwealth Tidelands should reflect this . . . ." Id.

Mr. Simpson's claims on behalf of Ms. Flanders and Mr. Tramontozzi challenging the validity of the Project Plan for the proposed Revised Project fail for the following reasons.

First, contrary to Mr. Simpson's assertions, 310 CMR 9.11(3)(c)1 did not require the Project Plan to set forth extended property and littoral lines in accordance with the definitions of "Project Shoreline" and "Project Site" in 310 CMR 9.02. Instead the regulation simply provides that "[t]he Department shall determine an application [for a c. 91 license or permit] to be complete only if [certain] . . . information has been submitted [with the application]," including:

> a set of final plans [for the proposed project] which are prepared in accordance with the format standards required for recording of [c. 91] licenses in the appropriate Registry of Deeds or Land Court for the district in which the licensed activity is to be performed; and which are certified by a Registered Professional Engineer or Land Surveyor, as deemed appropriate by the Department . . . .

The final plans are required to contain:

> a. an appropriately-scaled location map of the project site[;] . . .
>
> c. a delineation of the present high and low water marks, ***as relevant***; and

d. a delineation of the historic high and low water marks, ***as relevant*** and in a manner acceptable to the Department in accordance with the definitions thereof at 310 CMR 9.02. . . .

310 CMR 9.11(3)(c)1.a, c, d. (emphasis supplied).

Second, Ms. Flanders' and Mr. Tramontozzi's claims challenging the validity of the Project Plan for the proposed Revised Project are moot as a result of Mr. Simpson's Rebuttal PFT concurring with Mr. Hill's testimony regarding the Project Plan. Mr. Hill provided persuasive testimony on behalf of the Department that although 310 CMR 9.11(3)(c)1 "[does] not require that extended property lines or littoral lines be shown on [proposed] project plans[,] . . . [i]t has been [his] experience that Professional Engineers and Land Surveyors will often show these extended lines on the plan to demonstrate that the proposed structures will not protrude in front of abutting properties." Mr. Hill's Direct PFT, ¶ 18. Mr. Madden corroborated Mr. Hill's testimony by testifying that "extended littoral lines on the [Project] [P]lan for the [proposed Revised Project] . . . were merely provided to reflect that the Project does not extend any further east or west of the existing marina facilities" at the Applicant's marina. Mr. Madden's Direct PFT, ¶ 29. He also concurred with Mr. Hill's testimony that "if extended property lines are to be shown [on a proposed project plan], they should only be indicated within the area of private tidelands" and not Commonwealth tidelands and that this should be reflected in the final Project Plan for the proposed Revised Project. Id.; Mr. Hill's Direct PFT, ¶¶ 18-19. Mr. Simpson agreed with Mr. Hill by testifying that "extended property lines should only be shown for private tidelands and should therefore be removed from the [final] [Project] [P]lan" for the proposed

Revised Project. Mr. Simpson's Rebuttal PFT, ¶ 8.

E. The Municipal Harbor Plan Provisions of 310 CMR 9.34 Do Not Govern the Proposed Revised Project

The c. 91 Regulations at 310 CMR 9.34(2)(a) provide that "[i]f [a proposed c. 91] project is located within an area covered by a municipal harbor plan, [the] project must conform to the provisions of [the] plan to the degree applicable under [municipal harbor] plan approval [pursuant to the Municipal Harbor Plan Approval Regulations] at 301 CMR 23.00: Review and Approval of Municipal Harbor Plans. . . ." At the Hearing, Ms. Flanders and Mr. Tramontozzi contended that the Draft June 2015 c. 91 License is invalid under 310 CMR 9.34(2)(a) because the proposed Revised Project is inconsistent with the Town of Wareham's Municipal Harbor Management Plan, which was adopted by Wareham 24 years ago in 1996. Mr. Simpson's Direct PFT, at pp. 10-12; Mr. Simpson's Rebuttal PFT, ¶¶ 10, 16, 28; Mr. Tramontozzi's Rebuttal PFT, Section 2, at pp. 24-25, ¶ 26; Intervenors Hearing Exhibits 10-12. The Applicant and the Department disputed the claim, contending based on Mr. Hill's testimony on behalf of the Department, that the proposed Revised Project is not subject to 310 CMR 9.34 because the Town of Wareham's Municipal Harbor Management Plan has not been approved by the Secretary of the Massachusetts Executive Office of Energy and Environmental Affairs ("the EEA Secretary") in accordance with the requirements of the c. 91 Regulations at 310 CMR 9.02 and 9.34 and the Municipal Harbor Plan Approval Regulations at 301 CMR 23.00. Mr. Hill's Direct PFT, ¶ 37. I agree with the Applicant and the Department for the following reasons.

Mr. Hill testified that 310 CMR 9.34(2)(a) does not govern the Department's review of the proposed Revised Project based on his communications with officials of the Massachusetts

Office of Coastal Zone Management ("CZM")[38] who "informed [him] that the Town of Wareham does not have an approved Municipal Harbor Plan as defined in . . . [310 CMR 9.02]." Mr. Hill's Direct PFT, ¶ 37. I credit Mr. Hill's testimony because 310 CMR 9.02 states that a Municipal Harbor Plan as defined by the regulation[39] "take[s] effect under 310 CMR 9.00 only upon written approval by the [EEA] Secretary, provided that [the] plan approval is issued in accordance with [the Municipal Harbor Plan Regulations at] 301 CMR 23.00 . . . and any associated [CZM] written guidelines . . . ."

The Municipal Harbor Plan approval process under 301 CMR 23.00 is an extensive one which begins with a municipality filing a request with CZM's Director for the issuance of a Notice to Proceed. 301 CMR 23.03. "To request a Notice to Proceed and begin the process of developing [a Municipal Harbor Plan] that is eligible for approval [by the EEA Secretary], a written description of the proposed [municipal harbor] planning program must be submitted to [CZM's] Director, pursuant to 301 CMR 23.08(1), by the planning representative of the municipality . . . . 301 CMR 23.03(1)." The municipality's request for a Notice to Proceed must

[38] CZM is the Department's sister agency within EEA and "the lead policy and planning agency on coastal and ocean issues within [EEA]." https://www.mass.gov/service-details/about-czm. CZM's mission is to develop and implement programs that "balance the impact of human activities with the protection of [Massachusetts] coastal and marine resources." Id.

[39] 310 CMR 9.02 defines "Municipal Harbor Plan" as:

> ***a document*** (in words, maps, illustrations, and other media of communication) ***setting forth, among other things: [1]*** a community's objectives, standards, and policies for guiding public and private utilization of land and water bodies within a defined harbor or other waterway planning area; and ***[2]*** an implementation program which specifies the legal and institutional arrangements, financial strategies, and other measures that will be taken to achieve the desired sequence, patterns, and characteristics of development and other human activities within the harbor area . . . .

310 CMR 9.02 (emphasis and numerical references supplied).

contain the following information:

> (a) a description of the Harbor Planning Group and any staff or consultants that will be available to such group . . . ;
>
> (b) an appropriately scaled map identifying the proposed Harbor Planning Area;
>
> (c) a concise historical narrative of land and water use and development in the Harbor Planning Area, and the reasons for initiating the harbor planning process, including a summary of current problems, opportunities, and other harbor planning issues, together with a review of prior planning efforts as appropriate;
>
> (d) a general description of a participation program that includes[:] [1] early and continuing interaction with the public; [2] close coordination within municipal government and with boards, committees, and officials having jurisdiction over land and/or water resources affecting the Harbor Planning Area, including those of neighboring municipalities as appropriate; and [3] consultation with CZM, [the Department], and other affected state agencies, regional planning agencies, and federal government, including those owning real property or otherwise responsible for the implementation of plans or projects in the Harbor Planning Area; and
>
> (e) a general description of a study program that identifies the planning analysis to be employed for developing goals, addressing potential issues, and assessing alternatives including any potential substitutions or amplifications to [the c. 91 Regulations at] 310 CMR 9.00 . . . pursuant to 301 CMR 23.05(2)(b) through (d).

301CMR 23.03(1).

After the municipality's request for a Notice to Proceed is filed with CZM's Director, there is a Public Notice and 30-day Public Comment period on the request to allow members of the public to submit written comments on the request to the EEA Secretary. 301 CMR 23.03(2), 23.03(3). "No later than 30 days after the close of the [public] comment period [on the municipality's request for a Notice to Proceed CZM's] Director, pursuant to 301 CMR 23.08(1),

[is required to issue a written determination] whether the request for the proposed planning program has been accepted or declined." 301 CMR 23.03(4). If the request "is declined, [CZM's] Director [is required to] summarize the reasons for the determination." Id. However, "[i]f the request is accepted, [CZM's] Director [is required to] issue a Notice to Proceed on the proposed planning program." Id. "The Notice to Proceed may include specifications as to the information and analysis, including consideration of alternatives, that will be necessary to determine whether the [Municipal Harbor Plan] complies with all relevant standards for [Plan] approval set forth in 301 CMR 23.05." Id. Additionally, "[i]f the Harbor Planning Area appears to include filled tidelands subject to jurisdiction under [c. 91 Regulations at] 310 CMR 9.00[,] the Notice to Proceed [is to] indicate how the relevant boundaries of [those] tidelands should be estimated for planning purposes, based on best available information and any regulations and administrative guidelines for historic tideline delineation set forth by [the Department]." Id.

Within two years after the issuance of a Notice to Proceed, "[t]he planning representative of the municipality [is required to] submit a proposed [Municipal Harbor Plan] to the [EEA] Secretary[,] . . . unless written approval is obtained from the [EEA] Secretary for an extension of the submission deadline by an additional six months." 301 CMR 23.04(1). "The proposed [Municipal Harbor Plan must] be prepared in accordance with content and format instructions provided by CZM, with whom advance consultation is encouraged to obtain guidance as to the information necessary to allow the review process [by EEA's Secretary] to commence." Id. "At a minimum[,] [the proposed Municipal Harbor Plan must contain] . . . the following: (a) text encompassing all basic elements of an [Municipal Harbor Plan] as defined in 301 CMR 23.02 and addressing all matters discussed in the Notice to Proceed; and (b) supporting documentation

containing, among other things, the data and analysis establishing how the [Municipal Harbor Plan] complies with the standards for approval set forth in 301 CMR 23.05." Id.

Following a Public Notice and 30-day Public Comment period, including a public hearing that the EEA Secretary is required to conduct on the proposed Municipal Harbor Plan, the EEA Secretary is to issue a written decision approving or rejecting the Plan. 301 CMR 23.04(2)-23.04(6), 23.05. Under 301 CMR 23.05, the EEA Secretary may approve a proposed Municipal Harbor Plan only if it is consistent with: (1) all CZM Policies, as applicable; and (2) state tidelands policy objectives and associated regulatory principles, as set forth in the c. 91 Regulations at 310 CMR 9.00. 301 CMR 23.05(1)-23.05(2). In making the latter determination, the EEA Secretary "[is required to] take into account all relevant guidance as to the interpretation and application of [the c. 91] regulations as may be available in written determinations, licensing decisions, and other administrative documents issued pursuant to 310 CMR 9.00, or as may otherwise be provided by [the Department] . . . ." 301 CMR 23.05(2).

The EEA Secretary's approval of a Municipal Harbor Plan is not in perpetuity, but for a fixed number of years "[which will] expire on the date stipulated in the [EEA] Secretary's approval decision, unless the planning representative of the municipality submits a written request to the [EEA] Secretary to commence renewal of the approval or to extend the expiration date." 301 CMR 23.06(2)(a). The EEA Secretary may extend the expiration date of an approved Municipal Harbor Plan for no more than one year. Id. "No later than six months prior to the expiration date of [an approved Municipal Harbor Plan], . . . the [EEA] Secretary [is required to] notify the planning representative of the municipality of the [Plan] renewal requirement." 301 CMR 23.06(2)(b). "The notification may include instructions as to the information necessary for

the renewal process to commence, including but not limited to a review of the [Municipal Harbor Plan's] effectiveness in promoting state tidelands policy objectives and other water-related public interests." Id.

Here, neither Ms. Flanders nor Mr. Tramontozzi nor their expert, Mr. Simpson, presented any evidence at the Hearing of a document purporting to be the original or true copy of a Wareham Municipal Harbor Plan approved by the EEA Secretary in accordance with the requirements of the c. 91 Regulations at 310 CMR 9.02 and 9.34(2)(a) and the Municipal Harbor Plan Approval Regulations at 301 CMR 23.00 as discussed above. All they presented was testimonial and documentary evidence that the Town of Wareham adopted a Harbor Management Plan in 1996. Mr. Simpson's Direct PFT, at pp. 10-12; Mr. Simpson's Rebuttal PFT, ¶¶ 10, 16, 28; Mr. Tramontozzi's Rebuttal PFT, Section 2, at pp. 24-25, ¶ 26; Intervenors Hearing Exhibits 10-12. However, they presented no evidence that this Plan was ever approved by the EEA Secretary in accordance with the requirements of the c. 91 Regulations at 310 CMR 9.02 and 9.34(2)(a) and the Municipal Harbor Plan Approval Regulations at 301 CMR 23.00. Indeed, in his testimony, Mr. Simpson did not dispute Mr. Hill's testimony on behalf of the Department that the Town of Wareham does not have an Municipal Harbor Plan that has been approved by the EEA Secretary in accordance with the requirements of the c. 91 Regulations at 310 CMR 9.02 and 9.34(2)(a) and the Municipal Harbor Plan Approval Regulations at 301 CMR 23.00. Mr. Simpson's Rebuttal PFT, ¶ 38.

Nevertheless, Mr. Simpson attempted to get around the Municipal Harbor Plan approval requirements of the c. 91 Regulations at 310 CMR 9.02 and 9.34(2)(a) and the Municipal Harbor Plan Approval Regulations at 301 CMR 23.00, by contending that 310 CMR 9.34 still governs

review of the proposed Revised Project because "CZM . . . fund[ed] the [T]own's [1996 Harbor Management] [P]lan and the [EEA] Secretary approved it for payment (meaning the [P]lan met the goals establish[ed] by contract with the state)." Mr. Simpson's Rebuttal PFT, ¶ 38. Mr. Tramontozzi attempted to do the same by testifying that "[t]he Town of Wareham [drafted the 1996 Wareham] Harbor Management Plan with a [monetary] grant from [CZM]" and that "[t]his plan was already being developed before the promulgation of the Municipal Harbor Plan [Approval] [R]egulations [301 CMR 23.00]." Mr. Tramontozzi's Rebuttal PFT, Section 2, at pp. 24-25, ¶ 26. He also testified that "[t]he Town continued with the plan at the urging of CZM"; "CZM approved payment [of the grant] to the Town upon completion of the . . . [p]lan"; and "[t]he Town adopted the plan as its policy." Id. However, Mr. Tramontozzi failed to mention that in its January 19, 1996 letter to the Wareham Board of Selectmen, CZM stated that "[it had] accept[ed] the Town of Wareham's Final Harbor Management Plan . . . ***for reimbursement purposes*** under [the] Massachusetts Coastal Zone Management's (MCZM) Harbor Planning Grants Program." Intervenors Exhibit 12 (emphasis supplied). Based on this letter, Mr. Simpson's testimony discussed above that "[the EEA] Secretary approved [the grant] for payment" is wrong because CZM was the approving authority. Id. Moreover, CZM's grant reimbursement to Wareham did not constitute the EEA Secretary's or State approval of Wareham's Harbor Management Plan subjecting the proposed Revised Project to review under 310 CMR 9.34 given the extensive requirements of the c. 91 Regulations at 310 CMR 9.02 and 9.34(2)(a) and the Municipal Harbor Plan Approval Regulations at 301 CMR 23.00. Indeed,

Wareham's Harbor Management Plan is listed on CZM's website as one of the "Selected Local (***Non-State Approved***) Harbor Planning Initiatives."[40] (emphasis supplied).

Lastly, it is important to note, as Mr. Hill brought to light in his testimony for the Department at the Hearing, that the proposed Revised Project has the blessing of Wareham's Harbormaster, which cuts heavily against Ms. Flanders' and Mr. Tramontozzi's claim that the proposed Revised Project is inconsistent with the Wareham Harbor Management Plan. Mr. Hill's Direct PFT, ¶¶ 15, 37.

The Wareham Harbormaster is a Wareham municipal official appointed by the Town's Board of Selectmen pursuant to G.L. c. 102, § 19, which provides that:

> [t]he . . . the selectmen of a town where a harbor is situated, unless otherwise specially provided, may, and for all harbors that have been improved by the expenditure of money by the commonwealth shall, appoint a harbor master and assistant harbor masters . . . . Said appointment shall remain in force unless the harbor master is removed for neglect of duty, negligence or conduct unbecoming a harbor master . . . .

The Wareham Harbormaster is responsible for "ensur[ing] that all waterways, town owned waterfront facilities[,] and natural resources are used in a safe, environmentally friendly and lawful manner." https://www.wareham.ma.us/dept-natural-resources-harbormaster-and-shellfish-division. Under G.L. c. 102, § 21, "[t]he [operator] of a vessel within [all Wareham waterways and town owned waterfront facilities] . . . shall anchor his [or her] vessel according to the regulations of the [Wareham Harbormaster], and shall move to such place as [he or she] directs." The provisions of G.L. c. 102, § 24 authorize the Wareham Harbormaster to:

> at the expense of the [operator] or owners thereof, cause the removal of any vessel which lies in [the] harbor [under the Wareham Harbormaster's jurisdiction] and is not moved when directed by him [or her], and upon the neglect or refusal of such

[40] https://www.mass.gov/service-details/czm-port-and-harbor-planning-program-municipal-harbor-plans.

> [operator] or owners on demand to pay such expense, [the Wareham Harbormaster] may recover the same from them in contract, to the use of the town where the harbor is situated.

Mr. Hill testified that in December 2012, "the Department organized a site view with the Wareham Harbormaster [for] [t]he purpose of . . . introduc[ing] the [proposed Revised Project] to the Harbormaster and view[ing] existing structures and navigational conditions in the vicinity of the project." Mr. Hill's Direct PFT, ¶ 15. Mr. Hill testified that "[the] [P]roject [site] was viewed from the [Applicant's] Marina docks and from the water in the Harbormaster's vessel." Id. He testified that at no time during the site inspection or thereafter, did the Wareham Harbormaster "[make any] mention . . . that [the proposed Revised] [P]roject was inconsistent with the local Wareham Harbor Management Plan." Mr. Hill's Direct PFT, ¶ 37. Instead, the Wareham Harbormaster made a recommendation to improve the proposed Revised Project, specifically, the elimination of the most easterly finger float and approximately 38 feet of the main float from the Project in order to improve navigation to the existing marina floats and Mr. Tramontozzi's pier. Mr. Hill's Direct PFT, ¶ 15. Mr. Hill testified that the Applicant accepted the Wareham Harbormaster's recommendation and eliminated the most easterly finger float and approximately 38 feet of the main float as reflected in the Applicant's plan for the proposed Revised Project. Id. In an April 19, 2016 letter to Mr. Hill, the Wareham Harbormaster confirmed that the Applicant had "incorporated the suggested changes that [the Harbormaster had] discussed at [the] on-site meeting." Applicant's Exhibit No. 5; Mr. Hill's Direct PFT, ¶ 15.

F. The Proposed Revised Project Does Not Significantly Interfere with Public Rights of Navigation As Set Forth In 310 CMR 9.35(2)(a)1.c, 1.d, 1.e, and 1.j

1. The Requirements of 310 CMR 9.35(2)(a)1.c, 1.d, 1.e, and 1.j

310 CMR 9.35(2)(a) is entitled "Navigation" and provides that a "[proposed c. 91]

project shall not ***significantly interfere*** with public rights of navigation which exist in all waterways,"[41] and that "[s]uch rights include the right to conduct any activity which entails the movement of a boat, vessel, float, or other watercraft; the right to conduct any activity involving the transport or the loading/unloading of persons or objects to or from any such watercraft; and the natural derivatives thereof." (emphasis supplied). The Regulation provides that "[t]he Department ***shall find*** that the standard is not met" in certain specific circumstances, including those set forth in 310 CMR 9.35(2)(a)1.c, 1.d, 1.e, and 1.j. (emphasis supplied). These regulatory provisions require the Department to find that a proposed project will significantly interfere with public rights of navigation if the project will:

(1) "impair [a] line of sight required for navigation" (310 CMR 9.35(2)(a)1.c);

(2) "require the alteration of an established course of vessels" (310 CMR 9.35(2)(a)1.d);

(3) "interfere with access to adjoining areas by extending substantially beyond the projection of existing structures adjacent to the site" (310 CMR 9.35(2)(a)1.e); or

(4) "impair in any other substantial manner the ability of the public to pass freely upon the waterways and to engage in transport or loading/unloading activities" (310 CMR 9.35(2)(a)1.j).

By its terms, 310 CMR 9.35(2)(a) imposes "an explicit regulatory obligation [upon the Department] to [only authorize] . . . those structures such ***that the legal and reasonably foreseeable*** waterborne traffic associated with them does not significantly interfere with the

[41] 310 CMR 9.35(2)(a) uses the terms "significantly interfere" and "substantially interfere." "The remainder of the [Waterways] regulations generally utilize the term 'significant' when considering interference." In the Matter of David Fuhrmann, OADR Docket No. 2013-037, Recommended Final Decision (February 19, 2015), 2015 MA ENV LEXIS,17, at 25, n.12, adopted as Final Decision (April 8, 2015), 2015 MA ENV LEXIS 16; Jimary, 2018 MA ENV LEXIS 51, at 15 n.3. "[T]here is [no] material difference between 'significant' and 'substantial' in this context." Id.

public trust rights," including those set forth in 310 CMR 9.35(2)(a)1.c, 1.d, 1.e, and 1.j, as discussed above. Fuhrmann, 2015 MA ENV LEXIS 17, at 29-30 (emphasis supplied); Webster Ventures II, 2016 MA ENV LEXIS 27, at 73; Jimary, 2018 MA ENV LEXIS 51, at 17-18. This "legal and reasonably foreseeable waterborne traffic" standard is a rational, objective standard based on Chapter 91 regulatory requirements and is consistent with prior Final Decisions in administrative appeals involving challenges to Chapter 91 Licenses issued by the Department. See Fuhrmann (Chapter 91 License required modification to include conditions avoiding proposed structure's significant interference with public rights of navigation); Webster Ventures II (proposed structures authorized by Chapter 91 License would not significantly interfere with public rights of navigation); Contrast Jimary, 2018 MA ENV LEXIS 51, at 17-39 (proposed structure authorized by Chapter 91 License would significantly interfere with public rights of navigation). However, "in assessing the significance of any interference with public rights [of navigation] pursuant to 310 CMR 9.35(2)[(a)][,] . . . the Department [is required by 310 CMR 9.35(1) to] take into account that the provision of public benefits by certain water-dependent uses may give rise to some unavoidable interference with certain water-related public rights [and that] [s]uch interference may be allowed provided that mitigation is provided to the greatest extent deemed reasonable by the Department, and that the overall public trust in waterways is best served." 310 CMR 9.35(1).

2. The Proposed Revised Project Will Not Impair Any Line of Sight Required for Navigation Under 310 CMR 9.35(2)(a)1.c

At the Hearing, Ms. Flanders and Mr. Tramontozzi contended that the Draft June 2015

c. 91 License is invalid because the proposed Revised Project will significantly interfere with line of sight for navigation in violation of 310 CMR 9.35(2)(a)1.c. Specifically, Ms. Flanders and Mr. Tramontozzi asserted the following claims.

Ms. Flanders testified that the Applicant's existing marina and the boats docked there "block landmarks and visibility for safe passage to Onset Beach and the town pier." Ms. Flanders Direct PFT, ¶ 7. She testified that "[a]lthough the right of way 'may' be granted in theory, the lack of visibility [that] a larger boat has to see [her] in or on a much smaller craft creates significant risk and the potential for catastrophe." Id. She testified that "[e]xpansion of the docks [of the Applicant's marina] further out into the Bay, with even larger, more massive, taller and longer boats, will significantly increase the interference posed by [the Applicant's marina] to [her] line of sight while navigating." Id, ¶ 14. She testified that "[t]he boats [at the Applicant's marina] will block [her] vie[w] of key landmarks in the distance, while also blocking a clear view of approaching vessels." Id. She testified that "[t]he interference with [her] line of sight posed by these boats will actually force [her], when paddling small boats, to go even further from shore, out from the new extended end of the [Applicant's marina], to provide [her] a clear and safe view." Id. She testified that "[t]he proposed new docks [at the Applicant's marina] will not only push [her] out 58 more feet, but many more to attempt to get into safer waters." Id.; Ms. Flanders' Hearing Exhibit 3. However, Ms. Flanders admitted on cross-examination at the Hearing that she has never witnessed a collision in Onset Bay in the area of the Applicant's marina. Hearing Transcript, p. 117, lines 2-19.

Mr. Tramontozzi testified that the proposed Revised Project "[will] significantly interfer[e] with the line of sight for navigation" because he, his family members, and/or friends

"currently navigate between Onset Island and the mainland [and] between Wicketts Island and the mainland to and from the Town Pier . . . [by] power boat, sail boat, jet ski, row boat, wind surfing[,] and kayaking" and that "the existing lines of sight will be blocked by [additional] structures with vessels moored to those structures [at the Applicant's marina]." Mr. Tramontozzi's Direct PFT, ¶ 22. Mr. Simpson added to Mr. Tramontozzi's testimony by testifying that that "[t]he expansion of the [Applicant's] marina by extending [it] east, west, and south will interfere with sight lines from the eastern shore and [Mr.] Tramontozzi's pier, and from the shore and facilities to the west when boaters attempt to see vessels leaving [Applicant's marina] or other traffic as they try and navigate around it." Mr. Simpson's Rebuttal PFT, at p. 2. Mr. Simpson also testified that "[i]f a straight line is drawn from either side of the marina to the [other] existing structures [in the area, including Mr. Tramontozzi's property], not only [will] the distance to pass the seaward most proposed expansion increase[e] but the LOS [will] decreas[e] as [well]." Mr. Simpson's Direct PFT, at 8. However, Mr. Tramontozzi's and Mr. Simpson's testimony was undercut by Mr. Tramontozzi's cross-examination testimony at the Hearing that he could not recall any person having been killed or seriously injured while present in the area's waters. Hearing Transcript, p. 32, line 24; p. 33, lines 1-8.

Mr. Madden's and Mr. Hill's testimony on behalf of the Applicant and Department respectively, effectively refuted Ms. Flanders', Mr. Tramontozzi's, and Mr. Simpson's testimony that the proposed Revised Project will significantly interfere with the line of sight for navigation. They provided persuasive testimony demonstrating that there will be no significant interference.

Mr. Madden testified that the proposed Revised Project "would not create a line of sight issue for navigation [because] "[a] line of sight issue is generally not an issue for navigating in

the close quarters [in Onset Bay] described in [Ms. Flanders', Mr. Tramontozzi's, and Mr. Simpson's] testimony." Mr. Madden's Direct PFT, ¶¶ 25, 40. He testified that the Project "would not create a navigational impediment and/or hazard [because] navigating in close quarters or while approaching the shore or a marina facility would be done by maintaining safe distances and at a speed of six (6) miles per hour or less, or 'Headway Speed'." Id., ¶ 40. He testified that "Headway Speed is utilized to insure safe navigation." Id.

Mr. Hill testified that he determined that the proposed Revised Project would not significantly interfere with the line of sight for navigation based on his extensive c. 91 licensing experience; great familiarity with the waters of Onset Bay both professionally with the Department and personally as a former resident of the area; extensive experience as a boater who has navigated the waters in and around Onset Bay; and his three site inspections of the Applicant's marina and the project site from a boat. Mr. Hill's Direct PFT, ¶¶ 1-5, 26-28.

Mr. Hill testified that his three site inspections of the Applicant's marina and the project site from a boat included his August 16, 2012 inspection "to observe boating activities in the vicinity of the Point Independence Yacht Club and [the Applicant's] Marina during the boating season." Id., ¶ 28. He testified that he performed this inspection from a 12 foot aluminum boat with an outboard motor which "[he] repeatedly navigated along the northerly shoreline of Onset Bay from Wickets Island to Pleasant Harbor" and "from the vicinity of [Mr. Tramontozzi's] pier southerly into the mooring field" and also "drifted in the marina mooring fields." Id., ¶¶ 26-27, 28. He testified that "it was a perfect summer day for being out on the water with the temperature in the 80's and light breeze." Id., ¶ 28. He testified that "[he] spent approximately two (2) hours that afternoon making observations of the site from different vantage points." Id.

He testified that "[d]uring the course of [his] inspection, [he] observed[:] [1] several kayakers paddling in the vicinity of [the Applicant's] marina[;] . . . [2] a small sailboat navigating in the area of the mooring fields[;] . . . [3] a number of motorized vessels passing by[;] . . . [and] [4] a number of [sun]bathers at the Point Independence [Yacht Club's] private beach and the Nanumett Heights beach . . . ." Id. He testified that he observed neither "any swimmers venture close to the vicinity of the Project" nor "any vessels, other than those using the [Applicant's] marina facility, navigate in the area of the proposed float expansion" approved by the Draft June 2015 c. 91 License. Id.

Mr. Hill testified that based on his observations of the Applicant's marina and the project site, he determined that the proposed Revised Project would not significantly interfere with the line of sight for navigation for two reasons. Mr. Hill's Direct PFT, ¶¶ 26-27, 28. First, "[t]he [Project's] proposed floating docks [would] only extend approximately fifty-five (55) feet seaward from the end of the existing marina gas dock" and "[this] seaward extension would not significantly interfere with the line of sight for vessels navigating along the northerly shoreline of Onset Bay." Id., ¶¶ 26-27. Second, "the elevated bridge shown on the proposed revised plan [for the proposed Revised Project] provide a window allowing boaters to view vessels approaching from the opposite direction." Id., ¶ 26. Mr. Hill testified that he reached the same conclusions after conducting another inspection of the project site with Wareham Harbormaster in December 2012. Id., ¶ 27.

3. The Proposed Revised Project Will Not Alter an Established Course of Vessels In Violation of 310 CMR 9.35(2)(a)1.d

As discussed above, 310 CMR 9.35(2)(a)1.d requires the Department to find that a proposed project will significantly interfere with public rights of navigation if the project will

"require the alteration of an established course of vessels." "[T]he term 'established course of vessels' in 310 CMR 9.35(2)(a)1.d' is not synonymous with [the term] 'habitual use' by vessels in a particular area . . . [and] does not guarantee mariners that they will not have to alter their preferred course [of navigation in that area as the result of a c. 91 licensed project]." Webster Ventures, II, 2016 MA ENV LEXIS 27, at 83-84. "[I]nstead, the phrase 'established course of vessels' in 310 CMR 9.35(2)(a)1.d 'means that a particular course must have been established by mariners for a ***compelling and legitimate*** navigational reason, and must need to be ***continued*** for a compelling and legitimate navigational reason, and not just because a number of boaters are in the habit of navigating in the area where a [c. 91 licensed] project is proposed." Id., at 84 (emphasis in original). "[I]mplicit in this regulatory concept is the inability, without significant adverse consequences, to change course in order to pass around a new, [c. 91] licensed structure." Id., at 84-85.

"[C]ompelling and legitimate [navigational] reasons must be understood in the context of significant interference and . . . primarily include[s] serious considerations of navigational safety if the course were altered [by the c. 91 licensed project]." Id., at 85. "[E]xamples of navigational safety considerations . . . include, without limitation, [a mariner] being constrained by shoals to avoid grounding; rocks or other navigational hazardous; or the predominance of more numerous, larger, and/or less maneuverable vessels in the course (e.g. shipping lane)." Id. "[C]ompelling and legitimate [navigational] reasons" justifying the continuation of a particular course of vessels include a proposed c. 91 project's "significant interference with commercial fishing activities, significant economic loss (e.g. fuel costs) if the course were altered, or

[mariners] being entirely blocked by a permanent structure from entering a substantially sized and navigable portion of a waterway." Id.

Based on the regulatory criteria of 310 CMR 9.35(2)(a)1.d as discussed above, Ms. Flanders and Mr. Tramontozzi failed to demonstrate at the Hearing that the proposed Revised Project will alter an established course of vessels in violation of 310 CMR 9.35(2)(a)1.d. Their testimony on this issue and that of Mr. Simpson failed to demonstrate that: (1) a particular course of navigation for vessels in Onset Bay has been established by mariners for a compelling and legitimate navigational reason, (2) this course will be altered by the proposed Revised Project, and (3) the alteration of this course will cause significant adverse consequences, and as such, the course must be continued and the Project rejected. Webster Ventures, II, 2016 MA ENV LEXIS 27, at 84-85. Instead, their testimony made conclusory allegations that the proposed Revised Project will alter an established course of vessels in violation of 310 CMR 9.35(2)(a)1.d.

For example, Mr. Tramontozzi testified that the proposed Revised Project "[will] impede an existing navigational route . . . used by [his] family . . . members as well as [his] guests and the general public." Mr. Tramontozzi's Rebuttal PFT, ¶ 5. He testified that this is a "long established navigational route to/from Broad Cove, to/from the Town Pier[,] and to/from properties of [his] friends to the west of [the Applicant's marina]." Id. Ms. Flanders testified that "[t]he extension of the . . . dock system [at the Applicant's marina] will intensify the interference with the established courses for small boaters." Ms. Flanders Direct PFT, ¶ 7. Lastly, Mr. Simpson added to Mr. Tramontozzi's and Ms. Flanders' testimony by testifying that the proposed Revised Project "will alter [an] established course of vessels" because "[v]essels already must divert from where they otherwise would navigate to pass seaward of the

[Applicant's] marina" and "[e]xtending the structures [at the marina] farther out will force vessels to travel beyond the course they have been taking for over a decade, further from where they naturally would pass on this waterway." Mr. Simpson's Direct PFT, at p. 9.

Assuming for the sake of argument that Mr. Tramontozzi's, Ms. Flanders', and/or Mr. Simpson's testimony had any probative value in resolving the issue of whether the proposed Revised Project will alter an established course of vessels in violation of 310 CMR 9.35(2)(a)1.d, it was effectively refuted by Mr. Hill's persuasive testimony on behalf of the Department demonstrating that the Project will not cause any such alteration. Mr. Hill's testimony on this issue carries a degree of weight given his extensive professional and personal knowledge and experience discussed above. Mr. Hill's Direct PFT, ¶¶ 1-5, 28. His testimony also carries weight on the issue because the regulatory standard governing 310 CMR 9.35(2)(a)1.d as set forth above is based on his construction of that regulation which the Department's Commissioner adopted in Webster Ventures II in issuing his Final Decision affirming the Draft c. 91 License at issue in that case.[42]

Here, Mr. Hill testified that he determined that the proposed Revised Project will not alter an established course of vessels in violation of 310 CMR 9.35(2)(a)1.d based on his extensive professional and personal knowledge and experience, his review of aerial photographs of the project site and navigation charts, and the three site inspections he performed of the Applicant's marina and the project site, including his August 16, 2012 site inspection discussed extensively above. Mr. Hill's Direct PFT, ¶¶ 1-5, 26-32; Exhibits A through L of Mr. Hill's Direct PFT. He testified that "[his] observations of vessels navigating in the area of [the Applicant's] Marina

[42] Mr. Hill was the Department's expert witness in Webster Ventures II and I was the Presiding Officer in the case.

[during his] August 16, 2012 [site inspection] indicated that the routes being taken by vessels were random and they followed no established course." Mr. Hill's Direct PFT, ¶ 31.

In rendering his opinion that the proposed Revised Project will not alter an established course of vessels in violation of 310 CMR 9.35(2)(a)1.d, Mr. Hill testified "that with the exception of boaters actually using the [Applicant's] marina, [he] would not expect the area of the proposed docks [in the Project] would habitually be used by a substantial number of vessels, but even if it were, this would not be sufficient to constitute [an established course of vessels that would be altered in] violation of 310 CMR 9.35(2)(a)1.d." Mr. Hill's Direct PFT, ¶ 29. He noted, as discussed above, that 310 CMR 9.35(2)(a)1.d "do[es] not guarantee mariners that they will not have to alter their preferred course [of navigation] . . . ." Id. He testified that "[t]he reality is that almost all new [c. 91 licensed] structures will require some mariners to alter their prior habitual courses, if they have been travelling in that area prior to the structure or extension being built[,] [and] [t]hat alone, does not constitute an established course of vessels [because] [i]f it did, results that are both absurd and harmful would follow [because] [f]ew structures could be built or enlarged [] [given that] in any reasonably populated waterway, there would have been some amount of navigation along a particular shore or in front of an existing structure with a proposal for expansion." Id., ¶ 30. He testified that such a result "would create a de facto moratorium on the placement or extension of piers and docks on a shoreline[,] . . . contrary to the [intent] of . . . 310 CMR 9.35(2)(a), which clearly indicates that the Department is only concerned with a significant interference with navigation." Id. He testified that "'[s]ignificance' must be seen in terms of something much more serious than 'we were here first'[,] [which] . . . is contrary to the purpose stated in 310 CMR 9.01(2) of ensuring water-dependent uses, because it

would prevent and discourage the most typical water-dependent uses described in 310 CMR 9.12 and ultimately encourage nonwater-dependent uses of waterfront land in c. 91 jurisdiction as the only alternative." Id.

In sum, based on a preponderance of the testimonial and documentary evidence discussed above, I find that: (1) no particular course of navigation for vessels in Onset Bay has been established by mariners for a compelling and legitimate navigational reason, (2) if such a course exists, it will not be altered by the proposed Revised Project, and (3) if the course is altered, the alteration will not cause significant adverse consequences. Webster Ventures, II, 2016 MA ENV LEXIS 27, at 84-85.

4. The Proposed Revised Project Will Not Interfere with Access to Adjoining Areas in Violation of 310 CMR 9.35(2)(a)1.e Because the Project Will Not Extend Substantially Beyond the Projection of Existing Structures Adjacent to the Project Site

At the Hearing, Ms. Flanders and Mr. Tramontozzi contended through Mr. Simpson that the Draft June 2015 c. 91 License is invalid because "[t]he [Applicant's] marina with [the] expansion [contemplated by the proposed Revised Project will] extend substantially beyond the existing [marina] structures on [each] side" which will interfere with access to adjoining areas in violation of 310 CMR 9.35(2)(a)1.e. Mr. Simpson's Direct PFT, at pp. 9-10; Mr. Simpson's Rebuttal PFT, ¶ 14. Mr. Simpson testified that "[w]hen a line is drawn from the longest pier and floats to the east of the [Applicant's] [existing] marina to the pier to the west, the [facility] . . . significantly extends beyond the other two [marinas in the area]." Mr. Simpson's Direct PFT, at p. 9. He testified that "[t]he revised plans [for the proposed Revised Project] do not show the existing piers [at the Applicant's marina] to either the east or the west[,] [and] [i]f they did, it

would [show] . . . that the marina extends beyond those nearby [marinas] and does so in a substantial manner." Id., at pp. 9-10.

I do not find Mr. Simpson's testimony persuasive because it was effectively refuted by Mr. Hill's testimony on behalf of the Department demonstrating that the proposed Revised Project will not violate 310 CMR 9.35(2)(a)1.e. Mr. Hill's Direct PFT, ¶¶ 33-34. Mr. Hill testified that based on his extensive professional and personal knowledge and experience, his review of aerial photographs of the project site and navigation charts, and the three site inspections he performed of the Applicant's marina and the project site, including his August 16, 2012 site inspection discussed extensively above, he determined that "the proposed floating docks and mooring piles [approved for the proposed Revised Project] will not interfere with access to adjoining areas [because they will not extend] substantially beyond the projection of the existing structures." Id., ¶ 33. He testified that "[t]he existing marina floating dock system . . . already extends beyond the adjacent piers and floating docks" and the proposed Revised Project "will extend [the marina] approximately 55 feet seaward, which is less than a 10% increase over the length of the existing marina docks." Id. He also testified the Project "does not provide any further east or west expansion, which would be the most important consideration when assessing potential interference to adjoining areas." Id.

5. The Proposed Revised Project Will Not Prevent the Public From Passing Freely On the Waterway Pursuant to 310 CMR 9.35(2)(a)1.j

At the Hearing, Mr. Simpson contended on behalf of Ms. Flanders and Mr. Tramontozzi that the proposed Revised Project will prevent the public from passing freely in the waters of Onset Bay in violation of 310 CMR 9.35(2)(a)1.j. Mr. Simpson testified that the Project will cause the Applicant's marina "[to] further encroac[h] in Commonwealth Tidelands and [will]

preven[t] the public from passing freely on the waterway" and that "[b]etween the piles, pier, floats, and vessels, passage by the public [will be] limited." Mr. Simpson's Direct PFT, at p. 10. He testified that "[f]or over twenty years the public and in particular, [Ms. Flanders and Mr. Tramontozzi] have navigated through the waters [of Onset Bay] at the southern extremity of the [Applicant's] marina's seaward most end between the float and the mooring fields" and "[p]assage will be blocked entirely [by the proposed Revised Project] except for the undesirable opening under the pier for small craft." Mr. Simpson's Rebuttal PFT, ¶ 15.

I do not find Mr. Simpson's testimony persuasive because it was effectively refuted by Mr. Hill's testimony on behalf of the Department demonstrating that the proposed Revised Project will not violate 310 CMR 9.35(2)(a)1.j. Mr. Hill's Direct PFT, ¶¶ 35-36. Mr. Hill testified that based on his extensive professional and personal knowledge and experience and utilization of MassGIS tools,[43] he determined that "the proposed floating docks and mooring piles [approved for the proposed Revised Project] will not impair in any substantial manner the ability of the public to pass freely on [Onset Bay]." Id., ¶ 35. Mr. Hill testified that utilizing MassGIS tools he determined that "the interior portion of . . . Onset Bay . . . [contains]

[43] "GIS" is the acronym for "Geographic Information System" which is:

> is a computer system capable of capturing, storing, analyzing, and displaying geographically referenced information; that is, data identified according to location. Practitioners also define a GIS as including the procedures, operating personnel, and spatial data that go into the system.

In the Matter of Jodi Dupras, OADR Docket No. WET-2012-026, Recommended Final Decision (July 3, 2013), 2013 MA ENV LEXIS 40, at 37, adopted as Final Decision (July 12, 2013), 2013 MA ENV LEXIS 61; In the Matter of Francis P. and Debra A. Zarette, Trustees of Farm View Realty Trust, OADR Docket No. WET-2016-030, Recommended Final Decision (February 20, 2018), 2018 MA ENV LEXIS 7, at 39, n.21, adopted as Final Decision (March 1, 2018), 2018 MA ENV LEXIS 6. "MassGIS" is the Commonwealth agency that has created a comprehensive, statewide database of spatial information for mapping and analysis supporting environmental planning and management. Dupras, 2013 MA ENV LEXIS 40, at 37 38; Zarette, 2018 MA ENV LEXIS 7, at 39, n.21.

approximately 295 acres [or 12,850,200 square feet][44] of open water sheet" and "the area that will be encompassed by [the proposed Revised Project] . . . [will only] be approximately 16,653 square feet or [less than one-half acre:] 0.4 acres." Id. Hence, the Project "would [only] occupy approximately 0.14 % of Onset Bay." Id. Mr. Hill testified that the area covered by the Project will be even lower than 0.14% if the area is considered to be only the 5,692 square foot area that the Project's float expansion would occupy in Onset Bay. Id. Mr. Hill testified that regardless of which figure is used, 16,653 square feet or 5,692 square feet, the figure "illustrate[s] how insignificant [the area the proposed Revised Project will occupy in Onset Bay] when compared to the size of Onset Bay." Id. He testified that the expansion area "[will] in no way prevent or even inconvenience other vessels to navigate to their desired location and pass freely on Onset Bay." Id. He testified that in fact, the proposed Revised Project will add "a substantial area for free passage within Onset Bay" by the Applicant's removal of 15 existing moorings at the Applicant's marina, which is required by the Draft June 2015 c. 91 License. Id., ¶ 36.

6. Any interference with Water-related Public Rights In Navigation Resulting from the Proposed Revised Project Has Been Mitigated Pursuant to 310 CMR 9.35(1)

As previously noted above, 310 CMR 9.35(1) requires the Department, in determining whether a proposed c. 91 project will significantly interfere with any public rights of navigation set forth in 310 CMR 9.35(2)[(a), "[to] take into account that the provision of public benefits by certain water-dependent uses may give rise to some unavoidable interference with certain water-related public rights [and that] [s]uch interference may be allowed provided that mitigation is

[44] It is generally accepted that one acre contains 43,560 square feet of area.

provided [by the project proponent] to the greatest extent deemed reasonable by the Department, and that the overall public trust in waterways is best served." 310 CMR 9.35(1).

At the Hearing, Ms. Flanders and Mr. Tramontozzi claimed through Mr. Simpson that the Draft June 2015 c. 91 License is invalid because the Department failed to comply with 310 CMR 9.35(1) in approving the proposed Revised Project. Mr. Simpson's Direct PFT, at pp. 7-8; Mr. Simpson's Rebuttal PFT, ¶ 11. Specifically, Mr. Simpson testified that "[the Applicant] . . . ha[d] failed to demonstrate, consistent with the requirements of 310 CMR 9.35(1), that the interference with certain water- related public rights resulting from the [proposed Revised] [P]roject have been mitigated 'to the greatest extent deemed reasonable by the Department' and that 'the overall public trust in waterways is best served.' Mr. Simpson's Rebuttal PFT, ¶ 11. He took particular aim at the proposed elevated bridge section of the proposed Revised Project, contending that "[it will] forc[e] small craft through a dangerous gauntlet of much larger vessels." Mr. Simpson's Direct PFT, at p. 7. He testified that "a similar type bridge would be appropriate to mitigate a new structure's interference with foot access along the shore, [but] it is utterly inappropriate so far out in the waterway, encouraging small vessels to pass into a dangerous and congested fairway where the finger piers will hold the largest boats in the [Applicant's] marina and those large boats will be maneuvering to and from those finger piers in the same small area as the small vessels[,] stand up paddle boards, and kayaks." Id., at pp. 7-8.

I do not find Mr. Simpson's testimony persuasive because it was effectively refuted by Mr. Hill's testimony on behalf of the Department. Mr. Hill's Direct PFT, ¶¶ 23-25. As discussed in detail above, at pp. 67-81, Mr. Hill testified that the proposed Revised Project will not significantly interfere with the public rights of navigation set forth in 310 CMR

9.35(2)(a)1.c, 1.d, 1.e, and 1.j. However, he testified "that the mitigation provided by the [proposed Revised] [P]roject [pursuant to 310 CMR 9.35(1)] offsets any unavoidable interference with [those] rights." Id., ¶ 25. He testified that the mitigation is reflected by: (1) the proposed Revised Project being significantly smaller than the Original Project and (2) several Special Waterways Conditions contained in the Draft June 2015 c. 91 License. Id.

Regarding the reduced size of the proposed Revised Project evidencing mitigation, the Project significantly differs from the Original Project as follows:

(1) the proposed pier extension into Onset Bay from the Applicant's marina was reduced from 174 feet to 55 feet;

(2) the proposed number of increased dock slips at the Applicant's marina was reduced from 29 to 14; and

(3) an elevated 20 foot long by 6 foot high bridge was to be constructed at the Applicant's marina to allow small boating vessels to navigate through the marina docking facility instead of around the proposed additional docks.[45]

Mr. Hill's Direct PFT, ¶¶ 8, 25. Mitigation is also evidenced by the proposed Revised Project's, per the Wareham Harbormaster's recommendation, elimination of the most easterly finger float and approximately 38 feet of the main dock float to improve navigation to the existing marina floats and Mr. Tramontozzi's pier. Id., ¶¶ 15, 25.

As for the "Special Waterways Conditions" in the Draft June 2015 c. 91 License evidencing mitigation, Mr. Hill testified that several of these Conditions "required mitigation over and beyond [mitigation] requirements which are generally associated with the approval of a public recreational boating facility that is a marina." Id., ¶ 24. He testified that these Special

[45] Based on Mr. Hill's extensive professional and personal knowledge and experience and his Hearing testimony as discussed above, I reject Mr. Simpson's testimony that the proposed bridge is not an appropriate mitigation measure.

Waterways Conditions are:

(1) Special Condition No. 10: which requires the Applicant to (a) "provide a sewage disposal system for pump-out of sanitation devices on recreational boating vessels"; (b) make "[t]his system . . . available for use by marina patrons, transient boaters[,] and general public boaters for no charge"; (c) "[post] [s]ignage indicating the availability of the pump-out system . . . clearly visible to all marina patrons and other boaters"; and (d) "actively promote use of this system by marina patrons and other boaters";[46]

(2) Special Condition No. 11: which requires the Applicant to restrict the use of "[t]he seaward (southerly) side of the [approximately 272 long by] 10 foot wide access float for . . . the berthing of transient vessels and docking for the purpose of loading/offloading activities, vessel maintenance[,] and utilization of the fueling and sewage pump-out facilities";[47]

(3) Special Condition No. 12: which requires the Applicant to eliminate 15 existing moorings from the Applicant's marina's mooring field.[48]

G. The Provisions of 310 CMR 9.36(1), 9.36(2), and 9.36(3) Do Not Establish Any Specific Right to Navigate by Sailboat in a Waterway

At the Hearing, Ms. Flanders and Mr. Tramontozzi contended through Mr. Simpson that the Draft June 2015 c. 91 License is invalid because the proposed Revised Project "will . . . significantly interfere with [their] rights to navigation by sail[boat] to the east and west, and . . . with the approach to their shore" in violation of 310 CMR 9.36(1), 9.36(2), 9.36(3). Mr. Simpson's Direct PFT, at p. 11. The Applicant and the Department disputed the claim contending through Mr. Hill's testimony on behalf of the Department that the provisions of 310 CMR 9.36(1), 9.36(2), 9.36(3) do not establish any specific right to navigate by sailboat in a

[46] Draft June 2015 c. 91 License, at p. 3; Mr. Hill's Direct PFT, ¶ 24.

[47] Id.

[48] Id.

waterway and if such a right exists, the proposed Revised Project will not significantly interfere with that right for the same reasons discussed above, at pp. 67-81, regarding how the Project will not significantly interfere with any rights of navigation set forth in 910 CMR 9.35(2)(a)(1)(c), 9.35(2)(a)(1)(d), 9.35(2)(a)(1)(e), and 9.35(2)(a)(1)(j). Mr. Hill's PFT, ¶ 39. I agree with the Applicant and the Department for the following reasons.

1. There Is No Specific Right to Navigate by Sailboat Under 310 CMR 9.36(1)

310 CMR 9.36(1) provides that:

> [a proposed c. 91] project shall preserve the availability and suitability of tidelands, Great Ponds, and other waterways that are in use for water-dependent purposes, or which are reserved primarily as locations for maritime industry or other specific types of water-dependent use. In applying this standard the Department shall act in accordance with 310 CMR 9.36(2) through (5), and shall give particular consideration to applicable guidance specified in a municipal harbor plan, as provided in [the Municipal Harbor Plan Approval Regulations at] 310 CMR 9.34(2)(b)2.

As the provisions of 310 CMR 9.36(1) demonstrate, there is no language in the regulation that establishes any specific right to navigate by sailboat in a waterway. As discussed in the next sections below, the provisions of 310 CMR 9.36(2) and 9.36(3), which are referenced by 310 CMR 9.36(1) and are the other source for Ms. Flanders' and Mr. Tramontozzi's navigation by sailboat claim, also do not establish any specific right to navigate by sailboat in a waterway. 310 CMR 9.34(2)(b)2, which is also referenced by 310 CMR 9.36(1), also does not establish any specific right to navigate by sailboat in a waterway. Instead, as discussed in detail above, at pp. 59-67, 310 CMR 9.34(2)(b)2 concerns municipal harbor plans and does not govern review of the proposed Revised Project because the Town of Wareham's Municipal Harbor Management Plan has not been approved by the EEA Secretary in accordance with the extensive requirements of

the c. 91 Regulations at 310 CMR 9.02 and 9.34 and the Municipal Harbor Plan Approval Regulations at 301 CMR 23.00.

2. There Is No Specific Right to Navigate by Sailboat Under 310 CMR 9.36(2)

310 CMR 9.36(2) provides in relevant part that:

> [a proposed c. 91] project shall not significantly interfere with [the] littoral or riparian property owners' right to approach their property from a waterway, and to approach the waterway from [that] property . . . . In evaluating whether such interference is caused by a proposed structure, the Department may consider the proximity of the structure to abutting littoral or riparian property and the density of existing structures . . . .

As 310 CMR 9.36(2) makes clear, the regulation deals only with whether a proposed c. 91 project will significantly interfere with littoral or riparian property rights and does not establish any specific right to navigate by sailboat in a waterway. Ms. Flanders' and Mr. Tramontozzi's separate claim under 310 CMR 9.36(2) that the proposed Revised Project will significantly with their littoral rights is without merit and addressed in Section II.H below, at pp. 87-92.

3. There Is No Specific Right to Navigate by Sailboat Under 310 CMR 9.36(3)

310 CMR 9.36(3) provides that:

> [a proposed c. 91] project shall not significantly disrupt any water-dependent use in operation, as of the date of [the c. 91] license application, at an off-site location within the proximate vicinity of the project site. The project shall include such mitigation and/or compensation measures as the Department deems appropriate to avoid such disruption.

By its plain terms, the purpose of 310 CMR 9.36(3) is establishing "[t]he prohibition against a project significantly disrupting water dependent uses [which] . . . applies to 'off-site' locations." In the Matter of Oyster Harbors Yacht Basin, OADR Docket Nos. 2008-082 and 2008-090, Recommended Final Decision (July 9, 2010), 2010 MA ENV LEXIS 177, at 11, n.2; In the

Matter of Keith and Valerie Stamp, OADR Docket No. 2015-024, Recommended Final Decision (August 4, 2016), 2016 MA ENV LEXIS 43, at 3, adopted as Final Decision (August 8, 2020), 2016 MA ENV LEXIS 42. The regulation does not establish any specific right to navigate by sailboat in a waterway.

H. The Proposed Revised Project Will Not Significantly Interfere with Ms. Flanders' and Mr. Tramontozzi's Littoral Rights Under 310 CMR 9.36(2)

At the Hearing, in addition to wrongly claiming that 310 CMR 9.36(2) accorded them a specific right to navigate by sailboat in Onset Bay, Ms. Flanders and Mr. Tramontozzi also wrongly claimed that the proposed Revised Project would significantly interfere with their littoral rights in violation of 310 CMR 9.36(2). Mr. Simpson's Direct PFT, at p. 4; Mr. Tramontozzi's Direct PFT, ¶, 3; Mr. Tramontozzi's Rebuttal PFT, ¶ 6. Specifically, Mr. Simpson testified that the proposed Revised Project "significantly interferes with [Ms. Flanders' and Mr. Tramontozzi's respective] littoral rights [because] . . . [t]he [Applicant's] existing marina interferes with [Ms. Flanders and Mr. Tramontozzi's] ability to approach low water and their licensed structures" and that "[e]xtending the marina any additional distance would increase the interference to [Ms. Flanders and Mr. Tramontozzi] on both the east and west sides of the marina." Mr. Simpson's Direct PFT, at p. 4. I did not find Mr. Simpson's testimony to be persuasive for the following reasons.

The protection of littoral rights in 310 CMR 9.36(2) "does not provide that access to [real property] and from any particular direction [on a waterway] is protected." Stamp, 2016 MA ENV LEXIS 43, at 23. Additionally, "[t]he rights of [littoral] owners are not without limits." Id. "[A] significant interference [with the littoral property owner's right] must be greater than a mere

inconvenience or increase in difficulty in access." Id., at 24-25. Such a significant interference exists only if the littoral property owner is "wholly cut off" from his or her property by a structure built on an adjoining landowner's foreshore. In the Matter of Stanley A. Sylvia, OADR Docket No. 95-110, Final Decision (February 4, 1997), 1997 MA ENV LEXIS 122, at 8-9 (appellants failed to demonstrate that proposed pier would significantly interfere with their right to access their property from the water); In the Matter of Point of Pines Yacht Club, Inc., OADR Docket No. 91-116, Final Decision (November 20, 1997), 1997 MA ENV LEXIS 19, at 33 (appellant failed to demonstrate that portion of proposed pier would significantly interfere with his right to access his property from the water); Stamp, 2016 MA ENV LEXIS 43, at 23-26 (appellants failed to demonstrate that construction of proposed access pathway, pier, ramp, and floats would significantly interfere with their right to access their property from the water). If the party challenging a proposed c. 91 project has reasonable alternative access to his or her property from the water, there is no significant interference with party's littoral or riparian rights. Id.

As to Ms. Flanders' littoral rights claim, neither Mr. Simpson nor Ms. Flanders presented any specific evidence demonstrating that the proposed Revised Project will significantly interfere with Ms. Flanders' littoral right to access her property from the water by wholly cutting her off from the property. Sylvia, 1997 MA ENV LEXIS 122, at 8-9; Point of Pines Yacht Club, Inc., 1997 MA ENV LEXIS 19, at 33; Stamp, 2016 MA ENV LEXIS 43, at 23-26. They would have been hard pressed to present any such evidence because Ms. Flanders does not own any real property adjoining the Applicant's marina. Hence, she could not have

demonstrated that she would be wholly cutoff from her real property by the proposed Revised Project.

Although, Mr. Tramontozzi's property abuts the Applicant's marina, neither he nor Mr. Simpson presented any specific evidence demonstrating that the proposed Revised Project will significantly interfere with Mr. Tramontozzi's littoral right to access his property from the water by wholly cutting him off from the property

Mr. Tramontozzi testified that the proposed Revised Project will significantly interfere with his littoral right to access his property from the water because the current structures at the Applicant's marina "interfere with [his] ability to sail a vessel into the . . . floats" at his property. Mr. Tramontozzi's Direct PFT, ¶, 3. He testified that "[a]pproaching the floats [at his property] is necessary from the west to east direction, because east of the floats it is too shallow for a sail boat." Id. He testified that "[t]he approach course begins from south to north, due to the prevailing winds, and then moving to tack easterly at the location closest to [the Applicant's] most seaward structures." Id. He testified that "during low tide, [he] must approach [his] property from west to east, passing close to [the Applicant's marina] and the vessels docked at [that marina] on the outside of docks that are part of their structural footprint." Mr. Tramontozzi's Rebuttal PFT, ¶ 6. He testified that "[m]oving the gas dock [at the Applicant's marina] to the east [as contemplated by the proposed Revised Project], instead of leaving it where it [presently] is, means moving it closer to [his property]." Id. He testified that "[w]ith boats waiting to gas up, this will present a navigation problem and will hinder [his] ability to approach [his] land from the south." Id.

However, Mr. Tramontozzi's testimony (and Mr. Simpson's testimony above supporting

it) was effectively refuted by the testimonial and documentary evidence of the Applicant's witness, Mr. Madden, and the Department's witness, Mr. Hill.

First, Mr. Madden, presented credible testimony calling into question whether Mr. Tramontozzi has any littoral rights that could be significantly interfered with by the Applicant's proposed revised marina expansion project. Mr. Madden's Direct PFT, ¶ 28. Based on his review of Mr. Tramontozzi's deed to his property recorded with the Plymouth County Registry of Deeds on October 14, 1993, Mr. Madden testified that the deed "appear[ed] [to show] that [Mr. Tramontozzi did not have] . . . title to the land between the mean high water and mean low water marks on [his] . . . propert[y] and that a strip of land separate[d] [his] property from Onset Bay . . . ." Id., Applicant's Exhibit No. 11.

Second, assuming for the sake of argument that Mr. Tramontozzi has littoral rights, both Mr. Madden and Mr. Hill demonstrated that those rights will not be significantly interfered with by the proposed Revised Project.

Mr. Madden testified that "[t]he distance between the . . . [P]roject and [Mr. Tramontozzi's] dock is approximately four hundred (400) feet." Mr. Madden's Direct PFT, ¶ 30. He supported his testimony with an aerial photograph of the Applicant's marina and abutting properties, including Mr. Tramontozzi's property. Applicant's Exhibit No. 24.

Mr. Madden also testified that "[t]he water depths to the south of [Mr. Tramontozzi's] propert[y] . . . limit navigation in the area at low tide and are not conducive for sailboats, which approach the propert[y] under power and not sail [and] require deeper waters for their drafts." Mr. Madden's Direct PFT, ¶ 31. He supported his testimony with two Single Beam Survey Contours that measured the water depths in that area. Applicant's Exhibits Nos. 14 and 15.

These Single Beam Survey Contours show that the water depths immediately adjacent to Mr. Tramontozzi's property are very shallow, approximately two feet or less at low tide, and, as a result, at low tide, this shallow water depth is what limits Mr. Tramontozzi's ability to approach is his property from the water. Id. This is further evidenced by Mr. Tramontozzi's cross-examination testimony at the Hearing that the depth of the water at his dock during low tide "is roughly 24 to 28 inches." Hearing Transcript, at p. 23, lines 4-10. He also testified that he owns a 2008 Sea Ray, a 31-foot long motor sail vessel with twin engines and a 29-inch draft that he sails on Onset Bay and that to prevent the vessel from "ground[ing] out" he "lifts the [vessel's] outboard engines" out of the water. Hearing Transcript, at p. 22, lines 19-24; p. 23, lines 1-12. He also testified that he normally docks the vessel at the Applicant's marina and not at his property. Hearing Transcript, at p. 23, lines 13-24; p. 24, lines 1-13.

Mr. Hill's testimony on behalf of the Department corroborated Mr. Madden's testimony by testifying that "[b]ased on [his] professional knowledge and experience, it [was his] opinion that the [Applicant's] proposed [R]evised [P]roject [would] not significantly interfere with [Mr. Tramontozzi's] . . . littoral rights to access [his] property from or to the waterway." Mr. Hill's Direct PFT, ¶ 14. Mr. Hill supported his testimony with the following testimonial and documentary evidence.

Mr. Hill testified that he agreed with Mr. Madden's testimony that Mr. Tramontozzi's deed to his property called into question whether Mr. Tramontozzi has any littoral rights that could be significantly interfered with by the proposed Revised Project. Mr. Hill's Direct PFT, ¶ 17. He also testified that if Mr. Tramontozzi has any such rights, that the proposed Revised Project will not interfere with those rights because the Project's "timber piles, ramps and float

will be located at the seaward end of the existing marina floats and approximately five hundred sixty (560) feet from the mean high water shoreline." Mr. Hill's Direct PFT, ¶ 16. He also testified that the proposed Revised Project has the blessing of Wareham's Harbormaster as discussed in detail above, at pp. 66-67. Mr. Hill's Direct PFT, ¶ 15.

I. The Proposed Revised Project Does Not Violate the Massachusetts Ocean Sanctuaries Act ("MOSA"), G.L. c. 132A, §§ 12A, 13-16, 18 and Any MOSA Related Regulations

The c. 91 Regulations at 310 CMR 9.33(1)(f) provide that "[a]ll [proposed c. 91] projects must comply with applicable environmental regulatory programs of the Commonwealth, including but not limited to: . . . [MOSA], M.G.L. c. 132A, §§ 13 through 16 and 18 . . . ." 310 CMR 9.33(1)(f) also provides that "[n]o [c. 91] license or permit shall be issued for any structure or fill that is expressly prohibited [by MOSA] in M.G.L. c. 132A, §§ 1 through 16."

MOSA, which is administered by the Commonwealth's Office of Coastal Zone Management ("CZM"), "prohibits activities that may significantly alter or endanger the ecology or appearance of the ocean, seabed, or subsoil of [ocean] sanctuaries or the Cape Cod National Seashore." In the Matter of Entergy Nuclear Operations, Inc. and Entergy Nuclear Generation Co., OADR Docket No. 2015-009, Recommended Final Decision (February 5, 2016), 2016 MA ENV LEXIS 3, at 98, adopted as Final Decision (February 25, 2016), MA ENV LEXIS 6; http://www.mass.gov/eea/docs/czm/fcr-regs/ma-env-permit-guide-2003.pdf (at p. 23 Ocean Sanctuaries Act). CZM does not issue any licenses or permits under MOSA "but acts through the regulatory process of other agencies, particularly the [Department's] Chapter 91 Waterways Program." Id. After a c. 91 License application is filed with the Department, CZM staff submit written comments to the Department on the application during the public comment period. Id.

In accordance with 310 CMR 9.13(2)(b), the "Department shall presume that a project is consistent with [MOSA] unless [CZM] submits a notice of its intent to participate and written comments during the public comment period."

"Since the proposed floats [for the proposed Revised Project] will be sited seaward of the mean low water line, . . . the Project [will be] located within the boundary of the Cape Islands Ocean Sanctuary and is subject to [MOSA] . . . ." Mr. Hill's Direct PFT, ¶ 40. At the Hearing, Mr. Simpson, testifying for Ms. Flanders and Mr. Tramontozzi, contended that the proposed Revised Project violated the MOSA based on the Department of Conservation and Recreation's ("DCR") rejection of the Original Project in 2007 as not being compliant with MOSA. Mr. Simpson's Direct PFT, at pp. 13-14; Mr. Simpson's Rebuttal PFT, ¶ 30. I did not find Mr. Simpson's testimony persuasive based on Mr. Hill's testimony on behalf of the Department and Mr. Humphries' on behalf of the Applicant.

In his testimony, Mr. Hill acknowledged that the c. 91 Regulations at 310 CMR 9.13(2)(b) state that "the Department shall presume that a project is consistent with [MOSA] unless ***DCR*** . . . submits a notice of its intent to participate and written comments during the public comment period" on a proposed c. 91 project. Mr. Hill's Direct PFT, ¶ 44 (emphasis supplied). However, he noted that "since 2008 [MOSA] has been overseen by CZM . . . ." Id. Mr. Hill is correct and his testimony is supported by the recent Entergy c. 91 administrative appeal cited above.

Mr. Hill testified that in January 2013, the Department consulted with CZM regarding the proposed Revised Project and that after reviewing the Project, CZM "concurred with the Department that the [P]roject was consistent with the [M]OSA . . . ." Mr. Hill's Direct PFT,

¶ 43; Exhibit M to Mr. Hill's PFT. Mr. Hill also testified that CZM did not submit to the Department during the public comment periods on the proposed Revised Project, a notice of intent to participate and written comments objecting to the Project as being in violation of MOSA. Mr. Hill's Direct PFT, ¶ 44; Exhibit M to Mr. Hill's PFT. As a result, the Department "[could] conclusively presume that the [proposed Revised] [P]roject [was] consistent with [MOSA] . . . ." Mr. Hill's Direct PFT, ¶¶ 44, 45; Exhibit M to Mr. Hill's PFT.

Mr. Hill's testimony is supported by a March 28, 2016 Memorandum from CZM's Assistant Director to the Chief of the Department's c. 91 Program setting forth "supporting information on the consultation between [CZM] . . . and [the Department] regarding [the proposed Revised Project's] consistency with [MOSA] . . . ." Exhibit M to Mr. Hill's PFT. In the Memorandum, CZM's Director "provide[d] the following affirmation of [the Department's] . . . determination" that the proposed Revised Project is consistent with MOSA:

(1) "all state agencies must issue, deny, or condition permits or licenses in a manner that is consistent with [MOSA]" and "[they must] confer and consult with CZM to ensure consistency with [MOSA]" prior to making any permitting or licensing determination;

(2) "[t]he [c. 91] [R]egulations at 310 CMR 9.13(2)(b) state that CZM may request in writing to participate in the [c. 91] licensing proceedings" for a proposed c. 91 project;

(3) in those instances where CZM participates in the c. 91 licensing proceedings for a proposed c. 91 project, "CZM [is required to] prepare a written statement documenting [the project's] consistency with [MOSA]";

(4) in those instances where CZM does not participate in the c. 91 licensing proceedings for a proposed c. 91 project and/or does not submit written comments "during the public comment period [on the project] identifying issues relevant to [MOSA], the [c. 91] [R]egulations indicate that [the Department's] [c. 91] licensing decisions shall be presumed to be conclusive and consistent with MOSA";

(5) "[w]hile CZM did not request to participate in the [c. 91] licensing proceedings for [the proposed Revised Project] and did not provide written comments [on the Project] during the public comment period, . . . [the Department nevertheless] consulted with CZM on the [Project]";

(6) "[d]uring [the Department's] consultation [with CZM, the latter did not] identif[y] any significant issues that would preclude [the Department's] [c. 91] licensing of the [proposed Revised] [P]roject as it pertained to consistency with [MOSA]"; and

(7) "[i]t [was CZM's] understanding that based upon [the Department's] thorough analysis of the [proposed Revised Project], review of public comments received [on the Project], and in consultation with CZM, [the Department] issued [the Draft June 2015 c. 91 License approving] the [P]roject [after] finding that it complied with all applicable standards of the [c. 91] [R]egulations."

Exhibit M to Mr. Hill's PFT.

Mr. Hill's testimony is further supported by the testimony of the Applicant's witness, Mr. Humphries, who has extensive experience in the c. 91 licensing area and with MOSA requirements. Mr. Humphries' Direct PFT, ¶¶ 1-3, 6-7. Mr. Humphries testified that the proposed Revised Project is consistent with MOSA because "[the] Project's activity, consisting of a seasonal pile held floating dock system and tie-off piles, will not seriously alter "the [Cape Islands Ocean] Sanctuary for the following reasons":

(1) the Project does not involve the removal, excavation or dredging of any soil, sand, gravel or other minerals or aggregate materials;

(2) the Project will not cause any change in drainage, flushing characteristics, salinity distribution, sedimentation flow patterns, flood storage or the water table;

(3) the Project does not involve the dumping, discharging or filling with material that would degrade water quality;

(4) the Project's pilings are not significant in size or quantity;

(5) the Project will not destroy or adversely affect plant or animal life in more

than a negligible way;

(6) the Project will not significantly change the temperature or biochemical oxygen demand ("BOD") or other natural characteristics of the water so as to cause a negligible adverse effect on the marine environment; and

(7) the Project's size will not significantly increase the development in the part of Onset Bay (i.e., between Nanumett Heights Beach and Point Independence Beach) which has been classified as a "developed harbor" for well over 35 years.

Mr. Humphries' Direct PFT, ¶ 9.

J. The Issue of Whether An October 1989 Settlement Agreement Between the Applicant and Mr. Tramontozzi Bars the Proposed Revised Project Is Dismissed For Lack of Jurisdiction

One of the issues for resolution in this appeal that the parties presented to me for resolution is a private contract claim, specifically whether a prior settlement agreement between Mr. Tramontozzi and the Applicant entitled "Agreement for Settlement" which they executed more than 30 years ago in October 1989[49] bars the proposed Revised Project. This contract claim is dismissed for lack of jurisdiction because Presiding Officers of OADR are not authorized to resolve private contract claims.

CONCLUSION

Based on the foregoing, I recommend that the Department's Commissioner issue a Final Decision affirming the Department's issuance of the Draft June 2015 c. 91 License and directing

[49] A copy of the settlement agreement is contained in Applicant's Hearing Exhibit 19.

the Department to issue a Final c. 91 License approving the proposed Revised Project.

Salvatore M. Giorlandino

Date: August 28, 2020

Salvatore M. Giorlandino
Chief Presiding Officer

NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Chief Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain notice to that effect. Once the Final Decision is issued "a party may file a motion for reconsideration setting forth specifically the grounds relied on to sustain the motion" if "a finding of fact or ruling of law on which a final decision is based is clearly erroneous." 310 CMR 1.01(14)(d). "Where the motion repeats matters adequately considered in the final decision, renews claims or arguments that were previously raised, considered and denied, or where it attempts to raise new claims or arguments, it may be summarily denied. . . . The filing of a motion for reconsideration is not required to exhaust administrative remedies." Id.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

SERVICE LIST

In the Matter of Onset Bay II Corporation,
OADR Docket No. 2012-034, File No. W07-193
Onset, MA

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