

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

**March 27, 2017**

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In the Matter of  
Woods Hole, Martha's Vineyard  
& Nantucket Steamship Authority

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OADR Docket No. 2016-025  
DEP File No.: Waterways Application  
No. W165-4601, Written Determination  
Woods Hole, MA

**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

The subject of this appeal is the proposed reconstruction of a ferry terminal in Woods Hole, Massachusetts. Thirteen residents<sup>1</sup> of the Town of Falmouth proceeding as a Ten Residents Group (collectively "the Petitioners") challenge a Written Determination ("the Determination" or "WD") that the Southeast Regional Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") issued to the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority ("the Applicant" or "SSA") on September 1, 2016, pursuant to the Massachusetts Public Waterfront Act, G.L. c. 91 ("Chapter 91" or "c. 91"), and the Waterways Regulations at 310 CMR 9.00. The Determination authorized the Applicant's proposed reconstruction of the Woods Hole Ferry Terminal, including reconfiguration of three existing ferry slips, construction of a new terminal building, excavation of a portion of an

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<sup>1</sup> The Petitioners comprising the group are: (1) Denise Backus; (2) Barbara L. Blair; (3) Matthew H. Bumpus; (4) Janine Elliott; (5) Ronald H. Geering; (6) Anne D. Halpin; (7) Suzanne Kuffler; (8) Philip N. Logan; (9) Liz Saito; (10) Susan L. Shepard; (11) Nathaniel Trumbull; (12) Nan G. Logan; and (13) Lauren Leveque.

existing filled wharf, and dredging (“the Project”). The Project is located within flowed and filled tidelands of Great Harbor at the foot of Railroad Avenue in Falmouth (Woods Hole). (Determination at 1, ¶ 2).

The Petitioners assert that the Determination does not comply with the Waterways Regulations because the proposed Project will significantly interfere with navigation in the waterway, restricts public access in the tidelands and does not benefit the non-traveling public.

I conducted an evidentiary adjudicatory hearing on January 27, 2017, at which witnesses who had submitted written testimony in advance of the hearing were cross-examined. After reviewing the the administrative record, I find that the proposed Project complies with the applicable requirements of the Waterways regulations, and the Written Determination protects the rights of the public in the tidelands. Therefore, I recommend that the Department’s Commissioner issue a Final Decision affirming the Chapter 91 License with an addition to the Special Waterways Conditions. The additional license condition would require the SSA to place and maintain signage at the site in accordance with 310 CMR 9.35(5)(b) in order to encourage public patronage of the facilities.

## **WITNESSES<sup>2</sup>**

The following witnesses testified on behalf of the Petitioners at the adjudicatory hearing:

Dr. Pamela Neubart. Dr. Neubert is a Senior Associate at Stantec, where she serves as a program manager, marine ecologist and invertebrate taxonomist with expertise in ecological impact assessment of nearshore and offshore environments. She has more than twenty years of experience designing and implementing field programs to determine how anthropogenic

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<sup>2</sup> Throughout this Recommended Final Decision, the pre-filed direct testimony of witnesses will be referred to as ([witness] PFT at ¶ ); the pre-filed rebuttal testimony will be referred to as ([witness] PFR at ¶ ); References to the Adjudicatory Hearing Transcript will be referred to as ([Witness] Tr. at ).

influences affect the environment. She has performed shellfish and submerged aquatic vegetation studies throughout Cape Cod, Nantucket and Martha's Vineyard for over twenty years. (Neubert PFT at ¶ 3).<sup>3</sup>

Christopher Olmsted. Captain Olmsted is a licensed captain and tugboat operator. (Olmsted PFT at ¶ 1). He has worked in Great Harbor for more than fifty years in various capacities, including as a mate and a captain. Since 1969, he has been certified by the United States Coast Guard National Maritime Center as Master of Steam or Motor Vessels not more than 100 gross registered tons upon near coastal waters. He has also been certified as Master of Uninspected Towing Vessels upon near coastal waters since 1972. (Olmsted PFT at ¶ 2). He has maneuvered barges in and out of the slips at the SSA's ferry terminal, and has driven vessels through the official and unofficial channels of Great Harbor. (Olmsted PFT at ¶ 3-4). In addition, Captain Olmsted served as Harbor Master for Woods Hole as an assistant to the Falmouth Harbor Master. (Olmsted PFT at ¶ 4).

Eric J. Las, P.E. Mr. Las is a Principal at Beals and Thomas, Inc., a multidisciplinary consulting firm providing civil engineering, planning, landscape architecture, environmental, permitting, and land surveying services throughout New England. (Las PFT at ¶ 1). Mr. Las has seventeen years of experience in the environmental field. He has a Bachelor of Science degree in Civil Engineering, and is a Certified Professional Engineer in Massachusetts. In addition, he maintains a commercial fishing license for vessels 0 to 59 feet. (Las PFT at ¶ 2).

The following witnesses testified on behalf of the Applicant at the adjudicatory hearing:

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<sup>3</sup> Dr. Neubert's testimony was offered by the Petitioners limited to the issue of standing. By Joint Stipulation of the parties filed on December 15, 2016, the parties stipulated that her pre-filed testimony and Exhibit 1 would be offered into evidence without objection for the sole purpose of establishing that the Petitioners' have standing to appeal the Written Determination. I accepted the Stipulation. On January 24, 2017, prior to the hearing, the parties agreed that Dr. Neubert would not be required to appear at the hearing to adopt her pre-filed testimony.

Wayne Lamson. Mr. Lamson is the General Manager of the SSA. He has been employed by the SSA since 1972, and has served as General Manager since December 2004. He is the chief operating officer of the SSA, and under the direction of the SSA's governing Members,<sup>4</sup> he has general oversight, care and management of all of the SSA's property and business in all of its departments, and supervision of its agents and employees in the discharge of duties not specifically otherwise prescribed by law or by the Members. (Lamson PFT at ¶ 1).

Rebecca Skalaski. Ms. Skalaski is a project engineer at Childs Engineering Corporation, where she has been employed since 2000. She is a Massachusetts registered Professional Engineer. Her professional experience includes designing numerous marine facility projects involving ferry terminals, floating docks, ADA accessible ramp systems, permitting and resident engineering. She holds a Bachelor of Science Degree in Civil Engineering. (Skalaski PFT at ¶ 2 and Exhibit 1).

Steven Sayers, Esq.. Attorney Sayers is the General Counsel for the SSA, a position he has held since 1992. He provides day-to-day counsel to the SSA's governing Members and senior management regarding all aspects of the SSA's operations. He also participates in the creation, development and implementation of the SSA's policies, goals and strategies. (Sayers PFT at ¶ 1).

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<sup>4</sup> "The Steamship Authority is governed by a five-member board: a Nantucket resident appointed by the Nantucket County Commissioners; a Martha's Vineyard resident appointed by the Dukes County Commissioners; a Falmouth resident appointed by the Falmouth Selectmen; a Barnstable resident appointed by the Barnstable Town Council; and a New Bedford resident appointed by the Mayor of New Bedford, with the approval of the New Bedford City Council. Each of the Island board members has 35% of the members' combined vote; and each of the mainland board members has 10% of the members' combined vote." <https://www.steamshipauthority.com/about/history>

Christopher Iwerks. Mr. Iwerks is a Principal of Bertaux + Iwerks Architects, LLC of Boston. He is a licensed architect in Massachusetts with over 40 years of experience in design and architecture. His work includes projects for aquariums and zoos, marine environments, public works and civic programs, and academic and transportation facilities. He holds Bachelor of Science and Master Degrees in Architecture. (Iwerks PFT at ¶ 1 and ¶ 2, Exhibit 1).

Stephen Lecco. Mr. Lecco is a Senior Environmental Planner with GZA GeoEnvironmental, Inc. with twenty-nine years of experience in planning, permitting and environmental analysis for a variety of large-scale projects. His work includes project management, agency coordination, public participation, report writing, technical analysis and mapping. He holds a Bachelor of Arts Degree in Geography/Urban and Regional Planning and a Master of Science Degree in Environmental Science. He is a Certified Planner and a Certified Environmental Professional. (Lecco PFT ¶ 1 and ¶ 2, Exhibit 1).

Charles Monteiro. Captain Monteiro is the Assistant Port Captain for the SSA, with forty years of experience working on the SSA's vessels. He has worked for the SSA since 1976, and as Assistant Port Captain since 2009. His prior positions include Ordinary Seaman, Able Seaman, Boatswain, Purser, Mate and Pilot. (Monteiro PFT at ¶ 1). In his present capacity, he assists the Port Captain in directing the day-to-day operations of the SSA's fleet, and assumes the duties of Port Captain when required. He holds a Merchant Marine Credential issued by the United States Coast Guard, and by virtue of endorsements on that credential he can serve as Master of Steam or Motor Vessels of Any Gross Tons Upon Inland Waters, as Radar Observer, as First Class Pilot of Vessels of Any Gross Tons Upon Upon the Waters of Vineyard and

Nantucket Sounds, including the Harbors of Woods Hole,<sup>5</sup> Vineyard Haven, Oak Bluffs, Hyannis and Nantucket, and Able Seaman on Any Waters. (Monteiro PFT at ¶ 2). He has held a Massachusetts commercial fishing permit for over twenty years, and presently has two boats used for recreational and commercial fishing. (Monteiro PFT at ¶ 3).

Charles Gifford. Captain Gifford is the Port Captain for the SSA. He has held this position since 2003. (Gifford PFT at ¶ 1). He directs the day-to-day operations of the SSA's fleet, including supervising vessel personnel, initiating investigations into accidents and incidents relating to vessel operations, and scheduling and administering training of vessel personnel. He holds endorsements on his Merchant Marine Credential that entitle him to serve as Master of Steam or Motor Vessels of Any Gross Tons Upon Oceans; as Radar Observer; and as Able Seaman on Any Water. (Gifford PFT at ¶ 2). He has sailed on various types of vessels around the entire coast of the United States, through the Panama Canal. He has sailed inland as far north as Baton Rouge, Louisiana, on the Mississippi River, and to all U.S. major ports on all three coasts. His experience also includes ports in the Caribbean, the east and west coasts of South America, and various ports in the North Sea. (Gifford PFT at ¶ 3). He is a Coast Guard-approved instructor at the Massachusetts Maritime Academy and is a member of the U.S. Department of Homeland Security's Navigation Safety Advisory Council. He is Vice President-elect of the Boston Marine Society, which was formed to ensure safe navigation in the waters of Massachusetts. (Gifford PFT at ¶ 4).

The following witness testified on behalf of the Department at the adjudicatory hearing:

David Hill. Mr. Hill is employed by the Department's Wetlands and Waterways Program in the Southeast Regional Office. From 1998 to 2000 he worked as an Environmental Analyst

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<sup>5</sup> This endorsement required Captain Monteiro to draw the navigation chart of Woods Hole Harbor from memory.

and since July, 2000, he has worked as an Environmental Engineer. He holds a Bachelor of Science Degree in Natural Resource Conservation, and has completed graduate-level coursework in Wetland Identification and Delineation. Prior to his employment with the Department he worked in the private sector for eighteen years as a Land Surveyor and Wetland Scientist. (Hill PFT at ¶ 1). In his current position with the Department, Mr. Hill reviews applications for c. 91 licenses to determine whether they comply with the statute and the Waterways regulations. (Hill PFT at ¶ 2). Over the past sixteen years, he has reviewed applications and drafted c.91 licenses and permits for over 1,375 water-dependent projects, including previous applications and licenses for the SSA, and for other projects in the area of Great Harbor and Eel Pond. (Hill PFT at ¶ 3, 5). During his tenure at the Department, he has reviewed hundreds of c. 91 licenses drafted by Waterways program staff whom he supervises. He also has experience in recreational boating. (Hill PFT at ¶ 4).

## **BACKGROUND**

### The Project Site

The SSA was created by the Massachusetts Legislature in 1960 “[i]n order to provide adequate transportation of persons and necessities of life for the islands of Nantucket and Martha’s Vineyard.” (SSA’s Enabling Act, St. 1960, c. 701, as amended, § 1; SSA Exhibit 2). The Enabling Act requires, at § 16, that the SSA provide transportation to and from Woods Hole and Martha’s Vineyard, except in the case of an emergency. (St. 1960, c. 701, as amended, § 16).

The SSA operates a ferry terminal in Woods Hole (the “Site”) within the Town of Falmouth, on the eastern shore of Woods Hole Harbor. (Gifford PFT at ¶ 5). Eel pond and the Eel Pond Channel are generally north of the Site. Piers owned by the Landfall Restaurant, the Naushon Trust and the Woods Hole Oceanographic Institute (“WHOI”) are also located to the

north/northwest. (SSA Exhibits 3, 18, 49 & 50). The Site is a marine transportation facility that provides year-round ferry service for passengers and vehicles between the Massachusetts mainland and Martha's Vineyard. (Lamson PFT at ¶ 4). The Site currently consists of three ferry slips, a solid-filled wharf at the northwestern portion of the Terminal Site (on which is located a 1950s-era terminal/ administrative office building, plus employee parking and outdoor passenger waiting areas), vehicle staging areas, bus pick-up and drop-off areas, taxi stands, other employee and public parking, and several ancillary buildings. (Lamson PFT at ¶ 5; SSA Exhibit 3; License Plan No. W16-4601, Sheets 1 & 7). Within the terminal/administrative office building, customers can purchase tickets, buy food, use restrooms, and wait indoors. The building also houses offices for terminal employees, a stock room and maintenance shops. (Lamson PFT at ¶ 6.) A bike path runs through the property, though outside of filled Commonwealth tidelands. (Lamson Tr. at 50). There are two ferry slips ("Slip #1" and "Slip #2") on the south side of the Terminal's single wharf. Slips #1 and #2 are regularly used by the SSA to provide ferry service. A third ferry slip is located on the north side of the wharf ("Slip #3"). Slip #3 is closest to a dock to the north owned by the Naushon Trust, and is primarily used to berth vessels overnight. Vessels are also berthed in Slip #3 during the day when they are not providing ferry service or when they are being maintained or repaired. (Lamson PFT at ¶ 7.) The wharf extends approximately 304 feet into Great Harbor from the easternmost bulkhead to the face of the dolphin located at the southwest corner of the wharf. (Skalaski PFT at ¶ 10; License Plan No. W16-4601, Sheets 1; SSA Ex. 3).

### The Proposed Project

The SSA proposed a major reconstruction of the Woods Hole Ferry Terminal to address existing and ongoing concerns. Much of the infrastructure is old and outdated and the effects of

the marine environment have caused significant deterioration. Reconstruction and other modifications will allegedly improve ferry operations. (“BRP WW26 Combined License for Waterways & Water Quality Certification, Woods Hole Ferry Terminal Reconstruction Project, Appendix E, project Description, contained within the Department’s “Basic Documents”). Many of the components and structures are deteriorated and not up to current code requirements, including requirements of the Americans with Disabilities Act. (Iwerks PFT at ¶¶ 6-7). These include the bulkheads, dolphins,<sup>6</sup> fenders<sup>7</sup> and transfer bridges, as well as the terminal building. The building's unreinforced concrete-block construction has cracks in the exterior walls and the structure is not designed to resist hurricane force winds and waves to which the Terminal Site is subject. The building's ground floor is barely above sea level, and is well below the flood zone elevation required in an AE13 zone. The building does not meet many current code requirements, including those relating to flood zone, wind and seismic loads, electrical, energy efficiency, plumbing and accessibility (Iwerks PFT at ¶ 7).

The configuration of the Terminal's existing slips is not ideal from a navigational or operational standpoint. Currently, when an SSA ferry is docked in Slip #3, it is only 15 feet away from the western end of the Naushon Trust dock. Moving Slip #3 to the south, away from that dock and the docks just beyond that owned by the Landfall Restaurant and the WHOI ("Dyer's Dock"), will improve navigation safety when SSA ferries arrive at and depart from Slip #3. Relocating Slip #3 to the south also would improve vehicular land access to and from Slip #3. (Iwerks PFT at ¶ 8). To achieve the Project’s objectives, described below, repositioning and

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<sup>6</sup> A dolphin is a man-made marine structure that extends above the water level and is not connected to shore. [https://en.wikipedia.org/wiki/Dolphin\\_\(structure\)](https://en.wikipedia.org/wiki/Dolphin_(structure))

<sup>7</sup> A fender is a bumper used to absorb the kinetic energy of a boat or vessel berthing against a jetty, quay wall or other vessel. [https://en.wikipedia.org/wiki/Fender\\_\(boating\)](https://en.wikipedia.org/wiki/Fender_(boating))

reconstructing Slip #3 will enable that slip to be used as an operating slip in all weather and sea conditions while the other two slips are being reconstructed. That use is currently restricted by conditions in Waterways License No. 1960, issued to the SSA in 1989. (SSA Ex. 7). After project completion, this repositioned Slip #3 will enable the SSA to maximize safety based on weather and sea conditions by tailoring the operational use of all three slips, and ensure that there are accessible routes between the Terminal site and all the vessels, regardless of which slip is used.

The Terminal's existing transfer bridges are 30 feet long. As a result, the bridges have steep slopes, restricting the SSA's ability to load and unload longer vehicles and causing the transfer bridges to be noncompliant with the current regulations promulgated by the Massachusetts Architectural Access Board ("MAAB") requiring reconstructed Tier I marine facilities (which will include the reconstructed Terminal Site because it services scheduled waterborne passenger vessels with a vessel length of 40 feet or greater) to be accessible for individuals with disabilities. (Iwerks PFT at ¶ 9) Presently, there is no barrier-free accessible route at Slip #2 for passengers boarding or disembarking from side doors, as there is no passenger loading and unloading platform for that slip. At Slip #2, passengers are restricted to the use of the vehicle transfer bridge when boarding and disembarking from ferries. (Iwerks PFT at ¶ 10).

Because of these numerous problems with the existing facilities, the SSA determined that the Ferry Terminal and facilities needed to be reconstructed. The stated objectives of the proposed Project are:

- To ensure that the bulkheads, dolphins, fenders and transfer bridges will be in good and suitable condition to maintain the SSA's ferry operations for a projected service life of 50 years.

- To develop a preferred slip configuration that optimizes navigation and access from the water.
- To increase the length of the transfer bridges for each of the slips from 30 feet to 50 feet, to allow for the loading and unloading of all vehicles during high and low tides and to allow them to be barrier-free accessible routes for passengers under both state regulations and proposed federal regulations.
- To increase the amount of landside space in front of the transfer bridges to accommodate vehicle turning movements and improve pedestrian/passenger safety.
- To improve side passenger loading/unloading operations from adjacent piers to provide for better accessibility, reduce congestion in boarding/disembarkation operations, and improve pedestrian safety and convenience.

(Iwerks PFT at ¶ 11).

The existing wharf extends 304 feet into Great Harbor from the easternmost bulkhead to the face of the dolphin located at the southwest corner of the wharf. It will be removed, opening up approximately 11,800 square feet of currently filled tidelands. (Skalaski PFT at ¶ 8, 10; WD, License Plan Sheets 1, 6 & 7). The wharf is contaminated with petroleum hydrocarbons in soil and arsenic in groundwater. SSA will perform response actions pursuant to the Massachusetts Contingency Plan, 310 CMR 40.000, to address the contamination as part of its construction activities.

Existing Slip #3 will be shifted to the south, and the waterfront bulkhead will be shifted 70 feet westward to create adequate space on the land side for the terminal building, parking and queuing operations. (WD, License Plan Sheets 2 & 6). By shifting the bulkhead westward, the SSA will be able to meet its legal obligation to provide a fully accessible Terminal for passengers and visitors. (Iwerks PFT at ¶ 18-19). Combining the 70-foot westward shift of the bulkhead with the needed 20-foot increase in the length of the transfer bridges, the SSA determined that the SSA's fleet of ferries would need to be 90 feet farther west into Great Harbor when they are docked in the new slips. When the project is completed, the SSA's fixed structures

in Great Harbor will consist of 33 dolphins, two floating docks, two fixed piers, several articulating aluminum ramps, two fixed ramps and three transfer bridges. (Skalaski PFT at ¶ 8).

To ensure that the project design considered concerns regarding the project's impact on navigation in the area, the SSA commissioned the marine engineering firm of Moffatt & Nichol to study the currents of Great Harbor and their possible effect upon the Project's facilities (the "Currents Study"). It was clear that wind, currents and proximity to any adjacent moored vessels would be factors in design planning. (Iwerks PFT at ¶ 13). The ferry captains and operations staff of the SSA, consulted by the design team, wanted the new slips aligned so that the ferries could navigate along the existing approach paths to the slips. They opined that moving the slips farther into the harbor would provide ferries on the Woods Hole/Martha's Vineyard route more room to back out and turn around. (*Id.*) The Currents Study included preparation of a "two-dimensional depth-averaged model capable of representing the currents and tidal variability in the vicinity of the Woods Hole Terminal...." The model was then used "to investigate currents affecting vessel traffic at the existing Woods Hole Ferry Terminal, and with the proposed alternative slip configuration following terminal redesign" i.e. the slip configuration approved in the Written Determination. (Iwerks PFR at ¶ 3; SSA Exhibit 19).

The proposed project will be conducted in six phases over the course of approximately six years, with the majority of the work conducted in the off-season in order to minimize impacts to the community during the summer months. (*WD* at 1, ¶ 3).

#### The Written Determination

The Department issued the Written Determination on September 1, 2016. The Department determined that the proposed project was a water-dependent use pursuant to 310

CMR 9.12(2)(a) & (b).<sup>8</sup> (WD at 2, Finding 1). Existing structures at the site and previous dredging activities were authorized by prior c. 91 licenses, and maintenance dredging has been authorized by a prior permit. (WD at 2, Finding 2). The Applicant published the required public notice of its application in the Falmouth Enterprise. During the public comment period, the Department received and reviewed fifteen comment letters about the project. The primary issues raised by the comments letters included potential impacts on navigation, public access, impacts to water quality and eel grass beds, impacts to neighboring properties during construction and flood events, compliance with prior c. 91 authorizations, and general impacts to the Woods Hole community from an anticipated increase in ferry traffic. (WD at 2, Finding 3). A public hearing was held on the application on April 14, 2016. Eight additional public comment letters expressing concern about the project were submitted to the Department after the hearing, before the close of the public comment period. The Applicant filed a “Response to Comments” on June 16, 2016. (WD at 2, Finding 4; Basic Documents, “Response to Comments, June, 2016”, prepared by GZA GeoEnvironmental, Inc.)

The Department found that the Applicant provided relevant documentation regarding its compliance with the Massachusetts Environmental Policy Act (“MEPA”),<sup>9</sup> the Massachusetts Wetlands Protection Act,<sup>10</sup> and the local Planning Board requirements for submitting the application. (WD at 3, Finding 5). Finally, the Department determined that the proposed Project,

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<sup>8</sup> These sections provide, in part, that “[t]he Department shall determine a use to be water-dependent upon a finding that said use requires direct access to or location in tidal or inland waters, and therefore cannot be located away from said waters.”

<sup>9</sup> M.G.L. c. 30, sections 61 through 62I, inclusive (MEPA); See Exhibit 14 in Applicant’s Appendix of Hearing Exhibits;

<sup>10</sup> M.G.L. c. 131, section 40; The Falmouth Conservation Commission issued an Order of Conditions permitting the proposed Project on April 13, 2016. See Exhibit 15 in Applicant’s Appendix of Hearing Exhibits.

as conditioned, complies with all applicable standards of the Waterways Regulations, and that “no overriding detriment to the public interest has been identified to overcome the presumption that the project serves a proper public purpose in accordance with 310 CMR 9.31(3). Therefore, “the Department determine[d] that the proposed project serves a proper public purpose that provides greater public benefit than detriment to the rights of the public in the tidelands.” (WD at 3, Findings 8 & 9). The Department concluded that it would approve the proposed Project subject to conditions, including Special Waterways Conditions and Special Waterways Dredging Conditions.

#### The Petitioners’ Claims of Error & for Relief

The Petitioners object to the Determination, contending that the Project will:

(1) result in a loss of Land Under Ocean (“LUO”), because the apparent increased LUO [gained by removing the wharf] will be “effectively occupied by the ferries, platforms and pilings”, and therefore the public will gain no benefit, “other than transportation to Martha’s Vineyard via the Applicant”;

(2) result in increased ferry traffic when the use of Slip 3 is no longer restricted, with a resultant increase in motor vehicle traffic on nearby roads;

(3) negatively affect navigation, particularly boats leaving Eel Pond, by extending the slips 70-90 feet further into Great Harbor and increasing the use of Slip 3.

(4) provide inadequate public access to SSA facilities to the non-traveling public; and

(5) provide fewer benefits to the “public” because the detriment of the Project to the non-traveling public outweigh the public benefits.

In particular, the Petitioners allege that the Determination contains no accommodations for public access, but instead requires that the SSA “develop and plan and adopt rules governing

publicly accessible areas of the site.” The Petitioners contend that the balance of public benefit to public detriment is not met by the proposed Project. (Notice of Claim at 3-5) (“NOC”). In a nutshell, the Petitioners allege that the project favors the SSA and its customers to the detriment of the non-traveling public.

The Petitioners request changes to the c. 91 License to provide mitigation for the alleged impacts to navigation and detriments to the general public by developing a public access plan that includes additional access for fishing, boating, public restrooms, and a walking path that traverses the distance of the facility and connects to the tidelands. The Petitioners want the conditions restricting the use of Slip #3 contained in License No. 1960 incorporated into the new license to mitigate for traffic impacts (both boat and vehicular). They want the SSA’s public access plan to be developed now, rather than in the future, and incorporated as a condition of the license. (NOC at 5).

### **PROCEDURAL HISTORY**

I conducted a Pre-Screening/Pre-Hearing Conference (“Conference”) with the parties and their respective legal counsel on October 17, 2016, in accordance with 310 CMR 1.01(5)(a)15 and 310 CMR 1.01 (9)(a). At the Conference, the issues to be adjudicated at the adjudicatory hearing were discussed and determined. See below at p. 16. Prior to the Conference, the Applicant requested an Expedited Hearing pursuant to 310 CMR 1.01(6)(i) and Department Policy No. Com-00.002 on the Expedited Review of Applications and Adjudicatory Hearings (“the Policy”). The request was made to the Department’s Commissioner, who delegated to me the task of reviewing and responding to the request. I granted the request after conferring with the parties and determining that the request was consistent with the Policy and that an expedited Adjudicatory Hearing was warranted under the circumstances.

I conducted the evidentiary Adjudicatory Hearing (“Hearing”) on January 27, 2017 in the Department’s Southeast Regional Office. At the hearing, the parties cross-examined witnesses who had filed Pre-Filed Testimony (“PFT”) prior to the hearing, with the exception of Petitioners’ witness Dr. Pamela Neubert, whose PFT was admitted into the record via a Joint Stipulation filed by the parties, discussed further below at p. 3, note 3. A stenographically recorded transcript of the Hearing was filed with OADR on January 30, 2017.

### **ISSUES FOR ADJUDICATION**

1. Whether the Petitioners have standing as a Ten Residents Group to appeal the Determination’s provisions regarding navigation and access;
2. If the Petitioners have standing:
  - a. Whether the project meets the requirements of 310 CMR 9.35(2), including the requirement contained in 310 CMR 9.35(2)(a)1.g. that the project not “generate water-borne traffic that would substantially interfere with other water-borne traffic in the area at present, or in the future as may be evidenced by documented projections”;
  - b. Whether the project meets the requirements of 310 CMR 9.35(3) relating to public rights of fishing, fowling and on-foot passage;
  - c. Whether the project meets the requirements of 310 CMR 9.35(5) relating to public rights of access to tidelands;
  - d. Whether the Petitioners may obtain as part of their relief the carrying forward the prior restrictions contained in License No. 1960.

### **STATUTORY & REGULATORY FRAMEWORK**

The regulatory context of this case was recently described in the case In the Matter of The Landing Group, Inc., Docket No. 2014-025, 2015 MA ENV LEXIS 85 (October 27, 2015), adopted by Final Decision, 2015 MA ENV LEXIS 84 (October 29, 2015):

“Throughout history, the shores of the sea have been recognized as a special form of property of unusual value; and therefore subject to different legal rules from those which apply

to inland property.” Boston Waterfront Development Corporation v. Commonwealth, 378 Mass. 629, 631 (1979). Since the Magna Carta, the land below the high water mark has been impressed with public rights designed to protect the free exercise of navigation, fishing, and fowling in tidal waters. Id. at 632; Arno v. Commonwealth, 457 Mass. 434, 449 (2010). Thus, “[a]t common law, private ownership in coastal land extended only as far as mean high water line. Beyond that, ownership was in the Crown [and eventually the Massachusetts Bay Colony, followed by the Commonwealth] but subject to the rights of the public to use the coastal waters for fishing and navigation.” Opinion of the Justices, 365 Mass. 681, 684 (1974).

“In the 1640's, faced with an underdeveloped coastline and a need for wharves to promote commerce in the colonies, 'the colonial authorities took the extraordinary step of extending private titles to encompass land as far as mean low water line,' i.e., to include tidal flats.” Arno, 457 Mass. at 449 (quoting Opinion of the Justices, 365 Mass. at 685). However, “this ownership always had strings attached,” Boston Waterfront, *supra* at 637, because the Colonial Ordinance of 1641-1647, which authorized the transfer of title to private individuals, “expressly specific[d] that the public [was] to retain the rights of fishing, fowling and navigation” in the area between the high and low water marks, otherwise known as tidal flats.” Arno, (quoting Opinion of the Justices, *supra* at 685).

This body of law that retains public access rights is generally known as the public trust doctrine. Matter of Boston Boat Basin, Docket No. 2012-008 and 009, Recommended Final Decision (October 18, 2013), Adopted by Final Decision (November 14, 2014). Under the public trust doctrine the Commonwealth holds tidelands in trust for public use. See Boston Waterfront, 378 Mass. at 629; Arno, 457 Mass. at 449. Tidelands generally include flowed tidelands below the high water mark and filled tidelands below the historic high water mark. See

310 CMR 9.02. The traditional uses of tidelands, called water-dependent uses, include fishing, fowling, and navigation. Moot v. Department of Environmental Protection, 448 Mass. 340, 342 (2007); Fafard v. Conservation Comm'n of Barnstable, 432 Mass. 194, 198 (2000). The legislature delegated authority to the Department under Chapter 91 to “preserve and protect” the public's rights in tidelands by allowing only water-dependent uses or another proper public purpose. G.L. c. 91, § 2; See Fafard, 432 Mass. at 200. The Department is not authorized, however, to relinquish public rights; only the legislature may do that, and only under prescribed circumstances in furtherance of its fiduciary role. Moot, 448 Mass. at 352; Opinion of the Justices, 383 Mass. at 905. The regulations that govern this case are the Waterways regulations, 310 CMR 9.00.

#### **THE PETITIONERS' BURDEN OF PROOF AT THE HEARING**

In this appeal, my review of the record/evidence is de novo. As the party challenging the Department's action in approving the proposed Project, the Petitioners had the burden of proving not only that they have standing to bring the appeal, but that the proposed Project does not conform to the requirements of the applicable waterways regulations, and therefore, the Department's determination was erroneous. The Petitioners had the burden of going forward by producing credible evidence to support their position. In the Matter of Renata Legowski, OADR Docket No. 2011-039, Recommended Final Decision (October 25, 2012), 2012 MA ENV LEXIS 128, at 7-8 (party challenging Chapter 91 determination has burden of proof), adopted as Final Decision (November 5, 2012), 2012 MA ENV LEXIS 131. If the Petitioners have standing, then once the initial burden of production or going forward has been met, the ultimate resolution of factual disputes depends on where the preponderance of the evidence lies. Matter of Town of Hamilton, DEP Docket Nos. 2003-065 and 068, Recommended Final Decision (January 19,

2006), adopted by Final Decision (March 27, 2006). The relevancy, admissibility, and weight of evidence that the parties introduced in the Hearing was governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):

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

310 CMR 1.01(13)(h) provides that it is within the sound discretion of the Presiding Officer to determine the admissibility, relevance, and weight to be given to the evidence presented by the parties.

## **DISCUSSION/FINDINGS**

### **I. THE PETITIONERS HAVE STANDING TO CHALLENGE THE C. 91 LICENSE**

#### **A. The Jurisdictional Nature of Standing**

Standing “is not simply a procedural technicality.” Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975); In the Matter of Sawmill Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), at 13, adopted as Final Decision (July 7, 2015). Rather, it “is a jurisdictional prerequisite to being allowed to press the merits of any legal claim.” R.J.A. v. K.A.V., 34 Mass. App. Ct. 369, 373 n.8 (1993); Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998) (“[w]e treat standing as an issue of subject matter jurisdiction [and] . . . of critical significance”); see also United States v. Hays, 515 U.S. 737, 115 S.Ct.2431, 2435 (1995) (“[s]tanding is perhaps the most important of the jurisdictional doctrines”). Before the Petitioners’ substantive claims can be addressed, the question of their standing must be resolved.

**B. The Petitioners Have Standing as a Ten Residents Group to Appeal the Written Determination Pursuant to 310 CMR 9.17(1)(c) and M.G.L. c. 30A, § 10A.**

310 CMR 9.17(1)(c) provides that “ten residents of the Commonwealth, pursuant to M.G.L. c. 30A, § 10A, who have submitted comments within the public comment period” may appeal the Department’s decision to grant a c. 91 license, provided that (1) “at least five of the ten residents ... reside in the municipality” where the licensed project is located, (2) the appeal notice “clearly and specifically state[s] the facts and grounds for the appeal and the relief sought” and (3) each resident who intends to be a part of the appeal “shall file an affidavit stating the intent to be a part of the group and to be represented by its authorized representative.” 310 CMR 9.17(1)(c); In the Matter of Entergy Nuclear Operations, Inc. and Entergy Nuclear Generation Co., OADR Docket No. 2015-009 (“Entergy”), Recommended Final Decision, 2016 MA ENV LEXIS 3, at 44-45 (February 5, 2016), adopted as Final Decision (February 25, 2016); In the Matter of Webster Ventures, LLC, OADR Docket No. 2015-014 (“Webster Ventures”), Recommended Final Decision, 2016 MA ENV LEXIS 27 (June 3, 2016), adopted as Final Decision, 2016 MA ENV LEXIS 32 (June 15, 2016).

The right of a Ten Residents Group to bring an appeal pursuant to 310 CMR 9.17(1)(c) is also governed by M.G.L. c. 30A, § 10A. Entergy and Webster Ventures discuss in detail and with thorough analysis the framework for such appeals, and the six jurisdictional conditions<sup>11</sup>

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<sup>11</sup> (1) the Group must consist of at least ten residents of the Commonwealth at the time of the appeal’s filing;

(2) at least five of the ten residents in the Group must live in the municipality in which the licensed or permitted activity is located;

(3) each member of the Group must have submitted comments on the c. 91 license application during the public comment period prior to the appeal’s filing;

(4) each member of the Group must include an affidavit with the appeal

that must be met by a Ten Residents Group seeking to challenge a c. 91 license. Only one of those jurisdictional conditions is contested in this appeal: whether the Petitioners have alleged “damage to the environment” as that term is defined by M.G.L. c. 214, § 7A. M.G.L. c. 214, § 7A defines “damage to the environment” as:

*any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth, whether caused by the defendant alone or by the defendant and others acting jointly or severally. Damage to the environment shall include, but not be limited to, air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds or other water resources, destruction of seashores, dunes, wetlands, open spaces, natural areas, parks or historic districts or sites. Damage to the environment shall not include any insignificant destruction, damage or impairment to such natural resources.*

(emphasis added). As stated in Webster Ventures:

Chapter 91 and the Waterways Regulations at 310 CMR 9.00 are intended, in part, to implement the public trust doctrine with respect to the waterways, by protecting the waterways from the cumulative and other effects that would otherwise result from unregulated use of these natural resources of the Commonwealth, i.e. from their misuse or overuse. Thus, noncompliance with c. 91 or 310 CMR 9.00 implicitly damages and diminishes the waterways, natural resources of the Commonwealth, that they are designed to protect. As a consequence, inherent in a violation of c. 91 or 310 CMR 9.00 is diminishment of waterways, natural resources of the Commonwealth, resulting in environmental harm.

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stating his or her intention to be part of the Group and to be represented by its authorized representative;

- (5) Group membership of at least ten residents of the Commonwealth, five of which must live in the municipality in which the licensed or permitted activity is located, must be maintained throughout the appeal; and
- (6) the Group’s Appeal Notice challenging the c. 91 License must allege clear and specific facts that the Department’s grant of the c. 91 License might or will cause “damage to the environment” as that term is defined by G.L. c. 214, § 7A.

Entergy, 2016 MA ENV LEXIS 3, at 46-47; Webster Ventures, 2016 MA ENV LEXIS 27, \*24

Webster Ventures, 2016 MA ENV LEXIS 27, \*30. In reaching this conclusion in Webster Ventures, the Chief Presiding Officer agreed with the Department's argument "that a validly constituted Ten Residents Group pursuant to 310 CMR 9.17(1)(c) and G.L. c. 30A, § 10A "[that] alleges a violation of public trust rights under c. 91, including the most typical allegations of interference with navigation and other public rights' has alleged "damage to the environment" as that term is defined by G.L. c. 214, § 7A. Department's Pre-Hearing Brief, at pp. 14-15."

Webster Ventures, 2016 MA ENV LEXIS 27, \*29.

Each of the thirteen individuals in the Ten Residents Group resides in Falmouth and each submitted comments to the Department during the public comment period. (Basic Documents, Comment Letters). With their Notice of Claim, each of the thirteen individuals submitted an affidavit stating their intent to be a part of this appeal and to be represented by Petitioners' counsel. In their Notice of Claim, the Petitioners allege that the proposed Project will negatively affect navigation, particularly boats leaving Eel Pond, and provides inadequate public access to members of the non-traveling public. The Petitioners expounded this claim in their Pre-Hearing Conference Statement:

Navigation will be negatively impacted by increased ferry traffic, which will increase due to the availability of a third slip. The increase in ferry traffic will negatively impact other boats entering or exiting Eel Pond, which will have to move away, stop in place, or be prevented from traveling into or out of Eel Pond as ferries pull out and turn around. The increased number of private vessels using Eel Pond in the summer will compound this impact. Coast Guard enforcement of federal security zone around high capacity passenger vessels, pursuant to 33 CFR 165.1711, will also significantly impede navigation of other boats through the area. Moving the slips 70 feet further out into the waterway, also takes away from an area that is currently open to public navigation and fishing.

(Petitioners' Pre-Hearing Statement, October 11, 2016, at 4). The Petitioners also submitted testimony from an expert to support their claim of standing. This testimony from Dr. Pamela

Neubert, admitted into evidence solely with respect to Petitioners' standing claim, describes the potential damage to eel grass beds in the vicinity of the Site. Based on this testimony and the allegations regarding navigation, the Petitioners argue that they have satisfied the requirements for standing, and have put forth a "minimum quantum of credible evidence" in support of their claim. (Petitioners Ten-Resident Closing Brief and Recommended License Conditions, at 2-4).

The Applicant disagrees with the decision in Webster Ventures, asserting that it is wrong as a matter of law on the question of standing under 310 CMR 9.17(1)(c). (Applicant's Pre-Hearing Memorandum of Law at 3-4). The Applicant argues that the Waterways regulations address potential sources of "damage to the environment" in 310 CMR 9.33,<sup>12</sup> and that the Petitioners have not alleged that the project does not comply with that section or any other section of the Waterways regulations that seek to prevent "damage to the environment." (Id. at 4). The SSA further argues that it is undisputed that the proposed Project has obtained every environmental permit required under 310 CMR 9.33. (Applicant's Closing Brief at 2; Lecco PFT at ¶¶ 5-8). Additionally, the SSA asserts that even if Dr. Neubert's testimony gave the Petitioners standing to appeal, her testimony was confined "to the Project's potential impact on eelgrass beds to the north and south of the Terminal Site. Accordingly, under M.G.L. c. 30A, § 10A, Petitioners' standing is limited to the issue of that potential impact and 'the elimination or reduction thereof.'" (Applicant's Closing Brief at 3). Noting that the Petitioners have not sought any relief that would eliminate or reduce potential impacts to eelgrass beds, the SSA concludes that "[n]othing in [M.G.L. c. 30A, § 10A] permits a ten-citizens group to do what Petitioners are attempting to do here: bootstrap standing on eelgrass issues into standing on issues having

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<sup>12</sup> 310 CMR 9.33, Environmental Protection Standards, states, in part, "All projects must comply with applicable environmental regulatory programs of the Commonwealth, including but not limited to... [MEPA]... and the Wetlands Protection Act...."

nothing to do with eelgrass.” (Applicant’s Closing Brief at 3-4). The Applicant argues that Webster Ventures is distinguishable because the Petitioners in that case challenged a c. 91 license on expressly environmental grounds, including a failure to obtain all required environmental permits and the Department’s alleged failure to require the applicant to install a sewage pump-out station at a proposed marina. (Applicant’s Closing Brief at 4). Because the Petitioners in this case have not requested any relief relating to environmental issues, the SSA asserts that their appeal should be dismissed. (Applicant’s Closing Brief at 4).

The Department concurs with the Petitioners that they have standing to appeal the Written Determination as a Ten Residents Group pursuant to 310 CMR 9.17(1)(c). The Department maintains the position it asserted in Webster Ventures and avers that the decision was correct as a matter of law. Violations of navigation safety and public access constitute impairments of a waterway, and thus, “damage to the environment.” (Department’s Prehearing Memorandum at 1; Department’s Final Brief at 4). The Department argues that evidence regarding wetlands impacts is, therefore, irrelevant to the question of standing, and to the substantive issues in the case. (Department’s Prehearing Memorandum at 1). The Department notes, importantly, that M.G.L. c. 30A, § 10A specifically references c. 91, and that c. 91 is the only statute specifically referenced in that section.<sup>13</sup> “It would be contradictory to conclude that the legislature did not intend for claims of violating the public trust in tidelands under chapter 91 to satisfy the pleading requirements of [M.G.L. c. 214, § 7A] after making c. 91 the only statute referenced therein.” (Department’s Final Brief at 7). The Department disagrees with the Applicant that 310 CMR 9.33 describes and limits the violations that could be considered under

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<sup>13</sup> “In any proceeding pursuant to chapter 91, at least 5 of the 10 persons shall reside in the municipality in which the license or permitted activity is located.” M.G.L. c. 30A, § 10A.

M.G.L. c. 214, § 7A. (Department’s Final Brief at 7). The Department’s position, consistent with Webster Ventures, is that the Petitioners have standing “by virtue of their alleging that there have been violations of the performance standards relating to navigation and public access found in 310 CMR 9.00.” (Department’s Final Brief at 8).

Although the Petitioners and the Applicant expended considerable effort arguing about the impacts to the eel grass beds, the evidence of impacts to wetlands resources is not relevant to the question of standing in this Waterways case.<sup>14</sup> The Department’s position correctly identifies what a petitioning Ten Residents Group must alleged to support a claim of standing under c. 91. The SSA’s attempt to distinguish Webster Ventures is unavailing. While the Petitioners in that case did allege a failure to obtain all required environmental permits and the Department’s alleged failure to require the applicant to install a sewage pump-out station at a proposed marina, it was not on those allegations that the decision was based. See above at p. 20-22.

I find that the Petitioners have met the requirements to proceed as a Ten Residents Group to a determination of the merits of the substantive issues in this appeal. Their Appeal Notice, as augmented by their Pre-Hearing Statement, sufficiently alleges clear and specific facts that the Department’s grant of the c. 91 License might or will cause “damage to the environment” as that term is defined in M.G.L. c. 214, § 7A, by causing impacts to public rights of navigation in the waterway and access to the tidelands resulting from increased ferry traffic.

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<sup>14</sup> The Applicant correctly notes that 310 CMR 9.33(3) provides that “If an order of conditions has been issued by the conservation commission and the Department has not taken jurisdiction, the Department shall presume the project complies with state wetland standards, except upon a clear showing of substantial non-compliance with such standards.” The SSA received an order of conditions from the Falmouth Conservation commission. (See SSA Exhibit 15). That order was not appealed, and is final. I agree with the SSA that the Petitioners have not claimed that there is substantial non-compliance with state wetlands standards.

## II. THE DEPARTMENT PROPERLY ISSUED THE C. 91 LICENSE

In some measure this case presents a solution in search of a problem. As discussed below, the Petitioners seek mitigation for harms they have not proven will exist. Although the Petitioners may proceed to a consideration of the merits of their claims, as discussed in detail below, the preponderance of the evidence favors the conclusion that the Department properly issued the Written Determination. The Petitioners had the burden of proving their claims; they did not meet this burden.<sup>15</sup>

### A. **The Project Will Not Significantly Interfere With Public Rights of Navigation**

The standards set forth in section 310 CMR 9.35 of the Waterways regulations 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). The regulation directs the Department to find that this standard is not met when the project will “generate water-borne traffic that would substantially interfere with other water-borne traffic in the area at present, or in the future as may be evidenced by documented projections.” 310 CMR 9.35(2)(a)1. g. A project not meeting this standard cannot be permitted. Id.; See Matter of David Fuhrmann, Docket No. 2013-037, Recommended Final Decision, 2015 MA ENV LEXIS 17, \*41 (February 15, 2015), adopted as Final Decision, 2015 MA ENV LEXIS 16 (April 8, 2015). While the right to navigate should be construed liberally, see Commonwealth v. Alger, 61 Mass 53, 94 (7 Cush 53)(1851), cited in Matter of Stanley A. Sylvia, Final Decision, 1997 MA ENV LEXIS 122 (February 4, 1997), that does not mean that it is unlimited. “Alleged interference with navigation may not be merely an inconvenience, or based on anecdotal or conclusory statements. See Matter of

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<sup>15</sup> Because of the Expedited Hearing request, I shifted the order for the parties to file their PFT so as not to prejudice the Petitioners. This did not change the burden of proof. 310 CMR 1.10(13)(c)1.

Abdelnour, Docket Nos. 88-138, 88-358, 88-359, 88-360, 88-361, 90-270, Final Decision (November 22, 1994); Matter of Lipkin, Docket No. 92-043, Final Decision (December 22, 1995). 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. Matter of Stanley A. Sylvia, Docket No. 95-110, Final Decision (February 4, 1997)."; Matter of Oliveira, Docket No. 2010-017, Recommended Final Decision (January 7, 2011), adopted by Final Decision (January 7, 2011).

The focus of the regulation is not on whether a project results in a net increase in boat traffic, but on the impact of that boat traffic on the public's use of the waterbody. Fuhrmann, supra, at \*42. Whether interference with navigation is significant may depend on the type and frequency of the interference and who is experiencing it. Matter of Fuhrmann, supra, at \*63.

Primarily, the Petitioners object to the reconfiguration of Slip #3, asserting that it will negatively impact boats navigating into and out of Eel Pond to the north of the Ferry Terminal. The Petitioners presented the testimony of Captain Olmsted to support their claim that the proposed Project will "significantly interfere" with navigation, in violation of 310 CMR 9.35(2). Based on his many years of experience in Great Harbor, his observations of the boating practices of recreational boaters using the area, and his own use of Eel Pond for storm and winter mooring, Captain Olmsted testified as follows. According to Captain Olmsted, the current in Great Harbor on flood tide flows in a southeast direction at approximately 90 degrees from the slip centerline, and across the existing terminal bulkhead. In a hard flood tide, the current can move at up to two knots and has a very strong pull. (Olmsted PFT at ¶ 8). The existing solid fill wharf at the Ferry Terminal provides some protection from the current for ferries maneuvering into the slip. The plan to remove the wharf and replace it with a straight bulkhead will, in Captain Olmsted's

opinion, allow the current to flow directly across all three slips with no impediment. As a result, this will require adjustments to the ferries' docking practices, requiring them to approach the slips at greater speed and farther to the north to compensate for the current. Farther to the north is the staging area for boats waiting to enter Eel Pond. In support of this opinion regarding the currents, he testified that after a portion of a NOAA jetty located north and to the west of the WHOI pier was removed in 2014, the current flow increased so much that it dragged Can No. 9,<sup>16</sup> a channel marker, from its usual position to a location in front of the Ferry Terminal. He expects that the removal of the SSA wharf will have the same effect on the current flowing past the Ferry Terminal.<sup>17</sup> (Olmsted PFT at ¶ 11; Petitioners' Exhibit 3).

Captain Olmsted testified that access to Eel Pond is limited to small boats with little or no air draft<sup>18</sup> unless the drawbridge on Water Street is opened. The drawbridge opens on request on the hour and half-hour. Commonly, boaters waiting to navigate into Eel Pond stage their boats in an area of Great Harbor to the west of the ferry slips and south of the WHOI dock so that they can see when the bridge opens ("the Staging Area")(See Petitioners' Ex. 4; SSA Ex. 49 & 50). In the future after construction, when ferries leave the reconfigured slip at the Ferry Terminal, they will cross over this Staging Area. This will be particularly true for ferries departing from Slip #3. (Olmsted PFT at ¶ 12; Petitioners' Exhibit 4). Contrary to the customary boating practice affording boats exiting a waterway the right of way, boats entering Eel Pond have the right of way. Captain Olmsted testified that "...this practice is at the request of the SSA to accommodate

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<sup>16</sup> Can No. 9 is an Aid to Navigation set in Great Harbor to mark the northeastern extreme of Grassy Island. It is called a "can" because it is a buoy with a cylindrical shape and flat top. (Gifford Pre-filed Rebuttal Testimony at ¶ 5.

<sup>17</sup> Nowhere in their appeal have the Petitioners suggested that the project should be re-designed to keep the existing wharf in place.

<sup>18</sup> Air draft is the distance from the surface of the water to the highest point on the boat.

their need to turn in the area where boats congregate, and having boats enter Eel Pond first gets them out of the way.” (Olmsted PFT at ¶ 15).

Boaters frequently must move out of the way of a ferry entering Great Harbor because the ferries are typically off schedule by five to ten minutes. Boaters stage in the Staging Area based on their own needs and the timing of the drawbridge openings, and not on the ferry schedules. Captain Olmsted’s opinion is that the SSA’s use of the Ferry Terminal slips causes interference with navigation because the drawbridge openings are short in duration, lasting about four minutes. This allows for about two minutes for boats to travel in each direction in and out of Eel Pond. If the drawbridge opening coincides with the arrival or departure of a ferry, which Captain Olmsted testified is common, then the boats in the Staging Area must move southwesterly of the WHOI pier. When this happens, the bridge operator’s informal practice is to keep the bridge open to enable the boats to maneuver back into position and into Eel Pond. (Olmsted PFT at ¶¶ 17-18).

In Captain Olmsted’s opinion, increased use of Slip #3 after construction will impact the public’s ability to navigate into and out of Eel Pond. The reconfigured Slip #3 will be located about 150 feet closer to the entrance to Eel Pond than the existing Slip #1, with the effect of moving regular traffic 150 feet closer to the WHOI pier. By positioning active traffic patterns 150 feet farther north, ferries leaving Slip #3 will cross directly over the Staging Area. According to Captain Olmsted, ferry captains will need to travel further west in order to maneuver into the channel to exit Great Harbor. Captain Olmsted concluded that as long as Slip #3 is “used in this capacity or in regular use...based on weather conditions, it will interfere with public navigation.” (Olmsted PFT at ¶ 20).

On cross-examination by the SSA's attorney, Captain Olmsted acknowledged that he did not prepare any documents in connection with his testimony, nor prepare any reports concerning currents in Woods Hole Harbor. (Olmsted Tr. at p. 20). Neither did he provide any photographs, or studies concerning the currents in Woods Hole Harbor, in support of his observations. (Id. at p. 21). He also admitted that he was familiar with the USCG's "Rules of the Road", and described their purpose as having a set of rules to promote safety at sea. (Id. at p. 21- 22; see SSA Exhibit 26). He was asked about a publication called the "US Coast Pilot", and described it as a publication that "gives information to boaters...about particular things about individual harbors and guidance.... (Olmsted Tr. at p. 22-23). He stated that if he was going into an unfamiliar harbor he most likely would look at a publication such as the US Coast Pilot, which he considers a reliable source of information most of the time.<sup>19</sup> (Id. at p. 23). A fair inference from this testimony is that boaters traveling to or in an unfamiliar harbor will consult relevant information from reliable sources.

I do not find Captain Olmsted's evidence persuasive. First, his testimony regarding boats entering Eel Pond having the right of way directly undercuts the Petitioners' claim of "significant interference". This testimony tends to prove that boaters already accommodate the traveling

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<sup>19</sup> The United States Coast Pilot consists of a series of nautical books that cover a variety of information important to navigators of coastal and intracoastal waters and the Great Lakes. Issued in nine volumes, they contain supplemental information that is difficult to portray on a nautical chart.

<https://www.nauticalcharts.noaa.gov/nsd/cpdownload.htm>

NOAA maintains a searchable website for this publication. An example of information available via a search for Eel Pond in Woods Hole includes the following "Eel Pond, an extension of Great Harbor to the northeastward, is a basin with depths of 10 to 20 feet. In 2001, the narrow entrance to the pond had a reported controlling depth of 6 feet. A highway bridge over the entrance channel has a 31-foot bascule span with a clearance of 5 feet. (See 33 CFR 117.1 through 117.59 and 117.598, chapter 2, for drawbridge regulations.)

<https://www.nauticalcharts.noaa.gov/nsd/searchbychart.php>

ferries as part of their ordinary boating practices, without any apparent difficulty. There was no evidence offered from any boater, including Captain Olmsted, to support a claim of “significant interference” with navigation in the Eel Pond channel. Second, and notably, he did not offer any testimony that boaters are unable to move out of the way of the ferries in the Staging Area; that moving out of the way of the ferries is even difficult; or that any boater seeking to enter Eel Pond is prohibited from doing so as a result of ferries traveling into and out of the Ferry Terminal. Even if, as he testified, ferries departing the reconfigured Slip #3 will cross into the Staging Area, the evidence does not support a conclusion that the current boating practices in the area would not or could not continue after Slip #3 is reconfigured. Particularly in light of the testimony that the bridge operator’s informal practice is to keep the bridge open to enable the boats to maneuver back into position in the Staging Area and into Eel Pond, there was no evidence that boats in the Staging Area experience anything more than an occasional inconvenience. As a result, I find that the Petitioners have failed to meet their burden of proof. The Petitioners’ evidence was amply rebutted by the SSA and the Department with persuasive, probative evidence at the Hearing. The preponderance of the evidence clearly and substantially supports a finding that the proposed Project complies with 310 CMR 9.35(2)(a) because it will not significantly interfere with public rights of navigation existing in the waterways.

The Currents Study, described above at p. 12 is relevant to this analysis. Moffatt & Nichol validated the model in several ways, including using measurements of actual currents in Great Harbor taken over two days in October 2013, over several transects. The validated model “was used to investigate currents affecting vessel traffic at the existing Woods Hole Ferry Terminal, and with the proposed alternative slip configuration following terminal redesign” (the slip configuration approved in the Draft License). (Iwerks PFR, ¶ 3; SSA Exhibit 19). The

currents in the vicinity of the SSA's ferry slips at both peak flood and peak ebb are mild. The Currents Study concluded that in peak flood tide, the currents near the bulkhead of the existing SSA wharf are less than 0.5 knots, increasing to no more than 1.0 knots offshore in the vicinity of the proposed locations of the reconstructed slips and in the areas where the SSA's ferries now (and in the future) will turn. The Currents Study also concluded that the redesign of the terminal can be expected to have very little effect on the currents affecting navigation of vessels in and out of the proposed ferry slips. (Iwerks PFT at ¶¶ 25-26; SSA Exhibit 19; Gifford PFR at ¶ 4; Iwerks PFR at ¶¶ 5-6). This scientifically-based conclusion was more than sufficient to rebut the testimony of Captain Olmstead regarding the impact of the project on the strength of the currents near the Ferry Terminal, and thus sufficient to rebut his conclusion about the adjustments that the ferries would be required to make to compensate for any increased current flows. In addition, Captain Gifford testified that wind, more than currents, is a factor affecting how the SSA's vessels maneuver into the slips at the Ferry Terminal. (Gifford Transcript at p. 134; p. 155; p. 156) (“[W]e’re more governed by the wind than the currents....”)

To rebut the assertion that the removal of a portion of the NOAA jetty resulted in increased currents strong enough to knock Can No. 9 off position, Captain Gifford testified regarding a conversation he had on December 12, 2016 with a member of the USCG's Federal Aids to Navigation group at the USCG station in Woods Hole. (Gifford PFR at ¶ 5). According to USCG records, Can No. 9 had been repositioned only twice in the past thirteen years, on February 28, 2015 and on March 9, 2015. On both occasions, Can No. 9 had been dragged off position due to heavy ice floes in Great Harbor. (*Id.* at 5-6). During that period in the winter of 2015, Massachusetts had a very cold and snowy winter, resulting in ice floes going in and out of Great Harbor. Captain Gifford personally observed the ice floes in Great Harbor at that time and

the USCG's activities when they put Can No. 9 back into position, and he took photographs that were submitted with his pre-filed rebuttal testimony. (Id. at 8; SSA Exhibits 39-48). "Master Turnover Notes", submitted as SSA Exhibit 38 to the PFR of Captain Gifford, evidence the extreme winter conditions in Great Harbor during this time period. Included in the Notes is a notation from February 27, 2015, that at "1430 2 #9 Buoys drifting in ice - @WHOI dock" and a notation from March 8, 2015 that "At noon [Buoy] #9 was almost dead astern when we were tied up in Slip #1 – maybe 100 yards aware[sic] – much of the time it was under ice..." (emphasis added). Captain Gifford further testified that the log sheets maintained by the Master of one of the SSA's ferries indicated that the tides in Great Harbor were relatively mild on February 27 and March 8, 2015, reinforcing his conclusion that the cause of Can No. 9 being dragged from its position was heavy ice floes in the harbor, not an increase in current flow due to the shortening of the NOAA jetty. Because Captain Olmsted's conclusion about the cause of the Can No. 9 is directly contradicted by credible evidence from the SSA, his conclusions regarding the impact on currents when the wharf is removed is faulty, and I do not accord them any probative value.

The SSA provided substantial evidence to demonstrate that the proposed Project complies with the regulations. This included evidence regarding the current operation of its ferries in Great Harbor, as well as evidence regarding how the new slip configurations and other structures are anticipated to improve navigation in the harbor. (See PFT of Captains Gifford and Monteiro). Slips #1 and #2 are the primary slips used by the SSA; occasionally the vessels operate out of Slip #3. On their way from Martha's Vineyard to the Ferry Terminal, the vessels typically enter the Channel and the Harbor from the south. Two navigational buoys identified on SSA Exhibit 21 (the "Buoys") flank the Channel's southern entrance. (Gifford PFT at ¶ 9). On

their way to the Terminal, the SSA's two double-ended ferries<sup>20</sup> (*M/V Island Home* and *M/V Governor*) travel north/northwest past the Buoys, then make an easterly right-hand turn within the Turning Basin noted on SSA Exhibit 21 and proceed into one of the slips. That trip takes approximately ten minutes from the Buoys to a slip. When they depart from the Terminal, the SSA's double-ended ferries proceed west out of the slip, enter the Turning Basin, then make a left turn south/southeast into the Channel. That trip also takes approximately ten minutes from a slip to the Buoys. (Gifford PFT at ¶ 10).

The SSA's single-ended ferries *M/V Martha's Vineyard*, *M/V Nantucket* and *M/V Woods Hole* typically approach the Terminal's slips along the same path as the double-ended ferries, and take the same time (typically take less than ten minutes) from the Buoys to a slip. However, when they leave the Terminal, they must back out of the slip (with engines in reverse) into the Turning Basin, where they turn the stern of the ferry from west to north/northwest. The ferry then stops before proceeding forward south/southeast down the Channel. That trip takes approximately ten to twelve minutes from a slip to the Buoys. (Gifford PFT at ¶ 11.)

The SSA's single-ended freight boats *M/V Gay Head*, *M/V Katama* and *M/V Sankaty* approach the Terminal from the Buoys in much the same manner as the SSA's other vessels. But because each of those vessels must dock its stern in the slip (to load or unload freight), after exiting the Turning Basin, each remains parallel with the shore beyond the slips before coming to a stop, and then its stern typically turns 90° in a counterclockwise direction before the vessel backs into a slip. As a result, these vessels' trips from the Buoys into one of the slips typically take between eleven and thirteen minutes. Because these freight boats are thus docked in the

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<sup>20</sup> Double-ended ferries have interchangeable bows and sterns, enabling them to travel from one terminal to another without the need to turn around.

slips with their bows facing into the Harbor, when they leave the Terminal, they travel the same ten-minute course described above for the SSA's double-ended ferries. (Gifford PFT at ¶ 12).

According to the SSA, their operations within the Harbor are well known to those who regularly navigate there, and are described in the USCG's U.S. Coast Pilot. Regular users of the Harbor are aware of the SSA's schedules and maintain a safe distance from the SSA's vessels during the few minutes they are in transit to and from the Terminal. (Gifford PFT at ¶¶14-15; SSA Exhibit 25). The SSA's captains follow the USCG's "Rules of the Road," found at 33 CFR Part 83, subpart B (SSA Exhibit 26), while operating all ferries. The purpose of the Rules is to promote safety at sea. The Rules contain provisions for safe operation of vessels in narrow channels, in situations where there is risk of collision, in areas of heavy traffic, in instances when one vessel is in sight of another, and in conditions of restricted visibility. (Gifford PFT at ¶ 16). When entering and leaving Great Harbor, the SSA's vessel's captain, pilot/mate and other crewmembers in the pilot house watch for traffic approaching the vessel using both their eyes and radar. (Gifford PFT at ¶ 17). The SSA also positions other crewmembers as "lookouts" at the stern of any single-ended ferry when it is backing up. Before backing out of a slip, the vessel will also sound one prolonged blast, followed by three short blasts, from the vessel's whistle as per the Rules of the Road. All vessels usually sound their whistles when in sight of other vessels that might cross a ferry's path, unless they already are in direct communication via VHF radio with those other vessels. SSA vessels also have the capability to sound the fog signal automatically every minute in fog, and more often should the vessel's captain deem it necessary for safety. (Gifford PFT at ¶ 18). Captain Gifford also testified that the pilot houses of the SSA's vessels are equipped with marine radars that have the ability to detect small craft on the water. The vessel radars also have automatic radar plotting aid ("ARPA") capabilities. These systems can track and

calculate the courses of multiple objects on the water, as well as their speeds and closest points of approach, thereby alerting the SSA's captains and pilot/mates to the danger of a risk of collision with other vessels and objects in the water. (Gifford PFT at ¶ 19).

Captain Olmsted's testimony focused on boats traveling in and out of Eel Pond. The SSA provided substantial evidence describing this activity. According to Captain Gifford, recreational boaters tend not to navigate near the SSA's slips. Most small vessel traffic in the Channel and the Turning Basin travels to and from Eel Pond, or to and from various berthing areas and moorings southwest of the Marine Biological Laboratory ("MBL"). The areas west of the MBL are well away from the Terminal Site, and thus the Site has no impact on any navigation in the direction of areas west of the MBL. (Gifford PFT at ¶ 30). There are three facilities that affect navigation to and from Eel Pond: the WHOI Pier (and any vessels berthed at that pier), Dyer's Dock, and the Eel Pond Bridge. The WHOI Pier and Dyer's Dock create a channel in and out of Eel Pond, which vessels transit on an NE/SW axis. As a result, vessels using the Eel Pond channel typically enter the harbor (when leaving Eel Pond) or leave the harbor (when entering Eel Pond) north of the area in the Turning Basin transited by the SSA's ferries. (Gifford PFT at ¶ 31). When the Eel Pond Bridge is closed (so that motor vehicles can cross the bridge), most vessels cannot enter from Eel Pond from the Harbor and vice versa because of their size. As a rule, the Bridge opens every half hour to accommodate small vessel traffic to and from Eel Pond. The bridge keeper often is aware of what boats are waiting for the Bridge to open, either by VHF radio or vessel blasts. (Gifford PFT at ¶ 32; Gifford PFR at ¶ 11). The SSA concurs with Captain Olmsted relative to the gathering of boats in the Staging Area. Although Captain Olmsted did not testify about the quantity of boats in the Staging Area at any given time, other evidence presented by the SSA and the Department indicates that during the busy summer season, at most only a half dozen

of these small vessels are ever waiting for the Bridge to open, and often there are either no boats waiting or only one, which is also typical during the winter. There was no evidence of conflicts between any of those vessels and any of the SSA's ferries. (Gifford PFT at ¶ 32; Gifford PFR at ¶¶ 11-12; Hill Tr. at 160-161; Gifford Tr. at 156-157).

According to the SSA, operators of the small boats waiting to enter Eel Pond and the bridge keepers of the Eel Pond Bridge have accommodated the passage of SSA ferries in the harbor, without incident. Captain Gifford acknowledged that the small boats at times must move out of the way of a ferry as it approaches or exits a slip. Captain Gifford notes, as did Captain Olmsted, the right of way to enter Eel Pond before existing boats can leave. Further, in the event a ferry arrives or leaves at the same time the bridge is opening, it is the informal practice of the bridge keeper to keep the bridge open longer to allow boats to maneuver back into position and enter Eel Pond, as long as the bridge keeper is aware that boats are waiting. In those circumstances, the bridge keeper should be aware of what boats are waiting for the Eel Pond Bridge to open as the practice is for boaters who want to enter Eel Pond during the bridge's next scheduled opening to signal the bridge keeper by calling him or her on VHF radio (VHF 13), and they can also signal the bridge keeper that they want to enter Eel Pond with four short blasts. (Gifford PFR at ¶¶ 10-11).

To rebut the contention that ferries will interfere with the navigation of boats as they are leaving Eel Pond, even when a ferry is backing out of one of the Slips, the evidence amply demonstrates that the small boats can simply slow down on their way to the Channel. The small boats are very maneuverable and any interference with their navigation is insignificant. In addition, sailboats do not operate under sail as they enter or leave Eel Pond; rather, they operate under power with their sails down (Gifford Tr. at 145-146; Hill Tr. at 168).

In concluding that the the proposed Project meets all of the requirements of c. 91 and the Waterways regulations, Department witness David Hill relied not only on his sixteen years of experience reviewing waterways applications and drafting licenses, but also on his experience visiting Woods Hole, and his inspection of the SSA's Ferry Terminal and facilities there. (Hill PFT at ¶ 5). Noting that c. 91 does not regulate the ferry vessels themselves (just the structures, facilities, and the water-borne traffic generated by them), Mr. Hill opined that the reconstructed Ferry Terminal will not generate new water-borne traffic; water-borne traffic already exists by virtue of the existing terminal. The project site has waterways licenses dating back to at least 1871. The proposed Project does not increase the number of slips at the terminal. There are three slips now, there will be three slips after project completion. In Mr. Hill's opinion, in order to consider that a project would generate water-borne traffic that would substantially interfere with other water-borne traffic in the area, a project would have to substantially increase the number of slips at the terminal or drastically change the location or alignment of the slips. The proposed project does not do that, because it is not adding any new slips, and is moving only one slip, Slip #3, approximately 66 feet to the south. (Hill PFT at ¶ 11).

In addition, there is ample open water adjacent to the Ferry Terminal to accommodate safe navigation for all vessels in the area, including the SSA's ferries, commercial and research vessels, and recreational boaters. (Hill PFT ¶ 12; Hill Exhibits A and B (showing Great Harbor from the rear of a ferry exiting Slip #1); Exhibits C, D & E (showing open areas for navigation and the course of a vessel leaving Eel Pond Channel)).

From this evidence presented by both the SSA and the Department, I find that the preponderance of the evidence supports a conclusion that the proposed Project will not significantly interfere with navigation, and specifically will not generate water-borne traffic that

will substantially interfere with other water-borne traffic in the area. The Petitioners elicited testimony that the use of Slip #3 will likely increase to accommodate SSA operational needs. They did not prove, however, that there will be any increase in overall ferry traffic from the proposed Project. It is also important to note that a ferry terminal already exists at this site; the Written Determination does not involve a proposal for a brand-new facility where none currently exists. And while the proposed Project will generate water-borne traffic, as is its purpose and the SSA's mission, the evidence overwhelmingly supports a conclusion that this traffic will not interfere with other water-borne traffic in the waterway. I find, therefore, that the Written Determination protects the public rights of navigation in the tidelands and was issued in compliance with 310 CMR 9.35(2)(a), including 9.35(2)(a)1.g regarding water-borne traffic in the waterway.

**B. The Project will not significantly interfere with the public rights of fishing and fowling and on-foot passage in the tidelands.**

1. Fishing and Fowling

310 CMR 9.35(3)(a) provides:

(a) Fishing and Fowling. The project shall not significantly interfere with public rights of fishing and fowling which exist in tidelands and Great Ponds. Such rights include the right to seek or take any fish, shellfish, fowl, or floating marine plants, by any legal means, from a vessel or on foot; the right to protect habitat and nutrient source areas in order to have fish, fowl, or marine plants available to be sought and taken; and the natural derivatives thereof. The Department shall find that the standard is not met in the event the project:

1. poses a substantial obstacle to the public's ability to fish or fowl in waterway areas adjacent to the project site; or
2. results in the elimination of a traditional fishing or fowling location used extensively by the public.

The Petitioners contend that the proposed Project fails to properly balance the rights of the public in the tidelands against the rights of the “traveling public” and the SSA. (Notice of Claim at 4-5). They assert that the Department improperly concluded that the requirements of 310 CMR 9.35(3) have been met. (Petitioners’ Pre-Hearing Statement at 5). They argue that the SSA’s rules prohibit members of the public from fishing on the Ferry Terminal property. (See SSA’s Exhibit 10, “Rules and Regulations Governing Public Conduct on Terminal Property” at 10)(“Fishing or hunting in any manner from terminal property is prohibited”). To remedy this alleged violation, the Petitioners want the c. 91 License to require the SSA to provide fishing access, specifically, to build a fishing pier in the area south of proposed Slip #1. (Petitioners’ Closing Brief at 14). Because the evidence does not support these claims, no remedy is required.

As with their claim regarding navigation, the Petitioners had the burden of proving by a preponderance of credible evidence that the proposed Project will “significantly interfere” with public rights of fishing in the tidelands. See In the Matter of Renata Legowski, OADR Docket No. 2011-039, Recommended Final Decision (October 25, 2012), 2012 MA ENV LEXIS 128, at 7-8 (party challenging Chapter 91 determination has burden of proof), adopted as Final Decision (November 5, 2012), 2012 MA ENV LEXIS 131. The evidence presented by the Petitioners consisted of a single statement from Captain Olmstead: “I last observed people fishing from the SSA terminal in the 1990’s. The practice became more restricted over time, and was eventually banned by the SSA.” (Olmstead PFT at ¶ 21). Testimony elicited from the SSA’s witnesses on cross-examination at the Hearing did not bolster the Petitioners’ claim. Mr. Lamson testified on cross-examination that he has not seen anyone fishing from the Ferry Terminal site since 2002,

when the Maritime Security Transportation Act of 2002 became effective.<sup>21</sup> (Tr. at 59). Similarly, Captains Gifford and Monteiro and Attorney Sayers testified that they have not observed people fishing or fowling at or in the vicinity of the Ferry Terminal. (Gifford PFT at ¶¶ 26-27; Monteiro PFT at ¶ 3; Sayers PFT at ¶ 18). There was also no evidence that the proposed Project will interfere with fishing or fowling occurring elsewhere in Great Harbor. There was no evidence that the proposed Project “poses a substantial obstacle to the public's ability to fish or fowl in waterway areas adjacent to the project site” or “results in the elimination of a traditional fishing or fowling location used extensively by the public.” 310 CMR 9.35(a)(1) & (2). The preponderance of the evidence supports the Written Determination’s findings.

#### On-foot passage

The Petitioners claim that the SSA’s failure to demarcate a pathway that traverses the length of the Ferry Terminal site from its northern to southern boundaries constitutes a violation of the applicable regulations. (Petitioners’ Closing Brief at 13). They had the burden of proving that the proposed Project does not meet the standards of 310 CMR 9.35(3)(b), which provides that:

The project shall not significantly interfere with public rights to walk or otherwise pass freely on private tidelands for purposes of fishing, fowling, navigation, and the natural derivatives thereof; and on Commonwealth tidelands and Great Ponds for said purposes and all other lawful activities, including swimming, strolling, and other recreational activities.

This provision is modified, however, by subsection (b)2.b. which states:

[I]f the project is a water-dependent use project on filled Commonwealth tidelands, said project shall provide for public passage thereon by such means as

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<sup>21</sup> Pub.L. 107–295, 107th Congress.

are consistent with the need to avoid undue interference with the water-dependent uses in question;

There is no dispute that the proposed Project - a Ferry Terminal - is a water-dependent use on filled Commonwealth tidelands. (WD at 2, Finding 1; SSA Exhibit 1). The SSA argues that the evidence shows that the Ferry Terminal site provides public access that is consistent with the requirements of the regulation. (SSA Closing Brief at 13). “Those water-dependent uses are the performance of the SSA’s statutorily mandated, essential governmental functions of providing ferry runs for the transportation of passengers, vehicles and freight...in a safe and efficient manner and in accordance with the SSA’s obligations to comply with federal and state security regulations.” (SSA Closing Brief at 13; Lamson PFT at ¶¶ 3, 20, 22-24).

The Petitioners did not offer testimony, or elicit testimony on cross-examination, that would tend to disprove the credible evidence presented by the SSA. A preponderance of the evidence demonstrates that the SSA’s facilities after construction will comply with the regulation, as they do now. Mr. Lamson testified regarding the two types of interference that currently restrict the public’s use of the filled tidelands. First, the public is not allowed on filled tidelands when such access interferes with the SSA's operations or security, such as the temporary interruptions that occur when the SSA is actively loading or unloading vessels. Others interruptions are more permanent. Certain areas are closed to the public because they are used for the SSA's computer and communications equipment, maintenance or employee parking. (Lamson PFT at ¶ 22; Tr. At 50). The second type of interference or interruption arises from the Site's status as a public transportation facility regulated by the MTSA. The Terminal Site is considered to be part of the Commonwealth's critical maritime transportation infrastructure, and the SSA's operation of the Terminal Site is subject to overall regulation by the United States

Coast Guard ("USCG") and the Transportation Security Administration section of the Department of Homeland Security (for Transportation Workers Identification Credential ("TWIC") compliance) under the MTSA. The MTSA requires the implementation of security plans for regulated entities, and the MTSA's primary focus is controlling access to facilities and vessels so as to detect and prevent acts of terrorism from affecting critical transportation infrastructure. The SSA's failure to comply with MTSA requirements could result in suspension of operations, and substantial civil and criminal fines and penalties. (Lamson PFT at ¶ 23).

The SSA's MTSA security plan designates the entire Terminal Site (including its filled tidelands) to be a secure area, and all vehicles, customers, baggage and persons are subject to screening and search. Access to the entire Terminal Site must be controlled according to whichever Maritime Security (MARSEC) level is established from time to time by the USCG.<sup>22</sup> As a result of these requirements, the SSA welcomes the public to the Terminal Site, but that welcome is restricted to the areas of the Terminal Site that are open to the public at that time, usually where vehicles are parked or are staged to be loaded onto the ferries, where passengers are dropped off and picked up, where people arrive on, or wait for, inter-city and regional buses, as well as taxis and limousines, where customers purchase tickets, use the restrooms, buy refreshments, and board and disembark from the ferries, and also where the public conducts business at the SSA's administrative offices. The rest of the Terminal Site, including the non-public areas of the wharf and ferry slips, maintenance areas, and critical building equipment

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<sup>22</sup> Maritime Security (MARSEC) Levels are set to reflect the prevailing threat environment to the marine elements of the national transportation system, including ports, vessels, facilities, and critical assets and infrastructure located on or adjacent to waters subject to the jurisdiction of the U.S. MARSEC Levels apply to vessels, Coast Guard-regulated facilities inside the U.S., and to the Coast Guard. <https://www.uscg.mil/safetylevels/whatismarsec.asp> MARSEC requires owners of maritime facilities to implement security plans. (Lamson Tr. at 51).

rooms, must remain closed to the public in compliance with the MTSA. (Lamson PFT at ¶ 24.)

Mr. Lamson testified that the SSA may need to secure the entire Ferry Terminal site with temporary fencing or barriers under some security scenarios, including occasions when the bike path would need to be blocked. (Tr. at 52-53).

Under questioning by the Department's counsel, Mr. Lamson testified that it is the SSA's intention to allow members of the general public, including those not using the ferry service, to spend time at the Site for recreational purposes, limited, as described above, by the SSA's security situations requiring members of the public coming onto the Ferry Terminal property, including passengers, to be screened. The c. 91 License requires the SSA to develop an access plan. (WD at 8, Special Waterways Condition 2).

Based on the testimony presented at the Hearing and the lack of persuasive evidence that demonstrates that the proposed Project does not comply with the applicable regulations cited above, I find that while the Proposed project will interfere with public rights to walk or otherwise pass freely on Commonwealth tidelands, the interference will not be significant. The restrictions imposed by the SSA are necessary to avoid undue interference with the water-dependent use (the operation of the Ferry Terminal) and the SSA's obligations for safety and security imposed by applicable federal laws with which the SSA is required to comply. See 310 CMR 9.35(3)(b)2.b. The evidence shows that the SSA provides for on-foot passage on filled Commonwealth tidelands subject only to restrictions in place to comply with these necessities. The evidence presented by the SSA was highly probative, and uncontested. The preponderance of the evidence demonstrates that the proposed Project will provide for public passage on the tidelands by such means as are consistent with the need to avoid undue interference with the SSA's water-

dependent uses. I find that the proposed Project complies with the requirements of 310 CMR 9.35(3)(a) & (b) relating to fishing, fowling and on-foot passage.

**C. The Project complies with the requirements of 310 CMR 9.35(5) and the Written Determination properly protects other public rights of access.**

Consideration of this issue involves consideration of the same facts as are related to issue

II.B., above. The applicable section of the regulation states:

Any project that includes tidelands or Great Ponds accessible to the public, in accordance with any of 310 CMR 9.35(1) through (4), shall provide for long-term management of such areas which achieves effective public use and enjoyment while minimizing conflict with other legitimate interests, including the protection of private property and natural resources.

Thus, the SSA is required by this regulation to develop a management plan separate from the License for the proposed Project. At subsection (a), the regulation allows a Licensee to impose reasonable rules and regulations governing public use of its facility, which rules may be subject to review and approval by the Department. The regulation requires signage in some cases, and prohibits gates, fences, or other structures on any areas open to public access in a manner that would impede or discourage the free flow of pedestrian movement thereon...unless otherwise authorized in writing by the Department. 310 CMR 9.35(5)(c). Mr. Lamson acknowledged that the SSA's current Rules and Regulations provision (SSA Ex. 10) prohibiting "loitering or loafing" might require some review and revision during the development of the public access plan so that members of the public who are present at the Ferry Terminal Site merely to enjoy the scenery, and who are not obstructing operations, are not removed from the property for "loitering or loafing". (Lamson Tr. at 71-73).

The Department acknowledges that the SSA restricts pedestrian access at the site, and imposed Special Waterways Condition 2 to ensure compliance with the regulation. In its Final

Brief, the Department recommends that Special Waterways Condition 1 be revised to include an explicit requirement for signage to inform the public of its rights of access in the tidelands.

For the same reasons stated above at Section II.B., I find that a preponderance of the evidence demonstrates the proposed Project's compliance with this regulation. The c. 91 License requires the SSA to develop a management plan. (WD at 8, Specials Waterways Condition 2). In addition, adding to the c. 91 License a condition requiring the SSA to provide signs at the Ferry Terminal site clarifying that members of the general public – not just the traveling public – are welcome will help to ensure that the non-traveling public is aware that its access rights in the Commonwealth tidelands are not foreclosed, despite the necessity to limit those rights for operational and security reasons described above.

**D. The restrictions contained in License No. 1960 do not carry forward into the new license.**

The Waterways License for current Slip #3, License No. 1960, was issued on April 3, 1989. The License authorized the SSA to reconstruct and maintain the existing Ferry Slip #3 subject to certain conditions. (Sayers PFT at ¶ 5; SSA Ex.7). This license restricted the SSA's use of Slip #3 to "use as a repair and maintenance facility for the Licensee's vessels" or for waterborne public transportation only in emergencies, and subject to the Department's approval. (SSA Exhibit 7, page 2). The restrictions in License No. 1960 arose as a result of an agreement between the SSA and the neighboring Naushon Trust, which was concerned about Slip #3's proximity to the Trust's dock.<sup>23</sup> The SSA's reconstruction of Slip #3 in 1988 resulted in the slip being five feet closer to the southern end of the Naushon Trust's dock. The Trustees of the Naushon Trust took the position that there should be at least 30 feet of navigable water to the

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<sup>23</sup> The Trust is not a party to this appeal, and according to the administrative record, has not objected to the proposed Project.

south of the Naushon Trust's dock. However, as a result of the reconstruction of Slip #3 in 1988, when the *M/V Martha's Vineyard* is docked in current Slip #3, there are only 15 feet of navigable water between that vessel and the Trust's dock. (Sayers PFT at ¶¶ 7, 11, 13, 14, 15; SSA Ex. 22, 28-31.) The restrictions on the use of Slip #3 were developed to address these concerns. (Hill PFT at ¶ 31).

In the new configuration of Slip #3 in the proposed project, the SSA's ferries docked in the new Slip #3 will be farther away from the Trust's dock than the northern bulkhead of the SSA's new facilities. There will be 71 feet of navigable water between the southern end of Trust's dock and that bulkhead, which is more than the 30 feet that the Trustees claimed was necessary for safe navigation to and from their dock in 1988. (Sayers PFT at ¶ 15; SSA Ex. 24). The Trust has not objected to the repositioning of Slip #3, nor has it called for the continuation of License No. 1960's restrictions. Repositioning Slip #3 as proposed will eliminate the issues that the Trust had with the construction of the current Slip #3. (Lamson Tr. at 77).

Slip #3 is currently used primarily for berthing vessels overnight at the end of their operating day. It is also used during the day when the vessels are not providing ferry service, or when they are being maintained or repaired. (Lamson PFT at ¶ 7). Occasionally or on an emergency basis, Slip #3 is used to offload vehicles from a ferry for safety reasons. (Lamson Tr. at 45). During the construction of the Project, the SSA will use the new Slip #3 as an operating slip on a regular basis in all weather and sea conditions during those phases of the Project when each of Slips #1 and #2 is being reconstructed. After construction, the availability of Slip #3 as an operating slip will allow the SSA to tailor the operational use of all three slips at the Terminal to maximize safety based upon weather and sea conditions, as it will provide the SSA's captains with the option of using that slip if it is preferred at the time based upon current and wind

conditions, particularly when winds are coming from the north, northwest and northeast. Having three fully operational slips will also allow the SSA to improve management of vehicular traffic on the Terminal Site and ensure that there are accessible routes between the Terminal Site and all ferry vessels (each of which has a different freeboard height<sup>24</sup>) under all tide conditions, regardless of which slip a ferry uses. (Lamson PFT at ¶ 16; Iwerks PFT at ¶ 14; Gifford PFT at ¶ 34). But the proposed Project itself will not result in an increase in the number of ferry trips provided by the SSA between Woods Hole and Martha's Vineyard. The size of the Site's vehicle staging area acts as a practical constraint on handling more traffic at the Terminal Site. Any long-term, substantial increase in ferry trips to and from the Terminal Site would require a larger vehicle staging area, which the Project will not provide. (Lamson PFT at ¶¶ 19 & 30). The evidence supports a determination that while the use of Slip #3 will increase, overall ferry traffic will not.

The Petitioners seek to have the restrictions on the use of Slip #3 from License No. 1960 carried forward into the new License for the proposed Project in order to limit ferry traffic and prevent interference with navigation in the waterways. (Petitioners' Pre-hearing Memo at 7).<sup>25</sup> They argue that because the project will result in "significant interference" and "unavoidable interference" with vessels in the Eel pond Channel, mitigation is appropriate, citing to 310 CMR 9.35(1).<sup>26</sup> The Petitioners propose as mitigation additional conditions in the License requiring a

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<sup>24</sup> Freeboard is the height of the deck above the water.

<sup>25</sup> In their Notice of Claim and in their Pre-Hearing Memorandum, the Petitioners asserted that including the restrictions on the use of Slip #3 contained in License No. 1960 should be maintained in order to lessen the detriment to the public from increased roadway traffic. The Petitioners offered no evidence in support of this claim, and as noted at the Conference, concerns of roadway traffic are outside the scope of c. 91 licensing proceedings.

<sup>26</sup> 310 CMR 9.35(1) states "The project shall preserve any rights held by the Commonwealth in trust for the public to use tidelands, Great Ponds and other waterways for lawful purposes; and shall preserve any public rights of access that are associated with such use. In applying this standard the Department shall act in accordance with the

boat dock and a fishing pier, as well as permanent public access over the bike path. (Petitioners' Closing Brief at 14).

The Department and the SSA disagree. The Department does not believe it is appropriate or justified to include the License 1960 restrictions on the use of Slip #3 because the proposed Project will not significantly interfere with navigation. (Hill PFT at 34-35; Department's Final Brief at 13). Likewise, the SSA argues that the License No. 1960 restrictions are not necessary to safeguard navigation. (Applicant's Closing Brief at 19).

Having failed to prove that the proposed Project will "generate water-borne traffic that would substantially interfere with other water-borne traffic in the area at present, or in the future as may be evidenced by documented projections", see Section II.A, above at page 26-39, the Petitioners have failed to provide any basis for requiring the imposition of the restrictions from License No. 1960 on the new License, and otherwise have failed to prove that mitigation is required. The Petitioners have cited no legal authority to support their position. I find, therefore, that the c. 91 License should not include the restrictions contained in License No. 1960.

### **CONCLUSION**

For the reasons stated above, I recommend that the Commissioner issue a Final Decision affirming the Written Determination with Conditions in a Final c. 91 License, modified by adding a Special Waterways Condition to require signage consistent with the provisions of 310 CMR 9.35(5)(b).

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provisions of 310 CMR 9.35(2) through (6), and shall give particular consideration to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2. Further, in assessing the significance of any interference with public rights pursuant to 310 CMR 9.35(2) and(3), the Department shall take into account that the provision of public benefits by certain water-dependent uses may give rise to some unavoidable interference with certain water-related public rights. Such interference may be allowed provided that mitigation is provided to the greatest extent deemed reasonable by the Department, and that the overall public trust in waterways is best served.

Date: 3/27/2017



Jane A Rothchild  
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 his 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 his sole discretion, directs otherwise.

**SERVICE LIST**

**IN THE MATTER OF:**

**WOODS HOLE, MARTHA'S VINEYARD &  
NANTUCKET STEAMSHIP AUTHORITY**

**Docket No. 2016-025**

**Woods Hole**

REPRESENTATIVE

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