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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

September 30, 2022

In the Matter of
Palmer Renewable Energy, LLC

Docket No. 2021-010
DEP File No.: X224282
Springfield, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

Ten years ago, on September 11, 2012, the Western Regional Office ("WERO Office") of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") issued to Palmer Renewable Energy, LLC ("the Petitioner" or "PRE") an air pollution control permit known as a Final Plan Approval ("FPA") pursuant to MassDEP's Air Pollution Control Regulations at 310 CMR 7.00. The FPA authorized PRE's construction and operation of a 35-megawatt ("MW") (nominal net output) biomass-fired power plant ("the proposed Facility") at 1000 Page Boulevard aka 440 Cadwell Drive in Springfield, Massachusetts ("Springfield"). Springfield is an Environmental Justice ("EJ") community with many residents who are low income, minority, and/or English Language Isolated within the ambit of the 2017 and 2021 Environmental Justice ("EJ") Policies of the Massachusetts Executive Office of Energy and Environmental Affairs ("EEA"), governing the regulatory actions of all EEA agencies,

including those of MassDEP, and Chapter 8 of the Acts of 2021 entitled "An Act Creating a Next Generation Roadmap for Massachusetts Climate Policy" ("the 2021 Climate Act").[1]

Condition 45 of the FPA informed PRE that MassDEP could revoke the FPA "if construction [of the proposed Facility] . . . ha[d] not [been] commenced [by PRE] within the timeframes specified in [the Air Pollution Control Regulations at] 310 CMR 7.02(3)(k)." 310 CMR 7.02(3)(k) provides that MassDEP "may revoke any plan approval [for a facility approved under the Air Pollution Control Regulations] if construction [of the facility] has not commenced within two years of the date of a plan approval or, if during construction, construction is suspended for a period of one year or more." However, as 310 CMR 7.02(3)(k) makes clear, revocation of a plan approval is not mandatory following the air permit holder's failure to commence construction of the approved facility within the two-year construction start period, but rather, the regulation confers discretion on MassDEP by stating that MassDEP "***may*** revoke [the] plan approval . . . ." (emphasis supplied).

Here, MassDEP contends that as of April 2, 2021, more than eight and one-half years after MassDEP's issuance of the FPA to PRE and more than two years after unsuccessful litigation against PRE brought by the proposed Facility's opponents to block its construction had concluded, PRE had not yet commenced construction of the proposed Facility, and as a result, MassDEP revoked the FPA. In its Revocation Order, MassDEP provided the following reasons for exercising its discretion under 310 CMR 7.02(3)(k) to revoke the FPA instead of allowing the

[1] As discussed below, at pp. 106-14, EEA issued its 2021 EJ Policy following the Massachusetts Legislature's enactment of the 2021 Climate Act to incorporate the statute's EJ directives. EEA's 2021 EJ Policy replaced EEA's previous 2017 EJ Policy.

FPA to remain in place.

First, MassDEP stated that prior to issuing its Revocation Order, "[it] had undertaken a review of the construction status of the proposed PRE [F]acility to determine [whether] PRE ha[d] commenced a continuous program of physical on-site construction of the [proposed] [F]acility" that [was] permanent in nature" in accordance with 310 CMR 7.02(3)(k).[2] MassDEP stated that in conducting this review, it "ha[d] considered the information [PRE had] provided [to MassDEP] both in terms of documents submitted as well as information [PRE] provided in a call . . . with [MassDEP's] Commissioner and MassDEP staff," and based on its review, determined that PRE had failed to commence a continuous program of physical on-site construction of the proposed Facility within the required two-year construction start period of 310 CMR 7.02(3)(k).[3]

MassDEP stated that revocation of the FPA due to PRE's failure to commence construction of the proposed Facility within the required two-year construction start period of 310 CMR 7.02(3)(k) was appropriate under both MassDEP's Air Pollution Control Regulations at 310 CMR 7.00 and EEA's then in effect 2017 EJ Policy and the recent enactment of the 2021 Climate Act, which reinforced the Policy's EJ directives,[4] because: (1) "the amount of time that had elapsed since [MassDEP's] issuance of the [FPA to PRE on September 11, 2012]; (2) "more recent health-related information"; and (3) "the heightened focus on environmental and health impacts on [E]nvironmental [J]ustice populations [since 2012] from sources of pollution . . . ."[5]

[2] Revocation Order, at p. 1

[3] Id., at pp. 1-5.

[4] The way the 2021 Climate Act reinforced the EJ directives of EEA's 2017 EJ Policy is discussed below, at pp. 97-106. Also, as previously discussed in n. 1, at p. 2 above, EEA's subsequent 2021 EJ Policy replaced the 2017 EJ Policy to incorporate the 2021 Climate Act's EJ directives.

[5] Revocation Order, at pp. 3, 4.

MassDEP stated that these three factors warranted an updated review of the proposed Facility, specifically an updated review of: (1) the "technologies involved in the burning of biomass"; (2) the "Best Available Control Technology for air pollution mitigation"; (3) "[air] modeling that consider[ed] changes in the surrounding ambient air quality"; and (4) "the impact on the community that would result from the [proposed] [F]acility's emissions . . . ."[6]

MassDEP supported its revocation of the FPA by citing the directives of EEA's 2017 EJ Policy, as reinforced by the 2021 Climate Act, which directed all EEA agencies, including MassDEP to:

> (1) make Environmental Justice "an integral consideration to the extent applicable and allowable by law in the implementation of all EEA programs, including but not limited to, . . . the promulgation, implementation[,] and enforcement of laws, regulations, and policies";[7] and
>
> (2) "take direct action 'to address environmental and health risks associated with existing and potential new sources of pollution'" by "[e]nsuring that existing facilities in these neighborhoods comply with State environmental, energy, and climate change rules and regulations."[8]

MassDEP stated that EEA's 2017 EJ Policy required these actions because, as stated in the Policy, "environmental justice communities face 'existing large and small sources of pollution[,] . . . which can pose risks to public health and the environment,"[9] and, as a result, "increased attention [had to] be focused on communities that [were] built in and around the [Commonwealth's] oldest areas with a legacy of environmental pollution, particularly in areas

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[6] Revocation Order, at p. 4.

[7] Id., at p. 3; EEA's 2017 EJ Policy, at p. 4.

[8] Revocation Order, at p. 3; EEA's 2017 EJ Policy, at pp. 4-5.

[9] Revocation Order, at p. 3; EEA's 2017 EJ Policy, at pp. 1-2.

with residents who have elevated rates of disease and health burdens."[10] MassDEP noted that Springfield, the municipality in which the proposed Facility would be located, is "an [E]nvironmental [J]ustice community with many contaminated sites and sources of air and water pollution, and high rates of respiratory illness and other diseases that [could] be caused by air and other types of pollutants."[11] MassDEP also noted that "COVID-19 [infection] rates [were] particularly high in Springfield [causing an] increased concern, given multiple studies establishing a relationship between low-income and minority communities with elevated air pollution levels and increased severity of disease and/or mortality for COVID-19 patients in these communities."[12]

Following MassDEP's revocation of the FPA, PRE filed this appeal with the Office of Appeals and Dispute Resolution ("OADR")[13] seeking recission of MassDEP's Revocation Order and reinstatement of the FPA on several grounds, including that MassDEP had erred in determining that PRE had failed to commence construction of the proposed Facility within the required two-year construction start period of 310 CMR 7.02(3)(k). Appeal Notice, at pp. 1-10. In the alternative, PRE also contended that if it did not commence construction of the proposed Facility within the required two-year construction start period of 310 CMR 7.02(3)(k), MassDEP

[10] Revocation Order, at p. 3; EEA's 2017 EJ Policy, at p. 2.

[11] Revocation Order, at p. 3.

[12] Id., at pp. 3-4. As of the date of MassDEP's Revocation Order on April 2, 2021, the Commonwealth and the rest of the United States had been through the throes COVID-19 Pandemic for more than one year. To date, the COVID-19 Pandemic has claimed the lives of more than 20,000 Commonwealth residents and more than 1 million people nation-wide. https://www.mass.gov/info-details/covid-19-response-reporting; https://covid.cdc.gov/covid-data-tracker/#datatracker-home.

[13] OADR is an independent quasi-judicial office in MassDEP which is responsible for advising MassDEP's Commissioner (or an alternative agency Final Decision-Maker where the Commissioner is recused) in resolving all administrative appeals of MassDEP Permit Decisions, Environmental Jurisdiction Determinations, and Enforcement Orders. A description of OADR is set forth in Addendum No. 1, at p. 123 of this Recommended Final Decision.

nevertheless abused its discretion in revoking the FPA because in PRE's view, the revocation of the FPA was an extreme action by MassDEP that was not warranted by the circumstances of the case. Id., at pp. 3, 7-10.

At the outset of its appeal in April 2021, as reflected in its Notice of Claim ("Appeal Notice") challenging MassDEP's Revocation Order, PRE did not assert any racial discrimination claim against MassDEP contending that its revocation of the FPA was the product of illegal race discrimination against PRE in violation of the Equal Protection provisions of the Federal and Massachusetts Constitutions. Id., at pp. 1-10. As result, in accordance with the requirements of the Adjudicatory Proceeding Rules at 310 CMR 1.01(6)(k),[14] on April 20, 2021, I established two Issues for Adjudication in the appeal, specifically:

(1) Whether MassDEP properly determined that PRE had failed to commence a continuous program of physical on-site construction of the proposed Facility within two years of the date of the FPA as required by 310 CMR 7.02(3)(k)?

(2) If so, did MassDEP abuse its discretion in deciding to revoke the FPA?

After I established these two Issues for Adjudication neither PRE nor MassDEP filed a motion seeking to add more Issues for Adjudication. Instead, both PRE and MassDEP accepted the two Issues for Adjudication as I had established them and addressed them in their respective Pre-Hearing Memoranda and in the sworn Pre-filed Testimony ("PFT") that their respective witnesses filed for the evidentiary Adjudicatory Hearing ("Hearing") supporting PRE's or MassDEP's positions on the Issues.[15]

[14] 310 CMR 1.01(6)(k) provides that "[t]he Presiding Officer shall, absent good cause shown, limit the issues for adjudication [in an administrative appeal] to the issues identified in the [appellant's] notice of claim" in filing the appeal.

[15] The names of the individuals who filed PFT on behalf of MassDEP or PRE are set forth below, at pp. 15-21.

The Hearing was scheduled to take place on August 18, 2021 but was waived by PRE and MassDEP when they agreed to submit the appeal to me for adjudication based on their respective filings in the appeal, including the PFT of their respective witnesses.[16] On August 25, 2021 and prior to PRE and MassDEP filing their respective Closing Briefs in the appeal, I conducted a Site Visit with PRE's and MassDEP's respective representatives and counsel pursuant to the provisions of the Adjudicatory Proceeding Rules at 310 CMR 1.01(13)(j).[17]

Prior to filing their respective Closing Briefs on September 1, 2021, MassDEP and PRE both had agreed since the inception of PRE's appeal five months earlier that the rational basis test governed resolution of the Second Issue for Adjudication ("the Second Issue") regarding whether MassDEP abused its discretion to revoke the FPA. This agreement was reflected by the Pre-Hearing Memoranda that MassDEP and PRE had filed with the PFT of their respective witnesses, which made legal arguments in favor or against MassDEP's Revocation Order based on the rational basis test. In its September 1, 2021 Closing Brief, MassDEP re-asserted its position that the rational basis test governs resolution of the Second Issue. However, in its September 1, 2021 Closing Brief, PRE abandoned its position since inception of the appeal five months earlier that the rational basis test governed resolution of the Second Issue by asserting for

[16] The Adjudicatory Proceeding Rules at 310 CMR 1.01(13)(g) provide that:

> Parties may elect to waive participation in a hearing and to submit their case upon the record. Submission of a case without a hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses.

[17] 310 CMR 1.01(13)(j) provides as follows:

> The parties may request and the Presiding Officer may order that a view be taken of a site, property or other places and things that are relevant to an appeal to promote understanding of the evidence that has been or will be presented. Notice and a reasonable opportunity to be present shall be given to all parties. Parties shall not present evidence during the view, but may point out objects or features that may assist the Presiding Officer in understanding evidence. The Presiding Officer may rely on the Presiding Officer's observations during a view as evidence to the same extent permissible as if observed in the hearing room.

the first time that MassDEP's revocation of the FPA was the product of illegal race discrimination against PRE in violation of the Equal Protection provisions of Federal and Massachusetts Constitutions ("PRE's racial discrimination claim").

Specifically, PRE asserted for the first time in its September 1, 2021 Closing Brief that MassDEP's revocation of the FPA was subject to a strict scrutiny standard of review because in PRE's view, EEA's 2017 EJ Policy was an improper race-based policy upon which MassDEP relied in revoking the FPA. PRE's Closing Brief, at pp. 2, 5-10. PRE asserted in its September 1, 2021 Closing Brief that MassDEP's revocation of the FPA failed the strict scrutiny test because MassDEP purportedly:

(1) "relied upon the 2017 EJ Policy to distribute 'benefits and burdens' (i.e., deprivation of PRE's [Final] Plan Approval and concomitant license to emit) based upon the racial classification of the community where the [proposed Facility would be] located," Id., at pp. 6-7; and

(2) failed to undertake "serious, good faith consideration of workable race-neutral alternatives" to revocation of the FPA, but instead "fashioned a remedy (revocation) explicitly based upon proximity of the [proposed Facility] to a race-based minority population . . . ." Id., at p. 7.

In making these claims, PRE stated that "[w]hile [it] [did] not [in this administrative appeal] directly challenge [the constitutionality] of the 2017 EJ Policy[,] . . . it reserve[d] that argument for judicial review [in Superior Court] . . . ." Id., at p. 7.

As a result of PRE's newly asserted racial discrimination claim, I required and obtained additional briefing from PRE and MassDEP to address several issues raised by the claim, specifically:

> Question No. 1: Whether PRE had demonstrated, in accordance with 310 CMR 1.01(6)(k), good cause to assert its new racial discrimination claim against MassDEP at that late juncture of the appeal: five months after the appeal's filing; more than four months after the Issues for Adjudication in the appeal had

been established; and after the evidentiary record in the appeal was closed and the appeal was submitted to me for adjudication on the record?

Question No. 2: Did PRE, a limited liability company, have standing to assert its racial discrimination claim against MassDEP grounded in the Federal and/or Massachusetts Constitution?

Question No. 3: What specific evidence in the administrative record did PRE contend supported its claim that MassDEP's Revocation Order was based solely on race in violation of the Equal Protection provisions of the Federal and Massachusetts Constitutions?

Question No. 4: What was the factual and legal basis for PRE's claim that the 2017 EJ Policy was unconstitutional?[18]

I also heard Oral Argument from PRE's and MassDEP's respective counsel on these four questions and the original two Issues for Adjudication.

Based on the testimonial and documentary evidence that PRE's and MassDEP's respective witnesses presented for the waived Hearing and the governing legal requirements, I recommend that MassDEP's Deputy Commissioner for Policy and Planning[19] issue a Final Decision affirming MassDEP's Revocation Order for the following reasons.

First, MassDEP properly determined that PRE failed to commence a continuous program

[18] In challenging state agency action, it is well settled that "a party is not entitled to raise an argument on appeal [to court] if the claim could have been raised, but not raised, before the administrative agency" and as a result "litigants involved in adjudicatory proceedings should raise all claims before the agency, including those which are constitutionally based." Gurry v. Board of Accountancy, 394 Mass. 118, 125-26 (1985); New York & Massachusetts Motor Service, Inc. v. Massachusetts Commission Against Discrimination, 401 Mass. 566, 579-80 (1988).

[19] Ordinarily, MassDEP's Commissioner is the Final Decision-Maker in an administrative appeal such as this case. See Addendum No. 1 to this Recommended Final Decision, at p. 123 below. However, on occasion, MassDEP's Commissioner has recused himself or herself as the Final Decision-Maker in an administrative appeal. In such cases, the EEA Undersecretary for Environmental Affairs has designated an Alternative Final Decision-Maker in the administrative appeal. At the inception of this appeal, MassDEP Commissioner Martin J. Suuberg recused himself as the Final Decision-Maker in this appeal due to his previous involvement in the matter. As a result, EEA's Undersecretary for the Environment designated Stephanie Cooper, MassDEP's Deputy Commissioner for Policy and Planning, as the Alternative Final Decision-Maker in this appeal.

of physical on-site construction of the proposed Facility within the required two-year construction start date of 310 CMR 7.02(3)(k). See below, at pp. 21-45.

Second, MassDEP did not abuse its discretion in revoking the FPA because it had a rational basis, i.e. a sufficient factual and legal basis to revoke the FPA pursuant to both MassDEP's Air Pollution Control Regulations at 310 CMR 7.00 and EEA's 2017 EJ Policy, as reinforced by the 2021 Climate Act. See below, at pp. 45-114.

Third, PRE failed to demonstrate good cause pursuant 310 CMR 1.01(6)(k) for having asserted very late in the appeal its racial discrimination claim against MassDEP, specifically: (1) five months after the appeal's filing; (2) more than four months after the Issues for Adjudication in the appeal had been established; and (3) nearly three months after the evidentiary record in the appeal had closed and the appeal had been submitted to me for adjudication on the record based on the original two Issues for Adjudication. See below, at pp. 115-16.

Fourth, the provisions of 310 CMR 7.02(3)(k) and a preponderance of the evidence presented by the PFT and documentary evidence of MassDEP's and PRE's respective witnesses provide an independent basis for affirmance of MassDEP's revocation of the FPA. See below, at pp. 45-66, 116-17.

Lastly, even if PRE had asserted a timely racial discrimination claim, the claim would have failed due to PRE's lack of standing to assert the claim because none of PRE's witnesses, including its principal, Victor Gatto, Ed.D, testified under oath in their respective PFT that MassDEP had illegally racially discriminated against PRE in revoking the FPA. See below, at pp. 66-114, 117-18. PRE's racial discrimination claim would have also failed on the merits because EEA's 2017 EJ Policy was not based solely on racial classifications, but also other

classifications including low income and limited English proficiency.[20] Additionally, the Policy was a proper measure to promote environmental equity for EJ Populations in the Commonwealth. See below, at pp. 66-114, 118-20.

MassDEP'S BURDEN OF PROOF IN THE APPEAL

It is undisputed that in this appeal, MassDEP has the burden of proving that it properly revoked the FPA because: (1) MassDEP's Revocation Order is akin to a MassDEP enforcement Order; and (2) in administrative appeals of such orders, the Adjudicatory Hearing Proceeding Rules at 310 CMR 1.01(13)(c)1 governing resolution of the appeal mandate that "it shall be the usual practice for [MassDEP] to present its evidence first." In the Matter of Environmental Testing and Research Laboratories, Inc., OADR Docket No. 2018-006 ("ETR"), Recommended Final Decision (May 28, 2021), at 10, adopted as Final Decision (September 28, 2021). Also, undisputedly, MassDEP has the burden of proof in other appeals of MassDEP enforcement Orders such as appeals of MassDEP Unilateral Administrative Orders ("UAOs") directing a party to cease its environmental violations and perform remedial actions to correct the violations.[21] Id. MassDEP also has the burden of proof in appeals of MassDEP civil

[20] The same holds true for EEA's 2021 EJ Policy which adopted the EJ directives of the 2021 Climate Act and replaced EEA's 2017 EJ Policy. See below, at pp. 106-14.

[21] See e.g. In the Matter of West Meadow Homes, Inc., Docket Nos. 2009-023 & 024, Recommended Final Decision (June 20, 2011), 2011 MA ENV LEXIS 85, at 11-14, 27-37, adopted as Final Decision (August 18, 2011), 2011 MA ENV LEXIS 84 (MassDEP's UAO for appellant's wetlands violations affirmed but $6,000.00 penalty assessment against appellant for same violations vacated where MassDEP proved appellant committed violations and remedial measures ordered by UAO to correct violations were reasonable but failed to prove penalty complied with Civil Administrative Penalties Act, G.L. c. 21A, § 16); In the Matter of Edwin Mroz, OADR Docket No. 2017-021, Recommended Final Decision (June 7, 2019), 2019 MA ENV LEXIS 57, at 36-62, adopted as Final Decision (June 18, 2019), 2019 MA ENV LEXIS 63 (MassDEP's UAO to appellant for wetlands violations affirmed where MassDEP proved appellant committed wetlands violations and remedial measures ordered by UAO to correct violations were reasonable).

administrative penalty assessments ("PANs")[22] issued pursuant to the Civil Administrative Penalties Act, G.L. c. 21A, § 16, directing a party to pay a civil administrative penalty to the Commonwealth for having "[violated] "[a] regulation, order, license[,] or approval issued or adopted by the [D]epartment, or of any law which the [D]epartment has the authority or responsibility to enforce."[23] Id., at 10-11.

STANDARD OF REVIEW IN THE APPEAL

In this appeal, my review of MassDEP's determinations underlying its grounds for revoking the FPA is de novo, meaning that my review is anew based on: (1) a preponderance of the testimonial and documentary evidence presented by MassDEP's and PRE's respective witnesses for the waived Hearing and (2) the governing legal requirements, irrespective of what MassDEP determined previously. See e.g. Kane Built, Inc., 2017 MA ENV LEXIS 77, at 18-26; Mroz, 2019 MA ENV LEXIS 57, at 36-46; Cove, 2020 MA ENV LEXIS 49, at 16-19; ETR, at 11-12. The de novo standard of review has long been the standard of review in administrative appeals challenging MassDEP enforcement orders. Id.

Under the de novo standard review, the Presiding Officer:

(1) reviews anew MassDEP's determinations underlying the enforcement order at issue in the appeal based on a preponderance of the evidence presented by the parties in support of their respective positions in the appeal and the governing legal requirements;

[22] The term "PAN" is the acronym for "Penalty Assessment Notice" and a synonymous term for a MassDEP issued civil administrative penalty.

[23] See e.g. In the Matter of Kane Built, Inc., OADR Docket No. 2017-037, Recommended Final Decision (December 18, 2018), 2017 MA ENV LEXIS 77, at 16-93 (MassDEP's $67,250.00 penalty assessment against appellant for violations of asbestos removal regulations affirmed where MassDEP proved appellant committed violations and penalty complied with Civil Administrative Penalties Act, G.L. c. 21A, § 16); In the Matter of Michael J. Cove, OADR Docket No. 2017-031, Recommended Final Decision (May 1, 2020), 2020 MA ENV LEXIS 49, at 15, 19-67, adopted as Final Decision (May 11, 2020) (MassDEP's $55,600.00 penalty against appellant for wetlands violations affirmed where MassDEP proved appellant committed violations and penalty complied with Civil Administrative Penalties Act, G.L. c. 21A, § 16).

(2) makes: (a) findings of fact based on a preponderance of the evidence with no deference to any prior factual determinations of MassDEP; and (b) legal determinations based on the legal requirements with deference to MassDEP's reasonable interpretations or construction of the requirements; and

(3) issues a Recommended Final Decision ("RFD") to MassDEP's Commissioner, the Final Decision-Maker in the appeal,[24] recommending the Commissioner's affirmance of the enforcement order if based on a preponderance of the evidence presented by the parties and the governing legal requirements MassDEP's determinations underlying the enforcement order have a rational basis, i.e. a sufficient factual and legal foundation, and recommending otherwise if they do not.

West Meadow Homes, Inc., 2011 MA ENV LEXIS 85, at 11-14, 27-37; Kane Built, Inc., 2017 MA ENV LEXIS 77, at 16-93; Mroz, 2019 MA ENV LEXIS 57, at 36-62; Cove, 2020 MA ENV LEXIS 49, at 15, 19-67; ETR, at 12.

However, notwithstanding the Presiding Officer's independent factual and legal findings and recommendation on the challenged enforcement order in the appeal, it is MassDEP's Commissioner (or the Alternative Final Decision-Maker as the circumstances of this appeal present), as the final agency decision-maker in the appeal, who has the ultimate authority over the enforcement order's fate, and as a result, the Commissioner (or the Alternative Final Agency Decision-Maker) may affirm the enforcement order in whole or in part or vacate the enforcement order in its entirety based on the evidentiary record and the governing legal requirements. 310 CMR 1.01(14)(b);[25] In the Matter of Associated Building Wreckers, Inc., OADR Docket No.

[24] See n. 19, at p. 9 above.

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

2003-132, Final Decision (July 6, 2004), 11 DEPR 176 (2004) (Commissioner's Final Decision affirmed MassDEP's $2,500.00 penalty assessment against appellant for air pollution violations after rejecting, as erroneous, DALA[26] Administrative Magistrate's finding that penalty was excessive and be reduced to $1,875.00); In the Matter of Roofblok Limited, OADR Docket Nos. 2006-047 & 048, Final Decision (May 7, 2010), 17 DEPR 377 (2010) (Commissioner's Final Decision vacated MassDEP's $86,498.50 penalty assessment against appellant for solid waste, hazardous waste, and water pollution violations after accepting DALA Administrative Magistrate's finding that penalty was improper, "but for different reasons than those articulated by the DALA Magistrate"); West Meadow Homes, 2011 MA ENV LEXIS 85, at 11-14, 28-37 (Commissioner's Final Decision affirmed MassDEP's UAO and vacated MassDEP's $6,000.00 penalty against appellant for wetlands violations after adopting Chief Presiding Officer's findings that Department properly issued UAO but failed to comply with Civil Administrative Penalties Act, G.L. c. 21A, § 16, in assessing penalty); Kane Built, Inc., 2017 MA ENV LEXIS 77, at 18-93 (Commissioner's Final Decision affirmed MassDEP's $67,250.00 penalty against appellant for violations of MassDEP's asbestos removal regulations after adopting Chief Presiding Officer's finding that Department properly assessed penalty pursuant to Civil Administrative Penalties Act, G.L. c. 21A, § 16); Mroz, 2019 MA ENV LEXIS 57, at 36-62 (Commissioner's Final Decision affirmed MassDEP's UAO against appellant for wetlands violations after adopting Chief Presiding Officer's finding that Department properly issued UAO); Cove, 2020 MA ENV LEXIS 49, at 19-67 (Commissioner's Final Decision affirmed MassDEP's $55,600.00 penalty against appellant for wetlands violations after adopting Chief

[26] "DALA" is the acronym for the Massachusetts Division of Administrative Law Appeals, an agency within the Massachusetts Executive Office of Administration and Finance ("A&F"), that at one time adjudicated administrative appeals of MassDEP permit decisions and enforcement orders.

Presiding Officer's finding that MassDEP properly assessed penalty pursuant to Civil Administrative Penalties Act, G.L. c. 21A, § 16).

As for the legal standard governing my determinations on the relevancy, admissibility, and the weight of the testimonial and documentary evidence presented by MassDEP's and PRE's respective witnesses for the waived Hearing, this is governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). 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 in the record will rest within the sound discretion of the Presiding Officer. . . ." Speculative evidence is 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").

FINDINGS

I. THE PARTIES' RESPECTIVE WITNESSES

A. MassDEP's Witnesses

In support of its Revocation Order and positions on the Issues for Adjudication in this

appeal, MassDEP presented the PFT of five witnesses. These witnesses are as follows.

1. Michael Gorski ("Mr. Gorski")

Mr. Gorski is the Regional Director of MassDEP's WERO Office, a position which he has held for 22 years (since August 2000).[27] As Regional Director, Mr. Gorski is responsible for the management of MassDEP's WERO Office and of its Bureaus and Programs that work with the regulated community in the municipalities located within the Office's regulatory jurisdiction, which includes Springfield. Mr. Gorski's Direct PFT, ¶ 1. He holds a Bachelor of Science degree from the Rochester Institute of Technology and has attended numerous lectures and trainings on all aspects of environmental regulation. Id.

2. David Howland ("Mr. Howland")

Mr. Howland is the Regional Environmental Engineer for MassDEP's WERO Office and has held a senior environmental engineer position (Environmental Engineer VI) with the Office since 1988.[28] During his tenure with MassDEP, Mr. Howland has participated in and/or supervised MassDEP staff in many projects, including projects involving the administration and enforcement of the Massachusetts Clean Air Act, G.L., c. 111, §§ 142A-142O, and MassDEP's Air Pollution Control Regulations at 310 CMR 7.00. Mr. Howland's Rebuttal PFT, ¶ 2. He is also very knowledgeable about the administration and enforcement of the federal Clean Air Act ("CAA"). Id. As the regional engineer for MassDEP's WERO Office, he is responsible for managing special projects and projects involving complex issues. Id., ¶ 1. He was the Point of Contact in MassDEP's WERO Office for the air permitting of the proposed Facility. Id. He

[27] Pre-filed Direct Testimony of Michael Gorski, May 13, 2021 ("Mr. Gorski's Direct PFT"); Pre-filed Rebuttal Testimony of Michael Gorski, June 17, 2021 ("Mr. Gorski's Rebuttal PFT").

[28] Rebuttal Testimony of David Howland, June 17, 2021 ("Mr. Howland's Rebuttal PFT").

holds a Bachelor of Science degree from St. Lawrence University in Canton, New York, and a Master of Science degree in Public Health from the University of Massachusetts in Amherst. Id., ¶ 6.

3. Christine Kirby ("Ms. Kirby")

Ms. Kirby's is MassDEP's Assistant Commissioner in charge of MassDEP's Bureau of Air and Waste ("BAW") and has worked at MassDEP since 1985.[29] Ms. Kirby has held several high-level posts at MassDEP during her 37 years at the agency, including her current role as MassDEP's Assistant Commissioner for BAW, which she has served in since 2017. Ms. Kirby's Direct PFT, ¶¶ 2-5, 6. Her duties as MassDEP's Assistant Commissioner for BAW include overseeing the development, promulgation, and implementation of MassDEP regulations and policies that establish air-emissions programs, climate-mitigation programs, solid- and hazardous-waste programs, and programs regarding restriction and reporting of toxic materials. Id., ¶ 2. She is also responsible for supervision of the implementation of aspects of the Massachusetts Clean Air Act, G.L. c. 111, §§142A-O, MassDEP's Air Pollution Control Regulations at 310 CMR 7.00, and the Commonwealth's Climate Change law known as the Global Warming Solutions Act, G.L. c. 21N and the accompanying air and climate regulations, 310 CMR 7.00 and 60.00. Id. She also works with MassDEP's Office of Environmental Justice on all new policies and requirements and is responsible for implementing the Commonwealth's and MassDEP's policies to promote and ensure environmental justice in BAW programs,

[29] Pre-filed Direct Testimony of Christine Kirby, May 13, 2021 ("Ms. Kirby's Direct PFT").

including its air pollution control program. Id. She holds a Bachelor of Arts degree from Clark University. Id., ¶ 6.

4. Deneen Simpson ("Ms. Simpson")

Ms. Simpson is MassDEP's Environmental Justice Director ("EJ Director"), a position she has held during the last six years and has worked at MassDEP since November 1995.[30] As MassDEP's EJ Director, Ms. Simpson is responsible for developing and conducting agency-wide training for MassDEP staff regarding Environmental Justice requirements, including those of EEA's 2017 and 2021 EJ Policies. Ms. Simpson's Rebuttal PFT, ¶ 2. She is also responsible for facilitating MassDEP's community engagement with EJ Populations and development of public involvement plans ensuring EJ Populations have access to MassDEP's key agency activities. Id. She is also responsible for facilitating MassDEP's communications with English isolated residents in EJ communities by assisting in the identification of languages spoken in those communities and the media outlets serving those communities. Id. She also works with EJ Organizations and Stakeholders to assist in MassDEP's communication efforts in EJ Communities. Id. She is a graduate of Kinyon Campbell Business School, having received a Diploma in Paralegal Studies in 1993. Id., ¶ 1. She is also a 2013 graduate of the Commonwealth's Management Certificate Program and a 2020 graduate of the Commonwealth's CORE Management Program. Id. She has also participated in many trainings to enhance her knowledge and skills to better serve MassDEP in her role as EJ Director, including attending or participating in EJ trainings conducted by the U.S. Environmental Protection Agency ("USEPA") on community engagement, public involvement, and language access. Id., ¶ 3.

[30] Rebuttal Testimony of Deneen Simpson, June 16, 2021 ("Ms. Simpson's Rebuttal PFT").

5. Marc A. Simpson ("Mr. Simpson")

Mr. Simpson is the Permit Section Chief for the Air Program in MassDEP's WERO Office.[31] He has been an air-pollution control engineer for more than 25 years (since 1996) beginning his career at the Connecticut Department of Environmental Protection where he performed air pollution control compliance work for five years (1996-2001). Mr. Simpson's Direct PFT, ¶ 2. In 2001, he joined MassDEP's WERO Office where he has served as an air-permitting engineer. Id., ¶ 1. For the past 15 years (since 2007), he has served as the Permit Section Chief for the Air Program in MassDEP's WERO Office. Id. In this role, he has participated in and supervised staff in the review and approval of numerous air permit applications submitted to MassDEP's WERO Office pursuant to MassDEP's Air Pollution Control Regulation at 310 CMR 7.00 seeking approval for the installation of combustion and/or process equipment that would emit air contaminants to the ambient air. Id, ¶ 4. These applications have included PRE's application for the proposed Facility, of which he oversaw the review and approval. Id., ¶¶ 5-11. He holds a Bachelor of Science degree in Mechanical Engineering from Rensselaer Polytechnic Institute in Troy, New York. Id., ¶ 5.

B. PRE's Witnesses

In response to the PFT of MassDEP's witnesses, PRE filed several Motions to Strike portions or the entirety of the PFT contending that the PFT failed to contain competent evidence supporting MassDEP's claims in the appeal.[32] PRE also presented the PFT of three witnesses

[31] Pre-filed [Direct] Testimony of Marc A. Simpson, May 13, 2021 ("Mr. Simpson's Direct PFT"); Rebuttal Testimony of Marc A. Simpson, June 17, 2021 ("Mr. Simpson's Rebuttal PFT").

[32] PRE's Motions to Strike **are denied**. I have accorded the PFT of MassDEP's witnesses the weight that it was due after considering all the evidence, including the PFT of PRE's witnesses as set forth above in the text.

supporting its claim that MassDEP's Revocation Order is invalid and should be vacated. These witnesses are as follows.

1. Victor Gatto, Ed.D ("Dr. Gatto")

Dr. Gatto is a principal of PRE.[33] In this role, he has "over[seen] the development and permitting of the [proposed] Facility at the Site since at least 2006." Dr. Gatto's Direct PFT, ¶ 1.

2. Laura C. Green, Ph.D., D.A.B.T.[34] ("Dr. Green")

Dr. Green is a board-certified toxicologist and the President and Senior Scientist of Green Toxicology, LLC.[35] She has practiced in the fields of toxicology and health risk assessment for more than 40 years (since 1978) and has authored more than 160 reports related to toxicology and/or health risk assessment, as well as several book chapters in academic publications, including the chapters "Drug Toxicity" and "Environmental Toxicology" in the textbook, Principles of Pharmacology: The Pathophysiologic Basis of Drug Therapy, 3rd and 4th editions (2011 and 2016). Dr. Green's Direct PFT, ¶¶ 1, 3. She is also the co-author of the book, In Search of Safety - Chemicals and Cancer Risk (Harvard University Press, 1988). She has also served as an invited peer-reviewer for the Centers for Disease Control's Agency for Toxic Substances and Disease Registry ("ATSDR") and the U.S. Environmental Protection Agency ("USEPA"), as well as for several scientific journals. Id. She has also provided expert testimony in toxicology in federal and state courts and administrative law proceedings. Id., ¶ 4. She holds a Bachelor of Arts in Chemistry from Wellesley College and a Ph.D. in Nutrition and Food Science from the Massachusetts Institute of Technology ("M.I.T."). Id., ¶ 1.

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[33] Pre-filed Direct Testimony of Victor Gatto, EdD, June 3, 2021 ("Dr. Gatto's Direct PFT").

[34] "D.A.B.T." is acronym for Diplomate of the American Board of Toxicology. https://www.abtox.org/about-abt/.

[35] Pre-filed Direct Testimony of Laura C. Green, Ph.D., D.A.B.T., June 1, 2022 ("Dr. Green's Direct PFT").

3. Dale T. Raczynski, P.E. ("Mr. Raczynski")

Mr. Raczynski is a Massachusetts Professional Engineer (with an engineering registration of Environmental Engineering) and a Principal of Epsilon Associates, who has been an air quality engineer since 1981 and the Project Manager and engineer responsible for PRE's proposed Facility.[36] At Epsilon Associates, Mr. Raczynski works with a team of ten air quality engineers and air quality meteorologists to prepare air permit applications, Environmental Impact Reports, and compliance work for a wide variety of industrial and energy sources. Mr. Raczynski's Direct PFT, ¶ 1. He has worked as an environmental consultant, conducting studies, and permitting analyses since 1984. Id. He has also worked on environmental permitting and licensing of a variety of power plants for 35 years, being responsible for obtaining permits for several dozen power plants during this period. Id., ¶ 2. This has included his providing expert witness testimony on air quality (engineering and modeling) matters before the Massachusetts Energy Facilities Siting Board on eight major energy projects over the last 30 years. Id. He holds a Bachelor of Science in Chemical Engineering from Worcester Polytechnic Institute. Id., ¶ 1.

II. MASSDEP PROPERLY DETERMINED THAT PRE FAILED TO COMMENCE A CONTINUOUS PROGRAM OF PHYSICAL ON-SITE CONSTRUCTION OF THE PROPOSED FACILITY WITHIN THE REQUIRED TWO-YEAR CONSTRUCTION START PERIOD OF 310 CMR 7.02(3)(k)

As discussed in detail below, at pp. 21-114, based on a preponderance of the testimonial and documentary evidence presented by MassDEP's and PRE's respective witnesses and the

[36] Pre-filed Direct Testimony of Dale T. Raczynski, P.E., June 2, 2021 ("Mr. Raczynski's Direct PFT"); [Pre-filed] Rebuttal Testimony of Dale T. Raczynski, P.E., June 30, 2021 ("Mr. Raczynski's Rebuttal PFT").

governing legal requirements, I make the following findings.

A. The Proposed Facility's Permitting History

1. November 2008: The Filing of PRE's Air Permit Application With MassDEP Seeking Approval of the Proposed Facility

On November 21, 2008, PRE filed its application with MassDEP's WERO Office seeking approval of the proposed Facility pursuant to MassDEP's Air Pollution Regulations. Mr. Simpson's Direct PFT, ¶ 5. As originally proposed, the Facility was to have a 38 MW nominal net output and would utilize construction-and-demolition ("C&D") debris for the bulk of its fuel source. Id.

Subsequently, PRE altered its proposal by eliminating the use of C&D as a fuel source for the proposed Facility, substituting only forest-derived fuel, primarily green wood chips. Id., ¶ 6. PRE also decreased the proposed electrical output of the proposed Facility from 38 MW to 35 MW. Id.

2. June 2011: MassDEP's Initial Plan Approval of the Proposed Facility

Mr. Simpson, as the Permit Section Chief for MassDEP's Bureau of Air and Waste in MassDEP's WERO Office, supervised MassDEP's review of PRE's application seeking approval of the proposed Facility to determine whether the Facility complied with all applicable air-pollution-control regulatory requirements. Id., ¶ 8. As a result of its review, on June 30, 2011, MassDEP issued an Initial Plan Approval authorizing PRE's construction of the proposed Facility after determining that the Facility satisfied all then applicable air permitting

standards. Mr. Simpson's Direct PFT, ¶ 8.

3. June 2011 to September 2012: the Unsuccessful Administrative Appeal Challenging MassDEP's Initial Plan Approval of the Proposed Facility

Following MassDEP's Initial Plan Approval of the proposed Facility in June 2011, a group of ten citizens challenged the approval by filing an administrative appeal with OADR. Id., ¶ 9; In the Matter of Palmer Renewable Energy, LLC, OADR Docket Nos. 2011-021 & 022 ("Palmer I"). On November 30, 2011, an OADR Presiding Officer issued a Recommended Final Decision recommending that MassDEP's then Commissioner ("the former Commissioner") issue a Final Decision dismissing the administrative appeal due to appellants' lack of standing to challenge the Initial Plan Approval.[37] Mr. Simpson's Direct PFT, ¶ 9; Palmer I, Recommended Final Decision, November 30, 2011, 2011 MA ENV LEXIS 121. In response, on December 6, 2011, the former Commissioner issued an Interlocutory Remand Decision deferring a ruling on whether the appellants lacked standing to challenge the Initial Plan Approval and remanding the appeal to the Presiding Officer to conduct an evidentiary Adjudicatory Hearing and adjudicate the merits of the appellants' claims challenging the Initial Plan Approval.

After conducting an evidentiary Adjudicatory Hearing on the merits of the appellants' claims challenging the Initial Plan Approval, the Presiding Officer recommended that the former Commissioner issue a Final Decision affirming the Initial Plan Approval due to the appellants' lack of standing and failure to prove their claims on the merits. Palmer I, Recommended Final Decision After Remand, July 9, 2012, 2012 MA ENV LEXIS 120. In response, on September 11, 2012, the former Commissioner issued a Final Decision rejecting the Presiding Officer's

[37] I was not the Presiding Officer in Palmer I.

standing ruling but affirming the Initial Plan Approval after accepting the Presiding Officer's findings that the appellants had failed to prove their claims challenging the Initial Plan Approval. Palmer I, Final Decision, September 11, 2012, 2012 MA ENV LEXIS 113.

4. October 2012 to March 2017: the Unsuccessful Court Litigation Challenging MassDEP's FPA of the Proposed Facility

As a result of the former Commissioner's issuance of the Final Decision, the Initial Plan Approval became the FPA at issue in this appeal authorizing PRE's construction of the proposed Facility, subject to appeal to Superior Court pursuant to G.L. c. 30A, § 14. Opponents of the proposed Facility filed such an appeal with the Hampden County Superior Court in Springfield but were not successful in their appeal. Revocation Order, at p. 2; Mr. Simpson's Direct PFT, ¶¶ 10-11; Ten Residents of the Commonwealth, et al. v. Massachusetts Department of Environmental Protection, et al., C.A. No. 1279-CV-00833, Hampden Superior Court ("the Hampden Superior Court Appeal"). This Court litigation began on October 12, 2012 and concluded nearly four and one-half years later on March 6, 2017, when the opponents of the proposed Facility did not appeal to the Massachusetts Appeals Court, the January 3, 2017 Final Judgment of the Hampden Superior Court upholding the FPA. Id.[38]

B. March 7, 2017 to March 7, 2019: The Two-Year Construction Start Period Under 310 CMR 7.02(3)(k) For PRE to Commence Construction of the Proposed Facility Pursuant to the FPA

As previously discussed above, Condition 45 of the FPA made PRE aware of the two-year construction deadline of 310 CMR 7.02(3)(k). Mr. Simpson's PFT, ¶ 14. As also

[38] Under Rule 4(a)(1) of the Massachusetts Rules of Appellate Procedure the opponents of the proposed Facility had 60 days from the entry of the Final Judgment: until Monday, March 6, 2017, to appeal the Final Judgment to the Massachusetts Appeals Court. The opponents of the proposed Facility did not file such an appeal and accordingly, the Hampden Superior Court's Final Judgment was conclusive on March 7, 2017, following expiration of the 60-day appeal period at the end of March 6, 2017.

previously discussed above, 310 CMR 7.02(3)(k) provides in relevant part that MassDEP "may revoke any plan approval if construction [of the approved facility] has not commenced within two years of the date of a plan approval or, if during construction, construction is suspended for a period of one year or more." Hence, adjudication of the issue here of whether MassDEP properly revoked the FPA pursuant to the two-year construction requirement of 310 CMR 7.02(3)(k) presents the following the questions: (1) when did the two-year construction start period under 310 CMR 7.02(3)(k) for PRE to commence construction of the proposed Facility begin and (2) when did the period end?

1. The Two-Year Construction Start Period of 310 CMR 7.02(3)(k) Did Not Commence on September 11, 2012 When MassDEP Issued the FPA to PRE

In its Revocation Order, MassDEP contended that "[e]ven granting PRE the most generous interpretation of delays" in commencing construction of the proposed Facility "resulting from the [unsuccessful] court appea[l]" of the FPA, "PRE needed to commence construction [of the proposed Facility] no later than . . . March 7, 2019," the day after when the unsuccessful court litigation challenging the FPA ended. Revocation Order, at pp. 2 and 4; Mr. Gorski's Direct PFT, ¶¶ 5, 14; MassDEP's Closing Brief, September 1, 2021 ("MassDEP's Closing Br."), at pp. 1, 9-16. On PRE's appeal here to OADR, MassDEP has elaborated on its claim that the March 7, 2019 construction start date is MassDEP's "most generous interpretation" of the two-year construction start date under 310 CMR 7.02(3)(k). Id.

Specifically, MassDEP asserts that under the Massachusetts Administrative Procedure Act, G.L. c. 30A ("Chapter 30A"), the two-year construction start date under 310 CMR 7.02(3)(k) for PRE to commence construction of the proposed Facility began on September 11,

2012, when MassDEP's former Commissioner issued his Final Decision affirming MassDEP's approval of construction of the proposed Facility because when an administrative appeal is filed of a Massachusetts agency decision approving a proposed activity, as was the case here with MassDEP's September 2011 Initial Plan Approval authorizing construction of the proposed Facility, the agency decision approving the proposed activity becomes final if the Final Agency Decision-Maker in the appeal issues a final decision affirming the agency's approval of the proposed activity unless the final decision is appealed to Superior Court and the Court stays implementation of the final decision. MassDEP's Closing Br., at p. 9; G.L. c. 30A, § 14(3) ("[t]he commencement of an action [for judicial review of an agency decision] shall not operate as a stay of enforcement of the agency decision, but the agency may stay enforcement, and the reviewing court may order a stay upon such terms as it considers proper . . . ."). Here, neither MassDEP nor the Hampden Superior Court stayed enforcement of the former Commissioner's September 11, 2012 final decision affirming MassDEP's approval of construction of the proposed Facility, and as such, MassDEP contends that under 310 CMR 7.02(3)(k) PRE had until two years thereafter, by September 11, 2014, to commence construction of the proposed facility. MassDEP's Closing Br., at p. 9.

I disagree with MassDEP that the two-year construction start date under 310 CMR 7.02(3)(k) for PRE to commence construction of the proposed Facility pursuant to the FPA began on September 11, 2012. Instead, based on the undisputed facts, I find that the two-year construction start date began on March 7, 2017, the day after expiration of the 60-day deadline to appeal the Hampden Superior Court's Final Judgment upholding the FPA to the Massachusetts

Appeals Court. I make this finding for the following reasons.

First, by MassDEP's own admission, MassDEP has the discretion to extend the construction start date under 310 CMR 7.02(3)(k) for a party to commence construction of a facility approved by MassDEP's issuance of an air permit if a court appeal resulting in the air permit's affirmance was protracted in nature. MassDEP made this admission by its submissions in this appeal noting that "the [proposed] facility [approved by the FPA] had strong opposition from residents and other groups within Springfield during [the Court] appea[l] of the [FPA]" that did not conclude until the end of March 6, 2017, when "no further appeals [were taken]." Mr. Gorski's Direct PFT, ¶ 14. Also, the online public docket of the Hampden Superior Court Appeal of the FPA notes that the Court's adjudication of the appeal was stayed with MassDEP's assent for more than two and one-half years (February 28, 2013 to November 12, 2015) pending the resolution of zoning cases in the Massachusetts Land Court challenging PRE's ability to construct the proposed Facility at the Site. Hampden Superior Court Appeal, Docket Entries from February 28, 2013 through November 12, 2015. After the Massachusetts Land Court litigation concluded in PRE's favor, the Hampden Superior Court vacated the stay on November 12, 2015, but the appeal was not adjudicated until more than one year later on January 3, 2017, when the Court issued a Final Judgment affirming the FPA. Id., Docket Entries from November 30, 2015 through January 3, 2017. As previously noted above, the Final Judgment became final at the end of March 6, 2017, when no appeal of the Final Judgment was filed with the Massachusetts Appeals Court.

In sum, given MassDEP's acknowledgment of the undisputed long delay in resolution of the Hampden Superior Court Appeal challenging the FPA and MassDEP having agreed to a

more than two and one-half year stay (delay) of the Appeal's resolution while the Massachusetts Land Court litigation was pending, I find that it is not reasonable for MassDEP to contend that the two-year construction start period under 310 CMR 7.02(3)(k) for PRE to have commenced construction of the proposed Facility pursuant to the FPA began on September 11, 2012, when MassDEP's former Commissioner issued his Final Decision affirming MassDEP's approval of the proposed Facility, and concluded two years later on September 11, 2014. Instead, based on the undisputed facts as discussed above regarding the protracted nature of the Hampden Superior Court Appeal of the FPA, I find that the two-year construction start period under 310 CMR 7.02(3)(k) for PRE to have commenced construction of the proposed facility pursuant to the FPA began on March 7, 2017, the day after the Hampden Superior Court Appeal ended, and ran until two years later, March 7, 2019. I also find, for the reasons discussed below, at pp. 29-45, that as of the FPA revocation date of April 2, 2021, more than two years after the expiration of the March 7, 2019 construction start deadline, PRE had yet to commence construction of the proposed Facility. In making these findings and as discussed in the next two sections, I reject PRE's contention that the Permit Extension Act of 2010, as amended in 2012 ("Permit Extension Act"),[39] and/or Governor Baker's COVID-19 Executive Order 42 issued on July 2, 2020 ("COVID-19 EO 42"), extended the two-year construction start date under 310 CMR 7.02(3)(k) to "January 3, 2023 (six years from entry of final judgment [in] the [Hampden Superior Court]

[39] St. 2010, c. 240, § 173, as amended by St. 2012, c. 238, §§ 74 & 75.

Appeal" of the FPA. PRE's Appeal Notice, at p. 5.

2. The Permit Extension Act Does Not Govern the FPA

The Permit Extension Act, with certain exceptions and "notwithstanding any [Massachusetts] general or special law to the contrary, [extended] certain regulatory ***approvals*** . . . for a period of 4 years, in addition to the lawful term of the ***approval***." St. 2010, c. 240, §§ 173(a), 173(b)(1) (emphasis supplied). The term "approval" was defined by the statute as including, "except as otherwise provided in [the statute], any permit . . . from any . . . state governmental entity, including any agency, department, commission, or other instrumentality of the . . . state governmental entity, concerning the use or development of real property . . . ." Id. Additionally, the statute established the four-year extension or "tolling period" for the approval as being "the period beginning August 15, 2008, and continuing through August 15, 2012." Id.

The Massachusetts Executive Office of Housing and Economic Development ("EOHED"), a Massachusetts gubernatorial agency responsible for among other things, promoting economic development in the Commonwealth,[40] issued a guidance document explaining the provisions of the Permit Extension Act.[41] Under the EOHED Guidance Document, a permit that was applied for during the "qualifying period" of August 15, 2008 through August 15, 2012 but was issued after that period passed "[did] not qualify for [an] extension [under the Permit Extension Act, because] [t]he Act only extend[ed] permits that were

[40] See https://www.mass.gov/orgs/executive-office-of-housing-and-economic-development.

[41] The EOHED Guidance Document is available on-line at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fwww.ashburnham-ma.gov%2Fsites%2Fg%2Ffiles%2Fvyhlif266%2Ff%2Fuploads%2Fthe_permit_extension_act.pdf&clen=101006&chunk=true

issued or already in effect at any point (e.g., even for one day) during the qualifying period." EOHED Guidance Document, at p. 3. The EOHED Guidance Document emphasized this point by stating that "[a] permit or approval that was pending [in an administrative] appeal during the qualifying period [of August 15, 2008 through August 15, 2012 was] not extended [by the Permit Extension Act] because it [was] not a final permit or approval and as such [it was] not 'in effect or existence.'" EOHED Guidance Document, at p. 5. "However, if the administrative appeal . . . was resolved and a final permit was issued during the qualifying period [of August 15, 2008 through August 15, 2012], it [was] a permit in effect or existence and [was] entitled to the [four] year extension [under the Permit Extension Act]." Id. But, "[i]f the administrative appeal [was] resolved and a final permit [was] issued after the qualifying period [of August 15, 2008 through August 15, 2012], the final permit [was] not entitled to the [four] year extension [under the Permit Extension Act]." Id. Here, the FPA that MassDEP issued to PRE does not qualify for an extension under the Permit Extension Act because, undisputedly, it was issued by MassDEP on September 11, 2012, nearly one month after the qualifying period under the Act ended on August 15, 2012.

The FPA also does not qualify for an extension under the Permit Extension Act because the Act exempts from its reach "[p]ermits or approvals issued . . . by a state agency issued pursuant to federal law." EOHED Guidance Document, at p. 1. The FPA is such a permit or approval because it is an air pollution control permit or approval issued by MassDEP pursuant to a "cooperative federalism" regulatory system with the federal government, which is responsible for enforcing the federal CAA. City of Quincy v. Massachusetts Department of Environmental Protection, 21 F.4th 8 (1st Cir. 2021), 2021 U.S. App. LEXIS 37304, at 3-6. Under this

"cooperative federalism" regulatory system, MassDEP, in enforcing Massachusetts statutory and regulatory air pollution control requirements "is in fact acting pursuant to the federal CAA [and] . . . [u]nder its authority, [MassDEP] has issued comprehensive regulations governing the control of air pollutants, including regulations regarding the issuance of air permits for stationary sources of air pollution like the [proposed Facility] at issue in this appeal." Id. MassDEP has further explained this "cooperative federalism" regulatory system in its Permit Extension Act Guidance Document ("MassDEP Guidance Document") which further confirms that the FPA does not fall within the purview of the Permit Extension Act.[42]

In its Guidance Document, MassDEP explains that the Permit Extension Act does not apply to air permit approvals issued by MassDEP pursuant to MassDEP's Air Pollution Regulations at 310 CMR 7.00 such as the FPA at issue in this appeal because:

(1) "[a] large portion of the . . . [MassDEP's Air Pollution] [R]egulations . . . are authorized by the federal government under Section 110 of the federal Clean Air Act, 42 U.S.C. 7410, as part of the Commonwealth's State Implementation Plan to attain compliance with federal air emissions standards";[43]

(2) "[o]nce [MassDEP's Air Pollution] [R]egulations are submitted [to the federal government] as part of the [Commonwealth's] State Implementation Plan, the Commonwealth is obliged to enforce and abide by these regulations";[44]

(3) "[t]he regulations are also] enforceable by the federal government, and

[42] MassDEP Q&A on the Permit Extension Act Section 173 of Chapter 240 of the Acts of 2010, as amended by Sections 74 and 75 of Chapter 238 of the Acts of 2012, currently available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fwww.mass.gov%2Fdoc%2Fmassdep-qa-on-the-permit-extension-act-of-20102012-0%2Fdownload&clen=613150&chunk=true.

[43] MassDEP Guidance Document, at p. 6.

[44] MassDEP Guidance Document, at p. 6, citing, 42 U.S.C. 7410(a)(1).

[the Commonwealth's] deviation from the regulations can result in sanctions by the federal government in the form of a revocation of federal delegation, reduced federal monies or other financial sanctions";[45] and

(4) "[t]o the extent that there are deadlines for the terms of permits or interim deadlines, e.g., construction deadlines, in permits issued [by MassDEP] pursuant to 310 CMR 7.00, then such deadlines are issued 'pursuant to federal law,'" and, accordingly, "the permits and approvals issued under 310 CMR 7.00 as authorized in the [Commonwealth's] State Implementation Plan, including interim deadlines in such permits, are exempt from the Permit Extension Act." [46]

3. COVID-19 EO 42 Does Not Govern the FPA

On March 10, 2020, Governor Baker declared a State of Emergency in the Commonwealth due to the outbreak of the COVID-19 Pandemic.[47] COVID-19 EO 42, at p. 1. In declaring a State of Emergency, Governor Baker issued COVID-19 Executive Order No. 17 ("COVID-19 EO 17"), "which, for permits issued by agencies within the Executive Office of Housing and Economic Development and the Executive Office of Energy and Environmental Affairs ["EEA"], tolled the expiration dates of such permits during the state of emergency, suspended constructive approvals of permits and hearing and decision deadlines, and extended appeal deadlines." COVID-19 EO 42, at p. 1. MassDEP, an agency within EEA, was subject to COVID-19 EO 17.

On July 20, 2020, Governor Baker rescinded COVID-19 EO 17 by issuing COVID-19 EO 42. COVID-19 EO 42, at p. 1. With respect to the extension and tolling of permit terms and

[45] MassDEP Guidance Document, at p. 6, citing, 42 U.S.C. 7410(m).

[46] MassDEP Guidance Document, at p. 6.

[47] See n. 12, p. 5 above.

other permit-related matters, COVID-19 EO 42 contained a Permit Tolling provision which provided that:

> "[a]n ***approval*** issued by a state permitting agency [that was] valid as of March 10, 2020 and any deadline to record [that] ***approval*** to establish its validity [would] not lapse or otherwise expire during the state of emergency and the expiration date of the ***approval*** and the deadline to record [that] approval [would be] toll[ed] during the state of emergency. . . ."

Id., at p. 3 (emphasis supplied). The term "approval" was defined by COVID-19 EO 42 as "including "an environmental permit . . . issued by a state permitting agency . . . concerning the use, development, or rehabilitation of real property or improvements located thereon . . . ." COVID-19 EO 42, at p. 3. COVID-19 EO 42 also provided that:

> [t]he new date for the expiration of an approval or the deadline to record [the] approval [was to be] calculated as follows: determine how many days remained as of March 10, 2020 until the approval or the deadline to record would have expired, and that same number of days [would] remain as of the date that the state of emergency is terminated. . . .

Id. COVID-19 EO 42 also provided that:

> [t]o the extent that any such approval contain[ed] or [was] subject to other deadlines or conditions, the state permitting agency [could] extend such deadlines or waive such conditions if an approval holder [would] not [be] able to abide by the deadlines or conditions due to the state of emergency. [However,] [t]his section [did] not apply to a holder of an approval who was in violation of the terms and conditions of the approval as of March 10, 2020.

Id.

Here, it is undisputable that the FPA was in existence on March 10, 2020, the governing date of COVID-19 EO 42 as discussed above, because MassDEP revoked the FPA more than one year later April 2, 2021. However, COVID-19 EO 42 did not extend the two-year construction start date requirement of 310 CMR 7.02(3)(k) for PRE to commence construction of the proposed Facility for several reasons. First, PRE failed to present any conclusive evidence

from its witnesses demonstrating that it was unable to comply with that requirement during the state of emergency. Moreover, as of the COVID-19 EO 42 governing date of March 10, 2020, PRE had been in violation of the requirement for one year: since March 7, 2019 when the two-year construction start period expired as previously discussed above. In sum, COVID-19 EO 42 is of no assistance to PRE here.

C. PRE Failed to Commence a Continuous Program of Physical On-Site Construction of the Proposed Facility Within the Two-Year Construction Start Period of 310 CMR 7.02(3)(k)

1. MassDEP Provided Persuasive Evidence Demonstrating that PRE Failed to Comply with the Two-Year Construction Start Period of 310 CMR 7.02(3)(k)

310 CMR 7.02(3)(k) provides that "[f]or purposes of [this Regulation], ***construction*** [of an approved facility] has commenced" within the required two-year construction start period of the Regulation "if the owner or operator of the facility has begun a continuous program of ***physical on-site construction*** of the facility or emission unit that is permanent in nature." (emphasis supplied). MassDEP's witness, Mr. Simpson, provided persuasive testimony regarding what "construction" means for purposes of an air permit holder's compliance with 310 CMR 7.02(3)(k) and demonstrating that PRE failed to "commence a continuous program of physical on-site construction of the [proposed Facility] . . . that [was] permanent in nature" within the two-year construction start period of 310 CMR 7.02(3)(k). I accord his testimony on this issue great weight given his many years of experience as an air-pollution control engineer, including more than 20 years as an air-permitting engineer in MassDEP's WERO Office and 15 years as the Office's Permit Section Chief for the Air Program.[48] I also accord Mr. Simpson's

[48] I summarized Mr. Simpson's credentials above, at p. 19.

testimony great weight because none of PRE's witnesses presented testimonial or documentary evidence effectively refuting Mr. Simpson's testimony.

Mr. Simpson testified that "[u]nder 310 CMR 7.00, ***Construction*** means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in an increase in actual emissions" and "***Actual Construction*** means, in general, initiation of physical on-site construction activities of any facility subject to the requirements of 310 CMR 7.00, which are of a permanent nature." Mr. Simpson's Direct PFT, ¶ 17 (emphasis in original). He testified that "actual construction" activities of a "permanent nature" include, for example, installation of building supports and foundations, laying underground pipework, and construction of permanent structures." Id. He supported his testimony with the long-standing position of the USEPA, the principal federal agency responsible for enforcing the federal CAA, "pertaining to what constitutes 'construction' . . . . " Mr. Simpson's Direct PFT, ¶ 19. Specifically, he testified that the USEPA considers "the following permanent types of activities [as] 'construction'":

(1) the fabrication, erection, installation, demolition, or modification of an emissions unit;

(2) the installation of building supports and foundations;

(3) paving;

(4) laying of underground pipe work; and

(5) construction of permanent storage structures.

Mr. Simpson's Direct PFT, ¶ 20.

Mr. Simpson testified that based on criteria discussed above of what constitutes

construction, he determined that PRE failed to "commence a continuous program of physical on-site construction of the [proposed Facility] . . . that [was] permanent in nature" within the two-year construction start period of 310 CMR 7.02(3)(k) for the following reasons. Mr. Simpson's Direct PFT, ¶¶ 21-30.

First, PRE failed to comply with Special Terms and Condition No. 29 ("Condition No. 29") of the FPA which required PRE to notify MassDEP:

> [w]ithin 30 days of [its] selection of the specific boiler, dry scrubber, high efficiency regenerative selective catalytic reduction system, [and] fabric filter collector, that [it] propose[d] to install [for the proposed Facility. Specifically, PRE was to] notify MassDEP of the manufacturer and model of the respective piece of equipment selected and [was to] additionally, at the same time, submit to MassDEP for review specifications for the respective pieces of equipment that [were] comprehensive enough to allow MassDEP to determine if the selected pieces of equipment [was] equivalent to that proposed [by PRE] in [its] comprehensive plan approval application.

Mr. Simpson's Direct PFT, ¶ 21. Mr. Simpson testified that "[PRE] provided a submittal [to MassDEP] on June 11, 2019, that supplied information on the wood fuel that would be used [for the proposed Facility], but [failed to] . . . indicate [whether PRE had purchased] any equipment related to [this] source of air pollution as [required by] [C]ondition No. 29 . . . and that specifications regarding the combustor [to be installed at the proposed Facility] would be forthcoming."[49] Id.

Second, on February 3, 2021, Mr. Simpson inspected the Site to "evaluate the status of

[49] PRE failed to provide this required information to MassDEP notwithstanding PRE's assurances several months earlier in March 2019 to Mr. Howland, the Regional Engineer for MassDEP's WERO Office, that PRE would provide this information to MassDEP. Mr. Howland's Rebuttal PFT, ¶ 7; See also Mr. Gorski's Direct PFT, ¶¶ 10-11.

construction at the proposed Facility . . . ." Mr. Simpson's Direct PFT, ¶ 24.[50] Also present during the Site inspection were Mr. Howland, the Regional Engineer of MassDEP's WERO Office and PRE's representative, Ron Bucchi ("Mr. Bucchi"), and Jerome Gagliarducci, the principal of Gagliarducci Construction, a local construction company. Id.

During the Site inspection, Mr. Simpson "did not [] observe any . . . building supports or foundations, underground pipework or any permanent structures related to the proposed . . . [F]acility" having been installed or built at the Site. Mr. Simpson's Direct PFT, ¶ 27. However, he observed a large pile of recycled asphalt located within the footprint of the proposed Facility. Id. The size of this large pile of recycled asphalt dwarfed all the buildings on Site and had reached that size over the course of many years. Id. Mr. Simpson confirmed this by having

[50] Mr. Simpson's inspection of the Site occurred after U.S. Senators Edward J. Markey and Elizabeth Warren wrote to MassDEP's Commissioner on December 24, 2020:

> "urg[ing] . . . MassDEP to consider suspending the [FPA] . . . so that the new Biden administration [after taking office on January 20, 2021 could] review and potentially issue new regulations for biomass pollution and climate impact. [Senators Markey and Warren also urged MassDEP to] conduct a new review of the proposed [Facility's] air quality impacts that account[ed] for the ongoing respiratory health pandemic, new public health data, and the accelerating climate crisis [because] Springfield residents deserve[d] an updated air quality analysis that reflect[ed] the city's current health and environmental justice issues, which ha[d] become more acute in the decade since MassDEP initially issued the [FPA to PRE].

Mr. Gorski's Direct PFT, ¶¶ 7, 12; Exhibit MG-Ex. 3 attached to Mr. Gorski's Direct PFT. In support of their request that MassDEP conduct a new review of the proposed Facility, Senators Markey and Warren cited "[the] extremely high rates of respiratory illness [in Springfield, noting that] [n]early one in five children in Springfield have asthma—a rate more than twice the national prevalence rate of 8 percent [and resulting in Springfield in] 2018 and 2019 [being ranked by] the Asthma and Allergy Foundation of America . . . as its top "Asthma Capital" and the most challenging place in the U.S. to live with asthma. Exhibit MG-Ex. 3 attached to Mr. Gorski's Direct PFT. Senators Markey and Warren stated that "[t]he proposed [Facility] would only exacerbate th[e] serious [asthma] problem [in Springfield because the Facility was] expected to burn approximately one ton of wood per minute and emit fine particulate matter, nitrogen oxides, sulfur dioxide, and other harmful pollutants, which could damage the human respiratory system and make breathing difficult." Id. They also cited the COVID-19 Pandemic as also justifying MassDEP's conducting a new review of the proposed Facility because "[r]ecent research ha[d] linked poor air quality to a disproportionately high rate of coronavirus illness and death, and a report by the . . . Massachusetts Attorney General [had] found that COVID-19 ha[d] had a disproportionate effect on communities of color in Massachusetts' largest municipalities," including Springfield. Id.

MassGIS staff in MassDEP's WERO Office perform a MassGIS study of the Site.[51] Id. This MassGIS study of the Site produced two aerial photographs of the Site that are attached as Exhibits MS-6 and MS-7 respectively to Mr. Simpson's Direct PFT. Id.

Exhibit MS-6 is an aerial photograph of the Site in 2019 which shows the large pile of recycled asphalt on the Site discussed above. Id. Exhibit MS-7 is an aerial photograph of the Site overlain with the plan of the proposed Facility, which shows that the Facility will be in the same area where the large pile of recycled asphalt currently sits. Id. I observed this large pile of recycled asphalt on the Site during my August 25, 2021 Site Visit with PRE's and MassDEP's respective representatives and counsel.[52] The presence of this significant amount of material precludes construction of the proposed Facility at the Site and would need to be moved before any construction of the Facility could commence. Id.

2. PRE Failed to Present Evidence Effectively Refuting MassDEP's Persuasive Evidence Demonstrating that PRE Failed to Commence Construction of the proposed Facility Within the Required Two-Year Construction Start Period of 310 CMR 7.02(3)(k)

In response to Mr. Simpson's testimony that PRE had failed to commence construction

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[51] GIS:

> 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.

[52] As previously noted above, at p. 7, I conducted the Site Visit pursuant to the provisions of 310 CMR 1.01(13)(j).

of the proposed Facility pursuant to the FPA within the two-year construction start period of 310 CMR 7.02(3)(k), PRE presented the testimony of Dr. Gatto, a principal of PRE. Dr. Gatto disputed Mr. Simpson's testimony as follows.

First, Dr. Gatto testified that the following documents PRE provided to MassDEP on February 8, 2021 and prior to MassDEP's April 2021 revocation of the FPA evidence PRE's commencement of construction of the proposed Facility pursuant to the FPA within the two-year construction period of 310 CMR 7.02(3)(k):

> (1) documents evidencing PRE's purchase of the real property at 365 Cadwell Avenue located across the street from the Site of the proposed Facility for approximately $600,000.00, which contained a large building previously occupied by AT&T for its telecommunications business and which purportedly was to serve as PRE's office space and construction headquarters for the Site and also a potential future customer for steam and power generated by the proposed Facility;
>
> (2) documents evidencing PRE's purchase of the real property abutting the Site at 400 Cadwell Avenue for $1.4 million, which contained a closed industrial building that PRE demolished at a cost of approximately $180,000.00, which included asbestos abatement, tear down, and foundation removal;
>
> (4) documents evidencing PRE's agreement and payment to Eversource of approximately $240,000.00 to locate a switching yard near the Site instead of five miles away; and
>
> (5) documents evidencing PRE's real estate swap with Eversource and re-location of an Eversource access road at a cost of approximately $175,000.00.

Dr. Gatto's Direct PFT, ¶¶ 68.a.-68.b, 77; Mr. Simpson's Direct PFT, ¶ 26; Mr. Simpson's Rebuttal PFT, ¶¶ 4-5.

Contrary to Dr. Gatto's assertions, none of the documents set forth above evidence PRE's commencement of construction of the proposed Facility pursuant to the FPA within the two-year

construction start period of 310 CMR 7.02(3)(k). As Mr. Simpson persuasively testified, the actions taken by PRE as reflected in these documents do not constitute "actual construction" activities of the proposed Facility of a "permanent nature" within the meaning of the two-year construction start period of 310 CMR 7.02(3)(k) because none of these actions constitute the installation of building supports and foundations, laying underground pipework, and construction of permanent structures" for the proposed Facility. Mr. Simpson's Direct PFT, ¶ 20; Mr. Simpson's Rebuttal PFT, ¶¶ 4-5. Additionally, these actions also do not constitute evidence of any purchase orders or specifications for equipment for the proposed Facility as required by Condition No. 29 of the FPA as discussed above. Mr. Simpson's Direct PFT, ¶ 27; Mr. Simpson's Rebuttal PFT, ¶¶ 4-7; Mr. Howland's Rebuttal PFT, ¶ 7.

Dr. Gatto also testified that the following actions that PRE purportedly took "[b]efore March 6, 2019" also evidence PRE's commencement of construction of the proposed Facility pursuant to the FPA within the two-year construction period of 310 CMR 7.02(3)(k):

(1) PRE's "select[ion of] . . . Mas-Tec, along with its Massachusetts-based partner, StanTec," as the Engineering, Procurement, and Construction ("EPC") contractor for construction of the proposed Facility, "and negotiat[ing] the contract for signatures";[53]

(2) PRE's "select[ion of] the boiler and Air Quality Control System equipment suppliers (Babcock and Babcock Environmental), and negotiat[ing] the contract for signatures";[54] and

[53] Dr. Gatto's Direct PFT, ¶ 68.c.

[54] Dr. Gatto's Direct PFT, ¶ 68.d.

(3) PRE's "select[ion of] the steam turbine supplier (Siemens), and negotiat[ing] the contract . . . for signatures."[55]

However, as Mr. Simpson persuasively testified none of these purported actions by PRE constitutes proof of PRE's "actual construction" activities of the proposed Facility of a "permanent nature" within the meaning of the two-year construction start period of 310 CMR 7.02(3)(k) because none of these actions constitute PRE's "construction of permanent structures" for the proposed Facility, such as the installation of building supports and foundations, or the laying of underground pipework. Mr. Simpson's Direct PFT, ¶¶ 20, 27; Mr. Simpson's Rebuttal PFT, ¶¶ 4-6. These actions also do not constitute evidence of any purchase orders or specifications for equipment for the proposed Facility as required by Condition No. 29 of the FPA as discussed above. Id.

Indeed, as Mr. Simpson testified, while PRE purportedly selected Babcock and Babcock Environmental to supply the boiler and Air Quality Control System equipment for the proposed Facility "and negotiated the [purchase] contract for [these items]," PRE failed to present an executed purchase contract with Babcock and Babcock Environmental for these items. Mr. Simpson's Rebuttal PFT, ¶ 6. PRE also failed to present an executed purchase contract with Siemens, the entity PRE purportedly selected to supply the steam turbine for the proposed Facility and with whom "[it] negotiated the [purchase] contract for [this item]." Id.

Dr. Gatto also testified that PRE's negotiation and/or execution of the following contractual agreements also evidence PRE's commencement of construction of the proposed

[55] Dr. Gatto's Direct PFT, ¶ 68.e.

Facility pursuant to the FPA within the two-year construction period of 310 CMR 7.02(3)(k):

(1) September 2019: "[PRE's execution of] a Joint Venture Agreement with ATG under which PRE was to provide project assets – all in place except Power Purchase Agreements, and ATG was to provide $181.55 million to construct the [proposed] Facility [with] JP Morgan [being] the lead bank for the ATG investment";[56]

(2) February 2020: "[PRE's execution of] Power Purchase Agreements with eight municipalities" pursuant to which the municipalities would purchase power from the proposed Facility;[57]

(3) December 2020: "[PRE] enter[ing] into new financing and EPC agreements with Covarrubia & Company and Covarrubia Engineering, respectively (together "Covarrubia")", which was "coordinating all activities at the [S]ite and with suppliers Babcock Power, Babcock Power Environmental, and Siemens";[58]

(4) December 20, 2020: PRE's entering into a "[c]onstruction drawdown schedule with Covarrubia"; [59]

(5) in or about December 2020: PRE's entering into an agreement with Vanasse, Hangen, Brustlin, Inc. ("VHB") pursuant to which VHB performed stormwater planning work for the Site of the proposed Facility from December 27, 2020 to January 23, 2021;[60]

(6) January 15, 2021: PRE's entering into another EPC Agreement with Covarrubia;[61] and

(7) February 8, 2021: PRE's "execut[ion] [of an] agreement with Manafort Brothers Incorporated [("Manafort")] for the construction of the stack foundation [for the proposed Facility] and [receipt of a bid from]

[56] Dr. Gatto's Direct PFT, ¶ 78.

[57] Dr. Gatto's Direct PFT, ¶ 79.

[58] Dr. Gatto's Direct PFT, ¶¶ 91-92, 105.b.

[59] Dr. Gatto's Direct PFT, ¶ 105.b.

[60] Dr. Gatto's Direct PFT, ¶ 105.c.

[61] Dr. Gatto's Direct PFT, ¶ 105.a.

> Gagliarducci Construction, Inc. [("Gagliarducci")] . . . for the stack foundation prep."[62]

Notwithstanding Dr. Gatto's assertions, none of PRE's negotiation and/or execution of the contractual agreements set forth above constitute "actual construction" activities of the proposed Facility of a "permanent nature" within the meaning of the two-year construction start period of 310 CMR 7.02(3)(k) because PRE's negotiation and/or execution of these contractual agreements do not constitute PRE's "construction of permanent structures" for the proposed Facility, such as the installation of building supports and foundations, or the laying of underground pipework. Mr. Simpson's Direct PFT, ¶¶ 20, 27; Mr. Simpson's Rebuttal PFT, ¶¶ 4-6. Additionally, Mr. Simpson provided persuasive testimony that one of the contractual items listed above, specifically, the bid that PRE supposedly received from Gagliarducci to perform stack foundation prep work for the stack foundation that Manafort purportedly was to build for the proposed Facility pursuant to a contractual agreement with PRE was problematic because "[the bid] did not provide any date for work to actually be undertaken." Mr. Simpson's Rebuttal PFT, ¶ 6. Mr. Simpson also testified that "[a]side from some handwritten markings on [Gagliarducci's] bid, the purpose of which [was] unclear to [Mr. Simpson], PRE did not provide any other documentation [to MassDEP] . . . indicat[ing]" that Manafort had executed a contract with PRE to construct the stack foundation for the proposed Facility. Id.

Lastly, Dr. Gatto also testified that communications he had with Mr. Howland, the Regional Engineer of MassDEP's WERO Office, during the period of January 2019 to February 2021 regarding the proposed Facility also evidence PRE's commencement of construction of the

[62] Dr. Gatto's Direct PFT, ¶¶ 105.d, 106.

proposed Facility pursuant to the FPA within the two-year construction start period of 310 CMR 7.02(3)(k). Dr. Gatto testified that during that period "[he] had periodic telephone conversations with [Mr.] Howland . . . regarding the status of the project." Dr. Gatto's Direct PFT, ¶ 72. He testified that "[a]s far as PRE was aware, and as confirmed by multiple conversations between [him] and . . . [Mr.] Howland, MassDEP knew about the status of activity at the Site and approved the project as proceeding appropriately pursuant to the Air Plan Approval." Dr. Gatto's Direct PFT, ¶ 87. In support of his position Dr. Gatto pointed to an invoice that MassDEP had issued to PRE on November 20, 2020 for [an] "Air Quality Operating Permit Compliance Fee" regarding the FPA, which PRE paid on January 11, 2021. Id.

In response, Mr. Howland provided persuasive testimony effectively refuting Dr. Gatto's testimony. Specifically, Mr. Howland testified that while he did speak to Dr. Gatto regularly during MassDEP's review of PRE's air permit application seeking approval for the proposed Facility, these contacts were infrequent from January 2017, when the Hampden Superior Court issued a Final Judgment affirming the FPA, to early 2021, when Mr. Howland requested PRE provide MassDEP with documentation evidencing PRE's construction of the proposed Facility. Mr. Howland's Rebuttal PFT, ¶¶ 6-7. Mr. Howland testified that at no time during his conversations with Dr. Gatto "did [he] apprise Mr. Gatto that [he] or MassDEP [had] approved the project as proceeding appropriately under the [proposed] [F]acility's [Final Plan] approval." Id., ¶ 6. Mr. Howland testified that Dr. Gatto knew that Mr. Howland lacked singular authority to make that representation to Dr. Gatto on behalf of MassDEP because "[w]henever [Dr.] Gatto made specific requests to [Mr. Howland], [the latter] always indicated that [he] would have to consult with [MassDEP] program staff or management before responding." Id. Mr. Howland

testified that "[e]xcept in an imminent-danger situation, permitting and compliance assessment is done collaboratively at MassDEP[,]" and "[j]ust because [Dr.] Gatto [had] made [him] aware of PRE's [purported] construction activity status while conversing [with him]" did not mean that [Mr. Howland had given] any tacit approval of [that purported activity]." Id.

III. MassDEP PROPERLY EXERCISED ITS DISCRETION IN REVOKING THE FPA FOR PRE'S FAILURE TO COMMENCE CONSTRUCTION OF THE PROPOSED FACILITY WITHIN THE REQUIRED TWO-YEAR CONSTRUCTION START PERIOD OF 310 CMR 7.02(3)(k)

Having established above, at pp. 21-44, that MassDEP properly determined that PRE failed to commence construction of the proposed Facility pursuant to the FPA within the required two-year construction start period of 310 CMR 7.02(3)(k), the next issue for adjudication is whether PRE's failure to commence such construction warranted MassDEP's revocation of the FPA. The legal standard governing adjudication of this issue is whether MassDEP had a rational basis, i.e. a sufficient factual and legal basis for revoking the FPA. This rational basis test is similar to the rational basis test utilized by Massachusetts courts in conducting judicial review of discretionary decisions of state agencies. Mroz, 2019 MA ENV LEXIS 57, at 36-62.

As the Massachusetts appellate courts have explained, when a state government agency exercises its administrative discretion in making a determination, the determination should be affirmed by a reviewing court unless "the decision was arbitrary and capricious such that it constituted an abuse of [the agency's] discretion." Mroz, 2019 MA ENV LEXIS 57, at 39, citing, Frawley v. Police Commissioner of Cambridge, 473 Mass. 716, 728 (2016); Garrity v. Conservation Commission of Hingham, 462 Mass. 779, 792 (2012); Sierra Club v. Commissioner of Department of Environmental Management, 439 Mass. 738, 748-49 (2003); Forsyth Sch. for Dental Hygienists v. Board of Registration in Dentistry, 404 Mass. 211, 217

(1989). This is the rule regardless of whether judicial review is confined to review of the administrative evidentiary record before the agency or is de novo, where the judge makes his or her independent findings of fact based on a preponderance of the evidence presented at trial, because the legal definition of what constitutes arbitrary and capricious governmental action is the same.[63]

A state agency "decision is arbitrary or capricious such that it constitutes an abuse of discretion where it 'lacks any rational explanation that reasonable persons might support'" and "an abuse of discretion occurs when there has been a clear error of judgment in weighing relevant factors such that [the] decision falls outside [the] range of reasonable alternatives[.]" Mroz, 2019 MA ENV LEXIS 57, at 42-43, citing, Frawley, 473 Mass. at 729-33 (Cambridge Police Chief's reasons for denying retired police officer's application for "retired [police] officer identification card" authorizing him to carry a concealed weapon lacked a rational basis); Garrity, 462 Mass. at 792-97 (Hingham Conservation Commission's reasons for bringing enforcement action against plaintiff for wetlands violations had a rational basis); Sierra Club, 439 Mass. at 748-49 (state agency commissioner's MEPA findings in favor of proposed project

[63] The provisions of G.L. c. 30A, § 14(7) governing judicial review of Final Decisions of MassDEP's Commissioner in administrative appeals provide that judicial review is confined to the administrative evidentiary record before the agency and authorizes seven possible grounds for the reviewing court to overturn a Final Decision, including that the Final Decision is "[a]rbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." Mroz, 2109 MA ENV LEXIS 57, at 40-41, citing, G.L. c. 30A, § 14(7)(g). For the essentially the same reasons, a reviewing court may overturn a land use decision of a municipal zoning board pursuant to G.L. c. 40A, § 17, which provides for de novo judicial review of the board's decision where the Superior or Land Court judge: (1) "makes his [or her] own findings of fact[,] . . . (2) "'determines the content and meaning of statutes and [local zoning] by-laws [governing the board's decision] and . . . decides whether the board . . . chos[e] from those sources the proper criteria and standards . . . in [making its decision]'"; (3) "accord[s] deference to a local board's reasonable interpretation of its own zoning bylaw . . . with the caveat that an 'incorrect interpretation of a statute . . . is not entitled to deference'" and (4) "determines whether the board has applied [the governing zoning] standards in an 'unreasonable, whimsical, capricious or arbitrary' manner." Mroz, 2109 MA ENV LEXIS 57, at 41-42, citing, Doherty v. Planning Board of Scituate, 467 Mass. 560, 566-67 (2014). "The judge . . . should overturn a board's decision when 'no rational view of the facts the court has found supports the board's conclusion.'" Id., at 567.

had a rational basis); Doe v. Superintendent of Schools of Stoughton, 437 Mass. 1, 6 (2002) (high school principal's reasons for suspending student pending resolution of criminal charges against student had a rational basis); Forsyth, 404 Mass. at 217-19 (State Board of Registration in Dentistry's reasons for denying dental hygienist school's request to include certain course in its curriculum for dental hygienists had a rational basis); City of Brockton v. Energy Facilities Siting Board, 469 Mass. 196, 209-10 (2014) (Energy Facility Siting Board's reliance on Boston Logan Airport meteorological data in approving proposed Brockton energy facility had a rational basis because: (1) data "[was] representative of [Brockton meteorological] conditions", (2) "no suitable meteorological data for the Brockton site were available", and (3) Board's governing statute did not require Board to use on-site meteorological data); See also Doherty, 467 Mass. at 566-73 (on de novo judicial review, local planning board's decision denying property owner's application for special permits authorizing construction of residential dwellings on property owner's undeveloped lots affirmed because "board did not [deny property owner's application] in an 'unreasonable, whimsical, capricious or arbitrary' manner," but due to property owner's failure to demonstrate lots were "not subject to flooding" within the meaning of the local zoning bylaw).

A state agency decision, however, "is not arbitrary and capricious if 'reasonable minds could differ' on the proper outcome'" and "[i]t is not the place of a reviewing court to substitute its own opinion for that of the [agency]." Mroz, 2019 MA ENV LEXIS 57, at 43-44, citing, Doe, 437 Mass. at 6; Frawley, 473 Mass. at 729. Thus, if an agency's decision has a rational basis, i.e. a sufficient factual and legal foundation, it should be affirmed by the reviewing court notwithstanding that the court might have made a different decision based on the circumstances

of the case. Id. For these reasons, "[t]he deference . . . grant[ed] to an agency's determination of questions entrusted to its expertise places a 'heavy burden' on parties challenging the [determination]." Mroz, 2019 MA ENV LEXIS 57, at 44, citing, NSTAR Electric Co. v. Department of Public Utilities, 462 Mass. 381, 386 (2012). However, "[t]he principle of according weight to an agency's discretion . . . is 'one of deference, not abdication,'" meaning that "courts will not hesitate to overrule agency [determinations that are] . . . arbitrary, unreasonable, or inconsistent with the plain terms of the [governing regulatory requirements]." Mroz, 2019 MA ENV LEXIS 57, at 44, citing, NSTAR, 462 Mass. at 386-87; Warcewicz v. Department of Environmental Protection, 410 Mass. 548, 550 (1992); Moot v. Department of Environmental Protection, 448 Mass. 340, 346 (2007).

In sum, my role as Presiding Officer in this appeal "is not to 'second guess' [MassDEP's revocation of the FPA] or substitute my opinion for that of [MassDEP], but rather, to determine whether [MassDEP's revocation of FPA] ha[s] a valid and factual foundation based on a preponderance of evidenced presented [by the Parties' respective witnesses] and the governing [legal] requirements." Kane Built, Inc., 2017 MA ENV LEXIS 77, at 19-20. As discussed in detail below, based on a preponderance of the testimonial and documentary evidence presented by MassDEP's and PRE's respective witnesses, I find that MassDEP properly exercised its discretion in revoking the FPA because MassDEP had a rational basis, i.e. a sufficient factual and legal basis to revoke the FPA pursuant to: (1) MassDEP's Air Pollution Control Regulations

at 310 CMR 7.00; and (2) EEA's 2017 EJ Policy as reinforced by the 2021 Climate Act.

A. MassDEP Had a Rational Basis to Revoke the FPA Pursuant to MassDEP's Air Pollution Control Regulations at 310 CMR 7.00

1. MassDEP's Determination that an Updated BACT Review of the Proposed Facility Be Performed Has a Rational Basis

As previously noted above, in its Revocation Order, MassDEP stated the revocation of the FPA was appropriate because an updated review of the Best Available Control Technology ("BACT") for air pollution mitigation regarding the proposed Facility was warranted given the significant period of time (almost nine years) that had passed since the FPA had been issued to PRE in September 2012.[64] MassDEP's witnesses, Ms. Kirby and Mr. Simpson, provided persuasive testimony supporting MassDEP's position and effectively refuting the testimony of PRE's witness, Mr. Raczynski, which failed to include the critical information about BACT discussed below.[65]

Ms. Kirby testified that "MassDEP's air program is . . . based on updated science, public health information, and statutory and regulatory requirements that, in part, strive to create a protective permitting process . . . ." Ms. Kirby's Direct PFT, ¶ 12. She testified that "[t]he changes that occur in the statutes, regulations[,] and policies that govern the air permit program are progressive in nature [and] . . . [a]llowing [air] permits to go 'stale' through inaction by the permittee past [the required] two yea[r] [construction start period of 310 CMR 7.02(3)(k)] would allow for construction of [air pollution] emission units that would be less compliant with newer standards and polices . . . ." Id. She testified that "[i]t is also [unfair] to allow older [air] permits to remain valid indefinitely while newer projects are subject to more stringent standards and

[64] Revocation Order, at pp. 3, 4.

[65] See Mr. Raczynski's Direct PFT, ¶¶ 6, 10, 13 (pp. 9-10), 21; Mr. Raczynski's Rebuttal PFT, ¶ 15.

policies than the projects that remain idle for more than [the required] two yea[r] [construction start period of 310 CMR 7.02(3)(k)]." Id.

Mr. Simpson corroborated Ms. Kirby's testimony by testifying that "the purpose of [the two-year construction start requirement of] 310 CMR 7.02(3)(k) is to prevent stale [or outdated] air permits from being acted upon after an unreasonable period of time has passed, since technology is constantly changing, and statutory, regulatory and policy changes come into being over time." Mr. Simpson's Direct PFT, ¶ 16. He testified that "[an air] permit that is not acted upon by [the permit holder] commencing construction [of the approved facility within the two-year construction start period of] . . . 310 CMR 7.02(3)(k), can, over time, become mis-aligned with the changes that constantly occur in the air permitting program." Id. He testified that "[f]or example, changes in technology, including [BACT for each regulated air pollutant] constantly occur and [an FPA for a proposed facility] may no longer represent BACT after [expiration of two-year construction start period of 310 CMR 7.02(3)(k)]." Id.

BACT is defined by MassDEP's Air Pollution Control Regulations "as 'an emission limitation based on the maximum degree of reduction of any regulated air contaminant[,] [including Nitrogen Oxides ("NOx"),][66] emitted from or which results from any regulated facility' that [Mass]DEP 'determines is achievable for [that] facility through application of production processes and available methods, systems[,] and techniques for control of each such contaminant.'" City of Quincy v. Massachusetts Department of Environmental Protection and

[66] "Nitrogen Oxides are a family of poisonous, highly reactive gases[,] [which are] form[ed] when fuel is burned at high temperatures." https://www3.epa.gov/region1/airquality/nox.html. "NOx pollution is emitted by automobiles, trucks and various non-road vehicles (e.g., construction equipment, boats, etc.) as well as industrial sources such as power plants, industrial boilers, cement kilns, and turbines." Id. "NOx often appears as a brownish gas[,] . . . is a strong oxidizing agent[,] and plays a major role in the atmospheric reactions with volatile organic compounds ("VOC") that produce ozone ("smog") on hot summer days." Id.

Algonquin Gas Transmission, LLC, 21 F.4th 8 (1st Cir. 2021), 2021 U.S. App. LEXIS 37304 ("AGT 1st Cir. Decision"), at 3-4, citing, 310 CMR 7.00 (definition of "Best Available Control Technology"). In other words, "BACT is the most effective emissions control technology for a pollutant that is technologically and economically feasible for the given project." Id., at 4.

"In order to obtain an air permit from [Mass]DEP [authorizing the construction of a facility that will emit air pollutants regulated by MassDEP], [the air permit] applicant must show that the proposed facility employs [BACT] for each regulated air pollutant, including NO_x." Id., at 3. MassDEP determines whether an applicant has demonstrated BACT for each regulated air pollutant "on a case-by-case basis taking into account energy, environmental, and economic impacts and other costs . . . ." AGT 1st Cir. Decision, at 3; Palmer I, 2012 MA ENV LEXIS 120, at 6-7, 13-14, 123-24. MassDEP utilizes a five-step, "top-down" process developed by the USEPA for determining BACT. AGT 1st Cir. Decision, at pp. 4-6. These five steps of the "top-down" process are as follows.

In Step 1 of the BACT analysis, "[t]he [air permit] applicant identifies and lists all available control technologies that have 'a practical potential for application to the emissions unit and the regulated pollutant under evaluation.'" Id., at 4. "However, a control technology may be excluded [in] Step 1 of the BACT analysis if it would 'redefine the source.'" Id. Such a control technology is one that if utilized would "essentially 'requir[e] a complete redesign of the [proposed] facility.'" Id. For example, "a coal-burning power plant need not consider a nuclear fuel option as a 'cleaner' fuel because it would require a complete redesign of the coal-burning power-plant." Id. Another example is MassDEP's recent rejection of an electric motor to power a proposed natural gas compressor station in Weymouth, Massachusetts ("the Weymouth

Compressor Station Case") which the facility's opponents had proposed as an alternative to a natural gas fired turbine the air permit applicant had proposed. In the Matter of Algonquin Gas Transmission, LLC, Recommended Final Decision After Remand (January 11, 2021) ("AGT RFDAR"), 2021 MA ENV LEXIS 4, at 16-22, adopted as Final Decision After Remand (January 18, 2022), 2021 MA ENV LEXIS 2, affirmed, AGT 1st Cir. Decision, supra. MassDEP properly rejected the electric motor because the motor "required a completely different design compared to [the] combustion turbine [as proposed by the air permit applicant] and would not achieve the purpose of using the readily available natural gas flowing through the facility as fuel to power the compressor." AGT, 2021 MA ENV LEXIS 4, at 20.

In Step 2 of the BACT analysis, "[t]he applicant eliminates any 'technically infeasible options' from the list generated at Step 1 [of the BACT analysis]." AGT 1st Cir. Decision, supra, 2021 U.S. App. LEXIS 37304, at pp. 4-5. "A control option is 'technically infeasible' if, 'based on physical, chemical, and engineering principles, . . . technical difficulties would preclude the successful use of the control option on the emissions unit under review.'" Id., at 5.

In Step 3 of the BACT analysis, "[t]he [air permit] applicant 'rank[s]' the 'remaining control alternatives not eliminated in [S]tep 2 [of the BACT analysis] based on their effectiveness in reducing controlled pollutant emissions." Id.

In Step 4 of the BACT analysis, "[t]he [air permit] applicant evaluates 'the energy, environmental, and economic impacts' of each control option and eliminates any controls that do not meet certain effectiveness criteria." Id. At this stage, MassDEP "assesses, among other things, the 'economic impacts' of the control alternatives[.]" Id., at 12. "The economic feasibility of a control option is measured by the technology's cost-effectiveness at reducing

emissions of regulated pollutants - - with effectiveness 'measured in terms of tons of pollutant emissions removed' and cost 'measured in terms of annualized control costs.'" Id. The "[c]ost effectiveness calculations can be conducted on an average [] or incremental basis." Id. Recently, in the Weymouth Compressor Station Case, the United States Court of Appeals for the First Circuit affirmed MassDEP's elimination of, as not being cost-effective, the electric motor that the opponents of the proposed natural gas compressor station had proposed to power the station instead of the natural gas fired turbine that the air permit applicant had proposed. Id., at 12-23. The Court affirmed MassDEP's elimination of the electric motor as not being cost-effective because MassDEP properly measured the average cost-effectiveness of the electric motor in its BACT analysis pursuant to USEPA and MassDEP regulatory standards governing Step 4 of the BACT analysis. Id.

Lastly, at Step 5 of the BACT analysis, "[t]he 'most effective control option' that has not been eliminated is selected as BACT." Id., at 5.

In sum, MassDEP's BACT determination is a very critical part of MassDEP's air permitting process. It is undisputable that the last BACT analysis for the proposed Facility was performed more than 10 years ago, prior to MassDEP's issuance of the FPA in September 2012 authorizing PRE's construction of the proposed Facility. Palmer I, 2012 MA ENV LEXIS 120, at 6-7, 11-14, 106-18,123-40. MassDEP's BACT analysis for the proposed Facility and its BACT determination should be based on scientific data that are as current as possible because as Mr. Simpson testified persuasively that "changes in technology, including [BACT for each regulated air pollutant] constantly occur and a FPA [for a proposed facility] may no longer

represent BACT after [expiration of two-year construction start period of 310 CMR 7.02(3)(k)]." Mr. Simpson's Direct PFT, ¶ 16; Mr. Simpson's Rebuttal PFT, ¶ 9. For these reasons, it was reasonable for MassDEP in April 2021 to revoke the FPA as being stale or outdated.

2. MassDEP's Determination that an Updated Air Modeling Study of the Proposed Facility Be Performed Has a Rational Basis

Another valid reason for MassDEP to have revoked the FPA as being stale or outdated was MassDEP's determination that an updated air modeling study of the proposed Facility that considered changes in the surrounding ambient air quality should be performed. Revocation Order, at pp. 3, 4; Mr. Simpson's Direct PFT, ¶¶ 1, 4; Mr. Simpson's Rebuttal PFT, ¶ 9. It is well settled that an air permit applicant's submittal of a sound air modeling study of a proposed facility's emission of regulated pollutants into the ambient air is another critical part of MassDEP's air permitting process, in particular determining whether the emissions will comply with the National Ambient Air Quality Standards ("NAAQS") that have been promulgated by the USEPA pursuant to the federal CAA. 310 CMR 7.02(30(j)1; City of Brockton, 469 Mass. at 204-08; Palmer I, 2012 MA ENV LEXIS 120, at 9-14, 63-105. PRE's witness, Mr. Raczynski, testified that the proposed Facility's emissions would satisfy the NAAQS today as they did more than a decade ago when PRE submitted its air permit application for the proposed Facility that culminated in MassDEP's issuance of the FPA.[67] However, I do not find Mr. Raczynski's testimony persuasive because it failed to include critical information about the NAAQS that I discuss below.

It is undisputed that the NAAQS are health-based standards established by the USEPA pursuant to the federal CAA that are designed to preserve public health and protect sensitive

[67] Mr. Raczynski's Direct PFT, ¶¶ 13, 20, 21; Mr. Raczynski's Rebuttal PFT, ¶ 12.

populations, including persons suffering from asthma or cardiovascular disease, children, and the elderly. 42 U.S.C. § 7409(b); 40 C.F.R. Part 50 (2006); Palmer I, 2012 MA ENV LEXIS 120, at 11-12; In the Matter of Brockton Power Co., LLC, OADR Docket Nos. 2011-025 & 026 ("BP"), Recommended Final Decision (July 29, 2016), 2016 MA ENV LEXIS 66, at 41, adopted as Interlocutory Decision [of MassDEP Commissioner] (March 13, 2017), 2017 MA ENV LEXIS 21.[68] Air quality that satisfies the NAAQS is presumptively protective of public health but this presumption can be rebutted and even overcome, by the opponents of a proposed structure requiring an air permit from MassDEP under the Air Pollution Control Regulations at 310 CMR 7.00 presenting reliable data demonstrating that the NAAQS are not protective enough of public health, City of Brockton, 469 Mass. at 207, and/or that permitting the proposed structure would have a disparate or disproportionate discriminatory impact on a protected class of persons in violation of Massachusetts and/or federal anti-discrimination laws. See below, at pp. 75-77, 93-97.

"[T]he NAAQS . . . are [intended] to cover for air pollutants 'reasonably … anticipated to endanger public health or welfare,' including [for particulate matter of 2.5 micrometers in diameter ("$PM_{2.5}$") or less]." City of Brockton, 469 Mass. at 205; Palmer I, 2012 MA ENV LEXIS 120, at 78-79; BP, 2016 MA ENV LEXIS 66, at 39. Particulate matter or "PM" as it is commonly referred "is . . . found in the air, including dust, dirt, soot, smoke, and liquid droplets."[69] "Particles can be suspended in the air for long periods of time [and] [s]ome particles are large or dark enough to be seen as soot or smoke."[70] "Othe[r] [particles] are so small that

[68] BP remains pending before OADR. I have been the Presiding Officer in BP since July 2015.

[69] https://www3.epa.gov/pmdesignations/2012standards/faq.htm; BP, 2016 MA ENV LEXIS 66, at 39-40.

individually they can only be detected with an electron microscope."[71]

"Particles less than 2.5 micrometers in diameter ($PM_{2.5}$) are referred to as 'fine' particles and are believed to pose the greatest health risks. Because of their small size (approximately 1/30th the average width of a human hair), fine particles can lodge deeply into the lungs."[72] "Sources of fine particles include all types of combustion activities (motor vehicles, power plants, wood burning, etc.) and certain industrial processes."[73] "Particles with diameters between 2.5 and 10 micrometers are referred to as 'coarse' [and] [s]ources of coarse particles include crushing or grinding operations, and dust from paved or unpaved roads."[74] "Other particles may be formed in the air from the chemical change of gases [and] [t]hey are indirectly formed when gases from burning fuels react with sunlight and water vapor."[75] "These can result from fuel combustion in motor vehicles, at power plants, and in other industrial processes."[76]

According to the USEPA:

> [r]oughly one out of every three people in the United States is at a higher risk of experiencing PM[2.5] related health effects. One group at high risk is active children because they often spend a lot of time playing outdoors and their bodies are still developing. In addition, . . . the elderly population [is often] at risk. People of all ages who are active outdoors are at increased risk because, during

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[70] Id.

[71] Id.

[72] Id.

[73] Id.

[74] Id.

[75] Id.

[76] Id.

> physical activity, $PM_{[2.5]}$ penetrates deeper into the parts of the lungs that are more vulnerable to injury.[77]

"The NAAQS are expressed as ambient pollutant concentrations, measured in micrograms per cubic meter ($\mu g/m^3$) [volume of air],[78] and averaged over a specified period of time, usually twenty-four hours or one year." City of Brockton, 469 Mass. at 205, n. 19. "In setting the NAAQS, the [US]EPA relies on criteria developed by [US]EPA staff that [is to] 'accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare' from the pollutant . . . and recommendations of the [USEPA's] Clean Air Scientific Advisory Committee, a seven-member, independent scientific review committee." City of Brockton, 469 Mass. at 205, citing, 42 U.S.C. §§ 7408(a)(2), 7409(d)(2); BP, 2016 MA ENV LEXIS 66, at 41-42. "The [US]EPA reviews and, if necessary, revises the NAAQS every five years." City of Brockton, 469 Mass. at 205, citing, 42 U.S.C. § 7409(d)(1); BP, 2016 MA ENV LEXIS 66, at 42. "In Massachusetts, [MassDEP], in the course of the [air] permitting process for new emission sources, enforces [the] NAAQS in part [through Appendix A of MassDEP's Air Pollution Control Regulations at 310 CMR 7.00] by comparing total level of expected criteria pollutant (the sum of the background concentration and expected emissions from the new source) with the NAAQS." City of Brockton, 469 Mass. at 205-06, citing, G.L. c. 111, § 142D; 310 CMR 7.00; BP, 2016 MA ENV LEXIS 66, at 42.

In 2006, the USEPA established the NAAQS for: (1) 24-hour average concentrations of

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[77] https://www3.epa.gov/pmdesignations/2012standards/faq.htm; BP, 2016 MA ENV LEXIS 66, at 40-41.

[78] One (1) microgram (µg) is approximately 3.5 ounces, https://visualfractions.com/unit-converter/convert, and one (1) cubic meter (m^3) is approximately 35.315 cubic feet of area. https://apps.fs.usda.gov/r6_decaid/views/unit_converter.html.

$PM_{2.5}$ at 35 micrograms per cubic meter ($\mu g/m^3$) volume of air; and (2) annual concentrations of $PM_{2.5}$ at 15 micrograms per cubic meter ($\mu g/m^3$) volume of air. Palmer I, 2012 MA ENV LEXIS 120, at 82-83. Five years later, in April 2011 and while PRE's air permit application seeking approval of the proposed Facility was pending before MassDEP for review, the USEPA recommended that the NAAQS for 24-hour average concentrations of $PM_{2.5}$ remain at 35 micrograms per cubic meter ($\mu g/m^3$) volume of air but that annual concentrations of $PM_{2.5}$ be lowered from 15 micrograms per cubic meter ($\mu g/m^3$) volume of air "to somewhere in the range of 11 to 13 [micrograms per cubic meter ($\mu g/m^3$) volume of air]" in order to better protect public health. Palmer I, 2012 MA ENV LEXIS 120, at 83-84. The USEPA "[made these] recommendations based upon 'observational epidemiological studies that ha[d] reported statistical associations between health effects' and 'PM levels below the then current PM standards, and in the range of the proposed draft standards.'" Id., at 84.

As supported by the expert testimony presented in the evidentiary adjudicatory hearing that took place in Palmer I, the proposed Facility as authorized by the FPA in September 2012 satisfied both the 2006 NAAQS then effect and the 2011 recommended NAAQS. Id., at 85. In January 2013, four months after MassDEP's issuance of the FPA and the court challenge of the FPA was pending in Hampden Superior Court, the USEPA issued the final revised NAAQS commonly known as the 2012 NAAQS, effective March 18, 2013, which lowered the 2006 NAAQS for annual concentrations of $PM_{2.5}$ from 15 micrograms per cubic meter ($\mu g/m^3$) volume of air to 12.0 micrograms per cubic meter ($\mu g/m^3$) volume of air "so as to provide increased protection against health effects associated with long- and short-term exposures (including premature mortality, increased hospital admissions and emergency department visits,

and development of chronic respiratory disease)."[79] However, the 2012 NAAQS retained the 2006 NAAQS standard of 35 micrograms per cubic meter ($\mu g/m^3$) volume of air for 24-hour average concentrations of $PM_{2.5}$.[80]

In 2015, the USEPA augmented its seven-member, independent Clean Air Scientific Advisory Committee ("CASAC") with a Clean Air Scientific Advisory Committee Particulate Matter Review Panel ("CASAC PM Review Panel") to study the effectiveness of the 2012 NAAQS in protecting public health.[81] The CASAC PM Review Panel was comprised of experts "in epidemiology, toxicology, and controlled human exposure studies[,] . . . as well as experts in the measurement and modeling of air pollution, exposure and risk assessment . . . ."[82]

In December 2016, during the final months of the Obama Administration, the CASAC PM Review Panel advised the USEPA's Administrator about the Integrated Review Plan that the Panel had been developed for reviewing air quality criteria and making subsequent science and policy assessments of the 2012 NAAQS.[83] However, two years later in October 2018 during the

[79] 78 FR 3085, 3086 (January 15, 2013); https://www.federalregister.gov/documents/2013/01/15/2012-30946/national-ambient-air-quality-standards-for-particulate-matter. The USEPA established the 12.0 $\mu g/m^3$ standard after "review[ing] thousands of studies[,] . . . includ[ing] more than 300 . . . epidemiological studies [performed from 2006 to 2012]," and after "consider[ing] analyses by agency experts, input from the [USEPA's] independent Clean Air Scientific Advisory Committee[,] . . . and extensive public comments." BP, 2016 MA ENV LEXIS 66, at 44.

[80] Id.

[81] The Need for a Tighter Particulate-Matter Air-Quality Standard, New Eng. J. Med. (August 13, 2020), at 680.

[82] Id.

[83] Id.; chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www3.epa.gov/ttn/naaqs/standards/pm/data/201612-final-integrated-review-plan.pdf.

Trump Administration, the USEPA "dismissed [the CASAC PM Review Panel] . . . just before the [Panel's] draft science assessment [of the 2012 NAAQS] was released."[84]

Although the USEPA disbanded the CASAC PM Review Panel to study the NAAQS, USEPA scientific staff continued to study the 2012 NAAQS. In January 2020, the USEPA released a risk assessment study that USEPA scientific staff had performed of the 2012 NAAQS ("the 2020 USEPA Staff NAAQS Risk Assessment Study" or "the Study") to determine whether they were protective enough of public health.[85] The Study focused on: "(a) total mortality (all-cause and non-accidental), ischemic heart disease ("IHD") mortality,[86] and lung cancer mortality associated with long term $PM_{2.5}$ exposures and (b) total mortality associated with short-term $PM_{2.5}$ exposures."[87] The Study "estimate[d] health risks associated with air quality adjusted to simulate 'just meeting' the [2012] $PM_{2.5}$ [NAAQS] standards (i.e., the annual

[84] New Eng. J. Med. (August 13, 2020), at 680. After the USEPA disbanded the CASAC PM Review Panel, the Panel's members continued to study the NAAQS as a private scientific research panel entitled the Independent Particulate Matter Review Panel ("Ind. PM Review Panel"). Id. In October 2019, the Ind. PM Review Panel completed its study of the NAAQS and set forth the study's findings in a report it submitted to the USEPA Administrator, which "concluded that the current [2012] $PM_{2.5}$ standards [were] insufficient to protect public health [based on the Panel's] review of the scientific evidence from epidemiologic studies, toxicologic studies in animals, and controlled human exposure studies." Id. The Ind. PM Review Panel recommended that the annual NAAQS standard for $PM_{2.5}$ of 12.0 $\mu g/m^3$ be lowered to a figure between 10 $\mu g/m^3$ and 8 $\mu g/m^3$ because it would better protect the general public and at-risk groups. Id., at 681. The Panel also recommended that the 24-hour NAAQS standard for $PM_{2.5}$ be lowered from 35 $\mu g/m^3$ to a figure between 30 $\mu g/m^3$ and 25 $\mu g/m^3$. Id., at 682. In making these recommendations, the Panel "advised [the USEPA] that [in the interest of environmental justice], disparities in health risk borne by minority communities need[ed] to be taken into consideration in [the USEPA's establishment of the NAAQS]." Id., at 681-82.

[85] Policy assessment for the review of the National Ambient Air Quality Standards for particulate matter: EPA-452/R-20-002. Research Triangle Park, NC: Environmental Protection Agency, January 2020, at pp. 3-80 through 3-108.

[86] Ischemic heart disease or IHD "[is] the term given to heart problems caused by narrowed heart arteries." https://www.heart.org/en/health-topics/heart-attack/about-heart-attacks/silent-ischemia-and-ischemic-heart-disease. "When arteries are narrowed, less blood and oxygen reac[h] the hear muscle [and] [t]his [condition] is also called coronary artery disease and coronary heart disease [which] can ultimately lead to [a] heart attack." Id.

[87] Jan. 2020 USEPA Staff NAAQS Risk Assessment, at p. 3-83.

standard with its level of 12.0 [micrograms per cubic meter ($\mu g/m^3$) volume of air] and the 24-hour standard with its level of 35 [micrograms per cubic meter ($\mu g/m^3$) volume of air]" and "additionally evaluate[d] the potential for alternative annual [NAAQS] standards with levels of 9.0, 10.0 and 11.0 [micrograms per cubic meter ($\mu g/m^3$) volume of air] to reduce estimated risk, relative to the current standards."[88] "[T]o provide insight into the possible public health implications of a revised 24-hour [NAAQS] standard, [the Study] also examined an alternative lower 24-hour [NAAQS] standard . . . level of 30 [micrograms per cubic meter ($\mu g/m^3$) volume of air]."[89]

The Study determined that all-cause mortality from long-term exposure to $PM_{2.5}$, calculated based on the 2015 air quality adjusted to just meet the existing 2012 NAAQS standards, "[was] estimated to be associated with as many as 52,100 premature deaths [annually], including 16,800 IHD deaths and 3,950 lung cancer deaths, . . . across [] 47 [urban] study areas (and approximately 54 million people over the age of 30)."[90] The Study determined that "[t]hese estimates account[ed] for approximately 3-9% of all-cause, 13-14% of IHD, and 9% of lung cancer mortality in these areas, respectively" and that "[s]hort-term $PM_{2.5}$ exposures [were] estimated to be associated with up to 3,870 deaths annually across the 47 study areas."[91]

The Study also determined that "[c]ompared to the current annual [2012 NAAQS] standard [of 12.0 micrograms per cubic meter ($\mu g/m^3$) volume of air], air quality adjusted to

[88] Id., at p. 3-84.

[89] Id.

[90] Id., at p. 3-88.

[91] Id.

meet [several] alternative [lower] annual [NAAQS] standards . . . [resulted in] reductions in estimated IHD mortality risk" as follows:

> (1) a 7 to 9% reduction in estimated IHD mortality risk with an annual NAAQS level of 11.0 micrograms per cubic meter ($\mu g/m^3$) volume of air;
>
> (2) a 14 to 18% reduction in estimated IHD mortality risk with an annual NAAQS level of 10.0 micrograms per cubic meter ($\mu g/m^3$) volume of air; and
>
> (3) a 21 to 27% reduction in estimated IHD mortality risk with an annual NAAQS level of 9.0 micrograms per cubic meter ($\mu g/m^3$) volume of air.[92]

The Study concluded "[that] [w]hen taken together[,] [specifically,] . . . the available scientific evidence, air quality analyses, and the risk assessment[,] . . . can reasonably be viewed as calling into question the adequacy of the public health protection afforded by the combination of the current [2012] annual and 24-hour [NAAQS] $PM_{2.5}$ standards."[93] As such, the Study indicated "that (1) it [was] appropriate [for the USEPA] to consider revising the level of the current annual [2012 NAAQS] standard [of 12.0 micrograms per cubic meter ($\mu g/m^3$) volume of air] . . . to increase public health protection against fine particulate exposures and (2) depending on the decision made on the annual standard, consideration could be given to either retaining or revising the [current 2012 NAAQS] level of the 24-hour $PM_{2.5}$ standard of [35 micrograms per cubic meter ($\mu g/m^3$) volume of air]."[94]

In response to the Study's findings (and those of the Ind. PM Review Panel),[95] the

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[92] Id., at p. 3-93.

[93] Id., at p. 3-106.

[94] Id., at pp. 3-107 to 3-108.

[95] See n. 84, at p. 60, above.

USEPA did not revise the 2012 NAAQS standards. Instead, in April 2020, the USEPA proposed that the 2012 NAAQS for both the annual concentrations of $PM_{2.5}$ at 12.0 micrograms per cubic meter ($\mu g/m^3$) volume of air and the 24-hour average concentrations of $PM_{2.5}$ at 35 micrograms per cubic meter ($\mu g/m^3$) volume of air be retained as being protective of public health.[96] Later, in December 2020, the USEPA issued a Final Decision retaining the 2012 NAAQS.[97]

However, on June 10, 2021, the USEPA under the Biden Administration "announced that it [would] reconsider the previous [Trump] [A]dministration's [December 2020 Final] [D]ecision to retain the [2012 NAAQS for $PM_{2.5}$] . . . because available scientific evidence and technical information indicate[d] that the [2012 NAAQS] standards [might] not be adequate to protect public health and welfare, as required by the [federal CAA]."[98] In announcing the USEPA's decision to reconsider the 2012 NAAQS, recently appointed USEPA Administrator Michael S. Regan ("Administrator Regan") stated that "[t]he most vulnerable among us are most at risk from exposure to particulate matter, and[,] [accordingly, it was very] important [for the USEPA to] take a hard look at [the 2012 NAAQS] [S]tandards that [had not] been updated in nine years."[99] Administrator Regan also stated that "[the] [US]EPA [was] committed to ensuring

[96] Review of the National Ambient Air Quality Standards for Particulate Matter. Washington, D.C.: Environmental Protection Agency, April 30, 2020 (https://www.federalregister.gov/documents/2020/04/30/2020-08143/review-of-the-national-ambient-air-quality-standards-for-particulate-matter).

[97] chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.govinfo.gov/content/pkg/FR-2020-12-18/pdf/2020-27125.pdf.

[98] https://www.epa.gov/newsreleases/epa-reexamine-health-standards-harmful-soot-previous-administration-left-unchanged, at p. 1.

[99] Id.

[that its NAAQS] review . . . reflect[ed] the latest science and public health data."[100]

The USEPA's 2021 announcement to reconsider the 2012 NAAQS noted that:

(1) "[a] strong body of scientific evidence [demonstrated] that long- and short-term exposures to fine particles ($PM_{2.5}$) [could] harm people's health, leading to heart attacks, asthma attacks, and premature death";[101]

(2) "[l]arge segments of the U.S. population, including children, people with heart or lung conditions, and people of color, are at risk of health effects from $PM_{2.5}$";[102]

(3) "a number of recent studies ha[d] examined relationships between COVID and air pollutants, including PM, and potential health implications";[103] and

(4) "[w]hile some PM is emitted directly from sources such as construction sites, unpaved roads, fields, smokestacks or fires, most particles form in the atmosphere as a result of complex reactions of chemicals such as sulfur dioxide and nitrogen oxides, which are pollutants emitted from power plants, industrial facilities and vehicles."[104]

In its announcement, the USEPA acknowledged the findings of the 2020 USEPA Staff NAAQS Risk Assessment Study discussed above by noting that "[the Study had] concluded that the scientific evidence and information support[ed] revising the level of the annual standard for the PM NAAQS to below the current level of 12 [micrograms per cubic meter ($\mu g/m^3$) volume of air] while retaining the [current] 24-hour standard [of 35 micrograms per cubic meter ($\mu g/m^3$)

[100] Id.

[101] Id., at p. 2.

[102] Id.

[103] Id.

[104] Id.

volume of air]."[105]

The USEPA stated in its announcement that "[it would] move expeditiously to reconsider the decision to retain the particulate matter NAAQS, in a manner that adhere[d] to rigorous standards of scientific integrity and provide[d] ample opportunities for public input and engagement."[106] The USEPA stated that this would include the agency "tak[ing] into account the most up-to-date science, including new studies in the emerging area of COVID-related research" and that the revised policy assessment of the 2012 NAAQS "[would] be reviewed at a public meeting by the [USEPA's] Clean Air Scientific Advisory Committee (CASAC), supported by a particulate matter review panel of scientific experts on the health and welfare impacts of PM."[107] The USEPA stated that it "expect[ed] to issue a proposed rulemaking in [the] Summer [of] 2022 and a final rule in [the] Spring [of] 2023, following an open, transparent process with opportunities for public review and comment," and that "[i]n accordance with [U.S. Presidential] Executive Orders and guidance, the agency [would] be considering environmental justice during the rulemaking process."[108]

To sum up, it was reasonable for MassDEP in April 2021 to revoke the FPA and require PRE to submit a new air permit application for the proposed Facility pursuant to MassDEP's Air Pollution Control Regulations at 310 CMR 7.00 containing an updated air modeling study of the proposed Facility that considered changes in the surrounding ambient air quality. Such an updated air modeling study was warranted given the major scientific

[105] Id.

[106] Id.

[107] Id.

[108] Id.

and regulatory debate that had ensued during the nearly nine years since MassDEP had issued the FPA in September 2012 regarding whether the 2012 NAAQS adequately protected public health, which PRE's witness, Mr. Raczynski, did not discuss in his testimony. As discussed in the next section, such an updated review was also warranted by EEA's then in effect 2017 EJ Policy which had been recently reinforced by the enactment of the 2021 Climate Act.

B. MassDEP Had a Rational Basis to Revoke the FPA Pursuant to EEA's 2017 EJ Policy Which the 2021 Climate Act Reinforced

As previously noted above, at pp. 3-5, MassDEP also supported its revocation of the FPA for PRE's failure to commence construction of the proposed Facility within the required two-year construction start period of 310 CMR 7.02(3)(k) based on the EJ directives of EEA's then in effect 2017 EJ Policy which MassDEP claimed had been reinforced by the Massachusetts Legislature's recent enactment of the 2021 Climate Act.[109] Specifically, MassDEP asserted the following.

First, MassDEP stated that EEA's 2017 EJ Policy "directed all EEA agencies[,] [including MassDEP,] to make [E]nvironmental [J]ustice 'an integral consideration to the extent applicable and allowable by law in the implementation of all EEA programs, including but not limited to, . . . the promulgation, implementation[,] and enforcement of laws, regulations, and Policies.'"[110]

Second, MassDEP stated that EEA's 2017 EJ Policy "further directed all EEA

[109] Revocation Order, at pp. 3-4.

[110] Revocation Order, at p. 3; EEA's 2017 EJ Policy, at p. 4.

agencies[,] [including MassDEP,] take direct action 'to address environmental and health risks associated with existing and potential new sources of pollution by . . . ensuring that existing facilities in these [Environmental Justice] neighborhoods comply with [the Commonwealth's] environmental, energy, and climate change rules and regulations."[111]

Third, MassDEP stated that EEA's 2017 EJ Policy recognized that "[E]nvironmental [J]ustice communities face 'existing large and small sources of pollution[,] . . . which can pose risks to public health and the environment.'"[112]

Fourth, MassDEP stated EEA's 2017 EJ Policy recognized that "the need for increased [EEA] agency attention[,] [including from MassDEP,] 'on communities that [were] built in and around the [Commonwealth's] oldest areas with a legacy of environmental pollution, particularly in areas with residents who ha[d] elevated rates of disease and health burdens."[113]

Fifth, MassDEP stated that the 2021 Climate Act reinforced the EJ directives of EEA's 2017 EJ Policy as set forth above by making amendments to the Massachusetts Environmental Policy Act ("MEPA"), G.L. c. 30, §§ 61-62K, and the Massachusetts Global Warming Solutions Act ("GWSA"), G.L. c. 21N, which codified environmental justice requirements and required MassDEP to promulgate with public input regulations requiring MassDEP to conduct

[111] Revocation Order, at p. 3; EEA's 2017 EJ Policy, at pp. 4-5.

[112] Revocation Order, at p. 3; EEA's 2017 EJ Policy, at pp. 1-2.

[113] Revocation Order, at p. 3; EEA's 2017 EJ Policy, at p. 2.

"cumulative impact analyses for defined categories of air quality permits."[114]

Sixth, MassDEP stated that the 2021 Climate Act's amendments to MEPA and GWSA and mandate requiring MassDEP's adoption of regulations requiring "cumulative impact analyses for defined categories of air quality permits" reflected or "underscore[d] the importance of requiring [an] updated and expanded assessment of the air pollution impacts of the proposed PRE [Facility]."[115]

Lastly, MassDEP stated that the importance of requiring an updated and expanded assessment of the proposed Facility's air pollution impacts on the Springfield community in accordance with EEA's 2017 EJ Policy, as reinforced by the 2021 Climate Act, specifically "an updated review of [1] [the] technologies involved in the burning of biomass"; [2] "[the] Best Available Control Technology for air pollution mitigation"; [3] "[air] modeling that consider[ed]

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[114] Revocation Order, at p. 3, n.1. "Cumulative impacts are the total effect of past, present, and future actions on the environment and human health [and] [e]valuating these effects is the focus of [a] cumulative impact analysis[.]" https://www.mass.gov/info-details/cumulative-impact-analysis-in-air-quality-permitting. As the USEPA has explained:

> Cumulative Impacts refers to the total burden – positive, neutral, or negative – from chemical and non-chemical stressors and their interactions that affect the health, well-being, and quality of life of an individual, community, or population at a given point in time or over a period of time. Cumulative impacts include contemporary exposures in various environments where individuals spend time and past exposures that have lingering effects. Total burden encompasses direct health effects and indirect effects to people through impacts on resources and the environment that affect human health and well-being. Cumulative impacts provide context for characterizing the potential state of vulnerability or resilience of the community, i.e., their ability to withstand or recover from additional exposures under consideration.
>
> [A] Cumulative Impact Assessment [or Analysis] is the process [that] . . . requires consideration and characterization of total exposures to both chemical and non-chemical stressors, as well as the interactions of those stressors, over time across the affected population. [A] [c]umulative impact assessment [or] [analysis] explores how stressors from the built, natural, and social environments affect people, potentially causing or exacerbating adverse outcomes. . . .

chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.epa.gov/system/files/documents/2022-01/ord-cumulative-impacts-white-paper_externalreviewdraft-_508-tagged_0.pdf.

[115] Revocation Order, at p. 3, n.1.

changes in the surrounding ambient air quality"; and [4] "the impact on the community that would result from the [proposed] [F]acility's emissions"[116] was warranted by the facts that:

(1) the proposed Facility "[would be] located in Springfield, which is an [E]nvironmental [J]ustice community with many contaminated sites and sources of air and water pollution, and high rates of respiratory illness and other diseases that [could] be caused by air and other types of pollutants;"[117]

(2) "COVID-19 [infection] rates [were] particularly high in Springfield [causing an] increased concern, given multiple studies establishing a relationship between low-income and minority communities with elevated air pollution levels and increased severity of disease and/or mortality for COVID-19 patients in these communities;"[118]

(3) the FPA "[had been] issued . . . on September 11, 2012, almost nine years [earlier]";[119] and

(4) "[a] heightened focus on environmental and health impacts on [E]nvironmental [J]ustice populations" had occurred during that near nine-year period since the FPA had been issued, as reflected by EEA's 2017 EJ Policy and the 2021 Climate Act.[120]

As discussed in detail below, based on my review of EEA's 2017 EJ Policy and the 2021 Climate Act and a preponderance of the evidence presented by MassDEP's and PRE's respective witnesses, I find that MassDEP's grounds for revoking the FPA pursuant to EEA's 2017 EJ Policy, as reinforced by the 2021 Climate Act, were more than proper.

1. <u>The Intent of EEA's 2017 EJ Policy</u>

It is undisputable that EEA's 2017 EJ Policy was in effect prior to MassDEP's revocation

[116] Revocation Order, at p. 4.

[117] Revocation Order, at p. 3.

[118] Revocation Order, at pp. 3-4.

[119] Revocation Order, at p. 4.

[120] Revocation Order, at p. 4.

of the FPA on April 2, 2021. What is disputed is PRE's claim as reflected by the testimony of its witness, Mr. Raczynski, that "the [P]olicy would not have significantly changed any of the actions required of PRE during the permitting process, because PRE took all of the steps that the . . . Policy would have required if it applied to PRE's application." Mr. Raczynski's Direct PFT, ¶ 6. I am not persuaded by Mr. Raczynski's testimony.

MassDEP is correct that EEA's 2017 EJ Policy required all EEA agencies, including MassDEP, "[to make] [E]nvironmental [J]ustice . . . an integral consideration to the extent applicable and allowable by law in . . . the promulgation, implementation[,] and enforcement of laws, regulations, and policies . . . ."[121] In my view, this Policy directive required MassDEP to make environmental policy decisions and develop, implement, and enforce environmental laws, regulations, and policies in a manner that promoted environmental equity in the Commonwealth, and MassDEP's revocation of the FPA was consistent with that environmental equity directive.

Promoting environmental equity was the centerpiece of EEA's 2017 EJ Policy (as it is under EEA's current 2021 Policy) because as stated in the Policy Environment Justice "is based on the principle that ***all people have a right to be protected from*** environmental hazards ***and to live in and enjoy*** a clean and healthful environment ***regardless*** of [their background, including but not limited to, their] . . . income, ethnicity, class, handicap, race, color, religious creed, national origin, sex, gender identity, sexual orientation, genetic information[,] ancestry[,] or

[121] EEA's 2017 EJ Policy, at p. 4.

[ability to speak and/or understand the English language]."[122] Put another way, Environmental Justice "***is the equal protection and meaningful involvement of all people and communities*** with respect to the development, implementation, and enforcement of . . . environmental laws, regulations, and policies and the equitable distribution of . . . environmental benefits and burdens."[123]

As discussed below, my findings that EEA's 2017 EJ Policy required MassDEP to make environmental policy decisions and develop, implement, and enforce environmental laws, regulations, and policies in a manner that promoted environmental equity in the Commonwealth, and that MassDEP's revocation of the FPA was consistent with that environmental equity directive is supported by: (1) Massachusetts Gubernatorial Executive Order 552 issued in November 2014 ("Executive Order 552"), which led to EEA's issuance of its 2017 EJ Policy; (2) EEA's governing statute, G.L. c. 21A, which authorized EEA to issue its 2017 EJ Policy; (3) key components or requirements of EEA's 2017 EJ Policy; (4) the 2021 Climate Act, which reinforced the EJ directives of EEA's 2017 EJ Policy; and (5) the highly persuasive testimony from MassDEP's witnesses, Ms. Kirby and Ms. Simpson, supporting MassDEP's

[122] EEA's 2017 EJ Policy, at p. 3 (definitions of "Environmental Justice" and "Equal Protection"). EEA's 2021 EJ Policy, at p. 4 provides that:

> "Environmental Justice Principles" are principles that support protection from environmental pollution and the ability to live and enjoy a clean and healthy environment, regardless of race, color, income, class, handicap, gender identity, sexual orientation, national origin, ethnicity or ancestry, religious belief[,] or English language proficiency, which includes: (i) the meaningful involvement of all people with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies, including climate change policies; and (ii) the equitable distribution of energy and environmental benefits and environmental burdens."

[123] EEA's 2017 EJ Policy, at p. 3 (definition of "Environmental Justice").

Environmental Justice grounds for revoking the FPA pursuant to EEA's 2017 EJ Policy.

a. The Provisions of Executive Order 552 Mandating Environmental Equity in the Commonwealth

EEA's 2017 EJ Policy has its roots in Executive Order 552 which was issued "to encourage sustained and continued efforts [then] and into the future to ensure that environmental justice remain[ed] a priority for the executive branch [of the Commonwealth's government]."[124] The Order stated that:

> (1) Environmental Justice means that ***all people*** have a right to be protected from environmental pollution and to live in and enjoy a clean and healthy environment regardless of race, income, national origin or English language proficiency;[125]
>
> (2) ***Environmental justice populations are*** discrete and identifiable communities, ***mostly lower income and of color***, ***that are at risk of being disparately and negatively impacted by environmental policies and overburdened*** by a higher density of known contaminated sites and by air and water pollution;[126] and
>
> (3) ***All residents of the Commonwealth*** should be involved in the development, implementation, and enforcement of environmental laws, regulations, and policies, as well as equal beneficiaries of them.[127]

The Order directed EEA to, among other things, update its existing 2002 EJ Policy, which,

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[124] EEA's 2017 EJ Policy, at p. 2; Executive Order 552, at p. 2 (7th Whereas Clause).

[125] Executive Order 552, at p. 1 (2nd Whereas Clause) (emphasis supplied).

[126] Executive Order 552, at p. 1 (3rd Whereas Clause) (emphasis supplied). This inequitable environmental socio-economic condition is not unique to Massachusetts but exists in other areas of the United States. See e.g. RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) ("The Color of Law"), at pp. 48-57. In the Color of Law, Rothstein has made a compelling argument based on extensive historic and legal research that the cause for this inequitable environmental socio-economic condition is racial and economic segregation resulting from a century or more of local, state, and/or federal housing and land use (zoning) policies and laws that have made privately owned housing in many neighborhoods in the United States unaffordable for lower-income families of all races to purchase or rent and restricted them to living in areas near contaminated and abandoned sites, industrial facilities, and other sources of pollution. Id.

[127] Executive Order 552, at p. 1 (4th Whereas Clause) (emphasis supplied).

according to the Order had "ensure[d] [since the Policy's adoption in 2002] that environmental justice [be] an integral consideration in the development and implementation of all state programs . . . ."[128] The Order directed that EEA's updated EJ Policy include provisions:

> [1] ensuring equal compliance and enforcement for facilities subject to environmental regulatory programs and/or permitting requirements and located in geographic areas with identified Environmental Justice Populations,[129]
>
> [2] establishing a process for reviewing which MEPA[130] thresholds apply for enhanced public participation and substantive review,[131]
>
> [3] ensuring brownfield remediation in Environmental Justice Population areas,[132] and
>
> [4] creating an online Environmental Justice repository of information about the Commonwealth's environmental justice initiatives for the general public and project proponents.[133]

b. The Provisions of EEA's Governing Statute, G.L. c. 21A, Authorizing EEA to Adopt Policies and Directives Requiring EEA Agencies, Including MassDEP, to Promote Environmental Equity in Carrying Out the Commonwealth's Environmental Policy

G.L. c. 21A, § 2 provides that "[EEA] and its appropriate departments and divisions shall carry out the [Commonwealth's] environmental policy" and enumerates 30 duties specifying how they are to do so. These duties include those set forth in G.L. c. 21A, §§ 2(1), 2(17), and

[128] Executive Order 552, at p. 2 (5th Whereas Clause) and p. 3 (§ 3). EEA's 2002 EJ Policy was in effect on September 11, 2012 when MassDEP issued the FPA authorizing PRE's construction of the proposed Facility.

[129] Executive Order 552, at p. 3, § 3. Id. (numerical reference supplied).

[130] "MEPA" is the acronym for the Massachusetts Environmental Policy Act, G.L. c. 30, §§ 61-62K. I discuss MEPA below, at pp. 98-103.

[131] Executive Order 552, at p. 3, § 3. Id. (numerical reference supplied).

[132] Executive Order 552, at p. 3, § 3. Id. (numerical reference supplied).

[133] Executive Order 552, at p. 3, § 3. Id. (numerical reference supplied).

2(30), which EEA cited in its 2017 EJ Policy for its legal authority to issue the Policy[134] and provide a legal basis for EEA to adopt policies and directives requiring all EEA agencies, including MassDEP, to perform their duties in a manner that promotes environmental equity in the Commonwealth. These provisions authorize "[EEA] and its appropriate departments and divisions [to do the following in] carry[ing] out the [Commonwealth's] environmental policy":

(1) G.L. c. 21A, § 2(1): "develop policies, plans, and programs for carrying out [EEA's] assigned duties [and those of EEA's agencies]";

(2) G.L. c. 21A, § 2(17): "analyze and make recommendations, in cooperation with other state and regional agencies, concerning the development of energy policies and programs in the commonwealth"; and

(3) G.L. c. 21A, § 2(30): "consistent with [the GWSA, G.L. 21N], oversee state agency efforts to address and diminish the impacts of climate change by coordinating state agency actions to achieve the greenhouse gas emissions limits established in [G.L. c.] 21N.

There are other duties enumerated in G.L. c. 21A, § 2 not mentioned in EEA's 2017 Policy, which in my view, also authorized EEA to issue its 2017 EJ Policy and provide an additional legal basis for EEA to adopt policies and directives requiring all EEA agencies, including MassDEP, to perform their duties in a manner that promotes environmental equity in the Commonwealth. These duties are those set forth in G.L. c. 21A, §§ 2(2), 2(10), 2(22), and 2(28) and authorize "[EEA] and its appropriate departments and divisions [to do the following in] carry[ing] out the [Commonwealth's] environmental policy":

(1) G.L. c. 21A, § 2(2): "provide for the management of ***air***, water and land ***resources to assure*** the protection and ***balanced utilization of such resources*** within the commonwealth, ***realizing that*** providing safe water to drink and ***clean air to breathe is a basic mandate***" (emphasis supplied);

(2) G.L. c. 21A, § 2(10): "provide for the prevention and abatement of water,

[134] EEA's 2017 EJ Policy, at p. 2.

land, ***air***, noise, and other ***pollution*** or environmental degradation" (emphasis supplied);

(3) G.L. c. 21A, § 2(22): "***encourage, support, and undertake research and development*** and maintain laboratory and other research facilities to produce information ***relating to*** the ecological system***, pollution prevention and abatement***, resource management, and other areas essential to implementing the environmental policies of the commonwealth" (emphasis supplied); and

(4) G.L. c. 21A, § 2(28): "promulgate rules and regulations necessary to carry out [EEA's] statutory responsibilities [and those of EEA's agencies]."

c. The Provisions of EEA's 2017 EJ Policy Requiring EEA Agencies, Including MassDEP, to Perform their Duties in a Manner that Promoted Environmental Equity in the Commonwealth

(1) The Policy's Citation to Article 97 of the Amendments to the Massachusetts Constitution and the Policy's Definitions of "Environmental Justice", "Equal Protection", "Meaningful Involvement", and "Environmental Benefits"

In accordance with the directives of Executive Order 552 and EEA's authority under its governing statute, G.L. c. 21A, as discussed above, on January 31, 2017, EEA updated the then existing 2002 EJ Policy by replacing it with EEA's 2017 EJ Policy.[135] From the outset, EEA's 2017 EJ Policy made clear its intent to promote environmental equity in the Commonwealth by citing Article 97 of the Amendments to the Massachusetts Constitution ("Article 97"). Article 97 provides in relevant part that "***[t]he people shall have the right to clean air and water,*** . . . ***and protection of the people in their right to the conservation*** [of] . . . ***water, air[,] and other natural resources*** . . . ***is . . . a public purpose***."[136] (emphasis supplied). In my view, this

[135] EEA's 2017 EJ Policy, at pp. 1-2, 14.

[136] EEA's 2017 EJ Policy, at p.1 (emphasis supplied).

provision of Article 97 means that ***all the people*** of the Commonwealth "have the right to clean air and water. . . [and] to [their] conservation" regardless of their background, including but not limited to, their income, ethnicity, class, handicap, race, color, religious creed, national origin, sex, gender identity, sexual orientation, genetic information, ancestry, or ability to speak and/or understand the English language.[137] This principle was reinforced multiple times over by other provisions of EEA's 2017 EJ Policy, including by its definitions of "Environmental Justice", "Equal Protection", "Meaningful Involvement", and "Environmental Benefits."

The Policy defined "Environmental Justice" as:

> (1) "the principle that ***all people have a right to be protected from*** environmental hazards ***and to live in and enjoy*** a clean and healthful environment ***regardless*** of [their background, including but not limited to,] race, color, national origin, income, or English language proficiency; and
>
> (2) "the ***equal protection and meaningful involvement of all people and communities*** with respect to the development, implementation, and enforcement of . . . environmental laws, regulations, and policies and the equitable distribution of . . . environmental benefits and burdens."[138]

"Equal Protection" was defined as:

> ***[the] protection of all groups of people, including all federal and state protected classes*** under Title VI of the federal Civil Rights Act of 1964 . . . [and] M.G.L. Chapter 151B, regardless of income, ethnicity, class, handicap, race, color, religious creed, national origin, sex, gender identity, sexual orientation, genetic information, or ancestry ***from an unfair burden of environmental hazard from***

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[137] In the words of the late Justice Harlan:

> There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards [humans] as [humans], and takes no account of [their] surroundings or of [their] color when [their] civil rights as guaranteed by the supreme law of the land are involved.

Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting).

[138] EEA's 2017 EJ Policy, at p. 3 (definition of "Environmental Justice") (emphasis supplied).

> ***industrial, commercial, state[,] and municipal operations*** or limited access to natural resources, including green space (open space) and water resources, and energy resources, including energy efficiency and renewable energy generation.[139]

"Meaningful Involvement" was defined as "mean[ing] that ***all neighborhoods***" in the Commonwealth:

> (1) "have the right and opportunity to participate in energy, climate change, and environmental decision-making including needs assessment, planning, implementation, compliance and enforcement, and evaluation";
>
> (2) "are enabled and administratively assisted to participate fully through education and training";
>
> (3) "are given transparency/accountability by government with regard to community input"; and
>
> (4) "[are] encouraged to develop environmental, energy, and climate change stewardship."[140]

Lastly, "Environmental Benefits" were defined as "***access to*** funding, training, open space, ***enforcement***, technical assistance, training, or other beneficial resources disbursed by EEA, its agencies and its offices."[141]

(2) The Policy's Recognition of Environmental Justice Populations and Their Having Borne Unfair or <u>Disproportionate Burdens of Environmental Hazards</u>

As reflected by its definitions of "Environmental Justice", "Equal Protection", "Meaningful Involvement", and "Environmental Benefits" as discussed above, EEA's 2017 EJ Policy aimed to promote environmental equity in the Commonwealth by, among other things,

[139] EEA's 2017 EJ Policy, at p. 3 (definition of "Equal Protection") (emphasis supplied).

[140] EEA's 2017 EJ Policy, at p. 4 (definition of "Meaningful Involvement") (emphasis supplied).

[141] EEA's 2017 EJ Policy, at p. 3 (definition of "Environmental Benefits") (emphasis supplied).

"***protect[ing] [] all groups of people*** . . . regardless of [their] income, ethnicity, class, handicap, race, color, religious creed, national origin, sex, gender identity, sexual orientation, genetic information, or ancestry ***from an unfair burden of environmental hazard[s]"*** from various sources, including from industrial and commercial operations. In furtherance of that goal, the Policy recognized communities in the Commonwealth that the Policy described as Environmental Justice Populations ("EJ Populations"), which had been unfairly or disproportionately burdened by environmental hazards from industrial and/or commercial operations. Specifically, the Policy stated that "the need for environmental justice ha[d] been most widely recognized in communities of color and low-income communities" and that "build[ing] on federal environmental justice guidelines established [by the Clinton Administration in 1994 through its issuance of] Federal Executive Order 12898,"[142] the Policy "ha[d] been developed in ways that reflect[ed] the needs and circumstances specific to

[142] EEA's 2017 EJ Policy, at p. 4. The federal environmental justice guidelines, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," required all federal agencies, including the USEPA:

> [t]o the greatest extent practicable and permitted by law, . . . [to] make environmental justice part of [their] mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of [their] programs, policies, or activities on minority populations and low-income populations in the United States . . . .

In Re Chemical Waste Management of Indiana, Inc. ("CWMII"), RCRA Appeal Nos. 95-2 & 95-3, 6 E.A.D. 66, 69, 1995 EPA App. LEXIS 25 (1995); and 59 Fed. Reg. 7629 (Feb. 16, 1994). The federal environmental justice guidelines also required:

> [e]ach Federal agency [to] conduct its programs, policies, and activities that substantially affect human health and the environment, in a manner that ensure[d] that such programs, policies, and activities [did] not have the effect of . . . subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.

6 E.A.D. at 69, citing, 59 Fed Reg. at 7630-31.

Massachusetts."[143]

(a) The Policy's Definition of EJ Populations

The EEA's 2017 EJ Policy defined EJ Populations as:

> neighborhood[s][144] where 25 percent of the households ha[d] an annual median household income that [was] equal to or less than 65 percent of the statewide median ***or*** 25% of its population [was] Minority ***or*** identifie[d] as a household that ha[d] English Isolation.[145]

For those individuals in EJ Populations that were vulnerable health-wise, the Policy recognized that group of individuals as "Vulnerable Health EJ Populations" which the Policy defined as being:

> segments of the [EJ] population that ha[d] evidence of higher than average rates of environmentally-related health outcomes, including but not limited to childhood asthma, low birth weight, childhood lead poisoning, and/or heart disease morbidity.[146]

The Policy acknowledged that "[m]any EJ populations are located in densely populated urban neighborhoods, in and around the [Commonwealth's] oldest industrial sites . . . [and that] [t]hese high-minority/low-income neighborhoods sometimes encompass only a small portion of

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[143] EEA's 2017 EJ Policy, at 4.

[144] The Policy defined a "neighborhood" as being "a census block group [of people] as defined by the U.S. Census Bureau, but not including people [living] in college dormitories [and] people under formally authorized, supervised care or custody (i.e. in federal or state prisons)." EEA's 2017 EJ Policy, at p. 4 (definition of "Neighborhood").

[145] EEA's 2017 EJ Policy, at p. 3 (emphasis supplied). The Policy defined "Minority" as:

> individuals who identif[ied] themselves Latino/Hispanic, Black/African American, Asian, Indigenous people, and people who otherwise identif[ied] as non-white.

Id., at p. 4. "English Isolation" was defined as:

> refer[ring] to households that [were] English Language Isolated according to federal census forms, or [did] not have an adult over the age of 14 that [spoke] only English or English well.

Id., at p. 3.

[146] EEA's 2017 EJ Policy, at p. 3.

the land area[,] . . . but they host, or are in close proximity to, many of the [Commonwealth's] contaminated and abandoned sites, regulated facilities, and sources of pollution."[147] Recognizing this, the Policy stated that "[w]orking with these EJ populations, EEA [and its agencies would] take direct action as part of the [Policy's] implementation" to achieve several goals, including "address[ing] environmental and health risks associated with existing and potential new sources of pollution."[148] The Policy set forth several mechanisms for EEA and its agencies to utilize in achieving these goals, including: (1) "[e]nhancing opportunities for residents to participate in environmental, energy, and climate change decision-making"[149]; and (2) "[e]nhancing the environmental review of new or expanding significant sources of environmental burdens in these neighborhoods,"[150] by "address[ing] health disparities [and conducting] enhance[d] . . . review of significant new or expanding facilities presenting potential adverse impacts to public health or the environment . . . ."[151]

(b) The Policy's Requirements for Enhanced Participation of Members of EJ Populations in Environmental Decision-Making

Consistent with the Policy's requirement mandating enhanced opportunities for EJ residents to participate in environmental, energy, and climate change decision-making, in May 2020, MassDEP adopted a Public Involvement Plan ("PIP Plan"). Ms. Kirby's Direct PFT, ¶ 25;

[147] EEA's 2017 EJ Policy, at p. 7; See also n. 126, at p. 72 above.

[148] EEA's 2017 EJ Policy, at p. 7.

[149] EEA's 2017 EJ Policy, at p. 5.

[150] Id., at p. 5.

[151] Id., at p. 7.

Exhibit CK- 5 attached to Ms. Kirby's Direct PFT. As Ms. Kirby testified on behalf of MassDEP, "[o]ne of the purposes of the PIP [Plan] is [for MassDEP] to [obtain] early involvement from [EJ] communities that may be most impacted by a proposed new or modified facility [subject to MassDEP's environmental permitting]." Ms. Kirby's Direct PFT, ¶ 25. Ms. Kirby testified that "[i]t is critically important [for MassDEP] to hear from the [EJ] population [impacted by a proposed new or modified facility] at the beginning of the air-permitting process so that members of the [EJ] population have an opportunity to hear from the project owners on what they are proposing to build . . . and voice their concerns about how it will impact them since they are uniquely qualified to provide input and have firsthand knowledge about the environmental and public health issues they are affected by in their daily lives by living in the EJ area." Id.

Ms. Kirby testified that in accordance with MassDEP's PIP Plan, new sources of pollution subject to MassDEP's air permitting must adopt individual PIP [Plans] for the proposed project that must satisfy the following requirements.

First, the individual PIP Plan must establish a partnership with the members of the EJ Population impacted by the proposed project. Ms. Kirby's Direct PFT, ¶ 26(a). Ms. Kirby testified that "[EJ] Population members have a right to be involved in decisions that affect them [and they] can influence decision-making and receive feedback on how their input was [utilized by MassDEP]." Id. Members of the EJ Population "can [also] recommend projects and issues for [MassDEP's] consideration." Id.

Second, the individual PIP Plan must obtain early public involvement from members of the EJ Population. Ms. Kirby's Direct PFT, ¶ 26(b). Ms. Kirby testified that "[p]ublic

involvement [from members of the EJ Population] is an early and integral part of issue and opportunity identification, concept development, design, and implementation of MassDEP policies, programs, and projects." Id.

Third, the individual PIP Plan must have public involvement processes that "invest in and develop long-term, collaborative working relationships and learning opportunities with [EJ] population partners and stakeholders." Ms. Kirby's Direct PFT, ¶ 26(c).

Fourth, the individual PIP Plan must be inclusive and equitable. Ms. Kirby's Direct PFT, ¶ 26(d). Ms. Kirby testified that "[effective] [p]ublic dialogue and decision-making processes [in the individual PIP Plan] identify, include, and encourage participation of the [EJ] population in its full diversity," and as such, "[MassDEP's] [d]ecision-making processes [will] respect a range of values and interests and the knowledge of those involved." Id. Ms. Kirby testified that under this process, "[h]istorically excluded individuals and groups [from MassDEP's air-permitting review process] are included authentically in processes, activities, and decision- and policymaking" and "[project] [i]mpacts, including costs and benefits, are identified, and distributed fairly." Id.

Fifth, the individual PIP Plan must have well-designed public involvement processes and techniques that "appropriately fit the scope, character, and impact of a policy or project" and "[can] adapt to changing needs and issues as they move forward." Ms. Kirby's Direct PFT, ¶ 26(e).

Sixth, the individual PIP Plan must have "[p]ublic decision-making processes [that] are accessible, open, honest, and understandable" and enable "[m]embers of the public [to] receive

the information they need, and with enough lead time, to participate effectively." Ms. Kirby's Direct PFT, ¶ 26(f).

Lastly, the individual PIP Plan must make "MassDEP leaders and staff [] accountable for ensuring meaningful public involvement in [MassDEP's] work . . . ." Ms. Kirby's Direct PFT, ¶ 26(g).

Ms. Kirby testified that "[b]uilding on MassDEP's PIP [Plan] requirements, MassDEP's Bureau of Air and Waste [("BAW")] [has] adopted specific procedures to implement [the] . . . Plan that apply" to air permit applications for proposed facilities requiring MassDEP air permits to operate. Ms. Kirby's Direct PFT, ¶ 27. She testified that "[a]pplicants [for these air permits] must submit [with their air permit applications] the BAW PIP [Plan] information in a fact sheet [in order to enable] MassDEP, and the population [impacted by the proposed facility], especially the EJ communities, [to] learn about the project and begin early involvement in the [MassDEP air permit] decision-making [process]." Id.; Exhibit CK – 6 attached to Ms. Kirby's Direct PFT. She testified that "[t]he BAW PIP [Plan] process [for these type of] air applications includes":

(1) scheduling public meetings or hearings at locations and times convenient for neighborhood stakeholders, near public transportation, if possible;

(2) encouraging air permit applicants to hold pre-application meetings with the local population impacted by the proposed facility, provide Fact Sheets, and EJ Organizations Lists;

(3) translating public notices and other key public engagement documents in areas of limited English proficiency;

(4) establishing local information repositories conveniently accessible for the impacted population;

(5) providing timely notices and guidance on when to notify EJ Populations/Organizations;

(6) engaging with members of EJ populations "early and often" prior to the proposed air permit decision stage; and

(7) conducting outreach to the impacted population as early and as soon as possible by providing Fact Sheets needed at the air permit application stage that in two to four pages in lay language (simple, everyday terms that a layperson can understand) describes the proposed project and how it may affect EJ populations.

Ms. Kirby's Direct PFT, ¶¶ 27(a)-27(g).[152]

MassDEP's EJ Director, Ms. Simpson, corroborated Ms. Kirby's testimony regarding MassDEP PIP Plans, testifying that these Plans are part of the heightened awareness that EEA and MassDEP have had since MassDEP's issuance of the FPA more than 10 years ago on environmental and health impacts on EJ Populations in Massachusetts communities, including "undertaking a more comprehensive and detailed approach, both internally and externally, when examining the [environmental] benefits and burdens to the EJ population[s] of any project [subject to] MassDEP['s] permitting." Ms. Simpson's Rebuttal PFT, ¶ 6. In her testimony, Ms. Simpson "explain[ed] the evolution of the EJ Policies" governing MassDEP's environmental policy decisions and development, implementation, and enforcement of environmental laws, regulations, and policies; "the appropriate application of the 2017 EJ Policy" in analyzing MassDEP's Revocation Order revoking the proposed Facility's FPA; and "how, over the [near decade] since [MassDEP had] issued the [FPA] to PRE, the importance of environmental justice

[152] In May 12 2021, MassDEP developed the MassDEP PIP Plan repository (library) located on MassDEP's Intranet – EJ Resources page. Ms. Kirby's Direct PFT, ¶ 28. "The request to develop a PIP library was received as feedback from the [MassDEP] PIP guidance training [provided to MassDEP staff] as a resource that would be helpful agency-wide to others developing PIP [Plans]." Id. "In addition to the PIP [Plan] library, [MassDEP's] BAW air quality program . . . developed a PIP [Plan] template for certain air permits, which can also be helpful in developing PIP [Plans] and is also placed on [MassDEP's Intranet EJ resources page." Id.

in Massachusetts ha[d] become enhanced and an integral part of all of [MassDEP's] work and responsibilities." Ms. Simpson's Rebuttal PFT, ¶ 7.

Ms. Simpson testified that during her tenure as MassDEP's EJ Director (since 2016), MassDEP's EJ Program "has expanded to ensure that all MassDEP programs and staff that are conducting key agency activities in EJ populations[,] are aware of [EJ Policy] requirements[,] . . . and have resources, tools, and training available to better serve those populations." Ms. Simpson's Rebuttal PFT, ¶ 10. In furtherance of those objectives, Ms. Simpson testified that during her tenure as MassDEP's EJ Director, she has "developed an internal [MassDEP Intranet] EJ Resources page to help disseminate information to MassDEP [staff], which allows staff to have EJ resources and tools to assist with their EJ activities, including GIS mapping tools, a PIP [Plan] guidance document, list[s] of EJ organizations, list of alternative media outlet Sheets, PIP [Plans], and a list of EJ Populations." Id. She also "[has] revamped MassDEP's EJ Team," which "consists of 20 [MassDEP] staff [members] that serve as EJ points of contact for [MassDEP's regional offices], bureaus/programs[,] and most of MassDEP's offices." Id. She testified that she conducts "quarterly meetings [with the members of MassDEP's EJ Team] to discuss EJ projects, issues, concerns and/or initiatives." Id.

Ms. Simpson testified that all MassDEP staff are required to comply with EJ requirements, including "developing [PIP] plans, community-engagement strategies, EJ strategies and language-access plans (tools/services that EEA agencies including MassDEP will use to better serve EJ Populations located in densely populated urban neighborhoods, in and around the state's oldest industrial sites, while some are located in suburban and rural communities)." Ms. Simpson's Rebuttal PFT, ¶ 11. Ms. Simpson confirmed in her testimony

that "[a]lthough EJ Populations make up a small portion of the Commonwealth['s] [population], they host, or are in close proximity to, many of the state's contaminated and abandoned sites, regulated facilities, and sources of pollution." Id.

Ms. Simpson testified that as a result of the heightened awareness that EEA and MassDEP have had since MassDEP's issuance of the FPA more than 10 years ago on environmental and health impacts on EJ Populations in Massachusetts communities, "EJ Stakeholders are involved earlier in the [MassDEP] permitting process and are no longer asking questions just about how a single pollutant from one permitted facility will impact their air quality[,] [but] [n]ow they ask how the pollution from the proposed permitted facility, in combination with the pollution from all of the permitted facilities in their community, are impacting their health and well-being." Ms. Simpson's Rebuttal PFT, ¶ 12. Ms. Simpson testified that "EJ Stakeholders are [now] more informed, empowered, and knowledgeable at evaluating the impacts a [proposed new or expanded] project may have on the environment and public health of their community and raising their concerns to the permit applicant and MassDEP about the proposed project." Id. By way of example, Ms. Simpson testified about an Earth Day 2021 event that MassDEP participated in that was intended to address air pollution concerns of Chelsea, Massachusetts residents. Id.

Ms. Simpson testified that Chelsea is "an EJ population which for many years has raised concerns about the air pollution [in Chelsea] and the health of [its] residents." Id. To address those concerns, Ms. Simpson testified that "on Earth Day 2021, MassDEP [partnered] with the USEPA and [GreenRoots, Inc.,] an [EJ] community-based organization [in

Chelsea],[153] [to] celebrat[e] the installation of a new air monitor and deploy[ment] [of] nine purple air sensors across . . . Chelsea[.,] . . . [which were intended to address] some of the concerns raised in Chelsea [regarding air pollution and the health of its residents]. . . ." Id. Ms. Simpson testified that MassDEP "plan[s] . . . to expand this program beyond . . . to other [Massachusetts communities containing] EJ populations [to address] air pollution issues and concerns [in those communities]." Id.

(c) The Policy's Requirements for Enhanced Environmental Review of New or Expanding Facilities in Communities Containing EJ Populations

As previously noted above, EEA's 2017 EJ Policy would address environmental health risks associated with existing and potential new sources of pollution by conducting enhanced environmental reviews of such sources by "address[ing] health disparities [and conducting] enhance[d] . . . review of significant new or expanding facilities presenting potential adverse impacts to public health or the environment . . . ."[154] To assess potential health impacts that a proposed new or expanded facility might have on an EJ Population, the Policy granted MassDEP discretion to conduct a Health Impact Assessment Study ("HIA Study") of the proposed new or expanded facility utilizing the data on the Massachusetts Department of Public Health's ("MassDPH") Massachusetts Environmental Public Health Tracking Website ("MEPH Tracking

[153] GreenRoots, Inc. ("GreenRoots") describes itself as a community-based organization that "works to achieve [E]nvironmental [J]ustice [and] is . . . dedicated to improving and enhancing the urban environment and public health in Chelsea and surrounding communities." http://www.greenrootschelsea.org.

[154] EEA's 2017 EJ Policy, at p. 5 (section entitled "EJ Populations"); and pp. 6-7 (section entitled Vulnerable Health EJ Populations").

Website").[155] The MEPH Tracking Website contains a "Community Profile [that] brings together important health, environmental[,] and community indicators, providing a snapshot of [the] environmental health for each of Massachusetts' 351 communities," including Springfield where the proposed Facility approved by the revoked FPA would have been located.[156]

The MEPH Tracking Website "is [an] ongoing collection, integration, analysis, and interpretation of data about [1] [e]nvironmental hazards [such as] air pollutants[,] [2] [e]xposure to environmental hazards[,] [and] [3] [h]ealth effects potentially related to exposure" to environmental hazards, such as asthma and cancer.[157] It also "provides an opportunity to look at possible links between environmental exposure and chronic diseases statewide and locally."[158] "A key feature of [the] [W]ebsite is that . . . tables, charts, and maps of environmental and health data for [a particular] community" can be generated.[159] The Website also has an HIA tool "to identify potential health impacts and benefits of a proposed project, program, or policy decision and recommend strategies that best protect and promote health."[160] "The guiding principles of an HIA are: [1] involvement and engagement of stakeholders to inform a decision[;] [2] consideration of the vulnerable groups[;] [3] evaluation of both short-and long-term impacts and benefits[;] and [4] assessment of health using evidence-based methods that consider

[155] EEA's 2017 EJ Policy, at pp. 6-7; https://matracking.ehs.state.ma.us.

[156] https://matracking.ehs.state.ma.us.

[157] https://matracking.ehs.state.ma.us/National-EPHT_Program/index.html.

[158] https://matracking.ehs.state.ma.us/EPHT_Program/index.html.

[159] https://matracking.ehs.state.ma.us.

[160] https://matracking.ehs.state.ma.us/planning_and_tools/hia/index.html.

physical, mental, environmental, economic, and social determinants of health."[161] "Health and environmental datasets provided on [the Website] can help inform HIAs" because the Website "[can] inform HIA practice by: [1] Improving access to baseline health and environmental data[;] [2] Providing content developed by specialists in data analyses, GIS, data visualization, epidemiology, toxicology, and risk communication[;] [and] [3] Serving as a tool supporting the development of collaborative partnerships and cross-program activities or initiatives."[162] Additionally, "[t]racking data [on the Website] are collected and updated on an ongoing basis[,] [which] . . . makes [the] data . . . useful for monitoring and evaluating actions and decisions over time[,] . . . [including] evaluat[ing] pre- and post-implementation impacts of the HIA decision or action."[163]

While it is true that under EEA's 2017 EJ Policy, the "selected health criteria [on the MassDPH's MEPH Tracking Website was] . . . meant to be used as secondary screening process to evaluate existing health burdens and vulnerabilities among EJ populations"[164] the Policy nevertheless granted EEA agencies, including MassDEP, discretion to use the data "to further prioritize EJ Populations when . . . making discretionary decisions."[165] These discretionary decisions would have included permitting decisions.[166] It is also important to note as Ms.

[161] https://matracking.ehs.state.ma.us/planning_and_tools/hia/index.html.

[162] https://matracking.ehs.state.ma.us/planning_and_tools/hia/index.html.

[163] https://matracking.ehs.state.ma.us/planning_and_tools/hia/index.html.

[164] EEA's 2017 EJ Policy, at p. 6. The same language appears at p. 7 of EEA's current 2021 EJ Policy.

[165] EEA's 2017 EJ Policy, at p. 7. The same language appears at p. 8 of EEA's current 2021 EJ Policy.

[166] Below, at pp. 109-14, I recommend that MassDEP perform an HIA of the proposed Facility using the data on the MassDPH's MEPH Tracking Website if PRE files an air permit application seeking a new air permit for the proposed Facility.

Simpson, MassDEP's EJ Director, confirmed in her testimony that since EEA's issuance of its 2017 EEA Policy, "MassDPH and MassDEP have worked together to ensure that the permitting decisions made by MassDEP are equitable and not placing additional burdens on the already disproportionately over- burdened and under-served EJ Populations." Ms. Simpson's Rebuttal PFT, ¶ 14.

Ms. Simpson also testified that MassDEP's efforts in this area have intensified since inception of the COVID-19 Pandemic in March 2020 and the Massachusetts Attorney General's May 2020 release of a brief entitled "COVID-19's Unequal Effects in Massachusetts" which "she[d] an even brighter spotlight on the health of EJ populations and intensified the focus on public health." Ms. Simpson's Rebuttal PFT, ¶ 14; Exhibit DS -1 attached to Ms. Simpson's Rebuttal PFT.[167] This brief noted the COVID-19 Pandemic's disparate or disproportionate impact on low-income communities of color in Massachusetts, and "outline[d] steps [the Commonwealth] should take to address [this problem], including . . . strengthening [environmental] regulatory procedures to protect vulnerable communities . . . ."[168] The brief also "highlighted the racial disparities in exposure to air pollution, and how permitting any new source of pollution may have a greater impact on an already overburdened EJ population that has experienced higher levels of environmental health burdens than non-EJ populations." Ms. Simpson's Rebuttal PFT, ¶ 13; Exhibit DS -1 attached to Ms. Simpson's Rebuttal PFT.

Ms. Simpson testified "[s]ince [the inception of] COVID-19 and [the issuance of] the

[167] The Massachusetts Attorney General's brief was cited by U.S. Senators Markey and Warren in their December 24, 2020 letter to MassDEP's Commissioner urging MassDEP's suspension of the FPA and conduct a new review of the proposed Facility's air quality impacts. See n. 50, at p. 37.

[168] https://www.mass.gov/news/ag-healey-brief-environmental-pollution-contributes-to-disparate-impact-of-covid-19-pandemic-on-communities-of-color

Attorney General's brief[,] . . . MassDEP has created/developed both senior-level and line-staff equity groups, as well as re-configured the outreach-communications group to ensure that MassDEP is reaching and engaging EJ populations." Ms. Simpson's Rebuttal PFT, ¶ 14. She testified that "MassDEP staff are trained, and are continuing to receive training on, EJ mapping tools, public involvement plans and community engagement." Id. She testified that "[MassDEP] staff are looking not only at the facility being permitted, but other facilities or environmental burdens and health burdens in a community." Id. She testified that "[although] MassDEP has conducted community engagement and public outreach and [has] provided language translation services in the past[,] . . . the deliberate focus and intentional engagement has increased and is an integral part of [MassDEP's] everyday work." Id. In her words, "[MassDEP's] agenc[y] lens is much broader as [MassDEP] looks beyond just the emissions impacts from a project and now looks at a more wholistic way that a project may impact an environmental justice population." Id.

By way of example, Ms. Simpson testified that "in July 2020 MassDEP reopened the comment period on the Solid Waste Master Plan to address issues raised, including the challenges from solid waste activities in EJ populations." Ms. Simpson's Rebuttal PFT, ¶ 15.[169] She testified that "[t]here were many pre-meetings to ensure EJ populations were a part of the conversation and had a voice to share concerns about how they are impacted by solid waste activities." Id.[170] Another example that Ms. Simpson provided regarding MassDEP's

[169] G.L. c. 16, § 21 "requires MassDEP to develop and maintain a comprehensive statewide master plan for reducing and managing solid waste, which the agency updates on a ten-year planning cycle." https://www.mass.gov/guides/solid-waste-master-plan.

[170] In November 2021, MassDEP issued its 2030 Solid Waste Master Plan setting forth "what kinds of trash Massachusetts generates; the state's goals for reducing waste; grants and assistance available to cities, towns, and

enhanced review and consideration of the environmental health concerns of EJ Populations were MassDEP's efforts "over the summer and fall of 2019 [with] [EEA] and MassDOT[171] [holding] eleven regional workshops to engage with the public and seek input on the Transportation Climate Initiative (TCI)." Ms. Simpson's Rebuttal PFT, ¶ 15.[172]

Ms. Simpson testified that "[m]ost, if not all of the [TCI] workshops, were held in EJ populations across the Commonwealth and MassDEP, EEA and MassDOT deliberately reached out to EJ advocates and stakeholders to receive input about locations to hold the workshops, start time, interpreter/translation services [that] were needed[,] and shared information in advance to ensure [that] documents [discussed in the workshops] were easily understood by the community." Ms. Simpson's Rebuttal PFT, ¶ 15. "Based on those discussions, one of the workshops was held in Springfield [the EJ Community that is the subject of this appeal], . . . at American International College so [that] it was more accessible to the community." Id. "During those workshops, MassDEP received many questions and [heard many] concerns [regarding] how the TCI program [would] affect EJ populations." Id.

Ms. Simpson testified that since the TCI initiative, "MassDEP [has] . . . continue[d] to

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businesses; and how reuse, recycling, and composting create jobs and grow the state's economy." https://www.mass.gov/guides/solid-waste-master-plan.

[171] "MassDOT" is the acronym for the Massachusetts Department of Transportation. MassDOT is responsible for the Commonwealth's transportation infrastructure, including its highways, bridges, and mass transit system. https://www.mass.gov/orgs/massachusetts-department-of-transportation.

[172] TCI was intended to be "[a] regional collaboration of 13 Northeast and Mid-Atlantic states[,] [including Massachusetts,] and the District of Columbia that [sought] to improve transportation, develop the clean energy economy[,] and reduce carbon emissions from the transportation sector." https://www.transportationandclimate.org/content/about-us. Although, TCI ultimately did not go forward due to individual State issues, MassDEP's EJ initiatives in TCI as summarized by Ms. Simpson in her testimony discussed in the text above were laudable and consistent with promoting environmental equity and the requirements of EEA's 2017 and 2021 EJ Policies.

meet, virtually or provide[d] advance notice to EJ Community Based Organizations (CBOs) in advance of any public comment periods on permitting activities to ensure the EJ populations are informed and aware of a permit application received that may impact their community." Id. "This type of advance notification and robust intentional engagement and outreach to EJ populations [did] not happen [during the period back] . . . in March 2011[,] [when MassDEP was reviewing PRE's air permit application for the proposed Facility (which lead to MassDEP's issuance of the FPA in September 2012 authorizing the proposed Facility) and] when PRE [performed] its public outreach and held its public hearing [to the Springfield EJ Community pursuant to EEA's then 2002 EJ Policy]." Id. Ms. Simpson testified that although the COVID-19 Pandemic "has [prevented] MassDEP [from] hav[ing] face-to-face meetings," MassDEP has conducted virtual meetings which have allowed the agency "[to] continu[e] to conduct community engagement, develop [PIP] [P]lans that are inclusive to EJ populations, stakeholders, and activists to ensure access to MassDEP's key agency activities." Id.

(3) The Policy's Incorporation of federal Title VI Anti-Discrimination Provisions

MassDEP's responsibility under EEA's 2017 EJ Policy to promote environmental equity in the Commonwealth through MassDEP's environmental policy decisions and development, implementation, and enforcement of environmental laws, regulations, and policies was also reflected by the Policy's: statement that it "[was] intended to reinforce and enhance" EEA's efforts and those of its agencies "to comply with the existing [federal anti-discrimination]

mandates" of Title VI of the Federal Civil Rights Act of 1964 ("Title VI") and the USEPA's Title VI Regulations at 40 CFR 7, which the Policy "incorporated . . . by reference."[173]

Title VI and the USEPA's Title VI Regulations bar both intentional discrimination and disparate or disproportionate impact discrimination by State agencies receiving federal funds from the USEPA.[174] Specifically, Title VI and the USEPA's Title VI Regulations "preclude any EEA agency or program from using criteria or methods of administration, which have the effect of subjecting individuals to discrimination because of their race, color, or national origin."[175] "They also preclude any EEA agency or program from deeming a site suitable or locating a facility where it will have discriminatory effects on the basis of race, color, or national origin."[176]

Under the USEPA's Title VI Regulations, parties may file administrative complaints with the USEPA asserting Title VI violations against a recipient of USEPA financial assistance, but recipients are also required to have "grievance procedures [in place] that assure the [recipient's] prompt and fair resolution of [Title VI] complaints . . . ." BP, 2016 MA ENV LEXIS 66, at 23, citing, 40 CFR 7.90(a).[177] In the past, USEPA and State agency recipients of USEPA financial

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[173] EEA's 2017 EJ Policy, at p. 5.

[174] "Discrimination that is based on proof of disparate impact 'involve[s] [state agency regulatory] practices that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another.'" Cf. Lopez v. Commonwealth, 463 Mass. 696, 709 (2012) (discussion of disparate racial discrimination in administration of police promotional examinations). "Unlike disparate treatment [or intentional discrimination] claims, 'discriminatory motive [or intent] is not a required element of proof' in disparate impact cases." Id. "This is because 'the necessary premise of the disparate impact approach is that some [state agency regulatory] practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.'" Id.

[175] EEA's 2017 EJ Policy, at p. 5, citing, 40 C.F.R. § 7.35(b); 42 U.S.C. Section 2000d.

[176] Id. The USEPA's Title VI Regulations also prohibit intentional discrimination and disparate impact discrimination based on gender. 40 C.F.R. §§ 7.35(b), 7.35(c).

[177] At the inception of the BP appeal, MassDEP did not have a formal Title VI grievance policy in place but adopted such a policy during the course of the appeal after MassDEP's Commissioner concurred with my ruling in the

assistance have relied on a "draft [USEPA] guidance for recipient agencies involved in environmental permitting on Title VI compliance and on Title VI investigations by [the] [US]EPA" that the USEPA issued in 2000. BP, 2016 MA ENV LEXIS 66, at 34-35, citing, Draft Title VI Guidance for [US]EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Complaints Challenging Permits, at 65 Fed. Reg. 39650, 39667-39687 (June 27, 2000) ("the Draft USEPA Title VI Guidance").[178] The Draft USEPA Title VI Guidance "is intended to provide a framework for [the USEPA] to process [and investigate Title VI] complaints . . . alleging discriminatory effects resulting from the issuance of pollution control permits by recipients of [US]EPA financial assistance." BP, 2016 MA ENV LEXIS 66, at 35, citing, 65 Fed. Reg 39650, 39668.

The Draft USEPA Title VI Guidance provides that "[i]n order to find a recipient in violation of the discriminatory effects standard in [the] [US]EPA's Title VI implementing regulations, [the USEPA] would determine whether the recipient's programs or activities have resulted in an ***unjustified adverse disparate impact***." BP, 2016 MA ENV LEXIS 66, at 35-36, citing, 65 Fed. Reg. 39650, 39670 (emphasis supplied). In making this determination, "[the USEPA] would assess whether ***the impact is both adverse and borne disproportionately by a***

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appeal that until MassDEP formally adopted such a policy, OADR's administrative appellate adjudicatory process would serve in place of the policy to address Title VI discrimination claims made against MassDEP in administrative appeals of MassDEP permit decisions and enforcement orders. BP, 2016 MA ENV LEXIS 66, at 22-33; BP, 2017 MA ENV LEXIS 21, at 5-6. MassDEP's Title VI grievance policy is set forth at pp. 4-5, 9, 15-20 of MassDEP's Civil Rights and Non-Discrimination Plan. https://www.mass.gov/info-details/massdep-nondiscrimination-civil-rights.

[178] The Draft USEPA Title VI Complaint Investigation Guidance was recently cited by the USEPA in its 2015 Guidance Document entitled "[The] Roles of Complainants and Recipients in the Title VI Complaints and Resolution Process." https://www.epa.gov/ogc/ecrco-guidance-and-policies; chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.epa.gov/sites/default/files/2020-02/documents/roles-complainants_recipients_title_vi_complaints_and_resolutions_2015.05.04.pdf (p. 3).

group of persons based on race, color, or national origin, and, if so, whether that impact is justified." Id. (emphasis supplied).

Under the Draft USEPA Title VI Guidance:

> the recipient agency [is] to make a determination whether the alleged discriminatory act has a ***significant adverse impact***. If it finds that there is a significant adverse impact, ***the recipient agency must determine if the impact is disparate to an EJ community*** and if that disparate impact is justified. ***Finally, the recipient agency must determine if there is a less discriminatory alternative that will mitigate the significant adverse impact so that it is not disparate***.

BP, 2016 MA ENV LEXIS 66, at 38, citing, 65 Fed. Reg. 39650, 39676-84 (emphasis supplied).

The Draft USEPA Title VI Guidance states that "benchmarks" can be used to determine if an adverse impact exists. 2016 MA ENV LEXIS 66, at 38, citing, 65 Fed. Reg. 39650, 39680. These environmental benchmarks include whether a proposed facility's air emissions will comply with the NAAQS.

The Draft USEPA Title VI Guidance provides that:

> ***Air quality that adheres to [the NAAQS] standards . . . is presumptively protective of public health*** in the general population. If [a Title VI] investigation includes an allegation raising air quality concerns regarding a pollutant regulated pursuant to [the] NAAQS, and where the area in question is attaining that standard, the air quality in the surrounding community will generally be considered ***presumptively protective and emissions of that pollutant should not be viewed as "adverse" within the meaning of Title VI. However***, if the investigation produces evidence that significant adverse impacts may occur, ***this presumption of no adverse impact may be overcome***.

BP, 2016 MA ENV LEXIS 66, at 45-46, citing, 65 Fed. Reg. 39650, 39680 (emphasis supplied).

Thus, under the Draft USEPA Title VI Guidance, the NAAQS are rebuttable presumptive protective standards for ambient air quality that can be challenged, and even overcome, by a party asserting that the NAAQS are not protective enough of public health and/or asserting a

disparate disproportionate impact discrimination claim under Title VI. Id., citing, In re Shell Gulf of Mexico, Inc. and Shell Offshore, Inc., OCS Appeal Nos. 10-01 through 10-04 ("Shell"), slip. op. at 74, Order Denying Review in Part and Remanding Permits (USEPA Environmental Appeals Board, December 30, 2010)[179] (USEPA regional office "clearly erred [in] . . . rel[ying] solely on [permittee's] demonstrated compliance with the then-existing annual NO[2] NAAQS" because the USEPA's agency head had recently proposed a new NO[2] NAAQS based on "updated scientific evidence"). However, regardless if a Title VI claim is asserted against a State agency recipient of USEPA funds for having issued an air permit based on a proposed new or expanded facility's compliance with the NAAQS, the air permit, as previously discussed above, can be successfully challenged by a party presenting reliable data that the NAAQS are not protective enough of public health. City of Brockton, 469 Mass. at 207 ("[parties] may, of course, challenge the basis of a NAAQS standard set by the [US]EPA and relied on by [a state permitting agency] in its statutory review [of a permit application]"). Such a challenge is not beyond the realms of possibility given the existing controversy discussed above regarding whether the current 2012 NAAQS should be retained or revised by the USEPA.

2. The 2021 Climate Act's Reinforcement of the Environmental Equity Mandate of EEA's 2017 EJ Policy

On March 26, 2021, one week prior to MassDEP's revocation of the FPA on April 2, 2021, the 2021 Climate Act was enacted and became effective two months later on June 24, 2021. As discussed below, the Act, which MassDEP cited in its Revocation Order revoking the

[179] The USEPA Environmental Appeals Board's decision in Shell may be accessed at http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/(Filings)/41B37138DABA5A54852578090072B80A/$File/Shell%20Gulf%20of%20Mexico.pdf.

FPA,[180] made amendments to MEPA, G.L. c. 30, §§ 61-62K, and GWSA, G.L. c. 21N, and required MassDEP to promulgate regulations with public input requiring MassDEP to conduct "cumulative impact analyses for defined categories of air quality permits." These measures enacted by the 2021 Climate Act reinforced MassDEP's responsibility under EEA's 2017 EJ Policy to promote environmental equity in MassDEP's environmental policy decisions and enforcement of environmental laws, regulations, and policies. They also provided MassDEP with additional, valid environmental justice grounds for revoking the FPA and requiring an updated and expanded assessment of the air pollution impacts of the proposed Facility.

a. The 2021 Climate Act's MEPA Amendments

(1) The Purpose of MEPA

MEPA "sets forth a broad policy of environmental protection in [the] Commonwealth by directing [all State agencies] to 'review, evaluate, and determine the impact on the natural environment of all works, projects or activities conducted by them and . . . use all practicable means and measures to minimize ***damage to the environment***.'" Ten Persons of the Commonwealth v. Fellsway Dev. LLC, 460 Mass. 366, 368 (2011) (emphasis supplied). MEPA defines "damage to the environment" as:

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

G.L. c. 30, § 61 (emphasis supplied).

MEPA and the MEPA Regulations at 301 CMR 11.00 "establish a process to ensure that State permitting agencies [such as MassDEP] have adequate information on which to base their

[180] Revocation Order, at p. 3, n. 1.

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

(2) The Climate Act's MEPA Amendments Which Recognized EJ Populations and Their Having Borne Unfair or Disproportionate Burdens of Environmental Hazards

The 2021 Climate Act made amendments to MEPA ("the MEPA Amendments") which reinforced MassDEP's responsibility under EEA's 2017 EJ Policy to promote environmental equity in MassDEP's environmental policy decisions and development, implementation, and enforcement of environmental laws, regulations, and policies in several ways. This included the

MEPA Amendments' recognition of EJ Populations and their having borne unfair or disproportionate burdens of environmental hazards. The MEPA Amendments did this by requiring the submittal of a MEPA environmental impact report:

> ***for any [proposed] project that*** is likely to cause damage to the environment and ***is located within a distance of 1 mile of an environmental justice population***; provided, that for ***a [proposed] project that impacts air quality, such environmental impact report [is] required if the project is*** likely to cause damage to the environment and ***is located within a distance of 5 miles of an environmental justice population***.[181]

The MEPA Amendments defined an EJ Population as a neighborhood, specifically a census block group of persons defined by the United States Census Bureau, but not including persons living in college dormitories and persons "under formally authorized, supervised care or custody, including federal, state[,] or county prisons" that meets one or more of the following criteria:

> (i) the annual median household income is not more than 65 per cent of the statewide annual median household income;
>
> (ii) minorities comprise 40 per cent or more of the population;
>
> (iii) 25 per cent or more of households lack English language proficiency; or
>
> (iv) minorities comprise 25 per cent or more of the population and the annual median household income of the municipality in which the neighborhood is located does not exceed 150 per cent of the statewide annual median household income . . . .[182]

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[181] St. 2021, c. 8, §§ 58, 102A, 102B; G.L. c. 30, § 62B (emphasis supplied).

[182] St. 2021, c. 8, § 56; G.L. c. 30, § 62 (definitions of "environmental justice population" and "neighborhood"). The MEPA Amendments provide that "[if] a neighborhood that does not meet [one or more of the four] criteria [set forth above], but a geographic portion of that neighborhood meets at least [one] criterion, the [EEA] secretary [is authorized to] designate that geographic portion as an environmental justice population upon the petition of at least 10 residents of the geographic portion of that neighborhood meeting any such criteria . . . ." Id. However, the EEA Secretary is also authorized not to designate "a neighborhood, including any geographic portion thereof [as] . . . an environmental justice population upon [making] a finding that":

> (A) the annual median household income of that neighborhood is greater than 125 per cent of the statewide median household income;

Under the MEPA Amendments, a MEPA environmental impact report for any proposed project that is likely to cause damage to the environment must contain:

> (i) statements describing the nature and extent of the proposed project and its environmental and public health impact as result of any development, alteration and operation of the project;
>
> (ii) studies to evaluate [the environmental and public health] impacts [of the proposed project];
>
> (iii) all measures being utilized to minimize any anticipated environment and public health damage;
>
> (iv) any adverse short-term and long-term environmental and public health consequences that cannot be avoided should the project be undertaken; and
>
> (v) reasonable alternatives to the proposed project and their environmental consequences . . . .[183]

The MEPA environmental impact report must also contain additional information if the proposed project will impact an EJ Population living within one mile of the proposed project or five miles if the proposed project will impact air quality. Specifically, the report must include:

> statements about ***the results of an assessment of any existing unfair or inequitable environmental burden*** and related public health consequences impacting ***the environmental justice population*** from any prior or current private, industrial, commercial, state, or municipal operation or project that has damaged the environment . . . .[184]

(B) a majority of persons age 25 and older in that neighborhood have a college education;

(C) the neighborhood does not bear an unfair burden of environmental pollution; and

(D) the neighborhood has more than limited access to natural resources, including open spaces and water resources, playgrounds and other constructed outdoor recreational facilities and venues.

Id.

[183] St. 2021, c. 8, §§ 57, 102A, 102B; G.L. c. 30, § 62B.

[184] Id. (emphasis supplied). As discussed below, at p. 103, the MEPA Amendments also defined "environmental burdens."

If the report "indicates ***an environmental justice population*** is subject to an existing unfair or inequitable environmental burden or related health consequence the report [must] identify any":

> (i) environmental and public health impact from the proposed project that would likely result in a disproportionate adverse effect on such population; and
>
> (ii) potential impact or consequence from the proposed project that would increase or reduce the effects of climate change on the environmental justice population. . . . [185]

(3) The 2021 Climate Act's MEPA Amendments Recognizing Environmental Justice Principles and Requiring Their Application by the EEA Secretary and EEA Agencies In Conducting MEPA Reviews

The MEPA Amendments further reinforced MassDEP's responsibility under EEA's 2017 EJ Policy to promote environmental equity in MassDEP's environmental policy decisions and development, implementation, and enforcement of environmental laws, regulations, and policies by recognizing environmental justice principles and requiring their application by the EEA Secretary and EEA Agencies in conducting MEPA Reviews.[186] The MEPA Amendments defined "environmental justice principles" as:

> ***principles that support protection from environmental pollution and the ability to live in and enjoy a clean and healthy environment, regardless of race, color, income, class, handicap, gender identity, sexual orientation, national origin, ethnicity or ancestry, religious belief[,] or English language proficiency, which includes:***
>
> ***(i) the meaningful involvement of all people*** with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies, including climate change policies; ***and***

[185] St. 2021, c. 8, §§ 58, 102A, 102B; G.L. c. 30, § 62B (emphasis supplied).

[186] St. 2021, c. 8, § 56; G.L. c. 30, § 62 (definition of "environmental justice principles" (emphasis supplied)); G.L. c. 30, § 62K.

> ***(ii) the equitable distribution of*** energy and ***environmental benefits and environmental burdens***.[187]

"Environmental benefits" were defined as "***the access to clean natural resources, including air***, . . . clean renewable energy sources, ***[and] environmental enforcement*** . . . ."[188] "Environmental burdens" were defined as:

> ***any destruction, damage[,] or impairment of natural resources that is not insignificant***, resulting from intentional or reasonably foreseeable causes, ***including but not limited to***, climate change, ***air pollution, . . . inadequate remediation of pollution***, . . . from private industrial, commercial or government operations or other activity that contaminates or alters the quality of the environment and poses a risk to public health.[189]

The MEPA Amendments require the EEA Secretary "[to] consider the environmental justice principles . . . in making any policy or determination, or taking any action relating to a project review, undertaken pursuant to [MEPA] to reduce the potential unfair or inequitable effects upon an environmental justice population."[190] The MEPA Amendments also require the EEA Secretary to:

> direct [all EEA] agencies . . . to consider the environmental justice principles in making any policy, determination[,] or taking any other action related to a project review, or in undertaking any project pursuant to [MEPA], . . . and related regulations that is likely to affect environmental justice populations."[191]

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[187] St. 2021, c. 8, § 56; G.L. c. 30, § 62 (definition of "environmental justice principles" (emphasis supplied)); G.L. c. 30, § 62K.

[188] St. 2021, c. 8, § 56; G.L. c. 30, § 62 (definition of "environmental benefits" (emphasis supplied); G.L. c. 30, § 62K.

[189] St. 2021, c. 8, § 56; G.L. c. 30, § 62 (definition of "environmental burdens" (emphasis supplied); G.L. c. 30, § 62K.

[190] St. 2021, c. 8, § 56; G.L. c. 30, § 62 (definition of "environmental justice principles" (emphasis supplied)); G.L. c. 30, § 62K.

[191] Id.

b. The 2021 Climate Act's GWSA Amendments and "Cumulative Impact Analyses" Requirement Recognizing EJ Populations and Their Having Borne Unfair or Disproportionate Burdens of Environmental Hazards

(1) The Purpose of the GWSA

The GWSA, G.L. 21N, was enacted in 2008 "to address the grave threats that climate change poses to the health, economy, and natural resources of the Commonwealth." New England Power Generators Association, Inc. v. Department of Environmental Protection, 480 Mass. 398, 399 (2018). "[It] established a comprehensive framework to address the effects of climate change in the Commonwealth by reducing [greenhouse gas] emissions [by 2050] to levels that scientific evidence had suggested were needed to avoid the most damaging impacts of climate change." Id., at 400, citing G.L. c. 21N, §§ 3, 4; Kain v. Department of Environmental Protection, 474 Mass. 278, 281-82 (2016). The GWSA "require[d] a 25% reduction in greenhouse gas (GHG) emissions from all sectors of the [Massachusetts] economy below the 1990 baseline emission level in 2020 and at least an 80% reduction in 2050."[192]

The Commonwealth achieved the GWSA's mandate that there be a 25% reduction in greenhouse gas emissions from all sectors of the Massachusetts economy below the 1990 baseline emission level by 2020.[193] In April 2020, to comply with the GWSA's mandate that by 2050, there be at least an 80% reduction in greenhouse gas emissions below the 1900 baseline emission level, EEA issued "a determination letter . . . establishing the Commonwealth's legally

[192] https://www.mass.gov/service-details/gwsa-implementation-progress.

[193] Id. In a recent June 2022 report, the EEA Secretary certified that the Commonwealth had complied with the 2020 greenhouse gas emissions limit of 25% below the 1990 level with an estimated emissions reduction of 31.4% below the 1990 level. Id.

binding 2050 statewide emissions limit of net zero greenhouse gas emissions."[194] "Later that year, the 2030 emissions limit was set at 45 percent below 1990 levels . . . ."[195]

(2) The 2021 Climate Act's Amendments to the GWSA

The 2021 Climate Act amended the GWSA in several ways, including "codifying the [Commonwealth's] commitment to achieve net zero emissions [of greenhouse gases] in 2050 and requiring emissions reductions of at least 50 percent below 1990 levels in 2030."[196] The Act also significantly increased environmental protections for low and moderate income persons and EJ Populations by amending the GWSA to require "[t]he [EEA] [S]ecretary ***[to] establish programs to reduce emissions of greenhouse gases and promulgate regulations regarding sources or categories of sources that emit greenhouse gases*** [that] . . . achieve required [greenhouse] emissions reductions ***equitably*** and ***in a manner that protects low- and moderate-income persons and environmental justice populations***."[197]

(3) The 2021 Climate Act's Mandating of "Cumulative Impacts" Analyses

As discussed previously, "[c]umulative impacts are the total effect of past, present, and future actions on the environment and human health [and] [e]valuating these effects is the focus of [a] cumulative impact analysis[.]"[198] The 2021 Climate Act also significantly increased environmental protections for EJ Populations by requiring MassDEP to address "cumulative

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[194] chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.mass.gov/doc/2025-and-2030-ghg-emissions-limit-letter-of-determination/download, at p. 2.

[195] Id.

[196] Id.

[197] St. 2021, c. 8, § 10, G.L. c. 21N, § 6.

[198] See n. 114, at p. 68 above.

impacts."[199] Specifically, the 2021 Climate Act required MassDEP "[to] evaluate and seek public comment on the incorporation of ***cumulative impact analyses*** in the assessment and identification of certain categories of [MassDEP] permits and approvals."[200] Under the Act, MassDEP is required to, "[no] later than 18 months after the [Act's] effective date[,] . . . propose regulations to include ***cumulative impact analyses*** for defined categories of air quality permits identified through the evaluation and public comment process."[201] As Ms. Kirby testified, "[t]his is a significant change in policy on how air plan approval applications are to be evaluated [because] [u]nder the new [cumulative impact assessment] requirement, MassDEP [must] . . . g[o] beyond evaluating just the emission impacts from the proposed facility and [must evaluate] the 'cumulative impacts' the proposed facility may have on [an] [EJ] community already [overburdened] with pollution." Ms. Kirby's Direct PFT, ¶ 31. Ms. Kirby testified that "[t]he goal [of a cumulative impact analysis] is to prevent new [proposed] facilities from exacerbating the existing environmental and health burdens in [certain] communities." Id.

3. EEA's Issuance of Its 2021 EJ Policy and the Policy's Further Reinforcement of the Environmental Equity Mandate

On June 24, 2021, the same date when the 2021 Climate Act became effective, EEA issued its 2021 EJ Policy, which replaced EEA's 2017 EJ Policy and has governed the regulatory actions of all EEA agencies, including MassDEP, to date.[202] EEA's 2021 EJ Policy will govern

[199] St. 2021, c. 8, § 102C.

[200] St. 2021, c. 8, § 102C (emphasis supplied).

[201] Id. (emphasis supplied). The 2021 Climate Act's effective date was June 24, 2021 and 18 months after its effective date is December 24, 2022.

[202] chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.mass.gov/doc/environmental-justice-policy6242021-update/download

any new air permit application filed by PRE seeking approval of the proposed Facility pursuant to MassDEP's Air Pollution Control Regulations at 310 CMR 7.00 since Springfield is an EJ community with many residents who are low income, minority, and/or English Language Isolated within the ambit of the Policy.[203] Although EEA's 2021 EJ Policy has retained many the provisions of its predecessor 2017 EJ Policy,[204] the 2021 Policy goes much further than its predecessor in mandating that EEA agencies, including MassDEP, promote environmental equity in the Commonwealth for the following reasons.

First, EEA's 2021 EJ Policy acknowledges the 2021 Climate Act's enactment by noting that the Act "codifies foundational definitions for environmental justice principles and populations, as well as environmental benefits and burdens" which the Policy "incorporated into [its provisions]."[205]

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[203] Under EEA's 2021 EJ Policy, an EJ Population is defined in the same manner as the 2021 Climate Act's amendment to MEPA discussed above, at pp. 99-102. EEA's 2021 EJ Policy, at p. 4 (definition of "Environmentl Justice (EJ) Population"). The Policy defines the terms "English Isolation", "Low Income", and "Minority" respectively as follows:

- English Isolation:	"households that are English Language Isolated according to federal census forms, or do not have an adult over the age of 14 that speaks only English or English very well";
- Low Income:	"median annual household income at or below 65 percent of the statewide median income for Massachusetts, according to federal census data";
- Minority:	"individuals who identify themselves Latino/Hispanic, Black/African American, Asian, Indigenous people, and people who otherwise identify as non-white."

EEA's 2021 EJ Policy, at p. 4.

[204] For example, Article 97 is the starting point for EEA's 2021 EJ Policy as it was for EEA's 2017 EJ Policy. EEA's 2021 EJ Policy, at p. 1. Also, just as its predecessor 2017 EJ Policy had done, EEA's 2021 EJ Policy recognizes EJ Populations and Vulnerable EJ Populations, incorporates the federal Title VI anti-discrimination requirements, and grants MassDEP discretion to conduct an HIA of a proposed project utilizing the data on the MassDPH's MEPH Tracking Website. EEA's 2021 EJ Policy, at pp. 1-8.

[205] EEA's 2021 EJ Policy, at pp. 2-3.

Second, EEA's 2021 EJ Policy requires all EEA agencies, including MassDEP, to make:

> ***environmental justice principles . . . an integral consideration***, to the extent applicable and allowable by law . . . in the implementation ***of all*** EEA programs, including but not limited to . . . the promulgation, implementation[,] and enforcement of laws, regulations, and policies . . . ."[206]

The "environmental justice principles" under EEA's 2021 EJ Policy that MassDEP must apply to its environmental policy decisions and development, implementation, and enforcement of environmental laws, regulations, and policies are those established by the 2021 Climate Act's MEPA Amendments discussed above. Specifically, principles:

> ***that support protection from environmental pollution and the ability to live in and enjoy a clean and healthy environment, regardless of race, color, income, class, handicap, gender identity, sexual orientation, national origin, ethnicity or ancestry, religious belief[,] or English language proficiency, which includes:***
>
> ***(i) the meaningful involvement of all people*** with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies, including climate change policies;[207] ***and***
>
> ***(ii) the equitable distribution of*** energy and ***environmental benefits and environmental burdens***.[208]

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[206] EEA's 2021 EJ Policy, at p. 4 (definition of "Environmental Justice Principles"; and p. 5 (Statement of Purpose) (emphasis supplied).

[207] EEA's 2021 Policy, at p. 4 defines "Meaningful Involvement" as meaning that "all neighborhoods":

(1) "have the right and opportunity to participate in energy, climate change, and environmental decision-making including [a] needs assessment, [b] planning, [c] implementation, [d] compliance and enforcement, and [e] evaluation";

(2) "are enabled and administratively assisted to participate fully through education and training";

(3) "are given transparency/accountability by government with regard to community input"; and

(4) encouraged to develop environmental, energy, and climate change stewardship.

[208] The definitions of "Environmental Benefits" and "Environmental Burdens" in EEA's 2021 EJ Policy are same as the 2021 Climate Act's MEPA Amendments' definitions of those terms discussed above at p. 103. Specifically, the Policy defines these terms as follows:

> Environmental Benefits: "***the access to clean natural resources, including air***, . . . clean renewable

In sum, EEA's 2021 EJ Policy requires MassDEP's environmental policy decisions and development, implementation, and enforcement of environmental laws, regulations, and policies including under its Air Pollution Control Regulations at 310 CMR 7.00, to be in a manner that promotes environmental equity by:

(1) not discriminating, either intentionally or by disparate or disproportionate impact, against any persons due to their race, color, income, class, handicap, gender identity, sexual orientation, national origin, ethnicity or ancestry, religious belief, or English language proficiency;[209]

(2) providing meaningful involvement to all people with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies, including climate change policies;[210]

(3) furthering the equitable distribution of environmental benefits;[211] and

(4) furthering the equitable distribution of environmental burdens.[212]

These four requirements must be satisfied under EEA's 2021 EJ Policy in order for MassDEP to

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energy sources, ***[and] environmental enforcement*** . . ."; and

Environmental Burdens: "***any destruction, damage[,] or impairment of natural resources that is not insignificant[,]*** . . . ***including but not limited to***, climate change, ***air pollution, . . . inadequate remediation of pollution***, . . . from private industrial, commercial or government operations or other activity that contaminates or alters the quality of the environment and poses a risk to public health."

EEA's 2021 EJ Policy, at p. 3 (definition of "Environmental Benefits") and p. 4 (definition of "Environmental Burdens").emphasis supplied).

[209] EEA's 2021 EJ Policy, at pp. 3-4 (definitions of "Environmental Justice", "Equal Protection", "Environmental Benefits", "Environmental Burdens", and "Environmental Justice Principles"); and p. 5 ("Statement of Purpose" of EEA's EJ Policy).

[210] EEA's 2021 EJ Policy, at p. 4 (definition of "Meaningful Involvement").

[211] EEA's 2021 EJ Policy, at p. 3 (definition of "environmental benefits").

[212] EEA's 2021 EJ Policy, at p. 4 (definition of "environmental burdens").

issue a new air permit to PRE authorizing the proposed Facility's construction in the event PRE submits an application for a new air permit.

If PRE applies for a new air permit, MassDEP's review of the application should, in my view, take into consideration that MassDEP's last detailed air permit review of the proposed Facility took place more than a decade ago prior to MassDEP's issuance of the FPA to PRE on September 11, 2012. Accordingly, in my view, PRE's application for a new air permit from MassDEP authorizing PRE's construction of the proposed Facility should include, at a minimum, the following components in order for MassDEP to conduct a proper review of the application pursuant to EEA's 2021 EJ Policy.

First, PRE's application for a new air permit should contain an updated review of the technologies involved in the burning of biomass[213] and an updated review of BACT for air pollution mitigation. As discussed previously above, at pp. 49-53, an up-to-date BACT analysis for a proposed new or expanded facility emitting air pollutants is a critical part of MassDEP's air permitting process.

Second, PRE's application for a new air permit should contain an updated air modeling study that considers changes in the surrounding ambient air quality by, among other things, demonstrating that the proposed Facility's emissions: (1) will comply with the current 2012 NAAQS or revised NAAQS issued by the USEPA and (2) if the 2012 NAAQS remain in place,

[213] In their December 24, 2020 letter to MassDEP's Commissioner discussed above (n. 50, p. 37 and n. 167, p. 90), U.S. Senators Markey and Warren noted that "the body of scientific evidence on climate change and biomass energy has grown significantly since MassDEP originally issued the [FPA in September 2012]." Exhibit MG-Ex. 3 attached to Mr. Gorski's Direct PFT. They also noted that "[a] wood-burning power plant has a carbon dioxide emissions rate that is approximately fifty percent higher than that of a coal-fired power plant, emitting approximately 3,000 pounds of carbon dioxide per megawatt- hour" and that "[s]cientific studies, including one commissioned by the Commonwealth[,] . . . have found that it takes decades of forest regeneration to offset these emissions." Id.

that the emissions comply with both 2012 NAAQS and potentially more protective NAAQS analyzed by the 2020 USEPA Staff NAAQS Risk Assessment Study. As discussed previously above, at pp. 54-66, a major debate has existed for much of the past decade since the FPA was issued regarding whether the current 2012 NAAQS are protective enough of public health. The 2020 USEPA Staff NAAQS Risk Assessment Study documented significant reductions in estimated IHD mortality risk with lowering the current annual $PM_{2.5}$ 2012 NAAQS standard of 12.0 $\mu g/m^3$ to 9.0 $\mu g/m^3$, 10.0 $\mu g/m^3$, and 11.0 $\mu g/m^3$. USEPA Administrator Regan's June 2021 announcement (just two months after MassDEP's revocation of the FPA) discussed above, at pp. 63-66, that the USEPA was re-studying the 2012 NAAQS would also support MassDEP requiring PRE to demonstrate compliance with both the 2012 NAAQS and the potential revised NAAQS analyzed in the 2020 USEPA Staff NAAQS Risk Assessment Study. Id. It is also important to keep in mind that the NAAQS are presumptive of public health and can be challenged by a party opposing MassDEP's issuance of a new air permit to PRE authorizing the proposed Facility asserting that the NAAQS are not protective enough of public health and/or asserting a disparate disproportionate impact discrimination claim under Title VI. See above, at pp. 93-97.

Third, PRE's application for a new air permit should include an HIA of the proposed Facility utilizing the data on MassDPH's MEPH Tracking Website to evaluate existing health burdens and vulnerabilities among the EJ Populations in Springfield, including, but not limited to, the rates of asthma and other air pollution related diseases and mortality rates from such diseases. The recent 2019 health study performed by the Asthma and Allergy Foundation of America ("AAFA") "[cited] in [MassDEP's] Revocation Order [revoking the FPA] indicate[d]

that . . . Springfield has higher rates of respiratory illness and other diseases than the Massachusetts state average." Ms. Kirby's Direct PFT, ¶ 10; Exhibit CK – 1 to Ms. Kirby's Direct PFT. The AAFA's 2019 study "analyzed data from across the continental United States and ranked the 100 largest [U.S.] cities where it is challenging to live with asthma," including Springfield. Id. "The report also analyzed eight risk factors that can influence asthma outcomes: poverty, lack of health insurance, air pollution, pollen count, long-term controller medicine use, quick-relief medicine use, smoke-free laws, and access to asthma specialists." Id. "The report ranked . . . Springfield as the number one asthma capital [in the U.S.] based on three health outcomes: asthma prevalence, asthma-related emergency-department visits[,] and asthma-related mortality rates." Id.[214]

The COVID-19 Pandemic also warrants an HIA performed of the proposed Facility because the Pandemic "has placed the spotlight on EJ Populations due to the elevated numbers of COVID-19 cases and COVID related illnesses in EJ Populations." Ms. Simpson's Rebuttal PFT, ¶ 13. It has been well documented, including by the Massachusetts Attorney General's May

[214] Two years later in 2021, the AAFA conducted another health study in which it once again "analyzed data from across the continental United States and ranked the 100 largest [U.S.] cities where it is challenging to live with asthma," including Springfield. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.aafa.org/media/3040/aafa-2021-asthma-capitals-report.pdf. In the 2021 health study, the AAFA ranked Springfield as the 12th city in the United States with the most challenging asthma issues. Id. This No. 12 ranking, albeit better than a No. 1 ranking, is not a cause for celebration because it means that Springfield is in the top 20 municipalities in the U.S. with the most challenging asthma issues, which in my view, is still too high. Although not mentioned in her testimony on behalf of PRE, the lower ranking does not corroborate Dr. Green's testimony that "more recent heath information and relevant trends in health information over time do not indicate that the impacts to ambient air from the proposed [F]acility are known or reasonably expected to harm public health." Dr. Green's Direct PFT, ¶¶ 9-10. I do not find Dr. Green's testimony persuasive because even if the air quality in Springfield has improved since the 2019 AAFA health study, MassDEP cannot properly evaluate the updated air quality information necessary to determine the environmental and health impacts the Springfield area would experience from the proposed Facility without reviewing a new air permit application submitted by PRE for the proposed Facility. Mr. Simpson's Rebuttal PFT, ¶ 15. It is "[o]nly after reviewing the application, including a BACT demonstration and sound- and air- pollution modeling, and compliance with all of the enhanced public outreach requirement, would [MassDEP] be able to determine what would need to be included in the approval." Id.

2020 brief discussed above, at pp. 90-91, that the COVID-19 Pandemic has had a disparate or disproportionate impact on low-income communities of color in Massachusetts. MassDEP's April 2021 Revocation Order revoking the FPA noted this disparity by stating that "COVID-19 [infection] rates [were] particularly high in Springfield [causing an] increased concern, given multiple studies establishing a relationship between low-income and minority communities with elevated air pollution levels and increased severity of disease and/or mortality for COVID-19 patients in these communities."[215]

Fourth, within the HIA or in a separate cumulative impact assessment of the proposed Facility, PRE's application for a new air permit should contain a cumulative impact assessment of the proposed Facility that evaluates the potential impact of the additional air pollution from the proposed Facility in combination with other existing environmental issues in the community.[216] As noted in Ms. Kirby's testimony on behalf of MassDEP, Springfield "[has] a large a number of sources of pollution including sites with Activity and Use Limitations, Air Operating Permit facilities, Tier 1 21E sites, Hazardous Waste Treatment and Storage Disposal facilities, Hazardous waste recycling facilities, Large Quantity Generators of Hazardous Waste and Toxics Users, Resource Recovery Facilities, Incinerators, Hazardous Waste Handling and Transfer Facilities and Landfills." Ms. Kirby's Direct PFT, ¶ 9.

Lastly, PRE's application for a new air permit must comply with all MassDEP and BAW

[215] Revocation Order, at pp. 3-4.

[216] Although MassDEP has not yet adopted formal regulations pursuant to the 2021 Climate Act requiring "cumulative impact analyses for defined categories of air quality permits" that "in [an equitable] manner . . . protects low- and moderate-income persons and environmental justice populations," those Regulations ***will be*** promulgated per the mandate of the 2021 Climate Act. In the interim, MassDEP has the discretion under the provisions of EEA's 2021 EJ Policy, including the Environmental Justice principles that MassDEP is to apply in performing its regulatory duties and the Policy's HIA provisions, to require a cumulative impact analysis be performed of the proposed Facility in order to evaluate any potential environmental or public health inequity the proposed Facility may have on the EJ Populations in Springfield.

PIP Plan procedures to ensure that Springfield residents, including the members of EJ Populations, have a meaningful opportunity to be fully informed about PRE's air permit application and voice their concerns or opinions regarding whether MassDEP should approve or deny the application or require PRE to provide additional relevant information about the proposed Facility prior to MassDEP making its determinations on the application.

IV. EEA's 2017 AND 2021 EJ POLICIES ARE CONSTITUTIONALLY VALID MEASURES TO PROMOTE ENVIRONMENTAL EQUITY IN THE COMMONWEALTH

The remaining claim to be addressed in this appeal is PRE's assertion that MassDEP's revocation of the FPA is invalid because in PRE's view, the revocation was the product of illegal race discrimination against PRE in violation of the Equal Protection provisions of the Federal and Massachusetts Constitutions. At the heart of PRE's racial discrimination claim against MassDEP are PRE's contentions that:

(1) EEA's 2017 EJ Policy, upon which MassDEP relied to revoke the FPA for PRE's failure to comply with the two-year construction start requirement of 310 CMR 7.02(3)(k), was a racially discriminatory policy in violation of the Equal Protection provisions of the Federal and Massachusetts constitutions because in PRE's view, the Policy impermissibly relied on the racial classification of the community where a proposed facility subject to MassDEP's permitting would be located; and

(2) MassDEP revoked the FPA "based upon the racial classification of [Springfield,] the community where the [proposed Facility would be located" instead of undertaking "workable race-neutral alternatives" to revoking the FPA.

PRE's September 1, 2021 Closing Brief, at pp. 2, 5-10. MassDEP strongly disputes PRE's racial discrimination claim and urges me to reject it for the reasons it advanced in its October 21, 2021

Supplemental Closing Brief ("MassDEP's Supp. Closing Brief.").[217]

As a result of my review of PRE's racial discrimination claim and MassDEP's grounds for disputing it, I reject the claim for the following reasons:

(1) PRE's racial discrimination claim against MassDEP is untimely under 310 CMR 1.01(6)(k);

(2) the provisions 310 CMR 7.02(3)(k), and a preponderance of the evidence presented by the PFT and documentary evidence of MassDEP's and PRE's respective witnesses provide an independent basis for affirmance of MassDEP's revocation of the FPA;

(3) PRE lacks standing to assert its racial discrimination claim against MassDEP; and

(4) PRE's racial discrimination claim against MassDEP fails on the merits.

A. PRE's Racial Discrimination Claim Against MassDEP Is Untimely Under 310 CMR 1.01(6)(k)

As discussed previously above in n. 14, at p. 6, the provisions of 310 CMR 1.01(6)(k) provide that "[t]he Presiding Officer ***shall, absent good cause shown***, limit the issues for adjudication [in an administrative appeal] to the issues identified in the [appellant's] notice of claim" in filing the appeal. (emphasis supplied). At the outset of its appeal of the Revocation Order in April 2021, as reflected in its Appeal Notice, PRE did not assert any racial discrimination claim against MassDEP, specifically, that MassDEP's revocation of the FPA was the product of illegal race discrimination in violation of the Equal Protection provisions of the Federal and Massachusetts Constitution. Undisputedly, PRE asserted its racial discrimination claim for the first time in its September 1, 2021 Closing Brief: (1) five months after the appeal's filing; (2) more than four months after the Issues for Adjudication in the appeal had been

[217] MassDEP's Supp. Closing Brief is entitled "[MassDEP's] Reply to PRE's Supplemental Closing Memorandum."

established and as I have addressed above in detail, at pp. 21-114; and (3) after the evidentiary record in the appeal was closed with the PFT of PRE's and MassDEP's respective witnesses supporting PRE's and MassDEP's respective positions on the Issues for Adjudication having been filed and the appeal having been submitted to me for adjudication on the record.

I agree with MassDEP that PRE has failed to demonstrate good cause under 310 CMR 1.01(6)(k) for having asserted its racial discrimination claim so late in the appeal. See MassDEP's Supp. Reply Brief, at pp. 3-6. My finding is supported by the Massachusetts Appeals Court's recent decision in Haney v. Department of Environmental Protection, No. 19-P-1395 (Mass. App. Ct. Aug. 10, 2021), 2021 Mass. App. Unpub. LEXIS 576 (Presiding Officer in administrative appeal properly declined to consider party's new claim asserted for the first time "after [Presiding Officer conducted evidentiary adjudicatory] hearing [and in party's] post-hearing memorandum").

B. The Provisions of 310 CMR 7.02(3)(k) and A Preponderance of the Evidence Presented by the PFT and Documentary Evidence of MassDEP's and PRE's Respective Witnesses Provide an Independent Basis for Affirmance of MassDEP's Revocation of the FPA

At pp. 21-66 above, I provided detailed findings that based on the provisions of 310 CMR 7.02(3)(k) and a preponderance of the evidence from the PFT and documentary evidence of MassDEP's and PRE's respective witnesses, MassDEP demonstrated that PRE failed to commence construction of the proposed Facility within the two-year construction start period of 310 CMR 7.02(3)(k) and MassDEP's revocation of the FPA for PRE's failure to comply with that requirement was an appropriate exercise of MassDEP's discretion. These findings are an independent basis to affirm MassDEP's revocation of the FPA. Accordingly, there is no need for me to reach PRE's racial discrimination claim. Cf., Sullivan v. Five Acres Realty Trust, 487

Mass. 64, 66 (2021) ("[b]ecause we vacate the awards of damages on the G.L. c. 93A and warranty of habitability claims, we need not reach the arguments related to those awards").

C. PRE's Racial Discrimination Claim Against MassDEP Fails for Lack of Standing

I nevertheless reach PRE's racial discrimination claim because of the important public interest in MassDEP promoting environmental equity in the Commonwealth through MassDEP's environmental policy decisions and development, implementation, and enforcement of environmental laws, regulations, and policies. As such, I reject PRE's racial discrimination claim for several reasons, including PRE's lack of standing to assert the claim against MassDEP.

Standing "is not simply a procedural technicality." Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975); In the Matter of Onset Bay II Corp., OADR Docket No. 2012-034 ("Onset Bay II Corp."), Recommended Final Decision (August 28, 2020), 2020 MA ENV LEXIS 79, at 40-41, adopted as Final Decision (September 23, 2020), 2020 MA ENV LEXIS 82, affirmed, Tramontozzi v. Massachusetts Department of Environmental Protection, Norfolk Superior Court, C.A. No. 2082CV01007. 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 S.Ct.2431, 2435 (1995) ("[s]tanding is perhaps the most important of the jurisdictional doctrines"); Onset Bay II Corp., 2020 MA ENV LEXIS 79, at 41.

A party has standing to challenge governmental action where it has "suffered, or . . . [is] in danger of suffering, legal harm" because of the action. Ginther, 427 Mass. at 322 (plaintiff

lacked standing to challenge action of Insurance Commissioner approving insurer's purchase of two insurance companies). For a party to have standing to assert a racial discrimination claim, the party "[must] be able to demonstrate that he or she, ***personally*****,** has been injured by [an improper] racial classification . . . ." Hays, 515 U.S. at 744 (emphasis supplied). PRE fails to meet that test here because none of its witnesses, including its principal, Dr. Gatto, testified that MassDEP's revocation of the FPA was the product of illegal race discrimination against PRE. Onset Bay II Corp., 2020 MA ENV LEXIS 79, at 40-46 (claims of several intervenor parties challenging MassDEP's issuance of proposed amended Chapter 91 License dismissed for failure to file PFT claiming they had been harmed by MassDEP's action). Put another way, PRE's racial discrimination claim is based on unsworn allegations it has made in its Closing and Supplemental Closing Briefs. In my view, such unsworn allegations do not suffice to establish standing. Onset Bay II Corp., 2020 MA ENV LEXIS 79, at 40-46.

D. PRE's Racial Discrimination Claim Fails On the Merits

Assuming only for the sake of argument that PRE manages to get past the standing hurdle, its racial discrimination claim against MassDEP fails on the merits because as discussed in detail above at pp. 66-106, EEA's 2017 EJ Policy was not based solely on racial classifications, but also other classifications including low income and limited English proficiency.[218] Moreover, as also discussed in detail above, the Policy aptly recognized that EJ Populations in the Commonwealth are communities mostly low income and of color located in

[218] The same holds true for EEA's 2021 EJ Policy which adopted the EJ directives of the 2021 Climate Act and replaced EEA's 2017 EJ Policy. See above, at pp. 106-14.

densely populated urban neighborhoods, in the vicinity of the Commonwealth's oldest industrial sites and contaminated and abandoned sites, regulated facilities, and sources of pollution.[219]

Simply stated, EJ Populations in the Commonwealth are overburdened by comprised environmental conditions. As such, the Commonwealth had a compelling state interest to rectify this inequitable environmental situation by EEA adopting its 2017 EJ Policy, and later, its current 2021 EJ Policy to accord long overdue respect to EJ Populations. This long overdue respect has come in the form of MassDEP, among other things, "address[ing] environmental and health risks associated with existing and potential new sources of pollution";[220] "[e]nhancing opportunities for residents [in EJ communities] to participate in environmental, energy, and climate change decision-making"[221]; and "[e]nhancing the environmental review of new or expanding significant sources of environmental burdens in these neighborhoods"[222] by "address[ing] health disparities [and conducting] enhance[d] . . . review of significant new or expanding facilities presenting potential adverse impacts to public health or the environment . . . ."[223] In sum, there was nothing nefarious behind MassDEP's revocation of the FPA here; the revocation was based on noble environmental equity principles and not impermissible race

[219] EEA's 2017 EJ Policy, at p. 7; See also n. 126, at p. 72 above.

[220] EEA's 2017 EJ Policy, at p. 7.

[221] EEA's 2017 EJ Policy, at p. 5.

[222] Id., at p. 5.

[223] Id., at p. 7.

discrimination as PRE has claimed here.

CONCLUSION

For the reasons set forth above, I recommend that MassDEP's Deputy Commissioner for Policy and Planning,[224] the issue a Final Decision affirming MassDEP's revocation of the FPA authorizing PRE's construction of the proposed Facility.

Salvatore M. Giorlandino

Date: September 30, 2022

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 MassDEP's Deputy Commissioner for Policy and Planning ("Deputy Commissioner") for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d) and/or 14(e), and may not be appealed to Superior Court pursuant to G.L. c. 30A. The Deputy Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect. Because this matter has now been transmitted to the Deputy Commissioner, no party and no other person directly or indirectly involved in this administrative appeal shall neither (1) file a motion to renew or reargue this Recommended Final Decision or any part of it, nor (2) communicate with the Deputy Commissioner and any member of the Commissioner's office regarding this decision unless the Deputy Commissioner, in her sole discretion, directs otherwise.

[224] See n. 19, at p. 9 above.

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ADDENDUM NO. 1

OADR DESCRIPTION

The Office of Appeals and Dispute Resolution ("OADR") is an independent quasi-judicial office within the Massachusetts Department of Environmental Protection ("the Department" or "MassDEP") which is responsible for advising MassDEP's Commissioner in resolving all administrative appeals of MassDEP Permit Decisions, Environmental Jurisdiction Determinations, 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 ("TGP"), 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, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7); See also Mass. R. Prof. C. 1.0(p) (definition of "tribunal"). MassDEP's Commissioner is the final agency decision-maker in these appeals. TGP, 2017 MA ENV LEXIS 34, at 9, citing, 310 CMR 1.01(14)(b). To ensure its objective review of MassDEP Permit Decisions, Environmental Jurisdiction Determinations, and Enforcement Orders, OADR reports directly to MassDEP's Commissioner and is separate and independent of MassDEP's program offices, Regional Offices, and Office of General Counsel ("OGC"). TGP, 2017 MA ENV LEXIS 34, at 9.

OADR staff who advise MassDEP's Commissioner in resolving administrative appeals are Presiding Officers. Id. Presiding Officers are senior environmental attorneys at MassDEP appointed by MassDEP's Commissioner to serve as neutral hearing officers in administrative appeals. Presiding Officers have significant authority under the Adjudicatory Proceeding Rules at 310 CMR 1.01 to adjudicate appeals, including the authority to issue Orders "to secure [the] just and speedy determination of every [administrative] appeal." 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(13)(d)-(13)(f). This authority includes fostering settlement discussions between the parties in administrative appeals and resolving appeals by conducting pre-hearing conferences with the parties; ruling on dispositive motions; conducting evidentiary Adjudicatory Hearings (quasi-judicial/civil courtroom trial type proceedings), which includes the authority to establish prior to the Hearings, the number of witnesses that the parties may offer at the Hearings and to exclude witnesses whose testimony would be duplicative, irrelevant, or otherwise unnecessary; and issuing Recommended Final Decisions on appeals to MassDEP's Commissioner. TGP, 2017 MA ENV LEXIS 34, at 9-10, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(13)(d)-(13)(f), 1.01(14)(a), 1.03(7). MassDEP's Commissioner, as the agency's final decision-maker, may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision issued by a Presiding Officer in an appeal. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(b). Unless there is a statutory directive to the contrary, the Commissioner's Final Decision can be appealed to Massachusetts Superior Court pursuant to G.L. c. 30A, § 14. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(f).