**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

 **August 4, 2016**

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In the Matter of OADR Docket No. 2015-024

Keith & Valerie Stamp DEP File No.: Waterways Application No. W15-4327, Draft Waterways License

 Westport, MA

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**RECOMMENDED FINAL DECISION**

**I. INTRODUCTION**

James and Robin Winters (“the Winters”) challenge the draft Chapter 91 license issued to Keith Stamp (“Stamp”)[[1]](#footnote-1) on September 4, 2015 by the Southeast Regional Office of the Massachusetts Department of Environmental Protection (“the Department”) pursuant to the Massachusetts Public Waterfront Act, G.L. c. 91 (“Chapter 91” or “c. 91”), and the Waterways Regulations at 310 CMR 9.00. The Chapter 91 license authorized the Stamps’ construction and maintenance of an access pathway, pier, ramp and floats at their home on the East Branch of the Westport River at 14 Clyde’s Way in the Town of Westport (“the proposed Project”). The Winters’ home is located to the north of the proposed project location. The Winters contend that the Department erred in issuing the c. 91 because the proposed Project will significantly interfere with their ability to access their own dock from the river and will significantly interfere with public rights of navigation in the river. They seek a Final Decision amending the Chapter 91 license to require the Stamps to reconfigure and relocate the pier to the south side of a small peninsula at the site. Appeal Notice, ¶ 3. The Stamps and the Department dispute the Winters’ claims and request that the Chapter 91 license be affirmed.

After both the Winters and the Stamps filed their respective pre-filed direct testimony (PFT) the Stamps moved for summary decision on all of the issues in the appeal. In a prior ruling I concluded that the Stamps were entitled to summary decision as a matter of law on the Winters’ claims arising under 310 CMR 9.36(3) that the proposed Project would disrupt the Winters’ use of their own dock and under 310 CMR 9.36(4) that the proposed Project would displace the Winters’ water-dependent use[[2]](#footnote-2),[[3]](#footnote-3). As a matter of law, 310 CMR 9.36(3) does not apply to the facts of this case. Matter of Oyster Harbors Yacht Basin, DEP Docket Nos. 2008-082 and 2008-090, Recommended Final Decision, 2010 MA ENV LEXIS 177, fn 2 (“The prohibition against a project significantly disrupting water dependent uses in 310 CMR 9.36(3) applies to “off-site” locations.”) The Petitioners produced no evidence to support a claim that the Stamps’ project will disrupt a water-dependent use at an off-site location, nor did they cite any case law to support their claim under this regulation. In addition, I granted summary decision in favor of the Stamps on the Winters’ claim of a violation of 310 CMR 9.36(4) because there was no genuine issue of material fact relating to claim that the Stamps’ project would displace the Winters’ water-dependent use. An impediment to travel in a particular direction in a particular vessel, which is the essence of the claim, does not amount to a displacement of a water dependent use. The regulation defines “water dependent use” as “a use as specified in these regulations at 310 CMR 9.12(2)” 310 CMR 9.02. 310 CMR 9.12(2) makes clear that the term refers to some type of infrastructure, such as a recreational boating facility. It does not refer to an activity such as boating. Even assuming that the activity was included in the definition, the Petitioners produced no evidence that their ability to use their dock will be displaced as contemplated by the regulation. “Displace” means to “take the place of” Black’s Law Dictionary, 6th Edition (1990). There was no evidence that the Stamp’s project will displace the Winters’ dock or their use of it.

A genuine issue of material fact remained as to the other claims. The issues to be resolved at the evidentiary adjudicatory hearing (“the Hearing”) were as follows:

1. Whether the proposed Project will significantly interfere with the Winters’ riparian rights in violation of 310 CMR 9.36(2). (Appeal Notice, ¶ ¶ 1 & 2);
2. Whether the proposed project will significantly interfere with public rights of navigation, in violation of 310 CMR 9.35(2)(a) (Appeal Notice, ¶ 2), in any of the following ways:
3. Whether the proposed Project will impair the line of sight required for navigation, in violation of 310 CMR 9.35(2)(a)1.c. (Appeal Notice, ¶ 2);
4. Whether the proposed Project would require the alteration of an established course of vessels in violation of 310 CMR 9.35(2)(a)1.d.? (Appeal Notice, ¶ 2)
5. Whether the proposed Project would interfere with access to adjoining areas by extending substantially beyond the projection of existing structures adjacent to the site in violation of 310 CMR 9.35(2)(a)(1)e. (Appeal Notice, ¶ 2)

In addition, an ancillary issue was presented, relating to the location of the Winters’ own pier. The Stamps raised this issue in their Pre-Hearing Statement. Their contention was that the Winters constructed their pier in a more southerly location and at a different angle than was authorized by the Waterways license[[4]](#footnote-4) that the Department issued to them in 1998, and the problems they allege are due to their own noncompliance with the Waterways regulations. Stamp Pre-Hearing Conference Statement at pp. 3-4. This issue is discussed below in Section VI. The parties all presented testimony on this issue, and no party will be prejudiced by its inclusion in the case.

 I conducted a site visit on January 11, 2016 with all parties and their attorneys present. I conducted the Hearing on April 28, 2016 to resolve these issues. The parties were represented by legal counsel and presented witnesses and documentary evidence in support of their respective positions. The witnesses who appeared at the hearing were cross-examined under oath on the written testimony they had filed prior to the Hearing.[[5]](#footnote-5) As discussed below, the crux of the case is the impact of the proposed project on the Winters’ ability to navigate to and from their existing dock with a particular boat. After considering the evidence presented at the Hearing and in the Administrative Record, as well as the applicable law and the parties’ arguments, I recommend that the Commissioner issue a Final Decision affirming the Chapter 91 license. The proposed Project may interfere with the Winters’ preferred route to and from their own dock in a southerly direction but there will not be significant interference with their riparian rights of access or with public rights of navigation. The Stamps’ project as proposed complies with the performance standards of the applicable regulations.

**II. REGULATORY FRAMEWORK**

The Waterways regulations governing this appeal are found at 310 CMR 9.00, promulgated pursuant to the Department’s authority under M.G.L. c. 91, the Massachusetts Public Waterfront Act.

310 CMR 9.36: Standards to Protect Water-dependent Uses

(2) Private Access to Littoral or Riparian Property. The 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.

310 CMR 9.35, Standards to Preserve Water-related Public Rights, provides in relevant part:

(2) Public Rights Applicable to All Waterways

(a) Navigation. The project shall not significantly interfere 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. 1. The Department shall find that the standard is not met in the event a project will:

…

c. impair any line of sight required for navigation;

d. require the alteration of an established course of vessels;

e. interfere with access to adjoining areas by extending substantially beyond the projection of existing structures adjacent to the site.

**III. BACKGROUND/FACTS**

 On September 4, 2015, the Department’s Southeast Regional Office issued a draft Waterways License to Keith Stamp authorizing the construction and maintenance of a pier, ramp and floats “in and over the waters of the East Branch of the Westport River at 14 Clyde’s Way in the Town of Westport” in accordance with the draft plan that was submitted to the Department’s Southeast Regional Office with the Stamp’s license application. Chapter 91 License Transmittal Letter and Draft License, September 4, 2015. The draft Chapter 91 License specified that the structures authorized were to be used for noncommercial docking and boating access to navigable waters. Id. The proposed Project includes the following elements: a 4’ x 153’ fixed pier; a 20’ gangway; two 8’ x 16’ pile-held floats with float stops; a 6’ x 8’ platform with bench/storage bin; a ramp; and an access path. Id. The Winters submitted written comments to the Department prior to the date the draft License was issued. They were concerned that the Stamps’ proposed Project would be too close to their planned (but not yet permitted) extension of their existing pier and the Stamps’ pier’s height would spoil their existing views of the Westport River. The License plans show that the Stamps’ pier will be elevated to a height of five feet above the river bottom to allow clearance for lateral access beneath it. See License Plan Sheet 2 of 5. The Winters requested that the pier instead be built at a lower elevation and lateral access be provided with stairs, as they had done with their own pier. At the hearing James Winters confirmed that one of his first objections to the Stamps’ project was that it was going to ruin his view of the water. Hearing Transcript at 30.[[6]](#footnote-6)

Three witnesses testified for the Winters at the Hearing: (1) James Winters; (2) Robin Winters; and (3) Sean Leach.

1. James Winters. Mr. Winters resides at 1546C Drift Road in Westport, Massachusetts. He maintains a dock on the east branch of the Westport River at that address for which he was granted a waterways license in 1998. He and his wife have been using that dock since it was completed in 2004.[[7]](#footnote-7)
2. Robin Winters. Ms. Winters resides at 1546C Drift Road in Westport, Massachusetts with her husband, James Winters.[[8]](#footnote-8)
3. Sean Leach. Mr. Leach is a Civil Engineer and Professional Land Surveyor employed by Sitec, Inc. of North Dartmouth, Massachusetts.[[9]](#footnote-9)

Four witnesses testified for the Stamps at the hearing: (1) Mark A. Boucher; (2) Alan Heureux; (3) Dan Estow; and (4) Keith Stamp.

1. Mark A. Boucher. Mr. Boucher is a licensed Professional Land Surveyor who has been actively employed as such since 1999. He has owned and operated Boucher and Heureux, Inc. (formerly Mauk, Boucher and Heureux, Inc.) since 1990.[[10]](#footnote-10)
2. Alan Heureux. Mr. Heureux is a Registered Professional Civil Engineer who has been actively employed in that capacity since 1988. He has owned and operated Boucher and Heureux, Inc. (formerly Mauk, Boucher and Heureux, Inc.) since 1996.[[11]](#footnote-11)
3. Dan Estow. Mr. Estow is a resident of Westport, Massachusetts. He owns a dock structure directly abutting the location of the proposed project.[[12]](#footnote-12)
4. Keith Stamp. Mr. Stamp resides at 14 Clyde’s Way in Westport, Massachusetts. He is the Applicant for the proposed project.[[13]](#footnote-13)

One witness testified for the Department, Carlos T.B. Fragata. Mr. Fragata is an Environmental Analyst in the Wetlands and Waterways Program in the Department’s Southeast Regional Office. He has been employed in that capacity for fifteen years. Prior to joining the Department, he was employed for approximately one and one-half years by the Massachusetts Department of Transportation as an Environmental Analyst in the Wetlands Unit. Prior to his tenure with the Commonwealth, he was employed for ten years as the Conservation Administrator for the Town of Plymouth and the Conservation Director for the Town of Norton, and has prior experience in the fields of aquaculture, fresh water and marine invertebrate and fish sampling and identification, and fresh water and marine toxicology. He holds a Bachelor of Science degree with a double major in Biology and Marine Biology from the University of Massachusetts.[[14]](#footnote-14)

Findings related to the Stamps’ Proposed Project

 The proposed Project will be situated directly over a rocky peninsula. Stamp PFT at ¶¶ 5-7; Exhibits A and B to Stamp PFT. It will extend approximately 65 feet into the water at mean low tide. Boucher PFT at ¶ 9. The river bottom in that location is rocky and the water is shallow, and the projection of the proposed dock into the water is necessitated by the rocky contour of the peninsula. Stamp PFT at ¶ 6; Heureux PFT at ¶ 6. The dock was designed to project far enough into the water to avoid the rocky bottom and shallow waters. Stamp PFT at ¶ 7. The Winters’ existing dock and the proposed Project are comparably extended into the water based on the presence of the rocky peninsula and the depth of the water. Tr. at 188-189. To reach safe berthing depth, the two structures are approximately the same length. Tr. at 218-219. Eighteen inches of water at low tide is considered a safe berthing depth. Tr. at 220. The depth of water at low tide in the area of the proposed Project is approximately two to two and one-half feet. Tr. at 222. The distance from the Stamps’ proposed float, which will be located at the end of their fixed pier, to the secondary channel of the Westport River is approximately 160 feet. Boucher PFT at ¶ 7; Fragata PFT Exhibit B. To the main channel of the Westport River the distance is approximately 470 feet. Stamp PFT at ¶ 12. When the Stamps’ project is built it will be about forty-three feet (43’) south of the Winters’ pier at its closest point. Fragata PFT at ¶ 11. It will be approximately twenty-eight feet (28’) from the Winters’ southern property boundary. Id. at ¶ 10.

Findings related to Navigation

 The Winters maintain a licensed dock at their property on the east branch of the Westport River. J. Winters PFT at ¶ 3. They have been using that dock continuously since its completion in June 2004. Id. at ¶ 4. They usually navigate to and from their dock to the south directly over the area where the Stamps’ pier will be built, as well as to the north and east. Tr. at 63-64; Stamp PFT at ¶ 8. When the Stamps’ pier is built, because of its location it will interfere with the Winters’ ability to navigate directly to the south over the peninsula at mid- and high-tides. The Winters currently operate[[15]](#footnote-15) a 36-foot Yellowfin boat that is owned by Buzzards Bay Yacht Sales. Tr. at 19-20. Mr. Winters has a business relationship with Buzzards Bay Yacht Sales as a salesperson and he uses the Yellowfin to show to potential buyers, as well as for recreational uses and fishing. Tr. at 20-21. He may or may not purchase this boat. Tr. at 55-57. When he shows the boat to potential customers, he takes the boat off-site on a trailer. Tr. at 98-99 (testimony of Robin Winters). The Winters’ dock is used for recreational purposes. Id.

 Mr. Winters is an experienced boater who has been operating power boats for over thirty (30) years. J. Winters PFRT at ¶ 4. At low tide, the area of the Westport River in front of both the Winters’ property and the future location of the Stamps’ pier is largely not navigable by certain power boats because the depth of water is too low. Winters PFT at ¶ 8; Stamp PFT at ¶¶ 5-7. Currently at low tide, Mr. Winters cannot access his dock with the 36-foot Yellowfin because there is not enough water, only about twenty (20) inches. Tr. at 23-24. On many occasions, he leaves the boat at the Westport Yacht Club because he cannot go up the river. Tr. at 24. The tides prevent Mr. Winters from having any access at low tide. Id. At mid-tide, there are about 36-40” of water near the Winters’ dock, and at high tide there are about 60” of water. Tr. at 29. Even when the Stamps’ pier is constructed, the Winters will be able to access their dock to and from the north by using the reverse gear on their boat during mid-tide and high tide. Tr. at 65-66. Mr. Winters chooses not to use reverse gear on this boat except at high tide because he is concerned about mud entering the intake on the boat’s three motors, but he is able to operate this boat in reverse. Tr. at 45-47.

**IV. ISSUES FOR RESOLUTION AND BURDEN OF PROOF**

As stated above, the issues to be resolved in this appeal are:

1. Whether the proposed Project will significantly interfere with the Winters riparian rights in violation of 310 CMR 9.36(2).
2. Whether the proposed project will significantly interfere with public rights of navigation, in violation of 310 CMR 9.35(2)(a).
3. Whether the proposed Project will impair the line of sight required for navigation, in violation of 310 CMR 9.35(2)(a)1.c.;
4. Whether the proposed Project would require the alteration of an established course of vessels in violation of 310 CMR 9.35(2)(a)1.d; and
5. Whether the proposed Project would interfere with access to adjoining areas by extending substantially beyond the projection of existing structures adjacent to the site in violation of 310 CMR 9.35(2)(a)(1)e.

The Petitioners had the burden of producing credible evidence in support of their position that the Chapter 91 license does not comply with applicable regulations. In the Matter of Renata Legowski, OADR Docket No. 2011-039, Recommended Final Decision (October 25, 2012), 2012 MA ENV LEXIS 128, at 7-8 (party challenging Chapter 91 determination has burden of proof), adopted as Final Decision (November 5, 2012), 2012 MA ENV LEXIS 131. Specifically, the Petitioners had the burden of proving by a preponderance of credible evidence through the sworn testimonial and documentary evidence of their witnesses that the Chapter 91 License does not comply with the regulations. Id. “So long as the initial burden of production or going forward is met, the ultimate resolution of factual disputes depends on where the preponderance of the evidence lies. Matter of Town of Hamilton, DEP Docket Nos. 2003-065 and 068, Recommended Final Decision (January 19, 2006), adopted by Final Decision (March 27, 2006).” In the Matter of the Landing Group, Inc., DEP Docket No. 2014-028, Recommended Final Decision (October 15, 2015), 2015 MA ENV LEXIS 85. The weight to be given to any evidence in the record is within the sound discretion of the Presiding Officer. 310 CMR 1.01(13)(h)1.

**V. THE DEPARTMENT PROPERLY ISSUED THE CHAPTER 91 LICENSE**

This cases hinges largely on the credibility of Mr. Winters and on the Winters’ claim of a right to navigate in a particular direction: to and from the south. It was largely Mr. Winters’ burden to provide credible evidence on the issues for resolution. I find that his testimony on several relevant facts was not credible. My reasons for this are two-fold. First, at the hearing he was often evasive or less than truthful when asked simple questions. See, e.g. Tr. at 41-42[[16]](#footnote-16), 57, 91- 92[[17]](#footnote-17). Second, it defies common sense that an experienced boater like Mr. Winters cannot operate his boat in reverse under the conditions that exist at his dock now. The Department hones in on this point in its Closing Brief, pointing out contradictions in testimony and evasiveness in responses to questions. Department’s Closing Brief at p. 5; see also Tr. at 37, 39, 22, 40, 42, 47.

I will note for the record that my determination that there remained for the Hearing a genuine issue of material fact on the question of significant interference with rights of navigation was based on the Pre-Filed Rebuttal Testimony of Terry Nugent, whose testimony qualified him as an expert in boating and navigation, and in the function of motors on boats like that operated by the Winters. Mr. Nugent did not appear at the Hearing to be cross-examined, and I therefore struck his testimony from the record. Mr. Winters’ Pre-Filed Rebuttal Testimony mimicked Mr. Nugent’s in crucial respects relating to the potential harm that would occur if the 36-foot Yellowfin were driven in reverse, but it lacked the foundational facts necessary to similarly qualify him as an expert. As a result, I do not credit Mr. Winters’ testimony regarding the detrimental impacts to the Yellowfin’s motors that might occur if the boat were operated in reverse gear. Being unable to operate the boat in reverse gear when approaching or leaving their dock underpins the Winters’ claim of significant interference with their rights of navigation. There was no credible evidence that they could not do this. Ultimately, what the Winters have established is that the Stamps’ pier will interfere with their preferred route to the navigational channels of the Westport River and that they may have some added difficulty navigating in what is already at times a difficult area to navigate. What they have not established is that the interference with their rights of navigation will be significant. That is the legal standard. As discussed in more detail below, while the proposed project may interfere with the Winters’ rights of navigation, the interference will not be significant and the preponderance of the evidence supports the issuance Chapter 91 license.

1. **The proposed project will not significantly interfere with the Winters’ right to approach their dock from the river nor the river from their dock and therefore does not violate 310 CMR 9.36(2).**

As noted above in Section II, 310 CMR 9.36(2) protects a riparian owner’s right to navigate to and from their property. The regulation requires that a proposed 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….” The regulation does not provide that access to and from any particular direction is protected. The rights of riparian owners are not without limits. Matter of Stanley A. Sylvia, Docket No. 95-110, Final Decision, 1997 MA ENV LEXIS 122, **[\*8]** (February 4, 1997), quoting Henry v. City of Newburyport, 149 Mass. 582, 586, 22 N.E. 75, 76 (1889); Matter of Point of Pines Yacht Club, Inc., Docket No. 91-116, Final Decision, 4 DEPR 198 (November 20, 1997).

The Winters argue that they will have no access because their usual route is to the south and this route will no longer be available to them once the Stamps’ pier is constructed. Winters’ Pre-Hearing Brief at p. 2-3; Winters’ Closing Brief at p. 14. They argue that when the 36-foot Yellowfin is berthed at their pier facing south the proximity of their pier to the Stamps’ proposed pier will make it impossible for them to clear their float, turn the boat and then head south into the channel. Winters’ Pre-Hearing Brief at pp. 3-4. They assert that they have no viable alternative route to access the waterway. Winters’ Closing Brief at 10. The gist of their argument is that with the new pier in place they will no longer be able to navigate directly to the south, and this constitutes a significant interference with their rights. Id. The Stamps argue that the Winters will not suffer significant interference with their rights of access. “Simply by using the reverse gear, [the Winters] are able to access the channels of the Westport River from their dock in a northerly direction, an easterly direction, and, a southerly direction.” Stamps’ Post-Hearing Brief at 11. Citing to Matter of Renata Legowski, Docket No. 2011-039, Recommended Final, 2012 MA ENV LEXIS 128 (October 25, 2012)(a significant interference must be greater than a mere inconvenience or increase in difficulty in access), adopted as Final Decision, 2012 MA ENV LEXIS 131 (November 5, 2012), the Stamps argue that the interference the Winters’ may experience will not be significant. The Winters will still be able to access the secondary and main channels of the river, just not to and from the south in the way they do presently. Id. at 12. The Department makes similar arguments, and reiterates that no regulation assures access to property “to and from the south.” Department’s Pre-Hearing Brief at ¶ 1. The Department further argues that there is no regulatory violation arising from the Winters’ need to access their dock from a different direction than southerly, and the evidence shows that they have access to and from other directions. Department’s Closing Brief at p. 1. The Department points out that the common element in the applicable regulations is the question of significant interference with navigation, of both riparian owners and the general public. Department’s Closing Brief at 4. The Department argues that the Winters are the only people who will be affected by the Stamps’ project, both as riparian owners and as members of the public. The Department further argues that Mr. Winters was not a credible witness, citing to his evasiveness at the hearing and his testimony about being unable to use reverse gear. Id. at pp. 3, 5.

The Stamps and the Department have made the persuasive arguments in this case. The facts clearly show that the Stamps’ project will not significantly interfere with the Winters’ right of access. A significant interference must be more than increased difficulty or inconvenience. Matter of Squeek Realty Trust, Docket No. 2008-137, 138, 140 & 141, Recommended Final Decision (July 2, 2010), adopted by Final Decision (July 7, 2010) ("[d]ifficulty in docking a recreational boat does not … equate to being totally cut off from water access to one's property."). Significant interference must be shown by evidence that is more than anecdotal or conclusory statements. Id. The preponderance of the evidence demonstrates that the Winters’ “usual route” to the south is not the only way they access the secondary and main channels of the river. Keith Stamp testified that he has witnessed the Winters navigating in other directions on numerous occasions. Mr. Winters himself testified that he has done so “dozens” of times. The Stamps also provided evidence on this point from their southerly neighbor, Dan Estow, but I do not credit this testimony because it was evident at the hearing that there is animosity between him and Mr. Winters that impacts his credibility and showed bias. Tr. at 158-160. I did not find Mr. Winters’ testimony regarding his inability or unwillingness to use reverse gear credible. The testimony in ¶ 6 of his PFRT lacked a factual foundation to qualify Mr. Winters as an expert in boat motors, and he provided no additional evidence at the Hearing to bolster his credentials.[[18]](#footnote-18) With the Stamps’ pier in place, the Winters will need to back their boat up if it is berthed at their dock facing south, in order to head in an easterly or northerly direction to the navigation channel. At high tide this will not be a problem. At mid-tide, with 36-40” of water, Mr. Winters could use reverse gear; he just does not want to, out of fear that he may draw mud and silt into the motors of the boat he uses, does not own, and is trying to sell. His testimony regarding damage to the boat’s motors lacked a factual foundation. There was also no credible evidence that the boat could not be berthed facing in a direction other than south. I find that the preponderance of the evidence demonstrates that the proposed project will not significantly interfere with the Winters’ riparian rights pursuant to 310 CMR 9.36(2).

 **B. The proposed project will not significantly interfere with public rights of navigation**

While the right to navigate should be construed liberally, see Commonwealth v. Alger, 61 Mass 53, 94 (7 Cush 53)(1851), cited in Matter of Stanley A. Sylvia, Final Decision, 1997 MA ENV LEXIS 122 (February 4, 1997), that does not mean that it is unlimited. "Alleged interference with navigation may not be merely an inconvenience, or based on anecdotal or conclusory statements. See Matter of Abdelnour, Docket Nos. 88-138, 88-358, 88-359, 88-360, 88-361, 90-270, Final Decision (November 22, 1994); Matter of Lipkin, Docket No. 92-043, Final Decision (December 22, 1995). 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. Matter of Stanley A. Sylvia, Docket No. 95-110, Final Decision (February 4, 1997)."; Matter of Oliveira, Docket No. 2010-017, Recommended Final Decision (January 7, 2011), adopted by Final Decision (January 7, 2011). 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., citing Matter of Stanley A. Sylvia.

Here, the only members of the public who will be impacted by the Stamps project will be the Winters. There was no contrary evidence presented. The alleged interference will occur primarily when the tide is low, in other words, for two periods of time each day. There is already difficulty, if not impossibility, navigating at low tide in the area of the proposed project due to factors unrelated to the project, as Mr. Winters testified. The interference is only with a particular direction, to the south. There are alternative routes available at mid-tide and high tide, and Mr. Winters uses them. The Winters have alleged three specific types of interference, and argue that if any is present, the Chapter 91 license cannot be issued. I dispose of each claim in turn, below.

1. **The proposed Project will not impair the line of sight required for navigation, in violation of 310 CMR 9.35(2)(a)1.c.**

The Winters argue, briefly, that the height of the project combined with its length will impair the line of sight required to navigate to and from the channels of the river. Other than the conclusory statement in Mr. Winters’ PFT at ¶ 10[[19]](#footnote-19) (“The height of the [Stamps’] proposed Project coupled with its length will impair the line of sight required for navigation. Visibility of water traffic travelling to and from other docks to and from the channel will be blocked by the [Stamps’] Project.”) there was no additional evidence presented by the Winters on this issue. The Stamps assert that the Department must consider whether members of the general public, not just the Winters, are affected by the proposed Project. Stamps’ Closing Brief at p. 16. Since there is no allegation that anyone other than the Winters will suffer from an impaired sight line, and no evidence that anyone other than the Winters navigates in the area of their dock or the Stamps’ project, the proposed Project cannot impair the line of sight for anyone other than the Winters. The Stamps point out, accurately, that the Winters offered no evidence as to how their line of sight will be impaired, other than the conclusory statements in the Winters’ PFT at ¶ 10. The Department argues that there is no visual impairment caused by the proposed structure and it may in fact serve as a navigational aid due to its placement on a partially submerged shoal that has been acknowledged by the parties as a navigational hazard. Department’s Closing Brief at p. 3.

As discussed above, the design of the Stamps’ dock was necessitated by the natural conditions in the tidelands at the site. The record reflects that the Winters’ only objection to the project during the initial permitting stage was that its height would impair the view of the Westport River from their house. They offered no facts to support their conclusions that the Stamps’ pier will “impair any line of sight required for navigation.”

1. **The proposed Project does not require the alteration of an established course of vessels in violation of 310 CMR 9.35(2)(a)1.d**

Mr. and Mrs. Winters have a preferred route from their pier to the channels of the Westport River. That route is to the south over the rocky peninsula where the Stamps propose to construct their pier. This is their usual route. They argue that they have been using this route since 2004 and the Stamps’ pier will require them to alter this usual course. They argue that this usual route constitutes an “established course of vessels.” The Stamps, citing Abdelnour, supra, argue that the term “established course of vessels” means a course in a channel that could be marked with navigational buoys, and in this case would be the secondary and main channels of the Westport River. The Department, relying on the testimony of Mr. Fragata, argues that the term means “something more serious than simply the habitual course of any particular boat operator or operators.” Department’s Closing Brief at p. 2; Fragata PFT at ¶ 15.

The term “established course of vessels” is not defined in the Waterways regulations. But Abdelnour[[20]](#footnote-20) is instructive. The Hearing Officer in that case stated:

In construing 310 CMR 9.20(1)(d), I turn first to the common and ordinary definition of the key words, "established" and "course." "Established" means recognized and accepted; "course, "in its relevant context, means the direction of continuing movement, customary passage, or the compass point toward which a ship sails. The American Heritage Dictionary, 2nd College Ed. (1991). The dictionary definitions suggest that an "established course of vessels" differs little from the "navigable route regularly used" which defines a "channel" under 310 CMR 9.20(1)(b). It is a customary, recognized and accepted directional line of passage through a waterway that is used to reach a particular place or places and that could be marked in the waterway and plotted on its nautical chart.

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”). I agree with the Stamps and the Department that the term as used in 310 CMR 9.35(2)(a)d means more than a particular boater’s favored route. In this case, one boater’s usual and preferred route does not amount to an “established course of vessels” as the term is used in the regulation.

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

 The Stamps’ pier was described as extending approximately 65 feet into the water at mean low tide. Boucher PFT at ¶ 9. Mr. Fragata testified that the Stamps’ proposed pier and the Winters’ existing pier will be comparably extended into the water. While Mr. Winters may need to make some additional maneuvers with his boat while in close proximity to his pier, this is not considered by the Department to be significant interference, but rather part of boating life. Fragata PFT at ¶ 18; Tr. at 209. Other piers in the area extend comparably into the water. Id.; Fragata Exhibit B. As a result, the credible evidence supports a conclusion that the proposed project will not extend substantially beyond the projection of existing structures adjacent to the site.

**VI. EVIDENCE CONCERNING THE LOCATION OF THE WINTERS’ PIER**

 Although the issue of the location of the Winters’ pier was not set forth as an issue for resolution in this appeal, as noted above it was raised by the Stamps and the parties provided substantial testimony on this point in an effort to prove and disprove that when the Winters constructed their pier in 2004, they located it four feet south of where the license plans showed it was to be constructed. Resolving this issue is not necessary to resolve the appeal.

 According to the Stamps’ witnesses Boucher and Heureux the Winters’ dock as constructed differs from the plan they prepared for the Winters in 1996. Boucher PFT at ¶¶ 2-3; Heureux PFT ¶¶ 2-3. That plan was based on a topographic survey conducted by Mr. Boucher and dock plans prepared by Mr. Heureux. In their opinion, the Winters’ dock was constructed more southerly than planned by four feet. Mr. Heureux testified that there was no physical condition at the site which necessitated this deviation from the plan. Heureux PFT at ¶ 4. However, no boundary survey of the southern property boundary was conducted to prepare that plan. Tr. at 117-118. Without such a survey, it would not be possible for a person to determine exactly where the Winters’ southern boundary was for the purpose of building the Winters’ dock. Tr. at 120-121. On cross-examination Mr. Boucher admitted that the plan with overlay attached as Exhibit A to his PFT purporting to show the as-built location of the Winters’ pier compared to their license plan is an approximation of relative locations and not based on any complete boundary survey done by him. Tr. at 123-128.

 Mr. Leach disputed the Stamps’ evidence, relying on a full boundary survey he conducted for the Winters in 2011 when they were considering dredging an area in front of their float. Leach PFRT ¶¶ 3-4 and Exhibit 13, “Proposed Dredge Area, Westport River, (East Branch), February 10, 2011.” He testified that the Winters’ dock, ramp and floats “are in general conformance with the approved design plan as to location.” Leach PFT at ¶ 3. The Stamps argument is this: if the Winters had constructed their pier in accordance with their license plan then it would have been four feet north of its actual location and there would have been a greater distance between it and the Stamps proposed pier. In other words, the problem the Winters complain of results from their own non-compliance with their licensed plans. The Winters make the point in their Closing Brief that the plan for the Winters’ dock specifies that the location of the dock be 25 feet from the northern property line. Leach PFRT, Exhibit 14. Mr. Heureux testified at the Hearing that he would recommend to a person building the Winters dock based on their License plan that the northern property line be located in the field “because that’s the one property line that has a dimension from it.” Tr. at 151-152. However, no party presented any evidence regarding the location of the Winters’ dock relative to their northern property line. Because Mr. Leach actually performed a boundary survey of the Winters’ property in 2011, I give more weight to his testimony that the Winters’ dock is in general conformance with their License plan. A preponderance of the evidence supports a finding that the Winters’ dock was constructed as designed and in conformance with the License plan.[[21]](#footnote-21)

**VII. CONCLUSION**

The Stamps project as proposed complies with the applicable Waterways regulations. I find that the project will not significantly interfere with public rights of navigation existing in all waterways nor with the riparian rights of the Winters. Accordingly, I recommend that the Department’s Commissioner issue a Final Decision approving the Chapter 91 License for the Stamps’ proposed project.

## NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been

transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to 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 his sole discretion, directs otherwise.

Date: 8/04/2016 

 Jane A Rothchild

Presiding Officer

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1. Although the case is captioned as “Matter of Keith and Valerie Stamp”, the application and draft license are in the name only of Keith Stamp. They will be referred to as “the Stamps”. [↑](#footnote-ref-1)
2. See Ruling on Applicants’ Motion for Summary Decision, April 21, 2016. [↑](#footnote-ref-2)
3. 310 CMR 9.36(3) states “The project shall not significantly disrupt any water-dependent use in operation, as of the

date of license application, at an off-site location within the proximate vicinity of the project site. The project shall include such mitigation and/or compensation measures as the Department deems appropriate to avoid such disruption.

310 CMR 9.36(4) states in part “The project shall not displace any water-dependent use that has occurred on the site within five years prior to the date of license application, except upon a clear showing by the applicant that said use: (a) did not take place on a reasonably continuous basis, for a substantial period of time; or (b) has been or will be discontinued at the site by the user, for reasons unrelated to the proposed project or as a result of voluntary arrangements with the applicant. [↑](#footnote-ref-3)
4. Waterways License No. 7220. [↑](#footnote-ref-4)
5. Two witnesses filed PFT on behalf of the Winters but did not appear at the hearing. These two witnesses were Terry Nugent and Tim Mielby. In accordance with 310 CMR 1.01(12)(f) and 310 CMR 1.01(13)(h)3, I struck their pre-filed testimony from the record. [↑](#footnote-ref-5)
6. The Hearing Transcript is the transcript of the Hearing conducted on April 28, 2016. It will be referenced hereafter as “Tr. at …” [↑](#footnote-ref-6)
7. Pre-Filed Direct Testimony of James Winters (J. Winters PFT) at ¶¶ 2-4. [↑](#footnote-ref-7)
8. Pre-Filed Direct Testimony of Robin Winters (R. Winters PFT) at ¶ 2. [↑](#footnote-ref-8)
9. Pre-Filed Direct Testimony of Sean Leach (Leach PFT) at ¶ 1. [↑](#footnote-ref-9)
10. Pre-Filed Direct Testimony of Mark A. Boucher (Boucher PFT) at ¶ 1. [↑](#footnote-ref-10)
11. Pre-Filed Direct Testimony of Alan Heureux (Heureux PFT) at ¶ 1. [↑](#footnote-ref-11)
12. Pre-Filed Direct Testimony of Dan Estow (Estow PFT) at ¶¶ 1-2. [↑](#footnote-ref-12)
13. Pre-Filed Direct Testimony of Keith Stamp (Stamp PFT) at ¶ 1. [↑](#footnote-ref-13)
14. Pre-Filed Direct Testimony of Carlos T.B. Fragata (Fragata PFT) at ¶ 1. [↑](#footnote-ref-14)
15. In his Pre-Filed Rebuttal Testimony (PFRT) Mr. Winters testified that he and his wife owned a 36’ Yellowfin in 2015 and “now own and plan to operate a 36’ Yellowfin in 2016.” J. Winters PFR at ¶ 7. On cross-examination at the hearing, this testimony was shown to be partially false because they never took title to the boat last year and do not know if they will take title to the boat they currently use. [↑](#footnote-ref-15)
16. For example, the following exchange with Department demonstrates this evasiveness:

Mr. Bennett: What’s your basis for knowing that it does damage to motors? Are you a mechanic?

Mr. Winters: I’ll gladly answer the question, Mr. Bennett, say it again.

Mr. Bennett: How do you know that this causes damage to motors?

Mr. Winters: What causes damage? [↑](#footnote-ref-16)
17. Mr. Kelly: You do not own a 2016 Yellowfin?

Mr. Winters: Yes, I do.

Mr. Kelly: You do?

Mr. Winters: Yes.

Mr. Kelly: In whose title?

Mr. Winters: It hasn’t been titled yet…

Mr. Kelly: You have a bill of sale for it?

Mr. Winters: Yes.

Mr. Kelly: In your name?

Mr. Winters: It hasn’t been made out yet.

Mr. Kelly: So you don’t have a bill of sale, do you, in your name for the 2016 Yellowfin?

Mr. Winters: As of today, no. [↑](#footnote-ref-17)
18. At the Hearing, the Stamps’ attorney objected to and moved to strike testimony from Mr. Winters relating to the damage to a boat’s motors that would occur over time from the intake of silt. I allowed the testimony at the Hearing, but after reviewing all of the testimony and my ruling on the Motion for Summary Decision, I reverse that ruling. The testimony at Tr. p. 51, lines 21-24 is stricken. [↑](#footnote-ref-18)
19. Mrs. Winters’ PFT was identical to her husband’s. [↑](#footnote-ref-19)
20. The case involved a prior iteration of the Waterways regulations containing a similar provision, and which also did not define the term. [↑](#footnote-ref-20)
21. In their Closing Brief at pp. 20-21 the Winters indicate that subsequent to the Hearing, Boucher and Heureux conducted a field survey of the Stamps’ property to locate the Winters’ southern property line and confirmed Mr. Leach’s testimony regarding the Winters’ dock’s location. I did not consider this information in making my determination on this issue. [↑](#footnote-ref-21)