COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

August 26, 2024

In the Matter of **The Prysmian Group and** **Prysmian Cables & Systems USA, LLC**	**Docket No. 2024-006** **ePlace Authorization No.:** **AQ01P-0000176** **Application No.: 23-AQ0IP-0017-APP** **Class: NM25** **Facility No.: 642477** **AIR QUALITY PLAN APPROVAL** **Somerset, MA**

RECOMMENDED FINAL DECISION

INTRODUCTION

The Massachusetts Clean Air Act ("MCAA") authorizes the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") to adopt regulations "to prevent pollution or contamination of the atmosphere." G.L. c. 111, § 142A. In accordance with its authority under the MCAA, MassDEP has promulgated the Air Pollution Control Regulations ("APC Regulations") at 310 CMR 7.00 which set forth an air permitting program pursuant to which a person ("applicant")[1] may apply for, and receive, an air permit from MassDEP

[1] The APC Regulations at 310 CMR 7.00 define "person" as:

> any individual, public or private partnership, association, firm, syndicate, company, trust, corporation, department or instrumentality of the federal or state government, political subdivision of the

authorizing the applicant to emit air contaminants from a proposed facility.[2] One type of air permit that MassDEP issues pursuant to the APC Regulations is an Air Quality Limited Plan Approval ("LPA Air Permit") which is required for "[a]ny facility where the construction, substantial reconstruction, alteration or subsequent operation would result in an increase in potential emissions of [between one and ten tons of] a single air contaminant [per year] . . . ." 310 CMR 7.02(4)(a)(1).

Here, Kathleen Souza ("Ms. Souza"), on behalf of 12 residents of Somerset, Massachusetts ("Somerset") including herself ("the Somerset Residents Group" or "the Petitioner"),[3] have filed this appeal with MassDEP's Office of Appeals and Dispute Resolution ("OADR")[4] challenging a LPA Air Permit that MassDEP's Southeast Regional Office issued to Prysmian Cables & Systems USA, LLC ("the Applicant") on February 8, 2024 authorizing the

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commonwealth, authority, bureau, agency, law enforcement agency, fire fighting agency, or any other entity recognized by law as the subject of rights and duties.

[2] The APC Regulations define "air pollution" as:

> the presence in the ambient air space of one or more air contaminants or combinations thereof in such concentrations and of such duration as to:
>
> (a) cause a nuisance;
>
> (b) be injurious, or be on the basis of current information, potentially injurious to human or animal life, to vegetation, or to property; or
>
> (c) unreasonably interfere with the comfortable enjoyment of life and property or the conduct of business.

310 CMR 7.00 (definition of "air pollution").

[3] The 12 residents constituting the Somerset Residents Group are: (1) Kathleen Souza, (2) Edward Souza, (3) Patrick McDonald, (4) Nicole McDonald, (5) Nancy Thomas, (6) Peter Pelletier, (7) Jeffrey Kardel, (8) Charlene Faria, (9) Edward Faria, (10) Jodi Dupras, (11) Denise Monroe, and (12) Paul Healey.

[4] MassDEP is the acronym for the Massachusetts Department of Environmental Protection (also referred in this Recommended Final Decision as "the Department"). OADR is an independent, neutral, quasi-judicial office within MassDEP whose Presiding Officers are responsible for advising MassDEP's Commissioner in the adjudication of appeals filed with OADR. A more detailed description of OADR appears in Addendum No. 1, at p. 59 below.

Applicant's proposed construction and operation of an offshore wind cable manufacturing facility ("the proposed Facility") at 1 Brayton Point Road in Somerset, Massachusetts ("the Property"). LPA Air Permit, at p. 1. The Property is a 300-acre parcel of real property and the location of Brayton Point Power Station, a coal-fired power plant, that was shut down in 2017. The Applicant plans to acquire approximately 47 acres of the Property for the proposed Facility.

As approved by the LPA Air Permit, the proposed Facility will include a manufacturing warehouse building, a maintenance office, an approximately 600-foot tower for the application of cable insulation, a raw materials storage building, a cable-testing laboratory, cable storage, an employee support facility, a substation, and a new pier with associated dredging. LPA Air Permit, at pp. 2-3. MassDEP issued the LPA Air Permit to the Applicant authorizing the proposed Facility after determining that the latter's Permit application "[was] administratively and technically complete and . . . in conformance with the [APC] Regulations and current air pollution control engineering practice." MassDEP's LPA Air Permit Transmittal Letter, at p. 1.

On June 12, 2024, I conducted an evidentiary adjudicatory hearing ("Hearing") to adjudicate the Petitioner's appeal of the LPA Air Permit pursuant to an expedited appeal adjudication schedule that I established in the case on April 11, 2024, pursuant to MassDEP Policy COM-00.002[5] after determining that the Applicant had satisfied the conditions set forth in the Policy for expedited review of the Petitioner's appeal of the Permit.[6] The issue for

[5] MassDEP Policy COM-00.002 is titled "Expedited Review of Applications & Adjudicatory Hearings."

[6] Under MassDEP Policy COM-00.002, a request for expedited review of an appeal is made to MassDEP's Commissioner. MassDEP's Commissioner, to further preserve her neutrality as the Final Decision-Maker in the appeal, may delegate to the Presiding Officer in the appeal, the task of reviewing and determining whether to grant the request for expedited review. See, e.g., In the Matter of Woods Hole, Martha's Vineyard & Nantucket Steamship Authority, OADR Docket No. 2016-025, Recommended Final Decision (March 27, 2017), 2017 WL 1656437, adopted by Final Decision (April 13, 2017), 2017 WL 1656447. Here, MassDEP Commissioner Bonnie

adjudication at the Hearing was whether MassDEP, in issuing the LPA Air Permit to the Applicant authorizing the proposed Facility, properly determined that the proposed Facility complies with the APC Regulations and current air pollution control technology ("the Issue for Adjudication").

At the Hearing, the Petitioner, through the testimony of its two expert witnesses,[7] contended that MassDEP improperly issued the LPA Air Permit because, in the Petitioner's view:

(1) MassDEP failed to address air pollutant emissions from marine vessels that will be docked at the proposed Facility to receive cable manufactured by the proposed Facility;[8]

(2) the Applicant's sound models for the proposed Facility that were submitted to MassDEP for review as part of the LPA Air Permit application violate the APC Regulations regulating Noise Pollution because the sound models did not include sound emissions that will be caused by the Facility's construction;[9]

(3) the Applicant's sound models also violate the APC Regulations regulating Noise Pollution because they did not include impact/impulse noise "expected to be generated" from certain parts of the proposed Facility, specifically, "the winch in the Tower," "the winch from the loading of the cable," and pile-driving activities related to the construction of the pier;[10] and

(4) the LPA Air Permit failed to address the potential release of oil and hazardous materials during the proposed Facility's construction.[11]

Heiple delegated to me the task of reviewing and making a determination on whether to grant the Applicant's Request for Expedited Review of the Petitioner Somerset Residents Group's appeal of the Air Permit.

[7] The names of all the expert witnesses who testified at the Hearing and their professional backgrounds are set forth below, at pp. 9-19.

[8] Petitioner's Appeal Notice, at pp. 6-11.

[9] Id., at pp. 2-4.

[10] Id., at p. 4.

[11] Id., at pp. 5-6.

In response, the Applicant, through the testimony of its four expert witnesses, and MassDEP, through the testimony of its sole expert witness, disputed the Petitioner's claims, holding firm to their respective positions that MassDEP properly issued the LPA Air Permit to the Applicant authorizing the proposed Facility pursuant to the APC Regulations and as such, MassDEP's Commissioner should issue a Final Decision in the appeal affirming the Permit.

At the Hearing, all the Parties (the Petitioner, the Applicant, and MassDEP) were represented by legal counsel and their respective expert witnesses were cross-examined under oath on the sworn pre-filed testimony ("PFT") that they had filed prior to the Hearing in support of the Parties' respective positions in the appeal. The Hearing was recorded by a stenographer retained by the Applicant at its expense who also prepared a Hearing Transcript that was filed as part of the Administrative Record of the appeal. As explained in detail below, at pp. 19-56, based on a preponderance of the evidence presented at the Hearing by the Parties' respective expert witnesses and the governing legal requirements, I find that MassDEP properly issued the LPA Air Permit to the Applicant authorizing the proposed Facility, and as such, I recommend that MassDEP's Commissioner issue a Final Decision in the appeal affirming the Permit.

APPEAL ADJUDICATION PROCEDURE

I. THE PETITIONER'S BURDEN OF PROOF

As the Party challenging the LPA Air Permit authorizing the proposed Facility, the Petitioner had the burden of proof at the Hearing, specifically proving that MassDEP erred in issuing the Permit based on a preponderance of the evidence presented by the Parties' respective expert witnesses and the governing legal requirements. In the Matter of Brockton Power Co., LLC ("BP"), OADR Docket Nos. 2011-025 and 2011-026, Recommended Final

Decision (July 29, 2016), 2016 WL 8542559, at *5, adopted by Interlocutory Decision [of MassDEP's Commissioner] (March 13, 2017), 2017 WL 1063662. Regarding its burden of proof, the Petitioner was required to present competent and persuasive evidence at the Hearing from an expert witness(es) with sufficient expertise to testify on the technical issues presented by their claims that MassDEP improperly issued the LPA Air Permit. Id.; In the Matter of Dan and Eva Barstow, OADR Docket No. 2019-026, Recommended Final Decision (January 22, 2020), 2020 WL 2616472, at *4, adopted by Final Decision (February 19, 2020), 2020 WL 2616471 (internal citations omitted). The question of "sufficient expertise" turns on "whether the witness has sufficient education, training, experience, and familiarity with the subject matter of the testimony." Id.

II. STANDARD OF REVIEW

The standard of review governing my adjudication of the Petitioner's appeal of the LPA Air Permit as the Presiding Officer in the case is as follows.

First, my review of MassDEP's determinations underlying its grounds for issuing the LPA Air Permit to the Applicant is *de novo*, meaning that my review is anew irrespective of what MassDEP determined previously. In the Matter of Kane Built, Inc., OADR Docket No. 2017-037, Recommended Final Decision (December 18, 2018), 2017 WL 10924859, at *5, 2017 MA ENV LEXIS 77, at *18, adopted by Final Decision (January 17, 2019), 2019 WL 1122833, 2019 MA ENV LEXIS 8.

Second, my factual determinations in adjudicating the appeal are based on a preponderance of the evidence presented at the Hearing by the Parties' respective expert witnesses with no deference to MassDEP's prior factual findings in the matter because the

Adjudicatory Proceeding Rules at 310 CMR 1.01(13)(h) governing adjudication of the appeal provide that the "[t]he weight to be attached to any evidence in the record [of the appeal] will rest within the sound discretion of the Presiding Officer . . . ." Kane Built, 2017 WL 10924859, at *5, 2017 MA ENV LEXIS 77, at *17.

Lastly, my legal determinations in adjudicating the appeal are based on the governing legal requirements with deference to MassDEP's reasonable interpretation of environmental statutes, regulations, and policies it is responsible for enforcing, including the APC Regulations. In the Matter of Pioneer Valley Energy Center, LLC, OADR Docket No. 2011-010, Recommended Final Decision (September 23, 2011), 2011 WL 6019097, at *8, 2011 MA ENV LEXIS 109, at *26, adopted by Final Decision (November 9, 2011), 2011 WL 6019096, 2011 MA ENV LEXIS 108. However, no deference is due to MassDEP's interpretation or construction of a statutory or regulatory requirement that is arbitrary, unreasonable, or inconsistent with the plain terms of the governing statutory and regulatory requirements. Arrowood Indemnity Company v. Workers' Compensation Trust Fund, ___ Mass. App. Ct. ___ (July 11, 2024), 2024 WL 3363910, at *1-7; BP, 2016 WL 8542559, at *8-10, 2016 MA ENV LEXIS 66, at *19-141, adopted by MassDEP Commissioner's Interlocutory Decision (March 13, 2017), 2017 WL 1063662, at *2, 2017 MA ENV LEXIS 21, at *5-6 (no deference due MassDEP's interpretation that OADR lacked jurisdiction to adjudicate federal Title VI discrimination claims in air permit appeal where MassDEP lacked a formal Title VI Grievance Policy required by Title VI Regulations of the U.S. Environmental Protection Agency

("USEPA") to review such claims).[12]

III. THE MassDEP COMMISSIONER'S ROLE AS THE FINAL DECISION-MAKER IN THE APPEAL

Notwithstanding my independent/neutral role as the Presiding Officer in making factual and legal findings and recommendation to MassDEP's Commissioner on the challenged LPA Air Permit in this appeal, it is the Commissioner, as the Final Decision-Maker in the appeal, who has the ultimate authority over the Permit's fate. 310 CMR 1.01(14)(b). It is a well settled principle that "[MassDEP's] commissioner determines 'every issue of fact or law necessary to the [final] decision [in an appeal,] [and] . . . may adopt, modify, or reject a [Presiding Officer's] recommended decision [in the appeal], with a statement of reasons' [based on the evidence in the record]." Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 231 (2010). "[T]he commissioner's interpretation of [the governing] regulations [and statutes]," and not that of the Presiding Officer, "is conclusive at the agency level, and is the only interpretation that is entitled to deference by a reviewing court" on judicial review pursuant to G.L. c. 30A, § 14. Id., 457 Mass. at 228.

THE PARTIES' RESPECTIVE EXPERT WITNESSES

A total of seven (7) expert witnesses testified at the Hearing in support of the Parties'

[12] In BP, MassDEP's then-Commissioner noted that "MassDEP [was] in the process of developing a formal Title VI Complaint Policy for the Department" and until such time the Policy was adopted, Title VI discrimination claims could be asserted in an administrative appeal before OADR. BP, 2017 WL 1063662, at *2 n.8, 2017 MA ENV LEXIS 21, at *5-6. Specifically, MassDEP's then-Commissioner ruled that:

> anyone aggrieved by the Department's permit decisions or enforcement orders, based on purported Title VI violations [could in the absence of a formal MassDEP Title VI Grievance Policy] assert such claims in an administrative appeal with [OADR], as the Petitioners [had done] in [BP and] [a]s was also done in [that] case, the claims [would be] adjudicated by an OADR Presiding Officer based on the evidentiary record in the case, who [would] forward a Recommended Final Decision to the Department's Commissioner.

Id.

respective positions on whether MassDEP properly issued the LPA Air Permit to the Applicant authorizing the proposed Facility. Those expert witnesses were as follows.

A. The Petitioner's Expert Witnesses

At the Hearing, the Petitioner presented two expert witnesses: Caitlin Conley ("Ms. Conley") and Dr. Paul Healey ("Dr. Healey") who testified in support of the Petitioner's position that MassDEP improperly issued the LPA Air Permit to the Applicant authorizing the proposed Facility. The Applicant's legal counsel cross-examined Ms. Conley and Dr. Healy on the PFT they had filed prior to the Hearing. Ms. Conley's and Dr. Healy's professional backgrounds are as follows.

1. Ms. Conley

Ms. Conley is the Associate Director of the Environmental Health and Safety Department ("EHS Department") at Roger Williams University ("RWU") in Bristol, Rhode Island, a position that she has held for more than 13 years (February 2008-December 2018 and January 2021 to the present). Ms. Conley's Pre-filed Direct Testimony ("Ms. Conley's Direct PFT"), at p. 2, lines 1-4; Attachment No. 1 to Ms. Conley's Direct PFT, at pp. 1-2. RWU's EHS Department is responsible for "develop[ing] and implement[ing] programs aimed at protecting the safety and well-being of the [RWU] campus community" by facilitating "[RWU's] compliance with local, state, and federal statutes [and] regulations pertaining to occupational health, safety[,] and environmental protection."[13] Ms. Souza, who is a member of the Somerset Residents Group that has brought this appeal and who serves as the Group's representative in the appeal, heads RWU's EHS Department and is Ms. Conley's supervisor. See n. 13 below.

[13] https://www.rwu.edu/who-we-are/administrative-offices/environmental-health-safety.

Ms. Conley holds a Bachelor of Arts in Earth Sciences degree with a concentration in Oceanography from the University of New Hampshire ("UNH") which she obtained in 2005. Ms. Conley's Direct PFT, at p. 2, lines 9-18. Her responsibilities as the Associate Director of RWU's EHS Department include developing, managing, training, and implementing environmental programs including: Asbestos Management; Emergency Generator and Boiler Air Emissions; Hazardous Waste Contingency Plans; the federal Resource Conservation Recovery Act ("RCRA");[14] the Rhode Island Pollutant Discharge Elimination System ("RIPDES");[15] the federal Safe Drinking Water Act; the USEPA's Spill Prevention, Control, and Countermeasure Rule ("SPCC Rule");[16] and Wastewater and Septic System Management. Attachment No. 1 to Ms. Conley's Direct PFT.

Ms. Conley's previous employment positions include working for two years (January 2019-January 2021) as a Senior Scientist/Project Scientist for Woodard & Curran, an environmental consulting firm. Attachment No. 1 to Ms. Conley's Direct PFT, at p. 2; Ms. Conley's Direct PFT, at p. 2, lines 20-35. "[A]t Woodard & Curran, [she] worked . . . on

[14] RCRA authorizes the USEPA to regulate hazardous waste generation, transportation, treatment, storage, and disposal. https://www.epa.gov/rcra/resource-conservation-and-recovery-act-rcra-overview#whatisrcra.

[15] The RIPDES Program is a water pollution control program administered by the Environmental Protection Bureau ("EPB") of Rhode Island's Department of Environmental Management administers the RIPDES Program. https://dem.ri.gov/environmental-protection-bureau/water-resources/permitting/ripdes#:~:text=RI%20Pollutant%20Discharge%20Elimination%20System,Island%20Department%20of%20Environmental%20Management. The Program regulates water pollution by "developing and enforcing permit limitations for municipal and industrial wastewaters, storm water, and combined sewer overflows discharged directly to [Rhode Island] waters[,] . . . as well as industrial wastewaters discharged to municipally-owned treatment facilities." Id.

[16] The SPCC Rule addresses "the danger oil spills cause to public health and the environment," in particular to navigable waters of the U.S. and adjoining shorelines. https://www.epa.gov/oil-spills-prevention-and-preparedness-regulations/spill-prevention-control-and-countermeasure-19#:~:text=and%20Preparedness%20Regulations-,Spill%20Prevention%2C%20Control%2C%20and%20Countermeasure%20(SPCC)%20for%20the,up%20promptly%20once%20they%20occur. The Rule requires facilities to develop, maintain, and implement an oil spill prevention plan known as an SPCC Plan that is designed to prevent oil spills and control such spills if they occur by cleaning them up promptly as possible. Id.

[MassDEP] air permitting, reporting, and compliance projects for clients in multiple industries, including higher education, laboratory analysis, manufacturing, software development, entertainment, and waste management." Id. "[She] also worked on air permitting, reporting, and compliance projects in other states, including New Jersey and Rhode Island," and "assist[ed] with drafting and submitting new Comprehensive and Limited Plan Applications [pursuant to the APC Regulations] . . . ." Id. She also worked on other matters unrelated to air permitting, including researching, compiling, and submitting state and federal permit applications for wastewater, stormwater, and hazardous waste. Id.

2. Dr. Healey

Dr. Healey is a member of the Somerset Residents Group that has brought this appeal. See n. 3, at p. 2 above. He is a retired Public Health Physician with a Board Certification in Preventive Medicine with a subspeciality in Occupational & Environmental Medicine.[17] Dr. Healey's Pre-filed Direct Testimony ("Dr. Healey's Direct PFT"), at p. 2, lines 1-5. He received his medical degree from the F. Edward Hebert School of Medicine in Bethesda, Maryland in 1988 and did his post-medical school Residency in Occupational and Environmental Medicine, which he completed in 1992. Id., at p. 2, lines 11-17. He also holds several graduate degrees from the University of Connecticut ("U.Conn."): a Master in Public Health ("MPH") (1993); a

[17] According to the American Board of Preventive Medicine:

> Occupational and Environmental Medicine focuses on the health of workers, including the ability to perform work; the physical, chemical, biological, and social environments of the workplace; and the health outcomes of environmental exposures. Practitioners in this field address the promotion of health in the workplace, and the prevention and management of occupational and environmental injury, illness, and disability.

https://www.theabpm.org/become-certified/specialties/occupational-medicine.

Juris Doctor (law degree) (2001); and a Master in Business Administration ("MBA") (2003). Attachment No. 1 to Dr. Healey's Direct PFT.

Dr. Healey was employed for many years as a Public Health Physician specializing in Occupational and Environmental Medicine. Dr. Healey's Direct PFT, at p. 2, lines 11-15. Prior to retiring in 2017, he had been employed for 15 years (2002-2017) as the Director of Health Economics and Outcomes for Pfizer, a major pharmaceutical company. Id., at p. 2, lines 18-20. In that position, he focused "on providing quality of life measures to include in patient clinical trials (assessing the impact of exposure to a drug), conducting real-world database analyses, constructing economic models, reviewing data and publishing in medical journals relevant to these topics in support of a new medication." Id., at p. 2, lines 29-33. His other work experience includes serving as the Senior Area Medical Director for the U.S. Postal Service's Northeast Area (1998-2001) and the Division/Medical Director for the New England Office of the Federal Occupational Health Office of the U.S. Department of Health and Human Services ("U.S.HHS") (1993-1998). Id., at p. 2, lines 20-23.

B. The Applicant's Expert Witnesses

At the Hearing, the Applicant presented four expert witnesses: (1) Christopher Bajdek ("Mr. Bajdek"); (2) Alan Lumpkin ("Mr. Lumpkin"); (3) Vincent Tino ("Mr. Tino"); and (4) Jason Wilkinson ("Mr. Wilkinson") who testified in support of the Applicant's position that MassDEP properly issued the LPA Air Permit to the Applicant authorizing the proposed Facility. An attorney who is a member of the Somerset Residents Group that has brought this appeal ("the Petitioner's Hearing Counsel") cross-examined these four expert witnesses on the PFT they had

filed prior to the Hearing. The professional backgrounds of these four expert witnesses are as follows.

1. Mr. Bajdek

Mr. Bajdek is employed by VHB, Inc. ("VHB"), an environmental consulting firm based in Watertown, Massachusetts with a national practice. Mr. Bajdek's Pre-filed Direct Testimony ("Mr. Bajdek's Direct PFT"), at p. 2, lines 1-5. VHB "[has] more than 30 offices across the eastern United States and more than 2,000 employees overall" and "its specialties, [include] . . . expertise in environmental, planning and design, and land development consulting." Mr. Tino's Direct PFT, p. 2, lines 4-8.

At VHB, Mr. Bajdek serves as the Director of Noise and Vibration, responsible for managing noise studies for transportation, energy generation, industrial, and community projects. Attachment No. 1 to Mr. Bajdek's Direct PFT, at p. 1. He has been in the noise measurement field for 33 years. Id. He holds a Bachelor of Science degree in Mechanical Engineering from Northeastern University which he earned in 1990. Mr. Bajdek's Direct PFT, p. 2, lines 8-19. From 1992 and 1993, he did a year of graduate study in Mechanical Engineering at Northeastern University and in June 2003, he attended the Summer Program in Acoustics at Pennsylvania State University. Id.

Since graduating from Northeastern University in 1990, Mr. Bajdek's professional career has focused on noise assessment and control projects for private and public sector clients. Id. He has prepared and managed noise studies for transportation, energy generation, industrial, and community projects. Id. His responsibilities with noise studies have encompassed issues from baseline noise measurement programs and environmental documents through noise abatement

design studies, compliance testing, and public involvement. Id., Attachment No. 1 to Mr. Bajdek's Direct PFT, at pp. 1-4.

Mr. Bajdek had primary responsibility at VHB for preparing a sound assessment (the "Sound Study") for the proposed Facility for MassDEP's review during the LPA Air Permit review process. Mr. Bajdek's Direct PFT, at 3, lines 16-21. He testified at the Hearing to address specific noise-related questions and comments resulting from the construction and operational phases of the proposed Project. Id., at p. 3, lines 11-15.

2. Mr. Lumpkin

Mr. Lumpkin is the Vice President of Professional Engineering Assoc., Inc., a civil and structural engineering firm based in Greenville, South Carolina. Mr. Lumpkin's Pre-filed Direct Testimony ("Mr. Lumpkin's Direct PFT"), at p. 2, lines 1-3; Attachment No. 1 to Mr. Lumpkin's Direct PFT. He has 40 years of structural engineering experience that has focused on steel, foundations, seismic and dynamic design, concrete, specialty structures, finite element modeling and analysis, wood and cold formed steel designs. Attachment No. 1 to Mr. Lumpkin's Direct PFT. He holds a Bachelor of Science in Civil Engineering from Clemson University and a Master's degree in Structures and Foundations from the University of Central Florida. Mr. Lumpkin's Direct PFT, p. 2, lines 6-8. He is also a Registered Professional Engineer in 16 states, including Massachusetts.[18] Id., p. 2, lines 9-12.

Mr. Lumpkin's primary role regarding the proposed Facility has been to oversee the full design of all facets of the Facility, including Architectural, Structural, Mechanical, Electrical,

[18] The Commonwealth's Board of Registration of Professional Engineers and Land Surveyors ("the Board") licenses Professional Engineers in Massachusetts. https://www.mass.gov/orgs/board-of-registration-of-professional-engineers-and-land-surveyors. The Board establishes and enforces standards for Professional Engineers to protect the health, safety, and welfare of the public. Id.

Plumbing, Marine, Fire Protection, and Security. Id., at p. 2, lines 13-19. He also is the primary sealing engineer for the proposed Facility's structural engineering. Id.

3. Mr. Tino

Mr. Tino is a Senior Air Quality Consultant at VHB and an American Meteorological Society Certified Consulting Meteorologist ("CCM")[19] with more than 31 years of professional experience in air quality modeling, impact analyses, emissions estimation, data analysis, and project management. Mr. Tino's Direct PFT, at p. 2, lines 11-16; Attachment No. 1 to Mr. Tino's Direct PFT. He has extensive knowledge of air quality dispersion models, which are both approved, and under review by the USEPA. Id. He also has extensive experience (30 years) in performing air quality impact analyses for proposed projects subject to air permitting by MassDEP under the APC Regulations. Id. He holds a Bachelor of Science degree in Meteorology from the University of Massachusetts at Lowell (1990) and Master of Science degree in Meteorology from Florida State University (1992). Id.

Mr. Tino was responsible for preparing the Applicant's LPA Air Permit application for the proposed Facility, including the emissions estimates for the Facility, lead impact analysis, forms, and narrative. Mr. Tino's Direct PFT, at p. 3, lines 1-25. While the application was under review by MassDEP, Mr. Tino also met frequently with MassDEP staff overseeing and/or performing the review to discuss the application. Id., p. 3, lines 16-25; p. 4, lines 1-25; p. 5,

[19] The American Meteorological Society ("AMS") is a more than 100-year-old private organization based in Boston, Massachusetts whose "[m]ission [is to] advance the atmospheric and related sciences, technologies, applications, and services for the benefit of society." https://www.ametsoc.org/index.cfm/ams/about-ams; https://www.ametsoc.org/index.cfm/ams/about-ams/ams-history.

lines 1-2.

4. Mr. Wilkinson

Mr. Wilkinson is a Principal at Ramboll Americas Engineering Solutions, Inc. ("Ramboll"), an international environmental consulting firm with offices in the United States, including in Westford, Massachusetts. Mr. Wilkinson's Pre-filed Direct Testimony ("Mr. Wilkinson's Direct PFT"), at p. 2, lines 1-4; Attachment No. 1 to Mr. Wilkinson's Direct PFT. He has over 20 years of environmental consulting experience and his areas of expertise include site assessment and remediation, demolition and decommissioning of industrial facilities, and environmental engineering and groundwater hydrogeology. Attachment No. 1 to Mr. Wilkinson's Direct PFT. He has expertise with major contaminants including polychlorinated biphenyls ("PCBs"), chlorinated volatile organic compounds ("CVOCs"), and per- and polyfluoroalkyl substances ("PFAS"). Id. He holds a Bachelor of Science degree in Geology from Duke University (2000) and a Master in Earth Sciences degree from Dartmouth College (2003). Id.

Mr. Wilkinson is a Licensed Site Professional ("LSP") who has conducted numerous investigation and cleanup activities for contaminated real properties in Massachusetts pursuant to the Massachusetts Oil and Hazardous Material Release Prevention and Response Act ("Chapter 21E"), G.L. c. 21E, and MassDEP's Chapter 21E Regulations at 310 CMR 40.0000 known as the Massachusetts Contingency Plan ("MCP").[20] Id., Mr. Wilkinson's Direct PFT, p. 2, lines 12-22;

[20] Chapter 21E is a semi-privatized environmental cleanup program supervised by MassDEP that "requires owners and operators of real property (among others) with releases of oil or hazardous materials on their properties to assess and remediate those releases to protect health, safety, public welfare and the environment." In the Matter of Environmental Testing and Research Laboratories, Inc. ("ETR"), OADR Docket No. 2018-006, Recommended Final Decision (May 28, 2021), at p. 30, adopted as Final Decision (September 28, 2021); In the Matter of James M. Knott, OADR Docket No. 2011-011, Recommended Final Decision (January 31, 2012), 2012 WL 920529, at *3, 2012 MA ENV LEXIS 52, at *7, citing G.L. c. 21E, §§ 1, 2, 3, 4, and 5, adopted as Final Decision (March 12,

p. 3, lines 1-9. He is the LSP-of-record for the Property where the proposed Facility will be located. Id., at p. 3, lines 10-27; p. 4, lines 1-4. His firm, Ramboll, conducted a series of subsurface investigations for soil and groundwater contamination at the Property from September 2021 through May 2023. Id. Based on the findings of these subsurface investigations, concentrations of certain contaminants were detected in soil and groundwater on a portion of the Property characterized by Mr. Wilkinson as the "Disposal Site" that necessitated reporting to MassDEP, as required by the MCP. Id.

In January 2024, Mr. Wilkinson signed and submitted a Phase I Initial Site Investigation (Phase I) Report and Tier Classification Submittal (Tier Classification) to MassDEP pursuant to the MCP (310 CMR 40.0480 and 310 CMR 40.0500) that summarized all investigation activities that Ramboll had conducted and completed to date involving contamination issues at the Disposal Site. Id.; Attachment No. 2 to Mr. Wilkinson's Direct PFT, at p. 1. This Report is over 10,500 pages long. Mr. Wilkinson's Direct PFT, p. 3, lines 23-27; p. 4, lines 1-4.[21] As the LSP-of-record, Mr. Wilkinson will continue to oversee all environmental work (investigation, remediation, etc.) that is conducted pursuant to the MCP to address the contamination issues at

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2012), 2012 WL 920528, 2012 MA ENV LEXIS 51. Under Chapter 21E, a party responsible for cleaning up a real property that has been contaminated by the release of oil or hazardous materials retains an LSP to oversee assessment and cleanup of contamination, and to ensure these actions are performed in compliance with Chapter 21E and the MCP. ETR, at pp. 30-31. "An LSP is an environmental scientist or engineer experienced in cleaning up oil and hazardous material contamination [who is] licensed by the [Commonwealth's] Board of Registration of Hazardous Waste Site Cleanup Professionals (usually referred to as the LSP Board), based on education, experience, and passing an examination on applicable regulations and technical issues." Massachusetts' Approach to Waste Site Cleanup: Chapter 21E and the Massachusetts Contingency Plan (November 2012), at p. 1 (http://www.mass.gov/eea/docs/dep/cleanup/laws/bhfs.pdf).

[21] This Report is available online at: https://eeaonline.eea.state.ma.us/portal/dep/wastesite/viewer/4-0029671. The text and figures from this Report are contained in Attachment No. 2 to Mr. Wilkinson's Direct PFT.

the Disposal Site. Id.

C. The Department's Expert Witness

At the Hearing, MassDEP presented one expert witness: Peter Russell ("Mr. Russell") who testified in support of its position that it properly issued the LPA Air Permit to the Applicant authorizing the proposed Facility. The Petitioner's Hearing Counsel and the Applicant's counsel cross-examined Mr. Russell on the PFT that he filed prior to the Hearing. His professional background is as follows.

Mr. Russell is a senior environmental analyst (Environmental Analyst IV) at MassDEP who has been with the agency for more than 31 years (since January 1, 1993) principally working on air permitting matters governed by the APC Regulations. Mr. Russell's Direct and Rebuttal Testimony ("Mr. Russell's Direct PFT"), at p. 1, lines 1-4. He holds a Bachelor of Science degree in Geography from Bridgewater State College (1991) and has taken a variety of air pollution monitoring and air pollution control training courses sponsored by the MassDEP, the USEPA, the Northeast States for Coordinated Air Use Management ("NESCAUM")[22] and others. Id., at p. 2, lines 8-13.

After joining MassDEP in January 1993, Mr. Russell worked for more than nine years (January 1993 to September 2002) as an Environmental Analyst in MassDEP's Air Assessment Branch at the Wall Experiment Station in Lawrence, Massachusetts where he was responsible for data collection, operation, and maintenance of a network of continuous and non-continuous ambient air monitoring stations. Id., at p. 2, lines 4-7. His next position at MassDEP (September 2002 to October 2013) was as an Environmental Analyst in the Air Quality Permit Section of the

[22] "NESCAUM is a regional, nonprofit association of state environmental agencies working together to advance clean air" by "work[ing] state agency policy makers, federal agencies, and stakeholders to develop clean air programs." https://www-f.nescaum.org/about-us.

Bureau of Air and Waste ("BAW") in MassDEP's SERO Office where he was responsible for reviewing air permit applications. Id., at p. 1, lines 11-14; p. 2, line 1. From October 27, 2013, to the present, he has served as a principal Environmental Analyst for the New Source Review program, as set forth in the APC Regulations, in BAW's Air Quality Permit Section in MassDEP's SERO Office. Id.; at p. 1, lines 5-10. In that capacity, Mr. Russell assigns, reviews, and makes recommendations on air quality-related plan application work as directed by the air quality permit chief in MassDEP's SERO Office and as submitted to the Office pursuant to the APC Regulations. Id.

During his tenure at MassDEP, Mr. Russell has participated in the technical review of various Air Quality plan applications submitted to the MassDEP pursuant to the APC Regulations for the construction of combustion and/or process equipment that would emit air contaminants to the ambient air. Id., at p. 2, lines 14-17. He also has participated in the technical review of various Air Quality Operating Permit applications submitted to MassDEP pursuant to APC Regulations and has conducted numerous air quality compliance inspections at facilities that MassDEP has permitted pursuant to the APC Regulations. Id., at p. 2, lines 17-20. He served as the permit review analyst for the LPA Air Permit application that the Applicant filed with MassDEP on June 2, 2023 seeking approval of the proposed Facility. Id., at p. 3, lines 1-3.

FINDINGS

MassDEP PROPERLY ISSUED THE LPA AIR PERMIT TO THE APPLICANT AUTHORIZING THE PROPOSED PROJECT

I. THE PETITIONER'S EXPERT WITNESSES HAVE LITTLE OR NO AIR

PERMITTING EXPERIENCE AND AS SUCH THEIR HEARING TESTIMONY HAS LIMITED PROBATIVE VALUE

As discussed previously above, the Petitioner had the burden of proving at the Hearing that MassDEP erred in issuing the LPA Air Permit authorizing the proposed Facility and that burden required the Petitioner to present competent and persuasive evidence at the Hearing from an expert witness(es) with sufficient expertise to testify on the technical issues presented by their claims that MassDEP improperly issued the Permit. BP, 2016 WL 8542559, at *5; Barstow, 2020 WL 2616472, at *4. The Petitioner's expert witnesses at the Hearing, Ms. Conley and Dr. Healey, are highly accomplished individuals who appeared well meaning at the Hearing, but as their professional backgrounds as set forth above reveal, they have little or no air permitting experience. As a result, they lack the relevant knowledge, skill, experience, training, and education sufficient to opine as expert witnesses on the specific requirements of the APC Regulations and whether MassDEP complied with those requirements in approving the LPA Air Permit authorizing the Applicant's proposed Facility. BP, 2016 WL 8542559, at *5; Barstow, 2020 WL 2616472, at *4. Accordingly, I have accorded minimal probative value to their testimony opining that MassDEP improperly issued the LPA Air Permit to the Applicant. Id.

Ms. Conley's professional background discussed above reveals that at best, she has no more than two years of air permitting experience which she obtained working as a Senior Scientist/Project Scientist for the environmental consulting firm of Woodard & Curran from January 2019-January 2021. Attachment No. 1 to Ms. Conley's Direct PFT, at p. 2; Ms. Conley's Direct PFT, at p. 2, lines 20-35. However, her air permitting experience is more likely less than two years because during her tenure with Woodard & Curran, she worked on other

matters unrelated to air permitting, including researching, compiling, and submitting state and federal permit applications for wastewater, stormwater, and hazardous waste. Attachment No. 1 to Ms. Conley's Direct PFT, at p. 2; Hearing Transcript, at p. 42, lines 2-20. In contrast to Ms. Conley and as evidenced by their professional backgrounds discussed above, MassDEP's expert witness, Mr. Russell, has more than 31 years of air permitting experience and two of the Applicant's four expert witnesses, Mr. Tino and Mr. Bajdek, have 31 and 33 years of air permitting experience focusing on air quality and noise issues, respectively. Mr. Russell's Direct PFT, pp. 1-2; Attachment 1 to Mr. Tino's Direct PFT; Attachment 1 to Mr. Bajdek Direct PFT.

Regarding Dr. Healey, at the Hearing, he claimed to be "an expert on air quality permitting," specifically, he testified that "[he is] somebody who has some expertise that [he thought was] appropriate for this discussion" on whether MassDEP properly issued the LPA Air Permit to the Applicant and that "[he] considered [himself] an expert in the air quality permit as it applies to the health aspects and impacts on the residents at Brayton Point and within Somerset as a whole." Hearing Transcript, at p. 24, line 10 through p. 26, line 12. He testified as such notwithstanding his admission that he did not have any special training or education on the air permitting process set forth in the APC Regulations. Hearing Transcript, at p. 26, line 13 through p. 27, line 9. In his words, "[he did not study] how to permit projects under the Air Pollution Control Regulations" or "air quality permitting." Id. He also testified that his air permitting and air pollution control experience was limited to "some exposure to permitting in general, whether it be in [his] legal training or understanding things as they relate to people getting permits from . . . certain things with asbestos abatements and things like that." Hearing Transcript, p. 27, lines 2-9.

Dr. Healey also claimed to be qualified to give expert testimony on environmental noise modeling as it relates to the APC Regulations and the LPA Air Permit authorizing the proposed Facility. Hearing Transcript, at p. 27, line 20 through p. 28, line 3. He made that claim even though by his own admission his noise modeling experience is limited to the context of "understand[ing] the [federal Occupational Safety and Health Administration ("OSHA")] laws, which [he opined] are how you monitor people who have had noise exposures and how to mitigate [those exposures] with engineering and administrative controls." Id. As a matter of law, the OSHA noise regulations are irrelevant to noise modeling and the noise requirements of the APC Regulations because the OSHA noise regulations govern noise exposure in the workplace. See 29 CFR § 1910.5(a) (OSHA standards "apply with respect to employments performed in a workplace"); 29 CFR § 1910.95 (OSHA noise standard describing testing, monitoring, and recordkeeping requirements for employers regarding workplace exposures by employees).

Dr. Healey also admitted at the Hearing that his experience with the investigation or remediation of contaminated property, which is governed by Chapter 21E and the MCP,[23] is limited to his career as an "occupational medicine physician . . . overseeing the work of some people who were doing some work at a Superfund cleanup site" while working with the Federal Employee Occupational Health Program in Boston. Hearing Transcript, p. 32, lines 5-23. He is not an LSP, a licensed environmental professional authorized by the Commonwealth's Board of Registration of Hazardous Waste Site Cleanup Professionals ("LSP Board"), to oversee and implement investigations and cleanups of contaminated property pursuant to Chapter 21E and

[23] See n. 20, at pp. 16-17 above.

the MCP, and as such, he is not qualified to provide expert testimony on that subject matter as it relates to the LPA Air Permit authorizing the proposed Facility. Id., p. 33, lines 6-23.

II. THE PETITIONER'S CLAIMS AGAINST THE LPA AIR PERMIT FAIL BASED ON A PREPONDERANCE OF THE EVIDENCE PRESENTED AT THE HEARING AND THE GOVERNING LEGAL REQUIREMENTS

Assuming for the sake of argument that Ms. Conley and/or Dr. Healey possess the minimum quantum of relevant knowledge, skill, experience, training, and education sufficient to opine as expert witnesses on the specific requirements of the APC Regulations and whether MassDEP complied with those requirements in approving the LPA Air Permit at issue here, the Petitioner still does not prevail in the appeal. As discussed in detail below, the Applicant, through the testimony of its four expert witnesses (Mr. Bajdek, Mr. Lumpkin, Mr. Tino, and Mr. Wilkinson), and MassDEP, through the testimony of its sole expert witness (Mr. Russell), presented persuasive evidence demonstrating that MassDEP properly issued the LPA Air Permit to the Applicant authorizing the proposed Facility pursuant to the APC Regulations.

A. The LPA Permit Application Process Was Properly Conducted In Accordance With the Requirements of the APC Regulations

As discussed previously, the APC Regulations at 310 CMR 7.02(4)(a)(1) require a person to obtain an LPA Air Permit from MassDEP for "[a]ny facility where the construction, substantial reconstruction, alteration or subsequent operation would result in an increase in potential emissions of [between one and ten tons of] a single air contaminant [per year] . . . ." The calculation of potential emissions associated with an LPA Air Permit application is performed pursuant to the APC Regulations at 310 CMR 7.02(4)(b), which provides that "[the] [c]alculation . . . must be based on the potential emissions (as defined in 310 CMR 7.00) of the proposed construction, substantial reconstruction or alteration. . . ." The APC Regulations define

"potential emissions" as "the maximum capacity of a facility or a stationary source to emit any air contaminant or pollutant under its physical and operational design. . . ." 310 CMR 7.00 (definition of "potential emissions or potential to emit"). "Facility" is defined as "any installation or establishment and associated equipment, located on the same, adjacent or contiguous property, capable of emissions." 310 CMR 7.00 (definition of "facility"). These APC Regulations governing the issuance of LPA Air Permits do not contain any provision requiring emissions from marine vessels docked at the proposed structure to be included in the emissions calculation for the structure.

The APC Regulations at 310 CMR 7.02(3)(j) authorize MassDEP to issue the LPA Air Permit authorizing the proposed facility if the Permit applicant demonstrates that:

(1) the emissions from the proposed facility will not result in air quality exceeding either the Massachusetts or National Ambient Air Quality Standards ("NAAQS");[24]

(2) the emissions from the proposed facility will not exceed applicable emissions limitations specified in APC Regulations;

(3) the emissions from the proposed facility will not result in a violation of the APC Regulations;

(4) the proposed facility is not subject to the requirements of Appendix A of the APC Regulations;

[24] The NAAQS are health-based standards established by the USEPA pursuant to the federal CAA that are designed to preserve public health and protect sensitive populations, including persons suffering from asthma or cardiovascular disease, children, and the elderly. In the Matter of Palmer Renewable Energy, LLC, OADR Docket No. 2021-010 ("PRE"), Recommended Final Decision (September 30, 2022), 2022 WL 17479440, at *28, adopted by Final Decision (November 28, 2022), 2022 WL 17479443. Air quality that satisfies the NAAQS is presumptively protective of public health but this presumption can be rebutted and even overcome, by the opponents of a proposed structure requiring an air permit from MassDEP under the APC Regulations presenting reliable data demonstrating that the NAAQS are not protective enough of public health and/or that permitting the proposed structure would have a disparate or disproportionate discriminatory impact on a protected class of persons in violation of Massachusetts and/or federal anti-discrimination laws. Id., *46-48.

(5) the emissions from the proposed facility represent the most stringent emission limitations as specified in 310 CMR 7.02(8); and

(6) the owner or operator of the proposed facility has demonstrated that any facilities the LPA Air Permit applicant owns, operates or controls in Massachusetts are in compliance with the APC Regulations.

In the Matter of Algonquin Gas Transmission LLC, Docket Nos. 2019-008, 2019-009, 2019-010; 2019-011; 2019-012; 2019-013, Recommended Final Decision (June 27, 2019), 2019 WL 4735444, at *4, adopted by Final Decision (August 7, 2019), 2019 WL 4735443, affirmed in part, and vacated in part, Town of Weymouth v. Massachusetts Department of Environmental Protection, 961 F.3d 34, 47 (1st Cir. 2020).[25] Mr. Tino, on behalf of the Applicant, and Mr. Russell, on behalf of MassDEP, provided persuasive expert testimony demonstrating that the Applicant's LPA Air Permit application for the proposed Facility satisfied the requirements of 310 CMR 7.02(3)(j). Based on their testimony and the governing legal requirements, I find that the LPA Air Permit application process resulting in MassDEP's issuance of the LPA Air Permit to the Applicant authorizing the proposed Facility was properly conducted in accordance with the requirements of the APC Regulations.

The Applicant retained Mr. Tino's environmental consulting firm, VHB, to assist with complying with the air permitting requirements of the APC Regulations for the proposed

[25] In Town of Weymouth, the U.S. Court of Appeals for the First Circuit "resolved . . . in favor of [Mass]DEP" all issues raised by the appellants in the appeal regarding the propriety of an Air Permit authorizing a proposed natural gas compressor station in Weymouth, except for the question of whether the emissions limit of the natural gas fired turbine ("turbine"), as proposed by the project proponent, rather than an electric motor drive ("EMD") connected to the existing electrical power grid, was the Best Available Control Technology ("BACT") under the APC Regulations to limit Nitrogen Oxide ("NOx") emissions from the proposed natural compressor station. 961 F.3d 34, 47 (1st Cir. 2020). On the BACT issue, the Court ruled that MassDEP did not follow its own BACT procedures because it did not conduct a cost-effectiveness analysis before eliminating an EMD from consideration in Step 4 of the BACT analysis. Id. As a result, the Court remanded the matter to MassDEP for further review of the BACT issue, which MassDEP performed and the Court affirmed on appeal. City of Quincy v. Massachusetts Department of Environmental Protection, 21 F.4th 8, 19 (1st Cir. 2021).

Facility. Mr. Tino's Direct PFT, at p. 3, lines 10-15. Working with the Applicant's engineers, VHB determined that the proposed Facility had potential emissions greater than one ton but less than 10 tons annually, and as a result VHB prepared the Applicant's LPA Air Permit application for the proposed Facility pursuant to APC Regulations at 310 CMR 7.02(4)(a)(l). Id. This determination is set forth in Table 3-3 at p. 50 of the LPA Air Permit application that the Applicant submitted to MassDEP for the proposed Facility. Attachment No. 3 to Mr. Tino's Direct PFT, at p. 50. The Petitioner's expert witnesses, Ms. Conley and Dr. Healey, did not present any probative evidence refuting this determination. Specifically, they did not put forth any potential emissions estimate for the proposed Facility demonstrating emissions "equal to or greater than ten tons per year" that would have required the Applicant to apply for a different air permit for the Facility known as a Comprehensive Plan Approval ("CPA Air Permit"). 310 CMR 7.02(5). A Comprehensive Plan Approval application would have required the Applicant to satisfy the additional procedural and substantive requirements of the Appendix A of the APC Regulations ("Appendix A") titled "Emissions Offsets and Nonattainment Review" which applies to the air permitting of "new major source(s) [of air pollution]." 310 CMR 7.02(5)(a)(1). Having failed to present a credible counter emissions estimate for the proposed Facility exceeding ten tons per year, the Petitioner's claim that the Applicant was required to apply for a CPA Air Permit for the proposed Facility fails.[26]

VHB began working on the Applicant's LPA Air Permit application in early 2023 and began regular contact with MassDEP in approximately March 2023 to discuss the application. Mr. Tino's Direct PFT, at p. 3, lines 16-17. On March 23, 2023, VHB had a pre-application

[26] Below, at pp. 32-35, I discuss and reject the Petitioner's claim that the proposed Facility requires a CPA Air Permit because emissions from marine vessels berthed at the proposed Facility should be included in the total emissions calculation for the Facility.

meeting with MassDEP to discuss the application. Mr. Russell's Direct PFT, at p. 3, lines 4-5. At this meeting, MassDEP informed VHB that the Applicant's LPA Air Permit application was to consist of: (1) a Limited Plan Application - Process ("LPA-Process") through the MassDEP permitting portal; (2) an Air Quality ("AQ") Sound form and supporting report; and (3) an application narrative to support the electronic application, including a complete facility description addressing any mitigation for nuisance conditions, applicability of state and federal regulations, equipment specifications, air pollution control equipment, site plans, equipment layout, and Standard Operating Procedures ("SOPs"). Mr. Russell's Direct PFT, at p. 3, lines 5-11.

From March 23 to June 2, 2023, MassDEP provided additional guidance to VHB regarding what was expected as part of the LPA Air Permit application. Mr. Russell's Direct PFT, at p. 3, lines 12-14. During that period, the VHB submitted a "Noise Protocol" for the proposed Facility for MassDEP's review as part of the LPA Air Permit application process. Mr. Russell's Direct PFT, at p. 3, lines 14-15; Mr. Tino's Direct PFT, at p. 3, lines 18-20. Noise assessment and control for the proposed Facility was overseen by Mr. Bajdek at VHB who, as discussed above in his professional background, specializes in the field of noise assessment and control. Mr. Tino's Direct PFT, at p. 3, lines 18-20.

MassDEP reviewed this "Noise Protocol" and based on its review, requested that the Applicant extend noise monitoring time for the proposed Facility (from 4 days to 7 days at all monitoring sites) and provide additional noise monitoring sites to represent populations on the Fall River side of the Taunton River/Mount Hope Bay area. Mr. Russell's Direct PFT, at p. 3,

lines 15-17. Thereafter, VHB submitted the Applicant's revised "Noise Protocol" to MassDEP for its review which it found acceptable.[27] Mr. Russell's Direct PFT, at p. 3, lines 17-19.

On June 2, 2023, VHB submitted the Applicant's final LPA Air Permit application to MassDEP for its review. Mr. Russell's Direct PFT, at p. 3, lines 1-3. The application contained detailed evaluations of the potential emissions from the proposed Facility's operations. Mr. Tino's Direct PFT, at p. 3, lines 17-18. It also contained detailed sound modeling that was overseen by Mr. Bajdek at VHB. Mr. Tino's Direct PFT, at p. 3, lines 18-20.

Several weeks after it submitted the Applicant's LPA Air Permit application to MassDEP for its review, VHB and MassDEP began having weekly one-hour meetings to discuss the application. Mr. Russell's Direct PFT, at p. 3, lines 19-20. These weekly meetings took place for nearly one year prior to MassDEP's February 2024 approval of the Applicant's LPA Air permit application and issuance of the LPA Air Permit to the Applicant authorizing the proposed Facility. Mr. Tino's Direct PFT, at p. 3, lines 21-25; p. 4, lines 3-8, 13-18. Mr. Russell's Direct PFT, at p. 3, lines 20-23. These meetings were regularly attended by several senior staff members of MassDEP's SERO Office which has air permitting oversight over the proposed Facility: Millie Garcia-Serrano, the Office's then Regional Director; Seth Pickering, the Office's Deputy Regional Director for the Bureau of Air and Waste ("BAW") responsible for overseeing the Office's BAW programs, including the air permitting program; Mark Poudrier, the Chief of the Air/New Source Review section of the Office's air permitting program; and Mr. Russell, a senior environmental analyst (Environmental Analyst IV) in the Air/New Source Review section, who was the principal reviewer of the Applicant's LPA Air Permit application. Mr. Tino's

[27] Below, at pp. 35-49, I discuss and reject the Petitioner's claim that the LPA Air Permit for the proposed Facility is invalid because it was issued in violation of the APC Regulations governing noise pollution.

Direct PFT, at p. 3, lines 21-25; Mr. Russell's Direct PFT, at p. 3, lines 20-23. During that near one-year period, VHB also consulted with Glenn Pacheco, a MassDEP Senior Air Quality Modeling Specialist based in MassDEP's main office in Boston. Mr. Tino's Direct PFT, at p. 3, line 25; p. 4, lines 1-2.

The topics discussed at the weekly meetings VHB had with the senior staff members of MassDEP's SERO Office included the selection of appropriate emission factors for the proposed processes, facility sound issues and impacts, and the need for air dispersion modeling for lead, in addition to updates regarding the identification of potential sources of emissions that were not initially identified in the Applicant's LPA Air Permit application such as cooling towers, asphalt storage, and material handling. Mr. Russell's Direct PFT, at p. 4, lines 1-5. These discussions resulted in multiple revisions to the Applicant's LPA Air Permit application and additional information submitted in support of the application. Mr. Russell's Direct PFT, at p. 5, lines 9-13; Mr. Tino's Direct PFT, at p. 4, lines 13-18. The revisions included updated emission unit identification, refined emission factors, Air Quality dispersion modeling, and increased sound mitigation. Mr. Russell's Direct PFT, at p. 5, lines 13-15; Mr. Tino's Direct PFT, at p. 4, lines 13-18.

During MassDEP's review of the Applicant's LPA Air Permit application, VHB and MassDEP discussed extensively the Best Available Control Technology ("BACT") for air pollution mitigation regarding the proposed Facility as required by the APC Regulations. Mr. Russell's Direct PFT, at p. 5, lines 18-26. "BACT is the most effective emissions control technology for a pollutant that is technologically and economically feasible for the given project" and MassDEP's BACT determination is a critical part of the air permitting process under the

APC Regulations. PRE, 2022 WL 17479440, *26-27, citing, City of Quincy, 21 F.4th at 11.

The APC Regulations define BACT as:

> an emission limitation based on the maximum degree of reduction of any regulated air contaminant emitted from or which results from any regulated facility which [MassDEP], on a case-by-case basis taking into account energy, environmental, and economic impacts[,] and other costs, determines is achievable for [that] facility through application of production processes and available methods, systems[,] and techniques for control of each such contaminant. . . .

310 CMR 7.00 (definition of "Best Available Control Technology").

The LPA Air Permit that MassDEP issued to the Applicant authorizing the proposed Facility established BACT emission limitations, and corresponding operational limitations, for volatile organic compounds ("VOCs"),[28] particulate matter,[29] carbon monoxide ("CO"),[30]

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[28] VOCs:

> are compounds that have a high vapor pressure and low water solubility. Many VOCs are human-made chemicals that are used and produced in the manufacture of paints, pharmaceuticals, and refrigerants. VOCs typically are industrial solvents, such as trichloroethylene; fuel oxygenates, such as methyl tert-butyl ether (MTBE); or by-products produced by chlorination in water treatment, such as chloroform. VOCs are often components of petroleum fuels, hydraulic fluids, paint thinners, and dry-cleaning agents. VOCs are common ground-water contaminants.

https://www.epa.gov/indoor-air-quality-iaq/what-are-volatile-organic-compounds-vocs. "VOCs are emitted as gases from certain solids or liquids [and] include a variety of chemicals, some of which may have short- and long-term adverse health effects." Id. "Concentrations of many VOCs are consistently higher indoors (up to ten times higher) than outdoors [and] are emitted by a wide array of products[,] . . . include[ing] paints and lacquers, paint strippers, cleaning supplies, pesticides, building materials and furnishings, office equipment such as copiers and printers, correction fluids and carbonless copy paper, graphics and craft materials including glues and adhesives, permanent markers, and photographic solutions." Id.

[29] Particulate matter, or "PM" as it is commonly referred, "is . . . found in the air, including dust, dirt, soot, smoke, and liquid droplets." PRE, 2022 WL 17479440, at *28. "Particles can be suspended in the air for long periods of time [and] [s]ome particles are large or dark enough to be seen as soot or smoke." Id. "Othe[r] [particles] are so small that individually they can only be detected with an electron microscope." Id.

PM "less than 2.5 micrometers in diameter ($PM_{2.5}$) are referred to as 'fine' particles and are believed to pose the greatest health risks. Because of their small size (approximately 1/30th the average width of a human hair), fine particles can lodge deeply into the lungs." Id., at *29. "Sources of fine particles include all types of combustion activities (motor vehicles, power plants, wood burning, etc.) and certain industrial processes." Id.

PM "with diameters between 2.5 and 10 micrometers (PM_{10}) are referred to as 'coarse' [and] [s]ources of coarse particles include crushing or grinding operations, and dust from paved or unpaved roads." Id. "Other particles may

hazardous air pollutants ("HAPs"),[31] non-VOC organic compounds, and visible emissions. Mr. Russell's Direct PFT, at p. 8, lines 1-4. The BACT for the proposed Facility includes the use of high efficiency particulate air ("HEPA") filters, fume condensers, drift eliminators, and material usage limitations. Mr. Russell's Direct PFT, at p. 8, lines 4-6.

Section 4.D of the LPA Air Permit at pp. 15-17 of the Permit titled "Special Terms and Conditions: Sound" contains detailed provisions to ensure the proposed Facility's compliance with the APC Regulations at 310 CMR 7.10 regulating noise pollution. Mr. Russell's Direct PFT, at p. 8, lines 6-19. Table A at pp. 16-17 of the LPA Air Permit sets forth Total Predicted Sound Levels at designated monitoring locations around the proposed Facility. Mr. Russell's Direct PFT, at p. 8, lines 6-8. Section 4.D of the LPA Air Permit also requires sound mitigation including the use of low noise fans, roof top parapets, noise reduction enclosures, low noise cooling towers with whisper quiet fans, and the utilization of shore power for vessels at berth. Mr. Russell's Direct PFT, at p. 8, lines 8-11. Best operating practices are also required to mitigate sound including requiring combustion engines, if any, to be located under deck in

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be formed in the air from the chemical change of gases [and] [t]hey are indirectly formed when gases from burning fuels react with sunlight and water vapor." Id. "These [particles] can result from fuel combustion in motor vehicles, at power plants, and in other industrial processes." Id.

The LPA Air Permit that MassDEP issued to the Applicant authorizing the proposed Facility established BACT emission limitations, and corresponding operational limitations, for PM, $PM_{2.5,}$ and, PM_{10}. Mr. Russell's Direct PFT, p. 8, lines 1-3.

[30] CO "is a colorless, practically odorless, and tasteless gas or liquid [resulting] from incomplete oxidation of carbon in combustion." https://www.epa.gov/indoor-air-quality-iaq/what-carbon-monoxide. CO can be emitted from many sources, including unvented kerosene and gas space heaters; leaking chimneys and furnaces; back-drafting from furnaces, gas water heaters, wood stoves, and fireplaces; gas stoves; generators and other gasoline-powered equipment; and automobile exhaust from attached garages. Id.

[31] HAPs "also known as toxic air pollutants or air toxics, are those pollutants that are known or suspected to cause cancer or other serious health effects, such as reproductive effects or birth defects, or adverse environmental effects." https://www.epa.gov/haps/what-are-hazardous-air-pollutants. "Examples of toxic air pollutants include: benzene, which is found in gasoline; perchloroethylene, which is emitted from some dry cleaning facilities; and methylene chloride, which is used as a solvent and paint stripper by a number of industries." Id.

enclosed spaces; maintaining adequate lubrication on cable loading equipment and components to reduce power needs/increase efficiencies; using the Public Address ("PA") system at the proposed Facility only when necessary, such as for urgent communication between crew members or possible evacuation announcements; only authorizing the use of portable radio equipment (walkie-talkies) for operative communications on the open deck (instead of the PA system) during cable loading operations, with the vessel moored at the factory pier; and maintaining community expectations by providing advance notice of arrival and mooring times of ships. Mr. Russell's Direct PFT, at p. 8, lines 11-19. The proposed Facility will also not have any on-site combustion equipment. Mr. Russell's Direct PFT, at p. 8, line 19.

B. MassDEP Properly Excluded Any Emissions from Marine Vessels Berthed at the Proposed Facility from the Potential Emissions Calculation for the Facility Under the APC Regulations

The Petitioner, through its expert witness, Ms. Conley, claims that the LPA Air Permit for the proposed Facility is invalid because MassDEP did not include in the total emissions calculation for the Facility emissions from marine vessels that will be berthed or docked at the Facility to receive and transport manufactured cable. Ms. Conley's Direct PFT, at p. 7, lines 188-218; Attachments Nos. 2-7 to Ms. Conley's Direct PFT; Ms. Conley's Rebuttal PFT, at p. 1, line 1 through p. 5, line 100; Attachment No. 1 to Ms. Conley's Rebuttal PFT. In support of its claim, the Petitioner cites to the definition of "Building, Structure, Facility, or Installation" appearing in Appendix A(2) of the APC Regulations; several projects that USEPA Region I has permitted;[32] and an August 13, 2020 letter from the then Regional Administrator for USEPA

[32] USEPA Region I has federal environmental regulatory jurisdiction over several States, including Massachusetts. https://www.ecfr.gov/current/title-40/chapter-I/subchapter-A/part-1. The other States under USEPA Region I's federal environmental regulatory jurisdiction are Connecticut, Maine, New Hampshire, Rhode Island, Vermont. Id.

Region I ("the USEPA Region I Letter") regarding federal permitting requirements for air pollutant emissions arising from proposed changes to liquified natural gas cargo transfer operations. Id. I reject the Petitioner's claim for the following reasons.

First, Appendix A of the APC Regulations 310 CMR 7.00, including its definition of "facility" as appearing in Appendix A(2) as set forth below in n. 33 that includes as part of the definition "[a]ny marine vessel . . . while docked at the facility,"[33] applies only to a "major stationary source" of air pollutants which Appendix A defines as a "source of air pollutants which emits, or has the federal potential emissions greater than or equal to 100 [tons per year] or more of any pollutant subject to regulation under the [Clean Air] Act") . . . ." 310 CMR 7.00: Appendix A (definition of "major stationary source"). Here, Appendix A does not apply to the proposed Facility because based on the detailed data that the Applicant presented in its LPA Air Permit application for the Facility (which the Petitioner failed to refute at the Hearing with any probative evidence), MassDEP properly determined that the Facility is a non-major source of air pollutants because it will emit between one and ten tons of an air contaminant per year. As such, the proposed Facility falls with the provisions of the APC Regulations of 310 CMR 7.02(4)(a)(1) and 7.02(4)(b) governing the issuance of LPA Air Permits, which do not require the emissions of docked marine vessels in the emissions calculation for proposed facilities subject to these Permits. MassDEP's expert witness, Mr. Russell, provided a reasonable explanation for why

[33] Appendix A(2) defines Building, Structure, Facility, or Installation as:

> mean[ing] all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Any marine vessel is a part of a facility while docked at the facility. Any marine vessel is a part of an Outer Continental Shelf (OCS) source while docked at and within 25 miles en route to and from the OCS source. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same Major Group (i.e., which have the same two-digit code) as described in the Standard Industrial Classification Manual, 1987.

emissions from vessels that will be docked at the proposed Facility were not included in the emission calculation for the Facility: the vessels will not be part of the Facility's cable manufacturing process because they will not perform any function in that process. Mr. Russell's Direct PFT, at p. 9, line 22 through p. 10, line 4. Instead, the vessels' sole role will be to pick up manufactured cable from the proposed Facility and transport it elsewhere. Id.

Second, assuming for the sake of argument that emissions from the vessels were to be included in the emissions calculation for the proposed Facility, the Petitioner nevertheless does not prevail in the appeal because it failed to meet its burden of proof by failing to present any evidence regarding the potential emissions of marine vessels, including whether those potential emissions will bring the air permitting of the proposed Facility under the auspices of Appendix A of the APC Regulations.

Third, Ms. Conley's citations to other projects permitted by USEPA Region I (Attachment Nos. 2-7 to Ms. Conley's Direct PFT) do not prove that MassDEP was required to include emissions from marine vessels in the emissions calculation for the proposed Facility because those permits are federal permits that were issued pursuant to federal permitting requirements.

Fourth, the USEPA Region I Letter's interpretation of the APC Regulations at pp. 3-5 of the Letter does not bind MassDEP because the Regulations are State regulatory requirements of the Commonwealth which MassDEP is principally responsible for enforcing.

Lastly, the USEPA Region I Letter also does not support the Petitioner's claim that emissions from marine vessels that will be docked at the proposed Facility should have been included in the emissions calculation for the Facility because the Letter deals with the Northeast

Gateway Deepwater Port ("NEG"), a facility located in federal waters for transporting, then "vaporizing" or "regassifying" Liquified Natural Gas ("LNG") into pipeline gas that is regulated under the federal Deepwater Port Act of 1974, 33 U.S.C. § 1501 et seq. ("DWPA"), which does not apply to the proposed Facility. Additionally, the LNG tankers at the NEG port are different from the marine vessels associated with the proposed Facility because, as USEPA Region I determined, "the offloading operations of an LNG carrier at the port are associated with the port[,]" due in large part to the broad definition of emissions under the DWPA and the fact that LNG tankers are an integral part of making, transporting, and vaporizing natural gas from LNG, which is the sole and entire purpose of the NEG port. USEPA Letter, at p. 5. By contrast, the marine vessels that will be docked at the proposed Facility will not be engaged in "industrial activities associated with the port," specifically, the actual production and manufacturing of cable at the Facility, but instead, they will simply arrive at the Facility to receive and transport cable that is manufactured at the Facility. As previously discussed above, MassDEP's expert witness, Mr. Russell, confirmed this in his testimony. Mr. Russell's Direct PFT, at p. 9, line 22 through p. 10, line 4.

C. The LPA Air Permit for the proposed Facility Complies with the APC Regulations Regulating Noise Pollution

Under APC Regulations, "noise pollution" is considered a form of air pollution falling within the Regulations' purview. 310 CMR 7.10. The APC Regulations define "noise" as any "means of sound of sufficient intensity and/or duration as to cause or contribute to a condition of air pollution," 310 CMR 7.00 (definition of "Noise"), and prohibit:

> [any] person owning, leasing[,] or controlling a source of *sound* [from] willfully, negligently, or through failure to provide necessary equipment, service, or

> maintenance or to take necessary precautions cause, suffer, allow, *or permit unnecessary* emissions from [that] source of sound that may cause *noise*.

310 CMR 7.10(1) (emphasis supplied). Excluded from the definition of noise are "sounds emitted during and associated with":

> (a) parades, public gatherings, or sporting events, for which permits have been issued provided that [the] parades, public gatherings, or sporting events in one city or town do not cause noise in another city or town; (b) emergency police, fire, and ambulance vehicles; (c) police, fire, and civil and national defense activities; (d) domestic equipment such as lawn mowers and power saws between the hours of 7:00 A.M. and 9:00 P.M.

310 CMR 7.10(3).

The Petitioner contends that the LPA Air Permit authorizing the proposed Facility violates the APC Regulations regulating noise pollution because the sound models that the Applicant submitted to MassDEP in applying for the Permit did not include sound emissions that will be caused by the Facility's construction.[34] The Petitioner also contends that the sound models are improper because they did not include impact/impulse noise "expected to be generated" from certain parts of the proposed Facility, specifically, "the winch in the Tower," "the winch from the loading of the cable," and pile-driving activities related to the construction of the pier at the proposed Facility.[35] The Petitioner's claims are without merit based on the persuasive expert testimony that Mr. Bajdek and Mr. Lumpkin provided on behalf of the Applicant and Mr. Russell provided on behalf of MassDEP. Based on their testimony and the governing legal requirements I find that the LPA Air Permit authorizing the proposed Facility complies with the APC Regulations regulating noise pollution for the following reasons.

[34] Petitioner's Appeal Notice, at pp. 2-4.

[35] Id., at p. 4.

1. The LPA Air Permit Does Not Violate MassDEP's Noise Policy

As the U.S. Court of Appeals for the First Circuit ("the First Circuit") recently noted, "[MassDEP] has established a 'Noise Policy'[36] interpreting when emissions of sound are unnecessary" resulting in prohibited noise pollution within the meaning of the APC Regulations at 310 CMR 7.10(1) discussed above. Town of Weymouth, 961 F.3d at 56. Under the Policy, a source of sound will violate the APC Regulations regulating noise pollution if the source "[i]ncreases the broadband sound level by more than 10 dB(A) above ambient" or "[p]roduces a 'pure tone' condition."[37] Id. MassDEP "has a 'long standing practice . . . not to apply the Noise Policy to temporary construction' for purposes of air permitting and 'instead to require appropriate noise mitigation measures.'" Id., at 57. Mr. Russell confirmed the existence of this long-standing practice in his testimony at the Hearing. Hearing Transcript, at p. 200, lines 12-16. In his testimony, Mr. Bajdek confirmed MassDEP's application of this long-standing practice in reviewing and approving the LPA Air Permit for the proposed Facility. Mr. Bajdek's Direct PFT, at p. 3, lines 17-25; p. 4, lines 1-4, 14-22; p. 5, lines 1-22; p. 6, lines 11-23; p. 7, lines12-22; p. 8, lines 1-2; Mr. Bajdek's Rebuttal PFT, at p. 2, lines 14-22.

2. The Applicant's Sound Study for the Proposed Facility Used a Proper Noise Attenuation Rate to Predict Noise Impacts from the Proposed Facility's Construction

As part of the LPA Air Permit application process, Mr. Bajdek had primary responsibility

[36] https://www.mass.gov/doc/massdep-noise-policy/download.

[37] The Policy defines a "pure tone" condition as when the sound pressure level at any octave band center frequency exceeds the sound pressure level in the two adjacent octave bands by 3 decibels or more. https://www.mass.gov/doc/massdep-noise-policy/download; Mr. Bajdek's Direct PFT, at p. 8, lines 3-6. The Applicant's noise expert, Mr. Bajdek testified that "in a less technical sense, a pure tone is sound that is concentrated in a single frequency [and] [a]n example might be the note from a single key of a piano." Mr. Bajdek's Direct PFT, at p. 8, lines 6-7.

at VHB for preparing a sound assessment study ("the Sound Study") for the proposed Facility for MassDEP's review. Mr. Bajdek's Direct PFT, at p. 3, lines 17-18. He worked closely with MassDEP staff to ensure the Sound Study met MassDEP's requirements. Mr. Bajdek's Direct PFT, at p. 3, lines 18-19. The Sound Study was submitted both to MassDEP as part of the Applicant's LPA Air Permit application for the proposed Facility and the Town of Somerset Zoning Board of Appeals ("Somerset ZBA") as part of the Applicant's application for a Planned Development Permit and Variance ("Zoning Permit/Variance") for the Facility which the Somerset ZBA approved.[38] Mr. Bajdek's Direct PFT, at p. 3, lines 19-21; Mr. Bajdek's Rebuttal PFT, at p. 2, lines 14-22.

The Sound Study was in the form of a technical memorandum to demonstrate that the proposed Facility would not result in a source of excessive or unwarranted noise as established in the Somerset Noise Nuisance Bylaw (adopted August 3, 2020) and MassDEP's Noise Policy. Mr. Bajdek's Direct PFT, at p. 3, lines 23-25; p. 4, line 1. The Sound Study, which is part of the evidentiary record in the appeal,[39] includes a summary of the proposed Facility, the regulatory context for evaluating sound from the site of the proposed Facility, the results of ambient noise monitoring, the methodology for evaluation of sound, the results of the sound modeling, and an analysis of the effectiveness of noise mitigation alternatives. Mr. Bajdek's Direct PFT, at p. 4, lines 1-4.

The Sound Study focused on the potential for impact from construction noise, stationary source equipment noise during facility operation, and mobile source noise from vessel

[38] A copy of the Zoning Permit/Variance that the Somerset ZBA granted the Applicant for the Facility is in the evidentiary record of this appeal as Exhibit 5 to the Applicant's [Pre-Hearing] Memorandum of Law.

[39] See Attachment No. 4 to Mr. Tino's Direct PFT; Mr. Bajdek's Direct PFT, at p. 4, lines 5-12.

idling and loading operations while the proposed Facility is in operation. Mr. Bajdek's Direct PFT, at p. 4, lines 14-16. Although construction noise is not under the purview of MassDEP's Noise Policy, it was nevertheless included in the submission to MassDEP for informational purposes and because it had been presented to the Somerset ZBA as part of the Applicant's request for the Zoning Permit/Variance that the Somerset ZBA granted the Applicant for the proposed Facility. Id., at p. 4, lines 17-19.

The Sound Study predicted construction noise levels based on the maximum noise levels of the equipment (Lmax), the utilization factor (a measure of how often the equipment is used or the duty cycle), the distance between the equipment and noise receptors, the ground type, and the presence of intervening terrain or objects, such as buildings. Id., at p. 4, lines 19-22. The Sound Study used a noise attenuation rate of 4.5 dBA for each doubling of distance from the center of the construction site to account for sound levels reducing with distance over acoustically hardground conditions assuming a mix of stationary and mobile sources. Id., at p. 5, lines 1-4.

Noise attenuation is the reduction in noise level as it travels through a medium (air, water, etc.), and is measured in decibels. Id., at p. 8, lines 11-13. It is caused by different factors that affect the propagation of sound from a sound source to a receptor. Id., at p. 8, lines 15-16. It also accounts for spreading or divergence from the sound source, propagation over different types of ground, shielding provided by intervening terrain or structures, and atmospheric effects. Id., at p. 8, lines 16-18.

Noise Attenuation rates refer to the decrease in decibels per distance doubling from the sound source and account for the spreading or divergence from the source. Id., at p. 8, lines 18-20; p. 9, lines 1-2. By way of example, as Mr. Bajdek testified, noise levels from an infinite line

source drop off at a rate of 3 dB per distance doubling over hard ground and at a rate of 4.5 dB per distance doubling over soft ground. Id., at p. 9, lines 3-5. For a point source, noise levels drop off at a rate of 6 dB per distance doubling over hard ground and at a rate of 7.5 dB per distance doubling over soft ground. Id., at p. 9, lines 5-6.

The SoundPLAN model used in the Sound Study for the proposed Facility appropriately accounted for the propagation of sound from ground-based sources in accordance with International Organization of Standardization Standard 9613 "Acoustics - Attenuation of sound during propagation outdoors - Part 2: General method of calculation" ("ISO 9613"). Id., at p. 9, lines 7-9. The algorithms in ISO 9613 account for geometrical divergence, atmospheric absorption, ground effect, reflection from surfaces, and screening by obstacles. Id., at p. 9, lines 10-11.

The Sound Study's use of a noise attenuation rate of 4.5 dBA for each doubling of distance from the center of the construction site for the proposed Facility was an appropriate and conservative rate because it was a compromise between sound propagation from a stationary point source and a series of points moving along a line, and as a result, could possibly account for more predicted construction noise levels. Id., at p. 9, lines 12-18; Mr. Bajdek's Rebuttal PFT, at p. 5, lines 8-10. The Petitioner's expert witness, Dr. Healey, took issue with this 4.5 dbA noise attenuation rate, contending in his testimony that "a 3 [to] 6 dBA attenuation rate should be used per doubling of the distance to the receptor" and that the "Applicant's use of an attenuation rate of 4.5 dBA is more favorable to their analysis." Dr. Healey's Direct PFT, at p. 47, lines 1741-52. He also contended in his testimony that "[the] Applicant should provide the results of noise modeling using an attenuation rate of 3 AND 6 dBA per doubling of the distance to

provide a range (or sensitivity analysis) of anticipated noise at the receptor [because] . . . [t]he use of a range provides more information on the potential for noise to be above threshold levels." Id., at p. 47, lines 1747-50; p. 48, lines 1794-1812; p. 55, lines 2087-91; p. 57, lines 2112-14. Dr. Healey's testimony is not persuasive for the following reasons.

First, as noted previously, Dr. Healey is not a sound expert for purposes of air permitting under the APC Regulations. Second, the Petitioner's burden of proof required the Petitioner to present a counter sound study predicting construction noise levels for the proposed Facility using a noise attenuation rate of 3 and 6 dBA that Petitioner claims the Applicant should have used for its Sound Study. Undisputedly, the Petitioner did not present any such counter sound study at the Hearing. Lastly, the Applicant's noise expert, Mr. Bajdek, effectively refuted Dr. Healey's testimony as follows.

As Mr. Bajdek testified, Dr. Healey's testimony regarding the use of an "attenuation rate per distance doubling" provided a less than thorough understanding of acoustics and of the modeling of environmental noise because there are many factors affecting the level of sound as it propagates from a source of sound to a receiver or receptor of sound. Mr. Bajdek's Rebuttal PFT, at p. 5, lines 13-16. Additionally, the received sound pressure level depends upon the noise emission levels of the source, expressed as either a sound power level or a reference sound pressure level at a reference distance from the source. Id., at p. 5, lines 16-18. The received sound pressure level also depends upon factors that attenuate or reduce sound levels along the propagation path from the sound source to receiver, such as divergence (or "spreading loss"), atmospheric effects, ground effects, intervening structures (e.g., noise barriers, buildings), and other miscellaneous factors. Id., at p. 5, lines 19-22. In sum, an "attenuation rate per distance

doubling," refers to the attenuation due to divergence or spreading loss and describes the spreading loss in decibels as sound radiates from a sound source, based on the physical characteristics of the source. Id., at p. 5, lines 22-24; p. 7, lines 1-4.

Moreover, the modeling of construction noise in the Sound Study for the proposed Facility is consistent with the primary formula used by the Federal Highway Administration's Roadway Construction Noise Model ("FHW's RCNM"). Mr. Bajdek's Direct PFT, at p. 4, line 23; p. 5, line 1; Mr. Bajdek's Rebuttal PFT, at p. 7, lines 5-15; p. 8, lines 1-13. The primary formula used by the FHW's RCNM for predicting construction noise levels yields a noise attenuation rate of 6 dBA per distance doubling. Mr. Bajdek's Rebuttal PFT, at p. 7, lines 5-11. This rate is the same utilized by the Federal Transit Administration ("FTA") to predict construction noise levels for major transit projects. Id., at p. 7, lines 12-15; p. 8, lines 1-2. Hence, Dr. Healey's testimony that the Applicant should have used a noise attenuation rate of 3 dBA per distance doubling in the Sound Study for the proposed Facility is without merit. Id., at p. 8, lines 9-13. While it is true that the Sound Study for the proposed Facility could have used a noise attenuation rate of 6 dBA per distance doubling based on the formulas utilized by FHW's RCNM and the FTA to calculate noise attenuation rates, the Sound Study for the proposed Facility utilized the more conservative rate of 4.5 dBA per distance doubling to predict construction noise impacts for the Facility. Id., at p. 8, lines 3-8. Put another way, the Sound Study's use of the 4.5 dBA per distance doubling noise attenuation rate was more than appropriate because it was more protective than the 6 dBA per distance doubling noise attenuation rate and, as such, more likely to predict more construction noise impacts caused by the proposed Facility's construction. Id. To sum up, based on Mr. Bajdek's significant noise

expertise regarding air permitting under the APC Regulations and the lack of such expertise by the Petitioner's expert witnesses, Ms. Conley and Dr. Healey, I find that the methodology used by VHB to perform the Sound Study for the proposed Facility to evaluate and predict construction noise impacts from the Facility's construction was proper.

3. The Petitioner's "Winch" Noise Claims Are Without Merit

As noted previously, the Petitioner asserts that the LPA Air Permit for the proposed Facility violates the APC Regulations regulating noise pollution because the sound models used in the Applicant's Sound Study for the proposed Facility did not include impact/impulse noise "expected to be generated" by "the winch in the Tower" and "the winch from the loading of the cable" to the berthed vessel at the Facility that will transport manufactured cable to other locations.[40] These "winch" claims are without merit for the following reasons.

Noise emissions from the vessel that will be berthed at the site of the proposed Facility to transport the manufactured cable offsite were estimated using sound level data provided for an Applicant's vessel during cable loading activities. Mr. Bajdek's Direct PFT, at p. 5, lines 19-20. Monitoring for daytime and nighttime cable loading activity, including use of a winch to load cable onto the ship, was provided in addition to vessel hoteling and ambient sound level data. Id., at p. 5, lines 20-22. The winch will be used to move manufactured cable from a tower in the proposed Facility ("the Tower") to the berthed vessel. Mr. Lumpkin's Direct PFT, at p. 3, lines 4-9. Contrary to the Petitioner's claims, no such winch will be used in the Tower itself. Id., at p. 3, lines 4 through p. 4, line 2.

The Tower in the proposed Facility will be used for the process of sheathing or insulating

[40] Petitioner's Appeal Notice, at p. 4.

the raw copper for the cable. Id., at p. 3, lines 12-13. The Tower will be approximately 85 feet in outside diameter and approximately 600 feet in height, will be connected to the proposed Facility's Manufacturing/Office Building, and will include 24 elevated floors to support extruders, cooling tubes, and other equipment that are used in the cable production process. Id., at p. 3, lines 13-16. Because there are no winches involved in the cable construction process in the Tower, there is no potential noise generation from the use of a winch to carry the cable up and down the 600-foot tower. Id., at p. 3, lines 22-24. Near several machines in the Tower, there might be small pulley devices which will be used to raise only material when needed and not the cable itself. Id., at p. 3, lines 24-26. These devices will be small tools used exclusively for lifting objects which are entirely indoors and will not generate any noise audible outside of the Tower. Id., at p. 3, line 26; p. 4, lines 1-2.

As for noise emanating from the cable-making process in the Tower, there will be no noise audible outside the Tower. Mr. Lumpkin's Rebuttal, PFT, at p. 2, lines 7-24; p. 3, lines 1-19. The Tower will have 24-inch-thick concrete walls which will isolate any noise emanating from the cable-making process. Id., at p. 3, lines 6-14. The cable-making process in the Tower will be vertical and continuous in nature requiring bare wire core be lifted to the extrusion floor at an approximate elevation of 492 feet. Id., at p. 2, lines 13-14. At this point, there will be located a set of three (3) extrusion devices for the application of the insulation material to the bare wire. Id., at p. 2, lines 14-16.

At an elevation of approximately 541 feet there will be a large capstan or pulley wheel that will move the cable through the extrusion location and then up and over this capstan wheel to deliver the now-insulated cable into a series of cooling tubes to begin the curing process for

the cable. Id., at p. 2, lines 16-19. There is no potential for high-pitched "whining" or "squeaking" noise from this capstan wheel because it will turn very slowly when in operation (1.5 revolutions per minute). Id., at p. 3, lines 15-18.

During the Tower's construction (approximately 50 to 90 days will be necessary for construction), when nighttime activities are required, there will be a potential for construction noise impacts at the nearest residential receptors. Mr. Bajdek's Direct PFT, at p. 6, lines 15-17. To the extent feasible and practicable, the Applicant will reduce the number of pieces of equipment needed for operation during these nighttime hours and use local grid power in place of engine or generator power to reduce the potential for sound impacts. Id., at p. 6, lines 17-20. After the Applicant retains a Construction Manager for the proposed Facility, a Construction Management Plan ("CMP") will be adopted that will include a Noise Control Plan ("NCP") as required by the Zoning Permit/Variance that the Somerset ZBA granted to the Applicant for the proposed Facility. Id., at p. 6, lines 20-22; Mr. Bajdek's Rebuttal PFT, at p. 2, lines 14-22; p. 3, lines 1-21. Management of equipment idling at the site will be implemented as part of the CMP. Mr. Bajdek's Direct PFT, at p. 6, lines 22-23.

In the development of the NCP, the Contractor retained by the Applicant to construct the proposed Facility will perform an updated analysis of construction-related noise based upon the Contractor's specific means and methods for completing the Facility. Mr. Bajdek's Rebuttal PFT, at p. 3, lines 3-6. The modeling will be based upon the Contractor's equipment list for different activities, the types of activities, the phasing of those activities, and the schedule of activities. Id., at p. 3, lines 6-8. Should the updated modeling indicate potential excessive noise impacts due to construction, the NCP will identify mitigation measures for the

Contractor to adopt. Id., at p. 3, lines 8-10. Examples of noise mitigation measures include but are not limited to: alternative equipment (i.e. low-noise equipment), source controls (e.g. ambient-sensitive backup alarms, equipment noise emission level limits), path noise controls (e.g. partial enclosures, acoustical blankets, temporary noise barriers), and operational controls (e.g. limited nighttime work). Id., at p. 3, lines 10-14. The NCP also would provide the details of a noise complaint resolution process and identify an Acoustical Engineer who would investigate noise complaints and other noise-related issues for the duration of construction and who would work with the Contractor to resolve noise-related complaints and issues. Id., at p. 3, lines 14-17. The NCP also would identify the methods and procedures for any noise monitoring that may be required as part of the investigation to resolve noise-related complaints and issues. Id., at p. 3, lines 17-19.

The Applicant's Sound Study for the proposed Facility also evaluated possible mechanisms to control operational noise from the Facility including both manufacturing operations and noise related to the berthed vessel at the Facility that will transport the manufactured cable. Id., at p. 7, lines 12-14. In performing the Sound Study, VHB considered four alternatives for noise control. Id., at p. 7, line 14. The alternative that VHB selected included a revised site plan, a reduction in the number of pieces of equipment, rooftop noise controls, HUSHCORE Noise Reduction Systems on the Package Heat Pumps, heat pumps and cooling towers, low noise cooling towers, and other methods to control noise. Id., at p. 7, lines 14-17. Use of shore-to-ship power was also adopted, which will have the effect of reducing noise while ships are docked at the proposed Facility. Id., at p. 7, lines 18-19. For any ships that do not have the capability of utilizing shore-to-ship power (a maximum of one ship per

year for a period of up to 14 consecutive days), the Applicant has committed to conducting real time noise monitoring and should that monitoring detect noise emissions violating MassDEP's Noise Policy, vessel operations will be temporarily curtailed until such time as the ambient conditions are favorable for the commencement of activities in compliance with the Policy. Id., at p. 7, lines 19-22; p. 8, lines 1-2.

4. The Petitioner's "Pile-Driving" Noise Claims Are Without Merit

As noted previously above at p. 37, under MassDEP's Noise Policy, a source of sound will violate the APC Regulations governing noise pollution if the source "[p]roduces a 'pure tone' condition." Town of Weymouth, 961 F.3d at 56. The Applicant's Sound Study for the proposed Facility determined that operation of the proposed Facility will not produce pure tones. Mr. Bajdek's Direct PFT, at p. 8, lines 3-11; Sound Study, at pp. 53-54 and Attachment E to Sound Study (see Attachment No. 4 to Mr. Tino's Direct PFT). This determination is supported by a detailed octave band analysis that VHB (under Mr. Bajdek's supervision) performed demonstrating that operation of the proposed Facility will not produce pure tones. Attachment E to Sound Study, at pp. 1-3. The Petitioner's expert witness, Dr. Healey, took issue with this determination contending in his testimony that pile-driving activities related to the construction of the pier at the proposed Facility will be impact type noises that will contain pure tones. Dr. Healey's Direct PFT, at p. 47, lines 1708-39. Dr. Healey's testimony is not persuasive for the following reasons.

First, as noted previously, Dr. Healey is not a sound expert for purposes of air permitting under the APC Regulations and thus, his testimony has limited probative value. Second, the Petitioner's burden of proof in the appeal required the Petitioner to present a counter sound study

supporting the Petitioner's position that pile-driving activities related to the construction of the pier at the proposed Facility will emit pure tones in violation of the APC Regulations regulating noise pollution. Undisputedly, the Petitioner did not present any such counter sound study at the Hearing. Lastly, the Applicant's noise expert, Mr. Bajdek, effectively refuted Dr. Healey's testimony by noting that Dr. Healey in his testimony improperly combined the acoustical concepts of impact noise and pure tones, which are different concepts for noise evaluation purposes. Mr. Bajdek's Rebuttal PFT, at p. 3, lines 24-25.

Mr. Bajdek explained in his testimony that impact noise is defined in the Harris Handbook of Acoustical Measurements and Noise Control as "the noise which results when two masses collide" and that such noise may be characterized as a brief sound or burst of acoustic energy above ambient sound levels and occurring over a short period of time that is generally less than one second. Id., at p. 3, line 27; p. 4, lines 1-3. In contrast, a sound that contains a "pure tone" is a sound that contains acoustic energy in a single frequency band and may be characterized as "pitchy" (i.e., containing a low or high pitch). Id., at p. 4, lines 4-6. As noted previously, MassDEP's Noise Policy defines a "pure tone" as when the sound level in an octave band exceeds the levels in the two adjacent octave bands by 3 decibels or more. Mr. Bajdek testified that examples of impact sounds that are broadband (i.e., sounds that are not tonal) might include a wooden bat hitting a baseball or a paddle striking a pickleball. Mr. Bajdek's Rebuttal PFT, at p. 4, lines 6-10. He also testified that examples of impact sounds that may also produce pure tones might include a bell in a clock tower or a steel hammer hitting a steel anvil. Id., at p. 4, lines 10-11.

Mr. Bajdek testified that while pile driving is a construction activity that produces impact

noise that does not necessarily mean that pure tones will be produced because of that activity. Id., at p. 3, lines 25-26. The Sound Study's detailed octave band analysis demonstrating that operation of the proposed Facility will not produce pure tones is persuasive evidence that the Petitioner, with the burden of proof, failed to refute.

D. The Petitioner's Claim that the LPA Air Permit for the Proposed Facility Failed to Address the Potential Release of Oil and Hazardous Materials During the Proposed Facility's Construction is Without Merit

The Petitioner, through its expert witness, Dr. Healey, claims that the LPA Air Permit for the proposed Facility is invalid because it does not have adequate provisions relating to the control of dust emissions from construction activities, specifically activities that may involve construction in or near areas regulated by Chapter 21E and the MCP.[41] The Petitioner's claim is without merit for the following reasons.

First, as previously noted, Dr. Healey is not an expert on the air permitting requirements of the APC Regulations. He also is not an expert on the requirements of Chapter 21E and the MCP which govern the cleanup of contaminated sites. His lack of expertise is reflected by, among other things, that he is not an LSP, which as discussed above is the environmental professional responsible for overseeing the cleanup of contaminated sites and preparing and implementing remediation plans for such sites in accordance with Chapter 21E and MCP requirements. Dr. Healey's Direct PFT, at p. 2, lines 14-33; Hearing Transcript, at p. 33, lines 6-23.

Second, while the Petitioner, through Dr. Healey, repeatedly referred to the existence of

[41] Petitioner's Appeal Notice, at pp. 5-6; Dr. Healey's Direct PFT, at p. 7, lines 219-239; p. 8, lines 254 through p. 10, line 339; p. 10, lines 364 through p. 12, line 448; p. 16, lines 600 through p. 19, line 714; p. 23, lines 895 through p. 24, line 907; p. 25, lines 982 through p. 46, line 1693; and p. 64, lines 2420 through p. 65, line 2440.

contamination at the site of the proposed Facility,[42] proposed its preferences for how construction dust emissions should be regulated by MassDEP,[43] and expressed concerns regarding soil and hazardous material emissions, it failed to meet its burden of proof by failing to produce credible evidence that any dust generated by the construction of the proposed Facility will cause or contribute to a condition of air pollution in violation of the APC Regulations.

Third, the LPA Air Permit neither limits nor eliminates the Applicant's responsibility to comply with any other regulatory requirements. This is reflected at p. 1 of the LPA Air Permit which provides that "MassDEP's review [of the Applicant's LPA Air Permit application] . . . [was] limited to air pollution control regulation compliance and [did] not relieve the Applicant of the obligation to comply with any other regulatory requirements." This provision is supported by the APC Regulations at 310 CMR 7.03(3)(f) which provides that "a plan approval does not reduce or negate the responsibility of the facility owner or operator to comply with any other applicable requirements of the Department."

Fourth, the proposed Facility and any dust emissions from the contaminated site where the Facility will be located are regulated by the LPA Air Permit. Section 5 of the LPA Air Permit provides that the Applicant "is subject to and shall comply with [the APC Regulations at] 310 CMR 7.01, 7.02, 7.09, and 7.10." The APC Regulations at 310 CMR 7.09(2) provide that:

> *No person* responsible for any construction or demolition of an industrial, commercial, or institutional building or residential building with 20 or more dwelling units, *shall cause, suffer, allow, or permit emissions therefrom which*

[42] Hearing Transcript, at p. 135, lines 14 through p. 137, line 10.

[43] Dr. Healey's Direct PFT, at p. 16, lines 600 through p. 17, line 642; p. 34, lines 1286 through p. 35, line 1310.

cause or contribute to a condition of air pollution.

(emphasis supplied). Under the APC Regulations at 310 CMR 7.09(3):

> *No person* responsible for an area where construction or demolition has taken place *shall cause, suffer, allow, or permit particulate emissions therefrom to cause or contribute to a condition of air pollution* by failure to seed, pave, cover, wet, or otherwise treat said area to prevent excessive emissions of particulate matter.

(emphasis supplied).

Lastly, the proposed Facility and any dust emissions from the contaminated site where the Facility will be located are also regulated by the MCP. This is reflected in the MCP at 310 CMR 40.0018(1) which provides as follows:

> *Any person undertaking response actions shall implement health and safety procedures designed to protect health, safety, public welfare and the environment during the performance of response actions*. Such procedures shall include, without limitation, the following:
>
> (a) measures to protect sensitive human populations from exposure to oil and/or hazardous material;
>
> (b) *the institution of air monitoring activities, if necessary, to protect the public from exposure to gases and air-borne particulates*;
>
> (c) measures that may be necessary to contain oil and/or hazardous material during the performance of response actions, including:
>
> 1. *measures to control dust and other environmental media (e.g. wetting soils)*;
>
> 2. *measures to decontaminate vehicles and equipment to minimize the spread of contaminated soil from the disposal site*;
>
> 3. *measures to secure on-site excavations and stockpiles of contaminated materials*; and
>
> 4. *discontinuance of response actions where necessary to protect*

public health and safety.

(emphasis supplied). The MCP at 310 CMR 40.0049(1) further provides that:

> *Remedial actions that involve the emission or discharge of oil and/or hazardous material to the atmosphere shall be conducted* in a manner that ensures the protection of health, safety, public welfare and the environment, *in conformance with 310 CMR 40.0000, 310 CMR 7.00: Air Pollution Control*, and any other applicable permits, approvals, laws or regulations.

(emphasis supplied). Mr. Wilkinson, the Applicant's Chapter 21E expert and LSP for the site of the proposed Facility, provided detailed testimony confirming that dust emissions from an MCP site under construction will be subject to extensive controls under the MCP.

In his testimony, Mr. Wilkinson addressed Dr. Healey's claims regarding the potential for dust and odors to impact nearby residents during the construction activities for the proposed Facility. Mr. Wilkinson's Rebuttal PFT, at p. 2, lines 9-18. Dr. Healey contended in his testimony that:

> [t]he site excavation and construction activities must be actively monitored in real-time and mitigated against to protect the Public and Environment during th[e] excavation and construction period [for the proposed Facility and that] [t]hese monitoring and remediation measures [should] limit incidental inhalation, ingestion and dermal contact with contaminated soil that is blown towards the residential areas and to limit the impact on marine life.

Dr. Healey's Direct PFT, at p. 9, lines 305-10. Mr. Wilkinson agreed with Dr. Healey that active monitoring and mitigating is required during the excavation and construction period for the proposed Facility. Mr. Wilkinson's Rebuttal PFT, at p. 3, lines 17-25 through p. 4, lines 1-19. Regarding dust, gases, or other airborne particulates that may be generated from MCP response actions for the site of the proposed Facility (e.g., investigation, remediation, construction, etc.) conducted in accordance with MCP requirements, Mr. Wilkinson testified that the MCP at 310

CMR 40.0018 sets forth Health and Safety Procedures that describe the appropriate standard of care for protecting health, safety, public welfare, and the environment. Id., at p. 3, lines 18-23.

Specifically, the MCP at 310 CMR 40.0018 provides that when conducting activities that have the potential to generate dust, gases, or other air-borne particulates (e.g., excavation of soils), appropriate measures must be taken to ensure that no unacceptable risk is posed to any nearby sensitive receptors and to ensure that contaminants are not spread beyond the property where the work is being conducted. Id., at p. 3, lines 23-25 through p. 4, lines 1-2. As it relates to construction-related activities conducted within an area that is known to contain contaminants above MassDEP's regulatory standards, further guidance by MassDEP (in addition to the MCP) is provided by its guidance document titled "CONSTRUCTION OF BUILDINGS IN CONTAMINATED AREAS," dated January 2000, Policy #WSC-00-425. Id., at p. 4, lines 3-7. This guidance document provides that:

> it is DEP's position that construction activities at a Disposal Site meet the regulatory definition of a Remedial Action, to the extent that such activities involve the removal, disposal, or relocation (including re-grading) of released oil or hazardous material, and because such activities must be conducted in a manner to prevent, minimize, or mitigate damage to health, safety, public welfare, or the environment.

Id., at p. 4, lines 7-12.

Mr. Wilkinson testified that based on the construction work that is planned for the proposed Facility, a Release Abatement Measure ("RAM") Plan (or equivalent) will be prepared and submitted to MassDEP pursuant to the MCP prior to the start of construction activities that details how environmentally impacted soil and/or groundwater will be properly managed. Id., at p. 4, lines 13-17; p. 8, lines 1-8. The RAM Plan will also include a detailed description of how dust, odors, and fumes will be monitored to be protective of nearby sensitive receptors. Id., at

p. 4, lines 17-19; p. 8, lines 1-8.

Regarding the quality and reliability of soil and groundwater data in excavation areas, Dr. Healy "raise[d] concerns with the usability of . . . and fitness for purpose" of the data that Mr. Wilkinson and his consulting firm, Ramboll, used to prepare the Applicant's Chapter 21E/MCP Report for the site of the proposed Facility, and based on those concerns, he contended that, "a sampling/resampling plan must be completed to document the [oil or hazardous material ("OHM")] contamination in the excavation and construction site area PRIOR to these activities being initiated." Dr. Healey's Direct PFT, pp. 33-34, lines 1250-73; see also p. 31, lines 1155-67 and p. 34, lines 1278-81. Mr. Wilkinson effectively refuted Dr. Healey's testimony by pointing out the following.

As discussed previously, in January 2024, the Applicant, through Mr. Wilkson's consulting firm, Ramboll, filed with MassDEP pursuant to the MCP a Phase I Report, with Tier Classification, for the site of the proposed Facility. Mr. Wilkinson's Rebuttal PFT, at p. 6, lines 4-7; Attachment No. 2 to Mr. Wilkinson's Direct PFT. The MCP allows up to four more years after Tier Classification to reach a condition of either a Temporary Solution or Permanent Solution with the meaning of the MCP.[44] Mr. Wilkinson's Rebuttal PFT, at p. 6, lines 7-8. As detailed in the Phase I Report, the Applicant has a robust and extensive amount of soil/groundwater data (approximately 346 soil samples and 53 groundwater samples), and, as a result, only limited additional investigation was recommended in the Phase II Scope of Work

[44] "The MCP creates a multiphased assessment and cleanup process whereby a contaminated site can reach either a "temporary" or a "permanent" solution, as determined by [Mass]DEP." Peterborough Oil Co., LLC v. Department of Environmental Protection, 474 Mass. 443, 446 (2016), citing the MCP at 310 CMR 40.0006(2), 40.0006(12). "A temporary solution [under the MCP] means that the site has achieved a substantial elimination of hazardous material, but monitoring and mitigation efforts may remain ongoing indefinitely." Id. In contrast, "[a] permanent solution [under the MCP] means that, having been remediated, the site creates a condition of no significant risk to health, safety, public welfare, and the environment." Id., 446-47, citing the MCP at 310 CMR 40.0006(12).

provided as Section 11 of the Phase I Report. Id., at p. 6, lines 8-12. Once the additional data are collected and combined with the existing data, the need for additional response actions will be evaluated as part of the Phase II process for the site of the proposed Facility. Id., at p. 6, lines 12-14.

Regarding the quality and reliability of soil/groundwater data that the Applicant has collected to date for the site of the proposed Facility, Mr. Wilkinson testified that the data have been validated in accordance with the MCP, the Compendium of Analytical Methods ("CAM"),[45] and USEPA guidelines. Id., at p. 6, lines 15-20. As a result, all the current data related to contaminants of concern at the site of the proposed Facility are considered "usable" and none of the data related to contaminants of concern at the site have been compromised to the extent requiring their rejection. Id., at p. 6, lines 20-23. Ultimately, it is Mr. Wilkinson's responsibility as the LSP for the site to ensure that sufficient data are collected to: (1) establish the nature and extent of environmental impacts, (2) evaluate potential risks posed to human health and the environment, and (3) upon completion of remedial activities, verify if remedial objectives were achieved in accordance with Chapter 21E and MCP requirements. Id., at p. 6,

[45] According to MassDEP, the CAM:

> provides the regulated community with a compilation of recommended laboratory protocols, for the generation of analytical data used in support of assessment and evaluation decisions at disposal sites regulated under [Chapter 21E and the MCP]. These laboratory protocols include recommended analytical methods, reporting limit requirements, method-specific QC requirements and performance standards.

https://www.mass.gov/info-details/compendium-of-analytical-methods-cam#overview. "Compliance with the QC requirements and performance standards for these protocols will result in analytical data that are presumed to meet the performance standards of the MCP." Id.

lines 23-27.

CONCLUSION

For the reasons set forth above, I recommend that MassDEP's Commissioner issue a Final Decision affirming the LPA Air Permit that MassDEP issued to the Applicant authorizing the proposed Facility.

Salvatore M. Giorlandino

Date: August 26, 2024

Salvatore M. Giorlandino
Chief Presiding Officer

NOTICE-RECOMMENDED FINAL DECISION

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

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[46] See n.3, at p. 2 above for the names of the 12 Somerset residents comprising the Somerset Residents Group.

[continued from preceding page]

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ADDENDUM NO. 1

OADR DESCRIPTION

The Office of Appeals and Dispute Resolution ("OADR") is a quasi-judicial office within the Massachusetts Department of Environmental Protection ("the Department" or "MassDEP") 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. In the Matter of Tennessee Gas Pipeline Company, LLC, OADR Docket No. 2016-020 ("TGP"), Recommended Final Decision (March 22, 2017), 2017 MA ENV LEXIS 34, at 9, adopted as Final Decision (March 27, 2017), 2017 MA ENV LEXIS 38, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7). The Department's Commissioner is the final agency decision-maker in these appeals. TGP, 2017 MA ENV LEXIS 34, at 9, citing, 310 CMR 1.01(14)(b). To ensure its objective review of 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"). TGP, 2017 MA ENV LEXIS 34, at 9.

OADR staff who advise the Department's Commissioner in resolving administrative appeals are Presiding Officers. Id. 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 and issuing Recommended Final Decisions on appeals to the Commissioner. TGP, 2017 MA ENV LEXIS 34, at 9-10, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(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. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(b). Unless there is a statutory directive to the contrary, the Commissioner's Final Decision can be appealed to Massachusetts Superior Court pursuant to G.L. c. 30A, § 14. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(f).