COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS

DEPARTMENT OF ENVIRONMENTAL PROTECTION

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

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

August 4, 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

RECOMMENDED FINAL DECISION

In June 2019, the Buzzards Bay Coalition, Inc. ("the Petitioner") filed this appeal challenging 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. The Proposed Permit has since been assigned to Villages WWTF, LLC ("the Applicant"), the Former Applicant's successor in interest. The Petitioner asserts that the Department issued the Proposed Permit in violation of the requirements of the MCWA and the Groundwater Discharge Permit Regulations.

The Parties filed the sworn pre-filed testimony ("PFT") of witnesses, including experts, supporting their respective positions in the appeal who were to be cross-examined on their PFT by opposing counsel at an evidentiary adjudicatory hearing ("Hearing") that I was to conduct in the case. The Hearing did not go forward because prior to the Hearing, the Applicant and the Department moved to dismiss the Petitioner's appeal for failure to sustain their case which the Petitioner opposed. For the reasons explained in detail below, I agree with the Applicant and the Department that the Petitioner's appeal should be dismissed for failure to sustain its case. As such, I recommend that the Department's Commissioner issue a Final Decision affirming the Proposed Permit and dismissing this appeal.

WITNESSES[1]

For the record, I note that the individuals listed below submitted PFT and exhibits in support of the Parties' respective positions in the appeal regarding whether the Proposed Permit should be affirmed. I do so recognizing that for the purpose of ruling on the Applicant's and the Department's motion to dismiss the Petitioner's appeal for failure to sustain its case, the focus is on the PFT of the Petitioner's witnesses.[2]

For the Petitioner:

1. Scott Horsley: Mr. Horsley is a hydrologist with over 30 years of experience in the field of water resources management. He has worked as a consultant for federal, state, and local government agencies; non-governmental organizations; and private industry throughout the United States and in other countries. He has served as an instructor for

[1] Throughout this Recommended Final Decision, the witnesses' Pre-Filed Direct Testimony is referred to as "[Witness] PFT, ¶ X" and Pre-Filed Rebuttal Testimony will be referred to as "[Witness] PFR, ¶ X." Exhibits to testimony are referred to as "[Witness] Ex. X."

[2] A ruling on a motion to dismiss for failure to sustain a case is based solely upon the evidence submitted by the Petitioner. See In the Matter of Margaret Reichenbach, OADR Docket No. WET-2014-001, Recommended Final Decision (June 20, 2014), 2014 WL 2996117, *8, adopted as Final Decision (June 26, 2014), 2014 WL 2996124. As such, I did not rely on any of the testimony or exhibits submitted by the Applicant's or the Department's witnesses in this Recommended Final Decision.

training workshops on water resources restoration and watershed management and has served on advisory boards for the U.S. Environmental Protection Agency and MassDEP. He currently serves as Adjunct Faculty at Harvard University Extension School and Tufts University, where he teaches graduate courses in water resources policy, wetlands management, green infrastructure, and low impact development. Mr. Horsley is qualified as an expert witness.

2. Russell Keeler: Mr. Keeler is a former member of the Board of Directors for the Buzzards Bay Coalition. He was elected to their Board of Directors in 2009 and served in that role until 2021. He has also volunteered as boat captain of the Buzzards Bay Coalition's research vessel used to obtain water quality samples. He has lived in the vicinity of Phinneys Harbor and Back River for over 55 years.
3. Christopher Neill: Dr. Neill is a Senior Scientist at the Woodwell Climate Research Center in Woods Hole, Massachusetts. He received a Bachelor of Science from Cornell University, a Master of Science from the University of Massachusetts Amherst, and a Ph.D. from the University of Massachusetts Amherst. His research involves how changes to land use and human activities influence the hydrology, soils, and water quality in watersheds, particularly involving the sources and movement of nitrogen in soils and watersheds. He has overseen the laboratory analyses of water quality samples taken by the Buzzards Bay Coalition since 2013. Dr. Neill is qualified as an expert witness.
4. Neal Price: Mr. Price is a hydrogeologist and hydrologist with the Horsley Witten Group. He received a Bachelor of Arts in Archaeology from Oberlin College and a Master of Science in Geology from the University of Massachusetts Amherst. He has nearly 30 years of experience in water supply and wastewater disposal assessment and permitting; groundwater modeling; stream, salt marsh, and pond water resources restoration; dam

removals; and culvert replacements. He has successfully obtained groundwater discharge permits for multiple clients in southeastern Massachusetts and is familiar with the USGS MODFLOW groundwater modeling program. Mr. Price is qualified as an expert witness.

5. Mark Rasmussen: Mr. Rasmussen is the President of the Buzzards Bay Coalition. He has served in that role since 2008 and served as Executive Director of the Buzzards Bay Coalition from 1998 to 2008. As President, he manages the Board of Directors, staff, and budget of the Buzzards Bay Coalition. He has intimate knowledge of the activities of the Buzzards Bay Coalition regarding conservation of the waters in and around Phinneys Harbor.

For the Applicant:

1. Joseph Mattingly: Mr. Mattingly is a resident of the Villages at Brookside and has served as Chairman of the Board of Trustees for the condominium association since 2022. He is familiar with the permitting history of the PWTF at issue in this case.
2. David Formato: Mr. Formato is the founder and President of Onsite Engineering, Inc., an environmental consulting firm. He received a Bachelor of Science in Civil Engineering from Worcester Polytechnic Institute and a Bachelor of Science in Environmental Science from the University of Massachusetts Amherst. He has over 25 years of experience in the design, permitting, evaluation, and compliance monitoring of wastewater and stormwater systems. He is a Registered Professional Engineer as well as a certified Title 5 System Inspector and Soil Evaluator. Mr. Formato is qualified as an expert witness.

For the Department:

1. Andrew Osei: Mr. Osei is an Environmental Engineer for MassDEP. He received a Master of Science in Environmental Engineering from Worcester Polytechnic Institute.

He has served in his current position since 2015, where his duties involve reviewing applications for groundwater discharge permits, inspecting groundwater treatment facilities, reviewing applications submitted under Title 5 of the State Environmental Code, and reviewing submissions made under the Massachusetts Environmental Policy Act. He has drafted over 50 groundwater discharge permits. He is also a Registered Professional Engineer. Mr. Osei is qualified as an expert witness.

BACKGROUND

The Phinneys Harbor embayment system ("PHES") is a large watershed consisting of multiple subwatersheds. Price PFT, ¶ 13. The water quality in the PHES was recognized as impaired due to excess nitrogen causing eutrophication as early as 1995. Horsley PFT, ¶ 17. In February 2008, the U.S. Environmental Protection Agency ("U.S. EPA") approved a Total Maximum Daily Load ("TMDL")[3] for nitrogen in the PHES. These TMDLs are as follows: for the Phinneys Harbor subwatershed, 22 kilograms per day with a target threshold load[4] 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 TMDL document also states that the controllable load to Phinneys Harbor would need to be reduced by 68% to meet the target threshold load. Horsley PFT, ¶¶ 15, 17. The TMDLs were based on data gathered between 1992 and 2005. Horsley PFT, ¶ 14. These TMDLs are still in effect.

[3] A TMDL is "[t]he sum of a receiving water's individual waste load allocations and load allocations and natural background, which, together with a margin of safety that takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality, represents 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. TMDLs are developed by MassDEP and then approved by the U.S. EPA on a per-pollutant and per-waterbody basis. The TMDL for nitrogen in the PHES was finalized on November 26, 2007, and approved by the U.S. EPA on February 5, 2008.

[4] 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.

The subject of the Proposed Permit is a PWTF for the Villages at Brookside, a residential development in Bourne. Proposed Permit, p. 1. The PWTF discharges wastewater to the ground. Proposed Permit, p. 1. This nitrogen-containing wastewater flows into the Back River subwatershed in groundwater, then into the Phinneys Harbor subwatershed in surface water. Price PFT, ¶¶ 15-16. The Former Applicant filed its permit application on May 24, 2018. MassDEP issued a tentative determination to issue individual groundwater discharge permit ("Draft Permit") on January 8, 2019. The Draft Permit allowed for the discharge of up to 60,000 gallons of wastewater per day, with a requirement that the nitrogen concentration in the wastewater not exceed 10 milligrams per liter, but imposing no cap on the total amount of nitrogen discharged. Draft Permit, Special Condition A.1. The Petitioner submitted a comment letter during the public comment period for the Draft Permit requesting that the permitted discharge volume be reduced to 30,000 gallons per day or the permitted nitrogen concentration in the wastewater be reduced to 5 milligrams per liter. Comment Letter, p. 4. In response, MassDEP added requirements into the Proposed Permit that the total amount of nitrogen discharged not exceed 911 pounds per year and that the Former Applicant make best efforts to achieve an annual average nitrogen concentration of 5 milligrams per liter. Proposed Permit, Special Condition A.1. The Proposed Permit was issued on May 7, 2019.

PROCEDURAL HISTORY

The Petitioner filed a Notice of Claim ("NOC") on June 6, 2019 challenging the Proposed Permit. On October 11, 2019, the parties filed a joint motion to stay the proceedings so they could continue settlement discussions, which I granted on October 14, 2019. That stay was extended multiple times at the parties' request. On April 1, 2021, the parties filed a joint motion to lift the stay, stating that they had been unable to reach a settlement, which I granted on April 27, 2021. In MassDEP's Pre-Hearing Conference Statement filed on May 24, 2021, it stated that

it had learned during the course of settlement discussions that two separate entities owned portions of the PWTF in violation of the "single responsible entity" requirement in 314 CMR 5.15(1)(a).[5] MassDEP requested that the question of whether this ownership structure complied with the regulations be added as an issue for adjudication and stated that the Proposed Permit could not be finalized if the Former Applicant was in violation. On June 14, 2021, I issued an order staying the proceedings. That order pointed out that a violation of the "single responsible entity" requirement would be a violation of the 2009 Permit, and would therefore be an enforcement matter that could not be adjudicated in these proceedings.[6] The order also pointed out that the Petitioner's claims would not be ripe until the Former Applicant cured its lack of compliance with the "single responsible entity" requirement.

On January 10, 2022, the Former Applicant filed an assented-to motion to substitute the Applicant for the Former Applicant as permittee. On February 11, 2022, the parties filed a joint motion to lift the stay, stating that the Applicant now fully owned the PWTF and the Proposed Permit had been assigned to it. On June 3, 2022, I issued an order granting the substitution of the Applicant as permittee and lifting the stay. A Pre-Hearing Conference was held on September 8, 2022.

On February 27, 2023, MassDEP filed a motion to dismiss for failure to sustain a case, lack of standing, and untimeliness. On February 28, 2023, the Applicant filed a response joining MassDEP's motion to dismiss. The Petitioner filed an opposition to the motion to dismiss on March 15, 2023. On April 27, 2023, I issued a ruling granting MassDEP's motion to dismiss.

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[5] "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 PWTF." 314 CMR 5.15(1)(a).

[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").

That ruling stated that the basis for my determination would be explained in my Recommended Final Decision to MassDEP's Commissioner.

LEGAL FRAMEWORK

I. Massachusetts Clean Water Act

"The [MCWA] is a comprehensive program for protection of the surface and groundwaters of the Commonwealth. [G.L. c. 21, § 27(6)] vests authority in the department to adopt water quality standards and to prescribe effluent limitation, permit programs, and procedures for management and disposal of pollutants. The department may grant a permit if it determines that the discharge will conform to effluent limitations specified in the permit and to receiving water quality standards. G.L. c. 21, § 43(5). The water quality standards are grouped according to whether the discharge enters surface or groundwater." Friends and Fishers of Edgartown Great Pond, Inc. v. Department of Environmental Protection, 446 Mass. 830, 837 (2006).

"The department regulates the discharge of pollutants into the groundwaters of the Commonwealth through its groundwater discharge permit program, [314 CMR 5.00]. Under the program, the department is prohibited from issuing a groundwater discharge permit 'when the discharge will cause or contribute to a condition in contravention of' the groundwater quality standards . . . or the surface water quality standards, [314 CMR 4.00]." Healer v. Department of Environmental Protection, 75 Mass. App. Ct. 8, 11 (2009). "The Massachusetts Surface Water Quality Standards at 314 CMR 4.00 . . . create 'designated uses' for different classes of surface waters and enumerate the criteria necessary to protect both existing and designated uses." In the Matter of Bear Swamp Power Company, LLC, OADR Docket No. 2020-020, Recommended Final Decision (August 22, 2022), 2022 WL 6253987, *5, adopted as Final Decision (September 27, 2022), 2022 WL 6253980.

II. Standing

"Standing 'is not simply a procedural technicality.' . . . Rather, it 'is a jurisdictional prerequisite to being allowed to press the merits of any legal claim.'" In the Matter of Brian Corey, OADR Docket No. WET 2016-023, Recommended Final Decision (February 28, 2018), 2018 WL 2002973, *9, adopted as Final Decision (March 15, 2018), 2018 WL 2002972 (Buzzards Bay Coalition had standing to challenge the SOC as an aggrieved Person who previously participated in the permit proceedings), citing Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975).

The provisions of 314 CMR 2.08(2) state:

> During the 30-day period following issuance of the permit, general permit coverage, or determination to deny, any person aggrieved by the issuance or the determination, except an applicant for or permittee with general groundwater discharge permit coverage, may file a request for an adjudicatory hearing relative thereto with the Department. The standing of a person to request a hearing, and the procedures for filing such request are governed by M.G.L. c. 30A and 310 CMR 1.01: Adjudicatory Proceeding Rules for the Department of Environmental Protection.

"A 'person aggrieved' must assert a plausible claim of a definite violation of a private right, private property interest, or private legal interest that the MCWA was intended to protect. . . . Additionally, the purported harm to the party's private right, private property interest, or private legal interest must be specific or 'particularized' to the party, meaning that the harm must be different in kind or magnitude from that suffered by the general public." In the Matter of Sawmill Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), 2015 WL 5758252, *8, adopted as Final Decision (July 7, 2015), 2015 WL 5758285.

"To show standing, [however,] a party need not prove by a preponderance of the evidence [at the evidentiary Adjudicatory Hearing in the appeal] that his or her claim of

particularized injury is true." Brian Corey, 2018 WL 2002973, *10. As the Massachusetts Appeals Court explained in Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005):

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

"Under 310 CMR 1.01(11)(d)(1), a party may move to dismiss an administrative appeal for lack of jurisdiction . . . . 'In deciding [either] motion, the Presiding Officer shall assume all the facts alleged in the [appellant's Appeal Notice] to be true,' but '[the] assumption shall not apply to any conclusions of law' alleged in the Appeal Notice. . . . This standard mirrors the standard applied by Massachusetts courts in civil cases when reviewing challenges to court pleadings based upon the court's lack of subject matter jurisdiction under Mass. R. Civ. P. 12(b)(1) . . . ." In the Matter of Brice Estates, Inc., OADR Docket No. WET-2016-024, Recommended Final Decision (April 21, 2017), 2017 WL 2843027, *4, adopted as Final Decision (June 16, 2017), 2017 WL 2843023 (10 Resident Group with one member does not have standing, and that member was not a person aggrieved). "'To show standing, a party need not prove by a preponderance of the evidence that his or her claim of particularized injury is true.' . . . 'Rather, the plaintiff must put forth credible evidence to substantiate his allegations.'" In the Matter of Webster Ventures, LLC, OADR Docket No. WET-2014-016, Recommended Final Decision (February 27, 2015), 2015 WL 5758253, *6, adopted as Final Decision (March 26, 2015), 2015 WL 2381916.

"For a corporate entity to have aggrieved status and standing 'it must establish some harm to a corporate legal right.'" Harvard Square Defense Fund, Inc. v. Planning Board of Cambridge, 27 Mass. App. Ct. 491, 496 (1989); In the Matter of Entergy Nuclear Operations,

Inc. and Entergy Nuclear Generation Co., OADR Docket No. 2015-009, Recommended Final Decision (February 5, 2016), 2016 WL 921973, *9, adopted as Final Decision (February 25, 2016), 2016 WL 903463. "A mere statement of corporate purpose which expresses a general civic interest in the enforcement of [environmental] laws, or in the preservation of [natural resources], is not enough to confer standing" upon the corporate entity. Id.

III. Untimeliness

314 CMR 2.08(2) provides in relevant part, "During the 30-day period following issuance of the permit, general permit coverage, or determination to deny, any person aggrieved by the issuance or the determination, except an applicant for or permittee with general groundwater discharge permit coverage, may file a request for an adjudicatory hearing relative thereto with the Department." An appeal that is not filed within 30 days of the issuance or determination is considered untimely, which is a jurisdictional defect that requires dismissal. See In the Matter of Berkshire Housing Services, Inc., Docket No. 2010-007, Recommended Final Decision (March 16, 2010), 2010 WL 1257132, *2, adopted as Final Decision (March 19, 2010), 2010 WL 1257131.

IV. Failure to Sustain a Case

"Upon the petitioner's submission of prefiled testimony, or at the close of its live direct testimony if not prefiled, any opposing party may move for the dismissal of any or all of the petitioner's claims, on the ground that upon the facts or the law the petitioner has failed to sustain its case . . . ." 310 CMR 1.01(11)(e). A motion to dismiss for failure to sustain a case, also known as a directed decision, "may be granted against the petitioner . . . where its prefiled testimony and exhibits do not meet its burden of going forward." In the Matter of Trammell Crow Residential, OADR Docket No. WET-2010-037, Recommended Final Decision (April 1, 2011), 2011 WL 1897607, *3, adopted as Final Decision (April 21, 2011), 2011 WL 1688967.

"Whether the party bearing the burden of going forward has sustained its burden is determined from its direct case, which is generally its prefiled testimony and exhibits. . . . Dismissal for failure to sustain a case, also known as a directed decision, is appropriate when a party's direct case - generally, the testimony and exhibits comprising its prefiled direct testimony - presents no evidence from a credible source in support of its position on the identified issues." Id. The relevancy and admissibility of evidence that the Petitioner sought to introduce are governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)1. Under G.L. c. 30A, § 11(2):

> [u]nless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

DISCUSSION

I. Standing

MassDEP argues that the Petitioner has failed to demonstrate aggrievement because it has not shown that the Proposed Permit will cause a concrete injury to the Petitioner different in kind from that suffered by the general public. The Petitioner responds that it has expended time and money protecting the water quality of the PHES and filed written comments earlier in the permit proceedings.

The Brian Corey case which I previously adjudicated, and the Department's then-Commissioner adopted as his Final Decision in the case, provides a useful point of comparison. In that case, the Buzzards Bay Coalition, the same Petitioner as in the present case, appealed a Superseding Order of Conditions ("SOC") granted by MassDEP pursuant to the Massachusetts Wetlands Protection Act ("MWPA") for construction within Bordering Vegetated Wetlands ("BVW"). The BVW was associated with Angeline Brook, a waterbody within the Buzzards Bay watershed. The Petitioner's standing was challenged on the basis that it had not shown an injury

different in kind or magnitude from any injury that the public could suffer, and therefore was not aggrieved. The Petitioner responded that it had "actively worked to preserve land along Angeline Brook for permanent conservation," had "expended considerable time and monetary resources in order to protect Angeline Brook," and had "invested money (including money received from state and federal grants) as well as significant staff time to purchase land along Angeline Brook to protect the coldwater fishery, wetlands [,] and other natural resources from the impacts of changes in land and water use and to ensure that the land and water resources are available to the public." Brian Corey, 2018 WL 2002973, *12. I ruled that "where the core public mission of a non-profit corporate organization is to protect, preserve and advocate on behalf of one or more interests enumerated in the [Massachusetts Wetlands Protection Act] and the Wetlands Regulations, decisions involving proposed projects that are issued by the local permitting entity (the local conservation commission) and/or the Department can have a disproportionate impact upon that entity's core public mission, and may or does constitute a harm that is distinctly greater in kind and magnitude from the harm to the interests to the general public," and that the Petitioner's evidence was sufficient to prove aggrievement. Id., *13.

This case is largely comparable to Brian Corey. Mr. Rasmussen testified on behalf of the Petitioner that the Petitioner has been monitoring water quality in the PHES since 1992; Rasmussen PFT, ¶ 9; provided public comments on the draft TMDL for the PHES in 2007; Rasmussen PFT, ¶ 14; and provided public comments on the Proposed Permit at issue in this case. Rasmussen PFT, ¶ 15. The Petitioner also argues that it has "expended an incalculable amount of time, funds and other resources in its longstanding mission to protect Phinney's Harbor for the past thirty years." Pet. Opposition, p. 15. MassDEP does not challenge this evidence, but merely asserts that it is insufficient to prove aggrievement. I hold that under the standard set forth in Brian Corey, the Petitioner has demonstrated a harm significantly greater in

kind and/or magnitude from that which could be suffered by the general public, and is therefore an aggrieved party.

MassDEP also argues that the Petitioner has not presented sufficient evidence to show that a harm will occur, and therefore does not qualify as aggrieved. MassDEP cites to In the Matter of Town of Hopkinton, Docket Nos. 2007-148 & 165, Recommended Final Decision (October 7, 2009), 2009 WL 3586309, *7, adopted as Final Decision (October 9, 2009), 2009 WL 3586307, in which the Presiding Officer stated, "simply quantifying some increase in nutrient loading is not a sufficient basis upon which to conclude the waterbody will be impaired." The Petitioner counters that it is not required to prove the merits of its claims to establish standing. The Petitioner is correct. To demonstrate standing, the Petitioner need only "put forth credible evidence to substantiate [its] allegations." Webster Ventures, 2015 WL 5758253, *6. The quote from the Presiding Officer in Town of Hopkinton was related to whether the petitioners' evidence met the burden of going forward, not to whether the petitioners had standing. In this case, the Petitioner has provided credible evidence to substantiate its allegations that the Proposed Permit could allow nitrogen to enter the PHES in excess of the TMDLs. See, e.g., NOC, pp. 3-5 (arguing that the TMDLs for Phinneys Harbor and Back River are already exceeded and that the Proposed Permit would contribute to that excess). Accordingly, I find that the Petitioner has standing to bring this appeal.

II. Untimeliness

MassDEP argues that the Petitioner's arguments are untimely because the Proposed Permit is a permit renewal and the Petitioner should have raised its arguments during proceedings for the initial permit, which was issued on November 23, 2009 ("2009 Permit"). MassDEP argues that the TMDL for nitrogen in Phinneys Harbor was established in 2008, and the Petitioner knew that the Former Applicant may be discharging nitrogen-containing effluent

into the PHES but did not submit any comments during the public comment period for the 2009 Permit. Therefore, according to MassDEP, the time to request an adjudicatory hearing expired 30 days after the 2009 Permit was issued, making this appeal untimely.

In assessing the merits of MassDEP's claim, I follow the long-standing rule that in adjudicating an administrative appeal challenging Department action, the Presiding Officer owes deference to the Department's reasonable interpretations or construction of the environmental statutory and regulatory requirements pursuant to which the Department took the action at issue[7] but owes no deference to any Department interpretation or construction of those requirements that is arbitrary, unreasonable, or inconsistent with the plain terms of the governing statutory and regulatory requirements.[8] Based on this long-standing rule, I reject MassDEP's claim here. MassDEP cites no authority, nor could I locate any, that would suggest that arguments not raised when a permit is first issued cannot be raised when that permit is up for renewal. Indeed, it would seemingly defeat the purpose of the permit renewal procedures if MassDEP could not reexamine all the relevant evidence. The regulatory provision pertaining to untimeliness, 314 CMR 2.08(2), states: "During the 30 day period following issuance of the permit, general permit coverage, or determination to deny, any person aggrieved by the issuance or the determination, except an applicant for or permittee with general groundwater discharge permit coverage, may file a request for an adjudicatory hearing relative thereto with the Department." There is no

[7] In the Matter of The Prysmian Group and Prysmian Cables & Systems USA, LLC, OADR Docket No. 2024-006, Recommended Final Decision (August 26, 2024), 2024 WL 4920921, *3, adopted as Final Decision (September 26, 2024), 2024 WL 4920920; In the Matter of Energy North, Inc., OADR Docket No. 2021-003, Recommended Final Decision (June 7, 2024), 2024 WL 5681710, *10, adopted as Final Decision (April 30, 2025), 2025 WL 1298677.

[8] Arrowood Indemnity Company v. Workers' Compensation Trust Fund, 496 Mass. 222, 229-30 (2025); In the Matter of Brockton Power Co., LLC, OADR Docket Nos. 2011-025 and 026, Recommended Final Decision (July 29, 2016), 2016 WL 8542559, *8-10, adopted by Interlocutory Decision [of MassDEP's Commissioner] (March 13, 2017), 2017 WL 1063662 (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); Prysmian, 2024 WL 4920921, *3; Energy North, 2024 WL 5681710, *10.

dispute that the Petitioner filed its appeal within the required 30-day period following issuance of the Proposed Permit. Accordingly, the Petitioner's arguments are not untimely.

III. Failure to Sustain a Case

As a permit for a groundwater discharge, the Proposed Permit must comply with the Groundwater Discharge Permit Regulations at 314 CMR 5.00. The Petitioner raises two provisions in the Groundwater Discharge Permit Regulations that it alleges the Proposed Permit violates. 314 CMR 5.06(1) provides in relevant part, "The Department will not issue a permit pursuant to 314 CMR 5.00 if the discharge will cause or contribute to a violation of 314 CMR 4.00: Massachusetts Surface Water Quality Standards . . . ." 314 CMR 5.10(3) provides in relevant part, "All permits shall . . . contain limits which are adequate to protect surface waters for their existing and designated uses and to assure the attainment and maintenance of 314 CMR 4.00: Massachusetts Surface Water Quality Standards." As applied in this case, these provisions have the effect of prohibiting the Department from issuing the Proposed Permit if it would cause a violation of a Surface Water Quality Standard. The Petitioner raises the following provisions of the Surface Water Quality Standards that it alleges the Proposed Permit violates.

1. 314 CMR 4.03(1)(a)

314 CMR 4.03(1)(a) provides in relevant part, "The Department will limit or prohibit discharges of pollutants to surface waters to assure that surface water quality standards of the receiving waters are protected and maintained or attained. . . . Discharges shall be limited or prohibited to protect existing uses and not interfere with the attainment of designated uses in downstream and adjacent segments. The Department will provide a reasonable margin of safety to account for any lack of knowledge concerning the relationship between the pollutants being discharged and their impact on water quality." This provision effectively imposes three requirements on permits: (1) permits must limit or prohibit discharges for the protection of

existing uses in the waterbody; (2) permits must limit or prohibit discharges that would interfere with the attainment of designated uses in downstream and adjacent segments; and (3) permits must provide a reasonable margin of safety.

Regarding the first two requirements, a designated use is a use specified for all water bodies of a given Class, while an existing use is a use actually attained in a water body. See 314 CMR 4.02: Designated Use; 314 CMR 4.02: Existing Use. Examples of uses that may be a designated use or existing use for a water body are fish habitat, contact recreation, and public water supply. None of the Petitioner's witnesses discussed in their PFT any of the designated or existing uses of the PHES or any downstream or adjacent segments. Regarding the third requirement, none of the Petitioner's witnesses discussed in their PFT what a reasonable margin of safety would be in this case.

2. 314 CMR 4.04(1)

314 CMR 4.04(1) provides, "In all cases existing uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." As previously stated, none of the Petitioner's witnesses discussed in their PFT existing uses.

3. 314 CMR 4.04(5)(a)4

314 CMR 4.04(5)(a)4 provides in relevant part, "An authorization to discharge to waters designated for protection under 314 CMR 4.04(2) may be issued by the Department where the applicant demonstrates that . . . [t]he discharge will not impair existing water uses and will not result in a level of water quality less than that specified for the Class." As previously stated, none of the Petitioner's witnesses discussed in their PFT existing uses. Additionally, none of the Petitioner's witnesses discussed in their PFT which Class applies to the PHES.

4. 314 CMR 4.05(4)(a)

314 CMR 4.05(4)(a) provides in relevant part, "Class SA. Those Coastal and Marine

Waters so designated pursuant to 314 CMR 4.06; including, without limitation, 314 CMR 4.06(2) and (5), and certain qualified waters designated in 314 CMR 4.06(6)(b). . . . These waters shall have excellent aesthetic value." As the regulation states, 314 CMR 4.05(4)(a) applies only to Class SA waters. None of the Petitioner's witnesses testified that the PHES is classified as a Class SA water, let alone provided evidence of such a classification.

5. 314 CMR 4.05(4)(a)1

314 CMR 4.05(4)(a)1 provides in relevant part, "Dissolved Oxygen. Shall not be less than 6.0 mg/L." As a subsection of 314 CMR 4.05(4)(a), this provision also applies only to Class SA waters. As stated previously, the Petitioner has not provided sufficient evidence to show that the PHES is a Class SA water.

6. 314 CMR 4.05(5)(c)

314 CMR 4.05(5)(c) provides in relevant part, "Unless naturally occurring, all surface waters shall be free from nutrients in concentrations that would cause or contribute to impairment of existing or designated uses and shall not exceed the site-specific criteria developed in a TMDL . . . ." As applied in this case, 314 CMR 4.05(5)(c) essentially imposes two requirements that the Proposed Permit must satisfy: (1) the Proposed Permit cannot cause or contribute to impairment of existing or designated uses, and (2) the Proposed Permit cannot cause or contribute to an excess of the site-specific criteria developed in a TMDL.[9]

Regarding the first requirement, as stated previously, none of the Petitioner's witnesses discussed in their PFT the existing or designated uses of the PHES. As for the second requirement, the TMDLs for nitrogen in Phinneys Harbor and Back River are 22 kilograms of nitrogen per day and 12 kilograms of nitrogen per day respectively, with target threshold loads of

[9] MassDEP argues that a TMDL "is a standard, not a regulation which can be 'violated.'" MassDEP Motion, p. 11. This position would appear to be at odds with the language of 314 CMR 4.05(5)(c), which mandates that surface waters "shall not exceed" the TMDL. Nevertheless, I will assume without deciding that the TMDL is legally binding under 314 CMR 4.05(5)(c).

4.69 kilograms of nitrogen per day and 9.66 kilograms of nitrogen per day respectively. The Proposed Permit sets a "Cumulative Nitrogen Annual Load" of 911 pounds of nitrogen per year. Proposed Permit, Special Condition A.1. 911 pounds per year is equivalent to approximately 1.13 kilograms per day, so even if 100% of the nitrogen discharged goes into both Back River and Phinneys Harbor, the Proposed Permit sets a limit well below both the TMDLs and the target threshold loads. Thus, to show that the Proposed Permit would contribute to an excess of the site-specific criteria established in the TMDLs, the Petitioner would need to provide evidence of the total nitrogen load received by Phinneys Harbor and Back River to establish that the TMDLs are actually being exceeded. The only one of the Petitioner's witnesses who provided an actual number for the total nitrogen load was Dr. Neill, who testified that "the [Massachusetts Estuaries Project report] calculated that the 2005 watershed nitrogen load to Phinneys Harbor was 29 kg of N per day." Neill PFT, ¶ 16. However, the Proposed Permit was issued in 2019. While I do not question the accuracy of the MEP report, for purposes of this case, I do not consider data that is 14 years out-of-date to be "the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." G.L. c. 30A, § 11(2); 310 CMR 1.01(13)(h)1. Thus, the Petitioner has presented no evidence showing that the current nitrogen loads to Phinneys Harbor or Back River exceed the TMDLs, and thus has presented no evidence that the Proposed Permit would contribute to an excess of the TMDLs. Dr. Neill testified that the nitrogen load "has almost certainly increased since 2005 because of an increased population and an increase in the number of standard Title V (not nitrogen removing) septic systems"; Neill PFT, ¶ 16; but in the absence of actual data, this testimony is speculative.

The Petitioner also claims that the TMDL document recognized that the nitrogen load to Phinneys Harbor would need to be reduced by 68% to restore water quality, and therefore any increase in the nitrogen load would violate the TMDL. See Horsley PFT, ¶ 17. However, the

TMDL document derived this number using data from 2005. See Horsley PFT, ¶ 14 ("[t]he TMDL states that the data collected in support of the TMDL were collected during the 1992-2005 period"). Once again, I do not consider 14-year-old data to be sufficient to sustain the Petitioner's case. The TMDL itself, the portion of the document which is actually legally binding under 314 CMR 4.05(5)(c), establishes a limit of 22 kilograms of nitrogen per day, and the Petitioner has not provided any evidence showing that this limit was being exceeded at the time the Proposed Permit was issued.

In sum, the Petitioner has failed to sustain its case that the Proposed Permit violates any provision of the Groundwater Discharge Permit Regulations.

CONCLUSION

The Petitioner has failed to sustain its case that the Proposed Permit was issued in violation of the requirements of the MCWA or the Groundwater Discharge Permit Regulations. Accordingly, I recommend that the Department's Commissioner issue a Final Decision affirming the Proposed Permit and dismissing this appeal.

Salvatore M. Giorlandino

Date: August 4, 2025

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.

SERVICE LIST

Petitioner: Buzzards Bay Coalition, Inc.
114 Front Street
New Bedford, MA 02740;

Legal representative: Korrin N. Petersen, Esq.
Buzzards Bay Coalition, Inc.
114 Front Street
New Bedford, MA 02740
e-mail:petersen@savebuzzardsbay.org;

Daniel C. Hill, Esq.
Dennis A. Murphy, Esq.
Kaitlyn Baptista, Esq.
6 Beacon Street, Suite 600
Boston, MA 02108
e-mail: dhill@danhilllaw.com;
e-mail: dgusmurphy@gmail.com;
e-mail: kbaptista@danhilllaw.com;

Applicant/Permittee: Villages WWTF, LLC, successor in interest to
The Villages at Brookside c/o of The Dartmouth Group

Legal representative: Julie Barry, Esq.
Prince Lobel Tye LLP
One International Place, 37th Floor
Boston, MA 02110
e-mail: jbarry@princelobel;

The Department: Gerard Martin, Regional Director
MassDEP/SE Regional Office
20 Riverside Drive
Lakeville, MA 02347
e-mail: gerard.martin@mass.gov;

Brian D. Harrington, Deputy Regional Di
MassDEP/SE Regional Office/Bur. of Water Resources
20 Riverside Drive
Lakeville, MA 02347
e-mail: Brian.D.Harrington@mass.gov;
[continued next page]

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Andrew Osei, Environmental Engineer
MassDEP/Southeast Regional Office
Bureau of Water Resources
20 Riverside Drive
Lakeville, MA 02347
e-mail: Andrew.Osei@mass.gov;

Legal Representative: Brett Hubbard, Counsel
MassDEP/Office of General Counsel
100 Cambridge Street, 9th Floor
Boston, MA 02114
e-mail: brett.hubbard@mass.gov

cc: Shaun Walsh, Chief Regional Counsel
MassDEP/Southeast Regional Office
Office of General Counsel
20 Riverside Drive
Lakeville, MA 02347
e-mail: Shaun.Walsh@mass.gov;

Jakarta Childers, Paralegal
MassDEP/Office of General Counsel
MassDEP/Office of General Counsel
100 Cambridge Street, 9th Floor
Boston, MA 02114
e-mail: Jakarta.Childers@mass.gov