COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

**March 22, 2017**

In the Matter of
Tennessee Gas Pipeline Company, LLC

OADR Docket No. 2016-020
USACOE Application No. NAE-2013-02329
MassDEP Wetlands File Nos. 087-0610 and 278-0130
MassNHESP Tracking No. 13-32620
MEPA EOEEA No. 15205
Transmittal No. X265051
Agawam & Sandisfield, MA

# RECOMMENDED FINAL DECISION

## INTRODUCTION

In this appeal, a Citizen's Group comprised of 15 citizens of the Commonwealth residing in Amherst, Ashby, Ashfield, Cummington, Dalton, Montague, Northampton, Pepperell, Pittsfield, or Sandisfield, Massachusetts;[1] the Berkshire Environmental Action Team, Inc.

[1] The members of the Citizens Group are:

(1) Jean Atwater-Williams, 182 Cold Spring Road, Sandisfield;

(2) Ronald M. Bernard, 182 Cold Spring Road, Sandisfield;

(3) Cathy Kristofferson, 244 Allen Road, Ashby;

(4) Cheryl D. Rose, 89 North Mountain Road, Dalton;

("BEAT"); Jean Atwater-Williams; Ronald M. Bernard; and Heather Morrical (collectively "the Petitioners") challenge a Water Quality Certification ("WQC") that the Western Regional Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") issued on June 29, 2016 to Tennessee Gas Pipeline, LLC ("the Applicant") pursuant to the Massachusetts Clean Waters Act ("MCWA"), G.L. c. 21, §§ 26-53; the Massachusetts Surface Water Quality Standards, 314 CMR 4.00 ("SWQ Standards"); the Massachusetts WQC Regulations at 314 CMR 9.00 ("WQC Regulations"); and Section 401 of the federal Clean Water Act, 33 U.S.C. § 1251, et seq. ("Section 401"). The Department issued the WQC to the Applicant in connection with the latter's natural gas pipeline expansion project on a site in Western, Massachusetts which encompasses parcels of land located in Agawam and Sandisfield, Massachusetts ("the proposed Project"). The parcel located in Agawam is known as

---

(5) Irvine Sobelman, 116 Laurel Park, Northampton;

(6) Paula L. Terrasi, 77 Jewett Street, Pepperell;

(7) Susan K. Theberge, 250 Shutesbury Road, Amherst;

(8) Rosemary Wessel, 90 Trow Road, Cummington;

(9) Kathryn R. Eiseman, 17 Packard Road, Cummington;

(10) Ariel S. Elan, 506 Turner's Falls Road, Montague;

(11) Elliot Fratkin, 24 Massasoit Street, Northampton;

(12) Martha A. Nathan, 24 Massasoit Street, Northampton;

(13) Kenneth Hartlage, 53 Prescott Street, Pepperell;

(14) Ronald R. Coler, 168 Bailey Road, Ashfield; and

(15) Jane Winn, 27 Highland Avenue, Pittsfield.

Petitioners' Appeal Notice, ¶ 5, n.1.

"the Connecticut Loop, 300 Line" and the parcel located in Sandisfield is known as "the Massachusetts Loop, 200 Line."

The Petitioners contend that the Department improperly issued the WQC because the WQC purportedly fails to comport with a number of the SWQ Standards at 314 CMR 4.00 and the WQC Regulations at 314 CMR 9.00, and as such, they request that the be WQC be vacated. Petitioners' Appeal Notice, at pp. 7-11; Petitioners' Pre-Hearing Statement, pp. 5-8.

In response, the Applicant contends that under federal law, including the Natural Gas Act ("NGA"), the Department's Office of Appeals and Dispute Resolution ("OADR"), where the Petitioners' appeal of the WQC is pending for resolution, lacks jurisdiction to adjudicate the appeal. See below, at pp. 7-18. In the alternative, the Applicant contends that if OADR has jurisdiction to adjudicate the appeal, the Petitioners lack standing to challenge the WQC and "the WQC [should] be made final, excepting Condition 15 [of the WQC] which should be removed" because in the Applicant's view, "it is beyond the jurisdiction of MassDEP's authority to implement and is preempted by the NGA." See below, at pp. 18-80. While the Petitioners and the Department disagree regarding whether the Petitioners have standing and the WQC is valid (the Department contends the Petitioners lack standing and the WQC is valid while the Petitioners contend otherwise), they both agree that OADR has jurisdiction to adjudicate the Petitioners' appeal of the WQC. See below, at pp. 7-18.

On January 18, 2017, I conducted an evidentiary Adjudicatory Hearing ("Hearing") to resolve a multitude of issues raised by the Petitioners' appeal of the WQC as discussed below, at pp. 7-80. The Hearing was recorded by a certified court stenographer/reporter at the Applicant's expense, who prepared a written transcript of the Hearing that was filed with OADR. At the

Hearing, the parties were represented by legal counsel and presented witnesses and documentary evidence in support of their respective positions in the case. A total of nine witnesses filed sworn Pre-filed Testimony ("PFT") on behalf of the parties for the Hearing in support of the parties' respective positions in the case and were available for sworn cross-examination at the Hearing. The parties' respective witnesses were as follows.

The Petitioners' witnesses were:

(1) the Petitioner Jean Atwater-Williams ("Ms. Atwater-Williams");

(2) the Petitioner Ronald M. Bernard ("Mr. Bernard");

(3) the Petitioner Heather Morrical ("Ms. Morrical");

(4) Jane Winn, the Petitioner BEAT's Executive Director ("Ms. Winn"); and

(5) the Petitioners' expert witness, Matthew Schweisberg, a Professional Wetlands Scientist ("PWS") and the Principal at Wetland Strategies and Solutions, LLC ("WSS"), a private environmental consulting company based in Merrimac, Massachusetts, who has a combined 37 years of public and private sector experience in the environmental field.

The Applicant's witnesses were:

(1) James Flynn ("Mr. Flynn"), the Applicant's Project Manager/Engineering Principal for the proposed Project; and

(2) the Applicant's expert witness, Dennis Lowry ("Mr. Lowry), a Senior Program Manager/ Wetlands Ecologist at AECOM Environment ("AECOM"), a national environmental consulting firm, with 40 years of experience in the environmental field.

The Department's witnesses were two expert witnesses:

(1) David Cameron ("Mr. Cameron"), a PWS and the Chief of the Wetlands Program in the Department's Western Regional Office, who has a combined 25 years of public and private sector experience in the environmental field; and

(2) David Foulis ("Mr. Foulis"), an Environmental Analyst in the Wetlands

Program of the Department's Western Regional Office with 30 years of experience in the environmental field.

As discussed in detail below, based on the testimonial and documentary evidence of the parties' witnesses and the applicable law, I find that: (1) OADR has jurisdiction to adjudicate the Petitioners' appeal of the WQC; (2) some, but not all of the Petitioners, have standing to appeal the WQC; and (3) the Department properly issued the WQC except that Condition 15 of the WQC must be modified to comport with the requirements of 314 CMR 9.09(1)(e). Accordingly, I recommend that the Department's Commissioner issue a Final Decision affirming the WQC with a modification of Condition 15 of the WQC as discussed below.

## STATUTORY AND REGULATORY FRAMEWORK

### I. THE DEPARTMENT'S AUTHORITY TO ISSUE WQCs UNDER FEDERAL AND MASSACHUSETTS LAW

Under the Massachusetts Clean Waters Act ("MCWA"), G.L. c. 21, §§ 26-53, the Department has the "duty and responsibility . . . to enhance the quality and value of water resources and to establish a program for prevention, control, and abatement of water pollution." Entergy Nuclear Generation Company v. Department of Environmental Protection, 459 Mass. 319, 323 (2011), citing, G.L. c. 21, § 27. The WQC Regulations at 314 CMR 9.00 "[were] adopted [by the Department] pursuant to . . . the [MCWA], . . . and establishes procedures and criteria for the administration of Section 401 of the federal Clean Water Act, 33 USC 1251, for discharge of dredged or fill material, dredging, and dredged material disposal in waters of the United States within the Commonwealth . . . ." 314 CMR 9.01(1).

Specifically, the WQC Regulations were adopted by the Department "to carry out its statutory obligations to certify that proposed discharges of dredged or fill material, dredging, and

dredged material disposal in waters of the United States within the Commonwealth will comply with the [SWQ Standards at 314 CMR 4.00] and other appropriate requirements of state law." 314 CMR 9.01(3). The WQC Regulations "implemen[t] and supplemen[t] [the SWQ Standards] and is a requirement of state law under [the federal Clean Water Act,] 33 USC 1251." Id. The WQC Regulations implement and supplement the SWQ Standards by:

> protecting the public health and restoring and maintaining the chemical, physical, and biological integrity of the water resources of the Commonwealth by establishing requirements, standards, and procedures for the following:
>
> 1. monitoring and control of activities involving discharges of dredged or fill material, dredging, and dredged material disposal or placement;
>
> 2. the evaluation of alternatives for dredging, discharges of dredged or fill material, and dredged material disposal or placement; and
>
> 3. public involvement regarding dredging, discharges of dredged or fill material, and dredged material placement, reuse or disposal.

314 CMR 9.01(3)(a). The WQC Regulations also implement and supplement the SWQ Standards by "establishing a certification program for the Department to persons seeking to discharge dredged or fill material, conduct dredging, and place, reuse or dispose of dredged material." 314 CMR 9.01(3)(b).

## II. OADR'S ROLE TO RESOLVE ADMINISTRATIVE APPEALS OF DEPARTMENT PERMIT DECISIONS AND ENFORCEMENT ORDERS

OADR is a quasi-judicial office within the Department which is responsible for advising the Department's Commissioner in resolving all administrative appeals of Department Permit decisions and enforcement orders in a neutral, fair, timely, and sound manner based on the governing law and the facts of the case. 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7). The Department's Commissioner is the final agency decision-maker in these appeals.

310 CMR 1.01(14)(b). To ensure its objective review of Department Permit decisions and enforcement orders, OADR reports directly to the Department's Commissioner and is separate and independent of the Department's program offices, Regional Offices, and Office of General Counsel ("OGC").

OADR staff who advise the Department's Commissioner in resolving administrative appeals are Presiding Officers. Presiding Officers are senior environmental attorneys at the Department appointed by the Department's Commissioner to serve as neutral hearing officers, and are responsible for fostering settlement discussions between the parties in administrative appeals, and to resolve appeals by conducting pre-hearing conferences with the parties and evidentiary Adjudicatory Hearings (just as the Hearing that I conducted in this case) and making Recommended Final Decisions on appeals to the Commissioner. 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7). The Department's Commissioner, as the agency's final decision-maker, may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision issued by a Presiding Officer in an appeal. 310 CMR 1.01(14)(b). Unless there is a statutory directive to the contrary, the Commissioner's Final Decision can be appealed to Massachusetts Superior Court pursuant to G.L. c. 30A, § 14. 310 CMR 1.01(14)(f). In this case, the venue to appeal the Commissioner's Final Decision is the U.S. Court of Appeals for the First Circuit ("the First Circuit") pursuant to the NGA, 15 U.S.C. § 717r(d)(1).

## FINDINGS

### I. OADR HAS JURISDICTION OVER THE PETITIONERS' APPEAL OF THE WQC

The Applicant offers three theories why in its view OADR lacks jurisdiction to adjudicate the Petitioners' appeal of the WQC: (1) that the Department's issuance of the WQC in June 2016

was a final agency decision of the Department subject to an immediate appeal to the First Circuit pursuant to the NGA, 15 U.S.C. § 717r(d)(1); (2) that the Department waived its authority to issue the WQC because it purportedly acted on the Applicant's WQC application more than one year after the application was filed in violation of the federal Clean Water Act ("CWA"); and (3) that OADR was divested of jurisdiction to adjudicate the Petitioners' appeal of the WQC when the United States Army Corp of Engineers ("USACE") issue a federal 404 CWA Permit ("404 Permit") to the Applicant on January 13, 2017 for the proposed Project. As explained in detail below, none the Applicant's theories have merit, and as such, I rule that OADR has jurisdiction to adjudicate the Petitioners' appeal of the WQC.[2]

### A. The First Circuit Recently Ruled that There Has Been No Final Agency Action by the Department on the WQC Triggering the First Circuit's Appellate Jurisdiction under the NGA.

On August 8, 2016, in accordance with both my adjudicatory responsibilities as an OADR Presiding Officer and OADR standard practice, I issued a Scheduling Order to the parties placing the Petitioners' appeal of the WQC on the adjudication and resolution track. The Scheduling Order scheduled the appeal for a Pre-Screening/Pre-Hearing Conference ("Conference") on September 14, 2016 (subsequently re-scheduled to October 5, 2016 per agreement of the parties) and an evidentiary Adjudicatory Hearing ("Hearing") on January 18,

[2] OADR has authority to decide jurisdictional questions involving the Department's legal authority because the Massachusetts Supreme Judicial Court ("SJC") has long held that "where [a] contention is [made] that [a State agency] is acting beyond its jurisdiction, the [agency] should have [the] opportunity to ascertain the facts and decide the question for itself." Gill v. Board of Registration of Psychologists, 399 Mass. 724, 728 (1987), citing, Saint Luke's Hospital v. Labor Relations Commission, 320 Mass. 467, 470 (1946). This rule was recently followed in the SEMASS Partnership and BEC Final Decisions issued by MassDEP's Commissioner in administrative appeals that rejected claims challenging certain aspects of the Department's regulatory authority. In the Matter of SEMASS Partnership, OADR Docket No. 2012-015 ("SEMASS Partnership"), Recommended Final Decision (June 18, 2013), 2013 MA ENV LEXIS 34, at 27-41, adopted as Final Decision (June 24, 2013), 2013 MA ENV LEXIS 37; In the Matter of Boston Environmental Corporation, OADR Docket No. 2013-041 ("BEC"), Recommended Final Decision (February 10, 2015), at pp. 5-10, adopted as Final Decision (March 19, 2015).

2017. Scheduling Order, ¶¶ 3, 10. The purpose of the Conference was to determine the appeal's potential amenability to settlement and to establish the issues for resolution in the appeal to be tried at the Hearing if the appeal was not settled. Id., ¶¶ 4-9.[3] Prior to the Conference, the parties were required by the Scheduling Order to file Pre-Hearing Statements setting forth their respective positions on the issues for resolution in the appeal and the names of their witnesses for the Hearing. Id.

On August 17, 2016, nine days after I issued the Scheduling Order and nearly 30 days after the Petitioners had filed their appeal with OADR challenging the Department's issuance of

---

[3] Under 310 CMR 1.01(5)(a)15, the authority of Presiding Officers to prescreen appeals includes the power to conduct prescreening conferences with the parties to an appeal to discuss potential settlement of the appeal, identify the issues in an appeal, and to "issu[e] orders to parties, including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending prescreening conferences and ordering parties to provide more definite statements in support of their positions." Presiding Officers are also authorized to conduct simplified hearings of appeals in accordance with 310 CMR 1.01(8)(a), and issue recommended final decisions for dismissals of appeals. 310 CMR 1.01(5)(a)15.

The provisions of 310 CMR 1.01(9) authorize the Presiding Officer to order the parties to appear for a conference prior to the adjudicatory hearing" to:

a. discuss settlement;

b. define contested issues on which evidence will be offered, if not otherwise determined under 310 CMR 1.01(6)(k);

c. consider the possibility of obtaining stipulations, admissions and agreements that will avoid unnecessary evidence;

d. establish limits on presentations of the parties;

e. establish a schedule for continuing the appeal, including a date for the adjudicatory hearing; and

f. consider any other matters that may aid in the disposition of the adjudicatory appeal.

310 CMR 1.01(9)(a)1. The parties "[must] appear at the prehearing conference with full authority to make binding agreements, including commitments as to scheduling, or shall come to the conference with the name of the person from whom authority is required and be able to communicate directly with the person at the time of the conference." 310 CMR 1.01(9)(a)2. "The parties [must also] be prepared to advise the Presiding Officer as to the prospects of settlement," Id., and "[t]he Presiding Officer may order the parties to meet or confer prior to the date of the conference to discuss settlement or other matters." 310 CMR 1.01(9)(a)3.

the WQC, the Applicant moved to stay the proceedings in the appeal[4] pending a ruling by the United States District Court for the District of Massachusetts ("U.S. District Court") on the Applicant's motion seeking to enjoin OADR's adjudication of this appeal on the ground that the First Circuit had exclusive jurisdiction to rule on the Petitioners' appeal of the WQC pursuant to the NGA. Applicant's Motion to Stay, at p. 1. The Petitioners and the Department opposed the Applicant's Motion to Stay contending that no final agency action had been rendered by the Department on the WQC because the Petitioners had appealed the WQC to OADR. Petitioners' Opposition to Tennessee Gas Pipeline Company, LLC's Motion for Stay, August 26, 2016; [MassDEP's] Opposition to Motion for Stay, September 2, 2016. To preserve their appellate rights in the First Circuit "in the event [the Applicant] was correct" that OADR lacked jurisdiction, the Petitioners filed a Petition with the First Circuit seeking judicial review of the WQC pursuant to the NGA, 15 U.S.C. § 717r(d)(1). Berkshire Environmental Action Team, Inc., et al. v. Tennessee Gas Pipeline Company, LLC and Massachusetts Department of Environmental Protection, U.S. Court of Appeals for the First Circuit, No. 16-2100, Slip Opinion (March 15, 2017) ("First Circuit Decision"), at p. 7. "At the same time, they asked [the First Circuit] to reject their [P]etition on the grounds that [the Applicant] [was] not correct; that is to say, they claim[ed] that [the First Circuit's] review [was] premature until MassDEP complete[d] its adjudicatory process [at OADR]." Id. The First Circuit agreed with the Petitioners; on March 15, 2017, it dismissed the Petitioners' Petition for judicial review of the WQC for lack of jurisdiction "[b]ecause the [Department] ha[d] not yet finally acted on the matter . . . as is

[4] The Applicant's Motion to Stay was entitled "Tennessee Gas Pipeline Company, LLC's Special Appearance and Motion for Stay."

required to invoke [the First Circuit's] jurisdiction under [the NGA,] 15 U.S.C. § 717r(d)(1) . . . ." Id., at pp. 3, 6-18.

The First Circuit dismissed the Petitioners' Petition for judicial review of the WQC for the same reason that I stated on September 28, 2016 in denying the Applicant's motion to stay the proceedings in this appeal: the Department's issuance of the WQC on June 29, 2016 was not a final agency decision of the Department subject to judicial review by the First Circuit pursuant to the NGA, 15 U.S.C. § 717r(d)(1) because the Petitioners appealed the WQC to OADR. In light of the First Circuit's ruling, the issue has been conclusively resolved against the Applicant.

**B. The Department Did Not Waive Its Authority to Issue the WQC**

The Applicant also contends that OADR lacks jurisdiction to adjudicate the Petitioners' appeal of the WQC because the Department purportedly waived its right to issue the WQC, based upon its purported failure to issue the WQC within one year of the Applicant's filing of its WQC Application. The Applicant supports its position by relying upon 33 U.S.C. §1341(a)(1), which provides that where "***the State . . . fails to act*** on a request for certification within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such federal application." (emphasis supplied). The Applicant's claim is without merit for several reasons.

First, in its recent decision rejecting the Applicant's jurisdictional challenge against OADR's adjudication of the Petitioners' appeal of the WQC, the First Circuit stated that "[o]n June 29, 2016, ***after almost a full year*** during which interested citizens and environmental organizations (including [the] Petitioners) participated in a nontestimonial notice-and-comment

process, [the Applicant] received [the WQC] . . . ." First Circuit's Decision, at pp. 4-5 (emphasis supplied).

Second, the Department's witness, Mr. Foulis confirmed in his testimony at the Hearing, the Department acted on the Applicant's WQC request within one year of receiving the Applicant's request. Hearing Transcript, at p. 128, lines 7-16. Mr. Foulis testified that the Department acted on the Applicant's WQC request "[l]ess than a year" after the Applicant filed its WQC application with the Department. Id. Mr. Foulis' testimony was corroborated by an affidavit that Brian Harrington, Deputy Regional Director and head of the Bureau of Water Resources ("BWR") in the Department's Western Regional Office, filed in the case and that the Applicant cited in its Pre-Hearing Memorandum in this appeal,[5] stating that the Applicant "applied for the [WQC] . . . from MassDEP . . . by way of an application and correspondence dated June 30, 2015, received by MassDEP on July 7, 2015."[6] Undisputedly, the Department issued the WQC on June 29, 2016. June 29, 2016 would have been within one year of the WQC application date of June 30, 2015 and the Department's receipt date of July 7, 2015. It is also important to note that the Department issued the WQC by June 29, 2016 notwithstanding that its review of the Applicant's WQC application was delayed on three occasions because it

[5] Applicant's Pre-Hearing Memorandum, at p. 14, n. 7.

[6] In answering ¶ 55 of the Applicant's Complaint in the U.S. District Court action that the Applicant brought to enjoin OADR's adjudication of the Petitioners' appeal of the WQC, the Department stated "that on or about June 29, 2015 [the Applicant] filed with MassDEP for a WQC for the Project." Applicant's Pre-Hearing Memorandum, at p. 14. The Applicant contends that the Department's answer to ¶ 55 constitutes an admission by the Department that the Applicant filed its WQC application with the Department on June 29, 2015. Id. I disagree. The words "on or about" preceding the June 29th date in the Department's answer to ¶ 55 make the answer less than an affirmative statement by the Department that the Applicant filed its WQC application on June 29, 2015. Moreover, the Department's Answer to the Applicant's Complaint is an unverified pleading. For these reasons, I credit the sworn testimony of Mr. Harrington's affidavit indicating that the Applicant's WQC was "dated June 30, 2015 [and] received by MassDEP on July 7, 2015."

needed substantial additional information from the Applicant. Mr. Foulis's Hearing Testimony (Hearing Transcript, p. 128, lines 21-24; p. 129, lines 1-24; p. 130, lines 1-6); Mr. Cameron's Hearing Testimony (Hearing Transcript, p. 161, lines 11-24; p. 162, lines 1-24).

In response, the Applicant contends that the Department went beyond the one year maximum of 33 U.S.C. §1341(a)(1) to act on the Applicant's WQC because the Petitioners' appeal of the WQC to OADR caused the WQC not to be final agency action of the Department and put its action on the WQC beyond the statute's one year maximum period. Applicant's Pre-Hearing Memorandum, at pp. 14-18. The Applicant's claim is a bold assertion given that it goes against the Applicant's failed contention discussed above, that the Department's issuance of the WQC on June 29, 2016 was final agency action of the Department triggering the First Circuit's appellate jurisdiction. Regardless of the Applicant's "wanting it both ways" approach, the Applicant's construction of 33 U.S.C. §1341(a)(1) to argue that the Petitioners' appeal of the WQC to OADR put the Department's action on the Applicant's WQC request beyond the statute's one year maximum for action is unreasonable.

As the Department aptly noted at the Hearing, under the Applicant's reading of 33 U.S.C. §1341(a)(1), a party who has been denied a WQC by the Department can simply undo the denial and deprive the Department of having any further jurisdiction over the matter by appealing the denial to OADR and waiting it out until the one year maximum period of 33 U.S.C. §1341(a)(1) has passed. See Department's Pre-Hearing Memorandum, at pp. 10-13. This could not have been, and was not, the intent of the waiver provision of 33 U.S.C. §1341(a)(1). The Maine Supreme Judicial Court's decision in FPL Energy Me. Hydro LLC v.

Department of Environmental Protection, 926 A.2d 1197 (Me. 2007), cert. denied, 552 U.S. 1100 (2008) supports this conclusion.[7]

FPL involved the Maine Department of Environmental Protection's ("Maine DEP") final decision denying a WQC to a power company. Maine DEP "includes the [Maine] Board of Environmental Protection [("the Board")] and the [Maine] Commissioner of Environmental Protection [("Maine DEP Commissioner)]." 926 A.2d at 1202. Under Maine law, the Maine DEP Commissioner is generally responsible for making WQC determinations and "[a]n aggrieved party may appeal the Commissioner's [WQC] judgment to the Board . . . ." Id. The Board's decision, in turn, is subject to judicial review by the Maine Superior Court. Id.

In FPL, the Maine DEP Commissioner issued a WQC to the power company for one of its facilities in Maine within one year (364 days) after the power company had submitted its WQC application. 926 A.2d at 1999. Several environmental groups appealed the Commissioner's decision to the Board. Eight months later, "the Board issued a judgment vacating the [Commissioner's] decision and denying, without prejudice, [the power company's WQC] application . . . ." Id., at 1200. The power company appealed the Board's decision to Maine Superior Court, which affirmed the decision. Id. The power company then appealed to the Maine Supreme Judicial Court. Id., at 1200-01.

On appeal, the power company contended that "[s]ince the Board's decision [vacating the Maine DEP Commissioner's WQC] was issued more than one year after the [WQC] application was filed, [the Maine DEP] waived certification or, in the alternative, . . . the Board's [decision] after the one-year deadline [was] ineffective [under 33 U.S.C.

[7] In the absence of Massachusetts Superior Court and Appellate Court decisions to the contrary, I rely on the Maine Supreme Judicial Court's decision in FPL as persuasive authority governing the Applicant's claim in this case.

§1341(a)(1)]." 926 A.2d at 1202. The Maine Supreme Judicial Court rejected the power company's claim after reviewing the legislative history of 33 U.S.C. §1341(a)(1). 926 A.2d at 1202-03.

The Maine Supreme Judicial Court turned to the statute's legislative history because 33 U.S.C. §1341(a)(1) "does not define 'act on' and [thus], it is . . . unclear from the plain meaning of the statute whether the requirement is one of some action or final action." 926 A.2d at 1202. After analyzing the legislative history, that Court ruled that in enacting the statute, the U.S. Congress did not intend "for all in-state appeals [of WQC determinations] to be completed within the same one-year deadline" and that had "Congress intended to impose such extreme time pressure, it would have used specific language to that effect." Id., at 1203. The legislative history revealed that the purpose of 33 U.S.C. §1341(a)(1) "[was] to prevent states from effectively denying approval of a project [by] . . . 'simply sit[ting] on [their] hands and do[ing] nothing'" on a WQC application. Id., at 1202. As one U.S. Congressman noted in 1969 when the statute was being debated in the U.S. Congress: "Any such dalliance could kill a proposed project just as effectively as an outright determination on the merits not to issue the required [WQC]," and, accordingly, the statute's enactment would preclude the States from "passively" denying a WQC and compel them "to take affirmative action to consider the matter and to decide to withhold the [WQC] if [they] want[ed] to defeat a proposed project." Id.

The Maine Supreme Judicial Court's ruling was further supported by a decision of the Federal Energy Regulatory Commission ("FERC"), which licensed the power company's facility in Maine that was at issue in the case. Id., at 1202-03. In the licensing proceedings before the agency, "FERC . . . considered and rejected [the power company's] . . . arguments

that the [Maine DEP] had waived certification by failing to complete the appeal [of the WQC] within one year" of the filing of the power company's WQC's application. Id., at 1203, citing, FPL Energy Maine Hydro LLC, 108 FERC P61,261, 2004 FERC LEXIS 1939. FERC held that:

> Section 401 [of the federal Clean Water Act] requires a State certifying agency to act on a certification request within one year. In this case, the Maine DEP satisfied this requirement by granting certification within the statutory time period. ***There is nothing in the language of section 401 to suggest that a State must not only act on the certification request but also take action on any appeals that might subsequently be filed within one year.*** Accordingly, we cannot find that certification was waived.

Id. (emphasis supplied). In sum, in the present case, the Department acted on the Applicant's WQC application within one year of its filing and the Petitioners' appeal of the WQC to OADR did not put the Department's action on the WQC beyond the one year mark of 33 U.S.C. §1341(a)(1).

### C. The USACE's Issuance of the 404 Permit to the Applicant Neither Terminated the Petitioners' Appeal of the WQC Pending Before OADR Nor Divested OADR of Jurisdiction to Adjudicate the Appeal.

Less than one business day prior to the Hearing's commencement on January 18, 2017, the Applicant moved to dismiss the Petitioners' appeal of the WQC contending that the USACE's recent January 13, 2017 issuance of a 404 Permit to the Applicant[8] for the proposed

[8] "Section 404 of the [federal] Clean Water Act (CWA) establishes a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands." https://www.epa.gov/cwa-404/section-404-permit-program. "Section 404 requires a permit before dredged or fill material may be discharged into waters of the United States, unless the activity is exempt from Section 404 regulation (e.g., certain farming and forestry activities)." Id. "The basic premise of the program is that no discharge of dredged or fill material may be permitted if: (1) a practicable alternative exists that is less damaging to the aquatic environment or (2) the nation's waters would be significantly degraded." Id. "Proposed activities are regulated through a permit review process. An individual permit is required for potentially significant impacts. Individual permits are reviewed by the [USACE], which evaluates applications under a public interest review, as well as the environmental criteria set forth in the CWA Section 404(b)(1) Guidelines, regulations promulgated by [the United States Environmental Protection Agency ("EPA")]." Id.

Project terminated the Petitioners' appeal of the WQC pending before OADR or divested OADR of jurisdiction to adjudicate the appeal. Applicant's Motion to Dismiss, ¶ 4, Ex. A; Applicant's Post-Hearing Memorandum, at pp. 1-4. The Applicant also moved to supplement the Administrative Record in the appeal to include a copy of the 404 Permit that the USACE issued to the Applicant. Applicant's Post-Hearing Memorandum, at pp. 1-4.

The Applicant contends that the USACE's issuance of the 404 Permit to the Applicant terminated the Petitioners' appeal of the WQC pending before OADR or divested OADR of jurisdiction to adjudicate the appeal for the following reasons.

First, the Applicant contends that "[t]he 404 Permit requires [the Applicant] to implement the applicable terms and conditions [of the Department's] June 29, 2016 WQC," and as such, "the [Permit's] issuance . . . reaffirms [the Applicant's position discussed above in the previous section] that the WQC is a final agency action [of the Department] subject to the original and exclusive jurisdiction of the First Circuit under . . . 15 U.S.C. § 717r(d)(1)." Applicant's Post-Hearing Memorandum, at p. 2. Alternatively, the Applicant contends that "if [15 U.S.C. § 717r(d)(1)] requires a final agency action [on a WQC] and there [has been] no final agency action [of the Department on the WQC due to the Petitioners' OADR appeal of the WQC] (which the [Applicant] disputes), then [USACE's] issuance of the 404 Permit would mean [that the Department] waived its right to issue a binding WQC and [that the] USACE has elected not to wait for [the conclusion of the Petitioners' appeal of the WQC before OADR]." Id., at p. 3.

While I will allow the Applicant to supplement the Administrative Record to include a copy of the 404 Permit in the Record simply for the purpose of acknowledging that the USACE

issued the Permit to the Applicant, I reject the Applicant's contention that the USACE's issuance of the Permit terminated the Petitioners' appeal of the WQC before OADR or divested OADR of jurisdiction to adjudicate the appeal. As discussed above, the WQC is not yet a final decision of the Department subject to appeal to the First Circuit. The Applicant's waiver claims also lack merit for the reasons discussed in the previous section above. Lastly, there is nothing in the 404 Permit that supports the Applicant's contention that the USACE's issuance of the Permit terminated the Petitioners' appeal of the WQC pending before OADR or divested OADR of jurisdiction to adjudicate the appeal. The Permit simply incorporates the WQC and is silent about the effect, if any, the Permit's issuance has on the Petitioners' pending appeal before OADR challenging the WQC. See 404 Permit, at p. 7 (¶ 6). The lack of any provision in the 404 Permit clearly giving notice that the Permit's issuance terminated the Petitioners' appeal of the WQC pending before OADR or divested OADR of jurisdiction to adjudicate the appeal coupled with the Applicant's failure to cite any legal authority supporting its position, leads me to conclude that the USACE's issuance of the 404 Permit to the Applicant neither terminated the Petitioners' appeal nor divested OADR of jurisdiction to adjudicate the appeal. Accordingly, the Applicant's January 17, 2017 Motion to Dismiss is denied.

## II. SOME, BUT NOT ALL OF THE PETITIONERS, HAVE STANDING TO CHALLENGE THE WQC.

### A. The Jurisdictional Nature of Standing

Standing "is not simply a procedural technicality." Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975); In the Matter of Webster Ventures, LLC, OADR Docket No. 2015-014, Recommended Final Decision (June 3, 2016), 2016 MA ENV LEXIS 27, at 19, adopted as Final Decision (June 15, 2016), 2016 MA ENV LEXIS 32. Rather, it "is a

jurisdictional prerequisite to being allowed to press the merits of any legal claim." R.J.A. v. K.A.V., 34 Mass. App. Ct. 369, 373 n.8 (1993); Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998) ("[w]e treat standing as an issue of subject matter jurisdiction [and] . . . of critical significance"); see also United States v. Hays, 515 U.S. 737, 115 S.Ct.2431, 2435 (1995) ("[s]tanding is perhaps the most important of the jurisdictional doctrines"); Webster Ventures, 2016 MA ENV LEXIS 27, at 19.

### B. The "Persons" Who Have a Right to Appeal a WQC Issued by the Department

Under 314 CMR 9.10(1), "[c]ertain persons shall have [the] right to [appeal to OADR a WQC issued] by the Department . . . ."[9] These persons are:

(a) the applicant [of the WQC] or property owner;

(b) any person aggrieved by the decision [of the Department] who has submitted comments [on the WQC application] during the public comment period;

(c) any ten persons of the Commonwealth pursuant to M.G.L. c. 30A, where a group member has submitted written comments [on the WQC application] during the public comment period; and

(d) any governmental body or private organization with a mandate to protect the environment that has submitted written comments during the public comment period.

All of the Petitioners: the Citizen's Group, Ms. Atwater-Williams, Mr. Bernard, Ms. Morrical, and BEAT, claim that they have standing to challenge the Department's issuance of the WQC to the Applicant based on one or more of the provisions of 314 CMR 9.10(1) set forth above. As

[9] The WQC Regulations at 314 CMR 9.02 define "person" as appearing in 310 CMR 9.10(1) as "[a]ny agency or political subdivision of the Commonwealth or the federal government, public or private corporation or authority, individual, partnership or association, or other entity, including any officer of a public or private agency or organization."

discussed below, the Petitioners' claim is without merit because the Citizen's Group and Ms. Atwater-Williams do not have standing to challenge the Department's issuance of the WQC to the Applicant; only Mr. Bernard, Ms. Morrical, and BEAT have standing to do so.

### C. The Citizen's Group Does Not Have Standing to Challenge the WQC As a Ten Residents Group Pursuant to 314 CMR 9.10(1)(c) and G.L. c. 30A, § 10A.

As set forth above, the provisions of 314 CMR 9.10(1)(c) state that "any ten persons of the Commonwealth ["(Ten Residents Group")] pursuant to M.G.L. c. 30A where a group member has submitted written comments during the public comment period" may file an administrative appeal challenging a WQC. A Ten Residents Group "may appeal [the WQC] without having submitted comments during the public comment period only when [the Group's] claim [challenging the WQC] is based on new substantive issues arising from material changes to the scope or impact of the activity and not apparent at the time of public notice." 314 CMR 9.10(1).

As 314 CMR 9.10(1)(c) makes clear, the right to bring a Ten Residents Group appeal to challenge a WQC is also governed by G.L. c. 30A. Under G.L. c. 30A, § 10A:

> ***ten persons may intervene in any adjudicatory proceeding[10] . . . in which damage to the environment as defined in [G.L. c. 214, § 7A], is or might be at issue***; provided, however, that such intervention shall be limited to the issue of damage to the environment and the elimination or reduction thereof in order that any decision in such proceeding shall include the disposition of such issue.

(emphasis supplied). The provisions of G.L. c. 214, § 7A define "damage to the environment" as:

> ***any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth,*** whether caused by the defendant alone

[10] In this case, intervention is not an issue because the WQC Regulations at 314 CMR 9.10(1)(c) accord a right of appeal to a 10 Residents Group as a party to the proceedings.

> or by the defendant and others acting jointly or severally. ***Damage to the environment shall include, but not be limited to***, air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds or other water resources, destruction of seashores, dunes, wetlands, open spaces, natural areas, parks or historic districts or sites. Damage to the environment shall not include any insignificant destruction, damage or impairment to such natural resources.

(emphasis supplied).

Hence, the regulatory grant of standing to appeal as a Ten Residents Group pursuant to 314 CMR 9.10(1)(c) and G.L. c. 30A, § 10A carries with it four conditions which are jurisdictional in nature and must be met in order for the appeal of Department's issuance of a WQC to proceed as a Ten Residents Group appeal:

(1) the Group must consist of at least ten residents of the Commonwealth at the time of the appeal's filing;

(2) at least one Group member must have submitted comments on the WQC application during the public comment period, and if no comments were submitted, the Group's claim challenging the WQC must "[be] based on new substantive issues arising from material changes to the scope or impact of the activity and not apparent at the time of public notice";

(3) Group membership of at least ten residents of the Commonwealth must be maintained throughout the appeal; and

(4) the Group's Appeal Notice challenging the WQC must allege clear and specific facts that the Department's issuance of the WQC might or will cause "damage to the environment" as that term is defined by G.L. c. 214, § 7A.

Here, the Citizen's Group comprised of 15 citizens of the Commonwealth residing in Amherst, Ashby, Ashfield, Cummington, Dalton, Montague, Northampton, Pepperell, Pittsfield, or Sandisfield, Massachusetts[11] contend that collectively they can challenge the WQC as a Ten

[11] See n. 1, at pp. 1-2 above.

Residents Group pursuant to 314 CMR 9.10(1)(c) and G.L. c. 30A, § 10A because they are comprised of "more than ten citizens of the Commonwealth, at least three of whom submitted written comments during the public comment period" on the Applicant's WQC application, and "allege[d] [damage] to the environment [in the Petitioners' Appeal Notice], as that phrase is . . . defined by G.L. c. 214, § 7A." Petitioners' Appeal Notice, ¶ 5; Petitioners' Post-Hearing Memorandum, at pp. 11-12. The Citizen Group contends that the three members of the Group who submitted written comments on the Applicant's WQC application during the public comment period and thus satisfying the requirements of 314 CMR 9.10(1)(c) were Ms. Winn, the Petitioner Beat's Executive Director, and the Petitioners Mr. Bernard and Ms. Atwater-Williams. Petitioners' Appeal Notice, ¶ 5, n.1; Petitioners' Post-Hearing Memorandum, at pp. 11-12.

In response, the Applicant and the Department contend that none of the 15 members of the Citizen's Group, including Ms. Winn, Mr. Bernard, and Ms. Atwater-Williams submitted written comments during the public comment period on the Applicant's WQC application. Applicant's Pre-Hearing Memorandum, at pp. 18-19; Department's Pre-Hearing Memorandum, at p. 13. I agree with the Applicant and the Department for the following reasons.

First, Ms. Winn submitted comments on the Applicant's WQC application solely in her capacity as BEAT's Executive Director. Pre-Filed Direct Testimony of Jane Winn, Executive Director of Berkshire Environmental Action Team, Inc., November 8, 2016 ("Ms. Winn's PFT on behalf of BEAT"), ¶¶ 1-3.[12] BEAT's comments do not confer standing on Ms. Winn as a

[12] In ¶¶ 1-3 of her PFT on behalf of BEAT, Ms. Winn testified as follows:

(1) My name is Jane Winn. I am [BEAT's] Executive Director . . . .

(2) BEAT is a private, non-profit organization dedicated to protecting the environment. BEAT's Articles of

member of the Citizen's Group because a member of a Citizen's Group must submit comments in his or her individual capacity. See In the Matter of Massachusetts Department of Transportation, OADR Docket No. 2012-013, Recommended Final Decision (April 26, 2012), 2012 MA ENV LEXIS 54, at 18-19, adopted as Final Decision (May 11, 2012), 2012 MA ENV LEXIS 56 ("Both Petitioners filed comments, but in both cases identified themselves as spokesperson for neighborhood associations . . . . Thus, they appeared to have filed comments in a representational capacity. Their appeal appears to be filed in their individual capacity . . . They do not have standing based upon any of these grounds").

As for Mr. Bernard and Ms. Atwater-Williams, they did not prove that they submitted written comments to the Department in their respective individual capacities on the Applicant's WQC application during the public comment period. Both Mr. Bernard and Ms. Atwater-Williams stated in their respective PFT that the Sandisfield Taxpayers Opposing the Pipeline ("STOP"), a group that they are members of, "submitted comments on [their] behalf" to the Department.[13] Pre-Filed Direct Testimony of Ronald M. Bernard, November 11, 2016 ("Mr. Bernard's PFT"), ¶ 4; Pre-Filed Direct Testimony of Jean Atwater-Williams, November 10, 2016 ("Ms. Atwater-Williams' PFT"). As evidence, they submitted copies of two letters dated July 29, 2015 that an individual by the name Susan Baxter forwarded to a Department staff member

---

> Organization state that it 'is organized exclusively for charitable, scientific, and educational purposes, more specifically to be a watchdog for the environment of Berkshire County,' including the aim of 'ensur[ing] environmental laws are strictly followed and enforced.' . . . .
>
> (3) BEAT submitted numerous written comments to [Mass]DEP during the public comment period for the Water Quality Certification application filed by [the Applicant] . . . for the Connecticut Expansion Project . . . ."

[13] It appears that STOP is an unincorporated association of individuals because it is not listed as a corporate entity by the Massachusetts Secretary of State's Office. It is well settled that "an unincorporated association cannot be a party to litigation" Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 675 (1975); Board of Health of Sturbridge v. Board of Health of Southbridge, 461 Mass. 548, 560-61 (2012).

in the Department's Western Regional Office. Exhibit B to Mr. Bernard's PFT; Exhibit A to Ms. Atwater-Williams' PFT. Each letter began with the words: "We, the members of STOP." Id. However, the letters did not identify the members of STOP and were not signed by Mr. Bernard and Ms. Atwater-Williams. Id.

In addition to the lack of persuasive evidence demonstrating that at least one of its members submitted written comments on the Applicant's WQC application during the public comment period, the Citizen Group cannot seek refuge behind the exception to the prior written comments requirement in 314 CMR 9.10(1), which allows a Ten Residents Group "[to] appeal [a WQC] without [one of the Group's members] having submitted comments during the public comment period . . . when [the Group's] claim [challenging the WQC] is based on new substantive issues arising from material changes to the scope or impact of the activity [at issue in the appeal] and not apparent at the time of public notice." This exception does not apply here because the Citizen's Group has not alleged that there have been material changes to the scope or impact of the proposed Project that were not apparent at the time of the public notice of the Applicant's WQC application. As a result of the Citizen Group having failed to satisfy the prior written comments requirement of 314 CMR 9.10(1), the Group lacks standing to challenge the WQC as a Ten Residents Group pursuant to 314 CMR 9.10(1)(c) and G.L. c. 30A, § 10A and it is unnecessary to reach the issue of whether the Group "allege[d] [damage] to the environment

[in the Petitioners' Appeal Notice], as that phrase is . . . defined by G.L. c. 214, § 7A." Petitioners' Appeal Notice, ¶ 5; Petitioners' Post-Hearing Memorandum, at pp. 11-12.

### D. Ms. Atwater-Williams Does Not Have Standing to Challenge the WQC Pursuant to 314 CMR 9.02 and 9.10(1)(b) As a "Person Aggrieved" by the Department's issuance of the WQC.

Ms. Atwater-Williams claims that she has standing to challenge the WQC as "[a] person aggrieved" by the WQC pursuant to 314 CMR 9.10(1)(b). Petitioners' Appeal Notice, ¶ 6. The WQC Regulations at 314 CMR 9.02 define an "aggrieved person" as "[a]ny person who, because of [the WQC], may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of interests identified in [the WQC Regulations at] 314 CMR 9.00." 314 CMR 9.02. Under 314 CMR 9.10(1)(b), "[a] person aggrieved by [a WQC] who has submitted written comments [on the WQC application] during the public comment period" may file an administrative appeal challenging the WQC. "[A] person aggrieved . . . may appeal [a WQC] without having submitted comments during the public comment period only when [the person's] claim [challenging the WQC] is based on new substantive issues arising from material changes to the scope or impact of the activity and not apparent at the time of public notice." 314 CMR 9.10(1).

Here, assuming, but without deciding, that Ms. Atwater-Williams satisfies the definition of an "aggrieved person" under 314 CMR 9.02 as set forth above, she cannot satisfy the prior written comments requirement of 314 CMR 9.10(1)(b), because, as discussed above, she did not submit written comments to the Department in her individual capacity on the Applicant's WQC application during the public comment period. Ms. Atwater-Williams also cannot utilize the exception to the prior written comments requirement in 314 CMR 9.10(1), which allows "a

person aggrieved . . . [to] appeal [a WQC] without having submitted comments during the public comment period . . . when [the person's] claim [challenging the WQC] is based on new substantive issues arising from material changes to the scope or impact of the activity and not apparent at the time of public notice." This exception does not apply to Ms. Atwater-Williams because she has not alleged that there have been material changes to the scope or impact of the proposed Project that were not apparent at the time of the public notice of the Applicant's WQC application.

### E. Mr. Bernard Has Standing to Challenge the WQC As a "Property Owner" Pursuant to 314 CMR 9.10(1)(a), but not As a "Person Aggrieved" Pursuant to 314 CMR 9.02 and 9.10(1)(b).

In the Petitioners' Appeal Notice and at the Hearing, Mr. Bernard claimed standing to challenge the WQC as "[a] person aggrieved" by the WQC pursuant to 314 CMR 9.10(1)(b). Petitioners' Appeal Notice, ¶ 6; Petitioners' Pre-Hearing Memorandum, at pp. 10-11. His claim fails for the same reasons that Ms. Atwater-Williams' claim to standing under 314 CMR 9.10(1)(b) fails as set forth above: Mr. Bernard did not submit written comments to the Department in his individual capacity on the Applicant's WQC application during the public comment period, and he cannot take advantage of the exception to the prior written comments requirement in 314 CMR 9.10(1) because he has not alleged that there have been material changes to the scope or impact of the proposed Project that were not apparent at the time of the public notice of the Applicant's WQC application.

At the Hearing, Mr. Bernard asserted for the first time an additional ground for having standing to appeal the WQC: as a property owner pursuant to 314 CMR 9.10(1)(a), specifically "as [the] owner of [the] property at 182 Cold Spring Road in Sandisfield, through which the

[proposed] Project [will run]." Petitioners' Pre-Hearing Memorandum, at pp. 10-11; Petitioners' Post-Hearing Memorandum, at pp. 10-11. Mr. Bernard supported his claim with PFT in which he testified that "[a]pproximately one-third of a mile of the [proposed] Project is [slated] to run along a Right of Way ("ROW") on [his] land, with significant tree-clearing across the length of [the] property." Pre-Filed Direct Testimony of Ronald M. Bernard, November 11, 2016 ("Mr. Bernard's PFT"), ¶ 5.

In response, the Department did not address Mr. Bernard's claim of standing as a property owner pursuant to 314 CMR 9.10(1)(a), focusing solely instead on whether he had standing to challenge the WQC as a "person aggrieved" pursuant to 314 CMR 9.10(1)(b), which, as discussed above, he did not. See Department's Pre-Hearing Memorandum, at pp. 16-18; Department's Closing Brief, at p. 6. The Applicant, however, disputed both of Mr. Bernard's standing claims. Applicant's Pre- Hearing Memorandum, at pp. 20-22; Applicant's Post-Hearing Memorandum, at p. 4.

With respect to Mr. Bernard's claim of standing as a property owner pursuant to 314 CMR 9.10(1)(a), the Applicant contended that he was precluded from asserting that claim because he previously signed an Easement Agreement with the Applicant, in return for which he received compensation, authorizing the Applicant to proceed with construction on his property as long as the Applicant complied with "applicable standards and regulatory agency and governmental authority." Applicant's Pre- Hearing Memorandum, at pp. 20, 22, citing, Pre-Filed Testimony of James M. Flynn, December 13, 2016 ("Mr. Flynn's PFT"), ¶ 47 and Exhibit 27 to Mr. Flynn's PFT. The Applicant contended that "[it] is, and has been, complying with these requirements," and, accordingly, Mr. Bernard could not challenge the WQC. Applicant's Pre-

Hearing Memorandum, at pp. 20, 22. I do not find persuasive the Applicant's contention that Mr. Bernard's execution of the Easement Agreement precludes him from asserting standing to challenge the WQC as a property owner pursuant to 314 CMR 9.10(1)(a).

First, the Applicant's contention that "[it] is, and has been, complying with [the applicable standards and regulatory agency and governmental authority]" with respect to the proposed construction on Mr. Bernard's property is self-serving. It also ignores that Mr. Bernard is challenging the WQC because he believes that the proposed Project fails to comply with the Commonwealth's Water Quality Standards and cannot be conditioned to protect the interests of the MCWA. Petitioners' Appeal Notice, ¶¶ 35-47; Mr. Bernard's PFT, ¶¶ 5-13. As Mr. Bernard alleged in his PFT, "[w]ork for the [proposed] Project [will] result in discharge of dredged material into at least one vernal pool identified by the Applicant on [Mr. Bernard's] property," and that "[t]he Project . . . will overburden [his] land [and] [t]hreate[n] the water quality of the wetlands [on the land], particularly . . . Schoolhouse Brook, and . . . [his] well water only some 300 feet away." Mr. Bernard's PFT, ¶¶ 6, 13.

Moreover, in signing the Easement Agreement, Mr. Bernard did not waive any claims arising from unnecessary, overly intensive or otherwise unlawful damages that might result from the Applicant's use of the Right of Way on his property, even if the underlying use is consistent with the original purposes of the easement. See Kelleigh v. Algonquin Gas Transmission Co., 6 Mass. L. Rep. 208, 1996 WL 1186836, at 6, 1996 Mass. Super. LEXIS 29, at 17-18 (Mass. Super. Ct. 1996) ("landowner burdened by an easement obtained [by a utility company] pursuant to a Certificate of Public Necessity [issued by FERC authorizing the construction of a natural gas pipeline] may not question [FERC's] decision to grant the

certificate or the implementation of the certificate by the utility[,] [but] [t]his . . . does not bar [the] landowner from pursuing a state law remedy [against the utility] based on the utility's having exceeded the scope of its authority under the certificate[,] [because] [it ]would be difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct"); Township of Piscataway v. Duke Energy, 488 F.3d 203, 209 (3d Cir. 2007) (finding that servient land owners had standing to oppose pipeline to cut fifty trees from within or nearby the right of way), on remand, sub nom. Township. of Piscataway v. Spectra, 2008 WL 4534187 (D.N.J. 2008) (holding removal of trees was not reasonably necessary for the purposes of the existing pipeline); See also Yellowstone Pipe Line Co. v. Kuczynski, 283 F.2d 415, 420 (9th Cir. 1960) (finding release for pipeline's construction damages did not foreclose plaintiffs' future claims for damages from destabilized stream bank's washout).

### F. Ms. Morrical Has Standing to Challenge the WQC Both As a Property Owner Pursuant to 314 CMR 9.10(a) and As a "Person Aggrieved" Pursuant to 314 CMR 9.02 and 9.10(1)(b).

#### 1. Ms. Morrical's Standing as a Property Owner Pursuant to 314 CMR 9.10(a)

At the outset of the appeal, Ms. Morrical also only claimed standing to challenge the WQC as a "person aggrieved" pursuant to 310 CMR 9.02 and 9.10(1)(b). Petitioners' Appeal Notice, ¶¶ 7, 25. Later at the Hearing, Ms. Morrical asserted for the first time she also has standing to appeal the WQC pursuant to 314 CMR 9.10(1)(a) "as an owner of property upon which the [proposed] Project [will run]." Petitioners' Pre-Hearing Memorandum, at pp. 8-10;

Petitioners' Post-Hearing Memorandum, at pp. 8-10.

At the Hearing, the Department did not address Ms. Morrical's claim of standing as a property owner pursuant to 314 CMR 9.10(1)(a), focusing solely instead on whether she had standing to challenge the WQC as a "person aggrieved" pursuant to 314 CMR 9.10(1)(b) and concluding that she did. See Department's Pre-Hearing Memorandum, at pp. 16-18; Department's Closing Brief, at p. 6. The Applicant, however, disputed both of Ms. Morrical's standing claims, contending that she was precluded from asserting both standing claims because "[she] signed an Easement Agreement with [the Applicant] on August 27, 2015, in return for which she received compensation, authorizing [the Applicant] to proceed with construction on her property as long as the [Applicant] complie[d] with 'applicable standards and regulatory agency and governmental authority.'"[14] Applicant's Pre- Hearing Memorandum, at p. 20, citing, Mr. Flynn's PFT, ¶ 46 and Exhibit 26 to Mr. Flynn's PFT. The Applicant contends that "[it] is, and has been, complying with these requirements," and, accordingly, Ms. Morrical cannot challenge the WQC. Applicant's Pre- Hearing Memorandum, at p. 20. I reject the Applicant's contentions regarding Ms. Morrical's execution of the Easement Agreement for the same reasons above that I rejected the Applicant's claims with respect to Mr. Bernard's execution of an Easement Agreement with the Applicant for his property. As such, Ms. Morrical has standing to challenge the WQC as a property owner pursuant to 314 CMR 9.10(1)(a). As discussed in the

[14] The Applicant also contended that Ms. Morrical lacked standing to challenge the WQC as a "person aggrieved" pursuant to 314 CMR 9.02 and 9.10(b) because "[she was] unable to meet the injury in fact requirement" for such standing. Petitioners' Pre-Hearing Memorandum, at p. 20. I reject the Applicant's contention for the reasons set forth above in the text.

next section, she also has standing as a "person aggrieved" pursuant to 314 CMR 9.02 and 9.10(1)(b).

### 2. Ms. Morrical's Standing to Challenge the WQC as a "Person Aggrieved" Pursuant to 314 CMR 9.02 and 9.10(b)

Ms. Morrical claims that "[she] has standing pursuant to 310 CMR 9.10(1)(b) as a person aggrieved by the Department's decision to grant the [WQC] who submitted [written] comments [on the Applicant's WQC application] during the public comment period." Petitioners' Appeal Notice, ¶ 7; Pre-filed Testimony of Heather Morrical, November 11, 2016 ("Ms. Morrical's PFT"), ¶ 6. Neither the Applicant nor the Department dispute that Ms. Morrical submitted written comments to the Department about the Applicant's WQC application during the public comment period. Thus, the only issue is whether Ms. Morrical satisfies the definition of an "aggrieved person" at 314 CMR 9.02. The Department believes that she does, but the Applicant believes otherwise. Department's Pre-Hearing Memorandum, at pp. 16-18; Applicant's Pre-Hearing Memorandum, at pp. 20-21.

As discussed above, the WQC Regulations at 314 CMR 9.02 define an "aggrieved person as "[a]ny person who, because of [a WQC], may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of interests identified in [the WQC Regulations at] 314 CMR 9.00." An "aggrieved person" as that term is used in 314 CMR 9.02 and 9.10(1)(b) "must assert 'a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest. . . . Of particular importance, the right or interest asserted must be one that [the WQC Regulations at 314 CMR 9.00]. . . inten[d] to protect.'" Webster Ventures, 2016 MA ENV LEXIS 27, at 39.

However, "[t]o show standing [as "a] person aggrieved"], a party need not prove by a

preponderance of the evidence that his or her claim of particularized injury is true." Webster Ventures, 2016 MA ENV LEXIS 27, at 39-40, citing, Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005). As the Massachusetts Appeals Court explained in Butler:

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

63 Mass. App. Ct. at 441; Webster Ventures, 2016 MA ENV LEXIS 27, at 39-40. Simply stated, the party claiming standing as "[a] person aggrieved" is only required to put forth a minimum quantum of credible evidence in support of his or her claim that the proposed activity authorized by the WQC would or might cause him or her to suffer an injury in fact, which would be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interest protected by the WQC Regulations at 314 CMR 9.00. If the party meets that threshold, he or she can proceed through the "[s]tanding . . . gateway . . . to [the] inquiry on the merits" regarding whether the Department properly issued the WQC. Butler, 63 Mass. App. Ct. at 441; Webster Ventures, 2016 MA ENV LEXIS 27, at 39-40.

Based upon my review of Ms. Morrical's PFT, I find that she has proffered the minimum quantum of credible evidence in support of her claim that the proposed Project as authorized by the WQC will or might cause her to suffer an injury in fact, which will be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interest protected by the WQC Regulations at 314 CMR 9.00. Id. Ms. Morrical testified that the proposed Project as authorized by the WQC will cross her abutting real

property, requiring the clearing of a large swath of trees and vegetation in close proximity to the wetlands and private well on her land, which could result in harm to the wetlands and threaten her water supply.[15] Ms. Morrical's PFT, ¶¶ 7, 8, 11; Exhibit C to Ms. Morrical's PFT. This potential harm is within the public interest protected by the WQC Regulations at 314 CMR 9.00 because the Regulations were promulgated pursuant to the MCWA, which requires the Department "to enhance the quality and value of water resources and to establish a program for prevention, control, and abatement of water pollution." Entergy Nuclear Generation Company v. Department of Environmental Protection, 459 Mass. 319, 323 (2011), citing, G.L. c. 21, § 27; 314 CMR 9.01(1).

### G. BEAT Has Standing to Challenge the WQC Pursuant to 314 CMR 9.10(1)(d) As a "Private Organization with a Mandate to Protect the Environment."

As discussed previously, under 314 CMR 9.10(1)(d), "any . . . private organization with a mandate to protect the environment that has submitted written comments [on the WQC application] during the public comment period" may file an administrative appeal challenging the WQC. If the organization did not submit any written comments during the public comment period, the organization may appeal the WQC only if the organization's "claim [challenging the

[15] Ms. Morrical testified that the "[proposed] Project is proposed to run along a Right of Way on [her] land"; "[a] significant swath of [her] property would be cleared of trees and vegetation for temporary workspace"; and "[c]onstruction would take place within 100 feet from a well that [she] drilled in preparation for the construction of [her] home" on the property. Ms. Morrical's PFT, ¶¶ 7-8. She testified that her "property is an extremely private, flat[,] and wooded site" and that "[c]learing [a portion of her property] for the 'temporary' workspace will destroy the buffer between [her] home site and the pipeline by eliminating the vast majority of trees and vegetation," resulting in "[her] privacy . . . be[ing] replaced with only a view of the expanded pipeline right of way . . . ." Id., ¶¶ 9-10. She testified that "the well [on her property] is within 100 [feet] of [the pipeline] work zone, and if for any reason it is comprised, [she] will incur significant expense to redesign the siting of the well, septic [system], and home, if that's even possible with the topography of the land." Id., ¶ 11. She testified that "[t]he Project would also negatively impact the wetlands located on [her] property, including introduction of invasive vegetation[,] which is already a problem along the existing pipeline." Id.

WQC] is based on new substantive issues arising from material changes to the scope or impact of the activity and not apparent at the time of public notice." 314 CMR 9.10(1).

Here, BEAT asserted in the Petitioners' Appeal Notice that "[it] has standing pursuant to 314 CMR 9.10(1)(d), as a private organization with a mandate to protect the environment that . . . submitted written comments during the public comment period" on the Applicant's WQC application. Petitioners' Appeal Notice, ¶ 8. At the Hearing, BEAT supported its claim through Ms. Winn's PFT on behalf of BEAT. Ms. Winn testified that "BEAT is a private, non-profit organization dedicated to protecting the environment" and that "BEAT's Articles of [Corporate] Organization state that it 'is organized exclusively for charitable, scientific, and educational purposes, more specifically to be a watchdog for the environment of Berkshire County,' including the aim of 'ensur[ing] environmental laws are strictly followed and enforced.'" Ms. Winn's PFT on behalf of BEAT, ¶ 2; Exhibit A to Ms. Winn's PFT on behalf of BEAT. She also testified that "BEAT submitted numerous written comments to [the Department] during the public comment period [on the Applicant's] Water Quality Certification application . . . for the [proposed] Project . . . ." Ms. Winn's PFT on behalf of BEAT, ¶ 3; Exhibit B to Ms. Winn's PFT on behalf of BEAT.

In response, the Department does not challenge BEAT's claim of standing to appeal the WQC pursuant to 314 CMR 9.10(1)(d). Department's Pre-Hearing Memorandum, at p. 16; Department's Post-Hearing Memorandum, at p. 6. The Applicant, however, has not conceded that BEAT has standing pursuant to 314 CMR 9.10(1)(d). It asserts that "[its] cross-examination [of Ms. Winn at the Hearing] established that a website of a BEAT affiliate indicated that BEAT's real object[ive] may be to delay the [proposed Project]." Applicant's

Post-Hearing Memorandum, at p. 4. Hearing Transcript, at p. 34, lines 8-24; p. 35, lines 1-24; p. 36, lines 1-22; Cross-Examination Exhibit 1. The Applicant's assertion regarding "BEAT's real object[ive]" is speculative at best, and, accordingly, I reject it. I also reject it because the website at issue could be read as BEAT exercising its First Amendment right to inform interested members of the public about the proposed Project and to opine that the appeal of the WQC may delay the Applicant in obtaining permits for the Project "for months, possibly to the end of [2016]." Other than referring to this website, the Applicant has offered no other factual or legal grounds against BEAT's standing claim. In sum, BEAT has standing to challenge the WQC pursuant to 314 CMR 9.10(1)(d).

## III. THE DEPARTMENT PROPERLY ISSUED THE WQC TO THE APPLICANT.

My findings that Mr. Bernard, Ms. Morrical, and BEAT each have standing to challenge WQC do not mean that they prevail on the merits of their substantive claims challenging the WQC. My findings of standing only mean that these Petitioners may proceed through the "[s]tanding . . . gateway . . . to [the] inquiry on the merits" regarding whether the Department properly issued the WQC to the Applicant. Butler, 63 Mass. App. Ct. at 441; Webster Ventures, 2016 MA ENV LEXIS 27, at 39-40. Having passed through the "standing gateway," they had the evidentiary burden to prove their claim that the Department improperly issued the WQC to the Applicant; at this juncture they had the burden of proving by a preponderance of credible evidence through the sworn testimonial and documentary evidence of their witnesses that the Department erred in issuing the WQC to the Applicant. 310 CMR 1.01(13)(c)1.[16] As explained

[16] 310 CMR 1.01(13)(c)1 provides in relevant part that:

> [e]xcept as otherwise required by law or as determined by the Presiding Officer, in hearings initiated by the notice of claim for an adjudicatory appeal on a permit, license or similar decision, it shall be the usual

below, they did not meet their burden because a preponderance of the evidence introduced at the Hearing demonstrated that the Department properly issued the WQC to the Applicant, with the exception that Condition 15 of the WQC must be modified to conform with the requirements of 314 CMR 9.09(1)(e) as discussed below.

### A. The Department Issued The WQC In Compliance With The Applicable Provisions Of 314 CMR § 4.00.

As discussed previously, the WQC Regulations were adopted by the Department "to carry out its statutory obligations to certify that proposed discharges of dredged or fill material, dredging, and dredged material disposal in waters of the United States within the Commonwealth will comply with the [SWQ Standards at 314 CMR 4.00] and other appropriate requirements of state law." 314 CMR 9.01(3). The WQC Regulations "implemen[t] and supplemen[t] [the SWQ Standards]" by "establishing a certification program for the Department to persons seeking to discharge dredged or fill material, conduct dredging, and place, reuse or dispose of dredged material." Id.; 314 CMR 9.01(3)(b).

At the Hearing, the Petitioners contended that the WQC that the Department issued to the Applicant is invalid because it fails to comport with several SWQ Standards at 314 CMR 4.00. Specifically, the Petitioners asserted that the WQC violates:

(1) 314 CMR 4.04(5)(a)1 because the Applicant purportedly failed to demonstrate that the discharge authorized by the WQC "is necessary to accommodate important economic or social development in the area in which the waters are located";[17]

---

practice for the petitioner to present its evidence first. . . .

There is no exception to this general rule in this case that would should shift the burden of proof to the Applicant and the Department.

[17] Petitioners' Appeal Notice, ¶ 37.

(2) 314 CMR 4.04(5)(a)2 because the Applicant purportedly failed to demonstrate that "[n]o less environmentally damaging alternative site for the activity, receptor for the disposal, or method of elimination of the discharge is reasonably available or feasible"; [18]

(3) 314 CMR 4.04(5)(a)3 because the Applicant purportedly failed to demonstrate that "[t]o the maximum extent feasible, the discharge and activity are designed and conducted to minimize adverse impacts on water quality, including implementation of source reduction practices";[19]

(4) 314 CMR 4.04(5)(a)4 and 4.05 because the Applicant purportedly failed to demonstrate that "the discharge will not impair existing water uses and will not result in a level of water quality less than that specified for the Class [of surface water impacted by the WQC (Class B as set forth in 314 CMR 4.05(3)(b)[20]]";[21] and

(5) 314 CMR 4.05(3)(b)2 because the Applicant purportedly failed to demonstrate that the discharge authorized by the WQC will comport with the regulation's water temperature requirements. [22]

In response, the Applicant and the Department contend that the provisions of 314 CMR 4.04(5) set forth above do not govern the WQC, but rather, the provisions of 314 CMR 4.04(2) discussed below, apply to the WQC. Applicant's Pre-Hearing Memorandum, at p. 23; Applicant's Post-Hearing Memorandum, at pp. 4-9; Department's Pre-Hearing Memorandum, at pp. 18-20; Department's Post-Hearing Memorandum, at pp. 6-9. In the alternative, the Applicant and the Department contend that the proposed Project satisfies the provisions of 314 CMR

[18] Petitioners' Appeal Notice, ¶ 38.

[19] Petitioners' Appeal Notice, ¶ 39.

[20] Class B governs "[inland] waters [that are] designed as a habitat for fish, other aquatic life, and wildlife, including for their reproduction, migration, growth and other critical functions, and for primary and secondary contact recreation." 314 CMR 4.05(3)(b).

[21] Petitioners' Appeal Notice, ¶ 40.

[22] Petitioners' Appeal Notice, ¶ 47.

4.04(5) at issue. Applicant's Pre-Hearing Memorandum, at pp. 23-41; Applicant's Post-Hearing Memorandum, at pp. 9-13; Department's Pre-Hearing Memorandum, at pp. 20-24; Department's Post-Hearing Memorandum, at pp. 9-11.

**1. <u>The provisions of 314 CMR 4.04(2) govern the WQC</u>.**

314 CMR 4.04(2) is entitled "Protection of High Quality Waters" and provides as follows:

> ***High Quality waters*** are waters whose quality exceeds minimum levels necessary to support the national goal uses, low flow waters, and other waters whose character cannot be adequately described or protected by traditional criteria. ***These waters shall be protected and maintained for their existing level of quality unless limited degradation by a new or increased discharge is authorized by the Department pursuant to 314 CMR 4.04(5). Limited degradation also may be allowed by the Department where it determines that a new or increased discharge is insignificant because it does not have the potential to impair any existing or designated water use and does not have the potential to cause any significant lowering of water quality.***

(emphasis supplied).

I agree with the Department that by its terms, 314 CMR 4.04(2) authorizes "limited degradation [of High Quality Waters] by a new or increased discharge" in either of two ways: (1) if the discharge "is authorized by 314 CMR 4.04(5)" or (2) if the Department makes a determination "that [the] . . . discharge is insignificant because it does not have the potential to impair any existing or designated water use and does not have the potential to cause any significant lowering of water quality." Here, the Department's witness, Mr. Cameron, testified that the provisions of 314 CMR 4.04(5) do not apply to the WQC that the Department issued to the Applicant because "[t]he [proposed] Project's compliance with [the WQC Regulations at] 314 CMR 9.00 constitutes the Department's "determination [under 314 CMR 4.04(2)]" that "[t]he activity authorized by the WQC will cause a limited degradation, but due to the

conditions placed upon the [P]roject under the WQC, the authorized discharge is insignificant because it does not have the potential to impair any existing or designated water use and does not have the potential to cause any significant lowering of water quality." Mr. Cameron's PFT, ¶ 24. As discussed below, at pp. 44-57, 67-75, I agree that the WQC comports with the WQC Regulations at 314 CMR 9.00. Nevertheless, if the provisions of 314 CMR 4.04(5) cited by the Petitioners apply to the WQC, I also find that the proposed Project comports with those provisions for the reasons set forth below.

**2. In accordance with 314 CMR 4.04(5)(a)1, the Applicant demonstrated that the discharge authorized by the WQC "is necessary to accommodate important economic or social development in the area in which the waters are located."**

314 CMR § 4.04(5)(a)1 requires that the discharge "accommodate important economic or social development in the area in which the waters are located." Through the testimonial and documentary evidence of its witnesses, Mr. Flynn and Mr. Lowry, the Applicant demonstrated that the discharge authorized by the WQC is necessary to accommodate important economic and social developments in the area in which the waters are located: the Connecticut River Watershed. I find the following based on their highly probative testimony.

The area in which the waters are located encompasses the area from East Granby and Suffield, Connecticut and other portions of Hartford County in Connecticut. Mr. Lowry's PFT, ¶ 17. The entirety of the proposed Project's 3.81-mile Massachusetts Loop is located within the Farmington HUC8 Watershed, a subwatershed of the Connecticut River Watershed, which encompasses an interstate region that includes portions of western Massachusetts and central Connecticut. Id. East Granby and Suffield, Connecticut, as well as other portions of Hartford County, Connecticut are located in the Farmington River and Connecticut River Watersheds. Id.

Businesses and residences of East Granby and Suffield, Connecticut, as well as other portions of Hartford County, will be the recipients of increased natural gas capacity created by the proposed Project. Id.

The proposed Project will accommodate economic development in the area in which the waters are located (Farmington HUC8 Watershed) because it will enable the Applicant to provide an additional 72,100 dekatherms[23] per day of natural gas in interstate commerce to residences and businesses in the Hartford, Connecticut area. Mr. Flynn's PFT, ¶ 10. The proposed Project is also fully subscribed (fully invested) under long-term contracts with three local natural gas distribution companies serving residences and businesses in Connecticut. Mr. Flynn's PFT, ¶ 10. Additionally, the proposed Project will benefit Massachusetts residences and businesses located in the Connecticut River and Farmington River Watersheds by allowing for increased pressure to maintain deliveries during periods of high demand. Mr. Flynn's PFT, ¶ 10.

On July 31, 2014, the Applicant filed an application with FERC for a Certificate of Public Convenience and Necessity to construct and operate the proposed Project pursuant to the NGA. Mr. Flynn's PFT, ¶ 15. After conducting an 18 month review of the application, which involved hundreds of filings, 20 supplemental submissions by the Applicant, and hundreds of public comments, FERC issued a Certificate of Public Convenience and Necessity on March 11, 2016 ("the FERC Certificate"). Mr. Flynn's PFT, ¶ 15. The FERC Certificate determined that "the public convenience and necessity require[d] approval of [the proposed Project]," and authorized the Applicant's construction and operation of the Project on the Project route

[23] "A dekatherm (dth) is a unit of energy used primarily to measure natural gas, developed in about 1972 by the Texas Eastern Transmission Corporation, a natural gas pipeline company. It is equal to 10 therms or 1,000,000 British thermal units (MMBtu). It is also approximately equal to one thousand cubic feet (Mcf) of natural gas or exactly one Mcf of natural gas with a heating value of 1000 Btu/cf." https://en.wikipedia.org/wiki/Dekatherm

(including the Massachusetts Loop subject to the WQC). Mr. Flynn's PFT, ¶ 15; Exhibit 2 to Mr. Flynn's PFT.

The FERC Certificate also determined that the environmental impacts of the proposed Project would be "minor" and "temporary." Mr. Flynn's PFT, ¶ 16. The determination was based on extensive environmental analysis that FERC had conducted of the proposed Project that resulted in its issuance of a 300 page Environmental Assessment ("EA") on October 23, 2015. Mr. Flynn's PFT, ¶ 18. The EA examined, among other things, the proposed Project's anticipated impact on the environment, including: (1) geology and soils; (2) water resources and wetlands; (3) vegetation, fisheries, and wildlife; (4) threatened, endangered, and other special status species; (5) land use, recreation, and visual resources; (6) socioeconomics; (7) cultural resources; (8) air quality and noise; (9) reliability and safety; and (10) cumulative impacts. Mr. Flynn's PFT, ¶ 19.

In the EA, FERC also examined the impact of the proposed Project on the socioeconomic resources in the area, by analyzing its effects on: (1) population, economy, and employment; (2) transportation; (3) housing; (4) public service; (5) property values; (6) tax revenue; and (7) environmental justice. Mr. Flynn's PFT, ¶ 52. Ultimately, FERC determined in the EA that the proposed Project would "result in a range of cumulative socioeconomic impacts in the region of influence, such as increased employment and tax revenues." Mr. Flynn's PFT, ¶¶ 52, 54; Exhibit 30 to Mr. Flynn's PFT. The EA noted that construction of the Massachusetts Loop would require 250 construction workers, 70 percent of which would be local. Mr. Flynn's PFT, ¶ 55. FERC made these determinations after reviewing the extensive information that the

Applicant had supplied to FERC concerning the socio economic benefits of the proposed Project. Mr. Flynn's PFT, ¶ 51.

In addition to the extensive data and analysis it provided to FERC in connection with its application for the FERC Certificate, the Applicant's WQC Application also analyzed the socioeconomic impact of the proposed Project and noted that the Project will help to alleviate the natural gas pipeline constraints in the northeast United States, which has the nation's highest natural gas prices, by increasing pipeline capacity and supply. Mr. Flynn's PFT, ¶¶ 53, 55; Exhibit 31 to Mr. Flynn's PFT.

Through Mr. Schweisberg, the Petitioners contended at the Hearing that the Applicant failed to demonstrate that the discharge authorized by the WQC "is necessary to accommodate important economic or social development in the area in which the waters are located" in accordance with 314 CMR 4.04(5)(a)1, because "[t]he proposed pipeline is part of the Connecticut Expansion Project . . . [and] would serve three natural gas utility companies in Connecticut and none in Massachusetts[,] [and] [a]s such, . . . the pipeline would not serve ***any*** "important economic or social development in the area [of] [Sandisfield and Agawam, Massachusetts] in which the waters are located." Mr. Schweisberg's PFT, ¶ 12 (emphasis in original). I am not persuaded by the Petitioners' contention for the following reasons.

First, as the Applicant's witness, Mr. Lowry, testified, the "area in which the waters are located," as contemplated by 314 CMR § 4.04(5)(a)1, is not strictly limited to the local municipalities in which the proposed Project will be constructed. Mr. Lowry's PFT, ¶ 17. Rather, "[it] is most appropriately applied to the watershed area in which the waters are located because the application of watershed functions is the focus of CWA permitting." Mr. Lowry's

PFT, ¶ 17. "The entirety of the [proposed] Project's 3.81-mile Massachusetts Loop is located within the Farmington HUC8 Watershed, a subwatershed of the Connecticut River Watershed, which encompasses an interstate region that includes portions of western Massachusetts and central Connecticut. . . . East Granby and Suffield, Connecticut, as well as other portions of Hartford County, [Connecticut] are located in the Farmington River and Connecticut River Watersheds." Id. "Businesses and residences of East Granby and Suffield, Connecticut, as well as other portions

of Hartford County, [Connecticut] will be the recipients of increased natural gas capacity." Id. In sum, "the application of the term 'in the area in which the waters are located' logically and ecologically applies to this interstate region and not just a localized area of one state." Id.

Second, assuming for the sake of argument that that 314 CMR § 4.04(5)(a)1 is limited to the local municipalities in which the proposed Project will be constructed, the Applicant demonstrated that the Project serves economic and social development in Sandisfield and Agawam, Massachusetts. As discussed above, FERC's EA concluded that the "[b]eneficial effects associated with the [proposed] Project include increased property tax revenues, increased job opportunities, and increased income associated with ***local*** construction employment." Mr. Flynn's PFT, ¶ 54; Exhibit 32 to Mr. Flynn PFT (emphasis in original). The EA noted that construction of the Massachusetts Loop would require 250 construction workers, 70 percent of which would be local. Mr. Flynn's PFT, ¶ 55; Exhibit 33 to Mr. Flynn's PFT. In contrast, the Petitioners' expert witness, Mr. Schweisberg, testified at the Hearing that he is not aware of any information that contradicts FERC's findings. Hearing Transcript, p. 40, lines 23-24; p. 41, lines

1-24; p. 42, lines 1-24; p. 43, lines 1-13. As such, I accord FERC's findings great weight to my determination here that the WQC comports with 314 CMR 4.04(5)(a)1.

**3. In accordance with 314 CMR 4.04(5)(a)2, the Applicant demonstrated that "[n]o less environmentally damaging alternative site for the activity, receptor for the disposal, or method of elimination of the discharge is reasonably available or feasible."**

**a. The Giombetti Case does not govern the WQC that the Department issued to the Applicant.**

314 CMR § 4.04(5)(a)2 requires that "[n]o less environmentally damaging alternative site for the activity. . . is reasonably available or feasible." 314 CMR § 9.06(1) provides that "[n]o discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge that would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences."[24]

At the Hearing, the Petitioners cited a 1999 Proposed Final Decision of a Department hearing officer in the case of In the Matter of Donald A. Giombetti and Tharon E. Giombetti, Trustees, Giombetti Realty Trust ("Giombetti"), Docket Nos. 97-169 and 97-185, 1999 MA ENV LEXIS 726 (May 14, 1999), to support their contention that "the [proposed] Project fails to satisfy the [alternatives] criteria of 314 CMR 4.04(5)a2, 9.06(1), and 9.07(1),[25] as there are practicable alternatives . . . that would have less adverse impact on the aquatic ecosystem. . . ." Petitioners' Pre-Hearing Memorandum, at pp. 15-16; Petitioners' Post-Hearing Memorandum, at

[24] At the Hearing, the Petitioners combined their discussion of alternatives under 314 CMR § 4.04(5)2 and 314 CMR 9.06(1). Petitioners' Pre-Hearing Memorandum, at pp. 14-21; Petitioners' Post-Hearing Memorandum, at pp. 12-25. As such, I discuss the requirements of both regulations here as well as above in the text.

[25] As discussed below at p. 69, the provisions of 314 CMR 9.07(1) do not apply to the proposed Project.

p. 13. The Petitioners' reliance on the Giombetti case is misplaced for several reasons.

First, the 1999 Proposed Final Decision does not have precedential value because it was not adopted by the Department's Commissioner; the Commissioner remanded the matter to the hearing officer for further findings. Giombetti, 1999 MA ENV LEXIS 726, at 38-44. The Commissioner issued a Final Decision in the case in 2001 after the hearing officer made the further findings. Giombetti, 2001 MA ENV LEXIS 65 (February 6, 2001). It is the 2001 Final Decision that governs Giombetti.

Second, Giombetti involved a proposed discharge into an Outstanding Resource Water ("ORW")[26] for the construction of a driveway; the proposed Project does not involve any discharge into an ORW.

Third, the 2001 Final Decision in Giombetti discussed 314 CMR § 9.06(1) in the context how much "[a]dditional cost can constitute a bona fide reason for classifying an alternative as not practicable." 2001 MA ENV LEXIS 65, at 33. The 2001 Final Decision held that "[i]f an environmentally preferable alternative is prohibitively expense, it is not practicable." Id. This was against the backdrop of an alternatives analysis that the project proponent in Giombetti presented to the Department that was inadequate due to the proponent's insufficient financial analysis of the alternatives.[27] Id., at 33-36. The Petitioners have not made any allegation in this

[26] Under 314 CMR 4.04(3), ORWs are "waters [that have been] designated for protection under . . . 314 CMR 4.06. These waters include Class A Public Water Supplies ([under] 314 CMR 4.06(1)(d)1) and their tributaries, certain wetlands as specified in 314 CMR 4.06(2) and other waters as determined by the Department based on their outstanding socio-economic, recreational, ecological and/or aesthetic values . . . ."

[27] Giombetti involved a business owner's proposed construction of an access road to business owner's landlocked property ("Lot 10"). 2001 MA ENV LEXIS 65, at 2, 5. The proposed road was to be constructed on the adjoining Lot 11 (also owned by the business owner) and would alter a bordering vegetated wetland located on Lot 11 and within the Sudbury Reservoir watershed, an ORW of the Commonwealth. Id., at pp. 3, 7-9. The business owner contended that there was no practicable alternative to get to landlocked Lot 10 without crossing this wetland area on Lot 11, because of the purported high financial costs of the alternative means of access, including through the

appeal that the Applicant's alternatives cost analysis was inadequate. Moreover, as discussed in the next section, the proposed Project at issue in this case underwent a rigorous alternatives analysis during the (1) FERC, (2) MEPA,[28] and (3) WQC review processes of the Project.

**b. A thorough Alternatives Analysis was conducted of the Proposed Project**

The testimonial and documentary evidence of the Applicant's witnesses, Mr. Flynn and Mr. Lowery, and the Department's witnesses, Mr. Cameron and Mr. Foulis, demonstrated that the Applicant performed a proper alternatives analysis pursuant to 314 CMR 4.04(5)a2 and 314 CMR 9.06(1). Based on their testimonial and documentary evidence I find that alternatives were thoroughly examined through the: (1) FERC, (2) MEPA, and (3) WQC review processes of the proposed Project as follows.

During its review of the proposed Project, FERC determined in the EA that "[e]ach

---

business owner's adjoining Lot 12, which it had leased to another party. Id., at pp. 3, 7-9. The 2001 Final Decision in Giombetti rejected the business owner's claim, finding that the claim was "a subjective [financial] analysis and . . . the [business owner] should have identified costs objectively in terms of the financial capabilities of [businesses] comparable [to the business owner's business]." Id., at pp. 18-19.

[28] "MEPA" is the acronym for the Massachusetts Environmental Policy Act, G. L. c. 30, §§ 61-62H. MEPA and the MEPA Regulations at 301 CMR 11.00 "establish a process to ensure that State permitting agencies [such as the Department] have adequate information on which to base their permitting decisions, and that environmental impacts of the project are avoided or minimized." City of Brockton v. Energy Facilities Siting Board, 469 Mass. 196, 201, n.12 (2014) ("Brockton I"); In the Matter of Brockton Power Co., LLC, OADR Docket Nos. 2011-025 & 026, Recommended Final Decision (July 29, 2016), at 85, n. 44, adopted as Interlocutory Decision [of MassDEP Commissioner] (March 13, 2017). "Pursuant to MEPA, a project proponent requiring a permit from a State agency files an environmental notification form (ENF) with the Secretary [of the Massachusetts Executive Office of Energy and Environmental Affairs ("EEA"),] . . . who determines whether the project meets the review threshold requiring an . . . [Environmental Impact Report ("EIR")]." Id. "If so, and after submission of a final environmental impact report (FEIR) and opportunity for review by the public, the [EEA] Secretary certifies whether the FEIR has complied with MEPA . . . ." Id. A Certification by the EEA Secretary that the FEIR complies with MEPA "does not constitute final approval or disapproval of a particular project, which ultimately is left to various permitting agencies." Id. The Certification "[also] does not mean that a proposed project meets applicable permitting standards." In the Matter of Stephen D. Peabody, Final Decision on Reconsideration (December 27, 2011), 2011 MA ENV LEXIS 141, at 47-48. "Instead, it only means that the project's proponent has adequately described the environmental impacts and addressed mitigation" as required by MEPA. Id. The permitting agency "retains [its] authority to fulfill its statutory and regulatory obligations in permitting or reviewing [the] Project that is subject to MEPA review . . . ." 301 CMR 11.01(1)(b).

alternative was considered to the point where it was clear the alternative was not reasonable, would result in greater environmental impacts than those of the proposed Project, or it could not meet the Project objective." Mr. Flynn's PFT, ¶ 58; Exhibit 36 to Mr. Flynn's PFT. With respect to the MEPA review, the Applicant provided extensive information in its March 5, 2015 FEIR submission to EEA that was approved by the EEA Secretary on April 17, 2015, when the Secretary issued a MEPA Certificate on the FEIR. Mr. Flynn's PFT, ¶¶ 61-62; Exhibits 38 and 39 to Mr. Flynn's PFT; Mr. Foulis's PFT, ¶¶ 31-32. In accordance with the MEPA Certificate and FERC's routing guidelines as set forth in 18 C.F.R. § 380.15, the Applicant considered route alternatives, as well as construction, fuel source, system, and the no action alternatives. Mr. Lowry's PFT, ¶ 22; Exhibit 4 to Mr. Lowry's PFT. The Applicant conducted a detailed system alternatives analysis, including consideration of efficiency improvements, two greenfield pipeline options, roadway alternatives, and pipeline looping and compression options. Id. The Applicant's FEIR analyzed several alternate routes and determined that the Applicant's preferred route was the most appropriate, and that "additional wetlands mitigation [would] be identified in the WQC process." Mr. Foulis's PFT, ¶ 31.

In the MEPA Certificate, the EEA Secretary determined that:

> The [Applicant] ha[d] thoroughly addressed the [proposed] [P]roject's potential environmental impacts, considered alternatives and identified a comprehensive mitigation program to avoid, minimize and mitigate these impacts.

Certificate, at p. 1; Mr. Foulis's PFT, ¶ 32. The EEA Secretary also determined that:

> ***Limited analysis of alternatives*** to minimize project impacts and development of more detailed mitigation [was only] required, particularly in regards to mitigation associated with use of land protected by Article 97 of the Articles of Amendment

to the Constitution of the Commonwealth and impacts to wetland resource areas. Id. (emphasis supplied).

As a result of the EEA Secretary's findings and pursuant to the requirements of 314 CMR 9.06(1)(b)2,[29] the Department conducted a limited analysis of alternatives to minimize project impacts and development of more detailed mitigation. Mr. Foulis's PFT, ¶ 32. Alternatives analyses involving the reduction of Temporary Workspaces ("TWS") and Additional Temporary Workspaces ("ATWS"), shifting the alignment of the proposed pipeline within and adjacent to the existing maintained right-of-way, and using horizontal directional drilling ("HDD") were required of the Applicant by the Department. Mr. Foulis's PFT, ¶ 32. During the WQC review process, the Department issued several written requests for substantial additional information, and the Applicant responded to each. Mr. Foulis's PFT, ¶ 32.

The alternatives analysis in the Applicant's WQC Application was also extensive. Mr. Lowry's PFT, ¶¶ 22, 23a. Appendix B-1 in the Applicant's WQC Application contained a lengthy analysis of alternatives, including pipeline routing options, based on regional topography, potential adverse environmental impacts, population density, existing land uses, and construction safety and feasibility considerations. Mr. Lowry's PFT, ¶ 22; Exhibit 4 to Mr.

[29] 314 CMR 9.06(1)(b)2 provides that:

> No discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge that would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. . . . The scope of alternatives to be considered shall be commensurate with the scale and purpose of the proposed activity, the impacts of the proposed activity, and the classification, designation and existing uses of the affected wetlands and waters in the [SWQ Standards] at 314 CMR 4.00 . . . . For any activity resulting in the loss of more than one acre cumulatively of bordering and isolated vegetated wetlands and land under water, alternative sites not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed will be considered by the Department, but only if such information is required in an Environmental Impact Report or in an alternatives analysis conducted by the Corps of Engineers for an individual['s] 404 permit.

Lowry's PFT. The Applicant also provided extensive information about alternatives in its February 15, 2016 WQC Supplemental Submission to the Department. Mr. Flynn's PFT, ¶¶ 61-62; Exhibits 38 and 39 to Mr. Flynn's PFT; Mr. Foulis's PFT, ¶¶ 31-32.

In sum, in issuing the WQC, the Department properly found "that the [proposed] project, as shown on the plan(s) of record and further described in supplemental information, is the 'least environmentally damaging practicable alternative,' and therefore meets the criteria at 314 CMR 9.06(1)." Mr. Flynn's PFT, ¶ 57; Exhibit 35 to Mr. Flynn's PFT; Mr. Cameron's PFT, ¶¶ 30-32; Mr. Foulis's PFT, ¶¶ 31-34. Moreover, the Petitioners' claim that the Applicant "essentially present[ed] the [Applicant's] preferred option as the only option"[30] is not supported by the evidentiary record.

### (1) The No-build Alternative

The Petitioners contend that the Applicant failed to sufficiently present or consider a No-build alternative to the proposed Project. Petitioners' Pre-Hearing Memorandum, at pp. 17-19; Petitioners' Post-Hearing Memorandum, at pp. 13-25. The Petitioners' claim is without merit for the following reasons.

First, the Petitioners did not present expert testimony to support their No-build claim. Their expert witness, Mr. Schweisberg, only focused on a "Roadway" alternative discussed below, at pp. 51-55. Hearing Transcript, p. 51, lines 8-22. Accordingly, the Petitioners' No-build claim fails due to the Petitioners' failure to meet their burden of proof.

The Petitioners' No-build claim also fails because a No-build alternative is not a practicable alternative in that it would prevent construction of the proposed Project, a venture

[30] Petitioners' Pre-Hearing Memorandum, at p. 16; Petitioner's Post-Hearing Memorandum, at p. 13.

that FERC has found is necessary and beneficial to supply increased natural gas capacity. Mr. Flynn's PFT, ¶ 15; Exhibit 1 to Mr. Flynn's PFT. As 314 CMR 9.02 provides, an alternative is practicable if it is "[a]vailable and capable of being done after taking into consideration costs, existing technology, proposed use, logistics and potential adverse consequences . . . in light of the overall project purposes . . . ." Because the No-build alternative would prevent the proposed Project, it is not a practicable alternative.

The evidentiary record also demonstrates that the No-build alternative is not a practicable alternative. In Appendix B-1 to its WQC Application, the Applicant evaluated whether alternative energy sources had the capacity to meet the documented energy need that FERC determined exists, and concluded that there was not efficient alternative energy capacity to meet the need. Mr. Lowry's PFT, ¶ 23a; Exhibit 5 to Mr. Lowry's PFT. The Petitioners had the opportunity to rebut the Applicant's position in the FERC, MEPA and MADEP proceedings, but failed to do so. Additionally, the Petitioners presented no evidence at the Hearing that the proposed Project is unnecessary because there is a sufficient capacity from alternative sources of energy to meet demonstrated energy needs.

The Petitioners also claim that the Applicant failed to adequately evaluate additional infrastructure through a "System Alternatives" analysis, making use of the existing or proposed pipeline. Petitioner's Pre-Hearing Memorandum, at p. 18. A "compression only" alternative was thoroughly reviewed by FERC, which concluded that "[n]o viable alternatives were assessed that would be able to replace the entire proposed Project with increasing compression horsepower only." Mr. Flynn's PFT, ¶ 63; Exhibit 41 to Mr. Flynn's PFT. The Applicant also analyzed the compression alternative in its WQC Application, and concluded that this option

would adversely affect the reliability of the system east and west of the compressor station. Mr. Flynn's PFT, ¶ 64; Exhibit 42 to Mr. Flynn's PFT.

The Petitioners also contend that the Applicant failed to consider using the Northeast Energy Direct Project ("NED") as an alternative to the proposed Project. Petitioners' Pre-Hearing Memorandum, at p. 20, n.14. Specifically, they assert that "at the time that the [WQC] Application was submitted, the Applicant was planning to construct a pipeline loop in Connecticut as part of [the] separate [NED] project . . . to serve two of the same Connecticut utilities." Id. The Petitioners inquired as to "[w]hy . . . this loop [was] not considered [by the Applicant] as an alternative to the Sandisfield[,] [Massachusetts] loop." Id. In response, the Applicant provided rational bases for not considering NED as an alternative: (1) NED had been cancelled as a project; and (2) as noted in the FERC Certificate, NED and the proposed Project have different purposes:

> The Connecticut Expansion Project [was] designed to provide 72,100 [dekatherms] per day of firm transportation service from an interconnection with Iroquois Gas Transmission System, L.P. in Wright, New York, to three LDCs in Hartford County, Connecticut. In contrast, the NED Project [was] designed to provide 751,650 [dekatherms] per day of firm transportation from northern Pennsylvania to New York and New England for multiple shippers.

Mr. Lowry's PFT, ¶ 23d; Exhibit 8 to Mr. Lowry's PFT.

**(2) The Roadway Alternative**

Through Mr. Schweisberg, the Petitioners also claimed that the WQC does not comport with 314 CMR § 4.04(5)(a)2 because the Applicant and the Department rejected the Roadway Alternative, which in the Petitioners' view would have drastically reduced impacts (both temporary and permanent) to wetlands by placing the pipeline within existing local roads. Mr. Schweisberg's PFT, ¶¶ 15-20. According to Mr. Schweisberg, the route approved by the WQC

would cross one waterbody and two wetlands, directly impacting 12.41 acres of wetlands, while the Roadway Alternative would cross two waterbodies, no wetlands, and directly impact less than 1 acre of wetland. Id., ¶ 18.

I do not find Mr. Schweisberg's testimony persuasive because the Roadway Alternative was rejected during the EEA Secretary's MEPA review and FERC's review of the proposed Project. The MEPA Certificate stated that "[t]he Roadway Alternative would use more land and require a larger permanent ROW than the Preferred Alternative, and impact a greater area of forested land." Mr. Lowry's PFT, ¶ 26e; Exhibit 11 to Mr. Lowry's PFT. FERC rejected the Roadway Alternative due to its "increased effects on resources, increased proximity to residences, traffic disruptions, and additional constructability considerations." Mr. Lowry's PFT, ¶ 26e; Exhibit 12 to Mr. Lowry's PFT. Accordingly, it was reasonable for the Applicant and the Department to reject the Roadway Alternative due to the Alternative's "extensive impacts to residences, required forest clearing adjacent to the roadway[,] and disruption to area roadways and the general public during construction." Mr. Lowry's PFT, ¶ 25. I also do not find persuasive Mr. Schweisberg's contention that these reasons were not appropriate factors for the Applicant and the Department to consider in the alternatives analysis under 310 CMR 9.06(1), and I credit Mr. Lowry's testimony that they were appropriate factors to be considered. Mr. Schweisberg's PFT, ¶ 15; Mr. Lowry's PFT, ¶ 25.

As Mr. Lowry pointed out in his testimony, 314 CMR § 9.06(1) provides that "[n]o discharge of dredged or fill material shall be permitted if there is a ***practicable*** alternative to the proposed discharge that would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." (emphasis

supplied). Mr. Lowry's PFT, ¶ 25. As he also pointed out, the word "practicable" is defined by the WQC Regulations at 314 CMR 9.02 as something that is "[a]vailable and capable of being done after taking into consideration" certain factors, including "logistics" and "potential adverse consequences . . . ." Mr. Lowry's PFT, ¶ 25. I find that the factors of "extensive impacts to residences, required forest clearing adjacent to the roadway[,] and disruption to area roadways and the general public during construction" fall well within the parameters of "logistics" and "potential adverse consequences" as set forth in the definition of "practicable" in 314 CMR 9.02. I also find that the Applicant provided adequate proof of these factors to the Department during the WQC review process.

The Applicant submitted detailed information in its WQC Application about the Roadway Alternative, including the safety of constructing near a roadway, impacts on residences, and the extent of tree clearing and impacts near waterbodies. Mr. Lowry's PFT, ¶ 27; Exhibit 13 to Mr. Lowry's PFT; Mr. Lowry's Hearing Testimony, p. 120, lines 4-24; p. 121, lines 1-12. The Applicant's WQC Application demonstrated that the Roadway Alternative would have minimal benefits to the aquatic ecosystem, and would have significant adverse consequences, including safety issues, construction near residences, protracted traffic disruption, and greater land alteration and tree clearing. Id. This was made even clearer by Mr. Flynn's and Mr. Lowry's testimony at the Hearing.

Mr. Flynn compared the Roadway Alternative with the Preferred Route as approved by FERC and adopted in the WQC. Hearing Transcript, at p. 82, lines 2-24; p. 83, lines 1-24; p. 84, lines 1-14. He testified that two pipelines exist along the Preferred Route that are 24 inches and 30 inches wide, respectively. Id., at p. 82, lines 2-11. There is also a third pipeline, 36 inches

wide, that would be extended by the proposed Project. Id., at p. 82, lines 11-17. Mr. Flynn indicated that FERC prefers pipelines being co-located along existing pipelines. Id., at p. 83, lines 12-15.

Mr. Flynn also indicated that the Applicant has easements in area above the pipelines that range from 50 to 75 feet wide. Id., at p. 82, lines 18-21. The Applicant maintains this area, which is used by the public for hiking and snowmobile trails in connection with the Otis State Forest. Id., at p. 82, lines 22-24; p. 83, lines 1-9.

Regarding the Roadway Alternative, Mr. Flynn confirmed that a pipeline does not exist along that area, and, as such, a new pipeline would have to be constructed if the Roadway Alternative was pursued. Id., at p. 84, lines 19-24. The new pipeline corridor would be approximately 100 feet wide and four times greater in width than the existing pipeline corridor because the Applicant would need to make extensive use of the existing ROW. Id., at p. 85, lines 1-8. Construction of a new pipeline along the roadway would require the closing of traffic on that road. Hearing Transcript, at p. 85, lines 9-11. The roadway is a connecting point between various points in Sandisfield, Massachusetts and is one of the major east-west corridors that goes from the start of the proposed Project into Sandisfield. Id., at p. 85, lines 12-17. There are two major highways, Cold Spring Road, and Highway 57, which is further to the south. Id., at p. 85, lines 17-19. As a result, drivers would have to seek alternative driving routes during construction. Id., at p. 85, lines 20-23. Construction will take place "off and on" over the period of about six months. Id., p. 85, line 24; p. 86, lines 1-4.

Mr. Flynn also testified there are no residential homes within 100 feet of the existing pipeline corridor (the Preferred Route), but 12 residential homes abut along the route of the

Roadway Alternative. Id., at p. 86, lines 5-14. Construction of new pipeline along the Roadway Alternative would require the use of heavy equipment that would be kept overnight at the construction site in view of the residences in the area. Id., p. 86, lines 15-24; p. 87, lines 1-4. Construction of the new pipeline within the 100 foot area would also require the clearing of more trees than within the Preferred Route. Id., at p. 87, lines 5-10.

Mr. Lowry corroborated Mr. Flynn's testimony by confirming that "logistically[,] [it is] more difficult to build a brand new pipeline" for a number reasons, including "traffic disruptions" and "[the impact to] residences." Id., at p. 120, lines 11-20. He also indicated that adverse consequences associated with constructing a new pipeline would include safety issues, traffic delays, and road closures. Id., at p. 120, lines 21-24; p. 121, lines 1-5. He also agreed with Mr. Flynn that construction of a new pipeline would require the clearing of more trees than within the Preferred Route. Id., at p. 121, lines 6-12.

In response, the Petitioners did not refute Mr. Flynn's and Mr. Lowry's assertions as discussed above regarding the advantages that the Preferred Route has over the Roadway Alternative. Accordingly, the Petitioners failed to meet their burden of proving that the Department erred in accepting the Preferred Route over the Roadway Alternative in issuing the WQC to the Applicant.

### (3) The USACE's January 15, 2016 Letter

The Petitioners contend that a January 15, 2016 letter of the USACE is evidence of the Applicant having failed to perform a proper alternatives analysis pursuant to 314 CMR 9.06(1). Petitioners' Pre-Hearing Memorandum, at p. 21, n.15. The Petitioners contended that in its letter, "the [USACE] indicated that the Applicant had failed to perform a sufficient alternatives

analysis for Clean Water Act purposes" because "[the Applicant] had not established that there [were] no 'practicable alternative[']to the proposed discharge . . . as required by 314 CMR 9.06(1)." Id. The Petitioners' claims regarding the USACE's letter are without merit.

First, the letter was written five months before the Department's issuance of the WQC to the Applicant in June 2016 and during the period when the Department was still conducting its WQC review of the proposed Project. Also, the letter was the USACE's request to the Applicant for additional information as part the USACE's review of the Applicant's federal CWA Section 404 Permit Application. Mr. Flynn's PFT, ¶ 66; Exhibit 44 to Mr. Flynn's PFT. The Applicant provided this information as part of the Alternatives, Avoidance and Minimization of Impacts Memo attached to its February 15, 2016 Response to Additional Information Request Dated January 6, 2016, which the Applicant submitted to the Department. Mr. Flynn's PFT, ¶ 66; Exhibit 45 to Mr. Flynn's PFT. The Department reviewed the information and found it satisfactory. Mr. Cameron's PFT, ¶ 21.

**(4) The temporary workspace near Cold Spring Road at Spectacle Pond Brook**

Through Mr. Schweisberg, the Petitioners asserted at the Hearing that "it appears entirely practicable for the Applicant to avoid any work in the channel or along the steep bank of Spectacle Pond Brook by using only the west side of the existing dirt road for temporary workspace along this short stretch of the road." Mr. Schweisberg's PFT, ¶ 26. However, as Mr. Lowry pointed out in his testimony, the Applicant is using the existing dirt road as part of its proposed Project. Mr. Lowry's PFT, ¶ 31. The existing dirt access road at issue is depicted in the Applicant's WQC Application as part of the proposed Project's access route and reflects the

existence of Bordering Land Subject to Flooding ("BLSF") in this area. Id.; Exhibit 19 to Mr. Lowry's PFT. Section 6.1.6 of the Applicant's WQC Application states:

> One access road and associated ATWS[31] along with ATWS for hydrostatic testwater withdrawal are located within the flood zones of Spectacle Pond Brook and Lower Spectacle Pond. [The Applicant] is not proposing any improvements to this existing road and has limited the proposed use to rubber tired vehicles and no tandem trailers. No grading or tree felling will occur in any of the ATWS areas located within BLSF. These areas are identified for use by [the Applicant] as required by FERC for access only to Lower Spectacle Pond. Given the temporary nature of the work and the lack of any filling to raise existing grades, no loss of floodplain storage will occur on the existing floodplain.

Mr. Lowry's PFT, ¶ 31; Exhibit 20 to Mr. Lowry's PFT.

**4. In accordance with 314 CMR 4.04(5)(a)3, the Applicant demonstrated that "[t]o the maximum extent feasible, the discharge and activity are designed and conducted to minimize adverse impacts on water quality, including implementation of source reduction practices."**

314 CMR 4.04(5)(a)3 provides that "[t]o the maximum extent feasible, the discharge and activity are designed and conducted to minimize adverse impacts on water quality, including implementation of source reduction practices." Based on Mr. Lowry's testimonial and documentary evidence, I find that the Applicant made this demonstration for the following reasons.

First, the Applicant adjusted workspace to avoid all direct impacts to certified or potential vernal pools. Mr. Lowry's PFT, ¶¶ 34, 35; Exhibit 22 to Mr. Lowry's PFT.

Second, the Applicant reduced the width of the construction area through wetlands and across waterbodies from 100 feet or 125 feet to 75 feet. Mr. Lowry's PFT, ¶¶ 34, 35; Exhibit 23 to Mr. Lowry's PFT. The Applicant also reduced the width of ATWS from 50 feet to 10 feet in

[31] "ATWS" is the acronym for "Additional Temporary Workspace."

several areas, and eliminated ATWS in other areas. Mr. Lowry's PFT, ¶¶ 34, 35; Exhibit 24 to Mr. Lowry's PFT.

Third, the Applicant will phase construction of the proposed Project to minimize disturbed areas, which will be stabilized as quickly as practicable in accordance with Best Management Practices ("BMPs") and permit requirements. Id.

Fourth, recommendations from FERC, the USACE, the Department, the Commonwealth's Department of Conservation and Recreation ("DCR"), and the Sandisfield Conservation Commission ("SCC") have been incorporated into the proposed Project to avoid and minimize any adverse impacts on water quality to the greatest extent practicable. Mr. Lowry's PFT, ¶¶ 34, 35. Specifically, the Applicant has incorporated workspace modifications, construction methodologies, timing restrictions, and mitigation and monitoring recommendations. Id. The Applicant thoroughly evaluated alternatives to select the least environmentally damaging practicable alternative and committed to mitigation measures to compensate for all unavoidable impacts, including in-situ restoration of temporary impact areas, stream restoration/daylighting, and wetland creation/enhancement and land preservation at the Fales site. Id.

Mr. Lowry also effectively refuted the Petitioners' claim, made through Mr. Schweisberg, that the Applicant failed to address indirect impacts of the proposed Project. Mr. Lowry's PFT, ¶¶ 36-38.

First, as discussed above the proposed Project will be collocated (set side by side) next to two existing underground natural gas pipelines. A primary purpose and benefit of collocating a pipeline is to avoid indirect impacts; collocation avoids and minimizes indirect impacts because

those indirect impacts would have already occurred during the construction of the earlier installed pipelines. Mr. Lowry's PFT, ¶ 36.

Second, the Applicant disclosed all temporary and permanent impacts from the proposed Project's activities in its WQC Application materials, including the Final Compensatory Wetland Mitigation Plan. Mr. Lowry's PFT, ¶ 37, Exhibit 25 to Mr. Lowry's PFT. In addition, on February 15, 2016, the Applicant provided the USACE and the Department with a completed Linear Project Pivot Table, which included the secondary impact calculations used by the USACE to assess the proposed Project's impacts and determine the required mitigation. Mr. Lowry's PFT, ¶ 38, Exhibit 26 to Mr. Lowry's PFT. These impacts have been categorized and disclosed in accordance with requests and directives of both the USACE and the Department, and are fully consistent with regulatory standards and associated guidance. Mr. Lowry's PFT, ¶ 37.

Mr. Lowry also refuted Mr. Schweisberg's contention that the Applicant failed to address indirect impacts to 18 vernal pools along the pipeline corridor. Mr. Lowry's PFT, ¶ 39. As discussed above, the Applicant addressed all potential impacts in both the impact and mitigation assessments, and the proposed Project will have no impact on any vernal pool along the pipeline corridor. Mr. Lowry's PFT, ¶ 39; Exhibit 27 to Mr. Lowry's PFT. Additionally, most of the vernal pool habitat identified along the pipeline corridor is located within the actively managed portion of the right of way, which indicates that conditions along the right of way are compatible with the preservation of vernal pool functions and values. Mr. Lowry's PFT, ¶ 39; Exhibit 28 to Mr. Lowry's PFT. The Applicant's Final Compensatory Wetland Mitigation Plan also demonstrates that the Project is designed to, and does avoid, impacts to all vernal pools (both

certified and non-certified vernal pools). Mr. Flynn's PFT, ¶ 36; Exhibit 53 to Mr. Flynn's PFT. This Plan also demonstrates that the Petitioners are incorrect in their assertion that the proposed Project does not have sufficient erosion control measures. Mr. Lowry's PFT, ¶ 40. The Plan included erosion controls in compliance with the MEPA approved mitigation measures, and FERC Plan and Procedures. Id.

Mr. Lowery also effectively refuted Mr. Schweisberg's contention that the Applicant failed to develop plans to prevent or minimize the potential for adverse water quality impacts to Spectacle Pond Brook. Mr. Lowry's PFT, ¶¶ 40-41. Mr. Lowry demonstrated that the Applicant did develop plans that minimize adverse impacts on water quality for the following reasons. Id.

First, as indicated in the BMPs, the location of the test water dewatering structure was specifically chosen so that flows will radiate out and overland to the southwest, south, southeast, and east toward Spectacle Pond Brook, primarily through mature forested cover. Mr. Lowry's PFT, ¶ 41; Exhibit 29 to Mr. Lowry's PFT.

Second, this discharge will not flow over the recently disturbed pipeline area. Id.

Third, BMPs will be applied to the discharge area to dissipate the velocity of the discharged water and to disperse the flow overland at a rate compatible with the vegetated surface of the ground without causing surface scour or erosion. Mr. Lowry's PFT, ¶ 41; Exhibit 30 to Mr. Lowry's PFT. Most of the water is expected to disperse laterally through the root zone of the mature forest prior to reaching Spectacle Pond Brook or other surface waters. Id. This forested overland flow and shallow root zone lateral interflow will also maintain or reduce the temperature of the water. Mr. Lowry's PFT, ¶ 41.

Lastly, the application of BMPs to control erosion and sedimentation is standard practice

to address potential concerns related to such activities. Mr. Lowry's PFT, ¶ 41. Additionally, an environmental monitor will be on-site to inspect the dewatering discharge and direct the application of additional controls as necessary. Id.

**5. In accordance with 314 CMR 4.04(5)(a)4 and 4.05, the Applicant demonstrated that "the discharge will not impair existing water uses and will not result in a level of water quality less than that specified for the Class [of surface water impacted by the WQC (Class B as set forth in 314 CMR 4.05(3)(b)]."**

314 CMR 4.04(5)(a)4 requires that "[t]he discharge will not impair existing water uses and will not result in a level of water quality less than that for the Class [of surface water impacted by the WQC (Class B as set forth in 314 CMR 4.05(3)(b))]." As defined in 314 CMR 4.05(3)(b), Class B High Quality Waters are "designated as a habitat for fish, other aquatic life or wildlife, including for their reproduction, migration, growth and other critical functions, and for primary and secondary contract recreation [i.e., swimming, fishing, and boating]." It is undisputed that Condition 7 of the WQC recognizes that certain waterbodies and wetlands are appropriately classified as Class B High Quality Waters, and imposes upon the Applicant the obligation of "reasonable care and diligence ... to assure that the proposed activity will be conducted in a manner that will avoid violations of these [SWQ] Standards." See also, Mr. Lowry's PFT ¶ 43; Exhibit 31 to Mr. Lowry's PFT. Based on the testimonial and the documentary evidence presented by the parties, I find that the Applicant demonstrated that the proposed Project's discharge will not impair existing water uses or result in a water quality less than that specified for Class B waters, for the following reasons.

First, the Applicant has agreed to multiple measures, procedures, construction techniques, reporting, and BMPs that will be employed to maintain and protect surface water quality during

the course of the proposed Project. Mr. Lowry's PFT ¶¶ 44-45. These measures have been largely incorporated into the WQC, as evidenced by the Conditions involving Site Stabilization (Condition 17) and Compliance Monitoring (Condition 20) for the Project activities. Id.; Exhibit 31 to Mr. Lowry's PFT. Moreover, detailed procedures are included to prevent or minimize adverse water quality impacts during the discharge of the hydrostatic test waters. Id.; Exhibit 33 to Mr. Lowry's PFT. As a result of these measures, Mr. Lowry testified that "[b]ased upon [his] experience and review of the record, in [his] opinion, the above measures, procedures, construction techniques, and BMPs will ensure that the Project will not impair the reproduction, growth, or other critical functions of fish or aquatic life or wildlife, and will not impair the use of waters for any primary or secondary contact recreation." Mr. Lowry's PFT ¶ 44.

I also note for the record the Department's position that, while the proposed Project will result in a limited degradation, it does not have the potential to cause any significant lowering of water quality. Mr. Cameron's PFT ¶ 24. The Department further maintains that the WQC is conditioned to ensure that the dredge and fill discharge will not impair existing water use and will not result in a level of water quality less than Class B through the application of the performance standards of 314 CMR 9.00. Mr. Foulis's PFT ¶¶ 16-18; See also Mr. Lowry's PFT, ¶¶ 44-49 (summary of measures).

Through Mr. Schweisberg, the Petitioners contended that the WQC does not satisfy 314 CMR 4.04(5)(a)4 because the requirement in Condition 7 of the WQC imposing upon the Applicant the obligation of "reasonable care and diligence ... to assure that the proposed activity will be conducted in a manner that will avoid violations of [the SWQ] Standards" is meaningless and unenforceable. Mr. Schweisberg's PFT, ¶¶ 46-48. Mr. Schweisberg's contention is without

merit as evidenced by the fact that the Department employs a reasonableness standard throughout the SWQ Standards at 314 CMR 4.00. See, e.g., 314 CMR 4.03(1)(a), 4.05(5)(c), 4.05(5)(e)2, 4.06(1)(d)1. Additionally, he ignored the fact that the WQC and the Applicant's WQC Application have numerous procedures, BMPs, monitoring, reporting, and associated safeguards to protect and maintain surface water quality. Mr. Lowry's PFT, ¶ 45. As Mr. Lowry pointed out in his testimony, the WQC has numerous specific Site Stabilization and Compliance Monitoring conditions with which the proposed Project must comply. Id.; Exhibit 32 to Mr. Lowry's PFT. Detailed procedures are included to prevent or minimize adverse water quality impacts during the discharge of the hydrostatic test waters. Id.; Exhibit 33 to Mr. Lowry's PFT. Given these measures and procedures that the Applicant is required to employ for the maintenance and protection of water quality, Mr. Lowry concluded that the existing uses of the surface waters will also be protected and maintained per the antidegradation provisions at 314 CMR 4.04(1) and (2). Id.

**6. In accordance with 314 CMR 4.05(3)(b)2, the Applicant demonstrated that the discharge authorized by the WQC will comport with the regulation's water temperature requirements.**

314 CMR 4.05(3)(b)2 provides that a discharge into Class B Coldwater Fisheries may not raise the temperature more than 3 degrees Fahrenheit in rivers and streams designated as cold water fisheries and no more than 5 degrees Fahrenheit in rivers and streams designated as warm water fisheries. Based on the testimonial and the documentary evidence presented by the parties, I find that the Applicant demonstrated that the discharge authorized by the WQC will comport with the water temperature requirements of 314 CMR 4.05(3)(b)2 for the following reasons.

First, at the Hearing, the Petitioner offered no evidence that the proposed Project will

cause an increase in the water temperature of Class B Coldwater Fisheries by more than 3 degrees Fahrenheit, or 5 degrees Fahrenheit in warm water fisheries. The Petitioners' expert witness, Mr. Schweisberg, simply opined that the proposed Project could "potentially" impact water temperature. Mr. Schweisberg's PFT, ¶¶ 24, 49-50. He also did not offer any evidentiary support for his position, and he admitted on cross-examination at the Hearing that he had not conducted any modeling to determine if there would, in fact, be an increase in water temperature. Hearing Transcript, at p. 47, lines 19-24; p. 48, lines 1-8.

In contrast, the Applicant's expert witness, Mr. Lowry provided persuasive testimony that the discharge authorized by the WQC will comply with the requirements of 314 CMR 4.05(3)(b)2 because:

(1) there will be no discharges which will create a measurable impact on the thermal conditions of the waterbodies crossed by the proposed Project;

(2) all fill material will be temporary and will be removed; and

(3) the stream substrates will be returned to their pre-existing conditions upon completion of the crossing.

Mr. Lowry's PFT, ¶ 48; Exhibit 36 to Mr. Lowry's PFT. Mr. Lowry's testimony is also persuasive because during the EEA Secretary's MEPA review of the proposed Project, the Applicant in its FEIR Submission evaluated potential thermal warming and concluded that any impacts to fisheries would be minimized and temporary. Mr. Flynn's PFT, ¶ 73; Exhibit 50 to Mr. Flynn's PFT. Additionally, during its review of the proposed Project, FERC found in the EA that a "25-foot-wide riparian strip . . . would limit long term loss of riparian vegetation, and

therefore, the potential for warming of coldwater streams." Mr. Flynn's PFT, ¶ 74; Exhibit 51 to Mr. Flynn's PFT.

The Petitioners, through Mr. Schweisberg, also contended that the proposed Project does not comport with the water temperature requirements of 314 CMR 4.05(3)(b)2 because "[a]ny tree or shrub clearing in or along the Spectacle Pond Brook corridor would permit more sunlight to reach the Brook's waters, potentially raising water temperature within the Brook," and that "vegetation clearing, along the steep bank of [the] Brook just below the culvert under Cold Spring Road would likely lead to water temperature impacts to the Brook and, possibly, to the Clam River downstream." Mr. Schweisberg's PFT, ¶¶ 24, 49. The Petitioners' claims are without merit based on Mr. Lowry's persuasive testimony.

Mr. Lowry testified that the proposed Project will not have a measurable impact on water temperature because:

(1) the Project minimizes tree clearing along Spectacle Pond Brook to the greatest extent practicable;

(2) tree clearing will extend only 25 feet off of the existing pipeline right of way;

(3) due to the slope, orientation, and short water residence time for surface water flowing in the Spectacle Pond Brook at this location, detectable changes in temperature will be minimal and insignificant; and

(4) the Project will minimize any temporary effect on water temperature resulting from the temporary removal of trees by reducing workspace width, removing existing culverts within multiple streams, and replanting vegetation within the temporary workspace, within 10 feet of the Project centerline, and along stream banks.

Mr. Lowry's PFT ¶ 49. For these reasons, Mr. Lowry concluded that the permanent removal of small trees will not raise the temperature above the parameters required by 314 CMR

4.05(3)(b)2, and temperatures will remain within the range necessary for the continued Class B designation because of the slope of the terrain, the orientation of the pipeline and the resulting shadows, existing tree canopy cover directly adjacent to the cleared area (and elsewhere within the watershed), and the replacement of trees and shrubs. Id.

Mr. Lowry also effectively refuted Mr. Schweisberg's unsupported testimony that hydrostatic testing may impact the water temperature of Spectacle Pond Brook. Mr. Schweisberg's PFT ¶ 48; Mr. Lowry's PFT, ¶ 50. Mr. Lowry testified that hydrostatic testing water discharge will not increase water temperatures because the discharge will be to an upland area approximately 600 feet from Spectacle Pond Brook, and further from other surface waters it may flow overland toward. Mr. Lowry's PFT, ¶ 50. Additionally, the Project will utilize BMPs to dissipate the velocity of the discharged water and to disperse the flow overland at a rate compatible with the vegetated surface of the ground without causing surface scour or erosion. Id.; Exhibit 39 to Mr. Lowry's PFT.

Mr. Lowry also testified that the vast majority of the water will disperse laterally through the root zone of the mature forest and infiltrate the ground prior to reaching Spectacle Pond Brook. Mr. Lowry's PFT, ¶ 51. This forested overland flow and shallow root-zone lateral interflow will maintain or reduce the temperature of the water. Id. To further minimize any potential temperature change, the hydrostatic testing water will be withdrawn from Lower Spectacle Pond, which is the headwater of Spectacle Pond Brook. Id. Lastly, the Applicant will monitor the temperature in Spectacle Pond Brook in accordance with the U.S. Environmental

Protection Agency's Remediation General Permit for hydrostatic discharge. Mr. Lowry's PFT, ¶ 52.

### B. The Department Issued The WQC In Compliance With The Applicable Provisions Of 314 CMR § 9.00.

At the Hearing, the Petitioners contended that the WQC failed to comply with a number of provisions of 314 CMR 9.00, as discussed below. However, based upon the testimonial and documentary evidence, I find that the Petitioners' assertions lack merit and that the Department's issuance of the WQC fully complies with the applicable provisions of 314 CMR 9.00.

#### 1. The Applicant was not required to publish a public notice of its WQC Application in the Environmental Monitor pursuant to 314 CMR 9.05(3) because the proposed Project does not involve any discharge into Outstanding Resource Waters.

The Environmental Monitor is an EEA publication that "provides information on projects under review by [EEA's MEPA] office, recent MEPA decisions of the [EEA] Secretary[,] . . . and public notices from environmental agencies."[32] The Petitioners asserted at the Hearing that "[t]he Applicant failed to provide Notice [of the proposed Project] in the Environmental Monitor, and should have been required to do so pursuant to 314 CMR 9.05(3), as the [proposed] Project proposes discharges within Vernal Pools and their habitat, which are classified as Outstanding Resource Waters." Petitioners' Appeal Notice, ¶ 36.

The provisions of 314 CMR 9.05(3) state, in pertinent part, that "[a] person submitting an application for the discharge of dredged or fill material to, or dredging within, an Outstanding Resource Water shall also publish a notice in the Environmental Monitor, and the 21 day time

[32] http://web1.env.state.ma.us/EEA/emepa/emonitor.aspx.

period within which the public may comment shall extend from the later of the date of publication of the newspaper or Environmental Monitor notice." As noted by the Applicant's expert witness, Mr. Lowry, in his PFT at ¶¶ 57-60, this provision of the regulations regarding public notice is inapplicable to the proposed Project because the Project does not involve any discharges into an Outstanding Resource Water. Moreover, as further described by Mr. Lowry in his testimony, to the extent that there is one certified vernal pool located within the vicinity of the proposed Project area (certified vernal pools are classified as an Outstanding Resource Area pursuant to 314 CMR 4.06(2)), this certified vernal pool is not within the Project work area, and there will be no discharge impacting this pool. Mr. Lowry's PFT, ¶ 60; Exhibit 41 to Mr. Lowry's PFT. The Department agrees with the Applicant's position, and the Petitioners have failed to present any testimony or documentary evidence to the contrary. Accordingly, Petitioners have failed to prevail on their claim that the WQC was issued in violation of 314 CMR 9.05(3).

**2. As required by 314 CMR 9.06(1), the Applicant demonstrated that there is no practicable alternative to the proposed discharge authorized by the WQC to Bordering Vegetative Wetlands (BVW), Isolated Vegetated Wetlands (IVW), and Land Under Water (LUW) that would have less adverse impact on the aquatic ecosystem.**

The Petitioners asserted at the Hearing that "[t]he [proposed] Project fails to satisfy the criteria set forth at 314 CMR 9.06(1) and 9.07(1), as there are practicable alternatives to the proposed discharge to BVW, IVW and LUW, and dredging of LUW, that would have less adverse impact on the aquatic ecosystem without other significant adverse environmental consequences." Petitioners' Appeal Notice, ¶ 41. The Petitioners' claim is without merit.

The issue of whether the proposed Project underwent a proper alternatives analysis under

314 CMR 9.06(1) was discussed above, at pp. 44-57, in connection with the discussion of whether the Project comports with the requirements of 314 CMR 4.04(5)(a)(2). As discussed above, the testimonial and documentary evidence demonstrated that a proper alternatives analysis of the proposed Project was performed pursuant to 314 CMR 9.06(1).

As for 314 CMR 9.07(1), this regulation provides that "[n]o dredging shall be permitted if there is a practicable alternative that would have less impact on the aquatic system." Both the Applicant and the Department assert, and have supported through expert testimony, that the provisions of 314 CMR 9.07(1) are inapplicable to the proposed Project because the Project does not involve dredging that encompasses more than 100 cubic yards, and consequently does not meet the definition of "dredging" as set forth in this regulation. Mr. Flynn's PFT, ¶ 78; Mr. Lowry's PFT, ¶ 63; Mr. Foulis's PFT, ¶ 29. The Petitioners have presented no testimonial or documentary evidence to the contrary. Therefore, I find, based upon the undisputed testimony and evidence presented, that 314 CMR 9.07(1) is inapplicable to the proposed Project.

### 3. As required by 314 CMR 9.06(1), the Applicant demonstrated that it took appropriate and practicable steps to avoid and minimize potential adverse impacts to BVW, IVW, and LUW.

The Petitioners asserted at the Hearing that "the Project fails to satisfy the criteria set forth at 314 CMR 9.06(2) and 9.07(1)" because "[t]he Applicant did not take 'appropriate and practicable steps' to avoid and minimize potential adverse impacts to BV W, IVW and LUW[.]" Petitioners' Appeal Notice, ¶ 42. The Petitioners' claim is without merit.

As noted above, the provisions of 314 CMR 9.07(1) are inapplicable to the proposed Project because the Project does not involve dredging that encompasses more than 100 cubic yards. With respect to the provisions of 314 CMR 9.06(1), which are applicable to the proposed

Project, the provisions required the Applicant to demonstrate that it has undertaken appropriate and practicable steps to avoid and minimize potential adverse Project impacts to BVW, IVW, and LUW. Based upon the testimonial and the documentary evidence, I find that the Applicant made this demonstration for the following reasons.

As noted by the Department, the Applicant was required to undertake extensive efforts to avoid, minimize, or mitigate potential adverse resource area impacts through the implementation of extensive BMPs for the proposed Project, together with the incorporation of a "Final Compensatory Mitigation Plan," or FCMP, into the conditions of the WQC. Mr. Foulis's PFT, ¶¶ 36-48. As reflected more comprehensively in the WQC conditions, the Applicant, in collaboration with the Department, committed to extensive mitigation measures to address potential adverse temporary and permanent impacts to BVW, IVW, and LUW resulting from Project activities, which include (but are not limited to) the following:

(1) Extensive Site Stabilization Conditions (WQC Conditions 16-19); Mr. Foulis's PFT, ¶¶ 31-39. These conditions include comprehensive erosion and sedimentation controls, precise placement of excavated soils to minimize erosion/maintain stabilization during work activities, a construction sequencing plan that comports with USEPA NPDES Best Management practices, and the preservation, to the extent reasonable, of tree roots and stumps in BVW/IVW to encourage re-establishment of woody vegetation at the conclusion of the Project. See also Mr. Lowry's PFT, ¶ 64.

(2) The *In Situ* Restoration of BVW/IVW both in areas of No Temporal Loss and Temporal Loss as a result of Project Activities (WQC Conditions 24-28). As noted in the WQC

itself, these extensive *in situ* restoration activities are based upon the Applicant's FCMP commitments.

(3) Detailed off-Site restoration and enhancement of BVW/IVW at the Fales Site (WQC Conditions 29-33, 35-38). As noted by Mr. Foulis in his testimony, these WQC conditions contain extensive requirements for the creation, enhancement and monitoring of these wetlands located on the Fales property, which is off-Site from the Project Right-Of-Way. Hearing Transcript, at p. 156, lines 8-12. These mitigation measures are to compensate for permanent impacts associated with the proposed Project, and include replication areas that exceed the 1:1 replication requirements of the Department's regulations at 314 CMR 9.06(2). Hearing Transcript, at p. 155, lines 6-18; Mr. Lowry's PFT ¶ 65.

(4) The Transfer and Permanent Preservation of the 35.7 Acre Fales Property to Department of Conservation and Recreation (WQC Condition 34). This property transfer to DCR is also pursuant to the Applicant's FCMP. As noted by Mr. Lowry in his testimony, the Fales property preservation plan (including the replication elements) more than adequately compensates for the temporal loss of wetlands forest during the re-growth process, as well as other temporary project impacts. Mr. Lowry's PFT ¶ 65; See also, Mr. Foulis's PFT ¶ 44.

(5) Mitigation for LUW Project Activities (WQC Conditions 39-44). These WQC conditions impose stringent seasonal time period limitations and other construction restrictions upon the Applicant in connection with LUW activities in order to minimize potential adverse impacts. Furthermore, as mitigation for proposed Project activities that will impact LUW, the Applicant has committed to "daylighting" three streams by removing culverts that have failed or are undersized in order to maximize aquatic habitat corridor movements in these three water

bodies, which include Spectacle Pond Brook, a noted cold-water fishery. Mr. Lowry's PFT ¶ 65; Hearing Transcript, at p. 117, lines 3-24; Mr. Foulis's PFT, ¶ 43; See also, WQC Finding pursuant to M.G.L c. 30, section 61 (MEPA), p. 2, section IV Project Mitigation Measures ("[T]hree culverted stream reaches, including Spectacle Pond Brook, a cold-water fishery, will be permanently daylighted and restored as additional compensation for the aquatic ecosystem.")

The Petitioners' response to the Applicant's proposed mitigation measures was contained primarily in Mr. Schweisberg's testimony, who provided a generalized criticism of both the proposed Project construction activities in the wetlands and the Project's proposed mitigation measures. See Mr. Schweisberg's PFT ¶¶ 58-64. The Petitioners' most specific claim regarding the inadequacy of the proposed Project mitigation measures was to assert that the Project blasting plan is insufficient. Mr. Schweisberg's PFT ¶¶ 65-68. However, as noted by Mr. Flynn in his testimony, the blasting plan was thoroughly reviewed and approved during the FERC proceedings, and DCR also confirmed upon review that it "adequately protects environmental resources." Mr. Flynn's PFT ¶ 79; Exhibit 64 to Mr. Flynn's PFT. Moreover, as Mr. Lowry testified, the Applicant's blasting plan will utilize special trench-type explosives, prohibit the use of perchlorates or ammonium nitrate fuel oil, and, in addition, will ensure that all applicable permits are obtained and that blasting standards will meet or exceed applicable federal state and local requirements. Mr. Lowry's PFT ¶ 67.

Based upon the testimonial and documentary evidence, including the WQC Conditions regarding mitigation measures, and the failure of the Petitioners to present evidence effectively refuting the adequacy of the mitigation measures enumerated above, I find that the Applicant

demonstrated that it took appropriate and practicable steps to avoid and minimize potential adverse impacts to BCVW, IVW, and LUW in accordance with 314 CMR 9.06(1).

**4. The provisions of 314 CMR 9.06(2)(b)1 and (2)(b)2, and 9.07(1) are inapplicable to the proposed Project, because the Steam Crossing Standards required by these regulations only apply to permanent bridges or culverts, which are not part of the Project.**

Through Mr. Schweisberg, the Petitioners contended at the Hearing that the Steam Crossing Standards as set forth in 314 CMR 9.06(2)(b)1 and (2)(b)2, and 9.07(1) are applicable to the proposed Project. Mr. Schweisberg's PFT, ¶ 70. The Petitioners' claim is without merit for the following reasons.

First, as noted above, the provisions of 314 CMR 9.07(1) are inapplicable to the proposed Project because the Project does not involve dredging that encompasses more than 100 cubic yards.

Second, the Stream Crossing Standards only apply to construction of permanent stream crossings (i.e., bridges and culverts, or tidal crossings). See Massachusetts Stream Crossing Handbook, Division of Ecological Restoration, p. 1 (2nd Ed. 2012; identifying stream crossings as "culverts and bridges").[33] Both the Applicant and the Department assert, and have supported through testimonial and documentary evidence, that the Stream Crossing Standards are inapplicable to the proposed Project because there are no stream crossings associated with the proposed work activities. Mr. Lowry's PFT ¶ 68; Mr. Foulis's PFT ¶ 50; Mr. Flynn's PFT ¶ 82. Although he asserted in his PFT that the proposed Project included stream crossings (Mr. Schweisberg's PFT ¶¶ 70-72), at the Hearing Mr. Schweisberg conceded during cross-

[33] The Massachusetts Stream Crossing Handbook was adopted by the Department pursuant to the Wetlands Regulations at 310 CMR 10.000 et seq.

examination that the Project does not authorize and permanent bridges or culverts. Hearing Transcript, at p. 49, lines 21-24; p. 50, lines 1-2.

**5. The provisions of 314 CMR 9.06(3) are inapplicable to the proposed Project because there is no discharge of dredged or fill material into Outstanding Resource Waters.**

The provisions of 314 CMR 9.06(3), in pertinent part, prohibit the "discharge of dredged or fill material . . . to Outstanding Resource Waters." As noted above, at pp. 67-68, there are no discharges into Outstanding Resource Waters associated with the proposed Project. Accordingly, I find that 314 CMR 9.06(3) is inapplicable to the proposed Project. This finding is supported by Mr. Lowry's testimony. Mr. Lowry's PFT ¶ 72. The Petitioners' expert, Mr. Schweisberg, failed to address the provisions of 314 CMR 9.06(3) in any of his testimony.

**6. The provisions of 314 CMR 9.06(5) and 9.06(6) governing Stormwater Management Standards are inapplicable to this Project.**

The Petitioners asserted at the Hearing that "[t]he [proposed] Project fails to satisfy the criteria set forth at 314 CMR 9.06(5) and 9.06(6), . . . as the [WQC] does not require best management practices to attenuate pollutants and provide setbacks from receiving waters or wetlands in accordance with the Stormwater Management Standards." Petitioners' Appeal Notice, ¶ 45. The Petitioners' claim is without merit.

The provisions of 314 CMR 9.06(5) and 9.06(6) generally prohibit stormwater discharges from Projects, and require applicants to comply with the Department's Stormwater Management Standards. As noted by both the Applicant and the Department through their expert testimony, the Stormwater Management Standards do not apply to the proposed Project, because the WQC does not authorize stormwater management systems, stormwater outfall or stormwater discharge from a point source. Mr. Lowry's PFT ¶ 73; Mr. Foulis's PFT ¶ 56. The Applicant's and the

Department's respective witnesses also testified that the proposed Project does not involve or authorize stormwater discharges, stormwater management systems or stormwater outfall. Mr. Lowry's PFT ¶ 75; Mr. Foulis's PFT ¶ 56. The Petitioners' expert, Mr. Schweisberg, failed to address the provisions of 314 CMR 9.06(5) or 9.06(6) in any of his testimony. For these reasons, I find that the provisions of 314 CMR 9.06(5) and 9.06(6) are inapplicable to the Project, and the Petitioners have failed to prevail on this issue.

### C. Condition 15 of the WQC Must Be Modified to Comport with the Requirements of 314 CMR 9.09(1)(e).

Condition 15 of the WQC provides that "[n]o work subject to [the WQC], including the cutting of trees, may be conducted prior to the expiration of the Appeal Period [to appeal the WQC to OADR] ***and any appeal proceedings that may result from an appeal [to OADR].***" WQC, at p. 6 (emphasis supplied). The Applicant contends that the Department lacked authority under federal and Massachusetts law to impose Condition 15 in the WQC, and as such, Condition 15 should be stricken in its entirety from the WQC. Applicant's Pre-Hearing Memorandum, at pp. 48-53; Applicant's Post-Hearing Memorandum, at pp. 17-18.

As discussed in more detail below, I disagree with the Applicant that Condition 15 should be stricken in its entirety. Instead, I find that highlighted language above in Condition 15 should be stricken and replaced with the language "or until a final decision is issued by the Department if an appeal is filed" in order to conform Condition 15 to the language of 314 CMR 9.09(1)(e), which provides that "[n]o activity [authorized by a WQC] may begin prior to the expiration of the appeal period [to appeal the WQC to OADR] or until a final decision is issued by the Department if an appeal is filed." This modification also reflects the Department's concession at

the Hearing that the highlighted language above in Condition 15 "should not be part of the final WQC issued in this matter." Department's Pre-Hearing Memorandum, at p. 27.

**1. The NGA does not prohibit the Department from staying the Applicant's construction of the proposed Project during the pendency of the Petitioners' appeal before OADR and until the Department's Commissioner issues a Final Decision in the appeal.**

The Applicant contends that Condition 15 should be stricken in its entirety because "[the] NGA Section 717r(c) prohibits [or preempts] MADEP from staying construction during any appeal of the WQC." Applicant's Pre-Hearing Memorandum, at pp. 50-51. The Applicant's claim is without merit because "[t]he [NGA] preempts state environmental regulation of interstate natural gas facilities, ***except for state action taken under*** those statutes specifically mentioned in the [NGA]: the Coastal Zone Management Act, the Clean Air Act, and ***the Clean Water Act.***" Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot., 833 F.3d 360, 372 (3rd Cir. 2016) (emphasis supplied). Rather, the NGA at 15 U.S.C. § 717b(d) expressly states that "nothing in this chapter affects the rights of States under the" Clean Water Act. Pursuant to Section 401 of the Clean Water Act, "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate." 33 U.S.C. § 1341(a)(1); See also Tenn. Gas Pipeline Co. LLC v. Del. Riverkeeper Network, 921 F. Supp. 2d 381 (M.D. Pa. 2013).

**2. The provisions of 314 CMR 9.09(1)(e) authorize the Department to stay the Applicant's construction of the proposed Project during the pendency of the Petitioners' appeal before OADR and until the Department's Commissioner issues a Final Decision in the appeal.**

As discussed above, 314 CMR 9.09(1)(e) provides that "[n]o activity [authorized by a

WQC] may begin prior to the expiration of the appeal period [to appeal the WQC to OADR] or until a final decision is issued by the Department if an appeal is filed." The Applicant contends that "[c]ontrary to the plain and unambiguous terms of this regulation" Condition 15 states that "[n]o work subject to [the WQC], including the cutting of trees, may be conducted prior to the expiration of the Appeal Period [to appeal the WQC to OADR] ***and any appeal proceedings that may result from an appeal [to OADR].***" (emphasis supplied). Applicant's Pre-Hearing Memorandum, at p. 52; Applicant's Post-Hearing Memorandum, at pp. 17-18. WQC, at p. 6 (emphasis supplied). The Applicant contends that "[b]y purporting to prohibit all construction activity not just until MADEP issues a final decision on the WQC, but also until the First Circuit decides any subsequent appeal of the WQC, Condition 15 greatly exceeds the scope of 314 CMR § 9.09(1)(e) . . . ." Applicant's Pre-Hearing Memorandum, at p. 52. It appears that the Department has conceded that the Applicant's contention has merit because at the Hearing, the Department took the position that the language in Condition 15 that I highlighted above "should not be part of the final WQC issued in this matter." Department's Pre-Hearing Memorandum, at p. 27. Accordingly, in order to conform Condition 15 to the requirements of 314 CMR 9.09(1)(e), the highlighted language in Condition 15 should be stricken and replaced with the language "or until a final decision is issued by the Department if an appeal is filed."

**3. The Department's Commissioner's Final Decision in this appeal encompasses the period during which the Final Decision is subject to a Motion for Reconsideration of the Final Decision pursuant to 310 CMR 1.01(14)(d) and G.L. c. 30A, § 14(1).**

The Adjudicatory Proceedings Rules at 310 CMR 1.01 govern resolution of administrative appeals by OADR and the Department's Commissioner, including the resolution of this appeal. 310 CMR 1.01(1)(a). Under 310 CMR 1.01(14)(b), "[e]very final decision [in an

administrative appeal] shall be in writing and shall be signed by the [Department's] Commissioner or a designee of the Commissioner. . . . A final decision may adopt, modify, or reject a recommended [final] decision [of a Presiding Officer] . . . ."

After the Commissioner issues his Final Decision, a party to the appeal may file a motion for reconsideration with OADR pursuant to 310 CMR 1.01(14)(d) requesting that the Commissioner reconsider his Final Decision on the ground that it was based "[on] a finding of fact or ruling of law[,] . . . which . . . is clearly erroneous . . . ." The motion for reconsideration must be filed within seven business days of the issuance of the Final Decision. 310 CMR 1.01(14)(d). "The filing of a motion for reconsideration is not required to exhaust administrative remedies" before the Department, meaning that a party may proceed directly to court to seek judicial review of the Commissioner's Final Decision. Id.; 310 CMR 1.01(14)(f).

Generally, the Massachusetts Superior Court has jurisdiction under G.L. c. 30A, § 14 to conduct judicial review of the Commissioner's Final Decisions. The statute provides that "[e]xcept so far as any provision of law expressly precludes judicial review, any person or appointing authority aggrieved by a final decision of any agency in an adjudicatory proceeding, whether such decision is affirmative or negative in form, shall be entitled to a judicial review [in Massachusetts Superior Court]." The statute requires the action for judicial review "[to] be commenced in [Superior] [C]ourt within thirty days after receipt of notice of the final decision of the agency or if a petition for rehearing has been timely filed with the agency, within thirty days after receipt of notice of agency denial of such petition for rehearing." G.L. c. 30A, § 14(1). Hence, a timely motion under 310 CMR 1.01(14)(d) seeking reconsideration of a Commissioner's Final Decision tolls the 30 day appeal period to Superior Court under G.L.

c. 30A, § 14(1). Id. However, under G.L. c. 30A, § 14(3), "[t]he commencement of an action [for judicial review in Superior Court] shall not operate as a stay of enforcement of the agency['s] [final] decision, but the agency may stay enforcement, and the reviewing court may order a stay upon such terms as it considers proper."

Here, it is undisputed that the First Circuit, not the Superior Court, has the authority to conduct a judicial review of the Commissioner's Final Decision in this appeal pursuant to the NGA, 15 U.S.C. § 717r(d)(1). The statute, however, does not set forth a jurisdictional time limit for seeking judicial review of a state agency order with a U.S. Court of Appeals. The U.S. Supreme Court has held that, where a federal statute lacks a time limit for a petitioner to file for the review of an agency order in federal court, courts will "borrow" the most closely analogous state provision. See, e.g., DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 158 (1983). ("[Where a federal statute lacks a limitations provision], we do not ordinarily assume that Congress intended that there be no time limit on actions at all; rather, our task is to 'borrow' the most suitable statute or other rule of timeliness from some other source. We have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law").

In the First Circuit proceedings that just concluded, the parties disagreed regarding what the time limit should be for filing a complaint for judicial review with the First Circuit following issuance of the Commissioner's Final Decision. The Petitioners contended that a 60 day limitations period under the NGA, 15 U.S.C. § 717r(b) seeking judicial review of FERC decisions applied,[34] while the Applicant and the Department contended that the 30 day period of

[34] Petitioners' First Circuit Brief, at pp. 4-5.

G.L. c. 30A, § 14(1) discussed above should apply.[35] I agree with the Applicant and the Department that the 30 day time limit of G.L. c. 30A, § 14(1) should apply because it is "the most closely analogous statute of limitations under state law." DelCostello, supra. Thus, if any party to this appeal files a timely motion for reconsideration of the Commissioner's Final Decision in the case, the 30 day period to seek judicial review of the Commissioner's Final Decision will be tolled and the 30 day period will begin to run "after receipt of notice of agency denial of such petition for rehearing." G.L. c. 30A, § 14(1). For these reasons, I reject the Applicant's contention that "Condition 15 only extends to the date of the Final Decision [is] issued [] and does not encompass the period during which a Final Decision is subject to . . . a motion for reconsideration . . . ." Applicant's Post-Hearing Brief, at p. 18.

## CONCLUSION

Based on the testimonial and documentary evidence of the parties' witnesses and the applicable law as discussed above, (1) OADR has jurisdiction to adjudicate the Petitioners' appeal of the WQC; (2) some, but not all of the Petitioners, have standing to appeal the WQC; and (3) the Department properly issued the WQC except that Condition 15 of the WQC must be modified to comport with the requirements of 314 CMR 9.09(1)(e). Accordingly, I recommend that the Department's Commissioner issue a Final Decision affirming the WQC with a modification of Condition 15 of the WQC as discussed above.

Date: 03/22/17

Salvatore M. Giorlandino
Chief Presiding Officer

[35] Applicant's First Circuit Brief, at pp. 38-41; Department's First Circuit Brief, at pp. 27-28.

## NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Chief Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to the United States Court of Appeals for the First Circuit pursuant to the National Gas Act, 15 U.S.C. § 717r(d)(1). The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain notice to that effect. Once the Final Decision is issued "a party may file a motion for reconsideration setting forth specifically the grounds relied on to sustain the motion" if "a finding of fact or ruling of law on which [the] [F]inal [D]ecision is based is clearly erroneous." 310 CMR 1.01(14)(d). "[If] the motion repeats matters adequately considered in the [F]inal [D]ecision, renews claims or arguments that were previously raised, considered and denied, or where it attempts to raise new claims or arguments, it may be summarily denied. . . . The filing of a motion for reconsideration is not required to exhaust administrative remedies." Id.

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

## SERVICE LIST

**Petitioners:** A Citizen's Group comprised of 15 citizens of the Commonwealth residing in Amherst, Ashby, Ashfield, Cummington, Dalton, Montague, Northampton, Pepperell, Pittsfield, or Sandisfield, Massachusetts;[36]

the Berkshire Environmental Action Team, Inc. ("BEAT");
Jean Atwater-Williams; Ronald M. Bernard; and Heather Morrical;

**Legal representative:**
Luke H. Legere, Esq.
Gregor I. McGregor, Esq.
McGregor & Legere, P.C.
15 Court Square, Suite 500
Boston, MA 02108
**e-mail:** llegere@mcgregorlaw.com
gimcg@mcgregorlaw.com;

**Applicant:** Tennessee Gas Pipeline Company, LLC;

**Legal representative:**
James L. Messenger, Esq.
Margaret R. Stolfa, Esq.
Gordon & Rees
Scully Mansukhani
21 Custom House Street, 5th Floor
Boston, MA 02110
**e-mail:** jmessenger@gordonrees.com
mstolfa@gordonrees.com;

**The Department:**
David Cameron, PWS & Wetlands Program Chief
MassDEP/Bureau of Water Resources
436 Dwight Street
Springfield, MA 01103
**e-mail:** David.Cameron@state.ma.us;

**[continued on next page]**

[36] The names of the 15 citizens are listed in note 1, at p. 2 of the Petitioners' Appeal Notice.

**[continued from preceding page]**

David Foulis, Environmental Analyst
MassDEP/Bureau of Water Resources
436 Dwight Street
Springfield, MA 01103
**e-mail:** David.Foulis@state.ma.us;

**Legal Representatives:** MacDara Fallon, Senior Counsel
MassDEP/Office of General Counsel
One Winter Street
Boston, MA 02108
**e-mail:** MacDara.Fallon@state.ma.us;

cc: Christine LeBel, Chief Regional Counsel
MassDEP/Western Regional Office
Office of General Counsel
436 Dwight Street
Springfield, MA 01103
**e-mail:** Christine.LeBel@state.ma.us;

Leslie DeFilippis, Paralegal
MassDEP/Office of General Counsel
One Winter Street
Boston, MA 02108