COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF APPEALS AND DISPUTE RESOLUTION

In the Matter of
Entergy Nuclear Operations, Inc. and
Entergy Nuclear Generation Co.

OADR Docket No. 2015-009
DEP File No.: Waterways
Application # W14-4157,
Superseding Written Determination
Plymouth

DEPARTMENT OF ENVIRONMENTAL PROTECTION'S CLOSING BRIEF

INTRODUCTION

This matter concerns challenges by the Jones River Watershed Association and Twelve Citizens to the Department's issuance of a superseding Written Determination #W14-4157 (hereinafter "Chapter 91 License" or "License") to Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") on or about February 27, 2015. The Chapter 91 License authorizes the Applicant to construct and maintain two helical moorings with associated buoys and outhaul lines in Private Tidelands in and over the waters of Cape Cod Bay at 600 Rocky Hill Road in Plymouth in accordance with the locations shown and details indicated on the draft license plans that accompanied the License. The authorized moorings will be located approximately 130 feet from the mean high water shoreline in approximately 5 feet of water at low tide. The purpose of the moorings is to provide an anchoring system for the deployment of semi-rigid suction pipes with floating strainers as a redundant option for water withdrawal in the event of an emergency at the Pilgrim Nuclear Power Plant which requires a water source. The project is intended to implement the Diverse and Flexible Coping Strategies (FLEX Strategy) in response to the

United States Nuclear Regulatory Commission (NRC) Order EA-12049, "Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events" issued on March 12, 2012. In a letter dated December 16, 2013, the NRC approved the Applicant's plan (which includes the mooring system) provided that the components of the plan are properly implemented. See February 27, 2013 DEP Chapter 91 License Transmittal Letter, p.1. See also Las, ¶9; Harizi, ¶¶ 5, 8, 9, 11-14 and Harizi Exhibits 2-4.[1] The moorings are the final layer of redundancy called for in the overall FLEX Strategy. Harizi, ¶¶ 11-14.

On September 24, 2015, the parties and their witnesses appeared at an adjudicatory hearing in the Department's Southeast Regional Office in Lakeville, MA. Based on the evidence adduced at the hearing and the applicable law, the Department's issuance of the Chapter 91 License should be affirmed.

ISSUES IDENTIFIED FOR ADJUDICATION

In the June 5, 2015 Pre-Screening/Pre-Hearing Conference Report and Order ("June 5, 2015 Order"), the Presiding Officer set out the issues for adjudication in this matter as follows:

1. Whether the Petitioner Jones River Watershed Association ("JRWA") has standing to challenge the Chapter 91 License as an "aggrieved person" pursuant to 310 CMR 9.02 and 9.17(1)(b)?

   (a) As a result of the Department's issuance of the Chapter 91 License, could JRWA suffer an injury in fact, which is different either in kind or magnitude, from any injury, if any, that the general public could suffer and which is within the scope of public interests protected by G.L. c. 91 and G.L. c. 21A?

[1] All references herein to Pre-Filed Testimony are noted by using the last name of the witness and the paragraph(s) containing relevant testimony and/or the relevant exhibit number accompanying the witness' Pre-Filed Testimony.

2. Whether the 12 residents of the Commonwealth have standing to challenge the Chapter 91 License as a Ten Residents Group pursuant to 310 CMR 9.17(1)(c)?

    (a) Are the 12 residents a validly constituted Ten Residents Group pursuant to 310 CMR 9.17(1)(c)?
    (b) If not, do any of the 12 residents have standing to challenge the Chapter 91 License as an individual "aggrieved person" pursuant to 310 CMR 9.02 and 9.17(1)(b)?

3. If any of the Petitioners have standing to challenge the Chapter 91 License:

    (a) Did the Department properly determine that the structures and/or uses authorized by the Chapter 91 License will be located or take place within Private Tidelands?
    (b) Did the Department properly determine that the structures and/or uses authorized by the Chapter 91 License are water dependent pursuant to 310 CMR 9.12(2)?
    (c) Does the Chapter 91 License comply with the applicable requirements of 310 CMR 9.31?
        (i) Do the structures and/or uses authorized by the Chapter 91 License comply with the applicable environmental programs of the Commonwealth in accordance with 310 CMR 9.31(1)(b) and 9.33?
        (ii) Do the structures and/or uses authorized by the Chapter 91 License comply with the applicable standards governing the preservation of water-related public rights in accordance with 310 CMR 9.31(1)(d) and 9.35?
        (iii) Do the structures and/or uses authorized by the Chapter 91 License comply with the applicable standards governing engineering and construction of structures in accordance with the provisions of 310 CMR 9.31(1)(f) and 9.37?
        (iv) Do the structures and/or uses authorized by the Chapter 91 License comply with the "Proper Public Purpose Requirement" of 310 CMR 9.31(2)?

THE PETITIONERS' BURDEN OF PROOF

I. STANDING

A. JRWA

Standing to bring an administrative appeal challenging Department action is a jurisdictional prerequisite to maintenance of the appeal, and, as such, it may be raised at any time by any party or the Presiding Officer. In the Matter of Norman Rankow, OADR Docket No. WET-2012-029, 2013 MA ENV LEXIS 25, Recommended Final Decision (August 6, 2013), adopted as Final Decision, 2013 MA ENV LEXIS 79, citing In the Matter of Steven and Diane Miers, Docket No. DEP-04-434, Recommended Final Decision (March 11, 2005), adopted as Final Decision (March 30, 2005); In the Matter of Gallagher Group, Docket No. 2003-019, Recommended Final Decision (May 2, 2005), adopted as Final Decision (July 8, 2005); Reconsideration Denied (September 23, 2005); and In the Matter of Nguyen, DEP Docket No. WET-2008-031, Recommended Final Decision (June 20, 2008), adopted as Final Decision (July 18, 2008). Indeed, standing "is not simply a procedural technicality." Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975). Rather, it "is a jurisdictional prerequisite to being allowed to press the merits of any legal claim." R.J.A. v. K.A.V., 34 Mass. App. Ct. 369, 373, n.8 (1993); Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998) ("[w]e treat standing as an issue of subject matter jurisdiction [and]...of critical significance"); see also United States v. Hays, 515 U.S. 737, 115 S.Ct. 2431, 2435 (1995) ("[s]tanding is perhaps the most important of the jurisdictional doctrines").

Pursuant to 310 CMR 9.17(1)(b), "any person aggrieved by the decision of the Department to grant a license or permit who has submitted written comments within the public comment period" may file an administrative appeal challenging the Department's grant of a Chapter 91 License. The term "person" includes individuals, partnerships,

corporations, associations, departments, boards, municipalities and public agencies. 310 CMR 9.02. An "aggrieved person" is

> any person who, because of a decision by the Department to grant a license or permit, may suffer an injury in fact, which is different either in kind or magnitude, from that suffered by the general public and which is within the scope of the public interests protected by M.G.L. c.91 and c.21A.

Id.

An "aggrieved person" under the Chapter 91 regulations "must assert 'a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest....Of particular importance, the right or interest asserted must be one that the statute...intends to protect.'" Cf. In the Matter of Webster Ventures, LLC, OADR Docket No. WET-2014-016, Recommended Final Decision (February 27, 2015), 2015 MA ENV LEXIS 15, at 15, adopted as Final Decision (March 26, 2015), 2015 MA ENV LEXIS 10; In the Matter of Ronald and Lois Enos, OADR Docket No. WET-2012-019, 2013 MA ENV LEXIS 21, at 16-17, adopted as Final Decision, 2013 MA ENV LEXIS 20; In the Matter of Norman Rankow, supra, 2013 MA ENV LEXIS at 26-27. Although a party need not prove by a preponderance of the evidence that his or her claim of particularized injury is true, Webster Ventures, supra, 2015 MA ENV LEXIS 14, at 16, a party's case may not consist of "unfounded speculation to support their claims of injury." Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20, 37 (2006); In the Matter of Martin and Kathleen Crane, Docket No. 2008-100, Recommended Final Decision (March 30, 2009) (abstract, conjectural or hypothetical injury is not sufficient).

Thus, to demonstrate standing to appeal the Chapter 91 License in this case, JRWA must put forth a minimum quantum of credible evidence in support of its claims that the Applicant's proposed Project as approved by the Department's Chapter 91

License will or might cause JRWA to suffer an injury in fact, which will be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interest protected by G.L. c.91 and G.L. c.21A. June 5, 2015 Order, at 9 (citations omitted).

B. 12 Residents Group

In order for the 12 residents to appeal the Chapter 91 License as a Ten Residents Group pursuant to 310 CMR 9.17(1)(c), they must demonstrate: (1) that the group consisted of at least ten residents of the Commonwealth at the time of the appeal's filing; (2) that at least five of the ten residents in the group live in Plymouth, the municipality in which the work authorized by the Chapter 91 license is located; (3) that each member of the group submitted comments during the public comment period; (4) that each member of the group has submitted an affidavit stating his/her intention to be part of the group and to be represented by its authorized representative; and (5) that group membership of at least ten residents of the Commonwealth, five of whom must live in Plymouth, must be maintained throughout the appeal. June 5, 2015 Order, at 11-12. Moreover, under G.L. c.30A, §10A, the Ten Residents Group must demonstrate that the Department's grant of the Chapter 91 License will cause "damage to the environment" which, as defined by G.L. c.214, §7A, means:

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

natural resources.

II. SUBSTANTIVE CHALLENGES TO THE CHAPTER 91 LICENSE

If any of the Petitioners is found to have standing to challenge the Chapter 91 License, they have the burden of proving by a preponderance of credible evidence that the Department erred in issuing the Chapter 91 License to the Applicant. In the Matter of Renata Legowski, OADR Docket No. 2011-039, Recommended Final Decision (October 25, 2012), 2012 MA ENV LEXIS 128, at 7-8 (party challenging Chapter 91 determination has burden of proof), adopted as Final Decision (November 5, 2012), 2012 MA ENV LEXIS 131.

ARGUMENT

I. JRWA does not have standing to challenge the Chapter 91 License as an "aggrieved person" pursuant to 310 CMR 9.02 and 9.17(1)(b).

In its Notice of Claim and its subsequent filings, JRWA contends that it is a "person aggrieved" and thus has standing to appeal the Chapter 91 License. In its Memorandum of Law on Issues for Resolution, JRWA states that its "mission is directly linked to the health of Cape Cod Bay and the tidelands along the shoreline, including the area at and adjacent to the shoreline in front of Pilgrim" and that "its members and the organization will suffer harm from the failure to properly implement Chapter 91 with regard to Entergy's proposed activities." Petitioner's Memorandum of Law, p. 8. However, JRWA has failed to articulate *how* it will suffer any harm from the installation of two moorings authorized by the Chapter 91 License.

According to the Applicant, each helical mooring has a square thickness of 1 ½ ' and is 15' in total length, and will be augured into the sand to a maximum embedment

of approximately 14.5'. Las, ¶ 9, 11 and Las Exhibits 2 and 3. The floating strainers and semi-rigid suction pipe used during water withdrawal will be deployed only during training exercises or an actual emergency; they are not intended to remain in place. Las, ¶ 12, 14, 15; Hill, ¶ 23. Contrary to Petitioners' assertions in their Pre-Hearing Statement, there will be no dredging associated with the installation of the moorings. Las, ¶ 13. The environmental impact of installing the moorings is minimal compared to the typical bottom-weighted mooring system that is commonly used for boat moorings and less intrusive than thousands of other moorings located in the Commonwealth. Las, ¶ 11.

E. Pine duBois has testified that "JWRA has an ownership interest in riparian land along the Jones River, including land on the boundary of the Cape Cod Bay Ocean Sanctuary." duBois, ¶ 3. Measured over land and water, the mouth of the Jones River is approximately eight (8) miles from the proposed mooring location; the distance is even longer if limited to a water route. Las, ¶ 30 and Las Exhibit 7. Setting aside the lack of detail regarding JRWA's "ownership interest" in such land, it is exceedingly difficult to imagine how the installation of two helical moorings approximately 8 miles away from the mouth of the Jones River could impact any property owned by JRWA.

Ms. duBois asserts that "JRWA will be harmed because the proposed license allows use of Tidelands in a manner that will degrade, harm and impair the quality, habitat and ecosystem of Cape Cod Bay" and that the proposed license "will cause damage to the environment."[2] duBois, ¶¶ 8 and 9. However, Ms. duBois completely

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[2] Hundreds of moorings exist within Cape Cod Bay, and many moorings exist much closer to the mouth of the Jones River than the 2 subject moorings. At the hearing, Ms. duBois testified that she did not believe

fails to describe *how* the installation of 2 helical moorings will cause such harm and damage.

As the Presiding Officer has ruled, to demonstrate standing, JRWA must put forth a minimum quantum of credible evidence in support of its claim that the Applicant's proposed Project, as approved, will or might generate identifiable impacts on the Petitioner's property that would be different either in kind or magnitude from that suffered by the general public. See June 5, 2015 Order, at 9.

The testimony offered in support of JRWA's claim of aggrievement fails to contain the minimum quantum of credible evidence to demonstrate that JRWA may suffer an injury in fact, let alone an injury that is different either in kind or magnitude from that suffered by the general public. The evidence demonstrates that the proposed project, which is limited to the installation of two helical moorings as described above, will not impact the Jones River, its estuary or the functioning of the areas of Cape Cod Bay that provide habitat or migratory routes for wildlife associated with the Jones River. Indeed, it is far more likely that any injury or harm (whatever that may be) resulting from the moorings' installation would be suffered to a greater degree by landowners or other persons who are located closer to the area where the moorings are to be installed. A petitioner has the burden to put forth a minimum quantum of credible evidence in support of its claim, and JWRA has not supplied such credible evidence necessary to establish the requisite standing to maintain this appeal. In the Matter of City of Marlborough, Docket Nos. DEP-05-193 through 196, Ruling on Motion to Intervene (February 3, 2006).

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that JRWA has ever appealed any moorings in Cape Cod Bay other than those proposed by the Applicant here. Hearing Transcript ("Tr"), at 46.

Ms. duBois has a bachelor's degree in psychology and is a certified scuba diver; she is not an engineer and holds no graduate degrees. Tr., at 29-30. Ms. duBois testified "[w]hile **JRWA is not concerned about the direct environmental effects of screwing an anchor into the floor of the ocean,** JRWA is concerned that it will not stay there and will not be available when needed, and thus, will contribute to an uncontrolled accident at Pilgrim." duBois Rebuttal, ¶ 25 (emphasis added). At the hearing, Ms. duBois was asked whether, if the moorings were unearthed, they could travel 8 miles to the mouth of the Jones River. She answered: "**No, we're not worried about the moorings traveling 8 miles.**" Tr., at 38 (emphasis added). Rather, her concerns regarding the moorings "...depends on if they wind up in the intake screen, I suppose. If they wound up in the intake screen, they could damage things, which could damage the plant, which could damage the river, because we know that the intake structure damages the fish that are swimming to the Jones River." Id.

Throughout this proceeding, JRWA has repeatedly stated its general concerns about the overall safety of the continued operation of Pilgrim Nuclear Power Station and the possibility of a nuclear meltdown or other catastrophe. By issuing the Chapter 91 License in this case, the Department has approved only the installation of two 1 ½ inch thick helical moorings into the seabed. The Department has not attempted to expand its limited jurisdiction under Chapter 91 to review or approve any other aspect or component of the FLEX System, which properly rests within the purview of the NRC. JRWA's generalized concerns about the facility and the potential for a nuclear incident, no matter how legitimate or passionate, cannot serve

as a substitute for supplying the required amount of credible evidence to demonstrate standing to challenge the Chapter 91 License for the mooring project in this case. See Matter of Somerset Power LLC, DEP Docket No. 2008-054, Recommended Final Decision (June 13, 2008) ("Although CLF unquestionably has a long-standing involvement in the issues surrounding coal-fired power plants, this commitment does not mean that it has standing to initiate an adjudicatory hearing.") JRWA has not demonstrated that it has standing to bring this appeal.

II. The 12 residents do not have standing to challenge the Chapter 91 License as a Ten Residents Group pursuant to 310 CMR 9.02 and 9.17(1)(c), as they have not alleged any specific damage the moorings may cause.

In their appeal notice, the residents group merely alleges that the Chapter 91 License "will cause damage to the environment within the meaning of G.L. c. 214, §7A and the Ten Residents group ... will suffer harm to rights that are protected under G.L. c.c. [sic] 214, §7A."[3] This bare allegation is devoid of any description of how the installation of the 2 moorings may cause "actual or probable" damage to the environment.

G.L. c. 214, §7A provides that "damage to the environment" does not include "any insignificant destruction, damage or impairment to such natural resources." As the Applicant has demonstrated, each of the two 1 ½ square inch thick moorings will be augered into the sand to a maximum embedment of 14.5 feet. Any damage to the environment resulting from such installation would be insignificant. Because they have not presented evidence to show the threshold minimum damage to the

[3] Helical moorings are found in nearly every coastal town in the Commonwealth, and their installation is quite simple and arguably environmentally benign. The installation of a helical (or helix) mooring can be viewed here: https://www.youtube.com/watch?v=TxNIZ10L_J4

environment required for jurisdiction under G.L.c.214, §7A, the residents lack standing to bring this appeal.

THE WRITTEN DETERMINATION

III. The Department properly determined that the structures and/or uses authorized by the Chapter 91 License will be located or take place within Private Tidelands.

Pursuant to 310 CMR 9.11(2)(a), for a water-dependent project, upon receipt of a Waterways License application, the Department assigns a file number, makes a determination of water dependency under 310 CMR 9.12 and issues a public notice under 310 CMR 9.13(1). Although the public notice is issued by the Department, it must be distributed and published by the license applicant. Pursuant to 310 CMR 9.13(1)(c), the public notice must contain, inter alia, a statement regarding the deadline for filing public comments and where to send them, the time and place of any public hearing, the address where the application and any draft license conditions may be reviewed, and notification of appeal rights for parties who file written comments. Within 60 days of the close of the public comment period, the Department conducts an administrative completeness review of the submitted materials to determine whether all of the necessary information is included with the application. Within 90 days of determining that the application is complete, the Department completes a technical review to ensure that the submitted materials reflect actual site conditions. Following the technical review, the Department issues a draft or final license.

Petitioners' theory that the Department participated in "discussions behind closed doors" with Applicant after the public hearing had closed and then made an "after the

fact" determination that the project site is located in private tidelands is belied by the record and was thoroughly debunked at the hearing. David Hill, the Department's Environmental Engineer who reviewed the Chapter 91 application and supporting materials in this matter, testified that when a Chapter 91 application is assigned to him, he reviews the application for completeness, makes a determination of water-dependency and issues the text of a public notice to be distributed and published by the applicant. After the public comment period ends, he performs a thorough technical review of the information in the application and determines whether the project meets the requirements set forth in the Chapter 91 regulations. He also calculates displacement and occupation fees and, if the project is approvable, drafts a Chapter 91 License/Permit or a Written Determination that authorizes the applicant to conduct the approved work with appropriate special conditions. Hill, ¶ 5.

During the hearing, Mr. Hill further testified that the public gets a copy of the public notice and a copy of the project plans submitted by the Applicant. However, the public does not receive a copy of the entire application file. The public notice states that if any member of the public wishes to review the entire file, they may contact him. Tr., at 257. Mr. Hill testified that the application in this case did not contain information relating to the location of historic high or low water. Nevertheless, he deemed it sufficiently complete for purposes of issuing public notice. Tr., at 258-259. Later in the hearing, Mr. Hill clarified that nothing in 310 CMR 9.11 requires an applicant to provide information in its initial application regarding historic high or historic low water which would enable him to render a determination as to whether the application is administratively complete for purposes

of issuing public notice. It is not until the public comment period is over that the applicant would need to provide such information if he deemed it necessary. Tr., 286-287. Thus, the process by which Mr. Hill reviewed Applicant's Chapter 91 License application in this case was entirely consistent with the procedures set out in the regulations.[4]

Mr. Hill analyzed the proposed location of the moorings to determine whether they would be located within Commonwealth Tidelands or Private Tidelands[5]. Mr. Hill utilized what the Department considers the best available information with regard to the historic low water mark in the area of the moorings' proposed location. Hill, ¶¶ 13 and 14.

Historic Low Water Mark ("HLWM") is defined at 310 CMR 9.02 as "the low water mark which existed prior to human alteration of the shoreline by filling, dredging, excavating, impounding or other means. In areas where there is evidence of such alteration *by fill*, the Department shall make its determination of the position of the historic low water mark in the same manner as described in 310 CMR 9.02: Definitions: Historic High Water Mark." (emphasis supplied)

Petitioners misconstrue the standard for determining the HLWM. The Petitioners argue that "When there has been shoreline alteration, as there has at the Project site,

[4] 310 CMR 9.11(2)(a) specifies that for Water Dependent Use projects (as this project is), within 45 days of receipt of the information required under 310 CMR **9.11(3)(a) and (b)**, the Department shall assign a file number, make a determination of water dependency, and issue a public notice. (emphasis added) A delineation of the historic high and low water marks is required under 9.11(3)(c), not 9.11(3)(a) or (b).
[5] The term Private Tidelands is defined at 310 CMR 9.02 as "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. In accordance with the Colonial Ordinances of 1641-47, the Department shall presume that tidelands are private tidelands *if they lie landward of the historic low water mark* or of a line running 100 rods (1650 feet) seaward of the historic high water mark, whichever is farther landward; such presumption may be overcome upon a showing that such tidelands, including but not limited to those in certain portions of the Town of Provincetown, are not held by a private person or upon a final judicial decree that such tidelands are not subject to said easement of the public." (emphasis supplied)

DEP shall determine the location of the (HLWM) with reference to: topographic or hydrographic surveys, previous license plans, and other historic maps or charts, which may be supplemented as appropriate by soil logs, photographs, and other documents, written records, or information sources of the type on which reasonable persons are accustomed to rely in the conduct of serious business affairs." Petitioner's Memorandum, p. 12-13. While the shoreline at the project site has undoubtedly been altered, it has been altered by *dredging* and/or *excavating*, not "by fill." Hill ¶¶ 11 and 12; Tr., at 276. The definition of HLWM directs one to the definition of Historic High Water Mark only when there is evidence of alteration "by fill." The part of the definition of Historic High Water Mark that states that "the Department shall presume the historic high water mark is the farthest landward former shoreline..." does not apply to the determination of the HLWM.

Nonetheless, Mr. Hill reviewed several sources of information in determining the HLWM, primarily relying on the "Massachusetts Chapter 91 Mapping Project, Final Report" published by the Massachusetts Coastal Zone Management Office (MassCZM) in 2006 ("the CZM Mapping Report"). Hill, ¶¶ 13 and 14. The CZM Mapping Report is considered a highly reliable source of information for determining the HLWM in Massachusetts.

With regard to the shoreline at the project site, the CZM Mapping Report incorporates a map called "U. S. Coast Survey, Western Shore of Cape Cod Bay from Eel River to Ship Pond," which was published in 1866.[6] Hill, ¶13. This historical coastal map has been overlaid onto current day Mass Geographic Information System

[6] These historical plans are referred to as "T-Sheets." The T-Sheet for the subject locus is attached to Mr. Hill's PDT as Exhibit D. As requested by the Petitioners, this T-Sheet was provided to counsel for the Petitioners via email on 5/27/2015.

(GIS) aerial photos to identify changes in the Cape Cod Bay shoreline. Hill, ¶ 13 and 14 and Hill Exhibit D. By viewing the 1866 map on current GIS photos and by scaling the distances for the location of the moorings, Mr. Hill determined that the moorings would be located landward of the HLWM and thus within Private Tidelands.

The Petitioners have not produced any competent evidence that would refute the HLWM determined by the Department.[7] The testimony of Mr. Sovick is simply unconvincing. Mr. Sovick purports to use 1955 information, which is not depicted on his Exhibit 2. The Department and Applicant used 1866 information that depicts pre-alteration conditions which are the proper starting point as directed by 310 CMR 9.02. See Sovick, ¶¶ 11-16 and Sovick Exhibit 2; Hill, ¶¶ 13, 14,17 and Hill Exhibit D; Las, ¶¶ 20-21 and Las Exhibits 5 and 6. Accordingly, the Department properly determined that the project is within Private Tidelands.

IV. The Department properly determined that the structures and/or uses authorized by the Chapter 91 License are water dependent pursuant to 310 CMR 9.12(2).

It is hard to imagine a project that would be more water-dependent than the Applicant's helical mooring installation project. The purpose of the moorings is to facilitate *the withdrawal of water* in the event the applicant's regular emergency procedures are unavailable (or in the NRC vernacular, a "beyond-design-basis-external-event").

[7] Indeed, at the hearing, Mr. Hill testified that Exhibit 9 (a plan depicting details of the shoreline prior to construction of the Pilgrim Station) and Exhibit 11 (photographs of the shoreline showing the site in the initial phases of construction) attached to Ms. duBois' written rebuttal testimony actually **support** his conclusion that the project site is located in private tidelands. Tr., at 293-297

In pertinent part, 310 CMR 9.12(1) states that "The Department shall classify as a water-dependent use project any project which consists entirely of: (a) uses determined to be water-dependent in accordance with 310 CMR 9.12(2)." 310 CMR 9.12(2) states: "The Department shall determine a use to be water-dependent upon a finding that said use requires direct access to or location in tidal or inland waters, and therefore cannot be located away from said waters." The applicant's power plant was sited on the tidal waters because its operation requires a significant volume of water for cooling purposes. The project authorized by the Chapter 91 License requires direct access to such waters because its sole purpose is to withdraw water. Hill, ¶ 18

As an "industrial … facilit(y) not listed in 310 CMR 9.12(2)(b), which … require(s) large volumes of water to be withdrawn from … a waterway for cooling, process, or treatment purposes" and which existed as of the effective date of 310 CMR 9.00, the Department shall presume that its alteration (i.e., the project) is water-dependent, and that presumption may be overcome only upon a clear showing that the proposed alteration or expansion or energy facility can reasonably be located or operated away from tidal or inland waters. See 310 CMR 9.12(2)(c) and Hill, ¶ 18. The Petitioners argue that because nearby groundwater wells could serve as another source of emergency cooling water, the Project can be located away from the tidelands. Petitioners' Memorandum of Law, pp. 19-20. However, this argument completely ignores the fact that the Applicant must be able to have access to Cape Cod Bay's seawater in order to ensure that all options required by the FLEX Strategy are available. Harizi, ¶¶ 13-16; Las, ¶¶ 25-26. Considering the nature of the project as well as the significant volume of water that would be needed in the event the

applicant's FLEX Strategy would ever come to be deployed, it would not be reasonable to conclude that the project could be located anywhere else. Thus, the Petitioners have failed to make the clear showing required by 310 CMR 9.12(2)(c) and the Department properly found that the project is water dependent.

V. The License complies with the requirements of 310 CMR 9.31 and the applicable regulations referenced therein.

The Chapter 91 License and the project authorized therein comply with all applicable requirements set forth in 310 CMR 9.31, specifically 9.31(1)(b), 9.31(1)(d), 9.31(1)(f), and 9.31(2).

310 CMR 9.31(1) sets out the basic requirements for all authorized projects. The provision at 9.31(1)(b) requires the project "to comply with applicable environmental regulatory programs of the Commonwealth according to the provisions of 310 CMR 9.33." Of the environmental regulatory programs listed in 9.33, only those listed at subparagraphs (a), (b), (f) and (g) are implicated with regard to this project. As noted by Mr. Hill, the MEPA Office determined that this project did not require MEPA review, an Order of Conditions was approved by the Plymouth Conservation Commission acknowledging the project's (and additional activities') compliance with the Wetlands Protection Act, see Las, ¶ 28, the Department properly presumed that the project is consistent with the Ocean Sanctuaries Act[8], and the Mass Division of Marine Fisheries informed DEP that it had no recommendation on the project. Hill, ¶ 20.

[8] In accordance with 310 CMR 9.13(2)(b), the "Department shall presume that a project is consistent with the Ocean Sanctuaries Act unless DCR submits a notice of its intent to participate and written comments during the public comment period." Note that it is now MassCZM that comments on projects' compliance with the OSA, and CZM did not submit any OSA comments to DEP on this project.

With regard to 9.31(1)(d), the Department properly determined that the project complies with the applicable standards governing the preservation of water-related public rights according to the provisions of 310 CMR 9.35 due to its location within the Safety and Security Exclusion Zone established by the United States Coast Guard and the public's inability to access and use the area where the project will be sited. Hill, ¶ 22. See also Harizi, ¶¶ 24-25, Harizi, Exhibits 5-6. It is also the Department's position that even if the public were to have rights to access and use this area, the presence of 2 moorings would not significantly interfere with the public's Chapter 91 rights, similar to the hundreds or thousands of other moorings along the Massachusetts coastline. Hill, ¶ 22.

With regard to 9.31(1)(f), the Department properly determined that the project complies with the applicable standards governing engineering and construction of structures according to the provisions of 310 CMR 9.37, as the helical moorings and outhauls are of a similar typical design as many other moorings along the Massachusetts coastline, and the design and construction of the project was certified as structurally sound by Eric J. Las, a Registered Professional Engineer. Hill, ¶ 23. Petitioners have not sustained their burden to show, under 310 CMR 9.37(b), that the project would pose an unreasonable threat to public health or safety. See Las, ¶¶ 15, 31(a)-(c); Harizi, ¶¶ 14, 16, 18, 19; and Applicant's Memorandum of Law, pp. 20-21.

With regard to the Proper Public Purpose provisions at 9.31(2), the regulations explicitly exempt water-dependent use projects on Private Tidelands from the requirement that the project serve a proper public purpose providing greater benefit than detriment to the rights of the public in said lands. As such, the Department was

not required to make a Proper Public Purpose determination in connection with this project. Additionally, even if the project were not located on Private Tidelands, the Department shall presume that 9.31(2) is met if the project is a water-dependent use project. 310 CMR 9.31(2)(a). As noted above, this project was determined to be water-dependent. The Petitioners have not presented any information to overcome such a presumption.

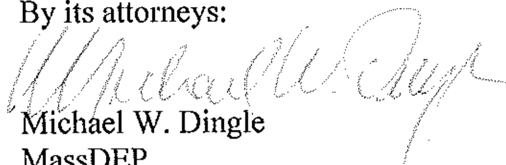
Further, if the project were deemed to be a nonwater-dependent project, the Department reasonably believes that the mooring system, which is designed and intended to be one of several options to bring cooling water to the facility in case of an emergency, would serve a proper public purpose providing greater benefit than detriment to the rights of the public in the lands where the moorings are to be located. Hill, ¶ 24; Tr., at 278-282.

CONCLUSION

The Petitioners lack standing to bring this appeal for the reasons noted herein. However, even if the Petitioners have standing to bring this appeal, the Department properly issued the Chapter 91 License for a project consisting solely of 2 standard helical moorings and associated outhaul lines. For the reasons set forth above, and based on the preponderance of credible evidence, a Recommended and Final Decision should be issued upholding the Chapter 91 License as proper and valid.

Respectfully submitted,

MassDEP
By its attorneys:



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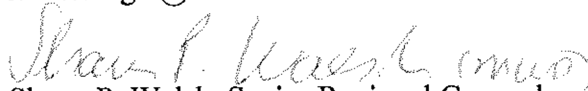

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