COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS

DEPARTMENT OF ENVIRONMENTAL PROTECTION

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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

April 17, 2025

In the Matter of **Tobias Welo, Beneficiary of the** **25 Cove Lane Realty Trust, II**	**OADR Docket No. WET-2022-024** **MassDEP-SE-File # 003-5976** **Barnstable, MA**

RECOMMENDED FINAL DECISION

I. INTRODUCTION

Tobias Welo, Beneficiary of 25 Cove Realty Trust, II ("the Applicant"), and Trustees, Robert F. Morrissey and Michael G. Lynch, and Tim's Cove Nominee Trust, By Its Trustee William J. Crane, and Valerie Winchester, Beneficiary ("the Landowners") (collectively "the Petitioners") filed this appeal with the Office of Appeals and Dispute Resolution ("OADR")[1] to challenge a Superseding Order of Conditions ("SOC") issued by the Massachusetts Department of Environmental Protection's Southeast Regional Office ("MassDEP" or "the Department"). The SOC denied the Petitioners' proposal to construct a wave break (also referred to in testimony as a knee wall) on the Coastal Beach along the toe of the eroding Coastal Bank, with a sand berm seaward of the wave break wall and fill and plantings behind the wall on the Coastal Bank. ("proposed Project").[2] The proposed Project would be implemented at 25 Cove Lane and

[1] OADR is an independent, neutral, quasi-judicial office within the Massachusetts Department of Environmental Protection whose Presiding Officers (senior environmental attorneys) are responsible for advising MassDEP's Commissioner in the adjudication of appeals filed with OADR.

[2] See Welo Wave Break Sacrificial Berm Schematic, prepared by A.M. Wilson Associates, Inc., 6/2/22. SOC Request, p. 37.

35 Cove Lane in Barnstable, Massachusetts, two parcels, each containing a dwelling that was built after August 10, 1978 (the "Properties"). The SOC affirmed the Barnstable Conservation Commission's ("Commission") denial of the proposed Project. The SOC was issued pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131 § 40 ("MWPA"), and the Wetlands Regulations, 310 CMR 10.00.

The preponderance of the evidence presented by the Parties at the evidentiary adjudicatory hearing ("Hearing") that I conducted to resolve this appeal demonstrates that the Coastal Beach is significant to the interests of the MWPA for storm damage prevention and flood control because the Coastal Beach supplies sediment to other Coastal Beaches. The Petitioners' proposed wave break wall is a coastal engineering structure which cannot comply with the applicable Performance Standards of the Wetlands Regulations because it will prevent Coastal Beach, and the Coastal Bank, from supplying sediment to the downdrift Coastal Beaches, will cause erosion of the Coastal Beach and change the form of the Coastal Beach. Even if the Coastal Bank that the proposed Project seeks to protect were not significant as sediment sources, I would still find that the proposed Project should be denied because the Department has the discretion to deny the proposed Project and feasible alternatives may be available. Therefore, as discussed in detail below, I recommend that the Department's Commissioner issue a Final Decision affirming the SOC denying the Petitioners' proposed Project.

II. EVIDENCE[3]

The evidence in the administrative record includes the Department's basic records and the pre-filed, sworn written testimony and exhibits submitted by witnesses on behalf of the

[3] 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."

Parties. The witnesses below were available for cross-examination at the Hearing.[4]

Witnesses for the Applicants/Petitioners:

1. Arlene Wilson: Ms. Wilson is a wetlands scientist and a principal of A. M. Wilson Associates, Inc. She has been certified as a Professional Wetlands Scientist since 1995. She has over 50 years of experience in wetlands identification and permitting and has directly participated in over 2,000 wetlands projects. She is qualified as an expert witness.
2. Peter Rosen: Dr. Rosen is a coastal geologist and Professor Emeritus of Marine and Environmental Sciences at Northeastern University. Dr. Rosen received a Bachelor of Arts in geology from the State University of New York at Potsdam, a Master of Science in geology from the University of Massachusetts, and a Ph. D. in marine science from the College of William and Mary. He was a partner at GEO/PLAN Associates, a coastal and environmental consulting firm, for 40 years, and presently provides coastal and environmental consulting independently. He is credited on over 130 publications about coastal processes. He is qualified as an expert witness.

Witnesses for the Town of Barnstable:

1. Fat Piu (Tom) Lee: Mr. Lee is the Chairman of the Commission. He received a Bachelor of Science in civil engineering from the University of Massachusetts and a Master of Science in civil engineering from Purdue University. He has been a member of the Commission since 2006 and has been its Chairperson since 2016. He is a Registered Professional Engineer in four states, including Massachusetts. Mr. Lee is also the Principal Engineer with Horsley Witten Group, Inc., at which he designs drinking water

[4] Throughout this Recommended Final Decision, the witnesses' cross examination testimony at the Hearing is referred to as "[Witness], time of recording."

treatment systems and distribution systems. He is qualified as an expert witness.

2. Darcy Karle: Ms. Karle is the Conservation Administrator for the Town of Barnstable. She received a Bachelor of Science in marine biology from Roger Williams University. She has been the Conservation Administrator since 2015, prior to which she was a Conservation Agent for the Town of Barnstable and Shellfish Biologist and Shellfish Officer for the Town of Barnstable, totaling over 35 years of experience. She is qualified as an expert witness.

Witnesses for the Department:

1. Whitney McClees: Ms. McClees is an environmental analyst with the Department. Ms. McClees received a Bachelor of Arts in environmental science from Drew University and a Master of Science in environmental science and management from Portland State University. She has worked for the Department since 2022. Her responsibilities include administering and enforcing the Wetlands Protection Act and its implementing regulations by reviewing NOIs, site plans, and wetland resource area delineations; conducting on-site inspections; and writing SOCs. Prior to joining the Department, she was a conservation agent and sustainability coordinator for the Town of Fairhaven. In that role, she administered and enforced the Wetlands Protection Act and the Fairhaven Wetlands Bylaws. She is qualified as an expert witness.

III. BACKGROUND

The Property

The Property consists of two lots; the first is 25 Cove Lane, bounded by Cove Lane to the east, private property to the south, 35 Cove Lane to the north and Cotuit Bay to the west; and the second is 35 Cove Land, bounded by 25 Cove Land and Cove Lane to the south, private property to the east, and Cotuit Bay to the west and north. McClees PFT, ¶ 7; McClees Ex. 2. The Parties

agree that the dwellings on the Properties were constructed after August 10, 1978. McClees PFT, ¶ 6; Wilson PFT, ¶¶ 7, 10; Rosen PFT, ¶ 7. The Parties agree that because the homes were built after 1978, the regulations prohibit coastal engineering structures[5] on the Coastal Bank. Wilson PFT, ¶¶ 10, 18; Karle PFT, ¶ D.2; Lee PFT, ¶¶ D.1., D.2; McClees PFT, ¶ 6.[6] The Parties agree that the Coastal Bank is a sediment source. Rosen PFT, ¶, 25; Wilson PFT, ¶¶ 14, 18; Lee PFT, ¶ D.1; McClees PFT, ¶ 37; McClees PFR, ¶¶ 46, 50, 60. See also Petitioners' Ex. 5A, 5B, and 10; Lee Ex. 2.

Resource areas located at the Properties include Coastal Bank, Coastal Beach, and Land Subject to Coastal Storm Flowage ("LSCSF"). McClees PFT, ¶¶ 6, 15; SOC cover letter, p. 1. Remnants of previously permitted projects are located on the Coastal Beach, including netting[7] and wooden stakes and deteriorating sandbags. The Coastal Bank is vegetated above the sandbags all the way up the face to a lawn which extends from the top of the Coastal Bank to the House at 25 Cove Lane. McClees PFT, ¶ 18; Petitioners' Ex. 5B. At least two rows of failing sandbags are exposed at the base of the Coastal Bank. Id.

The Properties are located on the west shore of Osterville Grand Island in Barnstable, Massachusetts. Rosen PFT, ¶ 9. Osterville Grand Island is located within an enclosed estuarine bay system, at the narrows between Cotuit and North Bays. Rosen PFT, ¶¶ 9-10; Wilson PFT, ¶ 13. Dr. Rosen testified that ocean wave energy is generally very low and largely blocked from

[5] The Coastal Wetland Regulations provide that "Coastal Engineering Structure means, but is not limited to, any breakwater, bulkhead, groin, jetty, revetment, seawall, weir, riprap or any other structure that is designed to alter wave, tidal or sediment transport processes in order to protect inland or upland structures from the effects of such processes." 310 CMR 10.23.

[6] See 310 CMR 10.30(3).

[7] The source, though not the presence, of the netting is disputed. Ms. McClees testified for the Department that she believes the netting and wooden stakes are remnants from a 2001 attempt to establish salt marsh by installing a temporary wave attenuator and planting salt marsh vegetation. McClees PFT, ¶ 26. However, on behalf of the Petitioners, Ms. Wilson testified that there was no netting used in the 2001 project. She testified that netting was used in a 2010 sandbag revetment project which she contends was removed 13 years ago. Wilson PFT, ¶ 24.

entering the tidal inlets. Rosen PFT, ¶¶ 14-15. Dr. Rosen testified that the bay system results in a tide range of 2.5 feet except during rare major storms with storm surge, sheltering the Properties from waves. Rosen PFT, ¶¶ 17-18; Wilson PFT, ¶ 11.[8] The Parties disagree both on the direction of waves and the relevance relative to sand movement to other downdrift beaches. Rosen PFT, ¶¶ 13-20; McClees PFR, ¶¶ 44-45. Nonetheless, erosion of the Coastal Bank does occur and a Mean High Water ("MHW") line has been roughly observed.[9] McClees PFT, ¶¶ 24-25; Wilson PFR, ¶ 23.

Dr. Rosen also testified that the Department's reliance on generalized data representative of conditions on a simple, straight ocean-facing sandy shoreline may not be representative of this site within the estuary. Rosen PFR, ¶ 19.

The Proposed Project

The proposed Project involves the construction of a wave break wall on Coastal Beach and within Land Subject to Coastal Storm Flowage.[10] The Petitioners proposed to install the wave break wall at or landward of the Mean High Water ("MHW")[11] line at the toe of the Coastal Bank. SOC cover letter, p. 1; McClees PFT, ¶ 8; Lee PFT, ¶ D.2; Karle PFT, ¶ 2; Rosen PFT, ¶ 26; Wilson PFT, ¶ 19. The wave break wall would be 4 feet high and 285 feet long and would be composed of vinyl sheeting driven in place by an undetermined number of 12-inch

[8] In response, Ms. McClees challenged the relevance of Dr. Rosen's opinion regarding tidal influences. McClees PFR, ¶ 44.

[9] The Parties disagree as to the exact location of the MHW line.

[10] The location is within Zone VE, at elevation 14, as mapped on the most recent Federal Emergency Management Agency (FEMA) Flood Insurance Rate Map 25001C0756J, July 16, 2014. SOC cover letter, p. 1; McClees PFT, ¶¶ 6, 15.

[11] The coastal Wetlands Regulations define "Mean High Water Line" as the line where the arithmetic mean of the high water heights observed over a specific 19-year metonic cycle (the National Tidal Datum Epoch) meets the shore and shall be determined using hydrographic survey data of the National Ocean Survey of the U.S. Department of Commerce. 310 CMR 10.23.

diameter timber piles set on the waterside of the structure. McClees PFT, ¶ 8[12]; Lee PFT, ¶ D.1; Rosen PFT, ¶ 26. An unspecified volume of fill would be placed behind the wall, on the Coastal Bank, topped with native plantings integrated with plantings on the Coastal Bank. McClees PFT, ¶ 9; Rosen PFT, ¶ 26; SOC cover letter, p. 1.[13] The plan submitted with the SOC request included a sand berm of unspecified volume to be placed at the seaward base of the wave break wall. SOC Request, p. 35; Rosen PFT, ¶¶ 19, 29, 34.

Procedural Background

The Petitioners initially filed their Notice of Intent ("NOI") with the Commission on March 21, 2022 seeking approval of the proposed Project. NOI, p. 12; Karle PFT, ¶ 2. The Commission issued the OOC on June 24, 2022, denying the proposed Project under the Wetlands Protection Act and the Barnstable Wetlands Bylaw for failure to "meet performance standards for the protection of Land Under the Ocean, Coastal Beach, Land Containing Shellfish, Coastal Bank, and Land Subject to Coastal Storm Flowage." OOC, p. 14. The Commission also pointed to prior Orders of Conditions for the Property prohibiting the construction of coastal engineering structures on the Coastal Bank and determined that the proposed Project was a coastal engineering structure proposed on Coastal Bank. OOC, pp. 12-14. The Petitioners filed a request with the Department for an SOC on July 5, 2022, arguing that the prior Orders of Conditions were no longer applicable, that the Property did not contain Land Under the Ocean or Land Containing Shellfish, and that the proposed Project would not take place on Coastal Bank.

[12] The number of piles, or the distance between piles is not in the record. McClees PFT, ¶ 8. Dr. Rosen testified that the number and spacing would be decided by the engineers and that any loss of beach area would be de minimis. Rosen PFT, ¶ 33. He further testified that there would be no significant impact from the piers which would be within the proposed gravel and therefore would be effective at dissipating wave scour, citing studies not included in the record. Rosen PFR, ¶ 14.

[13] The Department did not consider Coastal Bank as an impacted resource area, notwithstanding the fact that the proposed Project would effectively be connected to the Coastal Bank, and its stated purpose is to protect the Coastal Bank. See Pet. Ex. 23, p. 8; Pet. Brief, pp. 11-12.

SOC Request, pp. 1-2.

On August 1, 2022, MassDEP informed the Petitioners that they would need to file an Environmental Notification Form ("ENF") with the Massachusetts Executive Office of Energy and Environmental Affairs ("EEA") pursuant to the Massachusetts Environmental Policy Act ("MEPA"), G.L. c. 30, §§ 61-62K, due to "alteration of a coastal dune, barrier beach or coastal bank" before a SOC could be issued. McClees PFT, ¶ 19; Wilson PFT, ¶ 23; Wilson Ex. 22. The Petitioners requested an advisory opinion from EEA's MEPA Office, which concluded that the project as described by the Petitioners "does not require MEPA review as it does not meet or exceed a MEPA review threshold. However . . . the Project is currently on appeal before MassDEP, which may determine during the SOC process that the project will result in alteration of a Coastal Dune, Barrier Beach, or Coastal Bank. In this instance, the Project will be required to undergo MEPA review." McClees PFT, ¶ 19; Wilson PFT, ¶¶ 24-25; Wilson Ex. 24.[14]

On October 14, 2022, MassDEP issued a SOC denying the proposed Project for failure to meet the performance standards under the Wetlands Regulations for Coastal Beach. SOC cover letter, p. 1. The Department determined that "the proposed wave break would have an adverse effect on the coastal beach by increasing erosion, decreasing the volume, and changing the form of the coastal beach and the adjacent and downdrift coastal beaches. Furthermore, the proposed wave break would enhance scour by reflecting wave energy thereby leading to the narrowing and lowering of the coastal beach." SOC cover letter, p. 1. The SOC did not address the Commission's contention that the proposed Project would constitute construction of a coastal engineering structure on Coastal Bank.

[14] Ms. Wilson asserted in her request for a MEPA advisory opinion that "the lower portion of the slopes are not 'Coastal Banks' under 310 CMR 10.30" but rather that they are "sandbag revetments" that are "structures and not land-forms." Ms. Wilson described the proposed Project as being restoration of the existing "sandbag revetment" and not a "new alteration" and that the fill and plantings would "neither increase nor expand the cover and plantings allowed" under past OOCs.

The Petitioners filed a Notice of Appeal with the Superior Court on October 28, 2022 challenging the Commission's denial of the proposed Project under the Barnstable Wetlands Bylaw. McClees PFT, ¶ 21; Wilson PFT, ¶ 26. Pursuant to the mandatory stay rule of 310 CMR 1.01(6)(h) requiring a stay of the SOC appeal proceedings before OADR,[15] the proceedings in this appeal were stayed on November 14, 2022, pending the outcome of the Petitioners' Superior Court appeal of the bylaw denial.[16] The Superior Court appeal was dismissed after the Commission agreed to withdraw the portion of the Order of Conditions denying the proposed Project under the Barnstable Wetlands Bylaw. Accordingly, the stay was lifted on March 1, 2023 allowing this appeal to proceed.[17] Over the Petitioners' objection, I conducted a site view on September 20, 2023 pursuant to the Adjudicatory Proceeding Rules.[18] At the Pre-Hearing Conference, the Petitioners had objected to my conducting a site view, contending that the Department had already been to the Properties during its SOC review. The Petitioners' objection was without merit because the SOC appeal proceedings before OADR are de novo, meaning that the SOC review is anew regardless what the Department determined previously. See below, at pp. 13-14. Moreover, the purpose of the site view was to assist me in conducting a just adjudication of the appeal, including drafting and issuing a fair and impartial recommendation for the Commissioner's consideration regarding whether the SOC should be affirmed or vacated. All Parties consultants and counsel attended the site view. I conducted the Hearing on December 6, 2023, and the Parties submitted their closing briefs on January 26, 2024. On July 18, 2024,

[15] 310 CMR 1.01(6)(h) provides that "the Presiding Officer shall stay administratively any appeal of a superseding determination or order of conditions issued under M.G.L. c. 131, § 40 when the determination or order is denied under a local wetlands bylaw and the denial is appealed to court."

[16] Order Staying Proceedings, November 14, 2022.

[17] Order Lifting Stay, March 1, 2023.

[18] See 310 CMR 1.01(5)14. See also 310 CMR 1.01(13)(j).

the Petitioners filed a Motion to Reopen the Hearing to present new evidence which MassDEP and the Commission opposed.[19] I denied the Motion on August 14, 2024 because the Petitioner's position has been from the beginning that the Coastal Bank is eroding and presenting new evidence on to bolster a point previously made, is not a compelling reason to reopen the Hearing.[20]

IV. ISSUES FOR ADJUDICATION

The issues for adjudication in this appeal were established in consultation with the Parties during and after the Pre-Hearing Conference I conducted in the appeal. The issues on which the witnesses presented testimony are:

1. Whether the Department correctly determined that the proposed wave break would have an adverse effect on the Coastal Beach by increasing erosion, decreasing the volume, or changing the form of the Coastal Beach or any adjacent and downdrift Coastal Beaches?

2. Whether the Department correctly determined that the proposed wave break does not meet the performance standards imposed for Coastal Beaches at 310 CMR 10.27(3)?[21]

V. STATUTORY & REGULATORY FRAMEWORK

The purpose of the MWPA and the Wetlands Regulations is to protect wetlands and to regulate activities affecting wetlands areas in a manner that promotes the following eight statutory interests: (1) protection of public and private water supply; (2) protection of ground

[19] The Commission filed an email response regarding the Petitioners' alleged open meeting law violation. OADR does not have jurisdiction to make any ruling relative to the Commission's compliance with the open meeting law.

[20] In the Matter of Town of Falmouth, Docket Nos. 2003-001, 2003-002, 2003-008, Recommended Final Decision (October 17, 2005), 2005 WL 4124556, *3, adopted by Final Decision (November 10, 2005) ("[i]n the absence of a compelling reason to do so, it is not reasonable to reopen a hearing to allow a party to introduce data about events that occurred after a hearing merely because it is now available and the recommended final decision has not issued").

[21] 310 CMR 10.27(3) provides, "Any project on a coastal beach, except any project permitted under 310 CMR 10.30(3)(a), shall not have an adverse effect by increasing erosion, decreasing the volume or changing the form of any such coastal beach or an adjacent or downdrift coastal beach."

water supply; (3) flood control; (4) storm damage prevention; (5) prevention of pollution; (6) protection of land containing shellfish; (7) protection of fisheries; and (8) protection of wildlife habitat. G.L. c. 131, § 40; 310 CMR 10.01(2); see In the Matter of Kristen Kazokas, OADR Docket No. WET-2017-022, Recommended Final Decision (August 29, 2018), 2018 WL 9847851, *3, adopted by Final Decision (September 18, 2019), 2019 WL 5209254, citing Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 224 n.6 (2010).

The Wetlands Regulations pertaining to coastal wetlands are set forth at 310 CMR 10.21 through 310 CMR 10.37 ("Coastal Wetlands Regulations"). These Regulations are "intended to ensure that development along the coastline is located, designed, built and maintained in a manner that protects the public interests in the coastal resources listed in G.L c 131, § 40." 310 CMR 10.21; see In the Matter of Nantucket Land Bank, OADR Docket No. WET 2019-005, Recommended Final Decision (July 12, 2022), 2022 WL 16825865, *7, adopted by Final Decision (October 17, 2022), 2022 WL 16825863.

Coastal Beaches consist of "unconsolidated sediment subject to wave, tidal and coastal storm action which forms the gently sloping shore of a body of salt water and includes tidal flats. Coastal beaches extend from the mean low water line landward to the dune line, coastal bank line, or the seaward edge of existing human-made structures, when these structures replace one of the above lines, whichever is closest to the ocean." 310 CMR 10.27(2).

Coastal Beaches dissipate wave energy by their gentle slope, their permeability and their granular nature, which permit changes in beach form in response to changes in wave conditions. Coastal Beaches serve as a sediment source for dunes and subtidal areas. Steep storm waves cause beach sediment to move offshore, resulting in a gentler beach slope and greater energy dissipation. Less steep waves cause an onshore return of beach sediment, where it will be available to provide protection against future storm waves. 310 CMR 10.27(1), Preamble.

A Coastal Beach at any point serves as a sediment source for coastal areas down drift from that point. The oblique approach of waves moves beach sediment alongshore in the general direction of wave action. Thus, the Coastal Beach is a body of sediment which is moving along the shore. Id.

Coastal Beaches serve the purposes of storm damage prevention and flood control by dissipating wave energy, by reducing the height of storm waves, and by providing sediment to supply other coastal features, including coastal dunes, land under the ocean and other coastal beaches. Interruptions of these natural processes by human-made structures reduce the ability of the Coastal Beach to perform these functions. Id.

VI. BURDEN OF PROOF AND STANDARD OF REVIEW

As the Party challenging the Department's issuance of the SOC, the Petitioners had the burden of proof at the Hearing to produce credible evidence from a competent source to support their positions.[22] Specifically, the Petitioners were required to present "credible evidence from a competent source in support of each claim of factual error [made against the Department], including any relevant expert report(s), plan(s), or photograph(s)."[23]

My review of the evidence presented by the Parties at the Hearing is *de novo*, meaning that my review is anew, irrespective of any prior determination of the Department in issuing the SOC. In the Matter of Brian Corey, OADR Docket No. WET 2016-023, Recommended Final Decision (February 28, 2018), 2018 WL 2002973, *19, adopted by Final Decision (March 15, 2018), 2018 WL 2002972.

[22] See 310 CMR 10.03(2); 310 CMR 10.05(7)(j)2.b.iv; 310 CMR 10.05(7)(j)2.b.v; 310 CMR 10.05(7)(j)3.a; 310 CMR 10.05(7)(j)3.b.

[23] See 310 CMR 10.05(7)(j)3.c. "A 'competent source' is a witness who has sufficient expertise to render testimony on the technical issues on appeal." In the Matter of Diamond Development Realty Trust, Docket No. WET-2018-016, Recommended Final Decision (April 2, 2019), 2019 WL 4735457, *5-6, adopted by Final Decision (April 8, 2019), 2019 WL 4735456.

The relevancy, admissibility, and weight of evidence that all parties sought to introduce at the Hearing was governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h). 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.

Under 310 CMR 1.01(13)(h), "[t]he weight to be attached to any evidence . . . rest[ed] within the discretion of the Presiding Officer." Speculative evidence was accorded no weight given its lack of probative value in resolving the issues in the case. In the Matter of Sawmill Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), 2015 WL 5758252, *29, adopted by 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").

VII. 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 SOC in this appeal, it is the Department's Commissioner, as the Final Decision-Maker in the appeal, who has the ultimate authority over the SOC's fate. 310 CMR 1.01(14)(b); In the Matter of the Prysmian Group and Prysmian Cables & Systems USA, LLC, Docket No. 2024-006, Recommended Final Decision (August 26, 2024), 2024 WL 4920921, *4, adopted by Final Decision (September 26, 2024), 2024 WL 4920920. 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); Prysmian, 2024 WL 4920921, *4. "[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. New England Wind, 457 Mass. at 228; Prysmian, 2024 WL 4920921, *4.

VIII. DISCUSSION

The presumption in the Wetlands Regulations that the Coastal Beach is significant to storm damage prevention and flood control can only be overcome by a clear showing that the beach does not play a role in protecting those interests. 310 CMR 10.27(1). "Coastal Beach means unconsolidated sediment subject to wave, tidal and coastal storm action which forms the gently sloping shore of a body of salt water and includes tidal flats. Coastal beaches extend from the mean low water line landward to the dune line, coastal bankline or the seaward edge of existing human-made structures, when these structures replace one of the above lines, whichever is closest to the ocean." 310 CMR 10.27(2).

The ability of Coastal Beach to respond to wave action is critical to protecting those interests. If a Coastal Beach is determined to be significant to the MWPA statutory interests of storm damage prevention, flood control and wildlife habitat protection, then the project is governed by 310 CMR 10.27(3)-(7). The Petitioners agree that the Coastal Beach is significant to the interest of the MWPA and the Wetlands Regulations. SOC cover letter, p. 1; Wilson PFT, ¶ 30; McClees PFT, ¶ 33. Therefore, for the proposed Project to go forward, the proposed

Project must meet the regulatory performance standard for projects on Coastal Beaches. 310 CMR 10.27(1).

The Coastal Beach performance standard at 310 CMR 10.27(3) provides as follows:

> "Any project on a Coastal Beach, except any project permitted under 310 CMR 10.30(3)(a),[24] shall not have an adverse effect by increasing erosion, decreasing the volume or changing the form of any such coastal beach or an adjacent or downdrift coastal beach." (Emphasis supplied). 310 CMR 10.27(3)-(7).[25]

Adverse effect is defined in the coastal wetland regulations to mean "a greater than negligible change in the resource area or one of its characteristics or factors that diminishes the value of the resource area" to an interest of the Act. Negligible in this context means "small enough to be disregarded." (Emphasis supplied). 310 CMR 10.23: Adverse Effect.[26]

Any project on a Coastal Beach, except any project permitted under 310 CMR 10.30(3)(a), must meet *all* of the following requirements: the project shall not have an adverse effect by increasing erosion of any such Coastal Beach or an adjacent or downdrift Coastal Beach; the project shall not have an adverse effect by decreasing the volume of any such Coastal Beach or an adjacent or downdrift Coastal Beach; *and* the project shall not have an adverse effect by changing the form of any such Coastal Beach or an adjacent or downdrift Coastal Beach.

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[24] 310 CMR 10.30(3)(a) pertains to Coastal Banks and provides in relevant part, "No new bulkhead, revetment, seawall, groin or other coastal engineering structure shall be permitted on such a coastal bank except that such a coastal engineering structure shall be permitted when required to prevent storm damage to buildings constructed prior to the effect date of [the Coastal Wetlands Regulations] or constructed pursuant to a Notice of Intent filed prior to the effective date of the [Coastal Wetland Regulations] (August 10, 1978) . . . ."

[25] Subsection (4) applies to groins, jetties, solid piers and "other such solid fill structures" which will interfere with littoral drift [transport along the foreshore]; the revetment is not such a structure, so this provision does not apply. Subsection (5) allows beach nourishment with clean sediment of a grain size compatible with that on the existing beach, notwithstanding the language of Subsection (3).

[26] See also In the Matter of Stephen D. Peabody, Trustee, OADR Docket No. WET-2002-053, Final Decision (January 25, 2006), 2006 WL 7122013, *7.

A. **The Department correctly determined that the proposed Project fails to comply with the performance standard of 310 CMR 10.27(3)**

The ability of Coastal Beach to respond to wave action is critical because the Coastal Beach is determined to be significant to the statutory interest of storm damage prevention or flood control. The Petitioners' position is that the Department wrongly denied the proposed Project, the purpose of which is to protect the Coastal Bank, on which a coastal engineering structure would be prohibited. Wilson PFT, ¶ 18; Pet. Pre-Hearing Memorandum of Law, p. 6; see also Lee PFT, ¶ D.2; Karle PFT, ¶ D.2. In proposing the wave break wall on the Coastal Beach, the Petitioners contend that the proposed Project, will not "significantly increase erosion, decrease volume, or change beach form." (Emphasis supplied). Wilson PFT, ¶ 30.[27]

The Petitioners contend that the Properties are protected within the estuary system and that tidal flow plays a minimal role in sediment transport except erosion impacts of boat wakes, average and small storms and rare-event major storms. Rosen PFT, ¶ 16; Wilson PFT, ¶ 31. Dr. Rosen testified that the longshore currents and drift are strongly unidirectional, from south to north with fetch[28] limitations and prevalent low wave energy, extremely low longshore currents which limits the littoral transport of sand. Rosen PFT, ¶ 19; Wilson PFT, ¶¶ 11, 13. Dr. Rosen also testified that the tide range is 2.5 feet and plays a minimal role to sediment transportation. Rosen PFT, ¶ 17. As a result, the Petitioners experts opined that most of the sand removed from the Coastal Beach is carried offshore and the at the Coastal Beach is sediment starved. Rosen PFT, ¶ 20; Wilson PFT, ¶ 30.

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[27] "Nevertheless, this Beach is significant to Storm Damage Protection, and the Project complies with 310 CMR 10.27(3) in that it does not significantly increase erosion, decrease volume, or change the beach form." Wilson PFT, ¶ 30.

[28] Fetch distances, or the distances of water over which the wind blows, which control wave size, are 3,000 ft to the WSW; 2,300 ft to the North; and 1,600 ft normal to the shoreline. Winds from the NNE through SW are fully blocked by the island. As a result of these restricted fetches within the estuary, wave energy is generally very low. Rosen PFT, ¶ 14. Dr. Rosen testified that as result of these restricted fetches within the estuary, wave energy is generally very low. Id.

Additionally, the Petitioners contend that updrift stone revetment and fringe marsh combine to result in limited littoral transport of sand. Rosen PFT, ¶¶ 1-19; Wilson PFT, ¶¶ 11-13. The Petitioners do agree that the eroding Coastal Bank nourishes the Coastal Beach. Rosen PFT, ¶¶ 21,[29] 34[30]; Wilson PFT, ¶ 19[31].

The Petitioners describe the wave break wall as being constructed on a narrow strip of Coastal Beach above or adjacent to the MHW to protect the eroding Coastal Bank. Wilson PFT, ¶ 19[32]; Rosen PFT, ¶ 26[33]; Rosen PFR, ¶ 26.[34] The proposed Project reviewed through the SOC process includes sand berms in front of and behind the wall to provide some nourishment and to mitigate the loss of sediment from beach volume and bank volume. Wilson PFT, ¶¶ 19, 31, 32; Rosen PFT, ¶ 34. Ms. Wilson testified that any impacts from the proposed Project are sufficiently minimized by the small vertical footprint of the proposed wall and its location. Wilson PFT, ¶ 32. Additionally, Dr. Rosen testified that the number of 12-inch timber piles, while not yet determined, is not significant given the small size of the proposed Project. Rosen PFT, ¶ 33; Rosen PFR, ¶ 14.

During these proceedings, the Petitioners offered two changes to the proposed Project. First, Dr. Rosen testified that the sand berm proposed to be placed in front of the wall would be

[29] " . . .Although these sandbags provide partial protection of the toe, the lower portions of the bank are actively eroding . . . . As well, there is evidence of slope surface drainage, or rain/groundwater carrying surface sand down to the beach." In his rebuttal testimony, Dr. Rosen stated that, "[t]his is a small-scale process located at the exposed sediment at the base of the coastal bank." .

[30] Dr. Rosen testified that "the Project will nourish the beach with at least four times the estimated annual volume of sediment eroded form the bank onto the beach on the initial construction of the project (252 yrds)."

[31] Noting "on-going, predominantly storm-related erosion at the site."

[32] "[A] narrow strip of supra-tidal Beach above MHW and below the toe of the Coastal Bank, which could be used for a solution to the on-going, predominantly storm-related erosion at the site as found in my research and as noted in the Weishar Report."

[33] "The low wall will be constructed on the Coastal Beach above MHW and near the toe of Coastal Bank."

[34] "The proposed wave break is located adjacent to MHW line (McClees PFDT Exhibit 3), so tide range has no immediate relationship with wave break overtopping frequency."

rapidly eroded and transported offshore. Rosen PFT, ¶ 27. Dr. Rosen testified that the proposed Project's success would be significantly increased if the seaward side of the wave break wall is nourished with compatible gravel instead of sand. Rosen PFT, ¶¶ 27-28; Wilson PFR, ¶ 20. Dr. Rosen testified that his field observations of pebbles at the Properties of up to 3 inches in diameter is part of the natural beach and bank sediment within the wave transportation envelope. Rosen PFT, ¶ 28. Dr. Rosen's testimony did not include the volume or depth of the gravel proposed to be added in front of the wall, or documentation of his gravel size analysis.[35] See also McClees PFR, ¶ 57. Dr. Rosen testified that 3-inch gravel is more dissipative of wave energy than sand because it has a higher porosity, or larger spaces between grains, and will pile steeper against the wall and reduce wave reflection that could cause erosion. Rosen PFT, ¶ 27.a; Rosen PFR, ¶¶ 4-6. Dr. Rosen also testified that such gravel would move landward by waves but not seaward and therefore would stay longer on the beach. Rosen PFT, ¶ 27.c; Rosen PFR, ¶ 4. He further testified that the placement of the 12-inch timber piles in gravel would reduce scour, contending that studies addressing piling-scour are based on pilings in sand rather than gravel; however, his testimony does not cite to or include any study references. Rosen PFR, ¶ 14.

Second, Dr. Rosen testified that periodic nourishment could be added to the proposed Project to mitigate the impacts of the wave break wall. Rosen PFT, ¶¶ 29, 31, 34. Dr. Rosen testified that regular nourishment would add permeability and would naturally dissipate wave energy. Rosen PFT, ¶ 31. While he agrees with MassDEP that nourishment would result in a flatter beach, he contends that the use of gravel prevents that result. Rosen PFR, ¶ 34; see

[35] Dr. Rosen testified that he based his proposal to add 3-inch gravel to the berm in front of the wave break wall on the USGS description of material in the area and his observations. Rosen PFT, ¶¶ 11, 28; Rosen PFR, ¶¶ 3-6. However, he stated on cross-examination that he never provides his grain analysis. Rosen, 47:08. MassDEP may change its position during the course of an appeal based on new evidence; In the Matter of Francis P. and Debra A. Zarette, Trustees of Farm View Realty Trust, OADR Docket No. WET-2016-030, Recommended Final Decision (February 20, 2018), 2018 WL 2002978, *4, adopted by Final Decision (March 1, 2018), 2018 WL 2002977; but it is under no obligation to do so when the Petitioner has not provided any such evidence.

McClees PFR, ¶ 52. Except as to the initial construction of the wall, neither Ms. Wilson nor Dr. Rosen testified regarding the volume of nourishment, except at construction Rosen PFT, ¶34,[36] or the frequency of nourishment, except as needed after storms. Rosen PFT, ¶ 29. Regarding content of nourishment, Dr. Rosen testified only regarding the berm in front of the proposed wave break wall being nourished with gravel. Rosen PFT, ¶¶ 31, 37.

In issuing the SOC denial, MassDEP determined that the proposed Project failed to meet the performance standards for Coastal Beach because it would have an adverse effect of increasing erosion, decreasing the volume, and changing the form of the Coastal Beach and the adjacent and downdrift Coastal Beaches. SOC cover letter, p. 1; SOC Findings, ¶ 2. Additionally, the Department determined that the wave break wall would enhance scour by reflecting wave energy, thereby leading to the narrowing and lowering of the Coastal Beach. SOC cover letter, p. 1.

On behalf of the Department, Ms. McClees testified that a crucial factor in controlling the impact of the wave break wall is its position on the beach profile and she testified that the further seaward, the more often and energetically it can interact with waves. McClees PFT, ¶¶ 34-36, 40.[37] As noted above, the Petitioners contend that it would be placed on the narrow beach at or above MHW, with which the Department and the Commission generally agree. McClees PFT, ¶

[36] Dr. Rosen testified that "the Project will nourish the beach with at least four times the estimated annual volume of sediment eroded form the bank onto the beach on the initial construction of the project (252 yrds)." See also McClees PFR, ¶ 52.

[37] See also In the Matter of James J. and Lisa G. McGonigle, OADR Docket No. WET-2015-008, Recommended Final Decision (April 4, 2017), 2017 WL 2843006, *24, adopted by Final Decision (June 9, 2017), 2017 WL 2843097 (hard coastal structures reflect wave energy rather than dissipate it, leading to beach scour).

35[38]; Karle PFT, ¶ A.2.[39] Ms. McClees testified that its placement at or above the MHW means that the wall would interact with the daily tidal cycles and mild coastal storm events. McClees PFT, ¶ 35. While Dr. Rosen testified on behalf of the Petitioners that Ms. McClees's assumption of daily tidal interaction is a generalization, all the Parties testified that waves interact with Coastal Beach all the way to and including the Coastal Bank, which is a sediment source. See Rosen PFR, ¶¶ 11, 16; Wilson PFT, ¶¶ 15, 31-32; McClees PFT, ¶¶ 35, 37, 46; Lee PFT, ¶ D.1. Such interaction is further supported by Dr. Rosen's testimony on behalf of the Petitioners that the proposed Project, as reviewed in the SOC, would result in the sand added in front of the wall being rapidly eroded and transported offshore. Rosen PFT, ¶ 27. As such, it is reasonable to conclude that tidal action will interact with the wave break wall, daily or not.

MassDEP and the Commission contend that the wave break is a coastal engineering structure and would decrease the Coastal Beach's ability to change its form in response to wave conditions. McClees PFT, ¶¶ 34-35; Lee PFT, ¶ D.1.[40] The Commission cites Ms. Wilson's correspondence in which she states that the wave break wall could be considered a coastal engineering structure. Lee PFT, ¶ D.1; Lee Ex. 3, June 2, 2022 letter from Ms. Wilson to the Commission. MassDEP contends that construction of the wave break wall on the Coastal Beach at or slightly above the MHW line would permanently impact the structure of the

[38] "The proposed wave break would be located at a Mean High Water (MHW) line in some areas (Profile C-C and Profile D-D on Petitioner's Exhibit 2 and Petitioner's Exhibit 27). Due to its proximity to the water, the proposed wave break would interact with beach processes during daily tidal cycles and mild coastal storm events. It is unclear from both the site visit and the site plans where exactly Mean High Water is and where the proposed wave break will be located in relation to the MHW. The site conditions indicated tidal influences on the sandbags in some locations. Exhibits 7 & 10."

[39] "[T]o construct a wave break landward of the Mean High Water mark between 4 feet and 12 feet out from the toe of the coastal bank within land subject to coastal storm flowage as mapped on the most recent Federal Emergency Management Agency Flood Insurance Rate Maps."

[40] The Commission further contends that the fill that would be placed behind the wave break wall on Coastal Bank is armoring of a Coastal Bank, started from the structure on the Coastal Beach. Lee PFT, ¶ D.1. The Department issued the SOC only as to the structure that would be installed on the Coastal Beach and the SOC does not reference the fill proposed to be placed on the Coastal Bank as an impact to the Coastal Bank.

Coastal Beach, altering its ability to change form and provide sediment. McClees PFT, ¶ 33. MassDEP and the Commission contend that the wall's interaction with waves would alter these sediment sources, including eliminating the eroding Coastal Bank, and as a result would contribute to erosion of Coastal Beach seaward of the structure over time. McClees PFT, ¶¶ 36-37, 40; Lee PFT, ¶¶ D.3, D.4.

Included in the impacts from the wave break wall, Ms. McClees testified that the wave break wall would enhance scour by reflecting wave energy, resulting in the narrowing of the beach. McClees PFT, ¶¶ 36-37, 40. These changes would result in narrowed and lowered Coastal Beach due to erosion and scour from reflective wave energy and disruption of a contributing sediment source, which would reduce the ability of the Coastal Beach to dissipate wave energy and allow waves to overtop the seawall and cause damage further inland. McClees PFT, ¶ 39; McClees Ex. 12, storm diagram. By way of example, Ms. McClees cites Ex. 12, a storm diagram, to explain the narrowed and lowered Coastal Beach that would result from scour and reflective wave energy from the wave break wall. Id. Ms. McClees also testified that the proposed Project would result in changes within the velocity zone of LSCSF that would adversely affect the statutory interest of storm damage prevention and flood control. McClees PFT, ¶ 40. While Dr. Rosen contends that Ms. McClees wrongly cites her Ex. 12 storm diagram and contends that the addition of gravel to the seaside berm would have dissipative effects and the landward berm would be released into the littoral system, the proposal to add gravel is not one that the Commission or the Department accept based upon the testimony in the record. Rosen PFR, ¶¶ 16, 31.

Further, in addressing the additions proposed in the Petitioners' testimony, the Department and the Commission's experts testified that insufficient information was provided to analyze or approve the changes because there is no plan or other evidence to demonstrate the

additions would eliminate the adverse impacts, and therefore Dr. Rosen's testimony is speculative. McClees PFR, ¶ 51; Lee PFT, ¶ D.5. Ms. McClees testified that no grain size analysis was provided relative to the gravel proposal to demonstrate that 3-inch gravel is naturally occurring[41] or that the addition of 3-inch gravel would be compliant with 310 CMR 10.27(5).[42]

The Petitioners also proposed the addition of nourishment to the proposed Project. There is testimony that beach nourishment has been approved in the past, but it is unknown if or when nourishment occurred. Dr. Rosen testified, "I understand the Property owners have attempted several previous approaches to manage the beach, which have not proven successful. These approaches included . . . nourishment with sand . . . ." Rosen PFT, ¶ 12. Given his admission that this is merely his "understanding," I accord little weight to this testimony. Ms. Wilson testified, "The Certificates of Compliance . . . authorized period[ic] beach nourishment if desired," and "[i]n 1993, the then owners of each of the subject properties had obtained Order[s] of Conditions allowing sandbag revetments with occasional beach nourishment." Wilson PFT, ¶¶ 14-15. Ms. Wilson's testimony does not support the contention that beach nourishment actually occurred, only that it was authorized. Ms. Karle points to a letter dated February 26, 2010, from Sullivan Engineering to the Commission that states, "At this time the bank is in need of maintenance, which has been delayed while alternative bank stabilization techniques were attempted, which in the end were unsuccessful." Karle Ex. 2. This letter proves at the very least

[41] Ms. McClees acknowledged that Dr. Rosen testified that 3-inch gravel is consistent with USGS description for the area, but that he did not provide any grain analysis and that gravel could have come from the sandbags eroding from the bank. McClees PFR, ¶ 51. Regarding his observations, Dr. Rosen testified that he conducted grain analysis and did not feel the need to include it in his testimony. Rosen PFR, ¶¶ 28-31.

[42] 310 CMR 10.27(5) provides, "Notwithstanding 310 CMR 10.27(3), beach nourishment with clean sediment of a grainsize compatible with that on the existing beach may be permitted." Dr. Rosen testified that based on his observations, the gravel addition would satisfy this regulatory requirement. Rosen PFT, ¶ 28.

that no nourishment occurred on the Property prior to February 26, 2010. Ms. Wilson also states that the Certificate of Compliance allows beach nourishment only if authorized by the Commission, Wilson PFR, ¶ 7, but there is no evidence in the record of any requests by the Applicant to the Commission to perform nourishment.[43] Finally, Ms. McClees points out that there is no documentation of the progress or results of any such beach nourishment projects. McClees PFR, ¶ 43. A preponderance of the evidence presented at the Hearing demonstrates that no beach nourishment has taken place on the Property.

Regarding the details of the Petitioners' proposed addition of nourishment, Ms. McClees testified that any contribution from the berm behind the wall would be limited based on Dr. Rosen's testimony that typical waves are only 2.5 feet high and the wall is 4 feet high. As a result, only large storms would circulate any sediment from behind the wall, with which Dr. Rosen seems to agree. McClees PFR, ¶ 50. See also Rosen PFT, ¶¶ 17, 26; Rosen PFR, ¶ 26. However, the Petitioners, in proposing the addition of nourishment, do not identify the frequency or amount of nourishment, other than stating that large-scale nourishment would occur after rare-event storms or small-scale nourishment can occur at as needed, and that the content of nourishment in front of the wall would be gravel. McClees PFR, ¶ 52. See also Rosen PFT, ¶ 29.

The Department and the Commission contend that nourishment has not been tried, and as a result, other options are available to the Petitioners. McClees PFR, ¶¶ 43, 52; Lee PFT, ¶ D.2; Lee PFR, ¶ F.1. MassDEP's and the Commission's respective witnesses testified persuasively that the proposed Project would have an adverse impact on the Coastal Beach and that the Petitioners provided insufficient detail to support the contention that their proposed revisions

[43] Ms. Wilson contends that the Commission has refused permission for the Petitioners to perform beach nourishment. Wilson PFR, ¶ 7. However, as stated, the Petitioners have provided no evidence of any requests for permission.

would mitigate the impacts and prevent any adverse impact. Lee PFT, ¶ D.5; McClees PFR, ¶ 51.

The Petitioners contend that MassDEP failed to make findings that the proposed Project could not be appropriately conditioned to meet the performance standard. Wilson PFT, ¶ 28.[44] However, the Department testified that the SOC denial clearly stated that the proposed Project could not be conditioned to meet the performance standard. McClees PFR, ¶ 69. To satisfy the performance standard of no adverse impact, the Petitioners had to demonstrate that the only impacts from the proposed Project would be negligible, or small enough to be disregarded. The Petitioners have not met this burden. MassDEP's and the Commission's respective witnesses have testified persuasively that the proposed Project's impacts would not be negligible.

Finally, the Petitioners point to other nearby properties on which projects similar to the proposed Project have been permitted under the MWPA and the Wetlands Regulations. First, they refer to 11 Cove Lane in Osterville, which had a grouted stone revetment approved in 1997. Wilson PFT, ¶ 12. However, the dwelling at 11 Cove Lane was constructed prior to 1978, and is therefore exempt from the prohibition on construction of coastal engineering structures. Karle PFR, ¶ E.1; see 310 CMR 10.27 and 10.30(3). Next, the Petitioners mention 22 Santuit Road in Cotuit, which had a backbeach revetment approved. Wilson PFT, ¶ 29. Mr. Lee pointed out in his testimony on behalf of the Commission that the project the Petitioners are referring to here actually took place at 36 Clamshell Cove Road, which was also constructed prior to 1978 and can therefore claim the same exemption. Lee PFR, ¶ E.6. The Petitioners also point to 22 Clamshell Cove Road in Contuit, which had a vertical bulkhead approved in 2021. Rosen PFT, ¶ 36. Mr. Lee explained in his testimony that the circumstances of that case were substantively

[44] On cross-examination, Ms. McClees was asked if she understood that MassDEP can issue an SOC with conditions. She replied that the denial was for lack of compliance and that the Department did not analyze the proposed Project for the purpose of adding or eliminating conditions because there was not enough information for that to be done. McClees, 1:11:42.

different from the present case because the Commission found that the Coastal Bank at that location was not a sediment source, whereas the Coastal Bank on the Property in this case is a sediment source. Lee PFT, ¶ D.2. The Petitioners also noted 37 and 41 Nons Road in Harwich, which had a "corrugated vinyl sheet pile knee wall" approved in 2008. Rosen PFT, ¶ 36; Wilson PFT, ¶ 29. That case is not comparable to the proposed Project here, as the former was in a completely different town outside the Commission's jurisdiction a substantial distance from the Property. Lee PFR, ¶ E.6; McClees PFR, ¶ 55.2. Finally, the Petitioners noted a vinyl corrugated sheet pile approved at Sandy Point on the Osterville Grand Island shoreline. Rosen PFT, ¶ 36. However, the Petitioners failed provide any information, such as a file number, that could be used to identify that case, and I therefore cannot examine it to determine whether it is comparable to the proposed Project. McClees PFR, ¶ 55.3. In short, all the other cases the Petitioners cite are distinguishable and do not justify the approval of the proposed Project under the MWPA and the Wetlands Regulations.

IX. CONCLUSION

The Petitioners have not made the "clear showing" required to overcome the presumptions in the applicable Wetlands Regulations to obtain approval of the proposed Project. The Department's and the Commission's respective witnesses have persuasively testified that the wave break wall, constructed as a structure at or above the MHW line on this narrow beach, is designed to alter wave, tidal or sediment transport. Their witnesses have persuasively testified that the impacts from constructing the wave break wall would adversely impact the Coastal Beach by increasing erosion, decreasing the volume, or changing the form of the Coastal Beach or any adjacent and downdrift coastal beach in violation of the performance standard. The impacts to the Coastal Beach that would result from the construction of the proposed Project would not be negligible, and the Petitioners have not demonstrated that their additional proposed

mitigation would address these impacts. The preponderance of the credible evidence presented at the Hearing supports the Department's SOC denying approval for the proposed Project. In sum, I recommend that the Department's Commissioner issue a Final Decision affirming the SOC as a Final Order of Conditions denying the proposed Project.

Date: April 17, 2025

Margaret R. Stolfa
Presiding Officer

NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the 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 may not be appealed to Superior Court pursuant to G.L. c. 30A. The MassDEP Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain notice to that effect. Once the Final Decision is issued "a party may file a motion for reconsideration setting forth specifically the grounds relied on to sustain the motion" if "a finding of fact or ruling of law on which a final decision is based is clearly erroneous." 310 CMR 1.01(14)(d). "Where the motion repeats matters adequately considered in the final decision, renews claims or arguments that were previously raised, considered and denied, or where it attempts to raise new claims or arguments, it may be summarily denied. . . . The filing of a motion for reconsideration is not required to exhaust administrative remedies." Id.

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

SERVICE LIST

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