

COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS

DEPARTMENT OF ENVIRONMENTAL PROTECTION

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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

June 16, 2023

**In the Matter of
Westlook Farm Dock
Association, Inc.**

**Docket No. 2021-031A & 031B
Draft Waterways License
DEP File No.: W19-5683
Westport, MA**

RECOMMENDED FINAL DECISION

INTRODUCTION

In these consolidated appeals (collectively “the appeals”), Mary Anne Sedney, Trustee of the Mary Anne Sedney Trust-1996 (“Ms. Sedney”), Richard Mobley (“Mr. Mobley”), and Nancy Mobley (“Ms. Mobley”) (collectively “the Petitioners”) challenge a Draft Waterways License that the Southeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to the Westlook Farm Dock Association, Inc. (“the Applicant”) pursuant to G.L. c. 91 (“Chapter 91”) and the Chapter 91 Regulations at 310 CMR 9.00 on October 26, 2021 (“the Oct. 2021 Draft License”). The Oct. 2021 Draft License approved the construction of a pile-supported pier and associated floats on an existing solid fill jetty¹, and the repair and

¹ The testimony of the Parties’ respective witnesses debates whether this structure is a “jetty” or a “stone filled pier” or a “stone wharf” and use these terms and others interchangeably in the testimony and briefs. The Oct. 2021 Draft License authorizes the repair and maintenance of a “solid fill jetty” of the “the existing structures and/or uses previously authorized under H&L License No. 3932.” Oct. 2021 Draft License, page 1 and 2. This Recommended Final Decision (“RFD”) uses the term from the draft license, “solid fill jetty.”

maintenance of the existing solid fill jetty (the “Project”) located on the shore of the Westport River at 33 Westlook Lane (the “Site”) in Westport, Massachusetts.

The Petitioners contend that MassDEP erred in issuing the Oct. 2021 Draft License approving the proposed Project because the Petitioner Mary Anne Sedney, as trustee and life beneficiary of the Mary Anne Sedney Trust-1996, not the Applicant, owns the real property where the proposed Project will be located. The Applicant and MassDEP contend that the Applicant’s members are easement holders and as such the Applicant has sufficient ‘colorable claim of title’ to proceed with the application. The Petitioners also contend that the Oct. 2021 Draft License is invalid because the proposed Project will significantly interfere with public rights of navigation in the East Branch of the Westport River, while the Applicant and MassDEP contend that the proposed Project will not significantly interfere with public rights of navigation. Based on a preponderance of the testimonial and documentary evidence that the Parties’ respective witnesses presented at the evidentiary Adjudicatory Hearing (“Hearing”) that I conducted in the appeal, I recommend that MassDEP’s Commissioner issue a Final Decision affirming the Oct. 2021 Draft License, with an additional condition preserving Ms. Sedney’s and the Parcel Owners right to access the solid fill jetty to avoid substantial interference with their navigation rights as addressed in this RFD.

EVIDENCE

I. Witnesses²

The evidence in the administrative record consists of pre-filed, sworn written testimony and exhibits submitted by witnesses on behalf of the Parties. The witnesses below

² Throughout this RFD, the witnesses’ Pre-Filed Direct Testimony will be referred to as “[Witness] PFT at ¶” and Pre-Filed Rebuttal Testimony will be referred to as “[Witness] PFR at ¶.” Exhibits to testimony are referred to as “[witness] Ex. X”.

were available for cross-examination at the Hearing.³

For the Petitioners:

1. David Davignon, P.E. Mr. Davignon is a partner and Project Engineer with Schneider, Davignon & Leone, Inc. He is a Professional Civil Engineer licensed to practice in Massachusetts. He has more than 25 years of experience in consulting engineering, technical analysis and environmental permitting involving civil site design projects, dock and marina projects, waters and wetlands permitting and related engineering and environmental fields. His experience includes the design or assisting in design, of private residential pier projects in Southeastern Massachusetts. He is qualified as an expert witness.
2. W. Sterling Wall. Mr. Wall is a coastal scientist and geologist with more than 40 years' experience in the areas of environmental and regulatory planning, project permitting and licensing, environmental assessment, coastal wetlands and waterways resource evaluation and wetlands resource area creation and restoration. Mr. Wall is also a boater with 10 years of experience boating in the East Branch of the Westport River and nearshore areas of 33 Westlook Lane, including the proposed dock location. He is qualified as an expert witness.⁴
3. B.G. Read. Mr. Read is one of the Petitioners and is an owner of the abutting property at 37 Westlook Lane. Mr. Read is a serious fisherman and has used the waters of the East Branch of the Westport River for boating and fishing. He

³ The Hearing was recorded on Zoom and the recording was shared with all Parties. The Parties had a transcript of the Zoom recording prepared by Marsha Johnson, certified transcriber and Notary Public on October 19, 2022 and informed OADR on October 21, 2022. Throughout this RFD, the witnesses' Cross-Examination and Redirect Testimony will be referred to as "Transcript, [Witness], page, line(s)."

⁴ Mr. Wall submitted four (4) sets of prefiled, sworn testimony, referenced herein as follows: (1) his expert testimony, "Wall PFT"; (2) his personal testimony, "Wall Personal PFT"; (3) his rebuttal to Mr. Giosa, "Wall PFR (Giosa)" and (4) his rebuttal to Mr. Fragata, "Wall PFR (Fragata)".

maintains a moored boat in the river off the shore of his property, has used the existing stone pier in the Waterfront Easement Area to access his boat with a dingy. He is familiar with the nearshore areas off 33 Westlook Lane, including the proposed pier location.

4. Mary Anne Sedney. Ms. Sedney is one of the Petitioners and is the owner of 33 Westlook Lane. She is also the Trustee and life beneficiary of the Mary Anne Sedney Trust-1996. Ms. Sedney has owned 33 Westlook Lane since 1992 and has resided there full time since 2003. Ms. Sedney was a member of the now-defunct Westlook Farms Homeowner's Association and in that capacity became fully knowledgeable of the covenants, restrictions and easements that govern property ownership in the neighborhood.
5. Richard R. Mobley. Mr. Mobley is an owner of abutting property located at 88 Cummings Lane and adjacent parcels and has lived full time at that property since 2018. Mr. Mobley's property includes a dock, approximately 103 feet long located 230 feet north of the proposed Project.

For the Applicant:

1. Steven D. Gioiosa, P.E. Mr. Gioiosa is Professional Civil Engineer licensed to practice in Massachusetts. Mr. Gioiosa is the Vice President of CEC and senior design engineer and has more than 40 years of experience in civil engineering. His experience includes land surveying, commercial, industrial, and residential site design and planning and waterfront design and permitting. He has been the senior design professional on more than 50 coastal projects ranging from commercial docks, bulkheads, shoreline protection, and restoration, as well as private residential docks. The majority of the coastal projects completed under his direct supervision are private residential docks and associated shoreline

protection including revetments, dune restoration, groins and jettys. He has completed dozens of private dock design and permitting projects on the Westport River. He is qualified as an expert.

2. Patrick Long. Mr. Long is the representative of the Applicant, the Westlook Farm Dock Association, Inc., and an owner of the residential property located at 40 Westlook Lane. Mr. Long was a member of the now-defunct Westlook Farms Trust and in that capacity became fully knowledgeable of the covenants, restrictions and easements that govern the properties on Westlook Lane.

For MassDEP:

1. Carlos T. B. Fragata. Mr. Fragata is an Environmental Analyst in MassDEP's Southeast Regional office more than 20 years of experience. He currently administers and enforces the provisions of Chapter 91 and has reviewed approximately 430 water-dependent and non-water dependent projects that include private and commercial piers, ramps, floats boat ramps, seawalls, buildings and other waterfront structures, dredging, beach nourishment and other jurisdictional activities. Many of these projects involve the construction and maintenance of residential piers similar to the proposed Project. Mr. Fragata has also proof read over a hundred draft Chapter 91 licenses prepared by other MassDEP environmental analysts. He is qualified as an expert.

2. **Proposed Project Area**

a. **Westlook Farm Waterfront Easement Area**

The Westlook Farms neighborhood was subdivided from a larger tract of land in 1986 in accordance with the Westlook Farms Declaration of Trust and Protective Covenants and

Easements (the “Trust”).⁵ The parcels included in the subdivision are identified on the subdivision plan (“Westlook Farms Plan”).⁶ The property owned by Petitioner Mary Anne Sedney, as trustee and life beneficiary of the Mary Anne Sedney Trust-1996 (the “Sedney Parcel”)⁷ is identified as Lot 3 on the Westlook Farm Plan and lies on the eastern border of the East Branch of the Westport River. Sedney PFT, ¶10; Petitioners’ Ex. 1 (Sedney Deeds).

The Westlook Farm Trust included “Protective Covenants, Restrictions and Easements for Westlook Farms”, (subparagraph 7e), that authorized the Trust to construct a dock to a location “adjacent to” (i.e., not within) the “Waterfront Easement Area.” The Parties agree that, by its terms, the Trust expired in 2016. Sedney, PFT, 7; ¶ Long PFT, ¶6. Located on the Sedney Parcel, the Waterfront Easement Area (“WEA”) is for the benefit of the neighboring properties, Parcels 2, 5-10 as shown on the Westlook Farms Plan. The owners of these parcels (the “Parcel Owners”) rights to use the WEA are perpetual and include, “[t]he right and easement to use the waterfront easement area (“Waterfront Easement Area”) as shown on the Easement plan for swimming, non-commercial boating, the launching, taking out and docking of boats and other similar leisure activities.”⁸ The Sedney Parcel and the WEA is located at 33 Westlook Lane, along the shore of the East Branch of the Westport River. Sedney PFT, ¶ 10; Petitioners’ Ex.1.

b. Proposed Project Area

The east branch of the Westport River is shallow, approximately 1 foot at mean low water, from the shore until the designated channel, approximately 340 feet from shore. Wall

⁵ For the Trust, see Petitioners Ex. 2 and Applicants Ex. 3.

⁶ Petitioners Ex. 3 and Applicants Ex. 2.

⁷ Petitioners Exhibit 1; Applicant Ex.4.

⁸ The Parcel Owner’s easements also include: The right and easement to pass and repass, by foot, over the easement shown as the passage easement (the “Passage Easement”) on the Easement Plan for access to and from the east branch of the Westport River.

PFT, ¶¶10-11; See NOAA Chart # 13228, Petitioners' Ex. 11. The tide range in the area is 3.2 feet. Wall PFT, ¶ 37. The River bottom in the proposed Project area is relatively flat, but Mr. Giosa testified that there are more rock obstructions closer to shore, driving the length necessary for the dock and floats. Transcript, Giosa, page 153, line 24 to page 154, line 8. The designated channel is approximately 8-11 feet deep and approximately 150 feet wide. See NOAA Chart # 13228, Petitioners' Ex. 11; Wall PFT, ¶ 9; Wall PFR (Giosa), ¶ F. Spectacle Island is approximately 585 feet from the proposed Project Area, on the other side of the designated channel. Giosa PFT, ¶ 21; Fragata PFT, ¶ 11; Wall PFR (Giosa), ¶ 9.⁹

The existing solid fill jetty is licensed under H & L waterways license # 3932, dated January 27, 1915 as shown on Plan 1, Book No. 13; Page 79 and identified thereon as "old pier stone fill,"¹⁰ measuring 40 feet wide by 100 feet long from mean high water. Petitioners' Ex. 8. Mr. Giosa testified that the solid fill jetty was licensed with a top elevation of approximately 5 feet, 6 inches. Transcript, Giosa, page 145, lines 16-20.¹¹ Currently, the solid fill jetty is in disrepair and in its current state presents partially submerged obstructions during high tide events. Giosa PFT, ¶ 9; Transcript, Giosa, page 145, lines 13-23. Mr. Long described the solid fill jetty as being in a "collapsed condition" that is "dangerous at all times other than high tide" for launching of small boats. Long PFT, ¶ 26.

The nearest structure is the Mobley dock, License # 14812, which is 103 feet long,

⁹ Mr. Wall also testified that the Upper Spectacle Island is of no consequence as an obstacle because it is 220 feet on the opposite side of the designated channel which is 150 feet wide and is as shallow as the water in the area of the proposed Project. Wall PFR (Fragata), page 2.

¹⁰ The testimony of the Parties' respective witnesses debates whether this structure is a "jetty" or a "stone filled pier" or a "stone wharf" and use these terms and others interchangeably in the testimony and the Parties' briefs. For example, Mr. Fragata testified that it is really a "pier" but that the plans referred to it as a "jetty". Transcript, Fragata, Page 201, Line 11-16. The Oct. 2021 Draft License authorizes the repair and maintenance of a "solid fill jetty" of the "the existing structures and/or uses previously authorized under H&L License No. 3932." Draft License, page 1 and 2. This Recommended Final Decision uses the term from the Oct. 2021 Draft License, "solid fill jetty."

¹¹ Mr. Wall testified that the 1915 license authorized a height of 4 ft, 6 inches. Wall PFR (Giosa), ¶ A.

including a fixed dock, moveable ramp and float located approximately 230 feet north of the proposed Project location. Mobley PFT, ¶ 3; Wall PFT, ¶ 15. The end of the proposed floats are a minimum of 33 feet from the south riparian line and 85 feet from the north riparian line. Giosa PFT, ¶19. The Mobley dock would be located approximately 127 feet from the closest edge of the solid fill jetty and 140 feet from the closest edge of the proposed dock. Id. Testimony also indicates that there are twelve (12) other docks in the area. Giosa PFT, ¶ 24.

c. Navigational Uses of Proposed Project Area

The Parties agree that boating outside the designated channel is limited to smaller vessels due to the shallow water. Mobley PFT, ¶ 5; Long PFT, ¶ 25; Sedney PFT, ¶¶ 17-18; Wall PFT, ¶¶ 8, 10; Giosa PFT, ¶ 22; Fragata PFT, ¶¶ 12-13. Ms. Sedley and the Parcel Owners use the solid fill jetty, and the area next to it, to access the water. Wall PFR (Fragata) page 4. Ms. Sedney uses the area of the proposed Project regularly during the Summer, an average of 50 times per Summer, for rowing and kayaking. Sedney PFT, ¶ 14. Others use small boats¹² in the proposed Project area and Parcel Owners have used paddleboards and dinghies to access their boats. Sedney PFT, ¶ 16; Wall Personal PFT, ¶ 8; Read PFT, ¶¶ 4, 10.c., 29; Long PFT, ¶ 24.¹³ Motorboats turning into and out of the designated channel travel through the shallow water, including in the proposed Project area, by trimming their engines (tilting outboard motor up by 45 degrees) Mobley PFT, ¶ 8.¹⁴ Ms. Sedney is presently a member of the Dharma Voyage

¹² Hereinafter, where I use the term “small boats,” I refer to shallow draft, nonmotorized vessels that are propelled by oars or paddles, such as rowboats, kayaks and paddleboards. “Small boats” may also include shallow draft vessels propelled by wind, such as sailing dinghys and windsurfers, although these vessels are dependent upon wind direction and cannot necessarily maintain a course parallel to the shore. I have avoided the term “small craft,” an official but undefined category used by NOAA’s National Weather Service in advisories of potentially hazardous wind and wave conditions that includes larger vessels.

¹³ Ms. Sedney testified that 4-5 kayakers per week during the Summer use the area, as well as occasional wind surfers. Sedney PFT, ¶16. Mr. Wall testified that he has observed sailboats, motorboats, windsurfers and kayaks using the proposed Project area. Wall Personal PFT, ¶¶ 8-9. Mr. Long testified that kayakers and paddle boaters are occasionally seen using the proposed Project area. Long PFT, ¶25.

¹⁴ Mr. Read testified that he has seen boats leaving or entering the designated channel travel south of the proposed Project area and run parallel to the shore. Read PFT, ¶10.b. Mr. Long testified that boaters from Cummings

Boating Club of Westport, MA which launches from a public dock, about one mile north of her property. Sedney PFT, ¶ 13.¹⁵ These boats utilize the designated channel, because the water is too shallow outside the channel. Sedney PFT, ¶ 19. Some also swim and wade in the proposed Project area. Sedney PFT, ¶ 13; Mobley PFT, ¶¶12-13.¹⁶

Mr. Mobley testified that the location of the proposed Project is directly between the exiting Mobley dock and the boating channel heading south. Mobley PFT, ¶ 11. However, Mr. Mobley also testified that he has already adjusted his route of travel to accommodate Mr. Quinn's mooring.¹⁷ The Petitioners' expert, Mr. Wall, testified that Mr. Mobley had multiple potential routes he can travel to and from the designated channel and that his route depends upon the tide, wind direction and weather conditions. Transcript, Wall, page 97, line 24 to page 12.

If constructed, the proposed Project would reduce the current distance to the designated channel from 340 feet to 210 feet. Giosa PFT, ¶20; Fragata PFT, ¶11; Wall PFT, ¶ 10. The River is affected by tides, current and wind conditions that boaters must navigate. Wall PFT ¶¶ 2, 12-13. Boaters navigate the River in fog, and at dawn and dusk. Read PFT, ¶ 10.c.; Wall Personal PFT, ¶ 13; Mobly PFT, ¶¶ 10; 12.

d. The Proposed Project

Mr. Giosa, the Applicant's expert, testified that the proposed Project "consists of a 4 foot wide, 65 foot long fixed dock that is proposed to be constructed partially on the existing solid fill jetty. Approximately 55 feet of this fixed dock will extend beyond the west end of the solid fill

neighborhood (where Mr. Mobley lives) travel upriver past Upper Spectacle Island and then turn towards their dock to minimize the amount of shallow water travel. Long PFT, ¶25.

¹⁵ Mr. Wall is also a member of the Dharma Voyage Boating Club. Wall Personal PFT, ¶ 6.

¹⁶ Conversely, Mr. Long testified that he had never seen anyone swim in the proposed Project area. Long PFT, ¶ 23.

¹⁷ Mr. Wall also testified that "I did observe Mr. Mobley coming into his dock, and I did observe that he had to pass just outside of Mr. Quinn's buoyed Boston Whaler. Transcript, Wall, page 97, line 17-19.

jetty. This portion of the fixed dock will be supported by eight (8) 10 inch diameter piles. At the west end of the fixed dock, a 20 foot long by 3 foot wide gangway will lead to the float system portion of this docket. The floats will extend to a point 84 feet west of the west end of the fixed dock. The dock system will also include six, 6 foot by 20 foot floats that will provide for the Dock Association's individual boats. All dock floats will be anchored to 10 inch diameter piles. A total of 12 piles are proposed to support this portion of the dock.” Giosa PFT, ¶ 8.¹⁸ The dock will support up to nine (9) boats because the most landward side of the most landward float is not useable due to the topography in that location which includes many stones, 30-50 feet off the existing solid fill jetty. Transcript, Giosa, page 155, line 10 to page 156, line 20. The Oct. 2021 Draft License specifically limits the number of boats to nine (9) and small boats would not be allowed to be docked at the landward side of the most landward float. Transcript, Giosa, page 156, line 21 to page 157, line 2. On top of the reconstructed solid fill jetty, will be a small platform or “pier” with stairs and a ramp to the fixed dock to accommodate the height needed for 5 feet of headspace between the water at high tide and the fixed dock. Transcript, Giosa, page 160, line 18 to page 161, line 3. See also, Draft License Plans (4 sheets).

The proposed reconstructed solid fill jetty would be smaller than the structure originally licensed and would be confined to the area originally permitted under License #3892. Giosa PFT, ¶ 16; Transcript, Giosa, page 143, line 21-25 to page 144, line 10. Mr. Giosa testified that the 1915 license authorized a solid fill jetty measuring 100-102 feet long, 40 feet wide. Transcript, Giosa, page 144, line 7-8. See also Petitioners' Ex. 8. The 1915 plans authorized the solid fill jetty to be 5.6 in height from Mean Low Water (“MLW”). Transcript, Giosa, page 145, lines 16-20. The proposed work on the solid fill jetty would consist of resetting the displaced stones and creating a uniform top surface elevation at 5.0 MLW. Giosa PFT, ¶ 16.

¹⁸ Mr. Giosa references, Applicant's Ex. 10, Application and Design Plans.

The solid fill jetty would be 30 feet wide at the bottom, tapered to 20 feet at the top. Transcript, Giosa, page 142, line 24 through page 143, line 5; See also Draft License, plan Sheet 3 of 4. The length of the repaired solid fill jetty would be 95 feet. Transcript, Giosa, page 144, lines 16-19. The overall length of the proposed Project, including the stone filled jetty, the fixed dock and the floats, is designed to the minimum required to provide adequate depth for the boats at low tide. Giosa PFT, ¶ 11.

e. The Prior Proceedings

In 2019 some Parcel Owners formed the Westlook Farm Dock Association, Inc. (“Dock Association”). Long PFT, ¶ 16. Mr. Long testified that according to the corporate by-laws, only Parcel Owners can be members. Long PFT, ¶ 17. The Applicant obtained an Order of Conditions from the Westport Conservation Commission (“WCC”) in 2019 approving the proposed Project under the Massachusetts Wetlands Protection Act (“MWPA”) and the Wetlands Regulations at 310 CMR 10.00. Giosa PFT, ¶ 17. No party sought a superseding order of conditions from MassDEP pursuant to the MWPA and the Wetlands Regulations seeking to overturn the WCC’s Order of Conditions approving the proposed Project. *Id.* That same year the Applicant filed an application with MassDEP for a Chapter 91 license to build a dock and float structure extending into the East Branch of the Westport River from the shoreline. Long PFT, ¶ 15. In due course, MassDEP initially issued a chapter 91 license on September 30, 2021 (“the Superseded Sept. 2021 Draft License”) and approved the Applicant’s proposed Project “in and over the waters of [the] East Branch of the Westport River at 33 Westlook Lane in the Town of Westport[,] [Massachusetts],” specifically: (1) the construction and maintenance of a pier, ramp, and floats and (2) the reconstruction and maintenance of a solid fill jetty. The Sept. 2021 Superseded Draft License had also approved the proposed Project, which the Petitioners appealed to MassDEP’s Office of Appeals and Dispute Resolution (“OADR”) on October 20, 2021 (OADR Docket No. 2021-031A). After the Petitioners had filed their appeal of the Sept.

2021 Superseded Draft License, MassDEP informed the Petitioners that “[the Sept. 2021 Superseded] Draft License [was] . . . upon the advice of [MassDEP counsel] being REVISED to remove Special Waterways Condition No. 3, which [provided that] ‘All easement holders [would] be allowed to use and maintain structures as authorized [by] [the Sept. 2021 Superseded Draft] License.’” On October 26, 2021, MassDEP issued the “[Oct. 2021 Draft . . . License,” which according to MassDEP, “supersede[d] the [previous Sept. 2021] Draft [License] issued [by MassDEP] on September 30, 2021.” The Petitioners appealed the Oct. 2021 Draft License to OADR on November 15, 2021 (OADR Docket No. 2021-031A).¹⁹ The Oct. 2021 Draft License authorizes the construction and maintenance of a pier, ramp and floats, and the reconstruction and maintenance of a solid fill jetty, and existing structure previously authorized under H & L License No. 3932. Draft License, page 2.²⁰

The prior Presiding Officer in the appeal conducted a Pre-Hearing Conference on June 14, 2022 during which issues for adjudication were determined in consultation with the Parties. Also determined was the schedule for the remaining proceedings in the appeal which included a site visit which I conducted on August 24, 2022.²¹ At the Department’s request, and with the Parties agreement, I conducted the Hearing on September 14, 2022 in a hybrid-format with some

¹⁹ The Applicant’s witness, Mr. Long, testified that after the Sept. 2021 Superseded Draft c. 91 license was issued containing special condition 3, he asked his lawyer to bring it up with MassDEP and it was subsequently removed from the Oct. 2021 Draft License. Transcript, Long, page 127, line 22 through page 128, line 17. There is no other testimony in the record regarding this revision or the purpose thereof.

²⁰ The Draft License approves the proposed Project as a private recreational boating facility and is expressly limited to nine (9) slips. See also Draft License, Special Condition 3. Therefore it is not a Marina and may have a maximum of nine (9) berths at any time. *Id.*, ¶ 3

²¹ The prior Presiding Officer determined that at site visit would assist him in adjudicating the appeal. Pre-Hearing Conference Report and Order, page 15. I concurred with that position.

Parties and witnesses present in person and others present via the Zoom internet platform (“Zoom”).²² The Parties submitted their closing briefs on October 28, 2022.

ISSUES FOR ADJUDICATION

As determined at the June 14, 2022 Pre-Hearing Conference, and as the Parties’ respective witnesses addressed in their testimony at the September 14, 2022 Hearing,²³ the issues for adjudication in this appeal are as follows:

1. Does the Applicant have a colorable claim of title to the real property on which the proposed Project authorized by the Oct. 2021 Draft License will be located?
2. Whether the proposed Project will significantly interfere with public rights of navigation which exist in all waterways pursuant to 310 CMR 9.35(2)(a) by either:
 - a. extending into or over any existing channel such as to impede free passage in violation of 310 CMR 9.35(2)(a)(1)(b);
 - b. significantly interfering with the line of sight for navigation in violation of 310 CMR 9.35(2)(a)(1)(c);
 - c. altering an established course of vessels in violation of 310 CMR 9.35(2)(a)(1)(d);
 - d. interfering with access to adjoining areas by extending substantially beyond the projection of existing structures in violation of 310 CMR 9.35(2)(a)(1)(e); and/or
 - e. impairing in any other substantial manner the ability of the public to pass freely upon the waterways and to engage in transport or loading/unloading activities in violation of 310 CMR 9.35(2)(a)(1)(j)?

²² At the Hearing I denied the Petitioners’ motion to admit into evidence, a bathymetric survey plan that was not included in Mr. Davignon’s PFT and was not signed by Mr. Davignon. The Petitioners’ renewed request in their Closing Brief which is opposed by the Applicant, and is denied.

²³ The Pre-Hearing Conference was conducted by Chief Presiding Officer Salvatore M. Giorlandino. I was in attendance at the Pre-Hearing Conference and was subsequently assigned to adjudicate the appeal on August 19, 2022.

STATUTORY & REGULATORY FRAMEWORK

Chapter 91 and its' implementing regulations at 310 CMR 9.00, also known as the Waterways Regulations, "represent the modern embodiment of the public trust doctrine, and 'govern . . . water[-dependent] and nonwater-dependent development in tidelands and the public's right to use those lands.'" Navy Yard Four Associates, LLC v. Dept. of Envir. Prot., 88 Mass. App. Ct. 213, 218 (2015). "As such, those parties seeking to put tidelands to either water-[dependent] or nonwater-dependent use [within the meaning of the Waterways Regulations at 310 CMR 9.12 . . . must first obtain a license [from the Department] pursuant to [Chapter 91]." Id.

Public access rights to the coastline for fishing, fowling and navigation has long been established in Massachusetts in the public trust doctrine and is implemented by MassDEP through G.L. c. 91 and the Waterways Regulations at 310 CMR 9.00.²⁴ Chapter 91 and the Waterways Regulations authorize the Department to grant licenses to conduct work in tidelands provided that the project satisfies certain criteria designed to protect the interests of the public in the affected tideland. See 310 CMR 9.35(1). Some unavoidable interference is inherent in certain water-dependent uses, which "may be allowed provided mitigation is provided to the greatest extent deemed reasonable by the Department, and that the overall public trust in waterways is best served." Id.

The standards set forth in 310 CMR 9.35 for preserving water-related public rights prohibit a project from significantly interfering with public rights of navigation in the waterway. 310 CMR 9.35(2)(a). A project not meeting these standards cannot be permitted. See In the Matter of Onset Bay II Corporation, Docket No. 2012-034, Recommended Final Decision, 2020

²⁴ For discussion of this history see In the Matter of Jimary Realty Trust, Docket No. 2016-015, Recommended Final Decision, 2018 MA ENV LEXIS 51, (August 3, 2018), adopted as Final Decision, 2018 MA ENV LEXIS 50, (August 14, 2018) ("Jimary").

MA ENV LEXIS 79, (August 28, 2020), adopted as Final Decision, 2020 MA ENV LEXIS 82 (September 23, 2020), affirmed by Norfolk Superior Court (June 8, 2022) (“Onset Bay II”), (proposed project will not significantly interfere with public rights of navigation); In the Matter of Webster Ventures (“Webster Ventures II”),*29. Contrast Jimary, *17-39 (proposed project would significantly interfere with public rights of navigation); In the Matter of Keith & Valerie Stamp, OADR Docket No. 2015-024, 2016 MA ENV LEXIS 43, *22, Recommended Final Decision, (August 4, 2016), adopted as Final Decision, 2016 MA ENV LEXIS 42, (August 8, 2016)(“Stamp”); In the Matter of Syliva, Docket No. 95-110, 1997 MA ENV LEXIS 122, (February 7, 1997)(“Sylvia”) (no significant interference with established course of vessels where alternative, although more difficult, is available).

The Waterways Regulations, at 310 CMR 9.35(2)(a), Standards to Preserve Water-related Public Rights, provides in relevant part:

(2) Public Rights Applicable to All Waterways

(a) Navigation. The project shall not significantly interfere with public rights of navigation which exist in all waterways. Such rights include the right to conduct any activity which entails the movement of a boat, vessel, float, or other watercraft; the right to conduct any activity involving the transport or the loading/unloading of persons or objects to or from any such watercraft; and the natural derivatives thereof.

1. The Department shall find that the standard is not met in the event a project will:

....

- b. extend into or over any existing channel such as to impede free passage;
- c. impair any line of sight required for navigation;
- d. require the alteration of an established course of vessels;
- e. interfere with access to adjoining areas by extending substantially beyond the projection of existing structures adjacent to the site.
- j. impair in any other substantial manner the ability of the public to pass freely upon the waterways or to engage in transport or loading/unloading activities.

PETITIONERS' BURDEN OF PROOF AT THE HEARING

At the Hearing, the Petitioners had the burden of producing credible evidence in support of their position that the Oct. 2021 Draft License does not comply with Chapter 91 and the Chapter 91 Regulations at 310 CMR 9.00. Stamp, *4. 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).” “A ‘competent source’ is a witness who has sufficient expertise to render testimony on the technical issues on appeal.” In the Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 MA ENV LEXIS 89, at 36-37, adopted by Final Decision (August 19, 2010), 2010 MA ENV LEXIS 31. Whether the witness has such expertise depends “[on] whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony.” Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted). see e.g. In the Matter of Carulli, Docket No. 2005-214, Recommended Final Decision (August 10, 2006)(dismissing claims regarding flood control, wetlands replication, and vernal pools for failure to provide supporting evidence from competent source), adopted by Final Decision (October 25, 2006); In the Matter of Indian Summer Trust, Docket No. 2001-142, Recommended Final Decision (May 4, 2004) (insufficient evidence from competent source showing that interests under MWPA were not protected), adopted by Final Decision (June 23, 2004); In the Matter of Robert Siegrist, Docket No. 2002-132, Recommended Final Decision (April 30, 2003) (insufficient evidence from competent source to show wetlands delineation was incorrect and work was not properly conditioned), adopted by Final Decision (May 9, 2003).

STANDARD OF REVIEW

My review of the evidence presented at the Hearing is *de novo*, meaning that my review is anew, irrespective of any prior determination of the Department in issuing the Oct. 2021 Draft

License. See Onset Bay II, *39 Put another way, as the Presiding Officer responsible for adjudicating the appeal, "[I am] not bound by MassDEP's prior orders or statements [in the case], [but] instead [am] responsible . . . for independently adjudicating [the] appeal[l] and [issuing a Recommended Final Decision] to MassDEP's Commissioner that is consistent with [Chapter 91] and . . . [the Waterways] Regulations" Jimary, *13; See also In the Matter of John Soursourian, OADR Docket No. WET, 2013-028, Recommended Final Decision, 2014 MA ENV LEXIS 49, *36, adopted as Final Decision, 2014 MA ENV LEXIS 47 (2014).

The relevancy, admissibility, and weight of evidence presented at the Hearing are governed by M.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.

Under 310 CMR 1.01(13)(h), "[t]he weight to be attached to any evidence in the record . . . rest[ed] within the sound discretion of the Presiding Officer. . . ." See, In the Matter of Sawmill Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), 2015 MA ENV LEXIS 63, at 84, adopted as Final Decision (July 7, 2015), 2015 MA ENV LEXIS 62 (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").

DISCUSSION

I. The Applicant has demonstrated a “colorable claim of title, although disputed” to the real Property on which proposed Project authorized by the Draft License will be located

Following the Hearing, I directed the Parties to include in their respective closing briefs and proposed findings of fact the Parties’ respective positions on the four questions set forth

below arising from the first Issue for Adjudication in the appeal (“Issue No. 1”). As detailed in footnote 4 of the Post-Pre-Hearing Conference Report, Orders and Appeal Adjudication Schedule, and again at the close of the Hearing, MassDEP does not adjudicate property disputes. See also Standard Waterways License Condition No. 6. Nonetheless, to issue a Chapter 91 license, there must be a demonstration that meets the minimal threshold of a colorable claim of title to the relevant real property by the presentation of competent testimonial and documentary evidence. No Parties presented expert testimony regarding the property interests relied on by the Applicant for colorable claim of title. To aid my consideration of the documents relied on by the Parties to make this demonstration and to oppose it, the Parties were directed to further brief four questions.²⁵ The outcome of the first post-hearing question, determines whether it is necessary to reach post-hearing questions 2 and 3.

1. Whether the Petitioners are precluded from asserting in this appeal, and/or waived any claim, that the corporate Applicant to whom MassDEP issued the appealed [Oct. 2021] Draft Chapter 91 License, does not have colorable claim of title in the Property where the proposed Project will be located, as a result of not having appealed the Order of Conditions (“OOC”) by requesting a Superseding Order of Conditions (“SOC”) pursuant to the Massachusetts Wetlands Protection Act and the Wetlands Regulations relative to the same corporate Applicant, for the same proposed Project, relying on the same colorable claim of title?

2. If the Petitioners are not precluded from asserting in this appeal, and/or did not waive, any claim that the corporate Applicant lacks a colorable claim of title in the Property, does the corporate Applicant, which the corporate Applicant’s representative testified at the Hearing under oath has no real property interest of its own, have a colorable claim of title through its individual corporate shareholders?

3. If the Petitioners are not precluded from asserting in this appeal, and/or did not waive, any claim that the corporate Applicant lacks a colorable claim of title to the Property, did the corporate Applicant present sufficient, probative evidence at Hearing to demonstrate that the corporate Applicant had express written authorization from its individual corporate shareholders to file the Chapter 91 License application on their behalf, as individuals requesting approval of the

²⁵ These questions were clarified by Ruling and Order Clarifying Post-Hearing Questions Related to Issue 1 issued in response to Petitioners’ Request for Clarification and Motion for Summary Decision, and the Applicant and MassDEP’s Oppositions.

proposed Project subsequently approved by MassDEP in the Draft Chapter 91 License it issued to the corporate Applicant?

4. Whether the “waterfront area easement” included in the deeds of each of the corporate Applicant’s individual shareholders, on which the corporate Applicant relies for colorable claim of title, extends beyond the MHW [sic] where the proposed Project would be constructed, or if it does not, what other real estate interest supports Applicant’s claim of colorable claim of title?

Post-Hearing Issue No.1:

The following facts are not in dispute: The Applicant filed a NOI for the proposed Project with the WCC. Petitioner Sedney appeared and participated in the resulting proceeding. She contested the Notice of Intent at the June 25, 2019 WCC hearing claiming the Applicant has no legal authority (by way of the WEA held by the Parcel Owners) to seek approval to construct the proposed Project. The WCC, after hearing Ms. Sedney, unanimously approved the proposed Project by issuing an Order of Conditions (“OOC”) to the Applicant pursuant to Wetlands Protection Act for the proposed Project. See OOC. The Petitioners did not pursue an appeal by requesting a Superseding Order of Condition (“SOC”) from MassDEP. See Transcript Giosa, page 87, lines 4-16; Giosa PFT, ¶ 17. As a result, the OOC became final.

The Petitioners contend that there has been no waiver of Petitioners’ rights to challenge the Applicant’s claim of “colorable title” in this Chapter 91 appeal. The Petitioners’ position is that the WCC’s review of the proposed Project was confined to the performance standards of the MWPA and Wetlands Regulations.²⁶ The Petitioners assert that because the OOC was issued on the MassDEP Form 5, and includes the standard general condition which states that it does not grant any property rights, it follows that the issuance of the OOC did not adjudicate any property rights.²⁷ Furthermore, Petitioners argue that, under the MWPA and Wetlands Regulations, even

²⁶ The OOC was not issued under a local wetlands bylaw. See OOC, page 10.

²⁷Form 5, Standard General Condition C.2 reads, “The Order does not grant any property rights or any exclusive privileges; it does not authorize any injury to private property or invasion of private rights.”

if the OOC had been appealed to MassDEP for an SOC, such appeal would have been limited under 310 CMR 10.05(7)(c) to matters bearing on whether the OOC issued by the WCC is inconsistent with the Wetland Regulations and does not contribute to the protection of the MWPA interests. Petitioners contend, therefore, that an SOC review it would not have addressed the question of whether the Applicant had a colorable claim of title.

The Applicant contends, on the other hand, that the question of whether an Applicant who is not the landowner has colorable claim of title is a standing issue central to jurisdiction. As a result, it is a necessary threshold issue to be addressed by the WCC, and by MassDEP had Petitioner Sedney availed herself of the right to request an SOC from MassDEP challenging the WCC's issuance of the OOC. The Applicant further contends that this determination must also be made by MassDEP in the context of an application for a Chapter 91 license. Having forgone their opportunity for further review of the WCC's action on Petitioner Sedney's standing objection, the Applicant contends that the Petitioners are now precluded from relitigating the exact same objection in its current appeal of the Oct. 2021 Draft License.

Although property disputes may arise during the permitting process, the Department has a long-standing practice of leaving property disputes for the courts to resolve. Tindley v. DEQE, 10 Mass. App. Ct. 623 (1980)(affirming that the Department's role is not to adjudicate private property rights, but to determine whether the Applicant asserted a colorable claim of right sufficient to carry out the proposed work). For purposes of accepting a Notice of Intent, a local conservation commission or the Department need only look for a colorable claim of title. Id.; see also, In the Matter of Town of Brewster, OADR Docket No. WET-2012-006, Recommended Final Decision (August 10, 20212), 2012 MA ENV LEXIS 97, at 31, n.20, adopted as Final Decision (August 16, 2012), 2012 MA ENV LEXIS 99 (to establish standing must demonstrate a colorable claim of title to real property, citing Tindley); In the Matter of Michael Gleason, OADR Docket No. WET-2017-019, Recommended Final Decision (December 4, 2019), 2019

MA ENV LEXIS 151, at 11-12, adopted as Final Decision (January 7, 2020), 2020 MA ENV LEXIS 65 (MassDEP does not resolve property ownership disputes, but rather determines whether applicant has colorable claim of title). The same is true for c. 91 licenses. See, In the Matter of John Donovan, Jr., Trustee Seagate Realty Trust, Docket No. 2000-016, Final Decision, 2000 MA ENV LEXIS 97, *8 (September 21, 2000) (applicant must present a colorable claim to the property in question for review of Chapter 91 license application; at no point will MassDEP intrude upon the prerogative of the court and entertain the merits of a property dispute).

While the Petitioners are correct that MassDEP does not adjudicate property rights, the Applicant is correct that it is necessary to determine whether an Applicant can demonstrate a “colorable claim of title” as a standing issue and as such is necessarily relevant to whether a challenge to a permit or license may proceed. The Wetlands Regulations require that the applicant proposing to work in a wetlands resource area submit a Notice of Intent, and if the applicant is not the landowner, that the applicant “shall obtain written permission from the landowner(s) prior to filing a Notice of Intent for proposed work.” 310 CMR 10.05(4).²⁸ In that context, the scope of the MassDEP’s review of the OOC would include whether the Applicant has a colorable claim of title; its review would start with that inquiry. Such inquiry is necessary to confirm standing, which “is not simply a procedural technicality.” Gleason, at *10. “Rather, it is a jurisdictional prerequisite to being allowed to press the merits of any legal claim.” Id.

Having forgone their opportunity for further review of the WCC’s issuance of the OOC over its objection that the Applicant did not have ownership, or standing, the Petitioners are now precluded from relitigating the exact same objection in the present appeal. See Conservation

²⁸ It is not disputed that Petitioner Sedney did not sign the NOI. The Applicant contends that its president, Mr. Long, signed on behalf of the corporate Applicant and that he has “colorable claim to title” through the WEA associated with his Parcel.

Commission of Falmouth v. Pacheco, 49 Mass. App. Ct. 737, 744 (2000)(Petitioner precluded from relitigating the jurisdictional issue raised before the conservation commission, which was not appealed).

A party may not relitigate an issue when: “(1) there was a final judgment on the merits in [a] prior adjudication; (2) the party against whom estoppel is asserted was a party (or in privity with a party) to the prior adjudication; (3) the issue in the prior adjudication is identical to the issue in the current litigation; and (4) the issue decided in the prior adjudication was essential to the earlier judgment.” Green v. Town of Brookline, 53 Mass. App. Ct. 120, 123 (2001). “If the conditions for preclusion are otherwise met, a final order of an administrative agency in an adjudicatory proceeding precludes “relitigation of the same issues between the same parties, just as would a final judgment of a court of competent jurisdiction.” Id. at 124.

The Petitioners’ argument that the OOC findings should not be given preclusive effect because it was made under a different statute is not controlling as courts have readily applied collateral estoppel of a second action asserting a different claim from the first. Alba v. Raytheon Co., 441 MA 836, 843 (2004)(that claims are brought under different statutes is not controlling). Here, the threshold issue is the same under the MWPA and Chapter 91; did the Applicant have “colorable claim of title.” Ms. Sedney had a full and fair opportunity to litigate the issue of “colorable claim of title” the first time, before the WCC, and elected not to pursue it. See Id. at 844.

In sum, I conclude that the Petitioners are precluded from asserting in this appeal, and/or have waived any claim, that the corporate Applicant to whom MassDEP issued the Oct. 2021 Draft License, does not have colorable claim of title as a result of not having appealed the OOC by requesting a SOC pursuant to the Massachusetts Wetlands Protection Act and the Wetlands Regulations. The OOC permitting was issued to the same corporate Applicant, for the same proposed Project, relying on the same colorable claim of title. However, because OADR does

not make property decisions, this result does not mean that the Applicant has a property interest, or that the Applicant's members, the Parcel Owners, have a property interest sufficient to construct the proposed Project; resolution of that question is reserved to the superior court or the land court. As a result it is not necessary to address the Parties responses to Post-Hearing Issue 2-4.

II. The proposed Project does not significantly interfere with public rights of navigation.

The Petitioners contend that the proposed Project will significantly interfere with public rights of navigation in the east branch of the Westport River. The Applicant and MassDEP contend that the proposed Project will not significantly interfere with such rights. 310 CMR 9.35(2)(a), entitled "Navigation" provides that a "[proposed c. 91] project shall not significantly interfere²⁹ with public rights of navigation which exist in all waterways. Such rights include the right to conduct any activity which entails the movement of a boat, vessel, float, or other watercraft; the right to conduct any activity involving the transport or the loading/unloading of persons or objects to or from any such watercraft; and the natural derivatives thereof." (emphasis supplied).

By its terms, 310 CMR 9.35(2)(a) imposes "an explicit regulatory obligation [upon the Department] to [only authorize] . . . those structures such that the legal and reasonably foreseeable waterborne traffic associated with them does not significantly interfere with the public trust rights. See Onset II, at 81; Fuhrmann, at 29-30; Webster Ventures II, at 73; Jimary, at 17-18; Stamp, at *22; Sylvia, at 16-17.

Within this framework, the right to navigate should be construed liberally but is not

²⁹ 310 CMR 9.35(2)(a) uses the terms "significantly interfere" and "substantially interfere."

The remainder of the regulations generally utilize the term 'significant' when considering interference. There is no material difference between 'significant' and 'substantia' in this context. Webster Ventures, Inc., at *70, n. 15.

unlimited. Stamp, at *28. Mere inconvenience, anecdotal or conclusory statements of alleged navigation interference is not enough. Id. See also In the Matter of Lipkin, Docket No. 92-043, Final Decision (December 22, 1995) (summary decision granted when petitioners failed to provide evidence that a pier proposed 162 feet from their sailboat mooring would significantly interfere with navigation).

Factors in determining whether interference is significant may include the difficulty of adjustments by existing users, whether alternatives are available, and whether the interference would be experienced by the public or a single abutter. In the Matter of Stanley A. Sylvia, Docket No. 95-110, Final Decision (February 4, 1997) (more difficult launching for one family is not significant interference); Matter of Olivera, Docket No. 2010-017, Recommended Final Decision (January 7, 2011), adopted by Final Decision (January 7, 2011) (project for one user would result in significant interference with “established course of navigation” used by many to reach a specific cove). Relevant considerations include who is experiencing the interference, the anticipated frequency of it, and the extent or type of interference. Stamp, *29, citing In the Matter of Renata Legowski, supra, at *24. “For example, merely having to navigate around a dock is not significant interference, particularly when the dock is an impediment to just one abutting property, and such property owner has an alternative navigation route.”

Specifically, as identified in the Pre-Hearing Conference, the testimony of the Parties’ respective witnesses addressed impacts to navigation as follows:

1. 310 CMR 9.35(2)(a)1.b. and 1.d: The Proposed Project does not extend into or over any existing channel such as to impede free passage, nor require the alteration of an established course of vessels in violation of the regulations.

a. Proposed Project does not extend into or over the designated channel such as to impede free passage.

The regulations prohibit a project from extending “into or over any existing channel such as to impede free passage.” 310 CMR 9.35(2)(A)1.b. “Channel” is defined to mean “a

navigable route for the passage of vessels, established by customary use or under the authority of federal, state, or municipal law.” See 310 CMR 9.02. The testimony of the Parties’ respective witnesses referenced the designated boating channel depicted on NOAA Chart 13228 (the “designated channel”). Fragata PFT, ¶ 11; Giosa PFT, ¶ 20; Applicant’s Ex. 13; Wall PFT, ¶ 8C; Petitioners’ Ex. 12.

The Parties’ expert witnesses at the Hearing agreed that the designated channel is located approximately 210 feet from the proposed Project. Fragata PFT, ¶ 11; Giosa PFT, ¶¶ 11, 20; Applicant’s Ex. 13; Wall PFT, ¶ 9. Nothing in the testimony suggests that the proposed Project will “extend into or over” the designated channel. Nor is there testimony that the proposed Project would significantly interfere with the public rights of navigation by “impeding the passage of vessels” travelling to it. Initially, Petitioner, Mr. Mobley, testified that the proposed Project would result in a substantial interference with his ability to navigate from the eastern shore to the boating channel. Mobley PFT, ¶ 11. However, on cross-examination Mr. Mobley testified that he previously changed his course to the designated channel when Mr. Quinn’s mooring went in, “maybe two (2) seasons ago,” which is located at the approximate end of the proposed Project. Transcript, Mobley, page 21, line 14-15. He testified that before that time his course was to proceed south, southwest, to and from his dock. Transcript, Mobley, page 21, line 15-16. He further testified that he would not need to change his navigation because of the proposed Project as he already had done so to accommodate Mr. Quinn’s mooring. Transcript, Mobley, page 22, lines 17-21. He also testified that he also alters his course to accommodate tides and wind, and that he changes his navigation, if for example he sees people swimming, to stay away. Mobley PFT, ¶ 10; Transcript, Mobley, page 22, lines 5-8; page 22 lines 22 through

page 23, line 3. The Petitioners' expert, Mr. Wall, testified that Mr. Mobley has several route options. Transcript, Wall, Page 97, line 24 to page 12.³⁰

The testimony of the Petitioners' other witnesses that people who boat in the area will be impacted is anecdotal and generally conclusory in nature.³¹ In sum, the testimony in the record supports a finding that the proposed Project does not "extend into or over" the designated channel nor will it "impede the passage of vessels" to it or from it in any manner that would significantly interfere with public rights of navigation.

b. There is no 'established course of vessels' or channel 'established by customary use' through the area of the proposed Project:

The Petitioners have shown that boats use the area and pass through on a routine basis. They have not shown, however, that there is an 'established course of vessels' to a particular destination, or a route established for a compelling navigational reason that must be continued for a compelling or legitimate navigational reason. Onset Bay II, *88. Navigating around a dock is not a significant impact, even if there were an 'established course of vessels.' Syliva, *20.

The Petitioners contend that there is an "established course of vessels" for smaller boats that parallels the shoreline, runs through the proposed Project area, and extends to the designated channel. The Applicant and MassDEP contend, however, that this usage is habitual travel along the shoreline and to and from the designated channel and does not create an "established course of vessels." The Applicants further contend that small boats already navigate around other docks along the shoreline, and the proposed Project would be just one more dock around which small boats would navigate. The facts in the record do not support the Petitioners' argument that there is an 'established course of vessels' through the proposed Project area or that there is a "channel

³⁰ Mr. Long testified regarding traffic to and from the designated channel and although his testimony was anecdotal and conclusory, it does not contradict these facts. Long PFT, ¶ 25.

³¹ Mr. Read testified that he has seen motorboats turning out of the designated channel south of the area of the proposed project and run parallel to the shore. Read PFT, ¶ 10.b..

established by customary use” or a “established course of vessels” through the proposed Project area.³²

While not defined the term “established course of vessels” is not synonymous with “habitual use” by vessels in a particular area and is not a guarantee that mariners that will not have to alter their preferred course of navigation in that area as the result of a Chapter 91 licensed project. The phrase “established course of vessels” means that a particular course must have been established by mariners, and must be continued, for a compelling and legitimate navigational reason, and not just because a number of boaters are in the habit of navigating in the area where a project is proposed. Onset Bay II, *87-88. The term as used in 310 CMR 9.35(2)(a)1.d. means more than a particular boater’s favored route.” See Stamp, *33-*34, citing Matter of Abdelnour, supra (Established course of vessels not found where shell fishermen, sail boaters and windsurfers regularly used the area in question and area was considered an "informal navigational channel").

If there is an established course, there must be a significant impact from having to navigate around a new structure. "[I]mplicit in this regulatory concept is the inability, without significant adverse consequences, to change course in order to pass around a new, [c. 91] licensed structure." Onset Bay II, *8884, citing Webster Ventures II, *83-84 (a particular course must have been established by mariners for a compelling and legitimate navigational reason and must be continued for a compelling and legitimate navigational reason, not just because boaters habit of navigating there). In contrast see Oliveira, supra. (proposed project used by one would require alteration of ‘established course of vessels’ in violation of regulations, where that course

³² If there is a “channel established by customary use” then the inquiry is whether the proposed Project “extends into or over it” such as to “impede free passage” in violation of 310 CMR 9.35(2)(a)1.b. If there is an “established course of vessels” then the inquiry is whether the proposed Project requires an alteration that “significantly interferes with it. 310 CMR 9.35(2)(a)1.d.

was used by many to access one particular cove); and Sylvia, supra. (established course was not significantly interfered with where one boater had more difficult alternative).

First, the Petitioners contend that the established course for small vessels in the proposed Project area extends from the shore to the designated channel. Wall PFT, ¶ 12; Read PFT, ¶ 19. By this definition the entire distance from shore to designated channel would be an “established course of vessels.” A route established by customary use is by definition a “channel”³³ which is something more narrow than, or more precisely designated than, the entire available width of a River. Such a broad reading would eliminate the meaning of the term.³⁴

The Parties’ respective witnesses testified to regular use of the proposed Project area during the Summer by small boats, for mooring boats, and occasionally swimming.³⁵ Ms. Sedney testified that she rows and kayaks in the area an average of 50 times per summer season. Sedney PFT, ¶ 14. She also testified that she sees 4-5 kayakers per week during the Summer in the proposed Project area. Sedney PFT, ¶ 16.³⁶ Windsurfers, sailboats and small powerboats also used the area. Sedney PFT, ¶ 16; Wall PFT, ¶ 8; Read PFT, ¶ 10.c.³⁷ While the Applicant’s expert, Mr. Giosa, contests how frequently the area is used,³⁸ Mr. Long testified on behalf of the

³³ “Channel” - a navigable route for the passage of vessels, established by customary use or under the authority of federal, state, or municipal law.

³⁴ See Maters v Nixon, 15 LCR 541, *543 (October 2017) (basic tenant of construction to give effect to all the provision so that no part will be inoperative or superfluous).

³⁵ Mr. Long also testified that he went blue crabbing in the area at the end of the solid fill jetty a couple of years ago. Transcript, Long, page 131, lines 1-4.

³⁶ Ms. Sedney also testified that she boats with Dharma Voyage and referenced boating near the Hixbridge mooring area as being very low, and she learned about the importance of staying within the channel, as boating outside the channel carries the risk of running aground. Sedney PFT, ¶¶ 19-20. However, her testimony did not specify that this boating activity occurs in the proposed Project area.

³⁷ Mr. Read also testified that such boaters would be surprised by a dock extending twice as far out as the others. Id. However, his speculation is unsupported by any factual testimony.

³⁸ Mr. Giosa referred to near shore travel by kayaks and other paddle vessels to be infrequent and opined that it will not be negatively impacted by this structure, but does not support this conclusory statement with facts. Giosa PFT, ¶ 22.

Applicant that the area is used for boating, and that he and Mr. Quinn maintain and use moorings, located in the area where the proposed Project would be located. The Applicants and MassDEP contend that there is not an established course of vessels in the area of the proposed Project. Rather, they contend that there is room for small boats to travel around the proposed Project, as they do now for other docks, piers and moorings in the area along the shoreline. Mr. Long testified that he is an avid boater and that he another Parcel Owner, Mr. Quinn, maintain a moorings in the area of the proposed dock. Long PFT, ¶ 24.³⁹ Mr. Long testified that because the water is shallow it is not frequently navigated and then only occasionally by kayakers or paddle boaters. Long PFT, ¶ 25. As noted above, the Parties agree that the area is shallow.⁴⁰

Mr. Giosa testified that he conferred with the Harbormaster for the Town of Westport, Chris Leonard, regarding the proposed Project. While this testimony is hearsay, the Petitioners did not file a motion to exclude it, so did not perfect any objection to the testimony.⁴¹ Hearsay is admissible in an adjudicatory hearing. 310 CMR 1.01(13)(h). Evidence may be based on hearsay alone if that hearsay has “indicia of reliability.” In the Matter of Franklin Office Park Realty Corp., Docket No. 201—016, Recommended Final Decision, 2011 ME ENV LEXIS 64, *25, (February 24, 2011), adopted by Final Decision (March 9, 2011)(discussing hearsay admissibility). Factors to be considered in determining whether there is sufficient indicate of reliability include independence or possible bias of the declarant, the type of hearsay materials submitted, whether the statements are sworn to, whether the statements are contradicted by direct testimony, the availability of the declarant and credibility of the declarant. Id., *26, citing

³⁹ Mr. Long refers to Applicant’s Ex. 7, an aerial photograph showing moorings in yellow circles.

⁴⁰ The Public trust interest of navigation by users of small bots is not discounted or diminished either by vessel size or maneuverability. See Oliviera, page 16, citing Attorney General v. Woods, 108 Mass 436 (1871)(navigation is available for pleasure boating); See also 310 CMR 9.04(1).

⁴¹ Petitioners’ expert, Mr. Wall, noted the hearsay testimony provided counter comments which are addressed herein.

Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass 526, 530 (1988).

Mr. Giosa’s testimony is sworn, and while he may have bias as the Applicant’s representative, he is an expert with many years of experience whose integrity and ability to remain professional has not been challenged. The Petitioners did not move to exclude this testimony, nor did they call Mr. Leonard as a witness. Additionally, Mr. Giosa’s testimony regarding his conversation with Mr. Leonard is consistent with the facts observable on the exhibits.

Mr. Giosa testified that Mr. Leonard told him that the proposed Project would not interfere with boat passage in this area. Giosa PFT, ¶ 23-24; Applicant’s Ex. 10 and 11. He represented that Mr. Leonard told him that “there are at least 12 existing docks in the project vicinity and this dock would not be inconsistent with those structures.” Id. Mr. Giosa’s testimony also references Applicant’s Exhibit 14 which is an Aerial Photo which shows nine (9) other docks in the vicinity of the proposed dock, three of which are labeled, the Mobley Dock, the Cummings Lane Community Dock and the Shirley Street Community Dock.⁴² Mr. Giosa also testified that Mr. Leonard concluded that the proposed Project would not curtail or interfere with boat passage in the area. Id.

Petitioners’ expert, Mr. Wall contends that the existing docks are not similar to the proposed Project given that only two of the existing docks are multiple capacity docks and only one of those extends 135 feet into the river. He also asserts that those docks are in a wider section of the River and therefore not comparable. Wall PFR (Giosa), page 4, ¶ F.

Mr. Wall also contends that many boats operate in the designated channel and the “nearby areas” and can only operate safely when separated by approximately 20 feet. Id. Assuming for the sake of discussion that these statements are accurate, Mr. Wall does not

⁴² Petitioners’ Ex. 12 is also an aerial photograph that purports to show the location of existing docks along the shoreline. The Applicant’s expert testified that the aerials were taken in the off-season when many of the floats were removed and also pre-dates the Mobley’s dock, incorrectly labeling a shorter dock as the recently constructed Mobley dock. Giosa PFR, ¶ 29; See also, Fragta PFR, ¶ 19.

explain how the remaining 210 feet of open water between the end of the proposed Project and the designated channel would not be sufficient space for boats to operate with 20 feet between them.

Mr. Mobley's testimony, that he already adjusts his course to accommodate moorings and swimmers supports the conclusion that there is not an "established course of vessels" that would be significantly impacted by the proposed Project. Rather, the evidence in the record shows that there are several existing docks and moorings that boaters already maneuver around, and that boats also maneuver around swimmers. The area that the Petitioners argue is an established course of navigation is very shallow. As a result, boat traffic in the area is limited to small boats and already must travel slowly and to avoid grounding, moorings, other docks and swimmers. The addition of the proposed Project will not interrupt an "established course of vessels," but will be an additional dock around which mariners must maneuver.

Testimony of the Parties' respective witnesses also indicates that there are twelve (12) other docks in the area that are similar. Giosa PFT, ¶ 24. It is not disputed that small boats will have to navigate around the proposed Project, but this fact does not result in significant interference. First, there are other docks around which small boats navigate, so despite the Petitioners' assertions, given that the shallow water results in slow speeds and the known existence of docks in the area, surprise seems unlikely.⁴³ Mariners are expected to anticipate obstacles, and in fact Mr. Mobley's testimony supports this premise. Secondly, the available navigable water in this area remains quite wide with 210 feet between the proposed Project and the designated channel and it is acknowledged that small boats and larger boats moving into and out of the designated channel, travel slowly in the area due to the shallow water. Even if boats in

⁴³ Mr. Read testified that small boats will be surprised by the dock. This statement is speculative and is unsupported, particularly where the vessels in question, whether human powered or motor powered, will necessarily be traveling slowly due to the shallow water. Read PFT, ¶ 10.d.

the designated channel travel faster than they should and create wake, the Petitioners position that the remaining water area results in an unsafe distance is not persuasive.

In sum, there is no “established course of vessels” of “channel established by customary use” extending from the shore to the designated channel. As such the proposed Project will not “extend into or over” any additional existing “channel” such as to “impede free passage” in violation of 310 CMR 9.35(2)(a)1.b, nor result in an alteration in violation of 310 MR 9.25(2)(a)1.d. The testimony demonstrates that small and large boats travel slowly in the shallow water and that small boats already travel around 12 docks along the shore, including the Mobley dock. Finally, the record demonstrates that there are multiple routes for Mr. Mobley to travel from his dock to the designated channel and that he already modifies his route to take into account moorings, boaters and swimmers, as necessary.

2. 310 CMR 9.35(2)(a)1.c. The Proposed Project does not impair any line of sight required for navigation

The Petitioners contend that the length of the proposed Project would impair the line of site required for navigation. However, other than speculative and conclusory statements, there was no additional evidence presented by the Petitioners on this issue.

As noted above, the Parties agree that that the designated channel is located 210 feet way from the proposed Project. MassDEP’s expert, Mr. Fragata testified that “boats (especially those with deep drafts) navigating within the channel appear to have a clear sight line.” Fragata PFT, ¶ 12. Mr. Fragata further testified that small craft, those not confined to the channel and choosing to stay between the shore and the channel, “still have a straight line (of sight) trajectory.” *Id.*⁴⁴ He testified that smaller boats will be required to maneuver around or past existing docks,

⁴⁴ Mr. Fragata cites to Applicant Ex. 8, an aerial photograph with thick blue polygon markings to show designated channel, the proposed dock, a mooring near the end of the proposed dock, and an area marked in green between the shore and the designated channel.

although presumably at much slower speeds than boats within the channel (required to travel at headway; no wake speed), thus facilitating better visibility and reaction time to avoid a collision as they navigate closer to a pier, mooring and moored boat. Id.⁴⁵ Mr. Fragata testified that this exhibit demonstrated to him that the designated channel is well seaward of existing docks and most moorings. Fragata PFT, ¶ 12. Mr. Giosa testified that the design of the proposed Project preserves the clear, unobstructed sight lines through this area. Giosa PFT, ¶ 21.

The Petitioners' expert, Mr. Wall, testified that he agreed that the proposed Project will not significantly interfere with the line of sight of most operators in a motorized craft or standing on paddleboards. Wall, PFR (Fragata), page 3. However, Mr. Wall testified that "those boaters in kayaks will have a compromised line of sight by virtue of being lower in the water and their vision would be blocked by the proposed structure extending 239 feet from the shoreline." Id. However, Mr. Wall provided no testimony regarding how a low-profile is a unique handicap related to the proposed Project, particularly where the record demonstrates that several other docks extend from the shore, that small craft with a low-profile must already maneuver around them.⁴⁶ Mr. Wall does not counter Mr. Fragata's testimony that the slower speed of small boats facilitates better visibility and reaction time to avoid a collision as they navigate closer to a pier, mooring and moored boat.⁴⁷

3. 310 CMR 9.35(2)(a)1.e. The Proposed Project does not interfere with access to adjoining areas by extending substantially beyond the projection of existing structures adjacent to the site.

⁴⁵ Mr. Fragata cites to Applicant's Ex. 7, an aerial photograph that faces south. It has a thick blue polygon drawn over the channel showing the expected starting line of sight trajectory of the boats within the channel.

⁴⁶ There are two multiple boat dock systems within ¼ mile of the proposed dock; one 400 feet north of the subject property at the end of Cummings Lane and one 1,300 feet north of the subject property. Giosa PFR, ¶ 31; Applicant's Ex. 14. This dock would be the second longest structure in the East Branch of the Westport River. Wall PFR, ¶ 4.

⁴⁷ Petitioner's anecdotal testimony that boaters in the channel create wakes does not establish the proposed Project as significantly interfering with navigation rights. Wall PFT II, ¶ 12.

Petitioners contend that the proposed Project will interfere with access to adjoining areas because it is longer than it needs to be and extends substantially beyond existing structures adjacent to the site. I do not find the Petitioners' argument persuasive for two reasons.

First, the Petitioners' argument is effectively refuted by the testimony in the record regarding the location of the proposed Project in relation to the nearest existing structure, the Mobley dock. The Mobley dock is approximately 103 feet long and is located approximately 230 feet to the north of the proposed Project area. Mobley PFT, ¶ 3. Mr. Giosa testified that the end of the proposed floats are a minimum 33 feet from the south riparian line and 85 feet from the north riparian line. Giosa PFT, ¶ 19. The Mobley dock is located approximately 127 feet from the closest edge of the jetty and 140 feet from the closest edge of the proposed dock. Giosat PFT, ¶ 19.

A minimum of 25 feet from the abutting property line will be exceeded, and the closest structure of any kind is the Mobley docket, over 100 feet to the north, he does not address at all the Parcel Owners access to the waterfront. Fragata PFT, ¶¶ 16—17; Giosa PFT, ¶ 19. This distance complies with 310 CMR 9.35(2)(a)1.j. Mr. Fragata testified that based on his professional knowledge and experience, the proposed Project will not significantly interfere with access to adjoining areas by extending substantially beyond the projection of existing structures, nor does it extend beyond the length required to achieve a safe birthing. Fragata PFT, ¶ 15. Mr. Fragata testified that he based his opinion on his review of the aerial photographs, bathymetric information, and the Draft License Plan. Id.⁴⁸ He testified that his review of these materials demonstrated to him that there is more than adequate navigable space and water depth to

⁴⁸ Mr. Fragata testified that while he did not conduct a site visit, he is very familiar with the east branch of the Westport River having reviewed approximately (9) chapter 91 applications for projects located within this section of the River. Fragata PFT, ¶ 4. His review of projects included the Mobley's dock and he viewed the proposed Project area from the Mobley's property, because he was aware of the Applicant's proposal at that time. Fragata PFT, ¶ 7. He also testified that in addition to reviewing the application, he reviewed MassGIS aerial photos showing Chapter 91 jurisdictional boundaries and structures, USGS topographical map and the c. 91 regulations. Id.

navigate around the proposed structure for both visual and physical access to the waterway and adjoining areas. Id.

Secondly, while the proposed Project will extend further out than the Mobley's dock, it will not significantly interfere with Mr. Mobley's navigation. Mr. Mobley testified on cross-examination that he already changed his course to accommodate Mr. Quinn's mooring which is located approximately where the proposed Project will end. Transcript, Mobley, page 22, line 17-21. Mr. Mobley also testified that he already adjusts his navigation to accommodate wind direction and tide and, for example, swimmers. Transcript, Mobley, page 22, line 5-8.

4. 310 CMR 9.35(2)(a)1.j. The Proposed Project does not impair in any other substantial manner the ability of the public to pass freely upon the waterways and to engage in transport or loading/unloading activities provided that Ms. Sedney and Parcel Owners are not barred from access access

The Petitioners contend that the proposed Project will obstruct the use of the solid fill jetty by Ms. Sedney and the other Parcel Owners who are not members of the Applicant corporation. The Applicant contends that the proposed Project will leave enough room for the public to pass freely in the area of the proposed Project, both in marine vessels and on foot, and does not address whether the Petitioners can load or unload from the solid fill jetty if the proposed Project is constructed. MassDEP agrees with the Applicant, but also did not consider loading or unloading from the solid fill jetty, or any lack of access to the solid fill jetty during the permit issuance. The issue was address in limited testimony considered during these de novo proceedings.

a. Access upon the waterways and to engage in transport or loading/unloading activities will be impaired in violation f 310 CMR 9,35(2)(a)1.j if Parcel Owners are not permitted to utilize the proposed Project.

As discussed above, the proposed Project will not substantially impair others from passing freely in the waterways. Vessels can safely travel around the proposed Project, it does not significantly interfere with line of sight, or require alteration of an established course of

vessels. However, the Petitioners' expert testified that the Petitioners' ability to pass freely on the solid fill jetty and to load/unload via the solid fill jetty will be substantially impaired. Wall PFR (Fragata), page 4. However, he did not provide any factual support for this conclusion. Nor did he offer testimony that if unable to load or unload from the reconstructed solid fill jetty, Ms. Sedney and the Parcel Owners would be left without access to the River from other locations within the WEA, or in Ms. Sedney's and Mr. Read's case their properties beyond the WEA.⁴⁹ Similarly, Mr. Read testified that the dock construction would prevent him from using the solid fill jetty to access his boat on a nearby mooring. Read PFT, ¶ 29. His testimony does not provide any factual support for this conclusion. Nor did he offer testimony on whether he could access the River from any other point within the WEA, to which he has access, or his own Property, which abuts Ms. Sedney's parcel and has River frontage.

Mr. Fragata testified that the proposed structure will not significantly interfere with the ability to conduct any activity involving the transport or the loading/unloading of persons or objects to or from any watercraft; and the natural derivatives thereof. Fragata PFT, ¶ 16. This conclusory statement is, however, unsupported by any facts.

At the Hearing, in accordance with my authority as the Presiding Officer in the appeal, I asked Mr. Fragata, several times if the proposed Project would substantially affect Ms. Sedney's rights (and the other Parcel Owners) if excluded from using the solid fill jetty to access the River (to load and unload). Mr. Fragata initially answered a different question, asserting that the issue at hand was whether Ms. Sedney had room to build a separate dock, an issue he said he had not considered (and one that was not inquired of him by the Parties). Transcript, Fragata, page 202, line 24 through page 204, line 23. When pressed, Mr. Fragata acknowledged the Department's

⁴⁹ See Onset Bay II, See Onset Bay II, *95-*97(study conducted to evaluate impacts of the proposed project under 310 CMR 9.35(2)(a)1.j.; Sylvia, supra (no significant interference where petitioner has an available, albeit more difficult, alternative.)

position that the proposed Project would not substantially impact rights to load or unload materials to her property because “it’s going to be potentially not on this dock but it will be somewhere on her property where she could go out. It may not be the easiest way to get out there but the Department doesn’t look at it that way; they don’t look at those issues.” Transcript, Fragata cross examination, page 204, line 15-20. I disagree. This concern is exactly “the issue the department needs to look at” in determining whether the proposed Project “substantially impacts” the ability to load/unload in violation of 310 CMR 9.35(2)(a)1.j.. MassDEP’s effort to reframe this issue as a property rights issue, misses the mark. The issue is not about Ms. Sedney’s property rights, but rather is about c. 91 rights regarding whether the proposed Project “impairs in other substantial manner the ability of the public to pass freely upon the waterways and to engage in transport or loading/unloading activities.” 310 CMR 9.35(2)(a)1.j. Simply stated, the question is, whether the public – in this case Ms. Sedney and the other Parcel Owners – who currently access the water via the solid fill jetty (loading/unloading), will be “substantially impaired” from doing so as a result of the proposed Project.

The proposed Project will “reconstruct the solid fill jetty” to a height of 5 feet, 20 feet wide at the top, tapered to 30 feet at the bottom. It will install on the end of it a platform, a fixed dock and a floating dock. It can be inferred that due to its reconstructed height and width, with the end supporting a platform and fixed dock, that Ms. Sedney and the Parcel Owners would be unable to load or unload from it. It was however, the Petitioners’ burden to demonstrate that the proposed Project would “substantially impair” their ability to load and unload, and unfortunately for the Petitioners, they did not look beyond the solid fill jetty to prove that point.

If the Petitioners had presented probative evidence that they would be unable to launch (load or unload) from the reconstructed solid fill jetty, and that the surrounding area consisting of wetlands resource area including marsh is impassable, I might have found substantial impairment. However, they did not present that probative evidence. Nonetheless, the Applicant

cannot use the Oct. 2021 Draft License to exclude the Petitioners from accessing and using the solid fill jetty. As such, I recommend that the MassDEP Commissioner's Final Decision affirming the Oct. 2021 Draft License require MassDEP to issue a final c. 91 License to the Applicant including a condition that expressly preserves access to the solid fill jetty. Such a condition would not constitute a property rights determination, which the Parties must pursue in other forums, but would constitute a c. 91 determination to ensure that the proposed Project does not violate 310 CMR 9.35(2)(a)1.j.

b. Public access to pass freely on foot along the shoreline will not be impaired by the proposed Project in violation of 310 CMR 9.35(2)(a)1.j.

Under 310 CMR 9.35(2)(a)1.j the Department shall find that the standard is not met if the project will “impair in any other substantial manner the ability of the public to pass freely upon the waterways and to engage in transport or loading/unloading activities.” The Petitioners contend that the project will substantially impair Ms. Sedney and the Parcel Owners ability to pass freely. The Applicant's expert, Mr. Giosa, testified that the proposed Project will improve public access along the shoreline with the addition of steps on the sides of the solid fill jetty. He further testified that the fixed dock has been designed to have a clear distance separation of a minimum of 5 feet from the bottom of the dock structure to the Mean High Water (“MHW”) line. Giosa PFR, ¶ 27; Applicants Ex. 10. He testified that this design is consistent with accepted engineering practice to ensure clear passage on foot past structures.⁵⁰

Other issues:

MassDEP and the Applicant objected to Petitioners' Ex. 12, a google ortho dated 2/26/2018, contending that it incorrectly identifies the Mobley existing dock. Fragata PFT, ¶ 19;

⁵⁰ This position is consistent with MassDEP's Permitting Small Docks and Piers Guidance, which provides that structures should be designed to allow foot traffic, under, over or around the structure, with a preference for “passage under dock with 5 foot clearance at the high water mark” and that “the right of public access under or around the pier should be posted on the pier.” See, <https://www.mass.gov/doc/permitting-small-pile-supported-docks-and-piers-guidance/download>, page 14.

Giosa PFT, ¶ 29. The dock identified in the photograph is the Cloutier dock at 74 B Cummings Land, Westport. Id. The Mobley dock is the direct northerly located dock,⁵¹ and was constructed in 2018. Also, the image is “out of season” in that it was taken when floats and moorings were not in the water. Giosa PFT, ¶ 29. For these reasons I relied on, and cited herein, the other aerial exhibits to which no party objected.

There is also testimony in the record regarding the Petitioners’ assertion that the proposed Project is a marina as defined in 310 CRR 9.02.⁵² Davignon PFT, ¶ e. Whether the proposed Project is a marina was not included as an issue for adjudication in these proceedings. Nonetheless, Mr. Fragata testified that that he did not consider it to be a marina because it will berth less than 10 vessels. Fragata PFT, ¶ 8. Additionally, he testified that he included Special Condition 3 in the draft license, which states that “[a] maximum of nine (9) berths shall be allowed at any time, otherwise the structure shall be considered a Marina and will require a new License (or License Amendment upon the Department’s discretion.)” Fragata PFT, ¶ 8. Mr. Giosa testified that the docking floats will accommodate a maximum of 8 boats between the 6 floats because the shore side of the inner slip does not have sufficient water at low tide and the outer edge will be reserved to accommodate a maximum of 1 boat. Giosa PFR, ¶ 28.⁵³

Finally, the Petitioners’ expert witnesses alleged numerous shortcomings in the c. 91 plans, but again these issues were not identified for adjudication in these proceedings. Nonetheless, Mr. Giosa testified that the designs comply with engineering standards and construction of structures. Giosa PFR, 25. Mr. Giosa testified that the design is identical to

⁵¹ Authorized by License No. 14812.

⁵² Marina means a berthing area with docking facilities under common ownership or control and with berths for ten or more vessels, including commercial marinas, boat basins, and yacht clubs. A marina may be an independent facility or may be associated with a boatyard. 310 CMR 9.02.

⁵³ He also testified that the Applicant’s rules and restrictions ensure that this dock system will not serve 10 or more boats. However, this statement is unsupported by documentary evidence because the Applicant did not submit any rules or restrictions with its testimony. Giosa PFR, ¶ 28.

numerous other docks that have been designed, permitted, and constructed in the Westport River, referencing Applicant's Ex. 14, an aerial photograph of numerous dock structures on the east branch of the Westport River. He testified that the level of detail provided is consistent with generally accepted engineering practice.

CONCLUSION

I recommend that MassDEP's Commissioner issue a Final Decision affirming the Oct. 2021 Draft License, with an additional condition preserving public rights to access the solid fill jetty to avoid substantial interference with their navigation rights as described herein.

Date: June 16, 2023



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

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