

COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS

DEPARTMENT OF ENVIRONMENTAL PROTECTION

100 CAMBRIDGE STREET, BOSTON, MA 02114 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

**July 24, 2023**

---

In the Matter of  
Pontoosuc Lake Properties, LLC

---

OADR Docket No. 2021-019  
File No. BRP WW 01B  
Pittsfield, MA

**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

A 10 Residents Group (“Petitioners”) brought this appeal challenging the Draft Waterways License (“Draft License”) issued by the Massachusetts Department of Environmental Protection’s Western Regional Office (“MassDEP”) to Pontoosuc Lake Properties, LLC (“Applicant”). The Draft License authorized the Applicant’s construction and maintenance of a public Marina (the “proposed Marina”) on Pontoosuc Lake (the “Lake”), a Great Pond, located at the real property with an address of 22 Waubeek Road, Pittsfield, Massachusetts (the “Property”). The Draft License was issued pursuant to the Massachusetts Public Waterfront Act, G.L. c. 91, and the Waterways Regulations, 310 CMR 9.00.

The Petitioners claim that the Department erred in issuing the Draft License contending that the proposed Marina will not preserve water related public rights of navigation and will impact access to abutting public rights of way in violation of the regulations. However, as discussed in detail below, the Petitioners, the Parties with the burden of proving that the Department erred in issuing the Draft License, have failed to substantiate their claims.

Accordingly, I recommend that the Department's Commissioner issue a Final Decision dismissing the Petitioners' appeal and affirming the Draft License.

## **EVIDENCE**

### **Witnesses**

The evidence in the administrative record includes the Pre-Filed Testimony and related exhibits submitted on behalf of the witnesses below who were available for cross examination at the Hearing.

#### **For the Petitioner:**

1. **Daniel Miraglia**: Mr. Miraglia testified that he is a lifelong fisherman and resident of Pittsfield and has spoken on lake issues on multiple fishery and ecology organizations. The Applicant requested that his testimony be disregarded as irrelevant to the extent that it relates to the Wetlands Regulations. To the extent that it addresses navigational uses of the Lake in the area of the Property, I have considered it.
2. **Victor C. Capelli**. Mr. Capelli holds an AAS in Fisheries & Wildlife Technology from SUNY Cobleskill and a Bachelor of Science from the College of Agricultural and Life Sciences at Cornell. Mr. Capelli is a self-employed Field Ecologist and has served as an expert for court and municipality hearings. The Applicant requested that his testimony be disregarded in its entirety as irrelevant. The Petitioners requested that paragraph 4.c-f of his testimony not be excluded. To the extent that Mr. Capelli's testimony addresses navigational uses of the Lake in the area of the Property, I have considered it.
3. **James Conant**. Mr. Conant has been the City of Pittsfield Conservation Commission Chairperson for 15 years. The Applicant requested that his testimony be disregarded in its entirety as irrelevant because it relates to the Wetlands Regulations. Mr. Conant's

testimony describes the Applicant's Notice of Intent filed under the Wetlands Regulations and the Pittsfield Conservation Commission's review and denial of it and does not address the two issues identified for adjudication.

4. Dr. Michele Rivers Murphy. Dr. Rivers Murphy holds a doctorate in educational leadership. Dr. Rivers Murphy is the co-representative of the Petitioners 10 Residents Group. Dr. Rivers Murphy grew up on the Lake and currently owns and resides in one of two houses situated across the street from the Lake. She has been a member of the Friends of Pontoosuc Lake advisory group for over 20 years. The Applicant requested that those portions of Dr. Rivers Murphy's testimony that relate to the Wetlands Regulations be disregarded as irrelevant. To the extent her testimony addresses navigational uses of the Lake in the area of the Property, I have considered it.
5. Robert J. Pensivy Jr. Mr. Pensivy is a co-representative of the Petitioners 10 Residents Group. Mr. Pensivy holds an Associates of Science degree in Environmental Science from Berkshire Community College. Mr. Pensivy has lived directly across the street from the Property for 18 years and has been visiting the neighborhood for 44 years. He has been boating since he was a teenager and owns several boats. Mr. Pensivy fishes year-round on the Lake. The Applicant requested that those portions of Mr. Pensivy's testimony that relate to the Wetlands Regulations be disregarded as irrelevant. To the extent his testimony addresses navigational uses of the Lake in the area of the Property, I have considered it.

For the Applicant:

1. Eric J. Taylor. owner and manager of Pontoosuc Lake Properties, LLC. Mr. Taylor is at the Property nearly every day and testified as to his observations regarding navigational uses of the Lake.
2. Matthew Puntin, PE. Mr. Puntin is a professional civil engineer with 15 years experience designing and obtaining and implementing permits for a wide range of commercial and residential projects involving issues of zoning, wetlands, water supply, sewer and chapter 91 docks. He is a Project Engineer with SK Design Group, Inc., located in Pittsfield MA. He holds a Bachelor Degree in Civil Engineering from UMass Amherst. Mr. Puntin is qualified as an expert.
3. Kenneth J. Wagner, Ph.D., CLM. Mr. Wagner holds degrees from Dartmouth College and Cornell University in Natural Resource Management. He has over 45 years of experience working on a variety of water resource assessment and management projects including lake, reservoir, river and watershed assessment, rehabilitation and management, regulatory processes and educational programs. He is the founder of Water Resource Services, a company focusing on water supply protection and lake management consulting. He is a former president of the North American Lake Management Society and former Editor in Chief of Lake and Reservoir Management, a peer-reviewed journal. Mr. Wagner is qualified as an expert.

For MassDEP:

1. Christine Hopps, MassDEP Waterways Program, Assistant Director. Ms. Hopps is the Assistant Director for MassDEP's Waterways Regulation Program since 2018. Prior to that she was employed by the Miami-Dade County Division of Environmental Resource

Management from 2002 to 2018. She holds a Bachelor of Science degree in Marine Science from Long Island University. Ms. Hopps has reviewed approximately 200 applications for Chapter 91 Licenses/Permits for water-dependent and nonwater-dependent projects that include private and commercial piers, marines, ramps, floats, boat ramps, seawalls, buildings and other waterfront structures, dredging and beach nourishment. The significant majority of the projects that she has reviewed involved the construction of recreational docking structures, often in highly developed waterways. Ms. Hopps is also a competent and experienced boater with several years' experience operating 18-30 foot powerboats in varying weather and conditions including in marked and unmarked channels, areas densely developed with docks including with heavy traffic of varying types. She also has experience operating powerboats and non-motorized vessels. She is qualified as an expert.

## **BACKGROUND**

### **Proposed Marina Area**

The Lake is a Great Pond<sup>1</sup> located in Pittsfield, Massachusetts. Draft License cover letter, Findings, page 2. The total area of the Lake is 511 acres. Puntin PFT, 8; Puntin Ex. F, MassWildlife Map. The Applicant owns a parcel of land with frontage on the southern shore at 22 Waubeek Road, Pittsfield, Massachusetts (the "Property"). Puntin PFT, 2; Taylor PFT, 2. The Applicant operates a restaurant and event venue called the Proprietor's Lodge at the Property. Puntin PFT, 2; Taylor PFT, 3; Wagner PFT, 2. The Property currently supports a dock, public

---

<sup>1</sup> Great Pond means any pond which contained more than ten acres in its natural state, as calculated based on the surface area of lands lying below the natural high-water mark. The title to land below the natural low water mark is held by the Commonwealth in trust for the public, subject to any rights which the applicant demonstrates have been granted by the Commonwealth. The Department shall presume that any pond presently larger than (sic) ten acres is a Great Pond, unless the applicant presents topographic, historic, or other information demonstrating that the original size of the pond was less than ten acres, prior to any alteration by damming or other human activity. 310 CMR 9.02.

access stairs extending east and west along the shoreline, and a retaining wall. Puntin Ex. C, Revised Chapter 91 Narrative, page 1; Taylor PFT, 13.<sup>2</sup>

The available navigable watersheet in this area is approximately 2,000 feet of Lake from the proposed Marina to the island located north of the Property and 2,000 feet to the east side of the Lake. Puntin PFT, ¶ 5.a.<sup>3</sup> The narrowest embayment, near the Pontoosuc Lake Dam, is approximately 2,000 feet south-east of the Property. Id. There are no known navigational constraints or designated channels in the area. Puntin PFT, ¶ 5.a.

The Property is abutted to the west by a public Right-of-Way (“ROW”).<sup>4</sup> Draft License Plan, Sheet 1 of 3; Hopps PFT, ¶ 24; Pensivy PFT, ¶ 2, Pensivy Ex. 3.d.2. To the west there is a licensed docking structure 325 feet from the westerly Property line, 543 feet from the proposed Marina. Hopps PFT, ¶ 25. There is also a ROW abutting the east Property line. Draft License Plan, Sheet 1 of 3; Pensivy PFT, ¶ 2; Hopps PFT, ¶ 24. Within the easterly ROW is an unlicensed docking structure approximately 35 feet from the Property line. Hopps PFT, ¶ 24; Draft License Plan, Sheet 2 of 3. The proposed Marina would be located approximately 80 feet from the nearest licensed structure to the east of the Property line. Hopps PFT, ¶ 24; Puntin PFT, ¶ 4; Pensivy PFT, ¶ 27; Transcript, Puntin, 1:21:50-1:22:36; Puntin, 1:23:35-1:23:57.

---

<sup>2</sup> The Property also supported docks for swimming and boating when it was operated as the Breezy Knoll in the 1930’s. Miraglia PFT, 4(b); Miraglia Ex. 2; Pensivy PFT, 3; Pensivy Ex. 4. Transcript, Pensivy, 25:10-25:51. It also supported a pathway above the High-Water Mark. Miraglia PFT, 4(b) and (c); Miraglia Ex. 3; Pensivy PFT, 3; Pensivy Ex. 4.

<sup>3</sup> Mr. Pensivy testified that he believes the applicant stated that the nearest shore is 1,500 feet and that the proposed Marina would decrease the “channel” to 1,140 feet because of the no wake zone of 150 feet. Pensivy PFT, ¶ 26.

<sup>4</sup> The Draft License Plan, Sheet 1 of 3 shows a road to the east of the Property and a road to the west of the Property. No Party has disputed that these roads are the public ROW’s referenced in Petitioners’ testimony. Mr. Pensivy included several deeds as exhibits to his testimony, two of which are quitclaim deeds to his properties, which include the following reference, “Together with a right of way for all the usual proposes of a way in, over and upon the various ways shown upon said plan.” Pensivy Ex. 3e1 and 3e1. He testified that these deeded rights are the ROWs east and west of the Property. Pensive PFT, ¶ 2. While he did not include the plan referenced in the deeds to identify the location of these deeded interests, neither the Applicant nor MassDEP contradict his testimony.

The wetlands resource areas in the Project Area, Land Under Water Bodies and Waterways, Wildlife Habitat and Fisheries, are subject to a Final Order of Conditions issued by MassDEP on November 10, 2020. The Final Order of Conditions authorized the removal of the remnants of concrete structural elements below the High-Water Mark of the Lake at the proposed Marina site. Draft License cover letter, Findings, page 2.

On behalf of the Applicant, Dr. Wagner conducted an aquatic survey that indicated that the area has a gradient from shoreline to a depth of 10 feet that includes cobble and coarse gravel within about 30 feet of the shoreline in water <5 feet deep. Plants are not dense, no mussel species or snail species were encountered or were evident.<sup>5</sup> One adult fish was encountered. The rocky sandy substrate is suitable for fish spawning and young fish shelter, but only young-of-the-year smallmouth bass were observed among the rocks in 1-3 feet of water. No endangered species were encountered. Wagner Ex. B. The Lake is subject to draw-down of at least 3 feet in the fall and left at that lower level until early spring. This practice tends to move finer sediments from near shore to further from shore, resulting in courser nearshore sediment. Wagner Ex. B. At the Hearing, Dr. Wagner testified that the fishery area is not unique or rare, and that the proposed activity will not harm any potential nursery value.<sup>6</sup> The Petitioners did not include an aquatic

---

<sup>5</sup> Mr. Miraglia's testimony included an assertion that the proposed Marina would negatively affect fisheries and an undated photograph of a single mussel titled "Photograph of freshwater mussels on Southern Shore of Pontoosuc Lake," but no testimony asserting that the photographed mussel was located on the Property. Miraglia PFT, 7; Miraglia Ex. 5.

<sup>6</sup> On cross-examination Dr. Wagner testified regarding the area that is exposed due to the Fall draw-down as shown in Miraglia Ex. 9. "More than fine cobble, you've got some good size rocks there, but you wouldn't expect large bass to be sitting there when it was full." Wagner, 53:11-53:18, He testified that fine cobble is home for the benthic creatures on which fish feed. Wagner, 55:48-56:01. Further regarding habitat, Dr. Wagner testified that fine cobble area that is home for such benthic creatures is observed in other areas of the Lake. Specifically, he testified that "the area we are talking about is about here is about a tenth of an acre, there is 40 acres of habitat like this in a 500-acre lake, so statements like it's rare or unusual don't really work out. It's a nice habitat in terms potentially benthic organisms, although when you have the draw down that will affect the first three feet, it grades in to muck by 10 feet so it's a fairly narrow littoral range but because it is cobble to gravelly it doesn't support a lot of plant growth, whether you're applying herbicide treatments or not. It's a nursery area, there is no question that there's value in that, but

survey, however, Mr. Capelli asserted that his testimony was a refutation of Dr. Wagner's aquatic survey pursuant to 310 CMR 10.54(3) of the wetlands regulations. Capelli PFT, ¶ 2. The majority of his testimony is related to wetlands issues not on appeal in this adjudicatory proceeding and consists of general conclusory statements unsupported by factual evidence or documentary citations. As such, I give it little weight.<sup>7</sup>

Ms. Hopps testified that she did not conduct a site visit, as she was assigned to review the application after the prior analyst retired and did not have information regarding whether he visited the property. Hopps PFT, ¶ 5. She testified that she reviewed files including several sources of aerial photos, bathymetric information and other chapter 91 licenses that have been issued for structures on the Lake in the vicinity of the proposed Marina. Hopps PFT, ¶ 5. She also testified that the proposed Marina met the procedural requirements for public notice and procedure. Hopps, 2:27:27-2:27:40

### **Proposed Marina**

The Draft License authorizes the Applicant to construct and maintain a public Marina, including an existing concrete retaining wall, landings, a gangway/ramp, piers, finger piers, float(s), a mooring ball, and appurtenances.<sup>8</sup> The Draft License also establishes a "zone of reconfiguration."<sup>9</sup> Draft License, page 1; Draft License, Condition 27. The proposed Marina is

---

there's nothing about the proposed activity that's going to harm that." Wagner, 56:13-57:19.

<sup>7</sup> For example, Mr. Capelli states "Alteration and acceleration of hydrodynamic elements – wave currents, internal and external seiches and scouring effects will erode adjacent shorelines. Unprotected shorelines above and below the proposed Marina site will be eroded heavily by the redirection and speed of the lake currents, boat mediated waves and altered shoreline profile. This contradict the WRS survey [Dr. Wagner's aquatic survey." Capelli PFT, ¶ 4(a).

<sup>8</sup> The existing concrete retaining wall and the proposed landings, ramp/gangway, public lateral access stairways, piers, finger piers, mooring ball and appurtenances meet the definition of Structure. 310 CMR 9.02; Draft License cover letter, Findings, page 2.

<sup>9</sup> See 310 CMR 9.39(1)(b).



a Water-Dependent Use Project as defined in 310 CMR 9.02. Draft License cover letter, Findings, page 2; Draft License, page 1. The cumulative areal extent (“footprint”) of all proposed structures and/or fill in, on, over, or under the Waterway, as measured from the High-Water Mark, is 1,145 square feet. Id.; Puntin PFT, ¶ 9.<sup>10</sup>

The proposed Marina would extend approximately 60-feet from the shoreline and approximately 67-feet laterally. The six (6) “fingers” protruding from the dock provide nine (9) motorized slips and two (2) non-motorized slips. The dock would be connected to the shoreline by a 30-foot sloped gangway, perpendicular to the face of the shoreline. A lateral staircase extends from both sides of the proposed Marina landing, providing for public lateral access below the High-Water Mark. Hopps PFT, ¶ 14; Puntin PFT, ¶ 5.g; Draft License, Conditions 3-4; Draft License Plan, Sheet 2 of 3.

The proposed Marina will cause some shading of the substrate but the low density of rooted plants in the area does not suggest any significant change in plant community as a result. The nature of the sediment is not expected to result in any significant erosion or subsurface sediment redistribution. The shoreline is strongly armored by a mix of natural rocks and human-derived protection such as concrete. Wagner Ex. B.

The Draft License includes the following conditions related to preserving public rights:

- Maintain free public passage over the landward portion of the structures within area as shown on the Draft License plan(s). Draft License, Conditions 3-4
- Signage. Draft License, Conditions 4, 26
  - on the easterly and westerly public lateral access stairways
  - Waterways License Number sign or stencil on the lakeward end of the northernmost licensed finger piers

---

<sup>10</sup> This square footage reference is to the area of the dock structure itself. Puntin, 2:05:55; Draft License cover letter, Findings, page 2; Draft License, Condition 27.b..

- Maintain public rights of **navigation, fishing, fowling**, and the natural derivatives thereof; and all other lawful activities, including but not limited to swimming, strolling, and other recreational activities; to pass freely around all Facility structures located below the High-Water Mark. Draft License, Condition 5.
- Maintain public rights of **free passage over and through the water and on-foot passage** by walking upon the substrate, to pass freely around all Facility structures located below the High-Water Mark. Draft License, Condition 6.
- Conditions governing size, number and operation of watercraft. Draft License, Conditions 7-11
- Conditions governing safe use of the proposed public Marina. Draft License, Conditions 12-19
- Conditions requiring slips and moorings be available for transient, public use and short-term day-use landings. Draft License, Conditions 20-22, 24

### **Navigational Uses in the Proposed Marina Area**

The Parties agree that the area of the Lake in front of the Property is used for boating and fishing but they dispute the intensity or volume of such use. Taylor at ¶ 7;<sup>11</sup> Pensivy PFT, ¶ 12;<sup>12</sup> Miraglia PFT, ¶ 8;<sup>13</sup> Miraglia Ex. 7. The area to the west and east of the Property, extending from the public ROWs, is also used for boating, fishing and swimming. Rivers Murphy PFT, ¶ 7; Pensivy PFT, ¶ 5; Taylor PFT, ¶ 9.

On behalf of the Applicant, Mr. Taylor testified that he is at the Property on a near daily basis and has observed the volume and frequency of public use of the Lake including boat traffic, paddle boards, kayaks, fishers and swimmers. Taylor PFT, ¶ 6. Mr. Taylor testified that he has

---

<sup>11</sup> “I have rarely observed more than a handful of boats on the Lake at any one time. On a typical weekend day there will usually be about 10-20 boats spread out over the entire area of the Lake. . . .”

<sup>12</sup> “The property is located between two public/deeded right of ways that are heavily used for swimming, fishing, floating, kayaking and stand-up paddle boarding on a regular basis.”

<sup>13</sup> In front of the Applicant’s proposed Marina” happens to be one of the best and most popular fishing holes on the Pontoosuc Lake from land or boat.”

observed occasional fishers at or near the Property. Taylor PFT, ¶ 10. He also testified that most of this fishing occurs at the clearing west of the Property and west of the proposed Marina area, or on the far east side of the Property and east of the proposed Marina. Taylor PFT, ¶ 10. Boat fishing occurs throughout the lake. Taylor PFT, ¶ 11.

The Petitioners' exhibits include photographs of boats on the Lake, including paddle boards. Pensivy Ex. 12.<sup>14</sup> Mr. Taylor testified that the first photograph in Pensivy Ex. 12 is typical; it shows 4 kayakers and 3 other boats and purports to be from the Applicant's social media account. The second photograph also identified as being from the Applicant's social media account, shows more than a dozen boats on the water. Mr. Taylor stated that the picture must have been taken on July 4, the busiest time of year on the Lake. Taylor PFT, ¶ 12.b. He also states that 4 other photographs in Mr. Pensivy's Ex. 11 show more boat traffic than is usual. Taylor PFT, ¶ 12.c.

While Mr. Pensivy testified that he owns several boats, and has been a long-time fisherman on the Lake, he did not testify with any specificity as to his own experience boating on the Lake, or more specifically boating in the area of the proposed Marina. Pensivy PFT, ¶ 2. Mr. Miraglia also testified that he is a long-time fisherman on the Lake. His use of the phrase "historic navigational channel" related to fishing by trolling, could infer that he in fact uses the route, but he did not expressly testify to that effect. Miraglia PFT, ¶ 8. Dr. Rivers Murphy did not testify to using the Lake at all. She merely testified that she lives across from it in one of two

---

<sup>14</sup> Rivers Murphy, Ex. 3 "Public Recreation in Front of Proposed Marina Cove/Shoreline, includes 6 undated photographs, 5 showing boats on the water; Rivers Murphy Ex. 6, "Historical Fishing Shoreline At Pontoosuc Lake. Project Site 2021," includes an undated photograph of a boat on the water, location not identified; Pensivy, Ex. 2, includes 2 undated photos, one titled "Eastern ROW" and one titled "Western ROW" showing swimmers and one boat on the water; Pensivy Ex. 9, "Fishing Photos", includes 5 undated photos of boats on the water, or of children on the shore with fish, locations not identified; Pensivy Ex. 10a titled "ROW use," includes 5 undated photos (1 duplicate photograph) of swimmers and small boats; Pensivy Ex. 12, includes 11 undated photos of boats on the water, or people on the shore, purportedly from Applicant's social media sites (1 duplicate photograph).

homes she owns and her testimony generally references use of the Lake by others. Rivers Murphy PFT, ¶ 2.<sup>15</sup>

The Petitioners contend that the southern shoreline of the Lake is a heavily used route for fishing, wherein mariners fish and fish by trolling, near the shore, traveling routinely in a loop around the Lake. Miraglia PFT, ¶¶ 8-9; Miraglia Ex. ¶ 7; Rivers Murphy PFT, ¶ 8. They also contend that it is congested with active and heavy boating, especially on weekends. Pensivy PFT, ¶ 5; Rivers Murphy PFT, ¶ 6. The Petitioners contend that the loss of open water to accommodate the proposed Marina would cause “significant navigational interference” with traffic from across the Lake and with swimmers in the ROWs. Rivers Murphy PFT, ¶ 6a; Pensivy PFT, ¶ 5.

The Petitioners also contend that there is a “main navigational channel” on the Lake that will be impacted by the proposed Marina. Pensivy PFT, ¶ 9; Rivers Murphy PFT, ¶ 6. However, their testimony is inconsistent regarding the location of such “channel.” Mr. Pensivy testified that it is the width of “1,500 feet” of open water. Pensivy PFT, ¶ 26.<sup>16</sup> He also testified that there is a “channel” in the southern cove as shown on Pensivy Ex. 6. Pensivy, ¶ 5. Pensivy Ex. 6 is labeled “Google Earth overview 2018,” and is an aerial photograph on which the Property is identified on the shore of the Lake. However, the photograph does not identify a “southern cove” or a “channel.” Dr. Rivers Murphy testified that boats “come in and out of the channel at

---

<sup>15</sup> For example, she testified that at a public hearing held by the City of Pittsfield Mayor on May 10, 2021 she “spoke on behalf of over fifty Pittsfield neighbors on Ridge Avenue lakefront and the side streets thereof who were opposed to said Chapter 91 Marina license who are frequent lake users and residents of the Pontoosuc Lake.” Rivers Murphy PFT, ¶ 4a.

<sup>16</sup> “The applicant states that the nearest shore is 1,500 ft [sic] away. While this may seem like a large distance. When you factor in the no wake zone of 150 ft from any shore or dock this decreases the channel down to 1,140 ft. . .” Pensivy PFT, ¶ 26 (emphasis supplied). On behalf of the Applicant Mr. Puntin testified that the referenced distance is 2,000 ft. Puntin PFT, ¶ 5.a.

high speeds near the Rusty Anchor” which is shown on Rivers Murphy Ex. 4 as being located across the Lake on the eastern shore. Rivers Murphy PFT, ¶ 7. She also testified that there is a “natural pattern around the lake” that “hugs the shore.” *Id.* At the same time she testified that there is a “small navigation path” 220 feet from shore. Rivers Murphy PFT, ¶ 8. Also on behalf of the Petitioners, Mr. Miraglia testified that fisherman troll the Lake in a circle near the shore. Miraglia PFT, ¶ 8; See also Pensivy, PFT, ¶ 10. Mr. Miraglia also testified that the proposed Marina would “[push] boating traffic another 100 feet or more into the “high traffic volume area,” impacting “historical southern shore and rights of public use and safe navigational rights.” Miraglia PFT, ¶ 10. Ms. Hopps refers to these navigational pathways as habitual travel routes, and not as a regulated “established course of vessels.” Hopps PFT, ¶ 8.

### **Prior Proceedings**

The Final Order of Conditions approving the proposed Marina under the Wetlands Protection Act was issued by MassDEP on November 10, 2020. Draft License covers letter, Findings, page 2. On July 20, 2021, MassDEP issued the Draft License to the Applicant (No. X282446) for a period of 30 years.<sup>17</sup>

Petitioners initiated this appeal on August 13, 2021 and a Pre-Hearing Conference (“PHC”) was held on September 28, 2021. At the PHC the Parties discussed issues for resolution which the prior Presiding Officer included in the Pre-Hearing Conference Report and Order (“PHC Report and Order”). Of the four (4) issues listed in the PHC Report and Order, Issues 3 and 4 were later removed following a motion by MassDEP, assented to by the Applicant

---

<sup>17</sup> The application was filed on March 9, 2021, and a revised project narrative was filed on May 7, 2021. Puntin PFT, ¶ 3.

and opposed by the Petitioners.<sup>18</sup> Two months later, on January 1, 2022, the Petitioners filed a Motion for Reconsideration.<sup>19</sup> MassDEP and the Applicant opposed, and the prior Presiding Officer denied the Motion on January 12, 2022.

The prior Presiding Officer granted Petitioners' request for an extension to submit their Rebuttal Testimony and Memorandum of Law which Petitioners filed on April 1, 2022. Shortly before the September 8, 2022 Hearing, OADR received "Petitioners' Motion to Expand Issues of Argument at Hearing & Motion to Appoint a Fact Finder to View and Visit Proposed Marina Site of Marina." The Motion sought to add two (2) issues, requested appointment of a Fact Finder and a view of the Property.

The hearing regulations direct the Presiding Officer to conduct a just, efficient, and speedy adjudicatory appeal. 310 CMR 1.01(5)(a). Once the issues are established, the Presiding Officer shall, absent good cause show, limit the issues as identified at the prescreening conference. 310 CMR 1.01(6)(k). The Petitioners' September 2, 2022 motion did not demonstrate good cause for expanding the issues days before the Hearing, nor did it demonstrate how the newly presented issues could not have been identified in any of the three prior times the issues for Hearing were considered.<sup>20</sup> My review of the filings did not suggest that the Property or the issues presented are inadequately represented in the maps, plans and photographs included in the Parties PFT such that I would benefit from a view, or that a fact finder was warranted. Each of these requests would inevitably have resulted in delay without good cause. Petitioners

---

<sup>18</sup> On November 1, 2021 the prior Presiding Officer issued a Ruling and Order Allowing Motion to Modify Pre-Hearing Conference Report, eliminating Issues 3 and 4.

<sup>19</sup> The prior Presiding Officer had previously denied Petitioner's Motion for an Extension to file a Motion for Reconsideration, which MassDEP and Applicant Opposed.

<sup>20</sup> Petitioners acknowledged that they raised at least one of these issues in prior proceedings dating more than a year ago.

are pro se, and have been afforded leniency in these proceedings, but ultimately must comply with the rules which includes making reasonable and timely filings and being bound by the issues established for Hearing through these proceedings.<sup>21</sup>

For all the above reasons, the Petitioners' Motion was denied and the adjudicatory hearing proceeded on September 8, 2022. The Parties submitted their closing briefs on September 23, 2022.

### **ISSUES FOR ADJUDICATION**

The issues for adjudication on which the Parties witnesses addressed their testimony at the Hearing are as follows:

1. Whether the Project complies with the standards to preserve water-related public rights at 310 CMR 9.35?<sup>22</sup>
2. Whether the Project complies with the requirement under 310 CMR 9.36(2) that it not significantly interfere with littoral or riparian property owners' rights to approach their property from a waterway and to approach a waterway from the property, as provided in G.L. c. 91 §17?<sup>23</sup>

### **STATUTORY & REGULATORY FRAMEWORK**

Chapter 91 and the Waterways Regulations at 310 CMR 9.00 govern the development of structures in tidelands and Great Ponds of the Commonwealth. In the Matter of Dan and Eva

---

<sup>21</sup> Although a party's pro se status in an appeal accords the party some leniency from the litigation rules, the party is not excused from complying with those rules because "[litigation] rules bind a pro se litigant as they bind other litigants." In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 45-46, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77, citing, Mmoe v. Commonwealth, 393 Mass. 617, 620 (1985) (pro se litigants are required to file court pleadings conforming to the Massachusetts Rules of Civil Procedure); Rothman v. Trister, 450 Mass. 1034 (2008) (pro se litigants are required to comply with appellate litigation rules); Lawless v. Board of Registration In Pharmacy, 466 Mass. 1010, 1011 (2013) (same).

<sup>22</sup> See e.g. In the Matter of David Fuhrmann, Docket No. 2013-037, Recommended Final Decision (February 19, 2015), adopted by Final Decision (April 8, 2015); In the Matter of Renata Legowski, Docket No. 2011-039, Recommended Final Decision (October 25, 2012), adopted by Final Decision (November 5, 2012) ("Legowski"); Oliveria, supra.

<sup>23</sup> See e.g. Legowski, supra.

Barstow, OADR Docket No. 2019-026, 2020 MA ENV LEXIS 16 (“Barstow”), Recommended Final Decision (January 22, 2020), adopted by Final Decision, ( February 19, 2020); In the Matter of David Fuhrmann, OADR Docket No. 2013-037 (“Fuhrmann”), Recommended Final Decision (February 19, 2015), 2015 MA ENV LEXIS 17, at 14-15, adopted as Final Decision (April 8, 2015), 2015 MA ENV LEXIS 16; In the Matter of Webster Ventures, LLC, OADR Docket No. 2015-014 (“Webster Ventures II”), Recommended Final Decision (June 3, 2016), 2016 MA ENV LEXIS 27, at 14-15, adopted as Final Decision (June 15, 2016), 2016 MA ENV LEXIS 32.

The Department's Chapter 91 jurisdiction arises under "the public trust doctrine and related laws." Barstow, \*4; Fuhrmann, \*12; Webster Ventures, \*16-17. The public trust doctrine is an age-old concept with ancient roots," and "[i]n Massachusetts, it is expressed as the government's obligation to protect the public's interest in, among other things, navigation of the Commonwealth's waterways [,]" which includes Great Ponds. Fuhrmann, \*12, citing Trio Algarvio, Inc. v. Commissioner of the Department of Environmental Protection, 440 Mass. 94, 97 (2003). "It has long been established that the property rights of those who own property on a Great Pond extend only to the natural low-water mark." Barstow, \*4; Fuhrmann, \*12, citing, In the Matter of Rick Brooks, Docket No. 2005-009, Ruling on Legal Issues (DALA) (May 16, 2007), adopted by Final Decision (June 11, 2010) (citing numerous Massachusetts decisions from the Supreme Judicial Court). "Under the public trust doctrine, the Commonwealth holds tidelands [and Great Ponds] in trust for the use of the public for, traditionally, fishing, fowling, and navigation." Barstow, \*4; Fuhrmann, \*12-13, citing, Moot v. Department of Environmental Protection, 448 Mass. 340, 342-343 (2007), S.C., 456 Mass. 309 (2010).

Title to land below the natural low-water mark is held by the Commonwealth in trust of



the public. Barstow, \*4; Fuhrmann, \*13-14; Webster Ventures II, 2016 MA ENV LEXIS 27, \*.

"The Waterways Regulations 'protect and promote the public's interest in . . . Great Ponds . . . in accordance with the public trust doctrine . . . [and] protect the public health, safety, and general welfare as it may be affected by any project in . . . great ponds'"

Barstow, \*4; Fuhrmann, \* 1 4; Webster Ventures II, \*18-19.

Under the Waterways Regulations, "no 'structure shall be built or extended, or . . . other obstruction or encroachment made, in, over or upon the waters of any great pond below the natural high-water mark' unless licensed by the Department." Barstow, \*5; Fuhrmann, \*14; In the Matter of Rinaldi, Docket No. 2009-060, Recommended Final Decision (September 16, 2010), adopted by Final Decision (October 13, 2010). Additionally, "where feasible" all proposed structures in Great Ponds must comply with the 25 foot setback requirement of 310 CMR 9.36(2), which provides as follows:

[a] project shall not significantly interfere with littoral or riparian property owners' right to approach their property from a waterway, and to approach the waterway from said property, as provided in M.G.L. c. 91, § 17. In evaluating whether such interference is caused by a proposed structure, the Department may consider the proximity of the structure to abutting littoral or riparian property and the density of existing structures. In the case of a proposed structure which extends perpendicular to the shore, the Department shall require its placement at least 25 feet away from such abutting property lines, where feasible. (emphasis supplied).

The purpose of this 25-foot setback requirement "[is] to provide a distance between structures that [will] provide safe navigation and berthing, and provide adequate clearance for property owners to approach their property from a waterway and approach the waterway from [their] property." Barstow, \*5; Webster Ventures II, \*90. "Often a 25-foot setback is not feasible, due to lot sizes and other restrictions," and "[i]n those instances, [proposed] projects may still be approved because there is enough room for vessels to pass each other safely." Id.

Review of waterborne traffic considers whether the traffic generated by the proposed Marina will significantly interfere with other water-borne traffic in the area. The proposed Marina will accommodate up to 10 vessels. Draft License, Conditions 7-11, Governing Use of Licensed Facility by Watercraft. Some witness testimony focused on unsafe boating practices associated with the fact that the Property also supports a restaurant and that the Applicant has businesses at other locations on the Lake that would generate cross-lake traffic, and traffic by people who would have been drinking at the restaurant. While it is appropriate to consider the waterborne traffic generated by the proper use of the proposed Marina, it is inappropriate to consider evidence of interference based upon the allegations of unsafe boating practices on the Lake. Regulation of unsafe boating practices is outside the jurisdiction of Chapter 91 and 310 CMR 9.00 and MassDEP. I have therefore not credited any evidence and objections to the proposed Marina that are based on unsafe boating practices. See Furhmann, \*28-\*29.<sup>24</sup>

### **PETITIONERS' BURDEN OF PROOF AT THE HEARING**

At the Hearing, the Petitioners had the burden of producing credible evidence in support of their position that the Draft License does not comply with Chapter 91 and the Chapter 91 Regulations at 310 CMR 9.00. In the Matter of Keith & Valerie Stamp, OADR Docket No. 2015-024, 2016 MA ENV LEXIS 43, \*4 Recommended Final Decision, (August 4, 2016), adopted as Final Decision, 2016 MA ENV LEXIS 42, (August 8, 2016)(“Stamp”). Specifically, the Petitioners were required to present “credible evidence from a competent source in support of each claim of factual error [made against the Department], including any relevant expert

---

<sup>24</sup> That is not to say that safety is not an issue. The regulations address “protection and promotion of the public health, safety and general welfare as it may be affected by any project” in the Lake. See 310 CMR 9.01(2)(c). MassDEP’s review of safety is related to the proposed Marina, assuming proper and appropriate use by mariners. See Furhmann, supra.

report(s), plan(s), or photograph(s).” “A ‘competent source’ is a witness who has sufficient expertise to render testimony on the technical issues on appeal.” In the Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 MA ENV LEXIS 89, at 36-37, adopted by Final Decision (August 19, 2010), 2010 MA ENV LEXIS 31. Whether the witness has such expertise depends “[on] whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony.” Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted).

### **STANDARD OF REVIEW**

My review of the evidence presented at the Hearing is *de novo*, meaning that my review is anew, irrespective of any prior determination of the Department in issuing the Draft License. See Onset Bay II, \*39 Put another way, as the Presiding Officer responsible for adjudicating the appeal, "[I am] not bound by MassDEP's prior orders or statements [in the case], [but] instead [am] responsible . . . for independently adjudicating [the] appeal[] and [issuing a Recommended Final Decision] to MassDEP's Commissioner that is consistent with [Chapter 91] and . . . [the Waterways] Regulations . . . ." Jimary, \*13; See also In the Matter of John Soursourian, OADR Docket No. WET, 2013-028, Recommended Final Decision, 2014 MA ENV LEXIS 49, \*36, adopted as Final Decision, 2014 MA ENV LEXIS 47 (2014).

The relevancy, admissibility, and weight of evidence presented at the Hearing are governed by M.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 . . . rest[ed] within the sound discretion of the Presiding Officer. . . ." See, 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").

### **DISCUSSION**

As discussed below, the Petitioners testimony is conclusory and speculative. They offer no credible evidence that mariners, fishers and swimmers cannot maneuver around the proposed Marina, will be unable to utilize abutting properties to access the Lake or that the proposed Marina will otherwise significantly interfere with fishing, fowling and navigation. That is the legal standard. The evidence supports the issuance of the Draft License.

#### **Issue 1. The Project Complies With The Standards To Preserve Water-Related Public Rights set forth at 310 CMR 9.35.**

310 CMR 9.35 imposes an obligation on the Department to authorize only those structures that the "legal and reasonably foreseeable" waterborne traffic associated with them does not interfere with public trust rights. Onset Bay II, \*82<sup>25</sup> "[I]n assessing the significance of any interference with public rights of navigation, the Department is required to take into account that the provision of public benefits by certain water-dependent uses may give rise to some unavoidable interference with certain water-related public rights [and that] [s]uch interference

---

<sup>25</sup> The 'legal and reasonably foreseeable waterborne traffic' standard is a rational, objective standard based on Chapter 91 regulatory requirements and is consistent with prior Final Decisions. Onset Bay II, \*82.

may be allowed provided that mitigation is provided to the greatest extent deemed reasonable by the Department, and that the overall public trust in waterways is best served.” 310 CMR 9.35(1).

Onset Bay II, \*82-83

310 CMR 9.35(2)(a), provides that a “[proposed c. 91] project shall not significantly interfere<sup>26</sup> with public rights of navigation which exist in all waterways. Such rights include the right to conduct any activity which entails the movement of a boat, vessel, float, or other watercraft; the right to conduct any activity involving the transport or the loading/unloading of persons or objects to or from any such watercraft; and the natural derivatives thereof.” (emphasis supplied). The Department may only authorize those structures such that the legal and reasonably foreseeable waterborne traffic associated with them does not significantly interfere with the public trust rights. See Onset Bay II, at \*83; Fuhrmann, at 29-30; Webster Ventures II, \*73; Jimary, \*17-\*18; Sylvia, \*16-\*17.

The Commonwealth’s waterways are open to navigation by small crafts, recreational and commercial vessels alike. Matter of Oliveira, Docket No. 2010-017, Recommended Final Decision (January 7, 2011), \*16, adopted by Final Decision (January 7, 2011) (project for one user would result in significant interference with “established course of navigation” used by many to reach a specific cove; citing Attorney General v. Woods, 108 Mass. 436 (1871) (“Oliveria”). Within this framework, the right to navigate should be construed liberally but is not unlimited. Stamp, 29. Mere inconvenience, anecdotal or conclusory statements of alleged navigation interference is not enough. Id. See also In the Matter of Lipkin, Docket No. 92-043, Final Decision (December 22, 1995) (summary decision granted when petitioners failed to

---

<sup>26</sup> 310 CMR 9.35(2)(a) uses the terms “significantly interfere” and “substantially interfere.” The remainder of the regulations generally utilize the term ‘significant’ when considering interference. There is no material difference between ‘significant’ and ‘substantia’ in this context. Webster Ventures, Inc., at \*70, n. 15.

provide evidence that a pier proposed 162 feet from their sailboat mooring would significantly interfere with navigation).

Factors in determining whether interference is significant may include the difficulty of adjustments by existing users, whether alternatives are available, and whether the interference would be experienced by the public or a single abutter. In the Matter of Stanley A. Sylvia, Docket No. 95-110, Final Decision (February 4, 1997) (more difficult launching for one family is not significant interference); Oliveira, supra. Relevant considerations include who is experiencing the interference, the anticipated frequency of it, and the extent or type of interference. Matter of Renata Legowski, supra, at \*24. "For example, merely having to navigate around a dock is not significant interference, particularly when the dock is an impediment to just one abutting property, and such property owner has an alternative navigation route. " Id.

**1. 310 CMR 9.35(2)(a)1.b., 1.d and 1.i: The Proposed Marina does not extend into or over any existing channel such as to impede free passage, nor require the alteration of an established course of vessels in violation of the regulations.**

**a. Proposed Marina does not extend into or over the designated channel such as to impede free passage.**

The regulations prohibit a project from extending "into or over any existing channel such as to impede free passage." 310 CMR 9.35(2)(A)1.b. "Channel" is defined to mean "a navigable route for the passage of vessels, established by customary use or under the authority of federal, state, or municipal law." See 310 CMR 9.02. The Petitioners failed to produce credible evidence that there is a channel designated under federal, state or municipal law that would be impacted by the proposed Marina. As such, the proposed Marina does not adversely affect the depth or width of an existing channel.

**b. There is no 'established course of vessels' or channel 'established by customary use' through the area of the proposed Marina.**

The Parties dispute the volume and frequency of boaters and swimmers using the Lake in front of the Property, but not that the area is used for such navigation. The Petitioners have shown that boats, fishers and swimmers use the “southern shore” on a routine basis. They have not shown, however, that there is an ‘established course of vessels’ to a particular destination, or a route established for a compelling navigational reason that must be continued for a compelling or legitimate navigational reason. Their testimony is conflicting and unclear, asserting multiple locations for alleged “channels”.

While not defined, the term 'established course of vessels' is not synonymous with 'habitual use' by vessels in a particular area and is not a guarantee that mariners will not have to alter their preferred course of navigation in that area as the result of a Chapter 91 licensed project. The phrase 'established course of vessels' means that a particular course must have been established by mariners, and must be continued, for a compelling and legitimate navigational reason, and not just because a number of boaters are in the habit of navigating in the area where a project is proposed. Onset Bay II, \*82-\*83. The term as used in 310 CMR 9.35(2)(a)1.d. means more than a particular boater's favored route. See Stamp, \*34, citing Matter of Abdelnour, supra. (Established course of vessels not found where shellfishermen, sailboaters and windsurfers regularly used the area in question and area was considered an "informal navigational channel").

If there is an established course of vessels, there must be a significant impact from having to navigate around a new structure. "[I]mplicit in this regulatory concept is the inability, without significant adverse consequences, to change course in order to pass around a new, [c. 91] licensed structure." Onset Bay II, \*82 citing Webster Ventures II, \*83-84 (a particular course must have been established by mariners for a compelling and legitimate navigational reason and must be continued for a compelling and legitimate navigational reason, not just because boaters

habit of navigating there). Compelling and legitimate reasons include navigational safety, such as mariners being constrained by shoals, rocks, or a designated commercial shipping lane. Onset Bay II, supra.

The Petitioners testimony does not support a finding that there is an “established course of vessels,” and that any required variation of it is significant.<sup>27</sup> The Petitioners suggest multiple “navigational channels” exist and are used, ranging from “hugging the shore” to 100 feet out, to 220 feet out to the entire width from shore to shore. There is no testimony of shoals, other obstructions or channels that would support the safety concerns that Petitioners allege would occur if mariners must travel around the proposed Marina. Ms. Hopps contends that almost any new structure will require some mariners to alter their prior habitual courses and that the regulations do not guarantee mariners that they will not have to alter their preferred course of travel. HoppsPFT, ¶ 8. Ms. Hopps contends that the usage testified to describes habitual travel routes that may be preferred by fishermen or paddle boarders but do not create an “established course of vessels” for compelling and legitimate navigational reasons. Hopps PFT, ¶ 8. Ms. Hopps further opined that if habitual use was enough, then few structures would be built. Hopps PFT, ¶ 9. In fact, the photographs in Petitioners’ exhibits show numerous docks and marinas around which the public already navigates. Pensivy Ex. 6; Rivers Murphy Ex. 4; See also Onset Bay II, supra.

While the proposed Marina may interfere with the Petitioners’ preferred routes, I agree with the Department that these routes are preferred habitual routes and not “established courses

---

<sup>27</sup>For example, the Petitioners contend that the proposed Marina “forces traffic out into a narrow navigational channel”; impacts cross traffic from an opposite shore, swimming at an opposite beach, the island; “it is unimaginable that this kind of obstruction and navigational interference could be allowed on a Great Pond. Rivers Murphy PFT, ¶ 6; See also Pensivy PFT, ¶ 5; pushes boating traffic another 220 feet into the “small navigation path.” Rivers Murphy PFT, ¶ 6.a.; “[push] boating traffic another 100 feet or more into the high traffic volume area.” Miraglia PFT, ¶ 10; “decreases the channel down to 1,140 ft.” Pensivy PFT, ¶ 26.



of vessels” under the regulations. The Petitioners have not demonstrated that there is an “established course or vessels” or a channel that would be significantly impacted by the proposed Marina in violation of the regulations.

**2. 310 CMR 9.35(2)(a)1.c. The Proposed Marina does not impair any line of sight required for navigation**

The Petitioners provided no testimony to prove that the proposed Marina impairs line of sight required for navigation. Ms. Hopps testified that based upon her review of aerial photographs, photos of the project site, bathymetric information and the Draft License Plan that the proposed Marina would not impair any line of sight required for navigation. Hopps PFT, ¶ 10. On cross examination she confirmed her opinion that the proposed Marina would not cause visual interference of people accessing on the sides, or from the shore. Hopps, 2:54:16-2:55.

**3. 310 CMR 9.35(2)(a)1.e. The Proposed Marina does not interfere with access to adjoining areas by extending substantially beyond the projection of existing structures adjacent to the site.**

Petitioners did not provide any testimony to prove that the proposed Marina would interfere with access to adjoining areas because it is longer than it needs to be and extends substantially beyond existing structures adjacent to the site. Ms. Hopps testified that based upon her review of aerial photographs, photos of the project site, bathymetric information, and the Draft License Plan that the proposed Marina would not interfere with access to adjoining areas by extending substantially beyond the projection of existing structures. Hopps PFT, ¶ 10. Ms. Hopps testified that there is an unlicensed dock seasonally placed in the eastern ROW, and that the next nearest licensed structure is located approximately 80 feet to the east of the Property. Hopps PFT, ¶ 24. See also Puntin, 1:21:39-1:24:00. To the west, the nearest structure is 543 feet from the proposed Marina. Hopps PFT, ¶ 12. The Petitioners offered no testimony regarding

these structures.<sup>28</sup> I find that preponderance of the evidence demonstrates that the proposed Marina will not significantly interfere with access to adjoining areas by extending substantially beyond existing adjacent structures.

**4. 310 CMR 9.35(2)(a)1.f. The Proposed Marina does not extend beyond the length required to achieve a safe berthing, where there are no adjacent structures.**

The Petitioners did not provide any testimony to prove that the proposed Marina extends beyond the length required to achieve a safe berthing, where there are no adjacent structures.

**5. 310 CMR 9.35(2)(a)1.g. The Proposed Marina does not generate water-borne traffic that would substantially interfere with other water-borne traffic in the area at present, or in the future as may be evidenced by documented projections.**

The Petitioners contend that the proposed Marina would generate waterborne traffic that would substantially interfere with existing water-borne traffic. They contend that the proposed Marina will impact the “highest and heaviest boating traffic on the lake.” Rivers Murphy PFT, ¶ 6; Pensivy, PFT, ¶ 5. However, their testimony is conclusory and speculative and does not include any factual support.<sup>29</sup> Ms. Hopps testified that in her professional knowledge and experience the proposed Marina will not generate such traffic. Hopps PFT, ¶ 11. She also opined that the safety issues the Petitioners raise do not relate specifically to the proposed Marina but relate to safety responsibilities of all who use the Lake, the vessel operators and swimmers alike. Hopps PFT, ¶ 11.

As noted above, while it is appropriate to consider the waterborne traffic generated by the

---

<sup>28</sup> Except that Mr. Pensivy testified as to the existence and location of the nearest licensed structure to the east. Pensivy PFT, ¶ 27.

<sup>29</sup> For example, the Petitioners testified that, “There is a steady wind on the point that affect navigation in the area” Pensivy PFT, ¶ 15; The proposed Marina will “force traffic into a narrow navigational channel with cross traffic (from Rusty Anchor across the Lake, 2 swimming areas across the Lake; the Island with an extended sand bar; Rivers Murphy PFT, ¶ 6; Pensivy PFT, ¶ 5; “ “there are too many marinas on the lake” Pensivy PFT, ¶ 8; “vessels cutting across the historic navigational channel “ to leave or access the marina can only lead to accidents. Pensivy PFT, ¶ 5; the proposed Marina would push public lake users into harms way of congested and unmonitored boating traffic” Rivers Murphy PFT, ¶ 7

proper use of the proposed Marina, it is inappropriate to consider evidence of interference based upon alleged unsafe boating practices. It is appropriate to include conditions in the Draft License to address safety, as the Department has done in this case.

**6. 310 CMR 9.35(2)(a)1.j. The Proposed Marina does not impair in any other substantial manner the ability of the public to pass freely upon the waterways and to engage in transport or loading/unloading activities.**

The Petitioners did not provide any testimony to prove that the proposed Marina will impair in any other substantial manner the ability of the public to pass freely upon the waterways and to engage in transport or loading/unloading activities. Ms. Hopps testified that based upon her knowledge and experience the proposed Marina will not significantly interfere with the ability to conduct any activity involving the transport or the loading/unloading of persons or objects to or from any watercraft; and the natural derivatives thereof. Hopps PFT, ¶ 12. She testified that the proposed Marina will be sited with at least 218 feet of clearance from the west property line and the closest structure on the west side of the project site is approximately 543 feet from the proposed marina. *Id.* She further testified that a minimum of 25 feet from the abutting property line to the east will be maintained, with additional clearance between the proposed Marina and the unlicensed seasonal dock located thin the ROW to the east. *Id.*<sup>30</sup> In sum, the Petitioners have not shown that the proposed Mariana would result in substantial impacts to the ability of the public to pass freely upon the waterways and to engage in transport or loading/unloading activities.

**7. 310 CMR 9.35(2)(b) The Proposed Marina will not significantly interfere with the public rights of free passage over and through the waters of the Lake**

---

<sup>30</sup> In addition, the Draft License provides that if the structural elements are reconfigured, the floating lateral and finger piers cannot be located closer to the eastern ROW. Draft License cover letter, Findings, page 4; Draft License, Condition 27.

The regulations at 310 CMR 9.35(2)(b) provide that “[t]he project shall not significantly interfere with public rights of free passage over and through the water, which exist in all waterways. Such rights include the right to float on, swim in, or otherwise move freely within the water column without touching the bottom, and, in Commonwealth Tidelands and Great Ponds, to walk on the bottom.” The Draft License includes conditions that maintain the public’s right to free passage over and through the water. Draft License, Conditions 3-6.

Nonetheless, the Petitioners contend that the proposed Marina will significantly interfere with the public rights of free passage over and through the waters of the Lake. They contend that the area is heavily used, and that boaters and swimmers would be put at risk if they have to navigate around the dock. They offer only speculation and conclusory statements, however, to support their contention. As discussed above, there is no established course of vessels or “channel”. The watersheet adjacent to the Property is quite broad and the proposed Marina would occupy a relatively small area of it.<sup>31</sup> Access throughout the area where the Marina is proposed is not constrained by the proximity of adjacent shorelines, which are all located 2,000 linear feet away. The Petitioners’ testimony and exhibits speak to the uses of the Lake for various sport and recreational activities; however, merely having to share the use of a waterway does not equate to significant interference. Onset Bay II, *supra*; Stamps, *supra*. Ms. Hopps testified that based on her professional knowledge and experience, it is her opinion that the proposed Marina will **not** significantly interfere with the public rights of free passage over and through the waters of the Lake. Hopps PFT, ¶ 13. The Petitioners have not produced testimony to prove otherwise.

---

<sup>31</sup> The cumulative footprint of the structures of proposed Marina and/or fill in, on, over, or under the Waterway as measured from the High-Water Mark is 1,145 sf, Draft License cover letter, Findings, page 2; Draft License, Condition 27.b.; Puntin PFT, ¶ 9.

**8. 310 CMR 9.35(2)(c) The Proposed Marina will not significantly interfere with access to a town landing.**

The regulations at 310 CMR 9.35(2)(c) provide that, “[t]he project shall not significantly interfere with public rights associated with a common landing, public easement, or other historic legal form of public access from the land to the water that may exist on or adjacent to the project site.” Petitioners contend that the proposed Marina will impact use of the east and west ROWs which are used for swimming, fishing, floating, kayaking and stand-up paddle boarding. Pensivy PFT, ¶ 12. In referencing users of the east and west ROWs, the Petitioners testified in a conclusory and speculative manner that public rights would be impacted.<sup>32</sup> In support of this contention, Mr. Pensivy testified that to access the inner motored slips, boats will have to pass through one of the swimming areas (presumably the one off the east ROW). This testimony is conclusory and unsupported by factual evidence. Ms. Hopps testified that while there are structures in each ROW, she testified that they are not validly licensed structures. Hopps at 12, 17. She testified that her review of documents, photos and aerial records indicate that various structures are installed seasonally within the east and west ROW. Hopps PFT, ¶ 12, 17.<sup>33</sup> However, the proposed Marina would be located approximately 543 feet from the closest structure on the west side of the Property and more than 25 feet from the closest structure on the

---

<sup>32</sup> For example, the Petitioners testified that, “They [ROW users] will be most affected by this project and will most certainly have issues accessing their deeded right of ways with the increased boating traffic in the area.” Pensivy PFT, ¶ 2. See also Rivers Murphy PFT, ¶ 7. Neither Mr. Pensivy nor Dr. Rivers Murphy testified to using either ROW themselves. Nor did they testify regarding the unlicensed structure the eastern ROW to which Ms. Hopps testified. Hopps PFT, ¶ 24.

<sup>33</sup> Had Ms. Hopps presented conclusive evidence that the structures are unlicensed in violation of Chapter 91 and the Waterways Regulations, an argument could have been made for dismissal of the Petitioners claim of violations in issuance of the Draft License due to the inequity of the Petitioners claiming violations and at the same time being in violation of Chapter 91 requirements for having unlicensed structures on their Property. See In the Matter of James Valis, OADR Docket No. 2021-015, Recommended Final Decision, 2022 MA ENV LEXIS 23, \*3, \*20. (July 7, 2022), adopted by Final Decision, 2022 MA ENV LEXIS 22(July 25, 2022).

east side of the Property. Hopps PFT, ¶ 17. As a result, Ms. Hopps testified that in her professional opinion, the proposed Marina will not significantly interfere with public rights associated with a common landing, public easement, or other historic legal form of public access from the land to the water that may exist on or adjacent to the project site. Hopps PFT, ¶16.

Ms. Hopps further testified that in considering the proximity of the ROWs, she evaluated the anticipated route of access to and from the proposed Marina by vessels through the 25-foot setback area east of the western ROW, and determined that it will not significantly interfere with public rights associated with a common landing, public easement, or other historic legal form of public access from the land to the water that may exist on or adjacent to the Property in accordance with the regulations. Hopps PFT, ¶ 17. Dr. Wagner opined that the proposed Marina would result in slower speeds in this area and the routing of larger boats passing through the area to deeper water and greater distance from the shore. Wagner Ex. B.

**9. 310 CMR 9.35(3)(a) The Proposed Marina will not significantly interfere with public rights to fishing and fowling.**

The regulation ta 310 CMR 9.35(3)(a) provides as follows:

The project shall not significantly interfere with public rights of fishing and fowling which exist in tidelands and Great Ponds. Such rights include the right to seek or take any fish, shellfish, fowl, or floating marine plants, by any legal means, from a vessel or on foot; the right to protect habitat and nutrient source areas in order to have fish, fowl, or marine plants available to be sought and taken; and the natural derivatives thereof. The Department shall find that the standard is not met in the event the project:

1. poses a substantial obstacle to the public's ability to fish or fowl in waterway areas adjacent to the project site; or
2. results in the elimination of a traditional fishing or fowling location used extensively by the public.

The Petitioners testimony did not demonstrate that the proposed Marina would violate this regulatory provision. Petitioners' testified that the area where the Marina is proposed is a

“historical fishing location” and that there are many fishermen who regularly troll for fish in this area. Miraglia PFT, ¶ 8.<sup>34</sup> Petitioners also testified that several fish spawn in this area. Pensivy PFT, ¶ 10. The Applicant’s expert, however, testified to the contrary. Wagner Ex. B.

The Petitioners offer only conclusory and speculative assertions that a traditional fishing or fowling location extensively used will be eliminated. Miraglia PFT, ¶ 5.<sup>35</sup> Ms. Hopps testified that in her opinion, based upon her professional knowledge and experience, the proposed Marina will not significantly interfere with the public rights of fishing and fowling on the Lake. Hopps PFT, ¶ 18. Ms. Hopps testified that any interference with fishing from the proposed Marina will be insignificant and that the number of people fishing on the Lake does not change her opinion. Hopps PFT, ¶ 19. Mr. Puntin also testified that the proposed Marina will not significantly interfere with public rights of fishing and fowling, although he doesn’t testify as to why he draws that conclusion. Puntin PFT, ¶ 5.f. Therefore, I do not credit this testimony.

On behalf of the Applicant, Mr. Wagner testified regarding the Aquatic Survey he conducted of the Lake near the Property. Mr. Wagner testified that based upon his observations, the area in and around the proposed Marina is not a significantly fertile fishing ground. Wagner PFT, ¶ 4. He testified that the area offered the potential for casting a fishing line but is not overly favorable for adults of game species. Id. He also opined that the presence of docks may supply cover that will attract fish but will not alter the resources available below the waterline. Id. He concluded that he found no evidence in the plan to suggest that access to the shoreline area will

---

<sup>34</sup> Mr. Miraglia cites a letter signed from 4,000 League of Sportsman and Greylock Fishing Club and Members 2021 to MassDEP requesting that the project be denied. Miraglia PFT, ¶ 9.

<sup>35</sup> Mr. Miraglia cites to Miraglia Ex. 5, as evidence of a negative effect on fisheries. Miraglia Ex. 5 is a photograph of a single shellfish labeled “Photo of Fresh Water Mussels on Southern Shoreline of the Lake.” He offered no evidence that this single shellfish was in the area of the proposed Marina, or how the presence of a single shellfish is relevant.

be hindered. *Id.* Mr. Capelli testified on behalf of the Petitioners but his testimony was conclusory and offered no factual evidence countering Mr. Wagner's factual evidence or his conclusions.<sup>36</sup> In sum, the Petitioners have not provided testimony to prove that the proposed Marina will significantly impact the public's rights to fishing and fowling.

**10. 310 CMR 9.35(5) The Proposed Marina provide appropriate compensation commensurate with the extent of interference caused.**

The regulations at 310 CMR 9.35(5) provides as follows:

Any project that includes tidelands or Great Ponds accessible to the public, in accordance with any of 310 CMR 9.35(1) through (4), shall provide for long-term management of such areas which achieves effective public use and enjoyment while minimizing conflict with other legitimate interests, including the protection of private property and natural resources. In applying this standard, the Department shall act in accordance with the following provisions.

The proposed Marina will provide public access and informational signage. Hopps PFT, ¶ 22; ; Draft License, Conditions 4, 26<sup>37</sup> The Public Recreational Boating Facility Requirements will ensure that the proposed Marina is maintained and managed to achieve effective public use and enjoyment. Hopps PFT, ¶ 22. Draft License, Conditions 7-25. The Petitioners have not provided testimony to prove otherwise.

**Issue 2. The proposed Marina will not significantly interfere with littoral or riparian property owner rights under 310 CMR 9.36(2).**

Petitioners contend that the proposed Marina will interfere with public use of the Lake from the east ROW in noncompliance with 310 CMR 9.36(2) which provides,

“ [a proposed c. 91] project shall not significantly interfere with littoral or riparian property owners' right to approach their property from a waterway, and to approach the waterway from said property, as provided in M.G.L. c. 91, § 17.” In evaluating whether such interference is caused by a proposed structure, the

---

<sup>36</sup> Ms. Hopps testified that the Petitioners identified areas where water depths range between 10-120 feet as ideal for a specific fishing methodology for specific types of fish. She concluded that the referenced depths would be subject to insignificant impacts to a limited subset of the broad spectrum of fishing interests. Hopps PFT, ¶ 19.

<sup>37</sup> The Draft License requires compliance with 310 CMR 9.38 as Public Recreational Boating Facility.



Department may consider the proximity of the structure to abutting littoral or riparian property and the density of existing structures. In the case of a proposed structure which extends perpendicular to the shore, the Department shall require its placement at least 25 feet away from such abutting property lines, “where feasible.” (emphasis supplied).

The regulation does not provide that access to and from any particular direction is protected. 310 CMR 9.36(2) protects a riparian owner's right to navigate to and from their property, although those rights are not without limits. See Stamp, \*23; Onset Bay II, \*101(littoral or riparian property rights does not establish any specific right to navigate by sailboat in a waterway).

Significant interference must be greater than a mere inconvenience or increase in difficulty in access. Onset Bay II, \*102; Furhmann, \*20. “[A] significant interference [with the littoral property owner’s right] must be greater than a mere inconvenience or increase in difficulty in access.” Stamp, \*24-25. Such a significant interference exists only if the littoral property owner is “wholly cut off” from his or her property by a structure built on an adjoining landowner’s foreshore. Id. \*104. Citing In the Matter of Stanley A. Sylvia, Docket No. 95-110, Final Decision (February 4, 1997)(more difficult launching would not significantly interfere with their right to access their property from the water); In the Matter of Point of Pines Yacht Club, Inc., OADR Docket No. 91-116, Final Decision (November 20, 1997), 1997 MA ENV LEXIS 19, at \*33 (appellant failed to demonstrate that portion of proposed pier would significantly interfere with his right to access his property from the water.) The Petitioners have failed to provide evidence that the public is “wholly cut off” from the ROW by the structure. Nor is merely having to navigate around a dock a significant interference, particularly where a property owner has an alternative navigation route. Legowski, supra, \*24. The Petitioners have provided no testimony that the ROWs can not be utilized from another navigation route.

Here the proposed Marina is 25 feet from the property line, 35 feet from the unlicensed structure on the eastern ROW and 80 feet from the closest licensed structure on the eastern side of the Property. The Petitioners testified that the ROW areas to the west and east of the Property are regularly used for swimming, floating, wading, fishing and boating. Pensivy PFT, ¶ 2. They testified that nonmotorized boats and motorized boats “pass in front of said location regularly, moving in an established, continuous circular, natural navigational pattern around the lake, or mooring close by in the southwest cove for the day.” Rivers Murphy PFT, ¶ 7(a). They testified that the proposed Marina would “push non-motorized boats into harms way of congested and unmonitored boating traffic” while also forcing motorized and non-motorized vessels into the small navigational path, approximately 220 feet from shore.” Id. They also testified that the proposed Marina would “[push] boating traffic another 100 feet or more into the high traffic volume area.” Miraglia PFT, ¶ 10. According to the Petitioners “boats accessing the shoreward fingers of the dock will cut through a heavily used swimming/wading area to gain access as well as run the chance of running aground due to the shallowness in that area and the closeness to the shore.” Pensivy PFT, ¶ 15.

Ms. Hopps testified that the proposed Marina will extend perpendicular to the shoreline and in its most easterly potential location, will be sited 25 feet away from the east property line and in its most westerly location, will be sited 218<sup>38</sup> feet way from the west property line. Hopps PFT, ¶ 23-25. She testified that it more than exceeds the goal of 25 feet, where feasible. Id. Ms. Hopps testified that as approved, there will be sufficient distance between the proposed Mariana and abutting structures that will provide for safe navigation and berthing, and will provide

---

<sup>38</sup> The Draft License shows 228 feet. Draft License Plan, Sheet 2 of 3.

adequate clearance for adjacent property owners to approach their property from a waterway and approach the waterway from said property. Hopps PFT, ¶ 24. Mr. Pensivy's assertion that the proposed Marina is too close to the east ROW is conclusory and unsupported by any factual evidence.

### **Conclusion**

The Petitioners conclusory and speculative testimony fails to include credible evidence that the public's right of navigation will be significantly impacted. That is the legal standard. While boaters, fishers and swimmers use the Lake, the Petitioners have not demonstrated that they cannot maneuver around the proposed Marina. There is no established course of navigation as intended by the regulations, littoral property rights are not significantly impacted. The evidence supports the issuance of the Draft License. Based upon the foregoing, I recommend that the Department's Commissioner issue a Final Decision approving the Chapter 91 License.

**Date:** July 24, 2023



---

Margaret R. Stolfa  
Presiding Officer

### **NOTICE- RECOMMENDED FINAL DECISION**

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d) and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

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

## **SERVICE LIST**

### **Representative**

### **Party**

Robert Pensivy  
Dr. Michele Rivers Murphy  
10 Residents Group  
65 Waubeek Road  
Pittsfield, MA 01201  
[drmicheleriversmurphy@gmail.com](mailto:drmicheleriversmurphy@gmail.com)  
[rjpensivy@gmail.com](mailto:rjpensivy@gmail.com)

PETITIONERS

Dennis G. Egen Jr., Esq.  
Elizabeth Tully, Esq.  
Pontoosuc Lake Properties, LLC  
Cohen Kinne Valicenti & Cook LLP  
28 North Street, 3<sup>rd</sup> Floor  
Pittsfield, MA 01201  
[degan@cohenkinne.com](mailto:degan@cohenkinne.com)  
[etully@cohenkinne.com](mailto:etully@cohenkinne.com)

APPLICANT

David Bragg, Senior Counsel  
Office of General Counsel  
MassDEP - Boston  
100 Cambridge Street, 9<sup>th</sup> Floor  
Boston, MA 02114  
[David.Bragg@mass.gov](mailto:David.Bragg@mass.gov)

DEPARTMENT

Pittsfield Conservation Commission  
c/o Robert Van Der Kar, Conservation Agent  
70 Allen Street  
Pittsfield, MA 01201  
[rvanderkar@cityofpittsfield.org](mailto:rvanderkar@cityofpittsfield.org)

CONCOMM

Cc:  
Christine Hopps, Assistant Director  
Waterways Regulation Program  
MassDEP – Boston  
100 Cambridge Street, 9<sup>th</sup> Floor  
Boston, MA 02114  
[Christine.Hopps@mass.gov](mailto:Christine.Hopps@mass.gov)

DEPARTMENT

Christine Lebel, Chief Regional Counsel  
MassDEP-WERO  
436 Dwight Street, 5<sup>th</sup> Floor  
Springfield, MA 01103  
[Christine.Lebel@mass.gov](mailto:Christine.Lebel@mass.gov)

DEPARTMENT

Jakarta Childers, Program Coordinator  
[Jakarata.Childers@mass.gov](mailto:Jakarata.Childers@mass.gov)

DEPARTMENT

**In the Matter of Pontoosuc Lake Properties, LLC, OADR Docket No. 2021-019**

Recommended Final Decision

Page 37 of 37