

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

December 1, 2025

In the Matter of
The Villages at Brookside
c/o The Dartmouth Group

OADR Docket No. 2019-023
Permit No. 415-3
Transmittal No. X280677
Bourne, MA

ADDENDUM TO RECOMMENDED FINAL DECISION

INTRODUCTION

In this appeal, the Buzzards Bay Coalition, Inc. (“the Petitioner”) challenges a Groundwater Discharge Permit (“the Proposed Permit”) that the Southeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to The Villages at Brookside c/o of The Dartmouth Group (“the Former Applicant”) on May 7, 2019, pursuant to the Massachusetts Clean Waters Act (“MCWA”), G.L. c. 21, §§ 26-53, and the Groundwater Discharge Permit Regulations, 314 CMR 2.00 and 5.00. The Proposed Permit authorized the Former Applicant’s discharge of 60,000 gallons of effluent per day to the ground from an onsite privately owned wastewater treatment facility (“PWTF”) at a condominium complex known as The Villages at Brookside at 32 Brookside Road in Bourne, Massachusetts. During the appeal, the Proposed Permit was assigned to Villages WWTF, LLC

(“the Applicant”), the Former Applicant’s successor in interest, to obtain the PWT’s compliance with the “single responsible entity” requirement of 314 CMR 5.15(1)(a).¹

The Petitioner asserts that the Department issued the Proposed Permit in violation of the requirements of the MCWA and the Groundwater Discharge Permit Regulations. On August 4, 2025, I issued a Recommended Final Decision (“RFD”) rejecting the Petitioner’s claim because the Department properly issued the Proposed Permit for the detailed reasons set forth in the RFD.

Per the Standard Operating Procedure of the Office of Appeals and Dispute Resolution (“OADR”), the RFD contained a notice informing the Parties that “[the RFD] ha[d] been transmitted to MassDEP’s Commissioner for her Final Decision in this matter [and was] therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d) and/or 14(e), and [could] not be appealed to Superior Court pursuant to G.L. c. 30A.”² The notice also informed the parties that:

since “[the RFD] . . . had [] been transmitted to the Commissioner, *no party and no other person directly or indirectly involved in th[e] [] appeal [was permitted to]* (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, direct[ed] otherwise.*”³ (emphasis added.)

Notwithstanding that this notice prohibited all parties from communicating with the Commissioner regarding the RFD “unless[,] . . . in her sole discretion [she] direct[ed] otherwise,” the Petitioner’s counsel on August 12, 2025, forwarded a letter to the Commissioner requesting that she “hear directly from Petitioner prior to taking action on the Recommended

¹ 314 CMR 5.15(1)(a) provides that “[a] single entity (the ‘single responsible entity’) shall be the permittee responsible for the operation of the facility, including reporting, monitoring, maintenance, repair and replacement of the PWT.”

² RFD, at p. 20.

³ RFD, at pp. 20-21.

Final Decision.” The Petitioner’s counsel contended that such a hearing was necessary to prevent “further delay and litigation” of the appeal and because in his view I had “overlooked” “reams [of] data” presented by the Petitioner supporting its position that MassDEP had improperly issued the Proposed Permit. On my own initiative, I have issued this Addendum to the RFD to: (1) address the claims of the Petitioner’s counsel which, as discussed below, lack merit, and (2) affirm the RFD’s recommendation that the Commissioner issue a Final Decision affirming the Proposed Permit and dismissing the Petitioner’s appeal.

DISCUSSION

I. THE PETITIONER CONTRIBUTED TO THE DELAYED ADJUDICATION OF THE APPEAL

As stated above, the Petitioner’s counsel contended in his August 12, 2025 letter that it is necessary for the Commissioner to “hear directly from Petitioner prior to taking action on the Recommended Final Decision” to prevent “further delay and litigation” of the appeal. In making that claim, he asserted that adjudication of the appeal had been unduly delayed because “[the] appeal [had been] filed over six years [earlier] in 2019, and the [evidentiary adjudicatory] hearing [was] scheduled in February 2023, some two-and-a-half years [earlier]” The Petitioner’s counsel made this claim notwithstanding that the Petitioner had contributed to the appeal’s delayed adjudication.

As the Procedural History section of the RFD documented,⁴ adjudication of the appeal was delayed by 2.5 years after its filing due to the Petitioner’s, the Former Applicant’s, and the Department’s (collectively “the Original Parties”) actions. First, adjudication of the appeal was delayed by 1.5 years, from October 14, 2019 to April 27, 2021, per the Original Parties’ joint request so that they could attempt settlement of the appeal. When their settlement discussions

⁴ RFD, at pp. 6-8.

failed, I vacated the stay on April 27, 2021 per their joint request so that the appeal could be adjudicated. Shortly thereafter, I conducted a Pre-Hearing Conference with the Original Parties at which the Department informed me for the first time that it had learned during the course of its settlement discussions with the Petitioner and the Former Applicant that two separate entities owned portions of the PWTF in violation of the “single responsible entity” requirement of 314 CMR 5.15(1)(a).⁵ Neither the Petitioner nor the Former Applicant disputed that was the case. They and the Department should have brought the violation to my attention prior to requesting that the October 2019 stay order be vacated because I would have denied the request and would have kept the stay in place until the violation was addressed for the following reasons.

First, the PWTF’s non-compliance with the “single responsible entity” requirement of 314 CMR 5.15(1)(a) would constitute a violation of the 2009 Permit, and would therefore be an enforcement matter that could not be adjudicated in this appeal.⁶ Second, the Petitioner’s claims against the Proposed Permit would not be ripe for adjudication in the appeal until the PWTF’s non-compliance with the “single responsible entity” requirement was rectified. The Petitioner was aware of that or should have been aware that after learning during the settlement discussions with the Former Applicant and the Department of the PWTF’s non-compliance with the “single responsible entity” requirement.

In sum, the revelation of the PWTF’s non-compliance with the “single responsible entity” requirement at the Pre-Hearing Conference I conducted with the Original Parties following my vacating the October 2019 stay order resulted in my issuance of a new stay order on June 14,

⁵ See n.1, at p. 2 above.

⁶ Enforcement is within MassDEP’s discretion and OADR may not order an enforcement action as a form of relief. In the Matter of Stephen Arena, OADR Docket No. WET-2021-034, Recommended Final Decision (November 9, 2021), 2021 WL 6297695, *4, adopted by Final Decision (December 3, 2021), 2021 WL 6297696 (“[i]n a permitting proceeding, like this appeal, this tribunal has no jurisdiction relative to MassDEP’s exercise of enforcement discretion”).

2021, staying adjudication of the appeal until the PWTF complied with the “single responsible entity” requirement. This stay order remained in effect for nearly one year, until June 3, 2022, when I issued an order granting the Former Applicant’s assented-to-motion to substitute the Applicant for the Former Applicant as permittee after the Applicant had obtained full ownership of the PWTF and the Proposed Permit had been assigned to it.

II. THE PETITIONER DID NOT PRESENT “REAMS [OF] DATA” PROVING THAT THE DEPARTMENT IMPROPERLY ISSUED THE PROPOSED PERMIT

Also lacking merit is the Petitioner’s counsel’s claim in his August 12, 2025 letter to the Commissioner that in upholding the Proposed Permit in my RFD, I had “overlooked” “reams [of] data” evidence presented by the Petitioner supporting its claim that MassDEP improperly issued the Proposed Permit. Specifically, the Petitioner’s counsel asserted that:

[t]he RFD . . . dismissed the [Petitioner’s] appeal as a matter of law because data in support of the [Total Maximum Daily Load (“TMDL”)] from 14 years ago, which remains in effect, was not legally sufficient to sustain a claim for relief *But omitted from the RFD [were] . . . reams of more recent data submitted by Petitioner through its expert witnesses[.] . . . [t]hat . . . was apparently overlooked [by the Chief Presiding Officer].*

(emphasis supplied). The Petitioner’s counsel’s assertion that there were “reams of more recent data” submitted by the Petitioner in support its appeal is a bit of an overstatement. Also, contrary to the Petitioner’s counsel’s assertions, I considered all the Petitioner’s data evidence and after doing so, I accorded it little or no weight to it because it lacked probative value as discussed below.

A. Background

In addressing the Petitioner’s counsel’s claim, it is important to first recap why exactly the Petitioner failed to sustain its case resulting in my RFD upholding the Proposed Permit. Specifically, the Petitioner argued that the Proposed Permit would result in an exceedance of the Total Maximum Daily Load (“TMDL”) for nitrogen in Phinneys Harbor and Back River, but

provided no data more recent than 2005 to support this claim. A TMDL is “the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards in all seasons.” 314 CMR 4.02: Total Maximum Daily Load. The TMDLs for the Phinneys Harbor embayment system (“PHES”) are as follows: for the Phinneys Harbor subwatershed, 22 kilograms per day with a target threshold load⁷ of 4.69 kilograms per day; for the Back River subwatershed, 12 kilograms per day with a target threshold load of 9.66 kilograms per day; and for the Eel Pond subwatershed, 5 kilograms per day with a target threshold load of 4.89 kilograms per day.

The Petitioner alleged that the wastewater from the PWTF would flow into both Phinneys Harbor and Back River. However, the Proposed Permit set a limit that the total amount of nitrogen discharged not exceed 911 pounds per year, equivalent to approximately 1.13 kilograms per day, well below both the TMDLs and the target threshold loads. To prove that the TMDLs were being violated, the Petitioner was required to provide evidence of the total nitrogen load being received by the PHES at the time the Proposed Permit was issued. However, as set forth in the RFD, the Petitioner failed to present evidence of the nitrogen load more recent than 2005. For any evidence to materially impact the outcome of the case, the Petitioner was required to provide data regarding the nitrogen load being received by Phinneys Harbor and/or the Back River. As discussed below, the Petitioner’s data or documents more recent than 2005 was quite sparse and failed to demonstrate that MassDEP had improperly issued the Proposed Permit.

B. “The Data” that the Petitioner’s Counsel Claims to Exist in the Administrative Record Supporting the Petitioner’s Appeal

1. The TMDL and the MEP Report

The TMDL was published in 2007 and finalized in 2008, while the Massachusetts

⁷ The target threshold load is the maximum load from human sources that, when combined with the load from natural sources, will keep the total load at or below the TMDL.

Estuaries Project (“MEP”) Report was published in 2006. These documents were discussed in the RFD and it was noted that they both relied on data from 2005.

2. Scientific Studies

The Direct Pre-Filed Testimony (“PFT”) of the Petitioner’s witness, Christopher Neill (“Mr. Neill”), cited four scientific studies published later than 2005: (1) “Nitrogen loads to estuaries from wastewater plumes: Modeling and isotopic approaches” published in 2006; (2) “Nitrogen as the limiting nutrient for eutrophication in coastal marine ecosystems: Evolving views over three decades” published in 2006; (3) “Susceptibility of salt marshes to nutrient enrichment and predator removal” published in 2007; and (4) “Coastal eutrophication as a driver of salt marsh loss” published in 2012. All these studies covered nutrient loading to waterbodies and eutrophication generally, but did not contain any data regarding the nitrogen load being received by the PHES.

3. National Coastal Condition Report IV

Mr. Neill’s PFT also cited the National Coastal Condition Report IV that the United States Environmental Protection Agency (“USEPA”) published in 2012 that discusses the condition of coastal habitats in the United States generally. This document does not contain any data regarding the nitrogen load being received by the PHES.

4. Orleans Marketplace Scope of Work

The Pre-Filed Rebuttal Testimony (“PFR”) of the Petitioner’s witness, Scott Horsley (“Mr. Horsley”), referred to a Scope of Work prepared by the Horsley Witten Group, Inc. in 2015 for a proposed PWTF to serve the Orleans Marketplace in Orleans, Massachusetts. The Petitioner submitted this document as evidence that MassDEP requires no net increase in nitrogen to a waterbody already in violation of the Surface Water Quality Standards (“SWQS”). However, this document did not contain any data regarding the nitrogen load being received by

the PHES. Additionally, the RFD took into account that any increase in nitrogen load above the TMDL would constitute a violation of the SWQS.

5. Email from Brian Dudley

Mr. Horsley's PFR also referred to an email he received in 2018 from Brian Dudley, a senior environmental engineer at MassDEP, stating that: “[s]ince TMDLs (or even an MEP report or other study documenting impairment) indicates a violation of the SWQSs, MassDEP considers that the additional load will contribute to a further violation of the SWQSs; therefore, the Department cannot issue a permit unless that additional load is mitigated to a net zero nitrogen discharge or a reduction in nitrogen loading to the impaired resource.” This document did not contain any data regarding the nitrogen load being received by the PHES. Additionally, the RFD took into account that any increase in nitrogen load above the TMDL would constitute a violation of the SWQS.

6. Falmouth Wastewater Treatment Facility Comment Letter

Mr. Horsley's PFR also referred to a comment letter submitted by the USEPA to MassDEP in 2011 regarding the groundwater discharge permit for the Falmouth Wastewater Treatment Facility. The Petitioner submitted this document as evidence that MassDEP requires no net increase in nitrogen to a waterbody already in violation of the SWQS. However, this document did not contain any data regarding the nitrogen load being received by the PHES. Additionally, the RFD took into account that any increase in nitrogen load above the TMDL would constitute a violation of the SWQS.

7. PWTF Effluent Nitrogen Concentration Data

Mr. Horsley's PFR also referred to a chart showing the concentration of nitrogen in the wastewater discharged from the PWTF at issue here from 2016 to 2022. This chart does not contain any data regarding the nitrogen load being received by the PHES. Instead, it shows that

the concentration of nitrogen in the wastewater has consistently exceeded 5 mg/L and occasionally exceeded 10 mg/L even though the Proposed Permit requires that the concentration not exceed 10 mg/L and requires the Applicant to make best efforts to not exceed 5 mg/L. Whether the Applicant has violated the requirements of the Proposed Permit is an enforcement issue that cannot be adjudicated at OADR and is irrelevant to the question of whether MassDEP properly issued the Proposed Permit.

8. PHES Nitrogen Concentration Data

The Petitioner referred to various documents regarding the nitrogen concentration in the PHES. The comment letter the Petitioner submitted in 2019 about the proposed Permit claimed that the 5-year running average nitrogen concentration in Phinneys Harbor was 0.38 mg/L, which exceeded the target threshold of 0.35 mg/L identified in the TMDL. However, the comment letter did not mention the date for this data. Given that it was submitted in 2019, perhaps the 5-year running average considered data from 2014 to 2018. But that constitutes speculative, not probative evidence. In the Matter of Sawmill Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), 2015 WL 5758252, *29, adopted as Final Decision (July 7, 2015), 2015 WL 5758285 (petitioners' expert testimony "that pharmaceuticals, toxins, and other potentially hazardous material would be discharged from effluent generated by . . . proposed [privately owned wastewater treatment facility] . . . was speculative in nature and not reliable").

Additionally, even if it is true that the nitrogen concentration in Phinneys Harbor exceeds the target threshold identified in the TMDL document, the target threshold is not the same as the TMDL. The target threshold is the ultimate goal of the TMDL; the TMDL is the nitrogen load to the watershed that will allow the target threshold to be reached. If an exceedance of the target

threshold means that the TMDL is also being exceeded, the Petitioner would have needed to provide an expert testifying to that effect. The Petitioner did not do so.

9. Data on the Petitioner's Website

In his testimony, Mr. Horsley also referred to the Petitioner's internet website where it lists water quality data for the PHES. However, the data does not demonstrate that MassDEP improperly issued the Proposed Permit because the data does not address the nitrogen load being received by the PHES, which is what the TMDL addresses.

10. The Petitioner's 2021 Publication on Water Quality Measurements in Buzzards Bay

Lastly, Mr. Horsley in his testimony referred to a scientific study titled "Water quality measurements in Buzzards Bay by the Buzzards Bay Coalition Baywatchers Program from 1992 to 2018" published in 2021. This study contains a spreadsheet of water quality data in the PHES from 1992 to 2018. The Petitioner did not point to which portion of the nearly 90,000 rows of data in this spreadsheet was relevant to these proceedings. Regardless, the spreadsheet only includes water quality data, not data on the nitrogen load being received by the PHES. As discussed above, the Petitioner failed to tie the water quality data to the TMDL with expert testimony.

CONCLUSION

My previous finding as set forth in the Recommended Final Decision that the Petitioner failed to sustain its case that the Department improperly issued the Proposed Permit to the Applicant stands. Accordingly, I continue to recommend that the Department's Commissioner

issue a Final Decision affirming the Proposed Permit and dismissing this appeal.



Date: December 1, 2025

Salvatore M. Giorlandino
Chief Presiding Officer

NOTICE-ADDENDUM TO RECOMMENDED FINAL DECISION

This document is an Addendum to the Recommended Final Decision (“the Addendum”) of the Chief Presiding Officer. It has been transmitted to MassDEP’s Commissioner for her Final Decision in this matter. Neither the Addendum nor the Recommended Final Decision constitute 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 is presently before 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 the Addendum and Recommended Final Decision or any part of them, nor (2) communicate with the Commissioner and any member of the Commissioner’s office regarding the Addendum and Recommended Final Decision unless the Commissioner, in her sole discretion, directs otherwise.

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