

DEP REPORTER

*Massachusetts Department of Environmental Protection
Administrative Law Decisions*

PUBLISHED BY LANDLAW LEGAL PUBLISHERS

**VOLUME 26
2019**

Department of Environmental Protection (DEP) Presiding Officers/Year Appointed

Martin Suuberg, Commissioner	2015		
Salvatore M. Giorlandino, Chief	2007	Timothy M. Jones, Presiding Officer	2009
Jane A. Rothchild, Presiding Officer	2015		

COMMENTARY BY:

Matthew Watsky, Esq.

CITE BY VOLUME AND PAGE OF THE
DEP REPORTER THUS:

In the Matter of Kane Built, Inc. (Final Decision), 26 DEPR 2 (2019)



Landlaw's DEPR is published every other month.

Copyright © 2019 by Landlaw, Inc.

MASSACHUSETTS DEP REPORTER (ISSN-1522-6980)

675 VFW Parkway, #354, Chestnut Hill, MA 02467

(800) 637-6330

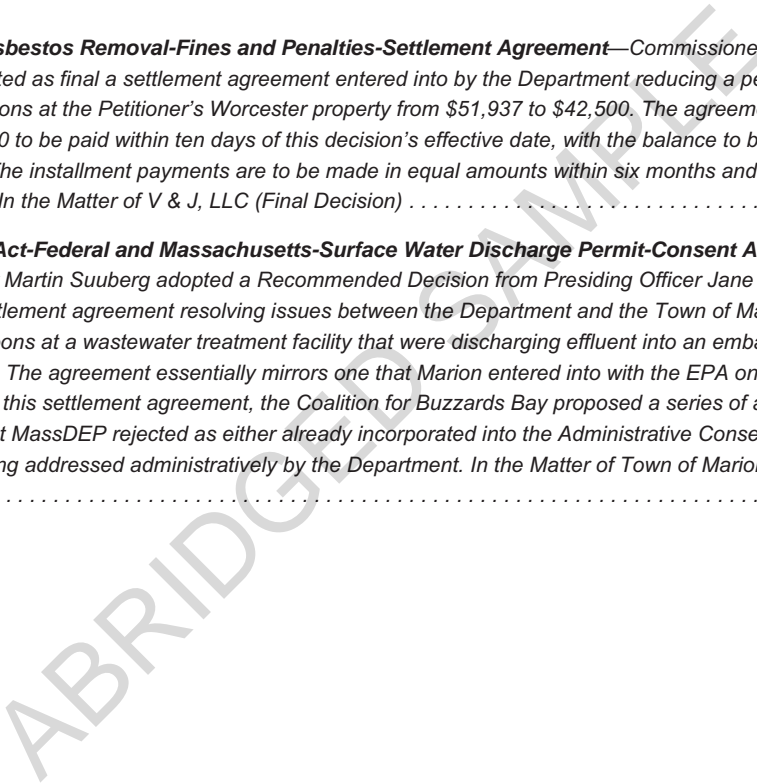
DEP Reporter

Department of Environmental Protection—Administrative Law Decisions

In This Issue

Air Quality-Asbestos Removal-Fines and Penalties-Settlement Agreement—Commissioner Martin J. Suuberg adopted as final a settlement agreement entered into by the Department reducing a penalty for asbestos removal violations at the Petitioner’s Worcester property from \$51,937 to \$42,500. The agreement requires the sum of \$21,250 to be paid within ten days of this decision’s effective date, with the balance to be remitted in two installments. The installment payments are to be made in equal amounts within six months and one year of the final decision. *In the Matter of V & J, LLC (Final Decision)* 259

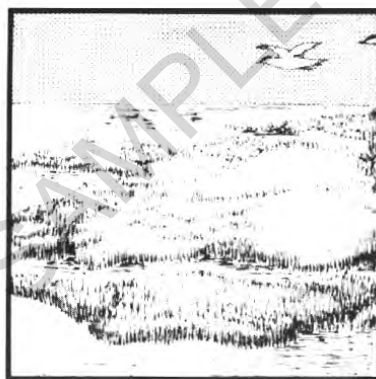
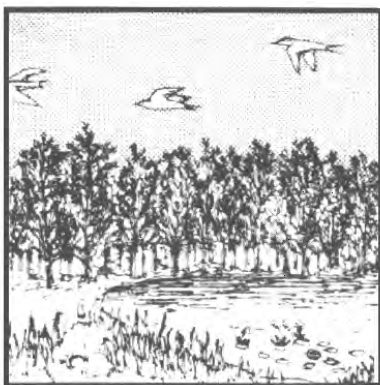
Clean Water Act-Federal and Massachusetts-Surface Water Discharge Permit-Consent Agreement—Commissioner Martin Suuberg adopted a Recommended Decision from Presiding Officer Jane A. Rothchild adopting a settlement agreement resolving issues between the Department and the Town of Marion with respect to unlined lagoons at a wastewater treatment facility that were discharging effluent into an embayment of Buzzards Bay. The agreement essentially mirrors one that Marion entered into with the EPA on the same issues. In response to this settlement agreement, the Coalition for Buzzards Bay proposed a series of amendments to the agreement that MassDEP rejected as either already incorporated into the Administrative Consent Order or capable of being addressed administratively by the Department. *In the Matter of Town of Marion (Final Decision)* 260



INDICES i-xxviii



LANDLAW LEGAL PUBLISHERS



For 2017-2018 cumulative DEP Reporter indices, please consult the Cumulative Indices section in this volume.

For 1994-2016 cumulative DEP Reporter indices, please consult the 23-year spiral-bound supplemental index.

To order, call (800) 637-6330, ext 204.

A COMPREHENSIVE ON-LINE ARCHIVE OF KEYWORD-SEARCHABLE MASSACHUSETTS CIVIL SERVICE REPORTER DECISIONS IS INCLUDED IN YOUR SUBSCRIPTION AND IS AVAILABLE AT WWW.LANLAW.COM

Cumulative Decisions Reported–January–December 2019
Alphabetical Listing

143 Lynnfield Street, LLC (Final Decision)	18-009	October 7, 2019	242
Algonquin Gas Transmission Co. (Final Decision)	16-025	October 24, 2019	211
Algonquin Gas Transmission Co. (Final Decision)	17-011	October 24, 2019	228
Algonquin Gas Transmission Co. (Final Decision on Reconsideration)	19-008	August 7, 2019	136
Algonquin Gas Transmission Co. (Final Decision)	19-008	July 12, 2019	116
Algonquin Gas Transmission Co. (Recommended Interlocutory Decision)	17-011	November 21, 2018	48
Andy's Service Center (Final Decision)	19-005	July 31, 2019	141
Anza (Final Decision)	18-026	March 6, 2019	80
Arsenault (Final Decision)	19-010	July 26, 2019	139
Beckman (Final Decision)	18-013	June 18, 2019	100
Carrigan (Decision Adopting Recommended Remand Decision)	18-017	May 13, 2019	95
Claussen (Final Decision)	18-008	February 5, 2019	65
Colby (Final Decision)	16-012	June 18, 2019	104
Craig (Final Decision on Reconsideration)	17-012	April 19, 2019	92
Craig (Final Decision)	17-012	March 6, 2019	76
Diamond Development Realty Trust (Final Decision)	18-016	April 8, 2019	87
Edgewood Development Company, LLC (Final Decision)	18-006	February 5, 2019	68
Ersi of New York, LLC (Final Decision)	18-027	May 1, 2019	94
FTO Realty Trust (Ruling Denying Motion for Recusal)	15-024	December 8, 2017	38
Harwich Gas, Diesel, and Propane LLC (Final Decision)	17-042	April 8, 2019	91
Hasmukh Gogri and Gogri, LLC (Final Decision)	18-015	January 17, 2019	1
Kane Built, Inc. (Final Decision)	17-037	January 17, 2019	2
Kazokas (Final Decision)	17-022	September 18, 2019	193
LH Realty, LLC (Final Decision)	18-011	August 13, 2019	171
Liatsos (Final Decision)	16-005	September 30, 2019	207
Liatsos (Final Decision After Remand)	16-005	August 9, 2019	142
Liatsos (Interlocutory Remand Decision)	16-005	May 25, 2017	34
Liatsos (Recommended Final Decision)	16-005	December 13, 2016	20
Marks (Final Decision)	18-009	June 18, 2019	105
Mierzejewski (Final Decision)	16-021	June 5, 2019	99
Mroz (Final Decision on Reconsideration)	17-021	August 13, 2019	189
Mroz (Final Decision)	17-021	June 18, 2019	173
Plum Island, LLC (Final Decision)	19-012	August 12, 2019	168
Sands (Final Decision)	19-007	March 28, 2019	83
Slattery (Final Decision)	18-015	October 7, 2019	249
Somerset Marine, Inc. (Final Decision)	18-021	October 3, 2019	255
Three Bays Preservation, Inc. (Ruling and Order Denying Applicant's Motion to Reverse Prior Standing Order)	17-020	September 27, 2017	74
Three Bays Preservation, Inc. (Ruling and Order Reversing Prior Order Allowing Motion to Dismiss)	17-020	September 20, 2017	73
Town of Chatham (Final Decision)	19-018	October 3, 2019	256
Town of Marion (Final Decision)	17-007	December 9, 2019	260
V & J, LLC (Final Decision)	18-028	November 15, 2019	259
Wessagussett Yacht Club, Inc. (Final Decision)	18-002	March 6, 2019	82
Zizza (Final Decision)	19-008	August 13, 2019	172

Cumulative Decisions Reported–January–December 2019
Chronological Listing by Decision Date

12-13-16	Liatsos (Recommended Final Decision)	16-005	20
05-25-17	Liatsos (Interlocutory Remand Decision)	16-005	34
09-20-17	Three Bays Preservation, Inc. (Ruling and Order Reversing Prior Order Allowing Motion to Dismiss)	17-020	73
09-27-17	Three Bays Preservation, Inc. (Ruling and Order Denying Applicant's Motion to Reverse Prior Standing Order)	17-020	74
12-08-17	FTO Realty Trust (Ruling Denying Motion for Recusal)	15-024	38
11-21-18	Algonquin Gas Transmission Co. (Recommended Interlocutory Decision)	17-011	48
01-17-19	Hasmukh Gogri and Gogri, LLC (Final Decision)	18-015	1
01-17-19	Kane Built, Inc. (Final Decision)	17-037	2
02-05-19	Claussen (Final Decision)	18-008	65
02-05-19	Edgewood Development Company, LLC (Final Decision)	18-006	68
03-06-19	Anza (Final Decision)	18-026	80
03-06-19	Craig (Final Decision)	17-012	76
03-06-19	Wessagussett Yacht Club, Inc. (Final Decision)	18-002	82
03-28-19	Sands (Final Decision)	19-007	83
04-08-19	Diamond Development Realty Trust (Final Decision)	18-016	87
04-08-19	Harwich Gas, Diesel, and Propane LLC (Final Decision)	17-042	91
04-19-19	Craig (Final Decision on Reconsideration)	17-012	92
05-01-19	Erst of New York, LLC (Final Decision)	18-027	94
05-13-19	Carrigan (Decision Adopting Recommended Remand Decision)	18-017	95
06-05-19	Mierzewski (Final Decision)	16-021	99
06-18-19	Beckman (Final Decision)	18-013	100
06-18-19	Colby (Final Decision)	16-012	104
06-18-19	Colby (Final Decision)	16-012	104
06-18-19	Marks (Final Decision)	18-009	105
06-18-19	Mroz (Final Decision)	17-021	173
07-12-19	Algonquin Gas Transmission Co. (Final Decision)	19-008	116
07-26-19	Arsenault (Final Decision)	19-010	139
07-31-19	Andy's Service Center (Final Decision)	19-005	141
08-07-19	Algonquin Gas Transmission Co. (Final Decision on Reconsideration)	19-008	136
08-09-19	Liatsos (Final Decision After Remand)	16-005	142
08-12-19	Plum Island, LLC (Final Decision)	19-012	168
08-13-19	LH Realty, LLC (Final Decision)	18-011	171
08-13-19	Mroz (Final Decision on Reconsideration)	17-021	189
08-13-19	Zizza (Final Decision)	19-008	172
09-18-19	Kazokas (Final Decision)	17-022	193
09-30-19	Liatsos (Final Decision)	16-005	207
10-03-19	Somerset Marine, Inc. (Final Decision)	18-021	255
10-03-19	Town of Chatham (Final Decision)	19-018	256
10-07-19	143 Lynnfield Street, LLC (Final Decision)	18-009	242
10-07-19	Slattery (Final Decision)	18-015	249
10-24-19	Algonquin Gas Transmission Co. (Final Decision)	16-025	211
10-24-19	Algonquin Gas Transmission Co. (Final Decision)	17-011	228
11-15-19	V & J, LLC (Final Decision)	18-028	259
12-09-19	Town of Marion (Final Decision)	17-007	260

Cumulative Decisions Reported–January–December 2019
Numerical Listing by DEP/DALA Docket Number

15-024	FTO Realty Trust (Ruling Denying Motion for Recusal)	December 8, 2017	38
16-005	Liatsos (Interlocutory Remand Decision)	May 25, 2017	34
16-005	Liatsos (Recommended Final Decision)	December 13, 2016	20
16-005	Liatsos (Final Decision After Remand)	August 9, 2019	142
16-005	Liatsos (Final Decision)	September 30, 2019	207
16-012	Colby (Final Decision)	June 18, 2019	104
16-012	Colby (Final Decision)	June 18, 2019	104
16-021	Mierzejewski (Final Decision)	June 5, 2019	99
16-025	Algonquin Gas Transmission Co. (Final Decision)	October 24, 2019	211
17-007	Town of Marion (Final Decision)	December 9, 2019	260
17-011	Algonquin Gas Transmission Co. (Recommended Interlocutory Decision)	November 21, 2018	48
17-011	Algonquin Gas Transmission Co. (Final Decision)	October 24, 2019	228
17-012	Craig (Final Decision)	March 6, 2019	76
17-012	Craig (Final Decision on Reconsideration)	April 19, 2019	92
17-020	Three Bays Preservation, Inc. (Ruling and Order Reversing Prior Order Allowing Motion to Dismiss)	September 20, 2017	73
17-020	Three Bays Preservation, Inc. (Ruling and Order Denying Applicant's Motion to Reverse Prior Standing Order)	September 27, 2017	74
17-021	Mroz (Final Decision)	June 18, 2019	173
17-021	Mroz (Final Decision on Reconsideration)	August 13, 2019	189
17-022	Kazokas (Final Decision)	September 18, 2019	193
17-037	Kane Built, Inc. (Final Decision)	January 17, 2019	2
17-042	Harwich Gas, Diesel, and Propane LLC (Final Decision)	April 8, 2019	91
18-002	Wessagusset Yacht Club, Inc. (Final Decision)	March 6, 2019	82
18-006	Edgewood Development Company, LLC (Final Decision)	February 5, 2019	68
18-008	Claussen (Final Decision)	February 5, 2019	65
18-009	Marks (Final Decision)	June 18, 2019	105
18-009	143 Lynnfield Street, LLC (Final Decision)	October 7, 2019	242
18-011	LH Realty, LLC (Final Decision)	August 13, 2019	171
18-013	Beckman (Final Decision)	June 18, 2019	100
18-015	Hasmukh Gogri and Gogri, LLC (Final Decision)	January 17, 2019	1
18-015	Slattery (Final Decision)	October 7, 2019	249
18-016	Diamond Development Realty Trust (Final Decision)	April 8, 2019	87
18-017	Carrigan (Decision Adopting Recommended Remand Decision)	May 13, 2019	95
18-021	Somerset Marine, Inc. (Final Decision)	October 3, 2019	255
18-026	Anza (Final Decision)	March 6, 2019	80
18-027	Ersi of New York, LLC (Final Decision)	May 1, 2019	94
18-028	V & J, LLC (Final Decision)	November 15, 2019	259
19-005	Andy's Service Center (Final Decision)	July 31, 2019	141
19-007	Sands (Final Decision)	March 28, 2019	83
19-008	Algonquin Gas Transmission Co. (Final Decision)	July 12, 2019	116
19-008	Algonquin Gas Transmission Co. (Final Decision on Reconsideration)	August 7, 2019	136
19-008	Zizza (Final Decision)	August 13, 2019	172
19-010	Arsenault (Final Decision)	July 26, 2019	139
19-012	Plum Island, LLC (Final Decision)	August 12, 2019	168
19-018	Town of Chatham (Final Decision)	October 3, 2019	256

Cumulative Decisions Reported–January-December 2019
Municipal Listing

Ashland		Maynard	
Marks (Final Decision)	105	Kane Built, Inc. (Final Decision)	2
Attleboro		Mroz (Final Decision)	173
Colby (Final Decision)	104	Mroz (Final Decision on Reconsideration)	189
Colby (Final Decision)	104	Middleborough	
Barnstable		Sands (Final Decision)	83
Three Bays Preservation, Inc. (Ruling and Order Denying Applicant's Motion to Reverse Prior Standing Order)	74	Newburyport	
Three Bays Preservation, Inc. (Ruling and Order Reversing Prior Order Allowing Motion to Dismiss)	73	Plum Island, LLC (Final Decision)	168
Chatham		Northborough	
Town of Chatham (Final Decision)	256	Anza (Final Decision)	80
Concord		Peabody	
Beckman (Final Decision)	100	143 Lynnfield Street, LLC (Final Decision)	242
Falmouth		Pepperell	
Zizza (Final Decision)	172	Slattery (Final Decision)	249
Gloucester		Rochester	
Carrigan (Decision Adopting Recommended Remand Decision)	95	Edgewood Development Company, LLC (Final Decision)	68
Harwich		Situate	
Harwich Gas, Diesel, and Propane LLC (Final Decision)	91	Diamond Development Realty Trust (Final Decision)	87
Holyoke		Somerset	
Ersi of New York, LLC (Final Decision)	94	Somerset Marine, Inc. (Final Decision)	255
Lanesboro		Springfield	
Mierzejewski (Final Decision)	99	Hasmukh Gogri and Gogri, LLC (Final Decision)	1
Littleton		Sudbury	
Kazokas (Final Decision)	193	Claussen (Final Decision)	65
Malden		Tewksbury	
Andy's Service Center (Final Decision)	141	FTO Realty Trust (Ruling Denying Motion for Recusal)	38
Marion		West Bridgewater	
Town of Marion (Final Decision)	260	LH Realty, LLC (Final Decision)	171
Mashpee		Weymouth	
Liatsos (Interlocutory Remand Decision)	34	Algonquin Gas Transmission Co. (Recommended Interlocutory Decision)	48
Liatsos (Recommended Final Decision)	20	Algonquin Gas Transmission Co. (Final Decision)	116
Liatsos (Final Decision After Remand)	142	Algonquin Gas Transmission Co. (Final Decision on Reconsideration)	136
Liatsos (Final Decision)	207	Algonquin Gas Transmission Co. (Final Decision)	211
Mattapoissett		Algonquin Gas Transmission Co. (Final Decision)	228
Arsenault (Final Decision)	139	Wessagussett Yacht Club, Inc. (Final Decision)	82
Craig (Final Decision)	76	Worcester	
Craig (Final Decision on Reconsideration)	92	V & J, LLC (Final Decision)	259

Cumulative Recommended Final Decisions Adopted–January-December 2019

Alphabetical Listing

The following Final Decisions of the Commissioner were *pro forma* adoptions of previously published ALJ/AM Recommended Decisions/Rulings, and do not appear in this Reporter. Citations are to the original Recommended Final Decision/Ruling.

None

Cumulative Orders of Dismissal–January-December 2019

Alphabetical Listing

55-9 Wheels Owner, LLC	WET-19-024	September 25, 2019	Rankow.	16-024	April 29, 2019
Farm Lne Associates, Inc.	19-001	February 21, 2019	Rizika	19-033	December 11, 2019
Kachadoorian	WET-18-014	February 21, 2019	Sands	18-011	September 18, 2019
Kerr and Kerr Family Trust	WET-19-031	November 27, 2019	Tom Denney, The Hanover Company	WET-19-001	March 12, 2019
Nantucket Islands Land Bank	WET-19-006	May 15, 2019	Wenzel.	WET-19-014	October 10, 2019

 Cumulative Subject Matter Index–January-December 2019

 Air Quality
Appeal

– Timeliness

Asbestos**BACT****Natural Gas****Noise Pollution****Penalties and Fines**

– Consent Order

– General

– Individual Liability

– Intentional Conduct

– Penalty Factors

Practice and Procedure

– Motion for Reconsideration

– Motion to Dismiss

– Witnesses

 Clean Water Act
Surface Water Discharge Permit

 Hazardous Waste
Penalties and Fines

– Administrative Consent Order With Penalty

– Fines

 Rivers Protection
Intermittent Stream**Riverfront Area**

 Solid Waste
Penalties and Fines

 Waterways
Designated Port Area**Expert Testimony****Local Approvals****Practice and Procedure**

– Motion to Dismiss

Preemption**Public Access****Standing**

– Estoppel

– Impacts/Navigation

Term**Tidelands****Water Dependent Uses**

 Wetlands Appeals
Administrative Law Judges/Magistrates/Presiding Officers

– Bias

Appeal

– Adequacy of Notice of Claim

Bordering Vegetated Wetlands**Buffer Zone**

– Conditions

Burden of Going Forward**Coastal Bank**

– Buffer Zone

– Coastal Engineering Structure

Coastal Beach**Commissioner of DEP**

– Authority to Order Remand Decision

DEP Jurisdiction

– Extension Permits

– Regulatory Consistency with Act

Enforcement Order

– Exhaustion of Remedies

– Extension Permits

Freshwater Bank

– General

Land Under the Ocean**Limited Project**

– General

Mootness**Order of Resource Area Delineation****Practice and Procedure**

– Dismissal of Appeal

– Motion for a More Definite Statement

– Motion for Reconsideration

– Motion to Dismiss/Failure to Prosecute

– Motion to Dismiss/Failure to State a Legally Sufficient Claim

– Motion to Dismiss/Informational Insufficiency

– Motion to Dismiss/Mootness

– Motion To Dismiss/Prefiled Testimony

– Motion to Dismiss/Withdrawal

Remand from Commissioner**Septic System Repair****Standing**

– Abutters

– Ownership Issues

Stormwater Management**Superseding Order of Conditions**

– Lack of Service

Cumulative Subject Matter Digest–January–December 2019

Air Quality

Appeal

– Timeliness

The appeal from a Unilateral Administrative Order by a Northborough property owner, previously convicted criminally for illegal dumping of solid waste and creating nuisance odors, was dismissed as untimely filed as he failed to meet the ten-day deadline following the service of the appeal by email due to exigent circumstances. The order was also sent by regular mail and that appeal deadline was also missed. *In the Matter of Anza (Final Decision)*, 26 DEPR 80 (2019).

Asbestos

Commissioner Martin J. Suuberg adopted as final a settlement agreement entered into by the Department reducing a penalty for asbestos removal violations at the Petitioner’s Worcester property from \$51,937 to \$42,500. The agreement requires the sum of \$21,250 to be paid within ten days of this decision’s effective date, with the balance to be remitted in two installments. The installment payments are to be made in equal amounts within six months and one year of the final decision. *In the Matter of V & J, LLC (Final Decision)*, 26 DEPR 259 (2019).

Chief Presiding Officer Salvatore M. Giorlandino affirmed a \$67,250 fine against a seasoned Maynard home builder found responsible for violating the Department’s asbestos removal regulations in connection with the demolition of a single-family home. Although Kane Built, Inc. had filed a Non-Traditional Asbestos Abatement Work Practice Approval Application, work at the site was performed without proper notifications to MassDEP by a painter, and in an unauthorized manner without containment. The Department ruled that Kane, as the property owner and operator, was responsible and that the violations, given his experience in homebuilding, were very much intentional. Chief Presiding Officer Giorlandino also found that the Department had properly assessed the penalties in accordance with Departmental guidelines and a computer program entitled PenCalc that provides a standardized format for reviewing the 12 factors relevant to penalty determination. *In the Matter of Kane Built, Inc. (Final Decision)*, 26 DEPR 2 (2019).

BACT

In approving an air quality permit for a natural gas compressor station forming a part of a pipeline project, Presiding Officer Rothchild urged the Commissioner to consider policy revisions that would update dollar amounts for purposes of BACT analysis and to reconsider its long standing practice and require air toxics dispersion modeling to assess background levels and not solely the ambient concentrations caused by a source’s emissions. *In the Matter of Algonquin Gas Transmission Co. (Final Decision)*, 26 DEPR 116 (2019).

Natural Gas

Presiding Officer Jane A. Rothchild treated the Department’s Motion for Clarification as a Motion for Reconsideration in connection with MassDEP’s approval of an air quality permit for a natural gas compressor station forming a component of a gas pipeline project. This decision corrects an error in the Recommended Final Decision relating to full compressor station blowdowns and adds monitoring conditions. *In the Matter of Algonquin Gas Transmission Co. (Final Decision on Reconsideration)*, 26 DEPR 136 (2019).

Consolidating six administrative appeals, MassDEP issued a Final Decision approving air quality permits for a very controversial natural gas compressor station in Weymouth that forms a part of the Algonquin Gas transmission pipeline for the Atlantic Bridge Project. Presiding Officer Jane A. Rothchild found that the permit sufficiently regulated air contaminants to prevent a condition of air pollution and would comply with the National Ambient Air Quality Standards. Maximum modeled impacts

from the facility’s emissions of air toxics during steady state operations were found to be below Massachusetts Allowable Limits but the permit was amended to reduce the “not to exceed” for startups and shutdowns. Presiding Officer Rothchild also recommended that the Commissioner consider policy revisions to update dollar amounts for purposes of BACT analysis and to reconsider its long standing practice by requiring air toxics dispersion modeling to assess background levels and not solely the ambient concentrations caused by a source’s emissions. *In the Matter of Algonquin Gas Transmission Co. (Final Decision)*, 26 DEPR 116 (2019).

Noise Pollution

MassDEP issued a Final Decision approving air quality permits for a very controversial natural gas compressor station in Weymouth that forms a part of the Algonquin Gas transmission pipeline for the Atlantic Bridge Project. Presiding Officer Jane A. Rothchild found that the permit sufficiently regulated air contaminants to prevent a condition of noise pollution to the maximum extent practicable. *In the Matter of Algonquin Gas Transmission Co. (Final Decision)*, 26 DEPR 116 (2019).

Penalties and Fines

– Consent Order

MassDEP accepted a reduced fine set forth in a settlement agreement in the amount of \$400 from a Somerset marina for its failure to comply with annual Stage 1 Certification for its gasoline dispensing facility. *In the Matter of Somerset Marine, Inc. (Final Decision)*, 26 DEPR 255 (2019).

Commissioner Martin Suuberg adopted as a Final Decision a consent order authorizing the reduction of a \$1,000 penalty to \$500 for purported air quality violations incurred in connection with the demolition of a former coal-fired plant in Holyoke known as Mt. Tom Station. *In the Matter of Ersi of New York, LLC (Final Decision)*, 26 DEPR 94 (2019).

MassDEP adopted a settlement agreement and consent order resolving a minor fine imposed by the Bureau of Air and Waste for reporting violations by a Weymouth yacht club. *In the Matter of Wessagusset Yacht Club, Inc. (Final Decision)*, 26 DEPR 82 (2019).

– General

Commissioner Martin J. Suuberg adopted as final a settlement agreement entered into by the Department reducing a penalty for asbestos removal violations at the Petitioner’s Worcester property from \$51,937 to \$42,500. The agreement requires the sum of \$21,250 to be paid within ten days of this decision’s effective date, with the balance to be remitted in two installments. The installment payments are to be made in equal amounts within six months and one year of the final decision. *In the Matter of V & J, LLC (Final Decision)*, 26 DEPR 259 (2019).

– Individual Liability

A building contractor LLC’s argument that it should not be found liable for asbestos removal violations that occurred in connection with the demolition of a single-family home because the work had been done by a painter operating independently was without merit where the contractor was the owner and operator of the site. *In the Matter of Kane Built, Inc. (Final Decision)*, 26 DEPR 2 (2019).

– Intentional Conduct

In affirming a \$67,250 fine against a seasoned Maynard home builder found responsible for violating the Department’s asbestos removal regulations in connection with the demolition of a single-family home, Chief Presiding Officer Salvatore M. Giorlandino applied the 12 penalty factors in assessing the reasonableness of the fine. In this case, the most noteworthy of these penalty factors related to that fact the violations were willful. *In the Matter of Kane Built, Inc. (Final Decision)*, 26 DEPR 2 (2019).

CUMULATIVE SUBJECT MATTER DIGEST—JANUARY-DECEMBER 2019

A builder's argument that his asbestos removal fine should be reduced because he had somehow done the Town of Maynard a favor by demolishing a rundown asbestos-laden home and replacing it with two new affordable housing units fell on deaf ears at MassDEP and Chief Presiding Officer Salvatore M. Giorlandino went so far as to comment the argument was even "a bit of chutzpah". *In the Matter of Kane Built, Inc. (Final Decision)*, 26 DEPR 2 (2019).

—Penalty Factors

In affirming a \$67,250 fine against a seasoned Maynard home builder found responsible for violating the Department's asbestos removal regulations in connection with the demolition of a single-family home, Chief Presiding Officer Salvatore M. Giorlandino applied the 12 penalty factors in assessing the reasonableness of the fine. In this case, the most noteworthy of these penalty factors related to the fact that violations were willful and also serious because the asbestos was left outdoors and uncontained in a residential neighborhood. This experienced builder also tried to perform the mitigation on the cheap, using a painter instead of a licensed professional, and failed to introduce any credible evidence refuting the penalty amount. *In the Matter of Kane Built, Inc. (Final Decision)*, 26 DEPR 2 (2019).

A builder's argument that a penalty assessment for asbestos removal violations in connection with the demolition of a single family home should somehow be based on a percentage of the profits he made on the project were without merit and, in any event, he failed to introduce any financial evidence substantiating that he had made a purported \$80,000 profit. *In the Matter of Kane Built, Inc. (Final Decision)*, 26 DEPR 2 (2019).

Practice and Procedure**—Motion for Reconsideration**

Presiding Officer Jane A. Rothchild treated the Department's Motion for Clarification as a Motion for Reconsideration in connection with MassDEP's approval of an air quality permit for a natural gas compressor station forming a component of a gas pipeline project. This decision corrects an error in the Recommended Final Decision relating to full compressor station blowdowns and adds monitoring conditions. *In the Matter of Algonquin Gas Transmission Co. (Final Decision on Reconsideration)*, 26 DEPR 136 (2019).

—Motion to Dismiss

The appeal from a Unilateral Administrative Order by a Northborough property owner, previously convicted criminally for illegal dumping of solid waste and creating nuisance odors, was dismissed as untimely filed as he failed to meet the ten-day deadline following the service of the appeal by email due to exigent circumstances. The order was also sent by regular mail and that appeal deadline was also missed. *In the Matter of Anza (Final Decision)*, 26 DEPR 80 (2019).

—Witnesses

Presiding Officer Jane A. Rothchild found that an expert challenging air permits for a pipeline project was not a competent witness where he conceded that he had not studied air dispersion modeling and had no specialized training in the use of AERSCREEN. *In the Matter of Algonquin Gas Transmission Co. (Final Decision)*, 26 DEPR 116 (2019).

Clean Water Act**Surface Water Discharge Permit**

Commissioner Martin Suuberg adopted a Recommended Decision from Presiding Officer Jane A. Rothchild adopting a settlement agreement resolving issues between the Department and the Town of Marion with respect to unlined lagoons at a wastewater treatment facility that were discharging effluent into an embayment of Buzzards Bay. The agreement essentially mirrors that Marion entered into with the EPA on the same issues. In response to this settlement agreement, the Coalition for Buzzards Bay proposed a series of amendments to the agreement that MassDEP re-

jected as either already incorporated into the Administrative Consent Order or capable of being addressed administratively by the Department. *In the Matter of Town of Marion (Final Decision)*, 26 DEPR 260 (2019).

Hazardous Waste**Penalties and Fines****—Administrative Consent Order With Penalty**

Chief Presiding Officer Salvatore M. Giorlandino authorized a settlement agreement with a *pro se* Malden gas station owner for purported violations of the Department's Stage 1 Form C Annual In-Use Compliance Certification regulations whereby the \$500 penalty was reduced to \$400 combined with a promise from the Petitioner to promptly submit the necessary compliance certificate. *In the Matter of Andy's Service Center (Final Decision)*, 26 DEPR 141 (2019).

Chief Presiding Officer Salvatore M. Giorlandino ratified an administrative consent order under which the Petitioners paid \$500 for failing to file a compliance certificate for an underground storage tank and agreed to complete their online owner/operator registration. *In the Matter of Hasमुख Gogri and Gogri, LLC (Final Decision)*, 26 DEPR 1 (2019).

—Fines

The Commissioner incorporated a Consent Order into a Final Decision whereby a \$500 fine imposed on a Harwich fuel dealer for failure to file a UST Compliance Certification was waived provided the Petitioner submits the proper certification. *In the Matter of Harwich Gas, Diesel, and Propane LLC (Final Decision)*, 26 DEPR 91 (2019).

Rivers Protection**Intermittent Stream**

Commissioner Martin Suuberg found that Presiding Officer Timothy M. Jones had correctly ruled that OADR does have jurisdiction to adjudicate facial challenges to MassDEP regulations and that he properly affirmed a Rivers Protection regulation that defines a river as intermittent where the watershed does not meet the minimum threshold of .5 square miles. As a consequence, the river in question in this Ashland appeal was ruled to be intermittent and not perennial as found by the Conservation Commission. *In the Matter of Marks (Final Decision)*, 26 DEPR 105 (2019).

Riverfront Area

An Applicant's construction of a natural gas compressor station within a Designated Port Area of the Weymouth Fore River met the relevant performance standards for a previously developed Riverfront area given that its delineation was correct and the project would improve the existing conditions of the previously developed area. *In the Matter of Algonquin Gas Transmission Co. (Final Decision)*, 26 DEPR 211 (2019).

Where an Applicant had appealed an SDA requiring an Order of Conditions for the construction of a single-family home within Riverfront Area in an Attleboro neighborhood already densely developed with homes that had never been permitted as being within Riverfront Area, MassDEP authorized a settlement whereby the proposed home would be approved as a limited project. *In the Matter of Colby (Final Decision)*, 26 DEPR 104 (2019).

Solid Waste**Penalties and Fines**

MassDEP affirmed a \$30,000 penalty against a Wakefield oil tank removal company unlawfully storing tanks and other debris at a Peabody locus, where it failed to comply with an Administrative Consent Order when not removing the debris in a timely fashion and failing to file the necessary compliance reports. The Petitioner unsuccessfully asserted the

Cumulative DEP Decisions Cited—January–December 2019
104 Stony Brook, Docket No. 17-021, Final Decision, 25 DEPR 120 (2018)

In the Matter of Marks (Final Decision), 26 DEPR 105 (2019)

104 Stony Brook, Docket No. 17-021, Recommended Final Decision, 25 DEPR 120 (2018)

In the Matter of Marks (Final Decision), 26 DEPR 105 (2019)

Algonquin Gas Transmission LLC, Docket Nos. 19-008-013, Final Decision, 26 DEPR 116 (2019)

In the Matter of Algonquin Gas Transmission LLC (Final Decision on Reconsideration), 26 DEPR 137 (2019)

Alosso, Docket Nos. 03-163 and 03-164, Final Decision, 17 DEPR 258 (2010)

In the Matter of FTO Realty Trust (Ruling and Order Denying FTO's Motion for Recusal), 26 DEPR 47 (2019)

Alosso, Docket Nos. 03-163 and 03-164, Recommended Final Decision, 17 DEPR 261 (2010)

In the Matter of FTO Realty Trust (Ruling and Order Denying FTO's Motion for Recusal), 26 DEPR 47 (2019)

AP Cambridge Partners, LLC, Docket No. 08-072R, Final Decision on Remand Reconsideration (May 4, 2012)

In the Matter of FTO Realty Trust (Ruling and Order Denying FTO's Motion for Recusal), 26 DEPR 47 (2019)

AP Cambridge Partners, LLC, Docket No. 08-072R, Recommended Final Decision on Remand Reconsideration (May 4, 2012)

In the Matter of FTO Realty Trust (Ruling and Order Denying FTO's Motion for Recusal), 26 DEPR 47 (2019)

Armstrong, Docket No. 09-032, Final Decision, 19 DEPR 48 (2012)

In the Matter of Algonquin Gas Transmission, LLC (Recommended Final Decision On Issues 2 Through 6), 26 DEPR 231 (2019)

In the Matter of Algonquin Gas Transmission, LLC (Recommended Final Decision On Issues 2 Through 6), 26 DEPR 237 (2019)

Associated Building Wreckers, Docket No. 03-132, Final Decision, 11 DEPR 176 (2004)

In the Matter of Kane Built, Inc. (Recommended Final Decision), 26 DEPR 7 (2019)

In the Matter of Mroz (Recommended Final Decision), 26 DEPR 184 (2019)

Autobody Solvent Recovery Corp., Docket No. 13-046, Final Decision, 21 DEPR 55 (2014)

In the Matter of Mroz (Recommended Final Decision), 26 DEPR 181 (2019)

Autobody Solvent Recovery Corp., Docket No. 13-046, Recommended Final Decision, 21 DEPR 55 (2014)

In the Matter of Mroz (Recommended Final Decision), 26 DEPR 181 (2019)

Bay Park Development Trust, Docket No. 88-291, Final Decision—Order of Dismissal (March 31, 1989)

In the Matter of Anza (Recommended Final Decision), 26 DEPR 81 (2019)

Beaudry, Docket No. 02-032, Decision on Motion for Reconsideration, 12 DEPR 75 (2005)

In the Matter of Craig (Recommended Final Decision), 26 DEPR 78 (2019)

Beckman, Docket No. WET-14-022, Final Decision, 22 DEPR 58 (2015)

In the Matter of Algonquin Gas Transmission LLC (Recommended Interlocutory Decision on Issues 1, 7, and 8), 26 DEPR 54 (2019)

In the Matter of FTO Realty Trust (Ruling and Order Denying FTO's Motion for Recusal), 26 DEPR 47 (2019)

Beckman, Docket No. WET-14-022, Recommended Final Decision, 22 DEPR 58 (2015)

In the Matter of Algonquin Gas Transmission LLC (Recommended Interlocutory Decision on Issues 1, 7, and 8), 26 DEPR 54 (2019)

In the Matter of FTO Realty Trust (Ruling and Order Denying FTO's Motion for Recusal), 26 DEPR 47 (2019)

Beckman, Docket No. WET-18-013, Final Decision, 26 DEPR 100 (2019)

In the Matter of Plum Island, LLC (Recommended Final Decision), 26 DEPR 169 (2019)

Beckman, Docket No. WET-18-013, Recommended Final Decision, 26 DEPR 100 (2019)

In the Matter of Plum Island, LLC (Recommended Final Decision), 26 DEPR 169 (2019)

Beechwood Knoll School, Docket No. 08-050, Final Decision, (September 18, 2008)

In the Matter of Slattery and Etchstone Properties, Inc. (Recommended Final Decision), 26 DEPR 254 (2019)

Beechwood Knoll School, Docket No. 08-050, Recommended Final Decision, 15 DEPR 257 (2008)

In the Matter of Slattery and Etchstone Properties, Inc. (Recommended Final Decision), 26 DEPR 254 (2019)

Bergeron, Docket No. 01-071, Final Decision, 9 DEPR 71 (2002)

In the Matter of Arsenault (Recommended Final Decision), 26 DEPR 140 (2019)

In the Matter of Mierzejewski (Recommended Final Decision), 26 DEPR 100 (2019)

In the Matter of Plum Island, LLC (Recommended Final Decision), 26 DEPR 170 (2019)

Bergeron, Docket No. 01-071, Recommended Final Decision, 9 DEPR 71 (2002)

In the Matter of Arsenault (Recommended Final Decision), 26 DEPR 140 (2019)

In the Matter of Mierzejewski (Recommended Final Decision), 26 DEPR 100 (2019)

In the Matter of Plum Island, LLC (Recommended Final Decision), 26 DEPR 170 (2019)

Berkshire Housing Services, Inc., Docket No. 10-007, Final Decision, 17 DEPR 161 (2010)

In the Matter of Anza (Recommended Final Decision), 26 DEPR 81 (2019)

Bogaty, Docket No. 01-005, Final Decision, 8 DEPR 188 (2001)

In the Matter of Anza (Recommended Final Decision), 26 DEPR 81 (2019)

Boston Boat Basin, Docket No. 12-008, 12-009, Final Decision, 21 DEPR 119 (2014)

In the Matter of Algonquin Gas Transmission, LLC (Recommended Final Decision On Issues 2 Through 6), 26 DEPR 232 (2019)

Boston Boat Basin, Docket No. 12-008, 12-009, Recommended Final Decision, 21 DEPR 119 (2014)

In the Matter of Algonquin Gas Transmission, LLC (Recommended Final Decision On Issues 2 Through 6), 26 DEPR 232 (2019)

Boston Environmental Corporation, Docket No. 13-041, Final Decision, 22 DEPR 3 (2015)

In the Matter of Marks (Final Decision), 26 DEPR 105 (2019)

In the Matter of Marks (Recommended Final Decision), 26 DEPR 108 (2019)

Boston Environmental Corporation, Docket No. 13-041, Recommended Final Decision, 22 DEPR 3 (2015)

In the Matter of Marks (Final Decision), 26 DEPR 105 (2019)

In the Matter of Marks (Recommended Final Decision), 26 DEPR 108 (2019)

Boston Properties, LP, Docket No. WET-04-012, Final Decision, 19 DEPR 126 (2012)

In the Matter of Beckman (Recommended Final Decision), 26 DEPR 102 (2019)

In the Matter of Claussen (Recommended Final Decision), 26 DEPR 65 (2019)

Boston Properties, LP, Docket No. WET-04-012, Recommended Final Decision, 19 DEPR 126 (2012)

In the Matter of Beckman (Recommended Final Decision), 26 DEPR 102 (2019)

In the Matter of Claussen (Recommended Final Decision), 26 DEPR 65 (2019)

Boston Redevelopment Authority, Docket No. 08-128, Final Decision on Remand, 24 DEPR 18 (2017)

In the Matter of FTO Realty Trust (Ruling and Order Denying FTO's Motion for Recusal), 26 DEPR 43 (2019)

Cumulative Cases Cited—January–December 2019
Algonquin Gas Transmission Co. v. Town of Weymouth, Civil Action No. 18-10871-DJC (D. Mass. February 11, 2019)

In the Matter of Algonquin Gas Transmission, LLC (Recommended Final Decision On Issues 2 Through 6), 26 DEPR 228 (2019)

Algonquin Gas Transmission Co. v. Weymouth Conservation Commission, Docket No. 1:17-CV-10788-DJC (December 29, 2017)

In the Matter of Algonquin Gas Transmission LLC (Recommended Interlocutory Decision on Issues 1, 7, and 8), 26 DEPR 62 (2019)

American Family Life Assurance Co. v. Commissione of Insurance, 388 Mass. 469 (1983)

In the Matter of Marks (Recommended Final Decision) 26 DEPR 114 (2019)

American Farm Bureau Federation v. EPA, 559 F.3d 512 (D.C. Cir. 2009)

In the Matter of Algonquin Gas Transmission LLC (Recommended Final Decision), 26 DEPR 124 (2019)

American Lung Association v. EPA, 135 F.3d 288 (C.A.D.C. 1998)

In the Matter of Algonquin Gas Transmission LLC (Recommended Final Decision), 26 DEPR 124 (2019)

American Petroleum Institute v. Costle, 665 F.2d 1176 (D.C. Cir. 1981)

In the Matter of Algonquin Gas Transmission LLC (Recommended Final Decision), 26 DEPR 124 (2019)

Anthony's Pier Four, Inc. v. HBC Associates, 411 Mass. 451 (1991)

In the Matter of FTO Realty Trust (Ruling and Order Denying FTO's Motion for Recusal), 26 DEPR 44 (2019)

Arno v. Commonwealth, 457 Mass. 434 (2010)

In the Matter of Algonquin Gas Transmission, LLC (Recommended Final Decision On Issues 2 Through 6), 26 DEPR 231 (2019)

Berrios v. Department of Public Welfare, 411 Mass. 587 (1992)

In the Matter of Marks (Recommended Final Decision) 26 DEPR 110 (2019)

Beverly Port Marina, Inc. v. Commissioner of Department of Environmental Protection, 84 Mass. App. Ct. 612 (2013)

In the Matter of Liatsos (Recommended Final Decision After Remand), 26 DEPR 153 (2019)

In the Matter of Liatsos (Recommended Final Decision), 26 DEPR 25 (2019)

Biogen IDEC MA, Inc. v. Treasurer and Receiver General, 454 Mass. 174 (2009)

In the Matter of Marks (Recommended Final Decision) 26 DEPR 110 (2019)

Borden, Inc. v. Commissioner of Public Health, 388 Mass. 707 (1983)

In the Matter of Marks (Recommended Final Decision) 26 DEPR 108 (2019)

Boston Waterfront Development Corp. v. Commonwealth, 378 Mass. 629, 393 N.E.2d. 356 (1979)

In the Matter of Algonquin Gas Transmission, LLC (Recommended Final Decision On Issues 2 Through 6), 26 DEPR 231 (2019)

Butler v. City of Waltham, 63 Mass. App. Ct. 435 (2005)

In the Matter of Kazokas (Recommended Final Decision), 26 DEPR 201 (2019)

Cahaly v. Falmouth Conservation Commission, Memorandum of Decision and Order on Defendant's Motion to Dismiss, 2006 Mass. Super. LEXIS 595 (Barnstable Sup. Ct., September 25, 2006)

In the Matter of Edgewood Development Company, LLC (Recommended Final Decision), 26 DEPR 72 (2019)

Cameron Painting, Inc. v. University of Massachusetts, 83 Mass. App. Ct. 345 (2013)

In the Matter of Three Bays Preservation, Inc. (Ruling and Order Denying Applicant's Motion for Rescission of the Ruling and Order Reversing and Vacating Prior Ruling and Order Allowing Applicant's Motion to Dismiss), 26 DEPR 75 (2019)

Chutehall Construction Co. v. Commonwealth, 2008 Mass. App. Unpub. LEXIS 610 (November 14, 2008)

In the Matter of FTO Realty Trust (Ruling and Order Denying FTO's Motion for Recusal), 26 DEPR 47 (2019)

City of Brockton v. Energy Facilities Siting Board, 469 Mass. 196 (2014)

In the Matter of Kane Built, Inc. (Recommended Final Decision), 26 DEPR 6 (2019)

In the Matter of Mroz (Recommended Final Decision), 26 DEPR 183 (2019)

City of Salem v. Bureau of Special Education Appeals, 444 Mass. 476 (2005)

In the Matter of Marks (Recommended Final Decision) 26 DEPR 114 (2019)

Clark v. Clark, 47 Mass. App. Ct. 737 (1999)

In the Matter of FTO Realty Trust (Ruling and Order Denying FTO's Motion for Recusal), 26 DEPR 40 (2019)

Colella v. State Racing Commission, 360 Mass. 152 (1971)

In the Matter of Marks (Recommended Final Decision) 26 DEPR 114 (2019)

Commerce Ins. v. Commssioner of Insurance, 447 Mass. 478 (2006)

In the Matter of Mroz (Recommended Final Decision), 26 DEPR 182 (2019)

Commonwealth v. Adkinson, 442 Mass. 410 (2004)

In the Matter of FTO Realty Trust (Ruling and Order Denying FTO's Motion for Recusal), 26 DEPR 40 (2019)

Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771 (2006)

In the Matter of Algonquin Gas Transmission, LLC (Recommended Final Decision), 26 DEPR 214 (2019)

In the Matter of Diamond Development Realty Trust (Recommended Final Decision), 26 DEPR 89 (2019)

In the Matter of Kazokas (Recommended Final Decision), 26 DEPR 199 (2019)

In the Matter of Liatsos (Recommended Final Decision on Reconsideration After Remand), 26 DEPR 208 (2019)

In the Matter of Plum Island, LLC (Recommended Final Decision), 26 DEPR 170 (2019)

Commonwealth v. Daye, 435 Mass. 463 (2001)

In the Matter of FTO Realty Trust (Ruling and Order Denying FTO's Motion for Recusal), 26 DEPR 39 (2019)

Commonwealth v. Henry's Drywall Co., 366 Mass. 539 (1974)

In the Matter of Marks (Recommended Final Decision) 26 DEPR 114 (2019)

Commonwealth v. Zone Book, Inc., 372 Mass. 366 (1977)

In the Matter of Algonquin Gas Transmission LLC (Recommended Interlocutory Decision on Issues 1, 7, and 8), 26 DEPR 55 (2019)

Consolidated Cigar Corp. v. Department of Public Health, 372 Mass. 844 (1977)

In the Matter of Marks (Recommended Final Decision) 26 DEPR 112 (2019)

Covell v. Department of Social Services, 439 Mass. 766 (2003)

In the Matter of Algonquin Gas Transmission, LLC (Recommended Final Decision On Issues 2 Through 6), 26 DEPR 234 (2019)

Craig v. Conservation Commission of Mattapoissett et al., Docket No. 2017-P-0269, Memorandum and Order Pursuant to Rule 1:28 (May 1, 2018)

In the Matter of Craig (Recommended Final Decision), 26 DEPR 77 (2019)

Craven v. State Ethics Commission, 390 Mass. 191 (1983)

In the Matter of FTO Realty Trust (Ruling and Order Denying FTO's Motion for Recusal), 26 DEPR 47 (2019)

Dagastino v. Commissioner of Correction, 52 Mass. App. Ct. 456 (2001)

In the Matter of Three Bays Preservation, Inc. (Ruling and Order Denying Applicant's Motion for Rescission of the Ruling and Order Reversing and Vacating Prior Ruling and Order Allowing Applicant's Motion to Dismiss), 26 DEPR 75 (2019)

D'Amour v. Board of Registration in Dentistry, 409 Mass. 572 (1991)

In the Matter of Liatsos (Final Decision After Remand), 26 DEPR 143 (2019)

In the Matter of Liatsos (Interlocutory Remand Decision), 26 DEPR 35 (2019)

Demoulas v. Demoulas Supermarkets, Inc., 428 Mass. 543 (1998)

In the Matter of FTO Realty Trust (Ruling and Order Denying FTO's Motion for Recusal), 26 DEPR 44 (2019)

In the Matter of V & J, LLC

Docket No. 2018-028
DEP Enforcement Document No. 00004745
Worcester

November 15, 2019
Martin J. Suuberg, Commissioner

Air Quality-Asbestos Removal-Fines and Penalties-Settlement Agreement—Commissioner Martin J. Suuberg adopted as final a settlement agreement entered into by the Department reducing a penalty for asbestos removal violations at the Petitioner’s Worcester property from \$51,937 to \$42,500. The agreement requires the sum of \$21,250 to be paid within ten days of this decision’s effective date, with the balance to be remitted in two installments. The installment payments are to be made in equal amounts within six months and one year of the final decision.

FINAL DECISION

On December 20, 2018, the Petitioner V & J LLC filed this appeal challenging a \$51,937.50 Penalty Assessment Notice (“PAN” or “Civil Administrative Penalty”) that the Central Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to the Petitioner on November 28, 2018 for purported violations of the Department’s Asbestos Regulations at 310 CMR 7.15. The Department issued the PAN to the Petitioner in connection with the removal of asbestos containing materials at the Petitioner’s real property at 21 May Street in Worcester, Massachusetts (“the Site”). In its Appeal Notice challenging the PAN, the Petitioner denied it violated the Asbestos Regulations and requested that the PAN be vacated. Petitioner’s Appeal Notice, at pp. 1-2. In the alternative, the Petitioner asserted that the \$51,937.50 PAN amount was excessive and should be reduced to an appropriate amount.

Currently pending before me for review pursuant to 310 CMR 1.01(8)(c), is a proposed Settlement Agreement that the Petitioner and the Department have executed to settle the Petitioner’s appeal of the PAN as set forth above. The Settlement Agreement is in the form of an Administrative Consent Order With Penalty and Notice of Non-Compliance (“Consent Order”) that was executed by: (1) Van K. Nguyen, the Petitioner’s Manager, on April 24, 2019 and (2) Mary Jude Pigsley, Regional Director of the Department’s Central Regional Office, on April 26, 2019.

After reviewing the Consent Order, I find that it is reasonable and furthers the statutory and regulatory interests of G.L. c. 111, §§ 142A-142O and the Department’s Air Pollution Regulations at 310 CMR 7.00, including the Asbestos Regulations at 310 CMR 7.15.

Accordingly, I issue this Final Decision approving and incorporating the Consent Order. Pursuant to the Consent Order, I issue the following Orders:

(1) In accordance with ¶26 of the Consent Order, the effective date of the Consent Order is the date of this Final Decision.

(2) In accordance with ¶¶13 and 21 of the Consent Order, the Petitioner shall pay the sum of Forty Two Thousand Five Hundred dollars (\$42,500.00) to the Commonwealth as a civil administrative penalty for the violations set forth in ¶¶4 through 7 of the Consent Order according to the following schedule:

(a) Within 10 days after the effective date of this Final Decision, the Petitioner shall pay to the Commonwealth the sum of Twenty One Thousand Two Hundred Fifty dollars (\$21,250.00);

(b) Within 182 days after the effective date of this Final Decision, the Petitioner shall pay to the Commonwealth an additional Ten Thousand Six Hundred Twenty Five dollars (\$10,625.00); and

(c) Within 356 days after the effective date of this Final Decision, the Petitioner shall pay to the Commonwealth an additional Ten Thousand Six Hundred Twenty Five dollars (\$10,625.00).

(3) In accordance with ¶¶20 and 21 of the Consent Order, if the Petitioner violates any provision of the Consent Order, the Petitioner shall pay to the Commonwealth, in addition to the \$42,500.00 civil administrative penalty set forth in ¶13 of the Consent Order and discussed above in ¶2, stipulated civil administrative penalties to the Commonwealth in the amount of five hundred dollars (\$500.00) per day for each day, or a portion thereof, each such violation continues.

(4) In accordance with ¶21 of the Consent Order and G.L. c. 21A, § 16, if the Petitioner fails to pay in full any civil administrative penalty as required by the Consent Order as set forth above, the Petitioner will be liable to the Commonwealth for up to three (3) times the amount of the civil administrative penalty, together with costs, plus interest on the balance due from the time such penalty became due and attorney’s fees, including all costs and attorney’s fees incurred in the collection thereof. The rate of interest will be the rate set forth in G.L. c. 231, § 6C.

(5) In accordance with ¶¶8, 9, and 14 of the Consent Order, G.L. c. 30A, and 310 CMR 1.01(8)(c), this appeal is dismissed with the parties waiving whatever rights they may have to further administrative review before the Department as well as any appeal to Court.

SERVICE LIST

Robert D. Cox, Jr., Esq.
Bowditch & Dewey, LLP
311 Main Street, P.O. Box 15156
Worcester, MA 01615
rcox@bowditch.com
Representing V & J LLC

MacDara Fallon, Senior Counsel
MassDEP/Office of General Counsel
One Winter Street
Boston, MA 02108
macdara.fallon@mass.gov
Representing the MassDEP/Central Regional Office

cc: Anne Berlin Blackman, Chief Regional Counsel
 MassDEP/CERO
 8 New Bond Street Worcester, MA 01606
 Anne.Blackman@mass.gov

Leslie Defilippis, Paralegal
 MassDEP/Office of General Counsel
 One Winter Street
 Boston, MA 02108

* * * * *

In the Matter of TOWN OF MARION

OADR Docket No. 2017-007
 DEP File No. MA0100030
 Marion

December 9, 2019
Martin Suuberg, Commissioner

Clean Water Act-Federal and Massachusetts-Surface Water Discharge Permit-Consent Agreement—Commissioner Martin Suuberg adopted a Recommended Decision from Presiding Officer Jane A. Rothchild adopting a settlement agreement resolving issues between the Department and the Town of Marion with respect to unlined lagoons at a wastewater treatment facility that were discharging effluent into an embayment of Buzzards Bay. The agreement essentially mirrors one that Marion entered into with the EPA on the same issues. In response to this settlement agreement, the Coalition for Buzzards Bay proposed a series of amendments to the agreement that MassDEP rejected as either already incorporated into the Administrative Consent Order or capable of being addressed administratively by the Department.

FINAL DECISION

I adopt the Recommended Final Decision of the Presiding Officer. The parties to this proceeding are notified of their right to file a motion for reconsideration of this decision, pursuant to 310 CMR 1.01(14)(d). The motion must be filed with the Case Administrator and served on all parties within seven business days of the postmark date of this decision. A person who has the right to seek judicial review may appeal this decision to the Superior Court pursuant to MGL c. 30A, § 14(1). The complaint must be filed in the Court within thirty days of receipt of this decision.

November 15, 2019
Jane A Rothchild, Presiding Officer

RECOMMENDED FINAL DECISION

INTRODUCTION

This is an appeal by the Town of Marion (“the Petitioner”) challenging a Surface Water Discharge/National Pollution Discharge Elimination System Permit No. MA 0100030 (“the Permit”) that the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to the Petitioner on April 13, 2017. The Permit was issued concurrently by MassDEP and the United States Environmental Protection Agency (“USEPA”) pursuant to the Federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* and the Massachusetts Clean Waters Act, as amended, MGL c. 21, §§ 26-53. *See* Exhibit A to Petitioner’s Notice of Claim. Among other things, the Permit required the Petitioner to line all twenty acres of unlined lagoons at its wastewater treatment facility (“WWTF”) located at 50 Benson Road in Marion, or cease using the lagoons within 48 months from the Permit’s effective date.

In its appeal, the Petitioner challenged the conditions relating to its operation of the lagoons, asserting that the conditions requiring it to cease using the lagoons and to remove sludge solids

currently in the lagoons would have a significant impact on the functioning of the WWTF. Notice of Claim at p. 3. At the same time, the Petitioner appealed its federal permit to the USEPA's Environmental Appeals Board. As a result, this appeal was stayed on May 15, 2017 pursuant to 310 CMR 1.01(6)(h) while the appeal of the federal permit was pending. On July 11, 2018, in response to a Motion to Intervene or, alternatively, to Participate, I granted the Buzzard Bay Coalition and nine additional citizens (“the Coalition”) Participant status pursuant to 310 CMR 1.01(7)(c), and afforded the Coalition an opportunity to file a brief in response to any settlement entered into by MassDEP and the Petitioner.¹

The federal appeal was resolved on December 1, 2017, with the Petitioner and USEPA entering into an Administrative Order on Consent (“the federal settlement”). Since that time, the Petitioner and MassDEP have been engaged in negotiations to resolve the disputes remaining between them, and they have now presented a Settlement Agreement by Administrative Consent Order (“ACO”) for approval by the Department's Commissioner.² The Coalition filed a response to the proposed settlement, proposing certain amendments to the ACO.³ After reviewing the Settlement, and considering the comments of the Coalition, I recommend that the Department's Commissioner issue a Final Decision which incorporates the Settlement Agreement by Administrative Consent Order, and approves the dual Surface Water Discharge/National Pollution Discharge Elimination System Permit No. MA 0100030 (“SWD/NPDES Permit”).

DISCUSSION

The WWTF discharges effluent into an unnamed brook which discharges into Aucoot Cove, an embayment of Buzzards Bay. Aucoot Cove is listed as impaired and requiring a Total Maximum Daily Load (“TMDL”)⁴ for total nitrogen, dissolved oxygen, fecal coliform and nutrient/eutrophication biological indicators. See EPA Fact Sheet at p. 6 of 34. <https://www3.epa.gov/region1/npdes/permits/2017/finalma0100030permit.pdf>. The Permit authorizes the Petitioner to discharge pollutants from Outfall 001 subject to effluent limitations, monitoring requirements and other conditions. Three unlined lagoons are currently used for effluent treatment and equalization. The federal settlement requires the Petitioner to conduct certain activities, including lining Lagoon 1. The proposed settlement with MassDEP mirrors the requirements of the federal settlement and contains additional requirements for Lagoons 2 and 3.

The federal settlement required the Petitioner to develop and submit a scope of work (“SOW”) for a Lagoon Optimization Plan

(“the Plan”). The Petitioner submitted the SOW on December 28, 2017, and after receiving comments on the SOW from USEPA and MassDEP, the Petitioner submitted its Plan to the agencies. The goal of the Plan is to maximize the use of Lagoon 1 for the receipt and storage of treated and untreated wastewater and to minimize to the extent reasonably practicable the Petitioner's use of Lagoons 2 and 3 for any wastewater.⁵

The ACO requires the Petitioner to address potential groundwater impacts from the lagoons and sets forth a process and establishes a schedule for doing so. ACO at ¶ 34. The intent of the ACO relative to the lagoons is to (a) have Lagoon 1 lined; (b) convert Lagoon 2 to be maintained in a dry condition; and (3) either maintain Lagoon 3 in a “pond” condition, convert Lagoon 3 to a dry condition, or repurpose all or part of the Lagoon 3 footprint to meet the Petitioner's infrastructure needs. The ACO requires the Petitioner to remove all sludge solids from Lagoon 1 and line Lagoon 1 by June 30, 2020. Preliminary modeling prepared by the Petitioner that analyzed the projected use of Lagoons 2 and 3 estimated, based on an assumption that Lagoon 2 will be dry in the future, that Lagoon 2 would be used for intermittent wastewater storage on average once every four years, and Lagoon 3 might not be needed for future wastewater storage. The ACO requires the Petitioner to submit a preliminary draft High Flow Management Plan (“HFMP”) to address the future use of Lagoons 2 and 3. The ACO further requires the Petitioner to cease placing sludge and other treatment solids into Lagoons 2 and 3 except during the time when the required modifications to Lagoon 1 are being made.

In their Joint Motion to Approve the Settlement, the parties assert that the purpose of the ACO is to establish a reasonable timeline for the Petitioner to undertake a series of tasks that will minimize the use of unlined lagoons for the storage of untreated or partially treated wastewater. They further assert that the Permit, the ACO and the federal settlement establish reasonable conditions and timelines for the WWTF to meet the requirements and to operate in a manner that is protective of the waters of the Commonwealth.

In their response to the proposed Settlement, the Coalition proposes a set of amendments which it asserts must be made to the ACO. First, the Coalition proposes that language be added to the ACO to make clear that Aucoot Cove is impaired. The parties counter that this information is included in USEPA's Fact Sheet for the Permit, and therefore does not need to be included in the ACO. I have noted both the condition of the receiving waters and a citation to the USEPA Fact Sheet above at p. 3.

1. See Ruling on Motion to Intervene, 7/11/18. 310 CMR 1.01(7)(e) provides that permission to participate is limited to the right to argue orally at the close of the hearing and to file a brief.

2. In addition to the Settlement Agreement by ACO, the parties submitted the Final NPDES permit, the USEPA Administrative Order on Consent, and a Motion to Approve the Settlement.

3. Because the Coalition is not a party to the appeal, the provisions of 310 CMR 1.01(8)(c) pertaining to settlements between and among parties does not apply. Regardless, the Coalition does not assert that the settlement should be rejected or is inconsistent with law.

4. 314 CMR 4.02 defines TMDL as “The sum of a receiving water's individual waste load allocations and load allocations and natural background, which, together with a margin of safety that takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality, represents the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards in all seasons.”

5. The Petitioner is also participating in an ongoing regionalization effort to determine whether it should connect its sewage collection system to the Wareham WWTF and eliminate its own WWTF. This process may take several years, and regionalization may not ultimately occur.

Second, the Coalition recommends that the ACO explicitly require the Petitioner to evaluate lining Lagoon 2 as part of the HFMP, if the HFMP finds a more frequent use of Lagoon 2 or a lengthy holding time of wastewater in that lagoon. In response, the parties state that the Petitioner will be required to evaluate lining Lagoon 2 in the HFMP if the data indicate that the anticipated frequency of using Lagoon 2 for high flows from the collection system does not align with the preliminary model. The ACO requires a preliminary draft HFMP, followed by quarterly progress reports, and then a revised draft HFMP. It requires the revised HFMP to incorporate recommended modifications to Lagoon 2, including increased storage capacity in a lined lagoon, if monitoring indicates that implementation of the Lagoon 1 and associated treatment plant modifications result in substantial departure from the previously modeled predictions. *See* ACO at ¶ 34i.iii. Based on my review of this paragraph, the ACO already requires the Petitioner to evaluate lining Lagoon 2 in its revised draft HFMP under the circumstances described above.

Third, the Coalition asserts that the ACO at ¶ 34.d.i. must be clarified to state that Lagoon 2 should only be used when the high flow from the collection system cannot be accommodated by lined Lagoon 1 and the treatment plant. The language in that paragraph states "...the [Petitioner] shall submit to [MassDEP]...a preliminary draft [HFMP] that will describe the operation of the treatment plant and lagoons in a future state where: I. Lagoon 2 is unlined and dry, other than when impacted by precipitation or on rare occasions when it receives high flows from the collection system that cannot be accommodated by the plant or Lagoon 1..." (emphasis added). In response, the parties assert that it was their mutual understanding when they drafted this language that the Petitioner's use of a dry Lagoon 2 would be limited to those instances where high flows could not be accommodated by both the plant and lined Lagoon 1. MassDEP states in its response to the Coalition's submittal that it will ensure that the final MassDEP-approved HFMP will make this abundantly clear.

Fourth, the Coalition suggests that language in the ACO pertaining to the required contents of the HFMP be changed from "should" to "shall" to strengthen MassDEP's authority to determine what must be included in the HFMP. In its opinion, the language of the ACO is discretionary ("should"), not mandatory ("shall"). MassDEP asserts that the ACO makes clear that MassDEP retains authority over determining what must be included in the HFMP, and ultimate approval authority of the HFMP. Additionally, the word "should" was used intentionally when describing the HFMP development process to maintain a degree of flexibility in anticipation of potential unknowns. Based on these assertions, I do not recommend that a change in this language is warranted.

Finally, the ACO provides timelines for the Petitioner to implement the HFMP and eliminate the discharge of wastewater to groundwater through Lagoons 2 and 3 that are contingent on MassDEP providing feedback to the Petitioner within specified

timelines. The Coalition urges MassDEP to act with all expediency "in order to compel [the Petitioner] to take the necessary corrective action to cure this legacy source of pollution." MassDEP asserts that it will do everything it can to expedite review and approval of the revised HFMP by February 2023 to facilitate the Petitioner's implementation of the HFMP by July 23, 2023.

CONCLUSION

Based on the parties' responses to the Coalition's comments, it is my recommendation that MassDEP's Commissioner issue a Final Decision which incorporates the Settlement Agreement by Administrative Consent Order, and approves the dual Surface Water Discharge/National Pollution Discharge Elimination System Permit No. MA 0100030 ("SWD/NPDES Permit").

SERVICE LIST

Matthew Connolly Esq.
Michael A. Leon, Esq.
Nutter McClennan & Fish LLP
155 Seaport Boulevard
Boston, MA 02210
mconnolly@nutter.com
mleon@nutter.com
Representing the Town of Marion

MacDara Fallon, Senior Counsel
MassDEP/Office of General Counsel
One Winter Street
Boston, MA 02108
Macdara.fallon@mass.gov
Representing the Department

Korrin N. Petersen
Buzzards Bay Coalition
114 Front Street
New Bedford, MA 02740
petersen@savebuzzardsbay.org
Representing the Buzzards Bay Coalition and Nine Citizens

cc: Shaun Walsh
Chief Regional Counsel
MassDEP/Southeast Regional Office
20 Riverside Drive
Lakeville, MA 02347
Shaun.walsh@mass.gov

Leslie DeFilippis, Paralegal
MassDEP/Office of General Counsel
One Winter Street
Boston, MA 02108
leslie.defilippis@mass.gov

* * * * *

Matthew Watsky, Esq.
Rachel Watsky, Esq.
WatskyLaw

WatskyLaw is an Environmental Permitting and Regulatory, Land Use, and Administrative Law practice based in Dedham, Massachusetts. **Matthew Watsky**, a former Mass-DEP Deputy General Counsel, has represented a wide range of clients in private practice since 1990. He brings his experience and insight, primarily on behalf of for-profit corporations and property owners, to matters ranging from simple ANR approvals to complex matters with overlapping layers of federal, state, and local environmental and land use regulation. In addition to environmental law and land use, he represents clients in other areas of administrative law proceedings, such as those before OSHA, the FAA, and local Airport Commissions. **Rachel Watsky**, who joined WatskyLaw in September 2018, was the principal contributor to this commentary.

I. Introduction

OADR released the Final Decision After Remand for *In the Matter of Liatsos, Pinchin, and Southwick*, as well as the Recommended Final Decision on Reconsideration After Remand. A brief summary of the decisions is included for their framing of the issues under the wetlands regulations regarding coastal engineering structures and discussion of coastal bank and coastal beach performance standards. *In the Matter of Algonquin Gas Transmission, LLC* discusses the difference between public and private tidelands and the impact of that difference on compliance with 310 CMR 9.35. *In the Matter of 143 Lynnfield Street, LLC and Commtank, Inc.* reviews the doctrine of force majeure and its application in Administrative Consent Orders.

II. The Continued Saga of the Liatsos, Pinchin, and Southwick Case

The *Matter of Liatsos* Decisions exhaustively analyze the coastal wetlands regulation that dates back to 1978, governing work on coastal banks and coastal beaches. The Applicant sought to design and obtain permits for a project that would strike a fine balance—between achieving the Applicant’s goal to protect the property from encroaching erosion; and the regulatory standards prohibiting coastal engineering structures on certain eroding coastal banks that contribute sediment to adjacent resources or work that interferes with coastal beach processes. The case focuses on erosion control work proposed on a coastal bank determined to be significant to storm damage prevention or flood control by supplying sediment to coastal beaches, coastal dunes, or barrier beaches, and the rule barring new coastal engineering structures except where necessary to protect buildings constructed prior to 1978; and on the performance standards for work on coastal beaches. In 2016 and 2017, the Commissioner disagreed with the Presiding Officer’s Recommended Final Decision and remanded the case back to DEP for further review. DEP and the Applicant underwent design revisions and settlement discussions, and an amended SOC was eventually issued. The case was appealed again to OADR, and the Presiding Officer issued a Recommended Final Decision on Remand.

The battle continues, as the parties have filed appeals to Superior Court. We will continue to follow the proceedings and report in upcoming issues of *DEP Reporter* if the decision adds any nec-

essary clarity for those of us in regulated coastal communities for standards to design permissible coastal erosion controls.

In the Matter of Liatsos, Pinchin, and Southwick, Docket No. WET-2016-005, 006, 007, File Nos. SE 043-2787, 2786, 2785, Mashpee, 26 DEPR 142

March 25, 2019. Timothy M. Jones, Presiding Officer, issued a Recommended Final Decision After Remand (“RFDAR”), which was adopted in part and rejected in part on August 9, 2019, by Martin Suuberg, Commissioner. In the Final Decision After Remand (“FDAR”), issued August 9, 2019, Commissioner Suuberg adopted the portion of the Recommended Final Decision on Remand that found the project complied with the performance standards for Coastal Bank, but ultimately denied approval for the combination coir envelope and pile array beach protection project, finding the project did not comply with the performance standards for Coastal Beach. Commissioner Suuberg again found that the project did not constitute a coastal engineering structure, rejecting that finding of the Presiding Officer.

Commissioner Suuberg reiterated his previous determination that “MassDEP’s Commissioner, as the agency’s final decision-maker in an administrative appeal of a MassDEP permit decision or enforcement order, may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision issued by a Presiding Officer in an appeal.” The Commissioner determines the issues of fact and law and is not bound by the Presiding Officer’s recommended final decision, so long as the Commissioner includes a statement of reasons. The Commissioner may also reject the Presiding Officer’s findings of fact and determinations of credibility, so long as a statement of reasons is included in the Final Decision. The Commissioner’s Final Decision can be appealed to the Superior Court pursuant to MGL c. 30A, § 14 and 310 CMR 1.01(14)(f).

Commissioner Suuberg did not adopt the portion of the RFDAR addressing Coastal Engineering Structures. The RFDAR found that the proposed pile array was a Coastal Engineering Structure. In rejecting that finding, the Commissioner noted that anchoring is and has been recognized as an important element of the type of bioengineering project like the one under review in this case, and that coir roll projects have previously been considered to be “soft” structures, rather than a prohibited “hard” structure. The pilings in this case were deemed by the Commissioner as the equivalent of anchoring, and thus not an engineering structure.

Commissioner Suuberg did adopt the RFDAR conclusions that the project does comply with the performance standards governing coastal bank but does not comply with the performance standards governing coastal beaches, 310 CMR 10.27. The FDAR ruled that the design would result in substantial deflection and refraction of waves and currents from the proposed vertical pilings that extend above the beach surface onto the coastal beach, causing scour. The Presiding Officer acknowledged that research demonstrates that with large wooden pilings, it is difficult to predict the precise amount of erosion that will occur, although it is understood that some erosion and scour will occur. To an extent, some patterns of scour can be predicted when the wooden pilings are within a certain minimum distance to each other, as piles that within the minimum distance “tend to act as a single pile equal to the diameter of the two piles together.” See 26 DEPR 159. In addition, the Applicants’ expert admitted the research he relied upon did not include a specific case study of the effect of piling anchors at the base of a coastal bank, as this project is designed. The FDAR found it is likely that the proposed pile array would result, over time and after severe storms, in significant scouring, erosion, and thus a general lowering of the coastal beach. Therefore, the project does not comply with the performance standards for coastal beach.

The Presiding Officer and the Commissioner agreed that the project complies with the performance standards governing coastal bank. See 26 DEPR 166. There are two coastal bank standards at issue in the *Liatsos* case: 310 CMR 10.30(4) and 10.30(6). 10.30(4) requires that any project on a coastal bank or within 100 feet landward of the top of coastal bank shall not have an adverse effect due to wave action on the movement of sediment from coastal bank to coastal beach, and 10.30(6) requires that any project on a coastal bank or within 100 feet landward of the top of coastal bank shall have no adverse effects on the stability of the coastal bank. Although it is true that the project will “effectively prevent erosion of the natural bank” and so does not comply with the performance standards, the project proposes the deposit of nourishment on the bank that will provide sediment to the coastal bank. “If compliance with the regulations is measured simply by the amount of sediment that will be removed from the nourishment cover provided on the coir envelope bank behind pile array, it appears the project will be in compliance.” See 26 DEPR 167. Regarding the second performance standard governing stability of the coastal bank, the preponderance of the evidence demonstrates that the project would increase stability of the coastal bank, rather than adversely impacting its stability, and as the project essentially insulates the coastal bank from erosive forces.

In the Matter of Liatsos, Pinchin, and Southwick, Docket No. WET-2016-005, -006, -007, Mashpee, 26 DEPR 207 - Reconsideration

September 20, 2019. Timothy M. Jones, Presiding Officer, issued a Recommended Final Decision on Reconsideration after Remand (“FRDRR”) which was adopted as a Final Decision on September 30, 2019, by Martin Suuberg, Commissioner. The Applicants filed a motion for reconsideration of the FDAR on the grounds that FDAR applied the incorrect burden of proof regarding the project’s compliance with coastal beach performance standards and that the FDAR incorrectly applied the coastal beach performance standards. MassDEP and the Petitioners opposed the motion for

reconsideration. The Presiding Officer agreed with MassDEP and the Petitioners and recommended that the motion or reconsideration be denied.

The standard for review for success on a motion for reconsideration requires that the moving party “demonstrate that the Final Decision was based upon a finding of fact of ruling of law that was ‘clearly erroneous.’” See 26 DEPR 207. This is a difficult burden of proof to meet, as the moving party also cannot repeat matters that were adequately considered in the Final Decision, cannot renew claims or arguments that were previously raised, considered, and denied, and cannot attempt to raise new claims or arguments, without risking being summarily denied. See 26 DEPR 207, 310 CMR 1.01(14)(d).

The Presiding Officer found that the FDAR applied the correct burden of proof, and that the Applicants, in their motion, had argued the incorrect burden of proof by placing the burden on the Petitioners. Although Petitioners had the burden of going forward by producing credible evidence from a competent source in support of their position, upon producing such evidence, the burden of proof shifted to the Applicants. The prevailing party must establish their case by a preponderance of the evidence, regardless of whether that party is DEP, the Petitioner, or the Applicant. The preponderance of the evidence demonstrates that the proposed piling array will not comply with the coastal beach performance standards, not due to the pilings themselves, but because the pilings will be too close to each other, and their unnecessary vertical extension above the coastal beach will cause erosion and a lowering of the beach. The Petitioners met their burden and submitted an abundance of evidence demonstrating that the project would adversely affect the coastal beach.

The Presiding Officer additionally found that the FDAR correctly applied the coastal beach performance standards to the piling array. The Applicants raised this issue for the first time, which in and of itself is a reason to deny the motion for reconsideration. The argument is also without merit. The design itself proposes the pilings to be buried vertically into the Coastal Beach and elevated above its surface. The pilings are proposed adjacent to and seaward of the Coastal Bank, and therefore are within Coastal Beach. See 26 DEPR 210. Thus, the Coastal Beach performance standards do in fact apply.

Assuming this decision is not overturned by the Superior Court—where does this leave us? An array of pilings anchoring coir logs intended specifically to block erosion is not a prohibited engineering structure on a coastal bank—as long as sand nourishment is included in the application to replace any sand materials removed from the system by those materials. Nor is such a design an “engineering structure” on a beach, but if installed either close to or on a beach such that wave reflection could result in increased erosion of the beach itself, the project would not comply with the standards applicable to work on coastal beaches. Query whether pilings and coir logs located within coastal bank and above the line of the coastal beach could be deemed subject only to the standards for coastal bank, and not to the beach standards? Would such a design have the desired effect? Are there other designs that could meet the coastal beach standards while actually offering some re-

lief from beach erosion and shoreline retreat? Those answers are not found in the decisions.

The Applicants, after the Final Decisions by the Commissioner, have appealed both the August 9, 2019 Final Decision After Remand and the September 30, 2019 Final Decision on Reconsideration after Remand to Superior Court (See *Pinchin v. Mass. Dept. Env. Prot.*, Civil Action No. 1984 CV 02833A). The appeal was filed with Superior Court on October 30, 2019. On February 24, 2020, the Court granted the motion to intervene of the Mashpee Citizen's Group that was a party to the DEP hearing. The Court has also, on March 4, 2020, granted an extension of the deadline to file an expanded record. We can expect a ruling at some point in 2020.

III. Public and Private Tidelands

In the Matter of Algonquin Gas Transmission, LLC, OADR Docket Nos. 2017-001, -012, Waterways Application No. W16-4600, Weymouth, 26 DEPR 228

October 24, 2019, Martin Suuberg, Commissioner, adopted the Recommended Final Decision on Issues 2-6 issued on October 16, 2019 by Jane A. Rothchild, Presiding Officer. The Commissioner issued the Final Decision finding that the proposed natural gas compressor project on private filled tidelands would not interfere with any public rights in the tidelands, and that the public safety concerns related to a gas accident or explosion were too speculative to show that the public might be disinclined to fish, fowl, or stroll on existing conservation parcels. Additionally, the project was not required to serve a proper public purpose since it will not be located on public Commonwealth tidelands, but instead will be located entirely on private filled tidelands. The case presented DEP with a novel legal theory—that a project located outside of Commonwealth Tidelands could have such adverse effects due to noise, odors or the public's fear of risk posed by this allegedly dangerous operation, that it would impermissibly interfere with the public use of the off-site tidelands. In a rigorously detailed, 13-page decision on the evidence and standards of the regulations, the decision spent little time dispensing of the basic legal claims, stating, the Petitioner:

has not provided any legal support for its claim that alleged interference of this type is legally cognizable under Chapter 91. Accordingly, I find that Weymouth has failed to present sufficient credible evidence in support of its position.

26 DEPR 228, 236 (2019); and

1. The six different appeals of the air permits were filed by: two separate “ten person” groups (one with residents of Braintree, Weymouth, Newton and Quincy; and one by residents of Hingham); A Ten Citizen Group of residents of Weymouth; and separate appeals by the Town of Hingham, City of Quincy and Town of Weymouth. There were also, prior to the DEP appeals, a series of Court cases to adjudicate and rule against the applicability of the Town of Weymouth's bylaws, and an appeal under the FERC rules. The six DEP Air Quality cases, consolidated together in “*In the Matter of Algonquin Gas Transmission LLC*,” Docket ##2019-008, 009, 010, 011, 012 and 013, and reported at 26 DEPR 116, have been appealed by the Petitioners to the US First Circuit Court of Appeals. We do not provide a summary of the issues in the Air Quality cases, in part because the scale of air quality cases are so large—presenting enormously technical issues that are rarely adjudicated and rarely addressed by most lawyers or consultants—that we felt a detailed review would not be of broad interest to the regulated community, and would take

they seek a review of claims that are specifically within the subject areas covered by MassDEP's air pollution control regulations, specifically 310 CMR 7.09 and 310 CMR 7.10. I find that the TRG has failed to state a claim for which relief could be granted in this proceeding [brought under Chapter 91]. The claims are precluded by the clear precedents . . .”

Id. at 241. So, why then a decision that details the factual findings and makes extensive rulings on credibility? This is just my informed speculation—but I suggest it likely was to try to make the decision appeal proof. Courts give great deference to an agency's findings of fact, especially those based on credibility of witnesses, while feeling free to reach their own conclusions about issues of law. The DEP attention to factual details was well founded in this case. This matter was one of a series of appeals—with multiple Petitioners filing appeals of the Wetlands Protection Act Order of Conditions, and of the Air Quality Plan Approval issued by DEP.¹

The Applicant proposed the use of approximately 7.9 acres of the property to construct the compressor station. The location of the project includes 5.2 acres of filled private tidelands that fall within the jurisdiction of Chapter 91, and an additional 2.7 acres of upland outside of Chapter 91 jurisdiction. The project does not propose work on filled commonwealth tidelands.

The Commonwealth retains public tidelands in trust for public use under the public trust doctrine. See 26 DEPR 232. The legislature delegated authority to the Department of Environmental Protection under Chapter 91 to “preserve and protect” the public's right in tidelands by allowing only water-dependent uses or another proper public purpose. See 26 DEPR 232, MGL c. 91, § 2.

The Presiding Officer found that the project complied with 310 CMR 9.35, and preserved the public rights in the tidelands, ruling against Petitioners' claims that the compressor station would significantly interfere with the public's rights in tidelands by inflaming the public's fears of an accident and the choice to avoid the alleged noise and odors. The Petitioners' bases for those concerns under 310 CMR 9.35, which governs work in Commonwealth Tidelands, were not applicable to work on filled private tidelands. The project, a water-dependent use project, is proposed on private filled tidelands and so is not required to provide on-foot passage. Critical to the Presiding Officer's ruling to establish a basis for judicial deference, the Decision made findings about the affidavits provided by the Petitioners, noting they are identical typed forms, though some contain additional handwritten statements, but none give specifics as to how the proposed project would be a physical obstruction to their use of the adjacent conservation areas. The

up more commentary space than appropriate. To comment broadly, the issues presented came down to disputes over whether the application had proven full compliance with the detailed technical standards set for issuance of such permits; and arguments that the DEP should use its discretion to change its long standing policies for how to interpret and apply those rules. As to the former, the decision found the DEP and Applicant had established compliance; as to the latter, it is an argument better suited to advocacy to use the 30A process to give notice and amend the regulations than to attack a permit decision that was made consistent with the current policies and regulations.

See, *Ten Persons Group v. MA Dept. of Environmental Protection*, 1st Cir. Ct App., 19-1803 (and associated cases 19-1794 and 19-1797); and see, *The Hingham Ten Persons Group v. DEP*, Mass. Sup Ct., 19-2550E, stayed and held in abeyance due to the Federal litigation, by Order granted 10-16-2019.

Decision concluded the affidavits are unreliable testimony that “cannot be considered an objective or scientific survey of public opinion; rather, they represent responses to overtly biased prompts from the Petitioners.” The decision also noted that none of the affiants testified at the adjudicatory hearing, and so none of them were available for cross-examination by DEP or the Applicant and their testimony should therefore be disregarded. There was no evidence submitted to substantiate community members’ fears of injury or accidents at the site. Additionally, on cross-examination of the Petitioners’ expert, the expert admitted that he had performed no study or analysis to determine the probability of damage to the compressor station from storms and so could not support his argument that the compressor station ran the risk of interfering with navigation or with the public’s right to access the waterway from the public way to the shoreline. See 26 DEPR 234.

The Presiding Officer also found that the project is not required to serve a proper public purpose, because it is located entirely on filled private tidelands. See 26 DEPR 236. Commonwealth tidelands, as defined by 310 CMR 9.02, are in general tidelands that are seaward of the historic low water mark, or no more than 1650 feet from high water, and thus are “tidelands held (1) by the Commonwealth, or (2) by its political subdivisions or a quasi-public agency or authority, in trust for the benefit of the public, or (3) tidelands held by a private person by license or grant of the Commonwealth subject to an express or implied condition subsequent that it be used for a public purpose.” Private Tidelands are “tidelands held by a private person subject to an easement of the public for the purposes of navigation and free fishing and fowling and of passing freely over and through the water...” Tidelands that lie landward of the historic low water mark and that are no more than 1650 feet seaward of the historic high-water mark are presumed Private Tidelands. See 310 CMR 9.02. Additionally, even if the project was located on commonwealth tidelands, the presumption is that the project serves a proper public purpose, and the Petitioners failed to rebut that presumption. See 26 DEPR 237. The concerns about flooding from hurricane storm surges and other storms were too speculative to be persuasive. See 26 DEPR 238.

There were additional issues for adjudication, such as whether the proposed internal roadway, parking spaces, underground utilities, stormwater basin, and fill are uses that are permissible within a Designated Port Area (“DPA”) and whether a 30-year c. 91 license term is permissible. Those are not relevant to the public trust doctrine and public versus private tidelands discussion, and so are not laid out in detail here.

In the Matter of 143 Lynnfield Street, LLC and Commtank, Inc., OADR Docket No. 2018-009, Peabody, 26 DEPR 242

October 7, 2019, Martin Suuberg, Commissioner, adopted the Recommended Final Decision issued on September 3, 2019, by Timothy M. Jones, Presiding Officer. The Presiding Officer affirmed the \$30,000 penalty against the Petitioners for failing to comply with an Administrative Consent Order (“ACO”) when they failed to remove unlawfully stored tanks and other debris in a timely fashion and for failing to file the necessary compliance reports.

The Petitioner Commtank’s business is to remove old underground storage tanks (“UST”) and to install new tanks and provide related services. The property at issue is 15 acres in size, with four large buildings. One of the buildings was demolished at some point, leaving behind debris stockpiled on site. In March 2016, the City of Peabody Inspectional Services notified Lynnfield that it was in violation of a city ordinance for failing to maintain the property in accord with applicable laws. The notice required that Lynnfield remove from the property garbage and all junked or abandoned vehicles. DEP inspected the site two weeks later, and noted several violations, including the storage of approximately 100 used storage tanks; numerous tanks, containers, and other debris piles that could contain hazardous constituents, many of which contained no identification regarding their contents; no documentation provided identifying whether containers and tanks were empty; and six large stockpiles of debris, including alleged solid waste.

Later that month, DEP issued Unilateral Administrative Orders (“UAOs”) for the alleged failures to operate in compliance with laws governing Hazardous Waste management and remediation, Clean Air, and Wetlands. The Petitioners appealed the UAOs to OADR, and the appeal was then stayed while the parties engaged in settlement negotiations for nine months. During the negotiations, Petitioners identified and properly disposed of the tanks’ contents, coming into compliance on those issues in the UAOs. See 26 DEPR 244. The parties eventually reached a settlement agreement that became the ACO, executed on January 19, 2017 and approved by the Commissioner on March 7, 2017. The ACO required that the Petitioners cease and desist from unlawful alteration of wetlands; cease and desist from unlawfully receiving and handling solid waste; cover all stockpiles; retain a wetland scientist to delineate the wetlands, test and identify the constituent parts of each stockpile; identify disposal and recycling facilities to accept materials removed from the property; submit a solid waste report summarizing the results of testing and identifying the facility to receive each material; and properly dispose or remove solid waste. See 26 DEPR 244. Two years later, DEP issued the Demand based on alleged violations of the ACO. Petitioners appealed the Demand to OADR.

The \$30,000 penalty was imposed on the basis of alleged violations of the ACO. The Petitioners and DEP were both represented by counsel while they negotiated the terms of the ACO over the course of 9 months. The ACO unambiguously provided DEP with the authority to demand a penalty if the terms of the ACO are violated, with a provision authorizing DEP to impose \$1,000 per day per violation as long as the violation occurs. The Petitioners committed three separate violations of the ACO that continued on for several months, and DEP, in demanding \$30,000, demanded less than it was entitled to under the terms of the ACO. See 26 DEPR 243. The Petitioners failed to remove, properly dispose of, and/or recycle all the accumulated solid waste from the property within 30 days of DEP’s approval of the Solid Waste report; failed to submit to DEP a Solid Waste Completion Report within 30 days of DEP’s approval of the Solid Waste report; and failed to submit a Solid Waste Completion Report that described the steps the Petitioner took to comply with the ACO.

The Petitioner responded to the penalty assessment notice by asserting the defense of force majeure. Force majeure is mentioned in the ACO as a provision, stating that “MassDEP agrees to extend the time for performance of any requirement of this Consent Order if MassDEP determines that such failure to perform is caused by a Force Majeure event. The failure to perform a requirement of this Consent Order shall be considered to have been caused by a Force Majeure event if the following criteria are met: (1) an event delays performance of a requirement of this Consent Order beyond the deadline established herein; (2) such event is beyond the control and without the fault of [the Petitioners] and [Petitioners’] employees agents, consultants, and contractors; and (3) such delay could not have been prevented, avoided, or minimized by the exercise of due care by Respondents or Respondents’ employees, agents, consultants, and contractors.” See 26 DEPR 246.

The Petitioners asserted the defense of force majeure on the grounds that they had been working diligently to meet the dead-

line and that the short delay could not have been prevented, avoided, or minimized. The DEP staff administering the ACO rejected the force majeure request because the Petitioners did not provide any of the supporting documentation and their failure to secure commitments from trucking companies and to meet the deadlines did not meet the definition of force majeure.

The Decision ruled that Petitioners’ force majeure justification was without merit. Petitioners failed to comply with the deadlines because they deployed and prioritized their own employees off site to complete Commtank jobs on other sites, rather than prioritizing the separation of solid waste materials on site as required in the ACO. This was the primary reason for the delay, and not a valid basis to invoke force majeure.

The Commissioner determined that the penalty was correctly calculated, and that the Petitioners’ defense of force majeure was without merit. ■

ABRIDGED SAMPLE