

August 16, 2024

Case Administrator
Office of Appeals and Dispute Resolution
Department of Environmental Protection
100 Cambridge Street, Suite 900
Boston, MA 02114

*Re: Holtec Decommissioning International, LLC Notice of
Claim for Adjudicatory Appeal*

Womble Bond Dickinson (US) LLP

Independence Wharf
470 Atlantic Avenue
Boston, MA 02210

t: 857.287.3100
f: 857.287.3101

Jed M. Nosal
Partner
Direct Dial: 857-287-3175
Direct Fax: 857-302-6845
E-mail: Jed.Nosal@wbd-us.com

Dear Sir or Madam:

Enclosed for filing, please find the following:

1. Holtec Decommissioning International, LLC Notice of Claim for Adjudicatory Appeal
2. Copy of Final Determination to Deny Application to Modify a Massachusetts Permit to Discharge Pollutants to Surface Waters (“Final Determination”) issued by the Massachusetts Department of Environmental Protection Division of Watershed Management (“MassDEP”) on July 18, 2024
3. Mail fee transmittal form
4. Copy of a check made payable to the Commonwealth of Massachusetts in the amount of \$100

Best regards,

Womble Bond Dickinson (US) LLP



Jed M. Nosal
Partner

JMN/dlw
Enclosures

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF APPEALS AND DISPUTE RESOLUTION**

August 16, 2024

In the Matter of
Holtec Decommissioning International, LLC

OADR Docket No. 2024-____
Surface Water Discharge Permit
No. MA0003557
Plymouth, MA 02360

NOTICE OF CLAIM FOR ADJUDICATORY APPEAL

Pursuant to 314 CMR 2.08(2), 310 CMR 1.01, and M.G.L. c. 30A, Holtec Decommissioning International, LLC (“Holtec” or “Appellant”) hereby submits this Notice of Claim for an Adjudicatory Appeal (“Notice”) from the Final Determination to Deny Application to Modify a Massachusetts Permit to Discharge Pollutants to Surface Waters (“Final Determination”) issued by the Massachusetts Department of Environmental Protection Division of Watershed Management (“MassDEP”) on July 18, 2024, attached hereto as Exhibit 1. As the Applicant, Holtec has status to file this Notice as a “person aggrieved.” 310 CMR 1.01(6)(b).

By this Notice, Appellant hereby requests an adjudicatory hearing as of right as described in 314 CMR 2.08. This Notice is facially timely, as well as provided in express conformity with the timeframe for appeal specified by MassDEP in the Final Determination consistent with 314 CMR 2.08. Specifically, this Notice is timely as provided in Section 2.08, because it is issued within thirty (30) days of the date set by MassDEP for appeal of the Final Determination. This Notice is otherwise in conformity with MassDEP regulations, including because it is submitted, as required, with payment of the requisite fees specified by MassDEP in the Final Determination.

I. BACKGROUND

Pilgrim Nuclear Power Station (“PNPS”) is a nuclear power generation facility that commercially generated electricity from 1972 to 2019. Prior to PNPS’ commercial operation, its original developer and operator, Boston Edison Company (“Boston Edison”), received an Interim Permit for the “discharge of industrial wastes from Pilgrim Station into Cape Cod Bay” from the Massachusetts Division of Water Pollution Control, effective on January 8, 1969, with an expiration date three years following PNPS’ initiation of commercial operation. On April 7, 1971, the U.S. Army Corps of Engineers (“ACOE”) promulgated a regulation requiring permits to discharge refuse into navigable waters under the Refuse Act, 33 U.S.C. 407. 36 Fed. Reg. 6564. Permit applications for facilities that were lawfully under construction prior to April 3, 1970, had to apply for permits by July 1, 1971. Accordingly, Boston Edison applied to ACOE for a permit on June 30, 1971. Because ACOE promulgated additional permitting regulations in July 1971 and implemented additional permit filing requirements, Boston Edison submitted a revised application on September 30, 1971.

With the enactment of the Water Pollution Control Act Amendments of 1972, the ACOE application was transferred to the U.S. Environmental Protection Agency (“EPA”), which issued PNPS’ first National Pollutant Discharge Elimination System (“NPDES”) Permit No. MA0003557 on March 25, 1975, jointly with the Massachusetts Division of Water Pollution Control. The radwaste system effluent outfall was designated as Outfall #001A. The permit authorized a daily average discharge of 20,000 gallons per day and a maximum discharge of 100,000 gallons per day. The permit stated in its “Effluent Limitations and Monitoring Requirements” that “[t]he liquid effluent radiation levels shall not exceed the limits specified in the Nuclear Regulatory Commission (NRC) permit or license for the operation of this facility.” The permit did not establish effluent pollutant characteristics for Outfall #001A but stated that

“[t]he discharge shall be in conformance with the NRC technical specifications as set forth in facility operating license DPR-35,” which is the Nuclear Regulatory Commission (“NRC”) permit for PNPS. The NPDES permit issued on May 15, 1980, redesignated the radwaste system effluent outfall as Outfall #010 but retained the same language. The NPDES permit issued on September 8, 1983, removed the designation of the radwaste system effluent outfall,¹ and the permit simply stated in its Effluent Limitations and Monitoring Requirements that “[a]ny discharge of radioactive waste shall be in conformance with regulations promulgated by the Nuclear Regulatory Commission.” Similarly, the NPDES permit issued on April 29, 1991 (and as amended on August 30, 1994) stated that “[t]he discharge of radioactive materials shall be in accordance with and regulated by the Nuclear Regulatory Commission (NRC) requirements (10 C.F.R. Part 20 and NRC Technical Specifications set forth in facility operating license, DPR-35),” without designating the radwaste system effluent outfall. Discharges from this outfall continued throughout PNPS’ commercial operation.

The NRC facility license for PNPS now held by Holtec Pilgrim, LLC, as owner, and Holtec Decommissioning International, LLC, as operator, permitted, and continues to permit, PNPS to dispose of “radioactive material released in liquid effluents to unrestricted areas,” *i.e.* Cape Cod Bay. After PNPS ceased commercial generation of electricity, Holtec submitted a post-shutdown decommissioning activities report (“PSDAR”) to the NRC on November 16, 2018, which calls for the spent fuel pool to be drained and other liquid wastes to be eliminated prior to dismantlement of the pool and other large plant systems and components, which are necessary steps for decommissioning.

¹ The outfall designated as Outfall #010 in the 1983 permit is a different outfall.

The 2020 NPDES permit, issued jointly by EPA and MassDEP, retained the same language regarding the discharge of radioactive materials as in the 1994 permit without designating the radwaste system effluent outfall. However, the permit now states that “[t]he discharge of pollutants in spent fuel pool water (including, but not limited to, boron) is not authorized by this permit.” Holtec initially believed that a permit modification would not be needed to discharge treated water from the radwaste system effluent outfall because EPA and MassDEP had ceased to regulate discharges from that outfall since the issuance of the 1983 NPDES permit. However, EPA notified Holtec by letter on February 17, 2022, that “should Holtec wish to discharge any such water, it should first provide EPA with a full characterization of pollutants present in such water to determine whether Clean Water Act requirements apply” After several meetings with EPA and MassDEP in 2022 and 2023, all agreed that Holtec would pursue a permit modification to authorize the discharge. Mass DEP and EPA advised that “new source” effluent limitation guidelines (“ELG”) for an electric steam generator (40 C.F.R. § 423.15) were appropriate for the source water and effluent characterization to support the application.

II. PROCEDURAL HISTORY

By the time that Holtec sought a modification to the NPDES permit, EPA and MassDEP ceased issuing permits jointly. On April 4, 2023, Holtec applied to MassDEP to modify its Surface Water Discharge Permit for PNPS to include the radwaste system effluent outfall, newly designated as Outfall #015, and to authorize the discharge of non-radiological pollutants in treated water volumes from the Spent Fuel Pool, Reactor Cavity, Dryer Separator Pit, and Torus. MassDEP issued a tentative determination to deny the application on July 24, 2023. MassDEP held a public hearing on August 24, 2023, and provided an opportunity for written public comment until August 31, 2023. Holtec filed comments on August 31, 2023.

On November 3, 2023, MassDEP issued a request for information to Holtec to produce copies of “state or federal permits issued for wastewater discharges from Pilgrim Nuclear Power Station in 1971 or earlier.” On November 10, 2023, Holtec produced: Division of Water Pollution Control Interim Discharge Permit, January 8, 1969; Division of Water Pollution Control State Certification, July 31, 1970; Division of Water Pollution Control State Certification, April 15, 1971; Division of Water Pollution Control State Certification, April 23, 1971. Holtec indicated that Federal discharge permits issued during the timeframe specified in the request were not identified. On December 8, 2023, MassDEP issued a second request for information for Holtec to produce “Pilgrim Station No. 600 Boston Edison Company, Salt Water Use and Waterfront Development for Pilgrim Nuclear Power Station [Salt Water Use Report] and operating records pertaining to treatment of liquid wastes” as well as “any applications and associated materials related to the three Water Quality Certifications (July 31, 1970, April 15, 1971 and April 23, 1971).” On December 19, Holtec produced: United States of America Atomic Energy Commission Summary of Application for an Operating License for Pilgrim Nuclear Power Station, Docket No. 50-293, August 6, 1971 (“OL Application”), which included the requested Salt Water Use Report; and Department of the Army, Corps of Engineers Application for Permit to Discharge or Work in Navigable Waters and Their Tributaries, September 30, 1971 (“ACOE Application”).

On April 23, 2024, Holtec revised its application for a permit modification because it had incorrectly identified Outfall #015 as a “new source” as defined by MassDEP’s Surface Water Discharge Program regulations, 314 C.M.R. § 3.02. The Spent Fuel Pool, Reactor Cavity, Dryer Separator Pit, Torus, and Outfall #015 were part of the original design basis of PNPS at the time that radwaste discharge was permitted by Massachusetts Division of Water Pollution Control on

January 8, 1969. When PNPS became subject to NPDES permitting, the radwaste discharge header was designated as Outfall #001A. Accordingly, the revision to the application removed references to Outfall #015 as a “new source.”

In its Final Determination, MassDEP denied the requested permit modification on the grounds that the proposed discharge is not a permitted discharge under the Ocean Sanctuaries Act (“OSA”), G.L. c. 132A, §§ 12A–18, on the grounds that it does not fall within the exceptions that allow the discharge of industrial wastes into the Cape Cod Bay Ocean Sanctuary.

III. GROUNDS FOR APPEAL

MassDEP committed errors of fact and law by determining that the proposed discharge of treated wastewater from Pilgrim into Cape Cod Bay is not an “existing” discharge under the OSA and that the proposed discharge is not “associated with” generation. MassDEP also committed an error of law in determining that it has legal authority to prohibit the proposed discharge under the OSA entirely, as opposed to imposing pollutant effluent limits, because the Atomic Energy Act of 1954 (“AEA”) preempts its application as a complete bar to discharging the treated radwaste effluent. Finally, MassDEP erred in failing to find that the discharge will be consistent with, and meet the requirements of, the Massachusetts Clean Waters Act (“CWA”), as amended (G.L. c. 21, §§ 26–53) and implementing regulations at 314 CMR 2.00, 3.00, and 4.00.

Appellant states as follows:

1. The Ocean Sanctuaries Act generally prohibits “the dumping or discharge of commercial, municipal, domestic or industrial wastes” in statutory ocean sanctuaries, including Cape Cod Bay. G.L. c. 132A, § 15.

2. MassDEP erred by finding that the pollutants remaining in the treated liquid radwaste effluent constitute prohibited “wastes.” Under 301 CMR 27.02, “wastes” are defined as “any unwanted, discarded, or environmentally harmful solid, liquid, or gaseous materials

resulting from commercial, municipal, domestic, or industrial Activities, including, but not limited to garbage, snow, thermal discharges, saline discharges, and sewage.” The “pollutants” in the liquid radwaste effluent are not of the class of wastes described as examples of wastes. Moreover, given the characterization of the effluent “pollutants,” as that term is used in the CWA, the water quality of the water resulting from the industrial activities and treatment will be better than the water used to generate it, and the concentrations of the detectable pollutants will be well *below the concentrations detectable in the receiving waters*. The treated water to be discharged is not environmentally harmful, and thus should not be characterized as waste that is likely to “significantly alter” or otherwise endanger the ecology or appearance of Cape Cod Bay. 301 CMR 27.02.

3. Further, Section 16 of the OSA provides that “[n]othing in this act is intended to prohibit the following activities, uses or facilities: In all ocean sanctuaries except the Cape Cod Ocean Sanctuary the planning, construction, reconstruction, operation and maintenance of industrial liquid coolant discharge and intake systems *and all other* activities, uses and facilities *associated with* the generation . . . of electrical power, provided that all certificates, licenses, permits and approvals required by law are obtained therefor, and provided, further, that such activities, uses and facilities shall not be undertaken or located except in compliance with any applicable general or special statutes, rules, regulations or orders lawfully promulgated” G.L. c. 132A, § 16 (emphasis added). This broad exclusion is applicable to the radwaste effluent discharge.

4. MassDEP erred by finding that the activity involved in decommissioning PNPS and the use of the radwaste system effluent outfall is a separate activity from the operation and maintenance of PNPS and use of the radwaste system effluent outfall when PNPS was

commercially generating power, because the decommissioning of a nuclear power plant is inextricably “associated with” the plant’s generation of electrical power.

5. According to the International Atomic Energy Agency (“IAEA”)² decommissioning is simply one phase in the life cycle of a nuclear power plant. “While decommissioning is the last stage in the lifetime of a facility, aspects of decommissioning, such as designing for the minimization of radioactive waste (especially long-lived radioactive waste), planning for decommissioning and record keeping, are required to be considered throughout the lifetime of the facility, beginning with the initial planning and design of the facility.” IAEA, *Decommissioning Of Nuclear Power Plants, Research Reactors and Other Nuclear Fuel Cycle Facilities - Specific Safety Guide* (2018) at p. 1.³ Moreover, “[a]lthough the principles and aims of radiation protection during operation and during decommissioning are fundamentally the same, the methods and procedures for implementing radiation protection may differ during decommissioning owing to differences in the physical conditions of the facility, the need for access to highly activated components or contaminated equipment or areas, and the removal of [Structures, Systems, and Components].” *Id.* at pp. 8–9.

6. The U.S. Nuclear Regulatory Commission (“NRC”) takes a similar approach to regulating the life cycle of nuclear plants. The NRC does not license any nuclear power plant to operate without consideration of the plant’s eventual decommissioning. The NRC considered the major environmental impact from decommissioning to have occurred when the decision was

² The IAEA, established in 1957, is “an independent intergovernmental organization consisting of over 150 Member States . . .” Legal Framework for IAEA Safeguards (Vienna: International Atomic Energy Agency, 2013) at p. 2. https://www-pub.iaea.org/MTCD/Publications/PDF/Pub1608_web.pdf. “The fundamental objective of the IAEA, as set out in Article II of its Statute, is to ‘seek to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world.’” *Id.*

³ https://www-pub.iaea.org/MTCD/publications/PDF/P1812_web.pdf

made to operate the reactor, and the NRC considered the incremental environmental impacts of decommissioning when PNPS was re-licensed.

7. Owners of every nuclear power station in commercial operation are required to maintain a fund for their ultimate decommissioning. MassDEP erred in finding that decommissioning is not associated with generation, because PNPS's decommissioning fund was directly linked to its revenue from generation of electricity.

8. As a plant transitions from operating to decommissioning, the licensee must develop a license termination plan ("LTP"). One of the first LTP-related tasks the licensee is required to complete is the preparation of a site characterization study. "Site characterization information is provided to determine the extent and range of radioactive contamination on site, including structures (on a structure by structure basis and as necessary on a room by room basis), systems, components, residues, soils, and surface and ground water. NRC, *Standard Review Plan for Evaluating Nuclear Power Reactor License Termination Plans NUREG-1700 Revision 2* (Published April 2018) at p. 2-2.⁴ "On the basis of the site characterization, the licensee designs final radiation surveys to evaluate all areas in which contamination previously existed, remains, or has the potential to remain." *Id.*

9. A related document a licensee is required to submit to the NRC is the Historical Site Assessment ("HSA"). "The HSA collects existing information describing a site's complete history from the start of site activities to the present." NRC, *Consolidated Decommissioning Guidance, Characterization, Survey, and Determination of Radiological Criteria - Final Report*, NUREG-1757 Volume 2, Revision 2 (Published July 2022).⁵

⁴ <https://www.nrc.gov/docs/ML1811/ML18116A124.pdf>

⁵ <https://www.nrc.gov/docs/ML2219/ML22194A859.pdf>

10. In reviewing – and determining whether to accept – an LTP from a licensee, NRC staff must determine whether the LTP “identifies all locations, both inside and outside the facility, where radiological spills, disposals, operational activities, or other radiological accidents and or incidents occurred and could have resulted in contamination.” *Id.* In short, the fundamental purpose of the LTP (the document on which all decommissioning activities are based) is to present a record of the activities at the plant over its operational lifetime to ensure that decommissioning activities address that operational history. Viewed properly, decommissioning activities are unquestionably “associated with” the generation of electricity at a nuclear power plant.

11. The volume of water currently in the Spent Fuel Pool, Reactor Cavity, Dryer Separator Pit, and Torus is the same water that accumulated during commercial operations and was previously in contact with plant components and surfaces that are now being dismantled. MassDEP erred because pollutants introduced during decommissioning operations are indistinguishable from pollutants that were introduced during commercial operations.

12. The activities and uses of the Spent Fuel Pool, Reactor Cavity, Dryer Separator Pit, and Torus occurring during decommissioning operations are the same activities and uses that occurred during both operational and refueling periods when PNPS was still in commercial operation, including but not limited to the dismantling and temporary storage of plant components. These Structures, Systems, and Components (“SSC”) were “necessary for plant operation.” NUREG-0586 Supp 1 § 3.1.2. These include radwaste facilities. Outages were performed for repairs and upgrades, at times independent of, and at other times concurrent with, refueling periods. The spent fuel pool was in use continuously from the first discharge of spent nuclear fuel and other consumable SSCs (including in core radiation monitors). During the

plant's operating history, while on-line and during outages, modifications were made to the spent fuel pool to accommodate storage of various pieces of irradiated hardware and re-racks to increase spent fuel storage capacity.

13. The radwaste treatment process was improved over the course of the commercial operation period of PNPS, and the radwaste treatment process used when PNPS ceased commercial operations is the same as that which will treat the water during decommissioning. Thus, the characterization of the constituents of the liquid radwaste effluent during decommissioning is consistent or improved compared with the effluent that was discharged when the plant was in commercial operation. MassDEP erred in finding the decommissioning process to be distinct from commercial operations because the same NRC regulatory requirements governing radioactive releases applies to both decommissioning and operating reactors and the same or better treatment process remains in use.

14. Section 16 of the OSA also excludes from the prohibition against the discharge of industrial waste "the operation and maintenance of existing municipal, commercial or industrial facilities and discharges where such discharges or facilities have been approved and licensed by appropriate federal and state agencies" MassDEP erred in finding that this exclusion is inapplicable, because the radwaste system effluent discharge is an "existing discharge" under the OSA.

15. In relevant part, an "existing discharge" is defined by statute as "a municipal, commercial or industrial discharge at the volume and locations authorized by the appropriate federal and state agencies . . . on *December eighth, nineteen hundred and seventy-one*, in the case of the Cape Cod Bay . . . Sanctuary." G.L. c. 132A, § 12 (emphasis added).

16. MassDEP erred by finding that any discharge as of December 8, 1971, could not have been authorized on the grounds that Holtec did not identify any federal discharge permits issued 1971 or earlier. MassDEP's reading of the OSA exception for an "existing discharge" to require a federal "permit" to have been issued for the discharge to be "authorized" impermissibly renders that exception a nullity, given that ACOE did not issue *any* permits under its Refuse Act permitting program under 33 C.F.R. § 209.131, 36 Fed. Reg. 6564. When the Massachusetts Legislature defined an "existing discharge" in St. 1989, c. 728, it would have been aware that no permits were issued and would have considered the fact that the Federal Water Pollution Control Act Amendments of 1972, enacted on October 18, 1972, overrode the effect of the Refuse Act, 33 U.S.C. § 407 and the provision in 33 C.F.R. § 209.131(d)(4) that "[a]ll discharges or deposits to which the Refuse Act is applicable . . . are unlawful unless authorized by an appropriate permit issued under the authority of the Secretary of the Army." Under 33 U.S.C. § 1342(a)(5), all ACOE permit applications still pending on October 18, 1972 were transferred to the EPA as applications for a NPDES permit. Under 33 U.S.C. § 1342(k), "[u]ntil December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of . . . [the Refuse Act], unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application." Thus, because a timely application would render any discharge on or before December 8, 1971, not to be a violation (except those where an enforcement action had been commenced),⁶ the Massachusetts Legislature must have intended the existence of a pending

⁶ The savings clause of Section 4 of the 1972 Amendments preserved "any suit, action, or other proceedings lawfully commenced" prior to the enactment of the 1972 Amendments.

ACOE/EPA application to be sufficient to demonstrate that a discharger was “authorized” to do so under federal law.

17. Boston Edison Company, the original owner and operator of PNPS, applied to ACOE for a permit to discharge into Cape Cod Bay on or about June 30, 1971, and, due to changes to application requirements in July 1971, reapplied as instructed by ACOE on September 30, 1971. These applications were timely when filed. MassDEP erred by finding that the materials provided by Holtec do not clearly demonstrate that the discharge was federally authorized on or before December 8, 1971, because the application is sufficient evidence. In fact, the application itself indicates that all appropriate authorizations and certifications had been obtained from the relevant state and federal agencies to support the application. The fact of the application having been submitted and the absence of any pending suits, actions, or other proceedings against PNPS, means that no action could be commenced for any discharge by PNPS into Cape Cod Bay that occurred prior to December 31, 1974. In other words, the existence of a federal discharge permit or any other authorization by a federal agency on December 8, 1971, is not required under the OSA because any discharge by PNPS on or before that date is not a violation of the Refuse Act.

18. The Massachusetts Water Resources Commission (“MWRC”) issued the Water Quality Standard Certification dated April 23, 1971, in support of Boston Edison Company’s petition to the Army Corps of Engineers dated June 30, 1971, and the refiled petition dated September 30, 1971, to dredge, construct discharge structures, and discharge liquid radwastes. MassDEP is estopped from arguing that the discharge would have violated Massachusetts water quality standards.

19. MassDEP erred by finding that Holtec did not demonstrate that the Interim Permit would have authorized the type of discharge for which Holtec now seeks authorization. On January 8, 1969, the Massachusetts Division of Water Pollution Control granted an Interim Permit for the “discharge of industrial wastes from Pilgrim Station into Cape Cod Bay,” pursuant to G.L. c. 21, § 43. The Interim Permit contained no limits, nor did it specify the constituent pollutants that could be discharged, because at that time, Massachusetts only evaluated applicable water quality standards. That is, any differences in the specific pollutants and concentrations in the effluents between what was studied or estimated in the late 1960s and what will be discharged from the radwaste system effluent outfall now are irrelevant under the OSA. The requirement for effluent limitations to be included in discharge permits was not established until the Massachusetts Clean Waters Act was amended in 1973. St. 1973, c. 546. The 1969 industrial waste discharge permit demonstrates that the “discharge of industrial wastes,” broadly defined and without limitation as to any effluent composition or concentration or volume, “from Pilgrim Station into Cape Cod Bay,” and without limitation as to any particular point source, was authorized by Massachusetts on December 8, 1971.

20. MassDEP erred by finding that the exception does not apply on the grounds that the proposed discharge is not “the continuation of an existing discharge.” The statute does not include a limitation that the proposed radwaste effluent discharge must be a continuing discharge.

21. MassDEP erred by finding that Holtec had the burden to demonstrate that the radwaste discharge had begun prior to December 8, 1971. The statute does not include a limitation that the proposed discharges had to have begun before that date.

22. MassDEP erred by finding that “[t]he proposed discharge contains pollutants resulting from decommissioning, which per se could not have been ‘existing prior to December 8, 1971, a full year before the Facility began commercial operations.’” The statute does not require that the same pollutants had to have been “existing” prior to December 8, 1971. Further, the pollutants in the radwaste system effluent discharge are indistinguishable from the pollutants that were contemplated in the early studies of radwaste system effluent discharge from PNPS. Moreover, the Massachusetts Interim Permit simply allowed the “discharge of industrial wastes” without distinguishing the constituent pollutants.

23. MassDEP’s findings that the discharge of treated liquid effluent from the Spent Fuel Pool, Reactor Cavity, Dryer Separator Pit, and Torus is not associated with generation and is not an existing discharge are in error because they lack reasoned consistency and are arbitrary and capricious. The 2020 NPDES permit allows discharges from all of the designated outfalls, but MassDEP failed to explain how those discharges are “associated with generation” or are “existing discharges,” or otherwise permissible under the OSA, while the discharge of treated liquid effluent from the Spent Fuel Pool, Reactor Cavity, Dryer Separator Pit, and Torus are prohibited.

24. MassDEP erred by finding that the proposed discharge is prohibited by the OSA, because the AEA preempts the OSA from acting as a complete bar against any radwaste effluent discharge, even if the prohibition were directed only against Clean Waters Act “pollutants.”

25. State law, and thus state law remedies, are preempted if federal law so pervades a given field as to evidence a congressional intent to occupy that field. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). Even if Congress has not entirely displaced state law in a field, state law is still preempted if an “actual conflict” exists between state and federal law. *Id.* Such a

conflict occurs “when it is impossible to comply with both state and federal law” or “where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.” *Id.*

26. “[W]hen the radiation and nonradiation hazards are inseparable, federal law preempts a state-law injunction ordering removal of the wastes.” *Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234, 1240 (7th Cir. 1985).

27. NRC comprehensively regulates the discharge of radioactive by-product materials in effluents. In regulating the management of by-product materials, the NRC ensures that disposal is carried out in a manner as the Commission deems appropriate “to protect the public health and safety and the environment from radiological and non-radiological hazards associated with the processing and with the possession and transfer of such material, taking into account the risk to the public health, safety, and the environment, with due consideration of the economic costs and such other factors as the Commission determines to be appropriate.” 42 U.S.C. § 2114. Accordingly, NRC regulations and guidance and PNPS’ NRC license and licensing basis limit radiological effluents, prescribe control technology, and dictate routine collection and reporting. 10 CFR 20.2001, 20.1301; *see also* 10 C.F.R. Part 20, Appendix B (effluent concentrations); 10 C.F.R. § 50.34a (design objectives for equipment to control releases of radioactive material in effluents—nuclear power reactors); 10 C.F.R. § 50.36a (technical specifications on effluents from nuclear power reactors); Regulatory Guide 1.21 (measuring, evaluating, and reporting radioactive material in liquid and gaseous form).

28. The NRC Facility License, DPR-35, provides the specifications and bases for the discharge of liquid effluent from PNPS. Among other documents that are incorporated into the NRC license, PNPS’ Offsite Dose Calculation Manual (“ODCM”) provides a detailed

description of the systems and operations for treating and discharging liquid radioactive waste. ODCM, § 3/4.2.1 (Liquid Effluents Concentration, incorporating the concentration limits provided in 10 CFR Part 20, Appendix B, Table 2, Column 2); § 6.1 (Liquid Radwaste System); § 7.1.1 (Liquid Radioactive Waste Release).

29. Although radiological effluents can be treated to control CWA pollutants to levels set forth in the application for the permit modification, it is technically infeasible to eliminate them completely such that there are zero pollutants in the effluent or to know with absolute certainty that there are zero pollutants in the effluent. Because pollutants are effectively inseparable from the radwaste effluent, there is an actual conflict between the NRC regulations and PNPS license, which permit the discharge of liquid radwaste effluent as the means of managing radiological by-product materials from PNPS, and the OSA, which would act as a complete bar to the discharge of pollutants contained in the effluent under MassDEP's interpretation of the OSA. It would be impossible for Holtec to comply with both state regulation under the OSA and the NRC regulations and license if MassDEP's interpretation is upheld. The OSA would also stand as an obstacle to the accomplishment of the full purposes of the AEA, which in this case is the full decommissioning of PNPS in the manner permitted by NRC. By permitting the release of liquid radioactive effluence, NRC deemed this manner of discharge as an appropriate method of disposal considering the balancing of the public health, safety, and the environment, with due consideration of the economic costs. Thus, MassDEP erred by finding that the OSA can be applied to PNPS, because it is preempted by the AEA if the OSA exceptions are inapplicable. MassDEP's findings also violate the rule of statutory construction that a statute should not be read in a way that invalidates it.

30. MassDEP's denial of the permit modification is in error because discharges from Outfall #015 will meet the effluent limitation guidelines applicable to PNPS. MassDEP entirely failed to address whether the discharge would be consistent with the Massachusetts Clean Waters Act, as amended (G.L. c. 21, §§ 26–53) and implementing regulations at 314 CMR 2.00, 3.00 and 4.00, given the characterization of the effluent pollutants. Having ignored the CWA-regulated pollutants that are actually in the treated radwaste system effluent discharge, while permitting discharges from the other designated outfalls, MassDEP's reasoning for denying the permit modification is mere pretext for an improper attempt to regulate the radioactive by-product materials, which is squarely preempted by the AEA.

IV. REQUEST FOR RELIEF

Holtec respectfully requests that the Final Determination to Deny a Modification to the Massachusetts Permit to Discharge Pollutants to Surface Waters for Pilgrim Nuclear Power Station, NPDES MA0003557, be reversed and remanded with instructions to approve the permit modification as requested, or in the alternative to make a determination on the merits of Holtec's application under the Massachusetts Clean Waters Act, not the Ocean Sanctuaries Act.

Respectfully submitted,

Holtec Decommissioning International, LLC

By their attorneys,



Jed M. Nosal (BBO# 634287)
Jesse S. Reyes (BBO# 634169)
WOMBLE BOND DICKINSON (US) LLP
Independence Wharf
470 Atlantic Avenue, Suite 600
Boston, MA 02210
Telephone: (857) 287-3175
Jed.Nosal@wbd-us.com
Jesse.Reyes@wbd-us.com

EXHIBIT 1

Holtec Final Determination
(dated July 18, 2024)



Commonwealth of Massachusetts
Executive Office of Energy & Environmental Affairs

Department of Environmental Protection

100 Cambridge Street Suite 900 Boston, MA 02114 • 617-292-5500

Maura T. Healey
Governor

Kimberley Driscoll
Lieutenant Governor

Rebecca L. Tepper
Secretary

Bonnie Heiple
Commissioner

July 18, 2024

Benjamin Reynolds
Director of Environmental Affairs
Holtec Decommissioning International, LLC
1 Holtec Boulevard
Camden, NJ 08104

Re: Final Determination to Deny a Modification to the Massachusetts Permit to Discharge Pollutants to Surface Waters for Pilgrim Nuclear Power Station, NPDES MA0003557

Dear Mr. Reynolds:

Enclosed please find a Final Determination to Deny a 2023 request to modify the Massachusetts Permit to Discharge Pollutants to Surface Waters for Pilgrim Nuclear Power Station, issued by the Massachusetts Department of Environmental Protection ("MassDEP") pursuant to the Massachusetts Clean Waters Act, M.G.L. Chap. 21, §§ 26-53, and the implementing regulations at 314 CMR 2.00, 3.00 and 4.00. On January 30, 2020, the United States Environmental Protection Agency ("USEPA") and MassDEP issued a joint NPDES Permit MA0003557 authorizing certain discharges from Pilgrim Nuclear Power Station which ceased power generation on May 31, 2019. MassDEP will issue a Response to Comments at a later date.

Please contact me at (617) 259-0537 or at lealdon.langley@mass.gov if you have any questions.

Very truly yours,

Lealdon Langley, Director
Division of Watershed Management

FINAL DETERMINATION TO DENY APPLICATION TO MODIFY**A****MASSACHUSETTS PERMIT TO DISCHARGE POLLUTANTS TO SURFACE WATERS**

Pursuant to the Massachusetts Clean Waters Act, as amended (M.G.L. c. 21, §§ 26 - 53), and implementing regulations at 314 CMR 2.00, 3.00 and 4.00,

Holtec Decommissioning International, LLC
1 Holtec Boulevard
Camden, NJ 08104
(the "Applicant")

has requested a modification of its authorization to discharge to surface waters pursuant to Permit No. MA0003557 dated January 30, 2020 ("Permit"), from the following facility,

Pilgrim Nuclear Power Station
600 Rocky Hill Road
Plymouth, MA 02360
(the "Facility")

to receiving water named

Cape Cod Bay

Pursuant to 314 CMR 2.08(1), the Massachusetts Department of Environmental Protection ("MassDEP") has determined to deny the Applicant's request for permit modification. The following statement of reasons supports this final determination:

1. Part I.B of the Applicant's Permit, titled UNAUTHORIZED DISCHARGES, states, in pertinent part, "The Permittee is authorized to discharge only in accordance with the terms and conditions of this permit and only from the outfalls listed in Parts I.A. through I.C. of this permit." The Permit also prohibits several specific types of discharges:
 - a. Pollutants in spent fuel pool water (including, but not limited to, boron).
 - b. Pollutants in stormwater associated with construction activity, including activities, physical alterations, or additions associated with the dismantlement and demolition of plant systems, structures, and buildings.
 - c. Pollutants associated with contaminated site dewatering, pipeline and tank dewatering, collection structure dewatering, or dredge-related dewatering, and including but not limited to physical alterations or additions resulting in the discharge of pollutants associated with the dismantlement and decontamination of plant systems and structures and/or the demolition of buildings.
2. The Facility permanently stopped generating electricity on May 31, 2019, and decommissioning and demolition is ongoing at the Facility.
3. On April 4, 2023, the Applicant applied to MassDEP for a permit modification to authorize the discharge of 1.1 million gallons of treated wastewater from the spent fuel pool, torus, dryer separator, and reactor cavity. This wastewater stream has been shown to contain pollutants such as suspended solids, oil and grease, copper, zinc, lead, nickel, boron, and phenol.
4. On July 24, 2023, in accordance with 314 CMR 2.04(1), MassDEP issued a tentative determination to deny the application for a permit modification. MassDEP provided public notice of this decision in

accordance with 314 CMR 2.06 and held a public hearing on August 24, 2023. The public comment period closed on August 31, 2023. MassDEP received more than 1,000 comments, including comments from the Applicant.

5. On November 3, 2023, MassDEP offered the Applicant an opportunity to supplement its application by providing to MassDEP any state or federal permits issued for wastewater discharges from the Facility in 1971 or earlier. On November 10, 2023, the Applicant provided an interim permit issued by the Massachusetts Division of Water Pollution Control, dated January 8, 1969 (“Interim Permit”), and three water quality certifications issued by the same office, dated July 31, 1970, April 15, 1971, and April 23, 1971. The Interim Permit is a one-page document that refers to an application dated October 17, 1968, and a report entitled “Pilgrim Station No. 600, Boston Edison Company, Salt Water Use and Waterfront Development for Pilgrim Nuclear Power Station” (“Salt Water Use Report”).
6. On December 8, 2023, MassDEP offered the Applicant a second opportunity to supplement its application by providing to MassDEP materials referenced in the Interim Permit as well as any documents submitted in support of the applications for the Interim Permit and the water quality certifications. On December 19, 2023, the Applicant provided an application for an operating license submitted to the United States Atomic Energy Commission dated August 6, 1971 (“AEC Application”), and an application for a discharge permit submitted to the Department of the Army, Corps of Engineers, dated September 30, 1971 (“Army Corps Application”). The Salt Water Use Report was included in the documents provided by the Applicant on December 19, 2023.
7. The receiving water is within Cape Cod Bay Ocean Sanctuary, as defined in the Ocean Sanctuaries Act (“Act”), M.G.L. c. 132A, §§ 12A – 18.
8. Section 15 of the Act prohibits the “dumping or discharge of commercial, municipal, domestic or industrial wastes” into ocean sanctuaries. M.G.L. c. 132A, § 15(4). According to the application to modify the Permit and the definition of “wastes” at 301 CMR 27.02, the water the Facility proposes to discharge is industrial waste subject to that prohibition. The water is stored in the spent fuel pool, torus, dryer separator pit, and reactor cavity, was utilized in the Facility’s industrial operations and for decommissioning activities, is contaminated, and is now proposed to be discharged into Cape Cod Bay Ocean Sanctuary.
9. Section 16 of the Act identifies certain narrow exemptions to the Act’s prohibition against discharges into ocean sanctuaries.
10. None of the exceptions in Section 16 applies to the proposed discharge.
11. Section 16 of the Act exempts “activities, uses and facilities associated with the generation, transmission, and distribution of electrical power.” M.G.L. c. 132A, § 16. It is undisputed that the Facility has ceased electrical power generation, is no longer transmitting or distributing power, and is in the process of being decommissioned. The waters proposed for discharge have been used for decommissioning processes, including dismantlement of plant systems, and require disposal as part of the decommissioning process. Since the proposed discharge is associated with the decommissioning of the Facility, not the generation, transmission, or distribution of electric power, this exception does not apply.
12. Section 16 of the Act also exempts “the operation and maintenance of existing municipal, commercial or industrial facilities and discharges.” Section 12B defines an “existing discharge,” with respect to Cape Cod Bay Ocean Sanctuary, as a discharge “at the volume and locations authorized by the appropriate federal and state agencies . . . on December [8, 1971].” M.G.L. c. 132A, §§ 12B, 16. There is currently no discharge from the spent fuel pool, torus, reactor cavity, and dryer separator pit, and such discharges are explicitly prohibited by Part I.B of the Applicant’s Permit. Since the proposed discharge is not the continuation of an existing discharge, this exception does not apply.

13. Even if MassDEP were to disregard the fact that the proposed discharge is not the continuation of an existing discharge and assume that the Interim Permit authorized a discharge at the same volume and location as the proposed discharge, the materials provided by the Applicant do not clearly demonstrate that, as of December 8, 1971, the radwaste discharge described in the Salt Water Use Report and the Army Corps Application was federally authorized on or before December 8, 1971, or had even begun on or before that date.
14. The documents provided by the Applicant indicate that Boston Edison Company (then owner of the Facility) applied to the Army Corps for a discharge permit on or about September 30, 1971. Army Corps Application, p. 55. According to Army Corps final regulations promulgated on April 7, 1971, facilities wishing to discharge (or already discharging) pollutants into navigable waters were required to apply for a permit before July 1, 1971, or no less than 120 days in advance of the date on which they proposed to begin discharging. 36 Fed. Reg. 6564, 6565 (April 7, 1971). The regulations further provided that “[a]ll discharges or deposits to which the Refuse Act is applicable ... are unlawful unless authorized by an appropriate permit issued under the authority of the Secretary of the Army. The fact that official objection may not have been raised with respect to past or continuing discharges or deposits does not constitute authority to discharge or deposit or to continue to discharge or deposit in the absence of an appropriate permit.” *Id.* Pursuant to these regulations, Boston Edison Company could seek to discharge not less than 120 days after September 30, 1971 (the date on which the Army Corps Application was submitted), or on or after January 28, 1972, and any discharge prior to the issuance of the Army Corps permit would be unlawful unless permitted. The Applicant did not provide an Army Corps permit issued prior to December 8, 1971, and in fact, responded that it was not able to identify any federal permits issued 1971 or earlier. As a result, any discharge as of that date could not have been authorized and therefore could not have been an existing discharge.
15. The three water quality certifications do not demonstrate an authorization for an existing discharge under the Act. A water quality certification issued pursuant to Section 21(b)(1) of the Water Quality Improvement Act of 1970 (the precursor to Section 401 of the federal Clean Water Act) is a prerequisite to federal authorization but in and of itself does not authorize a discharge. *See* Pub. L. No. 91-224, § 102, 84 Stat. 108 (1970). A water quality certification indicates that the state issuing the certification has determined that a discharge that a federal agency is proposing to authorize will comply with the state’s water quality standards. *See id.* The Applicant did not provide the federal permit certified by the water quality certifications, nor do the certifications indicate what proposed federal permit they are certifying.
16. Furthermore, the Army Corps Application contains ambiguous information about whether the radwaste discharge began prior to December 8, 1971. The Army Corps Application described the radwaste discharge as one that “will begin about July, 1971.” *Id.* at 61, 73. In addition, in part 1 of Section II of the Army Corps application, the discharge is described as “present” and not as “proposed new or changed.” *Id.* However, part 19 of Section II says “see Attachment 2” as the answer to the “date discharge began,” and part 20 says “see Attachment 2” as the answer to the “date discharge will begin.” *Id.* Attachment 2 says that the radwaste system effluents “discharge ... will begin about July, 1971,” even though the date of the Army Corps Application was September 30, 1971. *Id.* at 73. The attachment further indicates that when the discharge begins, it will contain “no added radioactivity. Radioactivity in this discharge will increase about December, 1971 when reactor operation is initiated.” *Id.* The radwaste discharge is the only discharge in Attachment 2 that is noted to be prospective (it describes two other discharges and the date they began). *Id.* The Applicant has not provided any documents that clearly identify when the radwaste discharge began. As a result, it has not demonstrated that the radwaste discharge had begun prior to December 8, 1971.

17. Therefore, even if MassDEP were to disregard the fact that the proposed discharge is not the continuation of an existing discharge, *see supra* ¶ 12, and assume, again, that the Interim Permit authorized a discharge at the same volume and location as the proposed discharge, the Applicant has not demonstrated that there was a discharge “authorized by the appropriate federal and state agencies ... on December [8, 1971],” as required by the definition of “existing discharge.” M.G.L. c. 132A, § 12B. In particular, the Applicant has not provided evidence of authorization by the appropriate federal agency, or that the proposed radwaste discharge had in fact begun as of December 8, 1971.
18. Even if the radwaste discharge had been properly authorized by both state *and* federal permitting agencies and had begun prior to December 8, 1971, the Applicant would need to demonstrate that the type of discharge for which it now seeks authorization falls within the types of discharges that would have been authorized by those permits.
19. The Applicant is presently seeking authorization of a discharge that would empty all the wastewater held in the spent fuel pool, torus, reactor cavity, and dryer separator pit. The proposed discharge contains pollutants resulting from decommissioning, which per se could not have been “existing” prior to December 8, 1971, a full year before the Facility began commercial operations.
20. Therefore, even if MassDEP were to assume that the discharge described in the Salt Water Use Report and the Army Corps Application was authorized and in existence as of December 8, 1971, the materials provided by the Applicant do not clearly demonstrate that the Interim Permit or the Army Corps permit, had it been issued, would have authorized the type of discharge for which Holtec now seeks authorization.
21. Section 16 of the Act identifies certain other exceptions, each of which is inapplicable on its face. These include exceptions for “the laying of cables ... ; channel and shore protection projects, navigation aids, projects authorized under chapter ninety-one ... ; other improvements not specifically prohibited by said sections 12B to 16K, inclusive and section 18 ... ; the harvesting and propagation of fish and shellfish ... ; temporary educational and scientific activities ... ; and the extraction of sand and gravel ...” and certain discharges from “municipal wastewater treatment facilities.” M.G.L. c. 132A, § 16.
22. For the foregoing reasons, the proposed discharge is prohibited by Section 15 of the Act and does not qualify for any exception to the Act under Section 16.
23. The Act prohibits state agencies from permitting activities contrary to the provisions of the Act. M.G.L. c. 132A, § 18.
24. Since the proposed discharge is prohibited by the Act, MassDEP must deny the requested Surface Water Discharge permit modification in accordance with Section 18 of the Act.
25. CZM is vested with the “care, oversight and control” of ocean sanctuaries, M.G.L. c. 132A, § 14. The Act directs state agencies to “confer and consult with [CZM] to ensure compliance with the Act.” M.G.L. c. 132A, § 18. Before issuing the tentative determination to deny the application, MassDEP conferred with CZM, including by letter, regarding application of the Act to the Applicant’s proposed discharge. CZM advised MassDEP on this matter, including by letter. Those letters are attached to the final determination and incorporated herein by reference. MassDEP conferred further with CZM before finalizing this determination.

Signed this 18th day of July, 2024

A handwritten signature in black ink, appearing to read "Lealdon Langley". The signature is fluid and cursive, with a large initial "L" and a long, sweeping underline.

Lealdon Langley, Director
Division of Watershed Management
Department of Environmental Protection

APPEALS

Any person aggrieved by this decision may request an adjudicatory hearing on the Determination to Deny by timely filing a Notice of Claim for an Adjudicatory Appeal ("Notice of Claim") in accordance with 314 CMR 2.08(2) and 310 CMR 1.01 within 30 days of its issuance. The Notice of Claim shall state specifically, clearly and concisely the facts that are grounds for the appeal, the relief sought, and any additional information required by applicable law or regulation. A copy of this decision shall be included with the Notice of Claim. In accordance with 314 CMR 2.08(5), any person who is not the permit applicant who files a Notice of Claim shall simultaneously send a copy of the Notice of Claim by certified mail, return receipt requested, to the permit applicant.

The Notice of Claim and supporting documentation, and a copy of the check and transmittal form described below, must be sent by certified mail, hand delivery or email to:

Case Administrator
Office of Appeals and Dispute Resolution
Department of Environmental Protection
100 Cambridge Street, Suite 900
Boston, MA 02114
Caseadmin.OADR@state.ma.us

In addition, the Department's fee transmittal form, together with a valid check made payable to the Commonwealth of Massachusetts in the amount of \$100 for the appeal filing fee, if required, must be mailed to:

Commonwealth of Massachusetts Lock Box
Department of Environmental Protection
P.O. Box 4062
Boston, MA 02211

The Notice of Claim may be dismissed if the filing fee is not paid, unless the appellant is exempt or granted a waiver. The filing fee is not required if the appellant is a city, town (or municipal agency), county, district of the Commonwealth of Massachusetts, or a municipal housing authority. The Department may waive the adjudicatory filing fee for a person who shows that paying the fee will create an undue financial hardship. A person seeking a waiver must file, along with the hearing request, an affidavit setting forth the facts believed to support the claim of undue financial hardship.



Department of Environmental Protection

100 Cambridge Street Suite 900 Boston, MA 02114 • 617-292-5500

Maura T. Healey
Governor

Kimberley Driscoll
Lieutenant Governor

Rebecca L. Tepper
Secretary

Bonnie Heiple
Commissioner

July 21, 2023

Lisa Berry Engler, Director
Office of Coastal Zone Management
100 Cambridge Street, Suite 900
Boston, MA 02114

Dear Ms. Engler:

On April 4, 2023, Holtec Decommissioning International, LLC (“Holtec”), filed an application with the Department of Environmental Protection (“MassDEP” or “Department”) to modify Holtec’s Surface Water Discharge (“SWD”) Permit, issued pursuant to the state Clean Waters Act, M.G.L. c. 21, §§ 26-53, and the Department’s regulations at 314 CMR 3.00, for the former Pilgrim Nuclear Power Station (“PNPS”), located in Plymouth, Massachusetts. Holtec’s application requests the authorization of a new discharge of wastewater that is prohibited under the existing permit.

Holtec is proposing to discharge that wastewater, via its permitted discharge canal, into Cape Cod Bay. The receiving waters for the proposed discharge are within Cape Cod Bay Ocean Sanctuary, which is protected under the Ocean Sanctuaries Act (“Act”), M.G.L. c. 132A, §§ 12A-18. The Act grants “care, oversight and control” of the ocean sanctuaries to the Office of Coastal Zone Management (“CZM”) and prohibits state agencies from permitting activities contrary to provisions of the Act. *Id.* at §§ 14, 18. After carefully reviewing the provisions of the Act and Holtec’s application for modification of its existing permit, MassDEP concludes that the proposed discharge is subject to and prohibited by the Act. By this letter, MassDEP seeks to confer and consult with CZM as required by the Act, M.G.L. c. 132A, § 18, to determine whether CZM agrees with MassDEP’s interpretation of the Act and its application to Holtec’s proposed discharge.

Background

Holtec states that PNPS began commercial operations in December 1972. PNPS was constructed and operated by Boston Edison Company, sold to Entergy Corporation in 1999, and then sold to Holtec in 2019. On May 31, 2019, PNPS permanently stopped generating electricity and is now undergoing decommissioning.

As described in the permit modification application, current wastewater discharges from the plant are authorized by a National Pollutant Discharge Elimination System (“NPDES”) Permit

(No. MA0003557) and Surface Water Discharge Permit of January 2020 (“2020 Permits”) issued jointly by the Department and the U.S. Environmental Protection Agency (“EPA”).

The 2020 Permits authorize discharges of circulating water, non-thermal backwash water, non-contact cooling water from the salt service water system, intake screenwash water, stormwater, station heating system water, cooling water from certain heat exchangers, drainage from boiler room floor drains, salt service water system chlorinated salt water from various sumps, and reject water from the demineralizer system and the emergency standby liquid control system. Holtec’s March 31, 2023, Application to EPA (“2023 Application”) at 3-22.¹ The 2020 Permits expressly prohibit certain discharges, including discharges of pollutants from the spent fuel pool, discharges of pollutants in stormwater associated with construction activity, and discharges of pollutants associated with the dismantlement, demolition or decontamination of plant systems and structures or otherwise not authorized by the 2020 Permits. *Id.* at 27.

Holtec’s applications to EPA and MassDEP to modify the 2020 Permits request authorization to discharge “a new source of industrial wastewater” from the spent fuel pool, torus, reactor cavity, and dryer separator pit, via an outfall numbered #015, into the existing, permitted discharge canal which discharges into Cape Cod Bay. 2023 Application at 3-4. According to Holtec, this wastewater stream, which it proposes to treat prior to discharge, would potentially contain pollutants such as suspended solids, oil and grease, copper, zinc, lead, nickel, boron, and phenol. *Id.* at 3-6.

Holtec’s proposed discharge is explicitly prohibited by the 2020 Permits because the wastewaters originate, in part, in the spent fuel pool and because it proposes to discharge pollutants associated with dewatering, dismantlement, demolition or other decommissioning of plant components. Since the plant ceased commercial operation, the waters of the spent fuel pool, reactor cavity, dryer separator pit, and torus have been used for decommissioning purposes unrelated to generation of electricity, as explained on page 4 of the 2023 Application:

Following the permanent shutdown of Pilgrim in 2019, spent fuel assemblies stored in the pool were transferred to dry cask storage in a stand-alone Independent Spent Fuel Storage Installation (“ISFSI”). The racks that stored the fuel have been removed and disposed of and the pool is currently being used to package radiological materials such as the reactor vessel internal components for ultimate disposal. Following the completion of the packaging campaign the [spent fuel pool] water will be drained to the Torus for final disposition.

In addition, “[d]uring decommissioning, water in the Reactor Cavity / Dryer Separator Pit provides for radiological shielding of irradiated component removal including underwater waste generation,

¹ Holtec’s submission to MassDEP consisted of the appropriate MassDEP application form plus a copy of its application to EPA.

consolidation, and packaging activities.” *Id.* at 62-63.² The waste generation, consolidation, packaging, and other decommissioning activities, such as dismantlement of the reactor vessel, are distinct from prior use of the waters and have introduced new pollutants or increased pollutant concentrations in these waters. Thus, the proposed discharges are distinct from historical discharges from these water volumes.

The Department encloses Holtec’s 2023 Application for your consideration.

MassDEP’s Jurisdiction

MassDEP has jurisdiction over Holtec’s proposed discharge of pollutants. Pursuant to the state Clean Waters Act, M.G.L. c. 21, §§ 26-53, and the Department’s regulations at 314 CMR 3.00, Holtec must obtain a surface water discharge permit from MassDEP for wastewater discharges into Cape Cod Bay.

Ocean Sanctuaries Act

The Ocean Sanctuaries Act, M.G.L. c. 132A, §§ 12A-18, protects five named ocean sanctuaries, including the Cape Cod Bay Ocean Sanctuary. *Id.* at § 13(b). The Act provides CZM with oversight responsibility for the ocean sanctuaries. *See id.* at §§ 12C, 14, and 18. Section 14 provides that “[a]ll ocean sanctuaries . . . shall be under the care, oversight and control of” CZM. Section 12C directs CZM to “promulgate such regulations as it deems necessary for the implementation, administration and enforcement of the act.” CZM has issued these regulations. *See* 301 CMR 27.00.

The Act prohibits “[a]ll departments, divisions, commissions, or units of the executive office of energy and environmental affairs and other affected agencies or departments of the commonwealth” from permitting or conducting activities “which [are] contrary to the provisions of the Act.” *Id.* at § 18. Therefore, if Holtec’s proposed discharge is contrary to the provisions of the Act, MassDEP, a department of the Executive Office of Energy and Environmental Affairs, cannot issue the requested permit modification. The Act requires departments to “confer and consult with [CZM] to ensure compliance with the Act.” *Id.* at § 18. MassDEP therefore seeks to confer and consult with CZM regarding whether Holtec’s proposed discharge is contrary to the provisions of the Act.

Broadly speaking, section 15 of the Act prohibits various activities, unless they are permitted by section 16. Section 15 states, in relevant part:

Except as otherwise provided in this section, the following activities
shall be prohibited in an ocean sanctuary:

² Holtec’s 2023 Application notes that there were historic discharges of waters from the spent fuel pool, torus, reactor cavity, and dryer separator pit, from which it now proposes to discharge. It states that waters of the spent fuel pool were combined with waters of the reactor cavity/dryer separator pit during biennial refueling and that a portion of those combined waters were later discharged. 2023 Application at 3-4. Holtec states that the last discharge of waters from these locations occurred in 2015. *Id.* at 4. Since then, these waters have been used for decommissioning purposes and the proposed discharge would be associated with dismantlement and dewatering of the plant in any event.

...

- (4) the dumping or discharge of commercial, domestic or industrial wastes

Id. (emphasis added).

Section 16 authorizes certain activities that would otherwise be prohibited by Section 15. It states that “[n]othing in this act is intended to prohibit the following activities, uses or facilities,” indicating that the activities, uses or facilities described in section 16 are permitted notwithstanding the prohibitions in section 15. *Id.* Section 16 contains nine unnumbered categories of permitted activities, of which two appear to merit review and are extracted below in separate lines for ease of reading:

In all ocean sanctuaries except the Cape Cod Ocean Sanctuary the planning, construction, reconstruction, operation and maintenance of industrial liquid coolant discharge and intake systems and all other activities, uses and facilities associated with the generation, transmission, and distribution of electrical power, provided that all certificates, licenses, permits and approvals required by law are obtained therefor, and provided, further, that such activities, uses and facilities shall not be undertaken or located except in compliance with any applicable general or special statutes, rules, regulations or orders lawfully promulgated;

the operation and maintenance of existing municipal, commercial or industrial facilities and discharges where such discharges or facilities have been approved and licensed by appropriate federal and state agencies;

Analysis

Based on our analysis, the Department concludes that: (1) Holtec’s proposed discharge of wastewater from the spent fuel pool, torus, reactor cavity, and dryer separator pit is prohibited by section 15 because it is a discharge of industrial wastewater into an ocean sanctuary; and (2) none of the exceptions in section 16 apply.

Section 15: Prohibited Activities in Ocean Sanctuaries

Section 15 of the Act prohibits Holtec’s proposed discharge. Section 15 of the Act contains a broad prohibition on discharges of wastes to ocean sanctuaries: “Except as otherwise provided in this section, the following activities shall be prohibited in an ocean sanctuary: . . . (4) the dumping or discharge of commercial, municipal, domestic or industrial wastes” The Regulations define “wastes” as:

any unwanted, discarded, or environmentally harmful solid, liquid, or gaseous materials resulting from commercial, municipal,

domestic, or industrial Activities, including, but not limited to garbage, snow, thermal discharges, saline discharges, and sewage. Waste does not include approved and licensed dredge spoils, approved and licensed stormwater discharges, or snow disposal consistent with Department guidance.

301 CMR 27.02.

Holtec's 2023 Application itself characterizes the proposed discharges as "industrial wastewater." 2023 Application at 4. Likewise, the proposed discharge qualifies as "waste" resulting from an "industrial Activit[y]" under the definition in CZM's Regulations, as the discarded water is unwanted, intended to be discarded, and may contain "environmentally harmful" pollutants resulting from PNPS's decommissioning activities, even after treatment. We therefore conclude that the proposed discharges would be a discharge of industrial wastewater and, consequently, that section 15 prohibits the discharge of water from the spent fuel pool, torus, reactor cavity, and dryer separator pit.

Section 16: Permitted Activities in Ocean Sanctuaries

As explained above, section 15 of the Act prohibits activities in the named ocean sanctuaries unless they are permitted by section 16. It is MassDEP's opinion that none of the section 16 exceptions to the section 15 prohibition on industrial wastewater discharges apply to Holtec's proposed discharge. Although section 16 contains nine exceptions, we only discuss the first two in detail because the remaining seven exceptions are inapplicable on their face.

1. Generation, transmission, and distribution of electrical power

Holtec's proposed discharge of wastewater from the spent fuel pool, torus, reactor cavity, and dryer separator pit is not authorized by the first exception in section 16 of the Act because it is a "new discharge" of wastewater for the purpose of decommissioning. It is the Department's opinion, based on the plain language of the statute, that the first exception in section 16 does not apply to the dismantling or decommissioning of a former power station. It is undisputed that PNPS has ceased power generation and is in the process of decommissioning.

Section 16 permits "the *planning, construction, reconstruction, operation and maintenance* of industrial liquid coolant discharge and intake systems and all other activities, uses and facilities *associated with the generation, transmission, and distribution of electrical power*" provided such activities, uses and facilities are otherwise properly authorized and conducted in accordance with applicable law. *Id.* (emphasis added). By its plain terms, this permitted activity does not apply to discharges associated with decommissioning. *See id.* The text limits permitted discharges to the pre-operating and operating phases of the life-cycle of a power plant—"planning, construction, reconstruction, operation and maintenance"—and does not mention post-operating phases such as dismantling or decommissioning. *See id.* This omission indicates that the legislature did not intend to include discharges associated with decommissioning in this exception. *See Metro. Prop. & Casualty Ins. v. Emerson Hosp.*, 99 Mass. App. Ct. 513, 522 (2021) ("It is a 'maxim of statutory

construction . . . that a statutory expression of one thing is an implied exclusion of other things omitted from the statute.” (citation omitted).

Nor would applying the maxim frustrate the Act. *Id.* (citation omitted). Indeed, the legislature’s omission of post-operation activities is consistent with and supports the legislative intent of the Act, which is to prohibit any discharges other than those within specific categories of activities of particular policy importance. In this instance, this omission indicates that the legislature made a reasonable policy determination that the economic and social benefits associated with constructing, operating, and maintaining facilities for electric power generation—not least, ensuring the availability and reliability of sufficient electrical power to meet the needs of the Commonwealth and its citizens—are absent once such facilities have been taken out of service and are being dismantled, when protection of the ocean sanctuary may be elevated as a policy priority.

Holtec’s proposed discharge also cannot be said to be “associated with” generation of electricity. While Holtec states that plant operators discharged a minimum volume of water from the spent fuel pool, reactor cavity, and dryer separator pit during episodic refueling outages, as described above, the proposed discharge differs and is related to decommissioning. It is not a function of refueling, which was a necessity for continued plant operation; the waters are currently being used for decommissioning purposes rather than electricity generation (underwater waste generation, consolidation, and packaging of materials such as the reactor vessel internal components); and the waters contain pollutants produced as a function of decommissioning activities. Further, setting aside the use of the water to facilitate decommissioning tasks, Holtec also acknowledges that disposing of this stored wastewater is itself a decommissioning task and would not occur but for decommissioning: “Following the completion of the packaging campaign the [spent fuel pool] water will be drained to the Torus for final disposition.” 2023 Application at 4.

The 2020 Permits expressly distinguish and prohibit discharges associated with decommissioning, including discharges from the spent fuel pool, as well as any other stormwater or dewatering associated with dismantlement, demolition or decontamination of plant systems and structures or any other discharge from a point source not authorized by the 2020 Permits. 2020 Permits at 27. Holtec’s 2023 Application was submitted precisely because the proposed discharge is a “new discharge” associated with decommissioning and prohibited by the 2020 Permits. Therefore, it is the Department’s opinion that Holtec’s proposed discharge of wastewater from the spent fuel pool, torus, reactor cavity, and dryer separator pit is outside the first category of activities that can be permitted pursuant to section 16.

2. Existing discharge

Holtec’s proposed discharge of wastewater from the spent fuel pool, torus, reactor cavity, and dryer separator pit is not authorized by the second exception in section 16 because it is not an existing discharge.

Section 16 permits “the operation and maintenance of existing municipal, commercial or industrial facilities and discharges where such discharges or facilities have been approved and

licensed by appropriate federal and state agencies” Section 12B, meanwhile, defines an “existing discharge,” in relevant part, as an “industrial discharge at the volume and locations authorized by the appropriate federal and state agencies on . . . December eighth, nineteen hundred and seventy-one, in the case of the Cape Cod Bay . . . Ocean Sanctuary”

The proposed discharge meets neither the plain language of section 16 nor the statutory definition of “existing discharge” in section 12B. First, PNPS is not currently discharging wastewater from the spent fuel pool, torus, reactor cavity, or dryer separator pit. The 2020 Permits, currently in force, explicitly prohibit such discharges, and they cannot occur without a permit modification. It is on that basis that the 2023 Application seeks authorization for the proposed discharge as a “new discharge.” 2023 Application at 9. The proposed discharge therefore cannot be an “existing . . . discharge[]” to which this category of permitted activities could apply.

Even if the proposed discharge was not ineligible as a result of being currently prohibited, no PNPS discharges appear to meet the requirements of the definition of “existing discharge” under the Act. Holtec did not provide any authorization for any discharge of pollutants related to plant operations prior to 1975—well after the December 8, 1971 cutoff for such discharges into Cape Cod Bay Ocean Sanctuary. Even if there were authorized discharges of pollutants occurring prior to the cutoff, those discharges would not be the same as those proposed: the proposed discharges contain pollutants resulting from decommissioning, which *per se* could not have been “existing” prior to December 8, 1971, while the plant was still operational.

Where the proposed discharge does not currently exist and was not existing as of December 8, 1971, the proposed discharge is not allowed under section 16.

Conclusion

For the reasons above, the Department concludes that the discharge proposed in Holtec’s 2023 Application is prohibited by section 15 of the Ocean Sanctuaries Act and does not qualify for any of the exceptions to that prohibition described in section 16 of the Act. Under section 18 of the Act, therefore, the Department concludes that it must deny the 2023 Application.

As noted at the outset, MassDEP seeks to confer and consult with CZM as the Act requires, to ensure that MassDEP’s interpretation of the Act, and any consequent decision regarding the department’s ability to permit the discharge, is in compliance with the Act. We look forward to your views on this matter.

Sincerely,



Lealdon Langley
Director
Division of Watershed Management



July 24, 2023

Lealdon Langley
Director
Division of Watershed Management
Department of Environmental Protection
100 Cambridge Street, Suite 900
Boston, MA 02114

Dear Mr. Langley,

In your letter of July 21, 2023 (“Letter”), you memorialized the results of the consultation between the Office of Coastal Zone Management (“CZM”) and the Department of Environmental Protection (“MassDEP”) with regard to the application of Holtec Decommissioning International, LLC (“Holtec”), to modify its Surface Water Discharge Permit, issued pursuant to the Massachusetts Clean Waters Act, G.L. c. 21, §§ 26-53, and MassDEP’s regulations at 314 C.M.R. 3.00 *et seq.*, for discharges into Cape Cod Bay from the former Pilgrim Nuclear Power Station (“PNPS”) in Plymouth, Massachusetts (“Application”). The Application seeks to authorize “discharge of a new source of industrial wastewater” that is prohibited under the existing permit. Your Letter presents MassDEP’s conclusion that approval of the Application would be inconsistent with the Ocean Sanctuaries Act, G.L. c. 132A, §§ 12A-18 (“Act”). CZM agrees with MassDEP’s interpretation of the Act and its application to the facts of Holtec’s proposed discharge, as described in the Letter.

I. BACKGROUND

The structure of the Act is straightforward:

- Section 13 of the Act names and geographically defines five ocean sanctuaries, including the Cape Cod Bay Ocean Sanctuary, at G.L. c. 132A, § 13(b);
- Section 14 of the Act provides that “[a]ll ocean sanctuaries as described in section thirteen . . . shall be protected from any exploitation, development, or activity that would significantly alter or otherwise endanger the ecology or the appearance of the ocean, the seabed, or subsoil thereof”;
- Section 15 identifies five categories of activities that, “[e]xcept as otherwise provided in this section, . . . shall be *prohibited* in an ocean sanctuary,” including “the dumping or discharge of commercial, municipal, domestic or industrial wastes,” *id.* § 15(4) (emphasis added);
- Section 16 lists activities that are *permitted* in ocean sanctuaries notwithstanding the prohibitions in Section 15, including:
 - “In all ocean sanctuaries except the Cape Cod Ocean Sanctuary the planning, construction, reconstruction, operation and maintenance of industrial liquid coolant discharge and intake systems and all other activities, uses and facilities associated



with the generation, transmission, and distribution of electrical power, provided that all certificates, licenses, permits and approvals required by law are obtained therefor, and provided, further, that such activities, uses and facilities shall not be undertaken or located except in compliance with any applicable general or special statutes, rules, regulations or orders lawfully promulgated”; and

- “the operation and maintenance of *existing* facilities and *discharges* where such discharges or facilities have been approved and licensed by appropriate federal and state agencies” (emphasis added).
- Section 12B defines “existing discharge” in relevant part as “a municipal, commercial or industrial discharge at the volume and locations authorized by the appropriate federal and state agencies . . . on December eighth, nineteen hundred and seventy-one, in the case of the Cape Cod Bay . . . Ocean Sanctuary”

As noted in the Letter, the Act places primary responsibility with CZM, but also requires all other agencies—including MassDEP—to fulfill their permitting responsibilities in accordance with the Act:

- Section 12C states that CZM “shall promulgate such regulations as it deems necessary for the implementation, administration and enforcement of the [A]ct” and “shall integrate its implementation, administration and enforcement of the [A]ct with other programs and agencies responsible for the protection of the public health, safety, welfare and the environment.” CZM has promulgated those regulations at 301 C.M.R. 27.00 (“Regulations”).
- Likewise, Section 14 states that “All ocean sanctuaries as described in section thirteen shall be under the care, oversight and control of” CZM.
- Finally, Section 18 states that “[a]ll departments, divisions, commissions, or units of the executive office of energy and environmental affairs”—including MassDEP—“and other affected agencies or departments of the commonwealth shall issue permits or licenses for activities or conduct their activities consistently with the act, and shall not permit or conduct any activity which is contrary to the provisions of the Act” and, as MassDEP has done via the Letter, “departments, divisions, commissions, units, or other agencies shall confer and consult with the office to ensure compliance with the Act.”

II. ANALYSIS

As the Letter concludes, granting of Holtec’s Application to modify its discharge permit to authorize “discharge of a new source of industrial wastewater” the PNPS into Cape Cod Bay would be contrary to the Act.

A. SECTION 15

The proposed discharge is prohibited by Section 15 of the Act. As noted above, Section 15 of the Act “prohibit[s] . . . the dumping or discharge of commercial, municipal, domestic or industrial wastes” into ocean sanctuaries, including Cape Cod Bay Ocean Sanctuary. *Id.* § 15(4). The Regulations in turn define “waste” as “any unwanted, discarded, or environmentally harmful solid, liquid, or gaseous materials resulting from commercial, municipal, domestic, or industrial Activities.” 301 C.M.R. 27.02.

Based on the description in the Letter, it appears to be undisputed that the receiving water for the proposed discharge is within the Cape Cod Bay Ocean Sanctuary, and that the proposed discharge is “waste” from an industrial activity. As the Letter notes, according to Holtec’s own application to EPA, the discharged water, though treated, will potentially contain suspended solids, oil and grease, copper, zinc, lead, nickel, boron, and phenol. Based on that description, the proposed discharge is plainly unwanted, discarded, and potentially environmentally harmful. Further, Holtec refers to the proposed discharge in the Application as a “new source of industrial wastewater.” Application at 4. The proposed discharge therefore is prohibited by Section 15.

B. SECTION 16

The proposed discharge does not qualify as one of the permitted activities under Section 16 of the Act, listed above.

First, the proposed discharge is unrelated to the “planning, construction, reconstruction, operation and maintenance of industrial liquid coolant discharge and intake systems and all other activities, uses and facilities associated with the *generation, transmission, and distribution of electrical power.*” *Id.* § 16. As described in the Application and your Letter, PNPS ceased commercial operation of electrical generation in 2019 and the water proposed for discharge has since then been used for the purposes of decommissioning. Where the proposed discharge is made in furtherance of the decommissioning of PNPS, it is, by the plain terms of the statute, not “associated with the generation, transmission, and distribution of electrical power.” As the Letter notes, the legislature could have included “decommissioning” as a permitted activity, but it did not. We interpret this to be an intentional decision to exclude only those listed aspects of electrical power generation, in accordance with canons of statutory interpretation, which instruct that explicit inclusion of a list of items is an implicit exclusion of terms not in the list.¹ Likewise, general terms in a list must be read to be limited by specific terms in the same list.² Similarly, “an exception from the coverage of a statute is ordinarily to be construed narrowly so as to prevent the purposes of the statute from being rendered ineffective.” *Singer Friedlander Corp. v. State Lottery Comm’n*, 423 Mass. 562, 565 (1996) (quoting *Martin v. Rent Control Bd. of Cambridge*, 19 Mass. App. Ct. 745, 747 (1985)). These canons apply to this proposed activity: the specific activities listed in Section 16 are limited to those relating to the building and operation of a power plant; the more general term “all other activities,” therefore, should be read within those limitations, i.e., to exclude the decommissioning of the plant. This interpretation accords with the legislative intent of the Ocean Sanctuaries Act as a whole, which is intended to prohibit discharges into Ocean Sanctuaries except in specifically limited circumstances supported by an overriding public policy priority.

Second, the proposed discharge was not an “existing discharge” on “December eighth, nineteen hundred and seventy-one, in the case of the Cape Cod Bay . . . Ocean Sanctuary” *id.* § 12B, that can be permitted under Section 16. Holtec’s application indicates that the proposed discharge is explicitly prohibited under the terms of Holtec’s existing permit and represents a new discharge associated with decommissioning (i.e., waters used in the packaging of reactor components for disposal and other decommissioning activities, and which require final disposition as part of the overall decommissioning process). A new discharge that is currently prohibited cannot reasonably be interpreted to be an “existing discharge” on its face. Further, as the Department notes, Holtec has not presented evidence of authorization for discharge of pollutants prior to 1975, which means

¹ *Expressio unius est exclusio alterius.*

² *Ejusdem generis.*

that any discharge would necessarily be outside the definition of "existing discharge" as articulated in the Act.

C. SECTION 18

Because no exception applies under Section 16, the proposed discharge is barred by the prohibition in Section 15. Section 18 of the Act, therefore, requires MassDEP to deny Holtec's application.

III. CONCLUSION

As noted at the outset, CZM's analysis, pursuant to its interpretation of the Act and based on the information provided by Holtec, reaches the same conclusion as MassDEP's interpretation and application of the Act in this matter. Please contact me if you have any questions or concerns.

Sincerely,



Lisa Berry Engler
Director

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August 16, 2024

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P.O. Box 4062
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*Re: Holtec Decommissioning International, LLC
Adjudicatory Hearing Transmittal Form & Fee*

Womble Bond Dickinson (US) LLP

Independence Wharf
470 Atlantic Avenue
Boston, MA 02210

t: 857.287.3100
f: 857.287.3101

Jed M. Nosal
Partner
Direct Dial: 857-287-3175
Direct Fax: 857-302-6845
E-mail: Jed.Nosal@wbd-us.com

Dear Sir or Madam:

Enclosed please find the Adjudicatory Hearing Fee Transmittal Form and filing fee check in the amount of One Hundred Dollars (\$100.00).

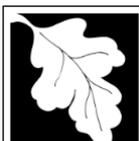
Best regards,

Womble Bond Dickinson (US) LLP

A blue ink handwritten signature, appearing to read "Jed M. Nosal", written over a horizontal line.

Jed M. Nosal
Partner

JMN/dlw
Enclosures



Adjudicatory Hearing Fee Transmittal Form

IMPORTANT! This form is intended for fee transmittal only. The contents of a request for an adjudicatory appeal (Notice of Claim) are established at 310 CMR 1.01(6) and the substantive statutes and regulations governing the Department's action.

A. Person/Party Making Request

Important: When filling out forms on the computer, use only the tab key to move your cursor - do not use the return key.



1. Name and address of person or party making request:

Holtec Decommissioning International, LLC

Name - If appropriate, name group representative

1 Holtec Boulevard

Street Address

Camden

City

New Jersey

State

08104

Zip Code

2. Project Information:

Pilgrim Nuclear Power Station 600 Rocky Hill Road

Street Address

Plymouth

City

Massachusetts

State

02360

Zip Code

NPDES MA0003557

DEP File or ID Number

\$ 100.00

Amount of filing fee attached

B.Reynolds@holtec.com

Email Address

B. Applicant (if applicable)

1. Name and address of applicant:

Holtec Decommissioning International, LLC

Name - If appropriate, name group representative

1 Holtec Boulevard

Street Address

Camden

City

New Jersey

State

08104

Zip Code

B.Reynolds@holtec.com

Email Address

C. Instructions

1. Send this form and check or money order of \$100.00 payable to the Commonwealth of Massachusetts to the MassDEP Lockbox at:

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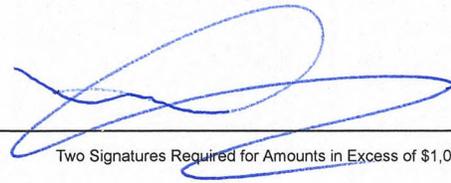
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