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Air Quality

Appeal

– Timeliness

An appeal from a New York resident of asbestos violations alleged to have occurred when he was renovating a Pittsfield house was dismissed as untimely filed where MassDEP was able to prove with sworn statements and supporting emails that the Petitioner was repeatedly told that he had to file the appeal within 21 days of issuance. The Presiding Officer also did not believe the Petitioner's claim that the Department had sent him a letter indicating that he had 21 days from his *receipt* of the PAN to file the appeal as the Petitioner was unable to produce any such letter. In response to the PAN, the Petitioner told MassDEP that he was incapable of paying the fine and could "barely pay my rent and have no savings." *In the Matter of Erkkinen (Final Decision)*, 18 DEPR 126 (2011).

A 10-citizens appeal from the renewal of an Air Quality Operating permit issued to a solid-waste incineration facility already operating for twenty years was dismissed as untimely having been filed well after the 21-day appeal period. *In the Matter of Covanta Springfield, LLC (Final Decision)*, 18 DEPR 75 (2011).

Asbestos

A Petitioner's appeal of a $53,937 penalty for asbestos-removal violations committed while removing a boiler from a five-unit apartment building in Fitchburg was dismissed for failure to submit prefiled testimony and also because the violations were clearly proven and the penalties assessed were perfectly proper. *In the Matter of Seney (Final Decision)*, 20 DEPR 45 (2013).

The Commissioner declined to reconsider his affirmance of a $54,714 PAN against an asbestos-removal firm for egregious asbestos violations at multiple sites. The decision notes the Department had amply proven its charges and that the Petitioners' motion merely repeats the conclusory claims made at hearing. *In the Matter of Patriots Environmental Corp. (Final Decision on Reconsideration)*, 20 DEPR 20 (2013).

Following the Recommended Decision of Chief Presiding Officer Salvatore M. Giorlandino, MassDEP affirmed penalties totaling $54,714 for serious asbestos and hazardous-waste violations at four locales in the Commonwealth by a Worcester-based asbestos-removal and demolition firm. Asbestos violations included failing to wet, seal, cover, or label material. This firm also failed to use the appropriate portable exhaust and air-cleaning units. *In the Matter of Patriots Environmental Corp. (Final Decision)*, 19 DEPR 295 (2012).

MassDEP affirmed a $54,937 fine imposed against the recent purchaser of a Fitchburg property for asbestos-removal violations in connection with a large furnace, where there was no question that the property owner's agent knew about the asbestos, having received a credit for abatement at closing, and Department officials were found to have properly assessed the 12 penalty factors. *In the Matter of Myrtle 107, LLC (Final Decision)*, 19 DEPR 153 (2012).

MassDEP affirmed a cumulative penalty of $54,937 imposed for the unlawful removal of one boiler covered with asbestos insulation and its placement in a pickup truck. The decision finds that the Petitioner presented no evidence that contravened the facts alleged and the penalty amount was not excessive after the consideration of the 12 penalty factors. *In the Matter of Sabbey (Final Decision)*, 19 DEPR 112 (2012).

On the recommendation of Presiding Officer Timothy M. Jones, Commissioner Kenneth Kimmell reduced asbestos-removal penalties from $246,875 to $92,575 assessed against the owner and manager of an enormous Lawrence mill, finding them not to be responsible for most of the removal violations because of the egregious conduct of subcontractors that was not reasonably foreseeable. They were found responsible for failing to notify MassDEP of the commencement of demolition and removal work inside the building and, in one instance, of failing to address piles of noncompliant asbestos debris that were required to be wetted down and contained. The decision finds the reduced penalties assessed were not excessive and that insufficient evidence was presented by the Appellants of their purported financial inability to pay the fines. *In the Matter of Wood Mill, LLC (Final Decision)*, 19 DEPR 89 (2012).

An appeal from a New York resident of asbestos violations alleged to have occurred when he was renovating a Pittsfield house was dismissed as untimely filed where MassDEP was able to prove with sworn statements and supporting emails that the Petitioner was repeatedly told that he had to file the appeal within 21 days of issuance. The Presiding Officer also did not believe the Petitioner's claim that the Department had sent him a letter indicating that he had 21 days from his *receipt* of the PAN to file the appeal as the Petitioner was unable to produce any such letter. In response to the PAN, the Petitioner told MassDEP that he was incapable of paying the fine and could "barely pay my rent and have no savings." *In the Matter of Erkkinen (Final Decision)*, 18 DEPR 126 (2011).

Penalties amounting to $18,225 assessed against a real-estate company for the attempted improper disposal and transport of asbestos roofing shingles were affirmed by DEP on the recommendation of Presiding Officer Timothy Jones who rejected the Appellant defense's of its own good faith and excessive penalty amounts. Agents of the Appellant had failed to notify DEP in advance of the shingle-removal project, used improper disposal methods, failed to label the containers containing asbestos, and attempted to dispose of the shingles at a facility not licensed for asbestos. *In the Matter of Franklin Office Park Realty Corp. (Final Decision)*, 18 DEPR 61 (2011).

Asphalt Plant

A proposed Final Permit for an existing concrete-batching plant in Sheffield negotiated by the Western Regional Office was emphatically rejected by the Commissioner as inconsistent with the law for fugitive and dust emissions and for also failing to adequately address sound emissions. Despite the recent implementation of management practices required by the proposed permit, and the construction of a berm, the Intervenors were able to establish continuing nuisance-level releases of dust and sand. The decision remands the matter to the region for further permitting proceedings. *In the Matter of Century Acquisition, Inc. (Decision Adopting Recommended Remand Decision)*, 20 DEPR 1 (2013).

Comprehensive Air Quality Plan Approval

MassDEP adopted the Recommended Decision of Presiding Officer Philip Weinberg dismissing a Ten Residents' petition challenging a non-major comprehensive air-quality plan approval that allowed SEMASS to receive and process fat, oil, and grease wastewater and to blend it with fuel oil. The decision found that the Petitioners' Notice of Claim failed to state a viable claim that the combustion of Biofuel, as conditioned by the comprehensive air-quality plan, violated air-quality regulations on the grounds that the Biofuel constituted sewage sludge. In addition, Presiding Officer Weinberg ruled that the Department was correct in ruling that Appendix A, regarding emissions offsets, did not apply because the changes approved by the CPA did not constitute a major modification of the facility. *In the Matter of SEMASS Partnership (Final Decision)*, 18 DEPR 46 (2011).

Evidence

– Hearsay

Presiding Officer Timothy M. Jones accepted hearsay evidence from a MassDEP environmental analyst regarding statements from individuals involved in the unlawful disposal of asbestos where the Appellant failed

to produce these individuals as witnesses before the Department and the hearsay evidence itself suggested sufficient indicia of reliability. *In the Matter of Franklin Office Park Realty Corp. (Final Decision)*, 18 DEPR 61 (2011).

Incinerators

MassDEP dismissed an appeal from a residents group challenging a "Conditional Approval to Construct" a 400-megawatt electric-power generating facility in Westfield, rejecting its claim that the proponent's air modeling did not meet regulatory standards or that MassDEP did not satisfy public-comment requirements. The decision also takes note of the fact that the Department properly addressed water-policy considerations in deciding, on balance, that the use of wet cooling was more protective of the environment. *In the Matter of Pioneer Valley Energy Center, LLC (Final Decision)*, 18 DEPR 157 (2011).

Chief Presiding Officer Salvatore M. Giorlandino ruled that an appeal from the renewal of a municipal incinerator permit failed to state grounds on which relief could be granted because the permit did not authorize a significant net emissions release" and the Appellant's claims of MEPA violations were non-justiciable before MassDEP's administrative forum. The Chief Presiding Officer also dismissed the Appellant's claims that the Department failed to accurately measure solid-waste weight and that the permit violated the current moratorium on the expansion of incinerators. In finalizing the decision, Commissioner Kenneth Kimmell noted that the Appellant was a business competitor of the Applicant and, following this filing of a third unsuccessful administrative appeal, it might consider more productive methods of business competition. *In the Matter of Covanta Springfield, LLC (Final Decision)*, 18 DEPR 75 (2011).

Penalties and Fines

– Ability to Pay

The Commissioner adopted without comment the Recommended Decision of Presiding Officer Salvatore M. Giorlandino affirming a $50,412 PAN assessed against the owner of an industrial building in Worcester and denying a motion for reconsideration. The Petitioner claimed that the $1.8 million lien that the US EPA had placed on the site rendered it unable to pay the fine but the Petitioner failed to submit any of the financial records requested by the Department necessary to evaluate that claim. *In the Matter of Peltier (Final Decision on Reconsideration)*, 19 DEPR 191 (2012).

The owner and manager of a Lawrence mill undergoing renovation, and fined for asbestos-removal violations, failed to adduce convincing evidence of their inability to pay penalties totaling $92,575, where the only documents they offered into evidence were a single paragraph of conclusory testimony from a manager, unsigned tax returns, and internally recreated balance sheets. In contrast, MassDEP's expert offered convincing, but unspecified, testimony of their ability to pay. *In the Matter of Wood Mill, LLC (Final Decision)*, 19 DEPR 89 (2012).

Based on the Recommended Decision of Presiding Officer Kenneth F. Langley, MassDEP affirmed a $500 Reporting Penalty Assessment against a Methuen gasoline-station operator who failed to file an annual compliance certificate for a Stage II vapor-control system. The decision found that the Petitioner had failed on at least two occasions to file the certificate and that the $500 penalty was not excessive or beyond the Petitioner's means to pay. *In the Matter of Babak Sardash Ayers Village Automotive, Inc. (Final Decision)*, 18 DEPR 53 (2011).

The appeal from an asbestos-removal contractor from penalties for asbestos violations was dismissed for failure to respond to an order to show cause and failure to prosecute the appeal. The Recommended Decision by Presiding Officer Salvatore M. Giorlandino noted that the Department had proven the Petitioner's violations and properly calculated the penalty, taking into account its ability to pay. *In the Matter of Act Abatement Corp. (Final Decision)*, 18 DEPR 2 (2011).

– General

A Petitioner's appeal of a $53,937 penalty for asbestos-removal violations committed while removing a boiler from a five-unit apartment building in Fitchburg was dismissed for failure to submit prefiled testimony and also because the violations were clearly proven and the penalties assessed were perfectly proper. *In the Matter of Seney (Final Decision)*, 20 DEPR 45 (2013).

Following the Recommended Decision of Chief Presiding Officer Salvatore M. Giorlandino, MassDEP affirmed penalties totaling $54,714 for serious asbestos and hazardous-waste violations at four locales in the Commonwealth by a Worcester-based asbestos-removal and demolition firm. *In the Matter of Patriots Environmental Corp. (Final Decision)*, 19 DEPR 295 (2012).

MassDEP denied a Motion for Reconsideration of penalties in the amount of $92,575 assessed against the owner and manager of a Lawrence mill undergoing renovation. The denial notes that the arguments presented were never previously raised and therefore should be denied summarily. Nevertheless, the decision goes on to reject the Petitioners' substantive arguments regarding separate notification requirements for different parts of a project and that dirt piles outside the mill did not qualify as facilities. *In the Matter of Wood Mill, LLC (Final Decision on Reconsideration)*, 19 DEPR 169 (2012).

MassDEP affirmed a cumulative penalty of $54,937 imposed for the unlawful removal of one boiler covered with asbestos insulation and its placement in a pickup truck. The decision finds that the Petitioner presented no evidence that contravened the facts alleged and the penalty amount was not excessive after the consideration of the 12 penalty factors. *In the Matter of Sabbey (Final Decision)*, 19 DEPR 112 (2012).

– Intentional Conduct

MassDEP affirmed a $54,937 fine imposed against the recent purchaser of a Fitchburg property for asbestos-removal violations in connection with a large furnace, where there was no question that the property owner's agent knew about the asbestos, having received a credit for abatement at closing, and Department officials were found to have properly assessed the 12 penalty factors. *In the Matter of Myrtle 107, LLC (Final Decision)*, 19 DEPR 153 (2012).

The owner and manager of a Lawrence mill undergoing renovation, and fined for asbestos-removal violations, were responsible for the willful violation of regulations. MassDEP was not required to show any proof of bad faith in assigning responsibility. *In the Matter of Wood Mill, LLC (Final Decision)*, 19 DEPR 89 (2012).

Penalties amounting to $18,225 assessed against a real-estate company for the attempted improper disposal and transport of asbestos roofing shingles were affirmed by MassDEP on the recommendation of Presiding Officer Timothy M. Jones who rejected the Appellant's defense of its own good faith, finding that the violations were willful and not the result of any error. *In the Matter of Franklin Office Park Realty Corp. (Final Decision)*, 18 DEPR 61 (2011).

Practice and Procedure

– Motion for Reconsideration

The Commissioner declined to reconsider his affirmance of a $54,714 PAN against an asbestos-removal firm for egregious asbestos violations at multiple sites. The decision notes the Department had amply proven its charges and that the Petitioners' motion merely repeats the conclusory claims made at hearing. *In the Matter of Patriots Environmental Corp. (Final Decision on Reconsideration)*, 20 DEPR 20 (2013).

The Commissioner adopted without comment the Recommended Decision of Presiding Officer Salvatore M. Giorlandino affirming a $50,412 PAN assessed against the owner of an industrial building in Worcester and denying a motion for reconsideration. The Petitioner claimed that the $1.8 million lien that the US EPA had placed on the site rendered it unable to pay the fine but the Petitioner failed to submit any of the financial records requested by the Department necessary to evaluate that claim. *In the Matter of Peltier (Final Decision on Reconsideration)*, 19 DEPR 191 (2012).

MassDEP denied a Motion for Reconsideration of penalties in the amount of $92,575 assessed against the owner and manager of a Lawrence mill undergoing renovation. The denial notes that the arguments presented were never previously raised and therefore should be denied summarily. Nevertheless, the decision goes on to reject the Petitioners' substantive arguments regarding separate notification requirements for different parts of a project and that dirt piles outside the mill did not qualify as facilities. *In the Matter of Wood Mill, LLC (Final Decision on Reconsideration)*, 19 DEPR 169 (2012).

MassDEP saw no reason to grant a violator's Motion to Reconsider a $54,937 penalty for egregious asbestos-removal violations that were willful and amply demonstrated by extensive testimonial, documentary, and photographic evidence. *In the Matter of Sabbey (Final Decision on Reconsideration)*, 19 DEPR 163 (2012).

– Motion to Dismiss

The appeal from an asbestos-removal contractor from penalties for asbestos violations was dismissed for failure to respond to an order to show cause and failure to prosecute the appeal. The Recommended Decision by Presiding Officer Salvatore M. Giorlandino noted that the Department had proven the Petitioner's violations and properly calculated the penalty, taking into account its ability to pay. *In the Matter of Act Abatement Corp. (Final Decision)*, 18 DEPR 2 (2011).

Sound Regulation

A proposed final permit for a concrete-batching plant in Sheffield was rejected by the Commissioner as inconsistent with MassDEP regulations controlling sound, where the operator had submitted a series of severely flawed sound studies and where the proposed permit would have only required the Permittee to conduct sound tests 220 days *after* the permit's issuance. *In the Matter of Century Acquisition, Inc. (Decision Adopting Recommended Remand Decision)*, 20 DEPR 1 (2013).

Standing

– Ten Residents

Commissioner Kenneth Kimmell rejected a Recommended Decision of Presiding Officer Timothy M. Jones who had ruled that neither the Conservation Law Foundation nor a 10-resident group had standing to challenge MassDEP permits for a biomass-fired electrical plant. The Presiding Officer had also concluded that the application process for an air-quality permit was not an adjudicatory proceeding and that such an adjudicatory proceeding could only be invoked by the applicant under c. 30A. The Commissioner, in contrast, determined that an air-quality permit proceeding is, in fact, an adjudicatory proceeding that begins when the application is filed and that a citizen group may intervene. In future cases, the Commissioner ruled that an intervention must be filed before the issuance of the final decision. Substantively, this decision affirms the air-quality permit. *In the Matter of Palmer Renewable Energy, LLC (Final Decision)*, 19 DEPR 205 (2012).

Presiding Officer Timothy M. Jones ruled that neither the Conservation Law Foundation nor a 10-resident group had standing to challenge MassDEP issued permits for a biomass-fired electrical plant after concluding that the application process for an air-quality permit was not an adjudicatory proceeding and that such an adjudicatory proceeding could only be invoked by the applicant under c. 30A. The Presiding Officer also found that the resident group lacked standing under 310 CMR 1.01(6) and (7) based on direct personal or concrete harm since those provisions only gave a right to intervene in an ongoing adjudicatory proceeding—not the right to initiate one. Finding the issue of standing to appeal air-quality permits by 10 resident groups to have been inconsistently addressed by prior MassDEP adjudicatory decisions with little judicial precedent, Commissioner Kenneth Kimmell sent the matter back to Presiding Officer Jones to resolve the substance of the appeal and took the issue of standing under advisement pending the receipt of a Recommended Final Decision addressing the merits. *In the Matter of Palmer Renewable Energy, LLC (Interlocutory Remand Decision)*, 18 DEPR 238 (2011).

MassDEP declined to find that a 16-resident group challenging air-quality permits for an electric-generating facility lacked standing to do so because they had failed to intervene during the permit proceedings. A Superior Court judge had recently ruled against the Department on this issue in another proceeding and the matter was on appeal. *In the Matter of Pioneer Valley Energy Center, LLC (Final Decision)*, 18 DEPR 157 (2011).

Presiding Officer Philip Weinberg declined to dismiss a Ten Residents' petition challenging a non-major comprehensive air-quality plan approval on the grounds that the group lacked standing because it failed to intervene earlier in the adjudicatory hearing. The decision notes the law on adjudicatory participation is unclear pending the filing of an appeal of a Suffolk Superior Court decision in *Conservation Law Foundation v. Dept. of Environmental Protection et al. In the Matter of SEMASS Partnership (Final Decision)*, 18 DEPR 46 (2011).

Clean Waters Act

Jurisdiction

Adopting the Recommended Decision of Chief Presiding Officer Salvatore M. Giorlandino, MassDEP Commissioner Kenneth Kimmell ruled that the Department had jurisdiction under the Massachusetts Clean Waters Act and Reclaimed Water Regulations to regulate a municipal solid-waste combustion facility's reuse of the wastewater generated from the recycling of FOG materials for the facility's Spray Dryer Absorber and NOxOUT system. *In the Matter of SEMASS Partnership (Final Decision)*, 20 DEPR 72 (2013).

Surface Water Discharge Permit

A DALA Magistrate recommended the dismissal of a petitioner group's appeal of NDPES surface-water discharge permits authorizing the discharge of treated Newburyport wastewater into the Merrimack River, finding that these issues had been previously resolved in a parallel federal permitting process or during a fully litigated federal appeal. The substantive issues presented by the appeal related to the measurement of total discharge and limits on the mass and concentration of chlorine. Commissioner Kenneth Kimmell generally adopted Magistrate James P. Rooney's Recommended Decision and its result but ruled that MassDEP regulations did, in fact, allow mixing zones for discharges. The Petitioners had waived the issue and failed to present expert testimony regarding chlorine discharge. *In the Matter of City of Newburyport Wastewater Treatment Facility (Final Decision)*, 19 DEPR 25 (2012).

Wastewater Reuse

Adopting the Recommended Decision of Chief Presiding Officer Salvatore M. Giorlandino, MassDEP Commissioner Kenneth Kimmell ruled that the Department had jurisdiction under the Massachusetts Clean Waters Act and Reclaimed Water Regulations to regulate a municipal solid-waste combustion facility's reuse of the wastewater generated from the recycling of FOG materials for the facility's Spray Dryer Absorber and NOxOUT system. The Final Decision goes on to find that MassDEP

properly issued the Reclaimed Water Permit pursuant to the "grandfathering" clause of the Reclaimed Water Regulations. *In the Matter of SEMASS Partnership (Final Decision)*, 20 DEPR 72 (2013).

Climate Change

GWSA

Commissioner Kenneth Kimmell adopted the Recommended Decision of Presiding Officer Timothy M. Jones that the Department had sufficiently considered climate-change impacts in issuing a sewer-connection permit for an electrical-generating facility and had made the associated MEPA findings. In a case of first impression, the Commissioner found that the amendments to MEPA adopted by the Global Warming Solutions Act would require MassDEP to comment on projects and, at a minimum, incorporate the MEPA certificate's CHG emission-reduction measures into its Section 61 findings that accompany a permit. The Commissioner disagreed with the Presiding Officer that the Department would only need to "consider" CHG emissions rather than make specific findings. More importantly, he also disagreed with Presiding Officer Jones that MassDEP's consideration of greenhouse-gas emissions is limited to the subject matter of the permit in question, finding that the Department could consider the climate-change impacts of projects irrespective of whether greenhouse-gas emissions are within the purview of the specific permit in question. *In the Matter of Pioneer Valley Energy Center, LLC (Final Decision)*, 18 DEPR 217 (2011).

Groundwater Discharge Permit

Penalties and Fines

MassDEP agreed to a dramatic reduction in penalty amount from $158,000 to $23,162 for violations of groundwater-discharge regulations in connection with the operation of a private on-site wastewater treatment facility. The Department agreed the reduction was appropriate because the facility was once again in compliance with discharge limits and the penalty would be paid by residential condominium unit holders who would likely discourage future violations. *In the Matter of Stonebridge Commons Condominium Trust (Final Decision)*, 21 DEPR 18 (2014).

MassDEP dropped a $12,650 penalty assessment against a Sturbridge brewery for unlawful ground- and surface-water discharges, executing a settlement agreement requiring the company to henceforth adhere to regulatory requirements and draft a plan to do so. *In the Matter of Pioneer Brewing Company, LLC (Final Decision)*, 21 DEPR 17 (2014).

Settlement Discussions

MassDEP approved a modified settlement agreement for a groundwater discharge permit covering a massive multi-use project in Plymouth with 1,175 new residences and 135,000 square feet of commercial and recreational buildings. The agreement modifies a 2010 accord reached with the Buzzards Bay Coalition and imposes additional measures to assure a "no net" nitrogen load impact that might impact the Agawam/Wareham River Estuarine Watershed. These measures include elimination of certain fertilizers, reservation of treatment capacity in the sewage-treatment facility, and the reaffirmation of the creation of a $500,000 developer-financed fund to be used to reduce other sources of nitrogen. *In the Matter of River Run WWTF (Amended Final Decision)*, 21 DEPR 97 (2014).

Wastewater Treatment Plants

On remand from the Middlesex Superior Court, MassDEP ruled that a proposed Hopkinton wastewater-treatment plant did not impact an Outstanding Resource Water; nor did it require a Water Quality Certificate since construction would not displace more than 5,000 s/f of BVW and would benefit from a utility-work exemption. The Department's alteration of its regulatory position on the stream's ORW designation was also found not to violate the principle of reasoned consistency since the basis for the agency's change in position was adequately explained. *In the Matter of Town of Hopkinton (Final Decision)*, 18 DEPR 172 (2011).

Hazardous Waste

Appeals

MassDEP dismissed a late-filed appeal of a hazardous-waste penalty assessed against an attorney whose only excuse was a busy schedule. The matter arose from her contractor's excavations at a contaminated home-building site where the Appellant failed to secure Department approval to perform the excavation, have the work supervised by an LSP, or prevent the mixing of contaminated soils with non-contaminated soils. *In the Matter of Gould (Final Decision)*, 21 DEPR 88 (2014).

An appeal from a gasoline-station owner of a $500 Standard Penalty Assessment Notice was dismissed by MassDEP because it was filed more than two months after the 21-day filing deadline. The fine related to the alleged failure of the Appellant to have an UST inspected. *In the Matter of Ayers Village Automotive (Final Decision)*, 19 DEPR 111 (2012).

Penalties and Fines

– Ability to Pay

An appeal by a home-heating oil company of a Unilateral Administrative Order was dismissed by the Department after the parties agreed to various remedial and security measures that included the establishment of a bank account to allow the Petitioner to finance over time the future investigation of releases of fuel oil at a loading shed. The Petitioner had presented tax returns showing its inability to finance any investigatory work at the present time. *In the Matter of Vincent Oil Company (Final Decision)*, 20 DEPR 54 (2013).

On the recommendation of Chief Presiding Officer Salvatore M. Giorlandino, Commissioner Kenneth Kimmel dismissed an appeal of a $35,000 PAN arising from a fuel-oil spill after the Petitioner failed to supply necessary financial information, furnish prefiled testimony, or generally comply with scheduling orders or appear for the hearing. *In the Matter of Kalami Fuels, Inc. (Final Decision)*, 19 DEPR 193 (2012).

Based on a Recommended Decision from Presiding Officer Salvatore M. Giorlandino, the Department affirmed a $40,520 penalty for hazardous-waste violations against a corporation for previous operations manufacturing circuit boards at a property in Holden that was also an EPA hazardous-waste cleanup site. The bulk of the penalty was for failing to remove containers contaminated with hazardous waste when the company ceased operations, creating a threat of toxic releases. The decision concluded that the Petitioner was shown to have an ability to pay the fine because of the presumption of financial capacity arising from its failure to provide DEP with copies of its previous three years of tax returns. In addition, the Petitioner was shown to have $168,715 in equity in the property despite a dearth of liquid assets. The equity figure was arrived at by deducting the amount of outstanding tax and EPA-cleanup liens from the property's $725,000 assessed value. *In the Matter of ECC Corp. (Final Decision)*, 18 DEPR 119 (2011).

– Administrative Consent Order With Penalty

In a creative resolution to a decade-old dispute over a 25-acre Northbridge automobile fueling, repair, and crushing site on the Blackstone River in longstanding violation of numerous provisions of the hazardous waste, wetlands, and solid waste regulations, Commissioner Kenneth Kimmell authorized a settlement that allowed the Petitioner to escape a $68,613 fine by investing the same sum into compliance and remediation. The

agreement also requires the landowner to cede conservation restrictions and trails over the site and construct a canoe launch. *In the Matter of Northbridge Auto Wrecking, Inc. (Final Decision)*, 20 DEPR 56 (2013).

– Fines

MassDEP affirmed a $27,875 fine against a Wilmington dentist who repeatedly failed to comply with regulations covering dental amalgam wastewater and falsely certified that he had. The dentist, James A. Ficociello, is a long serving member and former chairman of the Wilmington Board of Health. *In the Matter of Ficociello (Final Decision)*, 21 DEPR 137 (2014).

MassDEP dismissed the appeal of a Woburn printer for failing to prosecute its appeal of a $500 penalty for failure to file a completed Environmental Results Form. *In the Matter of Hannaford & Dumas Corp. (Final Decision)*, 20 DEPR 147 (2013).

The Commissioner signed off on a settlement agreement resolving a 2004 enforcement order that had imposed a $119,000 penalty for hazardous-waste violations at a property in Burlington. The settlement agreement reduces the penalty to $20,000 to be paid in 30 days, adds in $5,200 for costs to the Commonwealth, and would impose an additional $20,000 penalty in the event of future violations. *In the Matter of Kelly (Final Decision)*, 20 DEPR 116 (2013).

Following the Recommended Decision of Chief Presiding Officer Salvatore M. Giorlandino, MassDEP affirmed penalties totaling $54,714 for serious asbestos and hazardous-waste violations at four locales in the Commonwealth by a Worcester-based asbestos-removal and demolition firm. Hazardous-waste violations included the failure to transfer waste oil to authorized facilities, failure to store materials in closed containers, and the failure to put in place a proper outdoor containment system for hazardous wastes stored outside. *In the Matter of Patriots Environmental Corp. (Final Decision)*, 19 DEPR 295 (2012).

Commissioner Kenneth Kimmell affirmed a $31,000 penalty against a *pro se* Montague property owner for failure to take action to address a leaking 275-gallon oil tank in a basement. The Petitioner generally refused to proceed with the prosecution, contending repeatedly that the Department lacked the authority to issue PANs to private-property owners. *In the Matter of Golrick (Final Decision)*, 19 DEPR 165 (2012).

Commissioner Kenneth Kimmell affirmed a $10,787 penalty assessed against a South Natick industrial-property owner for repeatedly failing to report excessive concentrations of TCE to MassDEP. The Petitioner unsuccessfully claimed that he was exempt from reporting because an RAO statement had been filed and because the LSP had interchanged sampling results from different tests throughout the locus. Although the penalty amount was affirmed as reasonable, the Commissioner took note of the fact that, if anything, the penalty was far too small as the Petitioner was being fined for only one day of violation when he had actually failed to comply with the reporting requirements for almost two years. *In the Matter of Knott (Final Decision)*, 19 DEPR 67 (2012).

– General

An appeal from a gasoline-station owner of a $500 Standard Penalty Assessment Notice was dismissed by MassDEP because it was filed more than two months after the 21-day filing deadline. The fine related to the alleged failure of the Appellant to have an UST inspected. *In the Matter of Ayers Village Automotive (Final Decision)*, 19 DEPR 111 (2012).

– Pleading

The Department dismissed the appeal of a Leominster landowner who failed to remediate a diesel-fuel leak for which he was assessed a $44,925 penalty. The Petitioner failed to respond to an order requiring him to address pleading deficiencies that included a failure to contest liability, the amount of the fines, and his own ability to pay. *In the Matter of Moore (Final Decision)*, 20 DEPR 101 (2013).

– Priority Lien

A $27,035 priority Chapter 21E lien was affirmed by MassDEP to reimburse the Department for response actions performed in connection with the release of PCEs used in the dry-cleaning business of a *pro se* Worcester tailor. The Department had paid for indoor air sampling, a soil-gas survey, and remediation. *In the Matter of Raheb (Final Decision)*, 20 DEPR 15 (2013).

Practice and Procedure

– Motion for Reconsideration

In denying a Petitioner's Motion for Reconsideration, the Commissioner affirmed the dismissal of an appeal from the Department's denial of the renewal of a hazardous-waste transporter license for failure of the Petitioner to file its prefiled witness testimony. The company's license renewal was denied because of a continuous pattern of noncompliance with regulatory standards. The Petitioner's motion supplied no new information or claims that had not been previously considered and it was indisputable that it had failed to submit prefiled testimony. *In the Matter of Autobody Solvent Recovery Corp. (Final Decision on Reconsideration)*, 21 DEPR 86 (2014).

– Motion to Dismiss

The Commissioner affirmed the dismissal of an appeal from the Department's denial of the renewal of a hazardous-waste transporter license for failure of the Petitioner to file its prefiled witness testimony. The company's license renewal was denied because of a continuous pattern of noncompliance with regulatory standards. *In the Matter of Autobody Solvent Recovery Corp. (Final Decision)*, 21 DEPR 55 (2014).

On the recommendation of Chief Presiding Officer Salvatore M. Giorlandino, Commissioner Kenneth Kimmel dismissed an appeal of a $35,000 PAN arising from a fuel-oil spill after the Petitioner failed to supply necessary financial information, furnish prefiled testimony, or generally comply with scheduling orders or appear for the hearing. *In the Matter of Kalami Fuels, Inc. (Final Decision)*, 19 DEPR 193 (2012).

Transporter's License

In denying a Petitioner's Motion for Reconsideration, the Commissioner affirmed the dismissal of an appeal from the Department's denial of the renewal of a hazardous-waste transporter license for failure of the Petitioner to file its prefiled witness testimony. The company's license renewal was denied because of a continuous pattern of noncompliance with regulatory standards. The Petitioner's motion supplied no new information or claims that had not been previously considered and it was indisputable that it had failed to submit prefiled testimony. *In the Matter of Autobody Solvent Recovery Corp. (Final Decision on Reconsideration)*, 21 DEPR 86 (2014).

The Commissioner affirmed the dismissal of an appeal from the Department's denial of the renewal of a hazardous-waste transporter license for failure of the Petitioner to file its prefiled witness testimony. The company's license renewal was denied because of a continuous pattern of noncompliance with regulatory standards. *In the Matter of Autobody Solvent Recovery Corp. (Final Decision)*, 21 DEPR 55 (2014).

Public Health

Dental Practices

A $500 compliance penalty against a Back Bay dental practice for failing to submit a compliance certification for an approved amalgam separator was affirmed as reasonable and in accordance with prior departmental precedent. *In the Matter of Copley Dental Associates (Final Decision)*, 20 DEPR 123 (2013).

Practice and Procedure

– Res Judicata

An administrative appeal from the operator of a piggery in Deerfield challenging the Board of Health's issuance of site assignments under G.L. c.111, Section 143 was dismissed on the recommendation of Chief Presiding Officer Salvatore Giorlandino as *res judicata* since the Franklin Superior Court had issued a final judgment on the issue in a parallel judicial proceeding and because the Petitioner had failed to prosecute the DEP appeal. The fact that the Superior Court's decision was on appeal to the Appeals Court did not prevent the decision from being considered final for purposes of dismissing the DEP appeal. *In the Matter of Town of Deerfield (Final Decision)*, 18 DEPR 190 (2011).

Regulation of Piggeries

Based on the recommendation of Chief Presiding Officer Salvatore M. Giorlandino, the Commissioner dismissed the appeal of Haverhill piggery proponent who had been denied site-plan approval by the local Board of Health. MassDEP lacks jurisdiction over Board of Health actions governing piggeries that do not involve site assignments. *In the Matter of Stasinos (Final Decision)*, 19 DEPR 17 (2012).

An administrative appeal from the operator of a piggery in Deerfield challenging the Board of Health's issuance of site assignments under G.L. c.111, Section 143 was dismissed on the recommendation of Chief Presiding Officer Salvatore Giorlandino as res judicata since the Franklin Superior Court had issued a final judgment on the issue in a parallel judicial proceeding and because the Petitioner had failed to prosecute the DEP appeal. The fact that the Superior Court's decision was on appeal to the Appeals Court did not prevent the decision from being considered final for purposes of dismissing the DEP appeal. *In the Matter of Town of Deerfield (Final Decision)*, 18 DEPR 190 (2011).

Rivers Protection

Alternatives Analysis

MassDEP found that the alternatives analysis presented for a school-building project's "crumb rubber" artificial-turf field was sufficient in showing that an off-campus field would be problematic or that a natural or alternative material turf field should be used. *In the Matter of Town of Wilmington (Final Decision)*, 19 DEPR 263 (2012).

Evidence

– Hearsay

A watercourse on property in Manchester-by-the Sea designated as perennial on the most recent USGS map was not found to have been shown to be intermittent after the Department rejected observations reported on a stream log prepared by the Conservation Administration as both hearsay and ambiguous in content. *In the Matter of Soursourian (Final Decision)*, 21 DEPR 63 (2014).

Exemptions

Commissioner David W. Cash affirmed Chief Presiding Officer Salvatore M. Giorlandino's dismissal of a Motion for Reconsideration of a decision dismissing an appeal from an abusive *pro se* landowner claiming that his use of an Uxbridge dirt lane for site development, earth removal, and tree-logging qualified for an exemption from Riverfront regulations. In contrast to the Petitioner's reliance on his own lay testimony, the Department had presented the testimony of two highly qualified and experienced wetlands experts that emphasized the significant impact of the proposed work on various resource areas. *In the Matter of Vecchione (Final Decision on Reconsideration)*, 21 DEPR 116 (2014).

An appeal from an Uxbridge developer seeking grandfathering and agricultural-use exemptions from Riverfront Area regulations in order to construct a subdivision roadway was rejected by Presiding Officer Salvatore M. Giorlandino and affirmed by the Commissioner. With regard to the specific exemption asserted, that of a grandfathered roadway, the project did not qualify because the proposed use would entail heavy truck traffic and significantly impact protected wetland areas along the route, including BLSF, ILSF, BVW, and vernal pools. *In the Matter of Vecchione (Final Decision)*, 21 DEPR 99 (2014).

An appeal from an Uxbridge developer seeking agricultural-use exemptions from Riverfront Area regulations in order to construct subdivision roadway was rejected by Presiding Officer Salvatore M. Giorlandino, where the locus was almost entirely woodland, had never been exploited agriculturally, and was on the market for real-estate development. *In the Matter of Vecchione (Final Decision)*, 21 DEPR 99 (2014).

A landowner appeal challenging a SORAD from the Northeast Regional Office finding a watercourse on his property to be perennial and not intermittent was rejected by Commissioner David W. Cash, who also dismissed an alternate argument that the watercourse might be exempt from regulation as a manmade canal. The landowner failed to demonstrate that the watercourse was artificially created or continued to be operated as a canal. *In the Matter of Soursourian (Final Decision)*, 21 DEPR 63 (2014).

Intermittent Stream

A watercourse on property in Manchester-by-the Sea designated as perennial on the most recent USGS map was not found to have been shown to be intermittent after the Department rejected observations reported on a stream log prepared by the Conservation Administration as ambiguous and conflicting. *In the Matter of Soursourian (Final Decision)*, 21 DEPR 63 (2014).

Presiding Officer Pamela D. Harvey ruled that drainage channels and basins at a proposed Andover affordable-housing project were stormwater-management systems and not resource areas for purposes of maintenance. She also found that a drainage channel had not been shown by the Petitioners to be an intermittent stream merely based on the presence of wetland-indicator species absent a dominance test, soil evaluation, or other analysis along the drainage channel that would show saturated or inundated conditions. *In the Matter of Boston Properties LP (Final Decision)*, 19 DEPR 126 (2012).

Based on the Recommended Decision of Chief Presiding Officer Salvatore M. Giorlandino, MassDEP affirmed its SDA upholding an earlier Stoughton Conservation Commission determination that a proposed single-family home project site included Bordering Vegetated Wetlands associated with an intermittent stream. The Petitioner's wetlands consultant had claimed that the drainage ditch, found by MassDEP to be an intermittent stream, should be considered a "non-stream upgradient of all BVW areas." *In the Matter of Pickering (Final Decision)*, 19 DEPR 85 (2012).

Perennial Stream

Presiding Officer Timothy M. Jones did not agree with the Department that an appeal challenging an SDA that concluded a Rowley stream was perennial was moot because the Applicant had failed to appeal the denial under the local wetlands bylaw since there was no evidence whatsoever that the Commission's perenniality decision was based on anything other than the Wetlands Protection Act. *In the Matter of Tompkins-Desjardins Trust (Final Decision)*, 18 DEPR 82 (2011).

Practice and Procedure

– Change in Position by DEP

The fact that MassDEP abandoned its reliance on beaver dams as an impoundment after the issuance of a SORAD, but before it presented its direct case on this appeal concerning stream perenniality, could not be considered reversible error in view of longstanding precedent allowing the Department to change positions during the course of an appeal. *In the Matter of Soursourian (Final Decision)*, 21 DEPR 63 (2014).

Riverfront Area

On the recommendation of Presiding Officer Timothy M. Jones, the Commissioner dismissed appeals from opponents of a Wilmington school-building project who were challenging the replacement of a natural-turf athletic field with a "crumb rubber" artificial-turf field. In accordance with a recent MassDEP decision regarding a similar field proposed for the Fenn School, the Final Decision holds that the Petitioners failed to meet their burden to show that the chemical constituents in the base materials of the artificial turf would leach into and adversely affect Riverfront Area, or that the alternatives analyses submitted by the Applicant were inadequate. *In the Matter of Town of Wilmington (Final Decision)*, 19 DEPR 263 (2012).

A Wareham landowner's wetlands scientists erred in delineating a tidal riverfront area by reference to riverine characteristics when MassDEP regulations require tidal rivers to be defined by the Massachusetts Mouth of Coastal River Maps. Moreover, testimony from the Department helped to refute the Petitioner's experts contention that the embayment in question lacked riverine characteristics based on their observations of waterflow, shellfish, and vegetation in the area. *In the Matter of Job's Island Realty Trust (Final Decision)*, 19 DEPR 33 (2012).

Solid Waste

Penalties and Fines

MassDEP allowed the entry of an order of dismissal relating to an appeal from the Town of Southbridge of a Unilateral Administrative Order requiring it to undertake various actions in connection with the implementation of an erosion and sedimentation plan. The dismissal notes that Southbridge does not contest the necessary measures required by the UAO and has implemented, or is in the process of implementing, these measures. The Department agreed not to pursue any administrative or civil penalties for any alleged past violations described in the UAO. *In the Matter of Southbridge Recycling & Disposal Park, Inc. (Final Decision)*, 21 DEPR 91 (2014).

Upon the recommendation of Presiding Officer Salvatore M. Giorlandino, MassDEP affirmed a penalty of $12,150 against a Douglas homeowner who buried 28 computer monitors and other equipment against a block wall he was constructing in order to buttress the wall. The penalty was determined to have been properly calculated in accordance with the 12 factors that must be considered and the Appellant was found by the Department's financial expert to have the ability to pay based on a recent $76,500 real-estate profit and a brokerage account valued at $123,675. *In the Matter of Kiley (Final Decision)*, 18 DEPR 86 (2011).

Penalties amounting to $18,225 assessed against a real-estate company for the attempted improper disposal and transport of asbestos roofing shingles were affirmed by MassDEP on the recommendation of Presiding Officer Timothy M. Jones who rejected the Appellant defense of its own good faith and excessive penalty amounts. Agents of the Appellant had failed to notify the Department in advance of the shingle-removal project, used improper disposal methods, failed to label the containers containing asbestos, and attempted to dispose of the shingles at a solid-waste facility not licensed for asbestos. *In the Matter of Franklin Office Park Realty Corp. (Final Decision)*, 18 DEPR 61 (2011).

Title 5

Alternative Systems

– Calculation of Design Flow

A proponent of a 92-unit assisted-living project in Seekonk did not have the right to appeal the Department's denial of its request to use an alternative Title 5 septic-system design flow where it argued that regulations did not specifically address assisted-living projects but were limited to elderly housing, nursing homes, and rest homes. Adopting a Recommended Decision from Presiding Officer Pamela D. Harvey, Commissioner David W. Cash found that Department regulations simply do not provide for an administrative avenue of appeal to dispute a determination on alternative design flows. The Petitioner was trying to avoid the expense of installing a wastewater-treatment plant in favor of a Title 5 system and argued that actual flows from assisted-living projects are substantially less than nursing homes. *In the Matter of Swan Brook Assisted Living Seekonk (Final Decision)*, 21 DEPR 60 (2014).

Bordering Vegetated Wetlands

Adopting verbatim the Recommended Decision of Hearing Officer Timothy M. Jones, Commissioner Kenneth Kimmel affirmed a Superseding Order of Conditions authorizing the construction of a single-family home and found that the proposed septic system would not adversely affect the resource areas of BVW and Bank to an Intermittent Stream given its compliance with Title 5 and local supplements. The Petitioners alleged the system would not comply with Title 5 but they failed to take into consideration the amended plans and made unsupported allegations that even a compliant system would present unacceptable impacts. *In the Matter of Karen McNiff, Trustee (Final Decision)*, 20 DEPR 92 (2013).

Penalties and Fines

MassDEP affirmed a $27,875 fine against a Wilmington dentist who repeatedly failed to comply with regulations covering dental amalgam wastewater and falsely certified that he had. The dentist, James A. Ficociello, is a long serving member and former chairman of the Wilmington Board of Health. *In the Matter of Ficociello (Final Decision)*, 21 DEPR 137 (2014).

Water Management Act

Practice and Procedure

– Duplicative Appeal

The Commissioner dismissed a second administrative appeal filed by a 10-citizens group challenging a WMA permit as duplicative since this appeal was filed while the first appeal was still pending before the Commissioner and the permit had not been finalized. The dismissal would not prejudice the Petitioners since their first appeal was currently pending before the Superior Court. *In the Matter of Russell Biomass, LLC (Final Decision)*, 18 DEPR 92 (2011).

– Mootness

Appeals by watershed associations of permits for Hanson's Pleasant Street Wellfield were dismissed as moot on the Recommended Decision of Presiding Officer Pamela D. Harvey, where the Town decided to withdraw its application for this wellfield. The Petitioners did not oppose withdrawal but did seek acknowledgement of their long-standing concerns about the safety of withdrawals from the Taunton River Basin by Hanson and Brockton. *In the Matter of Town of Hanson (Final Decision)*, 20 DEPR 23 (2013).

Safe Yield

Appeals by watershed associations of permits for Hanson's Pleasant Street Wellfield were dismissed as moot on the Recommended Decision of Presiding Officer Pamela D. Harvey, where the Town decided to withdraw its application for this wellfield. The Petitioners did not oppose withdrawal but did seek acknowledgement of their long-standing concerns about the safety of withdrawals from the Taunton River Basin by Hanson and Brockton. *In the Matter of Town of Hanson (Final Decision)*, 20 DEPR 23 (2013).

Commissioner Laurie Burt remanded a safe-yield appeal to the WERO Office to determine whether a wood-fired electric-power generation facility in Russell would exceed the limits set by the Interim Safe Yield Methodology *In the Matter of Russell Biomass, LLC (Interlocutory Remand Decision)*, 18 DEPR 57 (2011).

Water Pollution Control

Mootness

Where the City of Gloucester had fully complied with a Unilateral Administrative Order requiring it to repair and replace wet well access doors and ventilation systems at two pump stations, the Commissioner entered a final order dismissing the appeal as moot and vacating the UAO. The City had contested some of the Department's factual allegations in the UAO and sought to have the order vacated so that its findings could not be used against the City in connection with any future enforcement actions. *In the Matter of City of Gloucester (Final Decision)*, 21 DEPR 85 (2014).

Sewer Connection Permit

Commissioner Kenneth Kimmell adopted the Recommended Decision of Presiding Officer Timothy M. Jones that the Department had sufficiently considered climate-change impacts in issuing a sewer-connection permit for an electrical-generating facility and had made the associated MEPA findings. In a case of first impression, the Commissioner found that the amendments to MEPA adopted by the Global Warming Solutions Act would require MassDEP to comment on projects and, at a minimum, incorporate the MEPA certificate's CHG emission-reduction measures into its Section 61 findings that accompany a permit. The Commissioner disagreed with the Presiding Officer that the Department would only need to "consider" CHG emissions rather than make specific findings. More importantly, he also disagreed with Presiding Officer Jones that MassDEP's consideration of greenhouse-gas emissions is limited to the subject matter of the permit in question, finding that the Department could consider the climate-change impacts of projects irrespective of whether greenhouse-gas emissions are within the purview of the specific permit in question. *In the Matter of Pioneer Valley Energy Center, LLC (Final Decision)*, 18 DEPR 217 (2011).

Water Supply

DEP Commissioner

– Conflict of Interest

Ruling on the motions for reconsideration from two *pro se* citizens living in the neighborhood of Quincy's Fore River Bridge Replacement project denied standing to a Section 401 Water Quality Certification, MassDEP affirmed its prior ruling, pointing out that the Petitioners had failed to file comments on behalf of the Fore River Watershed Association and that the number of truck trips necessary to remove the fill in connection with the project was not a water-quality issue. In addition, the Department rejected the attempt of the Petitioners to secure the recusal of the Commissioner based on his prior involvement in a 2002 Weymouth neighborhood matter while in private practice. *In the Matter of Massachusetts Department of Transportation (Final Decision on Reconsideration)*, 19 DEPR 140 (2012).

Practice and Procedure

– Motion for Reconsideration

Ruling on the motions for reconsideration from two *pro se* citizens living in the neighborhood of Quincy's Fore River Bridge Replacement project denied standing to a Section 401 Water Quality Certification, MassDEP affirmed its prior ruling, pointing out that the Petitioners had failed to file comments on behalf of the Fore River Watershed Association and that the number of truck trips necessary to remove the fill in connection with the project was not a water-quality issue. In addition, the Department rejected the attempt of the Petitioners to secure the recusal of the Commissioner based on his prior involvement in a 2002 Weymouth neighborhood matter while in private practice. *In the Matter of Massachusetts Department of Transportation (Final Decision on Reconsideration)*, 19 DEPR 140 (2012).

– Motion to Dismiss for Failure to Prosecute

On the recommendation of Presiding Officer Timothy M. Jones, the Commissioner dismissed a homeowner appeal of a Zone 1 Permit for a public water supply in Plympton, finding that the Petitioners had failed to timely prosecute the appeal or comply with the Presiding Officer's orders. *In the Matter of Rocky Mountain Spring Water Co. (Final Decision)*, 21 DEPR 39 (2014).

Section 401 Certification

Two *pro se* citizens living in the neighborhood of the Fore River Bridge Replacement project lacked standing to appeal a Section 401 Water Quality Certification based on their long term involvement with the project and its impacts on their neighborhoods because they failed to show any specific or individual aggrievement other than generalized collective concerns. *In the Matter of Massachusetts Department of Transportation (Final Decision)*, 19 DEPR 134 (2012).

On remand from the Superior Court, Commissioner Kenneth Kimmell adopted the Recommended Decision after Remand of Presiding Officer Pamela D. Harvey sustaining a 401 Water Quality Certification Variance issued in 2009, with the addition of a condition requiring restoration of a newly certified vernal pool, and thereby authorized Rockport to proceed with a project to increase storage for water supply at the Flat Ledge Quarry. The Recommended Decision of Presiding Officer Pamela D. Harvey also rejected the Petitioners' arguments that a new bedrock well and reduced water consumption obviated the need to expand the capacity of the quarry and that the newly created vernal-pool area could not adequately sustain a viable breeding population. *In the Matter of Rockport Department of Public Works (Final Decision)*, 18 DEPR 209 (2011).

A Recommended Decision of Presiding Officer Pamela D. Harvey, adopted as final by the Commissioner, rejected the arguments of a 10 Residents' group that a new bedrock well and reduced water consumption obviated the need to expand the water-supply capacity of a Rockport quarry since testimony from town experts showed the project would increase storage capacity and available volume that could be critical to Rockport's water needs during sustained drought conditions. *In the Matter of Rockport Department of Public Works (Final Decision)*, 18 DEPR 209 (2011).

Standing

Two *pro se* citizens living in the neighborhood of Quincy's Fore River Bridge Replacement project lacked standing to appeal a Section 401 Water Quality Certification based on their long term involvement with the project and its impacts on their neighborhoods because they failed to show any specific or individual aggrievement from other than generalized col-

lective concerns. In addition, if their petitions were considered to be filed by neighborhood associations rather than individuals, they would have failed to show any specific harm to a corporate legal right. *In the Matter of Massachusetts Department of Transportation (Final Decision)*, 19 DEPR 134 (2012).

Waterways

Amnesty License

Adopting the Recommended Decision of DALA Magistrate James P. Rooney, DEP affirmed two Beverly marina amnesty licenses subject to modifications that included the removal of two post-1984 docks, shortened finger floats, and a recalculation of the tidewater-displacement fee. Magistrate Rooney also modified the public-access provisions of the licenses, limited the size of boats, and proscribed rafting at the single privately owned dock. *In the Matter of Beverly Port Marina, Inc. (Final Decision)*, 19 DEPR 273 (2012).

DEP Jurisdiction

Adopting the Recommended Decision of Presiding Officer Pamela D. Harvey, Commissioner Laurie Burt agreed that a Boston restaurant on Commercial Wharf would require Chapter 91 licensing for those portions of the locus overhanging private tidelands because a special act authorizing the wharf in 1832 neither expressly nor implicitly authorized the use of structures housing restaurants. The Commissioner, however, vacated the Department's penalty assessment of $19,320, already proposed to be reduced by the Presiding Magistrate to $11,960, on the grounds that the Applicant had acted in good faith, the RDA raised legitimate jurisdictional questions, and there was no evidence that the RDA was filed to stave off the issuance of enforcement documents. *In the Matter of Wharf Nominee Trust (Final Decision)*, 18 DEPR 36 (2011).

Designated Port Area

Commissioner Kenneth Kimmel denied reconsideration motions challenging a final licensing decision governing a Designated Port Area where a competing alternate proposal from an abutting boatyard operation was ruled not to have provided a clear showing of project feasibility because of use restrictions imposed by a recorded Project Agreement. The abutter argued that feasibility should not be an issue under appeal and that the Department had failed to raise the question of the Project Agreement. *In the Matter of Beverly Port Marina, Inc. (Final Decision on Reconsideration)*, 18 DEPR 192 (2011).

In its first licensing decision in a Designated Port Area where a competing party submitted an alternate proposal, Commissioner Kenneth Kimmell found that the competing proposal from an abutting boatyard operation, while expanding a water-dependent industrial use, did not provide a clear showing of project feasibility because of use restrictions imposed by a recorded Project Agreement. In so doing, the Commissioner affirmed the City of Beverly's project that included both a non-water dependent restaurant use and a water-dependent use of pile-held boating floats. *In the Matter of Beverly Port Marina, Inc. (Final Decision)*, 18 DEPR 137 (2011).

Energy Facilities Licensing Board

An appeal by a 10-residents group of a Chapter 91 decision issued in connection with the upgrade of a Salem Power Plant from coal and oil to natural gas was dismissed following the issuance by the Energy Facilities Siting Board of a Certificate of Environmental Impact. Such a certificate bars any state agency from requiring any permit or approval that would delay or prevent construction of the facility. A similar appeal from public-interest groups was also dismissed. *In the Matter of Footprint Power Salem Harbor Development LP (Final Decision)*, 21 DEPR 59 (2014).

An appeal by groups such as the Conservation Law Foundation and Clean Water Action from a Chapter 91 decision issued in connection with the upgrade of a Salem Power Plant from coal and oil to gas was dismissed following the issuance by the Energy Facilities Siting Board of a Certificate of Environmental Impact. Such a certificate bars any state agency from requiring any permit or approval that would delay or prevent construction of the facility. *In the Matter of Footprint Power Salem Harbor Development LP (Final Decision)*, 21 DEPR 58 (2014).

Enforcement

Where nonwater-dependent areas of Commercial Wharf in Boston relating to parking and access were not entitled to any kind of exemption from waterways regulation based on an 1832 statute authorizing the wharf or a 1960s urban-renewal statute, the landowner could not argue estoppel or spoliation to prevent enforcement since the former could not be applied against government acts. As to the spoliation argument which claimed that records had been lost by MassDEP, this was ruled speculative and hardly sufficient to extinguish public rights in tidelands. *In the Matter of Boston Boat Basin, LLC (Final Decision)*, 21 DEPR 119 (2014).

Great Ponds

Following the Recommended Decision of Presiding Officer Timothy M. Jones, the Commissioner rejected a proposed Settlement Agreement between the Department and a homeowner proposing a submersible water-ski slalom course on a Great Pond in Belchertown. The proposal was found to potentially violate public-trust doctrines and interfere with the navigation rights of other users and would therefore require a remand to the Presiding Officer for further information and review. *In the Matter of Fuhrman (Decision Adopting Recommended Remand Decision)*, 21 DEPR 44 (2014).

A couple's appeal of a Chapter 91 license issued to a neighbor to construct a dock at a Great Pond in Lanesboro was dismissed since they presented scant evidence that the dock would significantly interfere with their littoral or riparian rights. *In the Matter of Tristany (Final Decision)*, 21 DEPR 41 (2014).

Commissioner Kenneth Kimmell adopted the Recommended Decision of Presiding Officer Timothy M. Jones, finding that a proposed dock at the Otis Reservoir, a Great Pond, would neither significantly interfere with public navigation rights or with free passage over and through the water. *In the Matter of Legowski (Final Decision)*, 19 DEPR 256 (2012).

An appeal from an abutter of a Waterways License for a removable dock on a Great Pond in Webster was dismissed for lack of prosecution and mootness, where the Petitioner had failed to inform the DALA Magistrate of a Land Court decision going against his claim that the project would overburden an easement and that accretion of the shoreline had impacted his property rights. *In the Matter of Audette (Final Decision)*, 19 DEPR 82 (2012).

Navigation

A couple's appeal of a Chapter 91 license issued to a neighbor to construct a dock at a Great Pond in Lanesboro was dismissed since they presented scant evidence that the dock would significantly interfere with their littoral or riparian rights. *In the Matter of Tristany (Final Decision)*, 21 DEPR 41 (2014).

In order to facilitate docking maneuvers between two adjoining marinas seeking amnesty licenses, DALA Magistrate James P. Rooney drafted recommendations limiting vessel beams and restricting tie ups to the section of one of the docks nearest the shore. *In the Matter of Beverly Port Marina, Inc. (Final Decision)*, 19 DEPR 273 (2012).

Commissioner Kenneth Kimmell adopted the Recommended Decision of Presiding Officer Timothy M. Jones, finding that a proposed dock at the Otis Reservoir, a Great Pond, would neither significantly interfere with public navigation rights or with free passage over and through the water. *In the Matter of Legowski (Final Decision)*, 19 DEPR 256 (2012).

An applicant was found to have taken reasonable measures to mitigate encroachment by a reconstructed bulkhead into Falmouth Harbor having lawfully placed the bulkhead seaward of the high-water mark due to site conditions and designed the project to be compatible with abutting coastal-engineering structures. *In the Matter of Mallette (Final Decision)*, 19 DEPR 197 (2012).

Adopting without comment the Recommended Decision of Presiding Officer Pamela D. Harvey, Commissioner Laurie Burt agreed with a Ten Resident Group's appeal challenging the Department's issuance of a draft license for a proposed 223-foot Mattapoisett pier whose purpose was to allow an inflatable motor dinghy to reach a motorboat at a nearby mooring. The decision found that the pier would have interfered with the public's ability to freely navigate over the area, impeded swimming activities, and required small-boat users to alter established courses of passage through the site. *In the Matter of Oliveira (Final Decision)*, 18 DEPR 15 (2011).

Penalties and Fines

Citing the agency's discretion in pursuing enforcement matters, Commissioner Kenneth Kimmel declined to revisit Commissioner Laurie Burt's previous ruling vacating a penalty against a Boston waterfront landowner because it had submitted an RDA prior to the Department's issuance of the UAO and PAN. This proceeding was unusual because it was the Department that sought to vacate the previous Commissioner's ruling on reconsideration, not the landowner. *In the Matter of Wharf Nominee Trust (Final Decision on Reconsideration)*, 18 DEPR 118 (2011).

Adopting the Recommended Decision of Presiding Officer Pamela D. Harvey, Commissioner Laurie Burt agreed that a Boston restaurant on Commercial Wharf would require Chapter 91 licensing for those portions of the locus overhanging private tidelands because a special act authorizing the wharf in 1832 neither expressly nor implicitly authorized the use of structures housing restaurants. The Commissioner, however, vacated the Department's penalty assessment of $19,320, already proposed to be reduced by the Presiding Magistrate to $11,960, on the grounds that the Applicant had acted in good faith, the RDA raised legitimate jurisdictional questions, and there was no evidence that the RDA was filed to stave off the issuance of enforcement documents. *In the Matter of Wharf Nominee Trust (Final Decision)*, 18 DEPR 36 (2011).

Practice and Procedure

– Dismissal

An appeal by groups such as the Conservation Law Foundation and Clean Water Action from a Chapter 91 decision issued in connection with the upgrade of a Salem Power Plant from coal and oil to gas was dismissed following the issuance by the Energy Facilities Siting Board of a Certificate of Environmental Impact. Such a certificate bars any state agency from requiring any permit or approval that would delay or prevent construction of the facility. *In the Matter of Footprint Power Salem Harbor Development LP (Final Decision)*, 21 DEPR 58 (2014).

– Mootness

The Commissioner treated a letter by the sole opponent remaining to an Onset-marina project as a motion to withdraw his reconsideration motion challenging approval of the Settlement Agreement. As such, the reconsideration motion was considered mooted. *In the Matter of Point Independence Yacht Club (Final Decision on Reconsideration)*, 20 DEPR 138 (2013).

– Motion for Reconsideration

Citing the agency's discretion in pursuing enforcement matters, Commissioner Kenneth Kimmel declined to revisit Commissioner Laurie Burt's previous ruling vacating a penalty against a Boston waterfront landowner because it had submitted an RDA prior to the Department's issuance of the UAO and PAN. This proceeding was unusual because it was the Department that sought to vacate the previous Commissioner's ruling on reconsideration, not the landowner. *In the Matter of Wharf Nominee Trust (Final Decision on Reconsideration)*, 18 DEPR 118 (2011).

– Motion to Dismiss

An appeal by a 10-residents group of a Chapter 91 decision issued in connection with the upgrade of a Salem Power Plant from coal and oil to natural gas was dismissed following the issuance by the Energy Facilities Siting Board of a Certificate of Environmental Impact. Such a certificate bars any state agency from requiring any permit or approval that would delay or prevent construction of the facility. A similar appeal from public-interest groups was also dismissed. *In the Matter of Footprint Power Salem Harbor Development LP (Final Decision)*, 21 DEPR 59 (2014).

An appeal from an abutter of a Waterways License for a removable dock on a Great Pond in Webster was dismissed for lack of prosecution and mootness, where the Petitioner had failed to inform the DALA Magistrate of a Land Court decision going against his claim that the project would overburden an easement and that accretion of the shoreline had impacted his property rights. *In the Matter of Audette (Final Decision)*, 19 DEPR 82 (2012).

An appeal from a Petitioner challenging draft Chapter 91 license determinations approving an existing Rochester pump house and dock on Snipatuit Pond in Rochester was dismissed for repeated failures to comply with the Presiding Officer's Order for a More Definite Statement. *In the Matter of Edgewater Bog Realty Trust (Final Decision)*, 18 DEPR 1 (2011).

– Preemption

The Department withdrew a Unilateral Administrative Order against a Charlestown marina as having been preempted by a lawsuit brought by the Attorney General for injunctive relief. *In the Matter of LDA Pier 9, LLC (Final Decision)*, 20 DEPR 133 (2013).

– Settlement Agreement

The Commissioner adopted the Settlement Agreement entered into by nine out of ten Petitioners challenging an Onset-marina reconfiguration and expansion. The sole remaining opponent failed to present evidence showing that the agreement was inconsistent with the law and should not have been approved by the Commissioner. *In the Matter of Point Independence Yacht Club (Final Decision)*, 20 DEPR 135 (2013).

– Simplified Procedure

A Chapter 91 permit application for a new dock on Otis Reservoir qualified for a simplified procedure based on an accessory residential use even though the residential property was a five-minute walk away and was not the Applicant's primary residence. *In the Matter of Legowski (Final Decision)*, 19 DEPR 256 (2012).

Property Dispute

Whether an applicant had impermissibly trespassed on the Petitioner's property in reconstructing a seawall amounted to a private-property dispute beyond MassDEP's jurisdiction. *In the Matter of Mallette (Final Decision)*, 19 DEPR 197 (2012).

Public Access

MassDEP affirmed two Beverly marina amnesty licenses but modified the public-access provisions of the permits to require the filing of a new plan that provides access through the most heavily trafficked portions of the fa-

cility; the decision also requires the marina to provide a 10-foot access way through the rest of the property. *In the Matter of Beverly Port Marina, Inc. (Final Decision)*, 19 DEPR 273 (2012).

Reconfiguration Zone

DALA Magistrate James P. Rooney declined to authorize reconfiguration zones for two Beverly marinas, finding that these may not be accorded to Applicants seeking amnesty licenses. *In the Matter of Beverly Port Marina, Inc. (Final Decision)*, 19 DEPR 273 (2012).

Standing

– Impacts/Navigation

Petitioners challenging a waterways license for a new dock on Otis Reservoir as interfering with rights of navigation had standing to do so based on their claim that the new structure would make it difficult for them to access their littoral properties in an area that is already heavily congested. *In the Matter of Legowski (Final Decision)*, 19 DEPR 256 (2012).

Term

Adopting the Recommended Decision of DALA Magistrate James P. Rooney, MassDEP affirmed a Beverly marina amnesty license for a 20-year term, rejecting the Applicant's request for a 99-year term (and the City's plea for 10 years) in finding that this duration would protect the public interest in the waterfront. *In the Matter of Beverly Port Marina, Inc. (Final Decision)*, 19 DEPR 273 (2012).

Tidelands

Adopting without modification the Recommended Decision of Presiding Officer Pamela D. Harvey, Deputy Commissioner Gary Moran concluded that nonwater-dependent areas of Commercial Wharf in Boston relating to parking and access were not entitled to any kind of exemption from waterways regulation based on an 1832 statute authorizing the wharf or a 1960s urban-renewal statute. Continued use of these areas for parking would require authorization from the Department. *In the Matter of Boston Boat Basin, LLC (Final Decision)*, 21 DEPR 119 (2014).

A Boston wharf built in the 19th century and located on tidelands found beyond the historic low-tide watermark was not entitled to any exemption from waterways regulation as Presiding Officer Pamela D. Harvey found that a public purpose was implicit in the original 1846 statutory grant authorizing the wharf and the circumstances were similar to those in the SJC's decision in *Boston Waterfront. In the Matter of Boston Boat Basin, LLC (Final Decision)*, 21 DEPR 119 (2014).

An applicant was found to have taken reasonable measures to mitigate encroachment by a reconstructed bulkhead into Falmouth Harbor having lawfully placed the bulkhead seaward of the high-water mark due to site conditions and designed the project to be compatible with abutting coastal-engineering structures. *In the Matter of Mallette (Final Decision)*, 19 DEPR 197 (2012).

In a rare reversal of the Department, a Recommended Decision by Presiding Officer Salvatore M. Giorlandino found that the Petitioner had shown that the Department's Historic High Water Mark line for its Marshfield bait house and a one-story addition was incorrect and not subject to Chapter 91 jurisdiction because the structures are located landward of the correct HHWM line on naturally occurring uplands. In adopting the Recommended Decision, Commissioner Kenneth Kimmell cautioned that this is an unusually compelling site-specific case that rebuts the conclusions of the 2006 Chapter 91 Project Mapping. The Petitioner's experts were able to establish flaws in the georeferencing of an 1858 map that was the sole reference for establishing the line. *In the Matter of Armstrong (Final Decision)*, 19 DEPR 48 (2012).

Adopting a Recommended Decision of Presiding Officer Pamela D. Harvey, Commissioner Kenneth Kimmel rejected an appeal from a civic association challenging the Department's Determination of Applicability that a Boston University Project, separated from the Charles River by Storrow Drive, was landward of the historic high-tide water mark. The decision also finds that even if the site were found to be landlocked tidelands, no further MassDEP review would be required. Under SJC rulings in the *Moot* cases, MassDEP's role with regard to landlocked tidelands is limited to an optional public-benefit review without further licensing requirements. *In the Matter of Bay State Road Civic Association (Final Decision)*, 19 DEPR 39 (2012).

Wetlands Appeals

Administrative Law Judges/Magistrates/Presiding Officers

– Conflict of Interest

Presiding Officer Beverly Coles-Roby declined to disqualify herself on the grounds of bias as requested by the Belmont Conservation Commission on appeal from a MassDEP decision affirming an SOC for a 299-unit affordable housing project in Cambridge. As have her predecessors, Presiding Officer Coles-Roby took the position that she was free of bias, although assigned to the MassDEP Office of the General Counsel, and charged the Conservation Commission with "calumny" in suggesting a conflict of interest. *In the Matter of Cambridge Partners II, LLC (Final Decision on Reconsideration)*, 19 DEPR 119 (2012).

– Decision Maker

An applicant's objection to the Chief Presiding Officer's assumption of adjudicatory responsibilities failed because it is the Department's Commissioner who is the final decision maker in all administrative appeals and not the Presiding Officer. *In the Matter of Peabody Family Trust (Final Decision on Reconsideration)*, 21 DEPR 1 (2014).

Air Quality

Commissioner David W. Cash also rejected a Wayland Petitioners' claim that air emissions might impact wetland resources in connection with a challenge to a SOC authorizing improvements to a transfer station roadway. Air quality issues are already covered by MassDEP air-quality regulations with no evidence having been presented that these latter regulations were inadequate to deal with the impact of poor air quality on the wetlands. *In the Matter of Town of Wayland (Final Decision)*, 21 DEPR 130 (2014).

Appeal

– Timeliness

The Department's 18-month delay in intervening in a wetlands appeal was justified under the "tolling" rule because the Conservation Commission had failed to forward the Order of Conditions in a timely manner. *In the Matter of M.G. Hall (Final Decision)*, 21 DEPR 22 (2014).

A landowner denied wetlands permits to construct a home on a coastal dune on the Plum Island barrier beach failed in his bid for reconsideration on the basis that his appeal had not been adjudicated in a timely manner since the delays complained of had either been acquiesced to or caused by the Appellant. *In the Matter of Peabody Family Trust (Final Decision on Reconsideration)*, 21 DEPR 1 (2014).

MassDEP rejected a Motion for Reconsideration of its ruling affirming a Unilateral Administrative Order arising from unauthorized work on a dam, rejecting the Petitioner's new claim that the Presiding Officer's Recommended Decision was invalid because it was issued three months later than the date established in the Conference Report. While MassDEP must act on wetlands appeals within six months, the instant matter was an ap-

peal from an enforcement order not subject to the six-month limit. *In the Matter of Fease (Final Decision on Reconsideration)*, 19 DEPR 161 (2012).

Based on the recommendation of Presiding Officer Pamela Harvey, Commissioner Kenneth Kimmell ruled that an unappealed 2008 Determination of Applicability given an Easton landowner, and reaffirmed by the Conservation Commission with a 2010 Determination, could not be collaterally attacked two years later by a residents group alleging fraud or mistake. The decision cites prior Department cases respecting considerations of finality in wetlands permitting and notes the fact that in none of the prior cases had a third party petitioner successfully challenged collaterally a valid Determination of Applicability on the grounds of fraud or mistake. *In the Matter of Williams Street Residents Group (Final Decision)*, 18 DEPR 153 (2011).

The appeal of an individual challenging an SOC issued for a Scituate project was dismissed as untimely because it was filed well after the 10-day appeal period had run and the Department's narrow tolling doctrine was inapplicable based on the Appellant's contention that the Department had failed to transmit a copy of the Fee Transmittal Form with the notice of the order. *In the Matter of Boyajian (Final Decision)*, 18 DEPR 72 (2011).

Barrier Beach

A culvert-replacement project located on a Brewster barrier beach that had been found to comply with coastal-dune and coastal-beach performance standards was not damaging to the barrier beach since it would actually improve storm-damage and flood-control interests. *In the Matter of Town of Brewster (Final Decision)*, 19 DEPR 173 (2012).

Bordering Land Subject to Flooding

Commissioner David W. Cash dismissed a Ten Citizen Group appeal of wetlands permits for the redevelopment of the former Arthur D. Little Research campus in Cambridge by the Bulfinch Companies after their Notice of Claim failed to specify in any detail why the project design provided insufficient flood storage. *In the Matter of Bulfinch Companies (Final Decision)*, 21 DEPR 95 (2014).

Engineering for a North Reading parking lot meant to address the resource area of BLSF was inadequate insofar as it failed to include a Wildlife Habitat study. *In the Matter of M.G Hall (Final Decision)*, 21 DEPR 22 (2014).

A North Reading parking lot's design that relied on stone fill for compensatory storage was not shown by the Department to necessarily restrict flows simply because of the use of stone. *In the Matter of M.G Hall (Final Decision)*, 21 DEPR 22 (2014).

A North Reading parking lot project failed to provide adequate compensatory storage where the project engineer impermissibly took into account voids between filling stones and failed to convince the Presiding Officer that the voids within the stones would provide comparable storage to that provided under existing conditions. *In the Matter of M.G Hall (Final Decision)*, 21 DEPR 22 (2014).

Commissioner Kenneth Kimmell adopted the Recommended Final Decision of Presiding Officer Timothy Jones affirming a settlement agreement against abutter challenge that would allow a Buddhist Temple to construct a mobile home at a Lowell site so long as it was raised to an elevation above the flood plain and provided compensatory storage. *In the Matter of Community of Khmer Lowell, MA Buddist Monks, Inc. (Final Decision)*, 20 DEPR 118 (2013).

An SOC regulating the realignment of Town Brook in Quincy as part of an extensive redevelopment of the City's center was found to meet standards for Bordering Land Subject to Flooding and would provide adequate flood storage to prevent an increase in flood stage or velocity. *In the Matter of City of Quincy (Final Decision)*, 19 DEPR 142 (2012).

Bordering Vegetated Wetlands

Adopting verbatim the Recommended Decision of Hearing Officer Timothy M. Jones, Commissioner Kenneth Kimmel affirmed a Superseding Order of Conditions authorizing the construction of a single-family home and found that the project would not adversely affect the resource areas of BVW and Bank to an Intermittent Stream. In this case, none of the work would be performed within resource areas and the Petitioners' claims that pre- and post-construction runoff and the migration of septic-system effluent would harm resources areas were unproven. *In the Matter of Karen McNiff, Trustee (Final Decision)*, 20 DEPR 92 (2013).

MassDEP rejected a Ten Residents challenge to a ropes course/zip line project proposed for a seven-acre island within the Norton Reservoir, finding that the Petitioners had failed to establish that the trimming of four trees would result in any impairment to Bordering Vegetated Wetlands. *In the Matter of Kenneth Leavitt/Pheeny's Island (Final Decision)*, 20 DEPR 37 (2013).

Commissioner Kenneth Kimmell affirmed a Final Order of Conditions issued for a 400' golf-cart path crossing Bordering Vegetated Wetlands, finding adequate its wetlands-replication and monitoring plans and ruling that the project complied with all Massachusetts Stormwater Management Standards. *In the Matter of Enos (Final Decision)*, 20 DEPR 25 (2013).

Based on the Recommended Decision of Chief Presiding Officer Salvatore M. Giorlandino, MassDEP affirmed its SDA upholding an earlier Stoughton Conservation Commission determination that a proposed single-family home project site included Bordering Vegetated Wetlands associated with an intermittent stream. The Petitioner's wetlands consultant had claimed that the drainage ditch, found by MassDEP to be an intermittent stream, should be considered a "non-stream upgradient of all BVW areas." *In the Matter of Pickering (Final Decision)*, 19 DEPR 85 (2012).

Ruling on a Motion for Reconsideration, MassDEP reaffirmed an SDA finding the presence of Bordering Vegetated Wetlands at a coastal Marion property. The locus was populated with wetland-indicator species and divided by a berm and once again MassDEP found that the topographical distinction between the berm and the surrounding area was insufficient to support the contention that the site lacked BVW. In addition, the decision notes that the Motion for Reconsideration should also have been denied on procedural grounds since it was filed five days after the seven-day deadline. *In the Matter of Burr (Final Decision on Reconsideration)*, 19 DEPR 66 (2012).

An SDA finding the presence of Bordering Vegetated Wetlands at a coastal Marion property divided by a berm was affirmed where MassDEP found wetlands-indicator species at the locus and the topographical distinction between a berm and the surrounding area was insufficient to support the contention that the site lacked BVW. In this case, the landowner had failed to conduct any subsurface investigations or prove by expert testimony that there were no breaks in the berm. *In the Matter of Burr (Final Decision)*, 19 DEPR 1 (2012).

Buffer Zone

A monitoring condition was imposed on large-scale residential project in Upton after the developer placed detention basins just 105 feet from a wetlands in order to avoid buffer-zone jurisdiction. The decision notes the

probability of channeling occurring during the first significant rain storm and future risks of altering the resource area. *In the Matter of Terrill (Final Decision)*, 18 DEPR 22 (2011).

– General

A trail-improvement project by the Martha's Vineyard Land Bank touching on a BVW buffer zone at Toad Rock Preserve in Aquinnah was purely *de minimis* and a minor activity. *In the Matter of Martha's Vineyard Land Bank (Final Decision)*, 21 DEPR 72 (2014).

Categorical Taking

A landowner denied wetlands permits to construct a home on a coastal dune on the Plum Island barrier beach could not claim a categorical taking given the continued economically viable use of the property as an existing single-family home. *In the Matter of Peabody Family Trust (Final Decision on Reconsideration)*, 21 DEPR 1 (2014).

Coastal Bank

– General

MassDEP did not have jurisdiction under the Wetland Protection Act to address a Petitioner's claim that a proposed septic system was in too close proximity to his well since the Order of Conditions only addressed work within 100-foot buffer zone of the coastal bank. Both the proposed leaching field and the Petitioner's irrigation well were outside the 100-foot buffer zone and the bank was not presumed significant to private- or ground-water supply. *In the Matter of Wannop (Final Decision)*, 19 DEPR 15 (2012).

A neighbor in a longstanding dispute over a Dartmouth elevated stairway over an existing coastal rock revetment failed to state a claim that the stairway would have an adverse effect on the stability of the coastal bank or present any but *de minimis* impacts on Land Subject to Coastal Storm Flowage. Moreover, the appeal was barred by collateral estoppel since these issues had already been addressed in a prior enforcement proceeding. *In the Matter of Sullivan (Final Decision)*, 19 DEPR 11 (2012).

A Superseding Amended Order of Conditions was sufficiently conditioned with respect to Land Subject to Coastal Storm Flowage and Buffer Zone to Coastal Bank to meet regulatory requirements and the experts for the Petitioners merely offered general and conclusory statements to the contrary. *In the Matter of Reichenbach (Final Decision)*, 18 DEPR 202 (2011).

Coastal Beach

A Petitioner seeking after-the-fact approvals for unauthorized stone-groin and stepping-stone structures on a coastal beach in Somerset lost a motion for reconsideration of the Department's Final Decision that these structures failed to comply with the relevant performance standards. *In the Matter of Dupras (Final Decision on Reconsideration)*, 20 DEPR 113 (2013).

A Somerset landowner failed in her bid to ratify the unpermitted construction of an oceanfront stone groin and accompanying stepping-stone structure where her testimony failed to prove that the project could be conditioned to meet the performance standards for a coastal beach. *In the Matter of Dupras (Final Decision)*, 20 DEPR 84 (2013).

A culvert-replacement project by the Town of Brewster that would cause the loss of 90 s/f of coastal beach, as well as impacts on an additional 210 s/f, was found to meet performance standards for coastal beaches where structural modifications to these resources were required to minimize the erosion of the beach and sediment volumes. *In the Matter of Town of Brewster (Final Decision)*, 19 DEPR 173 (2012).

A post and cable fence to be installed at a Hull locus within the resource areas of coastal beach and storm-damage prevention could easily be conditioned to protect these interests. Presiding Officer Pamela D. Harvey affirmed the SOC authorizing this project near the Town Landing and imposed an additional condition requiring the maintenance of the fence through periodic removal of debris. *In the Matter of Schindler (Final Decision)*, 19 DEPR 4 (2012).

An SOC approving a project adding a personal float system to an existing New Bedford dock was finally approved by MassDEP where the resources of Land Under the Ocean and Land Containing Shellfish were adequately protected despite some ambiguities as to the scope and identification of resource areas. The decision notes that that the SOC need not address the accumulation of sand under the pier since this issue was addressed by a prior Order of Condition. The fact that the Department had inadvertently omitted to review the project under the standards for coastal beaches was not fatal given that the standards for review are quite similar to those for Land Under the Ocean. *In the Matter of Community Boating Center, Inc. (Final Decision)*, 18 DEPR 230 (2011).

Coastal Dune

– Culverts

A culvert-replacement project by the Town of Brewster was found to comply with performance standards for coastal dunes and Chief Presiding Officer Salvatore M. Giorlandino rejected the testimony of the Petitioner's expert, finding that his conclusions were based on inaccurate calculations and misstatements regarding the impacts of the proposed culvert on coastal dunes. *In the Matter of Town of Brewster (Final Decision)*, 19 DEPR 173 (2012).

– Flood Protection

A Plum Island landowner denied wetlands permits to construct a home on a coastal dune on the Plum Island barrier beach failed in his bid for reconsideration after the Commissioner once again found that he had failed to propose mitigation that would protect the MWPA interests in Flood Control and protection against Storm Damage. *In the Matter of Peabody Family Trust (Final Decision on Reconsideration)*, 21 DEPR 1 (2014).

In an appeal that has produced three final decisions by three successive MassDEP commissioners, Commissioner Kenneth L. Kimmell affirmed the decision of his predecessor finding that a proposed single-family home at Plum Island on a coastal dune and barrier beach could not be effectively conditioned to sufficiently protect wetlands resources, in particular the interests of flood control and storm-damage prevention. *In the Matter of Peabody Family Trust (Final Decision)*, 18 DEPR 94 (2011).

Collateral Estoppel/Res Judicata

– General

A neighbor in a longstanding dispute over a Dartmouth elevated stairway over an existing coastal rock revetment failed to state a claim that the stairway would have an adverse effect on the stability of the coastal bank or present any but *de minimis* impacts on Land Subject to Coastal Storm Flowage. Moreover, the appeal was barred by collateral estoppel since these issues had already been addressed in a prior enforcement proceeding. *In the Matter of Sullivan (Final Decision)*, 19 DEPR 11 (2012).

Commissioner of DEP

– Final Decision Maker

An applicant's objection to the Chief Presiding Officer's assumption of adjudicatory responsibilities failed because it is the Department's Commissioner who is the final decision maker in all administrative appeals and not the Presiding Officer. *In the Matter of Peabody Family Trust (Final Decision on Reconsideration)*, 21 DEPR 1 (2014).

Delineation

– General

Abutters challenging a wetlands boundary delineation in connection with a Martha's Vineyard Land Bank trail-improvement project at Toad Rock Preserve in Aquinnah failed to meet their burden of proof where they relied on out-of-date plans and where one of their experts had even failed to visit the project site. *In the Matter of Martha's Vineyard Land Bank (Final Decision)*, 21 DEPR 72 (2014).

DEP Jurisdiction

– Federally Regulated Wetlands

A longstanding appeal challenging special conditions attached to an SOC for a hydroelectric dam replacement project was dismissed on the grounds of mootness and preemption where the parties agreed to the jurisdiction of the Federal Energy Regulatory Commission. *In the Matter of L.S. Starrett Co. (Final Decision)*, 21 DEPR 21 (2014).

– Title 5

MassDEP did not have jurisdiction under the Wetland Protection Act to address a Petitioner's claim that a proposed septic system was in too close proximity to his well since the Order of Conditions only addressed work within 100-foot buffer zone of the coastal bank. Both the proposed leaching field and the Petitioner's irrigation well were outside the 100-foot buffer zone and the bank was not presumed significant to private- or ground-water supply. *In the Matter of Wannop (Final Decision)*, 19 DEPR 15 (2012).

Determination of Applicability

– General

Commissioner Kenneth Kimmell rejected a Motion for Reconsideration on the grounds that its arguments merely elaborated on those presented previously and gave no meritorious reasons for setting aside a long line of Department precedent holding that the filing of an RDA that contravenes a binding Order of Conditions constitutes an impermissible collateral attack on the order. *In the Matter of Tompkins-Desjardins Trust (Final Decision on Reconsideration)*, 18 DEPR 117 (2011).

Endangered and Rare Species

– Turtle

Opponents of an oyster-aquaculture project in Marion that would use floating bags rather than tidal flats failed to prove that the project would adversely affect the habitat of the Diamondback terrapin after the National Heritage and Endangered Species program concluded that the project would not adversely affect habitat. NHESP conditioned the project by requiring "no wake" use of the boat serving the aquaculture facility, a time limitation on the installation of a mooring system, and a requirement that no nets be used that might entangle the turtles. *In the Matter of Christopher Bryant/Greenport Consulting, Inc. (Final Decision)*, 18 DEPR 181 (2011).

Enforcement Order

– Alteration of BVW

MassDEP accepted a settlement agreement arising from an enforcement order directed at unauthorized filing of BVW that provided for the removal of the fill, revegetation of the area, and the waiver of a $7,800 penalty that had previously been assessed. *In the Matter of Machie (Final Decision)*, 19 DEPR 294 (2012).

– Appeal

The Department issued an Administrative Consent Order dismissing enforcement appeals from a Templeton self-storage facility fined for wetlands violations. The order, entered into following the parties' good-faith settlement efforts, obligated the Petitioners to install a storm-water-management system at the site, refrain from the construction of further structures without permitting, and pay a fine of $5,000. *In the Matter of 101 Rentals, Inc. (Final Decision)*, 19 DEPR 255 (2012).

A Dartmouth abutter lacked standing to appeal an Administrative Consent Order with Penalty imposed on his neighbor in connection with unauthorized work in the intertidal zone. In determining that the Petitioner failed to state a claim on which relief might be granted, the Recommended Decision of Presiding Officer Timothy M. Jones applied the plain meaning of the Wetlands Protection Act, G.L. c.30A, and the Civil Administrative Penalty Act, none of which invest any rights to an adjudicatory matter in persons who might be incidentally affected by the penalty proceeding. The issue in this appeal was clouded somewhat by the fact that the matter began as a permit application by the landowner, under which the Petitioner would have had standing, and was converted later by the Department into an enforcement matter. *In the Matter of Sullivan (Final Decision)*, 18 DEPR 133 (2011).

– Earth Removal

The Commissioner ratified a settlement agreement whereby a Worcester real-estate developer found to have caused silt-laden runoff into the Blackstone River and other resources would pay a $2,000 fine and underwrite a $6,000 Mass Audubon trail-improvement project. *In the Matter of Arboretum Village, LLC (Final Decision)*, 21 DEPR 134 (2014).

Evidence

– Spoliation

In connection with an abutter's appeal of a culvert-replacement project, the Town of Brewster was found neither to have concealed or spoliated evidence in anticipation of the Presiding Officer's site visit but had instead been carrying on its annual beach renourishment activities pursuant to an Order of Conditions. *In the Matter of Town of Brewster (Final Decision)*, 19 DEPR 173 (2012).

Exemptions from the Act

A dam-spillway reconstruction project located in Northbridge and Sutton did not qualify for the agricultural-use exemption since the Petitioners failed to show that the dam was an active agricultural use yielding commodities that were being raised for commercial purposes. *In the Matter of Fease (Final Decision)*, 19 DEPR 43 (2012).

On remand from the Middlesex Superior Court, MassDEP ruled that a proposed Hopkinton wastewater-treatment plant did not impact an Outstanding Resource Water; nor did it require a Water Quality Certificate since construction would not displace more than 5,000 s/f of BVW and would benefit from a utility-work exemption. *In the Matter of Town of Hopkinton (Final Decision)*, 18 DEPR 172 (2011).

Fish Run

An SOC regulating the realignment of Town Brook in Quincy as part of an extensive redevelopment of the City's center was found not to pose adverse effects to a fish run by impeding or obstructing the migration of fish, impairing the capacity to spawn, or damaging the capacity of nursery habitat to sustain the various life stages of the fish. *In the Matter of City of Quincy (Final Decision)*, 19 DEPR 142 (2012).

Flood Control

Although the Department failed to raise the issue at the time of the issuance of an SOC for a dam replacement project, the Presiding Officer agreed that it was correct in its assessment that FEMA floodplain elevations were inaccurate. *In the Matter of L.S. Starrett Co. (Final Decision)*, 21 DEPR 21 (2014).

A Plum Island landowner denied wetlands permits to construct a home on a coastal dune on the Plum Island barrier beach failed in his bid for reconsideration after the Commissioner once again found that he had failed to

propose mitigation that would protect the MWPA interests in Flood Control and protection against Storm Damage. *In the Matter of Peabody Family Trust (Final Decision on Reconsideration)*, 21 DEPR 1 (2014).

Commissioner Kenneth Kimmell affirmed a Final Order of Conditions issued for a 400' golf-cart path crossing Bordering Vegetated Wetlands, finding that the Petitioner challenging the project failed to prove that that it did not comply with all 10 Stormwater Management Standards. *In the Matter of Enos (Final Decision)*, 20 DEPR 25 (2013).

Fraud

Based on the recommendation of Presiding Officer Pamela Harvey, Commissioner Kenneth Kimmell ruled that an unappealed 2008 Determination of Applicability given an Easton landowner, and reaffirmed by the Conservation Commission with a 2010 Determination, could not be collaterally attacked two years later by a residents group alleging fraud or mistake. The decision cites prior Department cases respecting considerations of finality in wetlands permitting and notes the fact that in none of the prior cases had a third party petitioner successfully challenged collaterally a valid Determination of Applicability on the grounds of fraud or mistake. *In the Matter of Williams Street Residents Group (Final Decision)*, 18 DEPR 153 (2011).

Informational Sufficiency (See also Wetlands Program Policy 2008-1)

A significant Upton residential-subdivision project could not be rejected on the grounds of failure to obtain local permits where there was no evidence in the record of any opinion by a local board or town counsel and the Order of Conditions did not specifically reference the issue of local permits. In addition, the Conservation Commission failed to identify the issue of informational insufficiency in its pre-hearing statement and the Commissioner rejected this as a grounds for refusing to make a decision with regard to the business use of lots and the application of stormwater-management standards. *In the Matter of Terrill (Final Decision)*, 18 DEPR 22 (2011).

Land Containing Shellfish

An SOC approving a project adding a personal float system to an existing New Bedford dock was finally approved by MassDEP where the resources of Land Under the Ocean and Land Containing Shellfish were adequately protected despite some ambiguities as to the scope and identification of resource areas. The decision notes that that the SOC need not address the accumulation of sand under the pier since this issue was addressed by a prior Order of Condition. *In the Matter of Community Boating Center, Inc. (Final Decision)*, 18 DEPR 230 (2011).

Land in Agricultural Use

– General

An appeal from an Uxbridge developer seeking agricultural-use exemptions from Riverfront Area regulations in order to construct subdivision roadway was rejected by Presiding Officer Salvatore M. Giorlandino, where the locus was almost entirely woodland, had never been exploited agriculturally, and was on the market for real-estate development. *In the Matter of Vecchione (Final Decision)*, 21 DEPR 99 (2014).

Three Rowley properties used primarily in raising agricultural commodities for sale—with the goal of making a profit, principally hay used to feed boarded horses—were found to be in agricultural use and qualified for the agricultural exemption under the Act. *In the Matter of Comley (Final Decision)*, 19 DEPR 215 (2012).

– Maintenance Exemption

Commissioner Kenneth Kimmell adopted the 129-page Recommended Decision of DALA Magistrate Mark L. Silverstein vacating a $96,500 penalty imposed in 2004 for maintenance and reconstruction work on three Rowley properties. The reconstruction of a drainage and irrigation system, including the construction of a pond with a small dam, along with other maintenance activities relating to drainage and irrigation, were found to have fallen under the agricultural exemption of the Act. *In the Matter of Comley (Final Decision)*, 19 DEPR 215 (2012).

Land Subject to Coastal Storm Damage

– General

A neighbor in a longstanding dispute over a Dartmouth elevated stairway over an existing coastal rock revetment failed to state a claim that the stairway would have an adverse effect on the stability of the coastal bank or present any but *de minimis* impacts on Land Subject to Coastal Storm Flowage. Moreover, the appeal was barred by collateral estoppel since these issues had already been addressed in a prior enforcement proceeding. *In the Matter of Sullivan (Final Decision)*, 19 DEPR 11 (2012).

Land Subject to Coastal Storm Flowage

– Flood Storage

A much litigated single-family home project along the ocean in Dartmouth now under construction following the resolution of a wetlands appeal in 2011 returned to MassDEP with an abutter appeal fashioned in the form of an RDA challenging the installation of an irrigation pump chamber. The appeal was dismissed for lack of standing and failure to show any impacts from this *de minimis* project on Land Subject to Coastal Storm Flowage. *In the Matter of Reichenbach (Final Decision)*, 21 DEPR 79 (2014).

– General

An Edgartown abutter lacked standing to challenge a neighbor's installation of a marine-utility pedestal for water and electrical power having not shown that any wetlands-resource area would be impacted by this very minor project. Moreover, the Petitioner's expert had identified the wrong resource area when claiming impacts to the coastal bank when the resource in question was Land Subject to Coastal Storm Flowage—a noteworthy blunder given the Petitioner's own recent construction project had identified only LSCSF as a wetlands resource and made no reference to a coastal bank. *In the Matter of Rankow (Final Decision)*, 20 DEPR 103 (2013).

– Residence

A Superseding Amended Order of Conditions for a coastal residence was sufficiently conditioned with respect to Land Subject to Coastal Storm Flowage and Buffer Zone to Coastal Bank to meet regulatory requirements and the experts for the Petitioners merely offered general and conclusory statements to the contrary. *In the Matter of Reichenbach (Final Decision)*, 18 DEPR 202 (2011).

Land Under the Ocean

A Petitioner unhappy with a Winthrop dock expansion project impacting Land Under the Ocean failed to state a claim on which relief could be granted because his flooding concerns were not addressed by a performance standard that excludes maintenance dredging. Moreover, his apprehension with the behavior of boaters as to fuel discharges and littering was outside the scope of the proposed work. *In the Matter of Cottage Park Yacht Club (Final Decision)*, 20 DEPR 125 (2013).

A motion for reconsideration of a decision approving a Marion oyster-aquaculture project was denied where the Petitioners unsuccessfully asserted that the Final Decision included factual errors relating to the number of oysters, the size of the annual harvest, and the permissible stocking density. Also rejected was the Petitioner's claim that MEPA review would be required based on a Mashpee project since that project involved oyster-growing cages on the ocean floor while the method at issue

here was floating bags with only the mooring anchors resting on the ocean floor. *In the Matter of Christopher Bryant/Greenport Consulting, Inc. (Final Decision on Reconsideration)*, 18 DEPR 247 (2011).

An SOC approving a project adding a personal float system to an existing New Bedford dock was finally approved by MassDEP where the resources of Land Under the Ocean and Land Containing Shellfish were adequately protected despite some ambiguities as to the scope and identification of resource areas. The decision notes that that the SOC need not address the accumulation of sand under the pier since this issue was addressed by a prior Order of Condition. The fact that the Department had inadvertently neglected to review the project under the standards for coastal beaches was not fatal given that the standards for review are quite similar to those for Land Under the Ocean. *In the Matter of Community Boating Center, Inc. (Final Decision)*, 18 DEPR 230 (2011).

Opponents of an oyster-aquaculture project in Marion that would use floating bags rather than tidal flats failed to prove that the project did not meet the performance standards for a water-dependent project on land under the ocean since it would use the best available measures to minimize adverse impacts on marine fisheries and wildlife habitat caused by alterations in water circulation, distribution of sediment, and water quality. *In the Matter of Christopher Bryant/Greenport Consulting, Inc. (Final Decision)*, 18 DEPR 181 (2011).

– General

An SOC approving an oyster aquaculture project within Popponesset Bay in Mashpee was affirmed following the recommendation of Presiding Officer Pamela D. Harvey, who found that it had not been shown that the project would not have an adverse short- or long-term effect on the habitat of various rare tern species. A Ten Citizens Group of property owners had appealed the permit, claiming that the project failed to meet the performance standards for Land Under the Ocean because of its impact on these species—a position largely undermined by a report from the National Heritage and Endangered Species Program finding to the contrary. *In the Matter of Cook (Final Decision)*, 21 DEPR 152 (2014).

MEPA

– Land Under the Ocean

A motion for reconsideration of a decision approving a Marion oyster-aquaculture project was denied where the Petitioners unsuccessfully asserted that the Final Decision included factual errors relating to the number of oysters, the size of the annual harvest, and the permissible stocking density. Also rejected was the Petitioner's claim that MEPA review would be required based on a Mashpee project since that project involved oyster-growing cages on the ocean floor while the method at issue here was floating bags with only the mooring anchors resting on the ocean floor. *In the Matter of Christopher Bryant/Greenport Consulting, Inc. (Final Decision on Reconsideration)*, 18 DEPR 247 (2011).

– Stay of Proceedings

Chief Presiding Officer Salvatore M. Giorlandino declined to lift a stay imposed in connection with a project presenting coastal-dune issues since an appeal under the Harwich local wetlands bylaw was ongoing in Superior Court and neither party had presented any evidence showing that the project had been approved under Harwich bylaws. Moreover, the project would also require a MEPA approval before the stay might be lifted. *In the Matter of Walsh (Memorandum and Order Denying Motion to Proceed)*, 20 DEPR 140 (2013).

Mootness

MassDEP dismissed an appeal from neighbors upset with a fence-replacement project across a stream proposed by the New England Wildflower Society on the grounds of mootness because the Applicant had withdrawn the Notice of Intent and was rethinking the project. Neighbors had been concerned with flooding issues. *In the Matter of Edelstein (Final Decision)*, 21 DEPR 135 (2014).

A longstanding appeal challenging special conditions attached to an SOC for a hydroelectric-dam replacement project was dismissed on the grounds of mootness and preemption where the parties agreed to the jurisdiction of the Federal Energy Regulatory Commission. *In the Matter of L.S. Starrett Co. (Final Decision)*, 21 DEPR 21 (2014).

Presiding Officer Timothy M. Jones dismissed an excavator's appeal of a Unilateral Administrative Order on the grounds of mootness after the Appellant indisputably fulfilled the requirements of the order. The Appellant had sought to keep the proceedings going given the possibility that the unresolved allegations and claims in the UAO might lead to future enforcement actions. *In the Matter of Joe Wilkinson Excavating, Inc. (Final Decision)*, 18 DEPR 80 (2011).

Notice of Intent

– Expansion of Project

Commissioner David W. Cash adopted a Recommended Decision of Presiding Officer Timothy M. Jones that rejected a Ten Citizens Group's attempt to condition an SOC authorizing improvements to a transfer station road on the future filing of a Notice of Intent should the roadway also be used to access the Town's new DPW facility. The decision notes that the Petitioner's claim is entirely speculative and hypothetical. *In the Matter of Town of Wayland (Final Decision)*, 21 DEPR 130 (2014).

– Failure to Notify Abutters

Commissioner Kenneth Kimmell adopted the Recommended Final Decision of Presiding Officer Timothy Jones rejecting abutter claims that a Buddhist Temple had failed to provide notice to them of the filing of the Notice of Intent. The Applicant provided mail receipts showing that at least 35 abutters were notified and the Petitioners failed to provide any evidence of prejudice to a few abutters who may not have received notice. *In the Matter of Community of Khmer Lowell, MA Buddist Monks, Inc. (Final Decision)*, 20 DEPR 118 (2013).

– Insufficient Information

A significant Upton residential-subdivision project could not be rejected on the grounds of failure to obtain local permits where there was no evidence in the record of any opinion by a local board or town counsel and the Order of Conditions did not specifically reference the issue of local permits. In addition, the Conservation Commission failed to identify the issue of informational insufficiency in its pre-hearing statement and the Commissioner rejected this as a grounds for refusing to make a decision with regard to the business use of lots and the application of stormwater-management standards. *In the Matter of Terrill (Final Decision)*, 18 DEPR 22 (2011).

– Landowner Permission

The Town of Brewster did not need the permission of a Petitioner/abutter to file an NOI for a culvert-replacement project since none of the work was proposed to take place on his property but would be confined to Town-owned land. *In the Matter of Town of Brewster (Final Decision)*, 19 DEPR 173 (2012).

Obtainable Permits

Proponents of a single-family home construction project in Essex had met the requirement to obtain all local permits relative to scenic roads by proffering a letter from the Chairman of the Conservation Commission stating that scenic-road permits are administered by the Essex Department of Public Works and are sought at the time the building-permit application is filed. *In the Matter of Karen McNiff, Trustee (Final Decision)*, 20 DEPR 92 (2013).

Commissioner Kenneth Kimmell agreed that a project involving the construction of a 400' golf-cart path crossing Bordering Vegetated Wetlands had obtained all necessary zoning permits as proven by a letter from the Chairman of the Wareham ZBA. *In the Matter of Enos (Final Decision)*, 20 DEPR 25 (2013).

Administrative Magistrate Bonney Cashin recommended overturning DEP's denial of permits for an 83-acre, 59-lot Upton subdivision, finding that the project did not present issues of informational insufficiency serious enough to prevent wetlands review and that a zoning variance need not be obtained prior to the issuance of wetlands permits. The applicant denied needing variances to use lots in a commercial district for residential uses and, in any event, the project could be conditioned so as to require further wetlands review were uses to be ultimately sanctioned and permitted under local zoning more intense than those of a residential subdivision. *In the Matter of Terrill (Recommended Final Decision)*, 18 DEPR 25 (2011).

A significant Upton residential-subdivision project could not be rejected on the grounds of failure to obtain local permits where there was no evidence in the record of any opinion by a local board or town counsel and the Order of Conditions did not specifically reference the issue of local permits. *In the Matter of Terrill (Final Decision)*, 18 DEPR 22 (2011).

Order of Conditions

– Collateral Attack

Presiding Officer Timothy M. Jones did not agree with the Department that an appeal challenging an SDA that concluded a Rowley stream was perennial was moot because the Applicant had failed to appeal the denial under the local wetlands bylaw since there was no evidence whatsoever that the Commission's perenniality decision was based on anything other than the Wetlands Protection Act. *In the Matter of Tompkins-Desjardins Trust (Final Decision)*, 18 DEPR 82 (2011).

Outstanding Resource Water

On remand from the Middlesex Superior Court, MassDEP ruled that a proposed Hopkinton wastewater-treatment plant did not impact an Outstanding Resource Water; nor did it require a Water Quality Certificate since construction would not displace more than 5,000 s/f of BVW and would benefit from a utility-work exemption. The Department's alteration of its regulatory position on the stream's ORW designation was also found not to violate the principle of reasoned consistency since the basis for the agency's change in position was adequately explained. *In the Matter of Town of Hopkinton (Final Decision)*, 18 DEPR 172 (2011).

Penalties and Fines (See also Enforcement Order)

– Deterrent Effects

Adopting the Recommended Decision of Chief Presiding Officer Salvatore M. Giorlandino, the Commissioner vacated a $6,000 penalty against a residential developer for failing to maintain erosion barriers or comply with a DEP enforcement order because the Department's Wetland Specialist, Karen Hirschberg, failed to consider 3 of the 12 penalty factors when calculating the penalty. The factors omitted related to the deterrent effects of the penalty on the penalized and others, as well as the relative cost of compliance versus the penalty amount. *In the Matter of West Meadow Homes, Inc. (Final Decision)*, 18 DEPR 165 (2011).

– Selective Enforcement

To the extent that the dismissal of a selective enforcement claim by Rowley farmers was based on their failure to allege such impermissible criteria as race and religion, such a ruling would be incorrect given the holding in the *SBT Holdings* case but ultimately irrelevant to this case since the penalties were vacated. *In the Matter of Comley (Final Decision)*, 19 DEPR 215 (2012).

– Supplemental Environmental Project

The Commissioner ratified a settlement agreement whereby a Worcester real-estate developer found to have caused silt-laden runoff into the Blackstone River and other resources would pay a $2,000 fine and underwrite a $6,000 Mass Audubon trail-improvement project. *In the Matter of Arboretum Village, LLC (Final Decision)*, 21 DEPR 134 (2014).

Practice and Procedure

– Decorum

Commissioner David W. Cash affirmed Chief Presiding Officer Salvatore M. Giorlandino's dismissal of a Motion for Reconsideration of a decision dismissing an appeal from an abusive pro se landowner claiming that his use of an Uxbridge dirt lane for site development, earth removal, and tree-logging qualified for an exemption from Riverfront regulations. The repeated breaches of decorum and nasty behavior of the Petitioner were also cited as the grounds for dismissal of this protracted dispute. *In the Matter of Vecchione (Final Decision on Reconsideration)*, 21 DEPR 116 (2014).

An appeal from an Uxbridge developer seeking grandfathering and agricultural-use exemptions from Riverfront Area regulations was dismissed on the basis of the *pro se* Petitioner's abusive conduct during the appeal—abuse that included inappropriate attacks on the Department's counsel's personal life, religious beliefs, civic activities, and motivations. The Petitioner also dismissed the Presiding Officer as unworthy of enforcing decorum because he was just a "hearing officer, not a judge." *In the Matter of Vecchione (Final Decision)*, 21 DEPR 99 (2014).

– Dismissal of Appeal

On the recommendation of Chief Presiding Officer Salvatore M. Giorlandino, the Department dismissed an eight-year-old appeal from landowners seeking to construct a single-family residence in Newbury on a coastal dune of a barrier beach. The Petitioners had failed to file prefiled testimony. *In the Matter of Wescott (Final Decision)*, 21 DEPR 150 (2014).

A wetlands appeal following the Department's issuance of a UAO in connection with wetlands violations at the Petitioner's properties in Grafton was dismissed by stipulation after the Petitioner agreed to hire a wetlands and erosion-control specialist and implement a wetlands-restoration plan. *In the Matter of Grafton & Upton Railroad Co. (Final Decision)*, 20 DEPR 53 (2013).

Pursuant to the Recommendation of Presiding Officer Pamela D. Harvey, a wetlands appeal was dismissed as moot because the Applicant had filed a new NOI with the Hull Conservation Commission after having been denied the possibility of amending the original filing under the Department's Project Plan Changes Policy 91-1. *In the Matter of Horne (Final Decision)*, 18 DEPR 129 (2011).

– Disparate Treatment

A Plum Island landowner denied wetlands permits to construct a home on a coastal dune on the Plum Island barrier beach was unable to show that he had been victimized by disparate treatment given the fact that similarly situated properties on Plum Island had been denied wetlands permits or the appeals had been dropped. *In the Matter of Peabody Family Trust (Final Decision on Reconsideration)*, 21 DEPR 1 (2014).

– Expert Testimony

A "wetlands scientist" was unqualified to opine on the possibility that a marine-utility pedestal might structurally undermine a marine bulkhead given her lack of engineering background or qualifications *In the Matter of Rankow (Final Decision)*, 20 DEPR 103 (2013).

A Somerset landowner failed in her bid to ratify the unpermitted construction of an oceanfront stone groin and accompanying stepping-stone structure where she herself was clearly unqualified to provide expert testimony

at the hearing and her own expert's testimony did not answer the central question posed by the appeal as to whether the project met performance standards for a coastal beach. *In the Matter of Dupras (Final Decision)*, 20 DEPR 84 (2013).

On remand from the Superior Court, MassDEP found that a 299-unit Cambridge affordable-housing project would comply with Stormwater Standard 3. The project design was found to provide for post-development runoff that would mostly be directed from the surface to infiltrative devices that would recharge with sufficient rapidity to prevent groundwater mounding that might cause the detention basins to fail hydraulically. Essentially, MassDEP found the testimony of the project proponent's expert, David Albrecht, to be far more compelling and well documented than that of the Petitioner's expert Scott W. Horsley. Presiding Officer Beverly Coles-Roby criticized the Horsley testimony as "wide of the mark" and lacking in appropriate calculations based on hydrology groups. She also took fault with the hydrologist's failure to perform groundwater calculations of his own. *In the Matter of AP Cambridge Partners II, LLC (Final Decision on Remand)*, 19 DEPR 76 (2012).

– Inconsistent MassDEP Positions

On remand from the Middlesex Superior Court, MassDEP ruled that a proposed Hopkinton wastewater-treatment plant did not impact an Outstanding Resource Water; nor did it require a Water Quality Certificate since construction would not displace more than 5,000 s/f of BVW and would benefit from a utility-work exemption. The Department's alteration of its regulatory position on the stream's ORW designation was also found not to violate the principle of reasoned consistency since the basis for the agency's change in position was adequately explained. *In the Matter of Town of Hopkinton (Final Decision)*, 18 DEPR 172 (2011).

– Mootness

MassDEP dismissed an abutter's appeal of a SOC for a City of Lowell stormwater-pipe maintenance project because the appeal had been rendered moot by the project's completion and challenges to the work could only be raised now through an enforcement proceeding. *In the Matter of City of Lowell Regional Wastewater Authority (Final Decision)*, 19 DEPR 133 (2012).

MassDEP dismissed the appeal of Plum Island landowners of its unilateral administrative orders on the grounds of mootness. The landowners and a contractor had been improperly charged with conducting unauthorized dune nourishment. The dismissal came after the Petitioners had provided the information sought by DEP in the orders as well as proof that the Selectmen had provided proper authorization for the project. It also turned out that the contractor performing the work was authorized to do so by Newbury and the OOC. *In the Matter of Connors (Final Decision)*, 18 DEPR 199 (2011).

Pursuant to the Recommendation of Presiding Officer Pamela D. Harvey, a wetlands appeal was dismissed as moot because the Applicant had filed a new NOI with the Hull Conservation Commission after having been denied the possibility of amending the original filing under the Department's Project Plan Changes Policy 91-1. *In the Matter of Horne (Final Decision)*, 18 DEPR 129 (2011).

– Motion for a More Definite Statement

MassDEP dismissed an appeal filed by a Falmouth landowner denied permits for the construction of a single-family home for failure to provide for wetlands replication where the Applicant responded to an order to provide a more definite statement by withdrawing the appeal. *In the Matter of Losardo (Final Decision)*, 18 DEPR 250 (2011).

– Motion for Reconsideration

Commissioner David W. Cash affirmed Chief Presiding Officer Salvatore M. Giorlandino's dismissal of a Motion for Reconsideration of a decision dismissing an appeal from an abusive pro se landowner claiming that his use of an Uxbridge dirt lane for site development, earth removal, and tree-logging qualified for an exemption from Riverfront regulations. The repeated breaches of decorum and nasty behavior of the Petitioner were also cited as the grounds for dismissal of this protracted dispute. *In the Matter of Vecchione (Final Decision on Reconsideration)*, 21 DEPR 116 (2014).

An abutter's Motion for Reconsideration of a Final Decision that dismissed his appeal of a negative Superseding Determination of Applicability was denied after project "non compliant issues" were no longer found to remain, the same issues did not need to be revisited, the Petitioner still lacked standing, and the Amended Order Policy remained inapplicable. The project is a much litigated construction of an oceanfront home in Dartmouth. *In the Matter of Reichenbach (Final Decision on Reconsideration)*, 21 DEPR 110 (2014).

A landowner denied wetlands permits to construct a home on a coastal dune on the Plum Island barrier beach failed in his bid for reconsideration after the Commissioner rejected his takings claims and reiterated that the Applicant had failed to propose mitigation that would protect the MWPA interests in Flood Control and protection against Storm Damage. The Appellant's procedural and takings claims also were rejected. *In the Matter of Peabody Family Trust (Final Decision on Reconsideration)*, 21 DEPR 1 (2014).

A Motion for Reconsideration from the dismissal of an appeal filed by a Wakefield landowner challenging a project for a data center was dismissed because it merely repeated matters already discussed in the Final Decision and renewed arguments previously rejected. *In the Matter of Digital Realty Trust (Final Decision on Reconsideration)*, 20 DEPR 146 (2013).

An abutter challenging an Edgartown marine utility-pedestal project found her motion for reconsideration rejected as the Commissioner reaffirmed her lack of standing and the failure of her challenge based on the Department's Amended Order Policy. *In the Matter of Rankow (Final Decision on Reconsideration)*, 20 DEPR 128 (2013).

A Petitioner seeking after-the-fact approvals for unauthorized stone-groin and stepping-stone structures on a coastal beach in Somerset lost a motion for reconsideration of the Department's Final Decision finding that these structures failed to comply with the relevant performance standards. The Petitioner's engineering expert's testimony was refuted by a MassDEP expert, while her wetlands expert failed to testify and only submitted a letter that was also refuted by the Department. *In the Matter of Dupras (Final Decision on Reconsideration)*, 20 DEPR 113 (2013).

The Commissioner denied a Motion for Reconsideration of a Final Decision in which he had rejected a SOC because its stormwater design for a seven-lot project in Worcester failed to meet regulatory requirements. In this case, the Applicant submitted substantially revised plans with the Motion for Reconsideration that were an attempt to bring the project into compliance with the various defects pointed out in the Final Decision. The attempt to introduce these substantially revised designs at this stage of the litigation was rejected as both untimely and in violation of the Department's Plan Change Policy. *In the Matter of Capital Group Properties, LLC (Final Decision on Reconsideration)*, 20 DEPR 68 (2013).

The Motion for Reconsideration from a 10 Residents Group unhappy with a final decision authorizing a school-building project that included an artificial-turf field in a Riverfront Area was dismissed by Commissioner Kenneth Kimmel who found that the arguments and evidence presented had been previously raised and that the obviously clerical omission of two pages from an expert's affidavit was not prejudicial. *In the Matter of Town of Wilmington (Final Decision on Reconsideration)*, 19 DEPR 271 (2012).

MassDEP rejected a Motion for Reconsideration of its ruling affirming a Unilateral Administrative Order arising from unauthorized work on a dam, rejecting the Petitioners' new claim that the Presiding Officer's Recommended Decision was invalid because it was issued three months later than the date established in the Conference Report. While MassDEP must act on wetlands appeals within six months, the instant matter was an appeal from an enforcement order not subject to the six-month limit. *In the Matter of Fease (Final Decision on Reconsideration)*, 19 DEPR 161 (2012).

An incorrect citation by the Presiding Officer in a Recommended Decision adopted as final in an appeal where the Petitioners challenged the realignment of Quincy's Town Brook was not grounds for reconsideration where no finding of fact or ruling of law was alleged to be erroneous. *In the Matter of City of Quincy (Final Decision on Reconsideration)*, 19 DEPR 151 (2012).

Ruling on a Motion for Reconsideration, MassDEP reaffirmed an SDA finding the presence of Bordering Vegetated Wetlands at a coastal Marion property. The locus was populated with wetland-indicator species and divided by a berm and once again MassDEP found that the topographical distinction between the berm and the surrounding area was insufficient to support the contention that the site lacked BVW. In addition, the decision notes that the Motion for Reconsideration should also have been denied on procedural grounds since it was filed five days after the seven-day deadline. *In the Matter of Burr (Final Decision on Reconsideration)*, 19 DEPR 66 (2012).

The Commissioner declined to reconsider a prior ruling approving a seasonal-float system for a boating dock in New Bedford. The decision rejected the Petitioners' claim that a new permit application should be filed because the project was "40 times" larger than that described in the Notice of Intent or that the Department had failed to consider coastal beach impacts. The Commissioner again rejected the claim that the project required MEPA review and should be relocated. *In the Matter of Community Boating Center, Inc. (Final Decision on Reconsideration)*, 19 DEPR 31 (2012).

A motion for reconsideration of a decision approving a Marion oyster-aquaculture project was denied where the Petitioners unsuccessfully asserted that the Final Decision included factual errors relating to the number of oysters, the size of the annual harvest, and the permissible stocking density. Also rejected was the Petitioner's claim that MEPA review would be required based on a Mashpee project since that project involved oyster-growing cages on the ocean floor while the method at issue here was floating bags with only the mooring anchors resting on the ocean floor. *In the Matter of Christopher Bryant/Greenport Consulting, Inc. (Final Decision on Reconsideration)*, 18 DEPR 247 (2011).

A Motion for Reconsideration of the denial of an appeal challenging permits for a Scituate project was denied since the motion failed to challenge the reasons for the dismissal and because core samples indicating subsurface soils uncharacteristic of dune deposits were not new information but had previously been submitted to the Conservation Commission. The appeal was also flawed by standing and timeliness issues. *In the Matter of Boyajian (Final Decision on Reconsideration)*, 18 DEPR 125 (2011).

Commissioner Kenneth Kimmell rejected a Motion for Reconsideration on the grounds that its arguments merely elaborated on those presented previously and gave no meritorious reasons for setting aside a long line of Department precedent holding that the filing of an RDA that contravenes a binding Order of Conditions constitutes an impermissible collateral attack on the order. *In the Matter of Tompkins-Desjardins Trust (Final Decision on Reconsideration)*, 18 DEPR 117 (2011).

Commissioner Laurie Burt denied a petition seeking reconsideration of a decision of Presiding Officer Timothy M. Jones rejecting a DEP Superseding Order of Conditions authorizing a 22-horse-stall barn complete with 14,500 s/f attached indoor-riding arena. The decision had found that the resource areas, BVW and Land Under Water, would not have been adequately protected from manure runoff and also that these resource areas were inadequately delineated. The reconsideration petition was denied since it failed to establish any errors in the RFD, rehashed arguments already addressed, and then raised arguments or evidence not previously raised nor forming a part of the record. *In the Matter of Newman (Final Decision)*, 18 DEPR 10 (2011).

– Motion to Dismiss/Failure to Prosecute

A five-year-old appeal filed by an applicant protesting conditions attached to an SDA covering proposed lawn-maintenance work at his property in Cheshire was dismissed for lack of prosecution. *In the Matter of Tenczar (Final Decision)*, 21 DEPR 48 (2014).

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

An appeal from a Wakefield landowner challenging a project for a data center was dismissed for lack of standing and failure to assert a cognizable claim based on flooding concerns. The Petitioner's home was located 500 feet from the locus on the other side of Route 128 and he presented no competent technical evidence to underpin his contention that flooding from the parking area of the project might reach his property. *In the Matter of Digital Realty Trust (Final Decision)*, 20 DEPR 144 (2013).

A Petitioner unhappy with a Winthrop dock expansion project impacting Land Under the Ocean failed to state a claim on which relief could be granted because his flooding concerns were not addressed by a performance standard that excludes maintenance dredging. Moreover, his apprehension with the behavior of boaters as to fuel discharges and littering was outside the scope of the proposed work. *In the Matter of Cottage Park Yacht Club (Final Decision)*, 20 DEPR 125 (2013).

On a motion for reconsideration, MassDEP affirmed its previous finding that a Dartmouth abutter lacked standing to appeal an Administrative Consent Order with Penalty imposed on his neighbor in connection with unauthorized work in the intertidal zone. In determining that the Petitioner failed to state a claim on which relief might be granted, the Recommended Decision of Presiding Officer Timothy M. Jones had applied the plain meaning of the Wetlands Protection Act, G.L. c.30A, and the Civil Administrative Penalty Act, none of which invest any rights to an adjudicatory matter in persons who might be incidentally affected by the penalty proceeding. The issue in this appeal was clouded somewhat by the fact that the matter began as a permit application by the landowner, under which the Petitioner would have had standing, and was converted later by the Department into an enforcement matter. *In the Matter of Sullivan (Final Decision on Reconsideration)*, 18 DEPR 163 (2011).

A Dartmouth abutter lacked standing to appeal an Administrative Consent Order with Penalty imposed on his neighbor in connection with unauthorized work in the intertidal zone. In determining that the Petitioner failed to state a claim on which relief might be granted, the Recommended Decision of Presiding Officer Timothy M. Jones applied the plain meaning of the Wetlands Protection Act, G.L. c.30A, and the Civil Administrative Penalty Act, none of which invest any rights to an adjudicatory matter in persons who might be incidentally affected by the penalty proceeding. The issue in this appeal was clouded somewhat by the fact that the matter began as a permit application by the landowner, under which the Petitioner would have had standing, and was converted later by the Department into an enforcement matter. *In the Matter of Sullivan (Final Decision)*, 18 DEPR 133 (2011).

– Motion to Dismiss/Lack of Prosecution

An appeal from a Uniform Administrative Order requiring the Appellant to cease and desist from altering BVW was dismissed because he repeatedly failed to comply with scheduling orders, attend hearings, or initiate settlement discussions. *In the Matter of Chatwood (Final Decision)*, 18 DEPR 130 (2011).

– Motion To Dismiss/Prefiled Testimony

The appeal of a *pro se* Amesbury Petitioner challenging the Department's negative Superseding Determination of Applicability relating to a neighbor's fence was affirmed on the recommendation of Presiding Officer Timothy M. Jones, who found that the Petitioner's conclusory statements in an email about her planned testimony did not meet her burden of filing competent prefiled testimony. Moreover, the Petitioner repeatedly failed to prosecute the appeal in accordance with the Rules of Adjudicatory Proceedings. *In the Matter of Hallisey (Final Decision)*, 21 DEPR 113 (2014).

– Motion to Dismiss/Timeliness

Chief Presiding Officer Salvatore M. Giorlandino's refused to consider three of five emails received from a Petitioner seeking to file a Motion for Reconsideration since they were filed well beyond the deadline. *In the Matter of Vecchione (Final Decision on Reconsideration)*, 21 DEPR 116 (2014).

– Prefiled Testimony/Credible Evidence

On the recommendation of Chief Presiding Officer Salvatore M. Giorlandino, the Department dismissed an eight-year-old appeal from landowners seeking to construct a single-family residence in Newbury on a coastal dune of a barrier beach. The Petitioners had failed to file prefiled testimony. *In the Matter of Wescott (Final Decision)*, 21 DEPR 150 (2014).

– Settlement Agreement/General

The Commissioner ratified a Settlement Agreement resolving an abutter appeal of an SOC from Somerset authorizing the construction of a single-family residence impacting various wetland resources. The Appellant secured the Applicant's agreement to plant and maintain a 350' long row of pine trees along a common boundary in the BVW buffer zone and to maintain a lawn within the Riverfront area. *In the Matter of Spellman (Final Decision)*, 21 DEPR 53 (2014).

The Commissioner issued a Final Decision adopting a settlement agreement entered into between the Department and an applicant regarding previously performed landscaping work, where the Respondent neighbors failed to file responses to motions or sign the agreements. *In the Matter of Park (Final Decision)*, 21 DEPR 38 (2014).

The Department issued an Administrative Consent Order dismissing enforcement appeals from a Templeton self-storage facility fined for wetlands violations. The order, entered into following the parties' good-faith settlement efforts, obligated the Petitioners to install a stormwater-management system at the site, refrain from the construction of further structures without permitting, and pay a fine of $5,000. *In the Matter of 101 Rentals, Inc. (Final Decision)*, 19 DEPR 255 (2012).

Commissioner Kenneth Kimmell approved a settlement agreement among the parties to a dispute over wetlands permits for a seven-lot Leominster residential subdivision after the project was revised to address the Petitioners' concerns by reducing the number of lots to four, minimizing impervious surfaces, and decentralizing the project's stormwater-management system. *In the Matter of Angelini (Final Decision)*, 19 DEPR 160 (2012).

– Site Visit

The testimony of an expert opposing a ropes course/zip line project for an island within the Norton Reservoir was undermined by her failure to make a site visit. The expert claimed to have been denied access by the Applicant, but had never filed a written request to gain entry as provided for in 2007 revisions to the wetlands regulations intended to assure consultant access to sites. *In the Matter of Kenneth Leavitt/Pheeny's Island (Final Decision)*, 20 DEPR 37 (2013).

– Skype Testimony

Presiding Officer Pamela D. Harvey declined to allow Applicant testimony via Skype because the hearing room was not designed to accommodate video technology and because the request was filed on the eve of the hearing. She did note, however, that this was the first request the Office of Appeals and Dispute Resolution had received to use video technology and that it might be considered in the future. *In the Matter of Christopher Bryant/Greenport Consulting, Inc. (Final Decision)*, 18 DEPR 181 (2011).

– Uniform Administrative Order

Presiding Officer Timothy M. Jones dismissed an excavator's appeal of a Unilateral Administrative Order on the grounds of mootness after the Appellant indisputably fulfilled the requirements of the order. The Appellant had sought to keep the proceedings going given the possibility that the unresolved allegations and claims in the UAO might lead to future enforcement actions. *In the Matter of Joe Wilkinson Excavating, Inc. (Final Decision)*, 18 DEPR 80 (2011).

Regulatory Taking (See also DEP Jurisdiction)

A landowner denied wetlands permits to construct a home on a coastal dune on the Plum Island barrier beach could not claim a regulatory taking where the property still had significant economic use, had not experienced a 90% reduction in value, and the owner had unreasonable investment expectations exacerbated by his lack of due diligence. *In the Matter of Peabody Family Trust (Final Decision on Reconsideration)*, 21 DEPR 1 (2014).

Commissioner Kenneth L. Kimmell analyzed a regulatory-taking claim by treating as one lot the two adjoining lots owned by the Applicant. The Commissioner took note of the Applicant's declaration of homestead covering both lots and the fact that the septic system for the developed lot was located on the undeveloped lot denied the wetlands variance. *In the Matter of Peabody Family Trust (Final Decision)*, 18 DEPR 94 (2011).

Commissioner Kenneth L. Kimmell affirmed the decision of his predecessor, finding that a proposed single-family home at Plum Island on a coastal dune and barrier beach could not be effectively conditioned to sufficiently protect wetlands resources. He also rejected the Applicant's regulatory-taking claim in ruling that the diminution in value caused by the denial of a variance nevertheless left the Applicant or his neighbors with a significant economic benefit in the property. The decision also notes that the property was not zoning compliant and had lost its grandfathered status due to common-ownership issues. *In the Matter of Peabody Family Trust (Final Decision)*, 18 DEPR 94 (2011).

Replication Plan

Commissioner Kenneth Kimmell affirmed a Final Order of Conditions issued for a 400' golf-cart path crossing Bordering Vegetated Wetlands, finding adequate its wetlands-replication and monitoring plans and ruling that the project complied with all Massachusetts Stormwater Management Standards. *In the Matter of Enos (Final Decision)*, 20 DEPR 25 (2013).

Commissioner Kenneth Kimmell affirmed a Final Order of Conditions issued for a 400' golf-cart path crossing Bordering Vegetated Wetlands, finding adequate its wetlands replication plan that would replicate 1,201 square feet of lost BWV with six replication areas ranging from 94 to 400

square feet. Since the area was dominated by invasive Phragmites, the plan also called for the use of a wetland-seed mix rather than the planting of native trees and shrubs. *In the Matter of Enos (Final Decision)*, 20 DEPR 25 (2013).

Commissioner Kenneth Kimmell affirmed a Final Order of Conditions issued for a 400' golf-cart path crossing Bordering Vegetated Wetlands, finding adequate its wetlands replication monitoring plan that required a qualified project monitor during construction and planting and for two years thereafter at the end of each growing season. *In the Matter of Enos (Final Decision)*, 20 DEPR 25 (2013).

Revetment

Acting on an appeal from a Superseding Order of Conditions that required a Brewster oceanfront landowner to annually provide beach nourishment around a revetment that he had repaired under an emergency declaration, Commissioner David W. Cash authorized a modification to the SOC that only required nourishment in the event beach elevations fell below current levels. *In the Matter of Norton (Final Decision)*, 21 DEPR 90 (2014).

Settlement Agreement

– General

Acting on an appeal from a Superseding Order of Conditions that required a Brewster oceanfront landowner to annually provide beach nourishment around a revetment that he had repaired under an emergency declaration, Commissioner David W. Cash authorized a modification to the SOC that only required nourishment in the event beach elevations fell below current levels. *In the Matter of Norton (Final Decision)*, 21 DEPR 90 (2014).

Shellfish Habitat

A Somerset landowner failed in her bid to challenge the designation of a Somerset locus as a Shellfish Suitable Area pursuant to Department of Wildlife mapping, where the Presiding Officer made note of her lack of expertise, and praised the testimony of the Department's own expert as to the presence of American oyster, soft-shell clam, and quahog. *In the Matter of Dupras (Final Decision)*, 20 DEPR 84 (2013).

Standing

– Abutters

A much litigated single-family home project along the ocean in Dartmouth now under construction following the resolution of a wetlands appeal in 2011 returned to MassDEP with an abutter appeal fashioned in the form of an RDA challenging the installation of an irrigation pump chamber. The appeal was dismissed for lack of standing and failure to show any impacts from this *de minimis* project on Land Subject to Coastal Storm Flowage. *In the Matter of Reichenbach (Final Decision)*, 21 DEPR 79 (2014).

Concerns expressed by abutters to a Martha's Vineyard Land Bank trail-improvement project over ancient ways and property rights of access were insufficient to accord them standing. *In the Matter of Martha's Vineyard Land Bank (Final Decision)*, 21 DEPR 72 (2014).

Adopting the Recommended Decision of Presiding Officer Pamela D. Harvey, Commissioner David W. Cash agreed that a Sharon homeowner whose property was 2,487' from a DPW road-surfacing project lacked standing to challenge the work. The Appellant argued that his lot abutted a paved portion of the street undergoing improvements and that he would be impacted by the proposed work and drainage issues. *In the Matter of Sharon DPW (Final Decision)*, 21 DEPR 50 (2014).

Abutters to a proposed single-family home construction project in Essex proved standing to contest a Superseding Order of Conditions based on potential impacts on their downgradient property. *In the Matter of Karen McNiff, Trustee (Final Decision)*, 20 DEPR 92 (2013).

Abutters to a proposed affordable-housing project in Andover did not have standing to challenge the Department's SORAD where the project's proposed detention basins were down gradient from the Petitioners' property and their factual claims to support standing were vague and speculative. In a Recommended Decision by Presiding Officer Pamela D. Harvey, MassDEP rejected the argument that a project might escape review entirely if the SORAD fails to identify a resource area and Applicants could construct a project harming the abutters' interests. *In the Matter of Boston Properties LP (Final Decision)*, 19 DEPR 126 (2012).

Andover abutters opposing a school building project lacked standing to challenge Mass DEP's SOC based on their general claim that the filling of Isolated Vegetated Wetlands would lead to greater post-development stormwater runoff because they failed to show that such runoff would impact their own properties. The runoff in question would occur downgradient and a significant distance from their homes. *In the Matter of Town of Andover (Final Decision)*, 19 DEPR 22 (2012).

– Administrative Consent Order with Penalty

A Dartmouth abutter lacked standing to appeal an Administrative Consent Order with Penalty imposed on his neighbor in connection with unauthorized work in the intertidal zone. In determining that the Petitioner failed to state a claim on which relief might be granted, the Recommended Decision of Presiding Officer Timothy M. Jones applied the plain meaning of the Wetlands Protection Act, G.L. c.30A, and the Civil Administrative Penalty Act, none of which invest any rights to an adjudicatory matter in persons who might be incidentally affected by the penalty proceeding. The issue in this appeal was clouded somewhat by the fact that the matter began as a permit application by the landowner, under which the Petitioner would have had standing, and was converted later by the Department into an enforcement matter. *In the Matter of Sullivan (Final Decision)*, 18 DEPR 133 (2011).

– Condominiums

The Department's denial of a request for an SOC from a condominium unitholder was vacated and the matter remanded to the Department after the Petitioner filed a certificate executed by the condominium trustees certifying that she was authorized to oppose the development under review. *In the Matter of Hart (Final Decision)*, 20 DEPR 83 (2013).

– Flooding

An appeal from a Wakefield landowner challenging a project for a data center was dismissed for lack of standing and failure to assert a cognizable claim based on flooding concerns. The Petitioner's home was located 500 feet from the locus on the other side of 128 and he presented no competent technical evidence to underpin his contention that flooding from the parking area of the project might reach his property. *In the Matter of Digital Realty Trust (Final Decision)*, 20 DEPR 144 (2013).

Commissioner Kenneth Kimmell found that an abutter had standing to challenge wetlands permits for a 400' golf-cart path crossing Bordering Vegetated Wetlands based on concerns with exacerbated flooding as presented by expert testimony. *In the Matter of Enos (Final Decision)*, 20 DEPR 25 (2013).

– Impacts/Flooding

A Brewster Petitioner challenging a culvert-replacement project lacked standing to do so since he failed to demonstrate that he had a colorable claim of title to real property that purportedly would be flooded by the proposed replacement culvert. *In the Matter of Town of Brewster (Final Decision)*, 19 DEPR 173 (2012).

– Impacts/General

An abutter challenging an Edgartown marine utility-pedestal project found her motion for reconsideration rejected as the Commissioner reaffirmed her lack of standing and rejected her claim that the Department had raised the issue of standing too late for consideration. *In the Matter of Rankow (Final Decision on Reconsideration)*, 20 DEPR 128 (2013).

An Edgartown abutter lacked standing to challenge a neighbor's installation of a marine-utility pedestal for water and electrical power having not shown that any wetlands-resource area would be impacted by this very minor project. *In the Matter of Rankow (Final Decision)*, 20 DEPR 103 (2013).

– Property Ownership

A Brewster Petitioner challenging a culvert-replacement project lacked standing to do so since he failed to demonstrate that he had a colorable claim of title to real property that purportedly would be flooded by the proposed replacement culvert. *In the Matter of Town of Brewster (Final Decision)*, 19 DEPR 173 (2012).

– Specific Harm

An abutter's challenge to an amendment to an SOC authorizing a Town of Marblehead pier-extension project was dismissed for lack of standing after the Petitioner failed, in a number of pleadings, to elaborate any specific harm to wetland resources. Her pleadings complained about prop wash, fumes, noise pollution, and the "bottoming out" of the pier at low tides. *In the Matter of Marblehead Harbors and Waters Board (Final Decision)*, 19 DEPR 167 (2012).

An abutter's appeal of an SOC authorizing the construction of a small residence on pilings off the Weir River in Hull was dismissed for lack of standing where the Petitioner's claims were either speculative or failed to show specific injury to his property. Other claims, such as the Petitioner's concern with his continued enjoyment of fishing, observation of wildlife, traffic, and noise were simply outside the purview of the WPA. *In the Matter of Horne (Final Decision)*, 18 DEPR 200 (2011).

The appeal of an individual challenging an SOC issued for a Scituate project was dismissed for lack of aggrievement since the Appellant's only assertion was that there was a general distinction between a coastal and barrier beach—a contention that did not illuminate any specific harm to the Appellant's own property. *In the Matter of Boyajian (Final Decision)*, 18 DEPR 72 (2011).

– Work Outside Wetlands Jurisdiction

Weymouth residents opposing a 242-unit multifamily project lacked standing to do so based on the project's compliance with stormwater-management performance standards because the discharge from the system would be outside the wetland's geographical jurisdiction. *In the Matter of Trammell Crow Residential (Final Decision)*, 18 DEPR 111 (2011).

Stormwater Management

Engineering for a North Reading parking lot failed to meeting stormwater management standards relating to peak attenuation rates, recharge to groundwater due to mounding issues, and submission of an appropriate operation and management plan. The Presiding Officer also found the project proponent had failed to adequately explain why MassDEP should accept a 93.1% TSS removal rate for the proposed proprietary hydrodynamic separator. *In the Matter of M.G. Hall (Final Decision)*, 21 DEPR 22 (2014).

The stormwater-management design for a seven-house project in Worcester failed to meet Stormwater Standard 3 because it used flawed soil data that relied on a Classification C rather than B category, thereby requiring less stormwater to be recharged. *In the Matter of Capital Group Properties, LLC (Final Decision)*, 20 DEPR 58 (2013).

The stormwater-management design for a seven-house project in Worcester failed to meet Stormwater Standard 2 because it relied only on one design point resulting in an unlawful lumping together of calculations—a design expressly forbidden by the regulations. *In the Matter of Capital Group Properties, LLC (Final Decision)*, 20 DEPR 58 (2013).

The stormwater-management design for a seven-house project in Worcester failed to meet Stormwater Standard 1 because it would have resulted in discharging untreated stormwater directly into wetlands and would also have resulted in swales that would have caused wetlands erosion. *In the Matter of Capital Group Properties, LLC (Final Decision)*, 20 DEPR 58 (2013).

The site design for a seven-house project in Worcester failed to meet the Department's requirements for environmentally sensitive site design and low impact development because of egregious flaws in its stormwater-management design and other shortcomings. *In the Matter of Capital Group Properties, LLC (Final Decision)*, 20 DEPR 58 (2013).

In a stinging rebuke to his own Central Regional Office, the Commissioner emphatically rejected an SOC authorizing a seven-house residential development as out of compliance with no less than four Stormwater Standards and pointing out that this was true regardless of whether the full standards would apply or whether the lesser "maximum extent practicable" standard applicable to smaller projects should govern. In this case, the lots in question are a part of a much larger development offering Continuing Care elderly housing. *In the Matter of Capital Group Properties, LLC (Final Decision)*, 20 DEPR 58 (2013).

In a stinging rebuke to his own Central Regional Office, the Commissioner emphatically rejected an SOC authorizing a seven-house residential development as out of compliance with no less than four Stormwater Standards and failing to meet MassDEP regulatory provisions encouraging environmentally sensitive site design and low-impact development. *In the Matter of Capital Group Properties, LLC (Final Decision)*, 20 DEPR 58 (2013).

Commissioner Kenneth Kimmell approved a settlement agreement among the parties to a dispute over wetlands permits for a seven-lot Leominster residential subdivision after the project was revised to address the Petitioners' concerns by reducing the number of lots to four, minimizing impervious surfaces, and decentralizing the project's stormwater-management system. *In the Matter of Angelini (Final Decision)*, 19 DEPR 160 (2012).

MassDEP dismissed an abutter's appeal of a SOC for a City of Lowell stormwater-pipe maintenance project because the appeal had been rendered moot by the project's completion and challenges to the work could only be raised now through an enforcement proceeding. *In the Matter of City of Lowell Regional Wastewater Authority (Final Decision)*, 19 DEPR 133 (2012).

Presiding Officer Pamela D. Harvey ruled that drainage channels and basins were stormwater-management systems and not resource areas for purposes of maintenance where their maintenance was already required under a previous Order of Conditions. *In the Matter of Boston Properties LP (Final Decision)*, 19 DEPR 126 (2012).

On remand from the Superior Court, MassDEP found that a 299-unit Cambridge affordable-housing project would comply with Stormwater Standard 3. The project design was found to provide for post-development runoff that would mostly be directed from the surface to infiltrative devices that would recharge with sufficient rapidity to prevent groundwater mounding that might cause the detention basins to fail hydraulically. Essentially, MassDEP found the testimony of the project proponent's expert, David Albrecht, to be far more compelling and well documented than that of the Petitioner's expert Scott W. Horsley. Presiding Officer Beverly

Coles-Roby criticized the Horsley testimony as "wide of the mark" and lacking in appropriate calculations based on hydrology groups. She also took fault with the hydrologist's failure to perform groundwater calculations of his own. *In the Matter of AP Cambridge Partners II, LLC (Final Decision on Remand)*, 19 DEPR 76 (2012).

A post and cable fence to be installed at a Hull locus within the resource areas of coastal beach and storm-damage prevention could easily be conditioned to protect these interests. Presiding Officer Pamela D. Harvey affirmed the SOC authorizing this project near the Town Landing and imposed an additional condition requiring the maintenance of the fence through periodic removal of debris. *In the Matter of Schindler (Final Decision)*, 19 DEPR 4 (2012).

Administrative Magistrate Bonney Cashin recommended overturning DEP's denial of permits for an 83-acre, 59-lot Upton subdivision, finding that the project did not present issues of informational insufficiency serious enough to prevent a wetlands review and that a zoning variance need not be obtained prior to the issuance of wetlands permits. In addition, the project did not have to meet Stormwater Standard 5 and complied with Stormwater Standard 6 with regard to the protection of coldwater fisheries from project runoff. *In the Matter of Terrill (Recommended Final Decision)*, 18 DEPR 25 (2011).

Superseding Order of Applicability

Based on the recommendation of Presiding Officer Pamela Harvey, Commissioner Kenneth Kimmell ruled that an unappealed 2008 Determination of Applicability given an Easton landowner, and reaffirmed by the Conservation Commission with a 2010 Determination, could not be collaterally attacked two years later by a residents group alleging fraud or mistake. The decision cites prior Department cases respecting considerations of finality in wetlands permitting and notes the fact that in none of the prior cases had a third party petitioner successfully challenged collaterally a valid Determination of Applicability on the grounds of fraud or mistake. *In the Matter of Williams Street Residents Group (Final Decision)*, 18 DEPR 153 (2011).

Superseding Order of Conditions

– Revocation

The Commission dismissed the appeal of a Petitioner who sought the annulment of the Gloucester Conservation Commission's revocation of his Order of Conditions. MassDEP does not have jurisdiction over revocations and appeal must be made to the Superior Court. *In the Matter of Scola (Final Decision)*, 19 DEPR 123 (2012).

Superseding Order of Resource Delineation

Abutters to a proposed affordable-housing project in Andover did not have standing to challenge the Department's SORAD where the project's proposed detention basins were down gradient from the Petitioners' property and their factual claims to support standing were vague and speculative. In a Recommended Decision by Presiding Officer Pamela D. Harvey, MassDEP rejected the argument that a project might escape review entirely if the SORAD fails to identify a resource area and Applicants could construct a project harming the abutters' interests. *In the Matter of Boston Properties LP (Final Decision)*, 19 DEPR 126 (2012).

Abutters to a proposed affordable-housing project in Andover did not have standing to challenge the Department's SORAD where detention basins were down gradient from the Petitioners' property and their factual claims to support standing were vague and speculative. In the alternative, the Presiding Officer Pamela D. Harvey ruled that drainage channels and basins were stormwater management systems and not resource areas for purposes of maintenance. She also found that a drainage channel had not been shown by the Petitioners to be an intermittent stream simply because of the presence of wetland-indicator species absent a dominance test, soil evaluation, or other analysis along the drainage channel that would show saturated or inundated conditions. *In the Matter of Boston Properties LP (Final Decision)*, 19 DEPR 126 (2012).

An appeal challenging the accuracy of a Superseding Order of Resource Delineation issued by MassDEP for BVW at Camp Lion of Lynn in Salem was withdrawn and the appeal dismissed. *In the Matter of Camp Lion of Lynn, MA (Final Decision)*, 19 DEPR 20 (2012).

Variance Request

– Mitigation Measures

In an appeal that has produced three final decisions by three successive MassDEP commissioners, Commissioner Kenneth L. Kimmell affirmed the decision of his predecessor, finding that a proposed single-family home at Plum Island on a coastal dune could not be effectively conditioned to sufficiently protect wetlands resources and did not merit a variance for work on a primary coastal dune on a barrier beach. An administrative magistrate had previously ruled that the project could be conditioned to serve the interests of the Act but her recommendations were rejected by former Commissioners Burt and Golledge. *In the Matter of Peabody Family Trust (Final Decision)*, 18 DEPR 94 (2011).

Vernal Pool

– General

A Recommended Decision of Presiding Officer Pamela D. Harvey rejected a 10 Residents Group's arguments that a newly created vernal-pool area offered in mitigation of a vernal-pool loss caused by a Rockport dam/quarry expansion project would not adequately sustain a viable breeding population. The Hearing Officer pointed to the fact that the replicated area would vastly exceed the size of the lost vernal pool and that the transfer of egg masses would encourage habitat development. *In the Matter of Rockport Department of Public Works (Final Decision)*, 18 DEPR 209 (2011).

Wetlands Bylaws

Chief Presiding Officer Salvatore M. Giorlandino declined to lift a stay imposed in connection with a project presenting coastal-dune issues since an appeal under the Harwich local wetlands bylaw was ongoing in Superior Court and neither party had presented any evidence showing that the project had been approved under Harwich bylaws. *In the Matter of Walsh (Memorandum and Order Denying Motion to Proceed)*, 20 DEPR 140 (2013).

Presiding Officer Timothy M. Jones did not agree with the Department that an appeal challenging an SDA that concluded a Rowley stream was perennial was moot because the Applicant had failed to appeal the denial under the local wetlands bylaw since there was no evidence whatsoever that the Commission's perenniality decision was based on anything other than the Wetlands Protection Act. *In the Matter of Tompkins-Desjardins Trust (Final Decision)*, 18 DEPR 82 (2011).

Wetlands Program Policies

– 1985-4 (Amended Orders)

An abutter challenging an Edgartown marine utility-pedestal project found her motion for reconsideration rejected as the Commissioner reaffirmed her lack of standing and the failure of her challenge based on the Department's Amended Order Policy. *In the Matter of Rankow (Final Decision on Reconsideration)*, 20 DEPR 128 (2013).

The installation of a marine-utility pedestal for water and electrical power pursuant to a previously issued Edgartown Order of Conditions would not require the filing of a new NOI by the applicant since the work was properly within the purview of the landscaping requirement of the original order. *In the Matter of Rankow (Final Decision)*, 20 DEPR 103 (2013).

A Superseding Amended Order of Conditions did not run afoul of Amended Order Policy 85-4 because the changes, developed after the Applicant hired a new landscape designer for a coastal residence, were relatively minor, aesthetic, and would result in the same or decreased impacts on the wetland-resource areas. The amendments included the addition of some curvature to a retaining wall, realignment of a stairway, the use of FilterMitt instead of hay bales for erosion control, and a reduction in the width of a stone trench. *In the Matter of Reichenbach (Final Decision)*, 18 DEPR 202 (2011).

– 1989-1 (Stays)

Chief Presiding Officer Salvatore M. Giorlandino declined to lift a stay imposed in connection with a project presenting coastal-dune issues since an appeal under the Harwich local wetlands bylaw was ongoing in Superior Court and neither party had presented any evidence showing that the project had been approved under Harwich bylaws. Moreover, the project would also require a MEPA approval before the stay might be lifted. *In the Matter of Walsh (Memorandum and Order Denying Motion to Proceed)*, 20 DEPR 140 (2013).

– 1991-1 (Plan Changes)

The Commissioner denied a Motion for Reconsideration of a Final Decision in which he had rejected a SOC because its stormwater design for a seven-lot project in Worcester failed to meet regulatory requirements. In this case, the Applicant submitted substantially revised plans with the Motion for Reconsideration that were an attempt to bring the project into compliance with the various defects pointed out in the Final Decision. The attempt to introduce these substantially revised designs at this stage of the litigation was rejected as both untimely and in violation of the Department's Plan Change Policy. *In the Matter of Capital Group Properties, LLC (Final Decision on Reconsideration)*, 20 DEPR 68 (2013).

Pursuant to the Recommendation of Presiding Officer Pamela D. Harvey, a wetlands appeal was dismissed as moot because the Applicant had filed a new NOI with the Hull Conservation Commission after having been denied the possibility of amending the original filing under the Department's Project Plan Changes Policy 91-1. *In the Matter of Horne (Final Decision)*, 18 DEPR 129 (2011).

Wildlife Habitat

– Migration of Animals

MassDEP rejected a Ten Residents challenge to a ropes course/zip line project proposed for a seven-acre island within the Norton Reservoir, finding that the Petitioners had failed to establish any impairment to wildlife habitat since the pine trees slated for removal were not within BVW and, in any event, the site included no mapped Bald Eagle habitat. *In the Matter of Kenneth Leavitt/Pheeny's Island (Final Decision)*, 20 DEPR 37 (2013).

– Noise

An appeal challenging a SOC issued to the Town of Milton for the construction and operation of a 414-foot wind turbine on the grounds of noise and vibrational impacts on wildlife habitat was dismissed on the recommendation of Presiding Officer Timothy M. Jones. A long line of decisions hold that sound is not cognizable under the Wetlands Regulations and the case presented in this instance, regarding the impact of vibration on wildlife habitat, included only cursory and conclusory witness statements. No quantitative vibration estimates or assessments were performed. *In the Matter of Town of Milton (Final Decision)*, 19 DEPR 106 (2012).

– Stormwater Management

Engineering for a North Reading parking lot meant to address the resource area of BLSF was inadequate insofar as it failed to include a Wildlife Habitat study. *In the Matter of M.G. Hall (Final Decision)*, 21 DEPR 22 (2014).

– Vibration

An appeal challenging a SOC issued to the Town of Milton for the construction and operation of a 414-foot wind turbine on the grounds of noise and vibrational impacts on wildlife habitat was dismissed on the recommendation of Presiding Officer Timothy M. Jones. A long line of decisions hold that sound is not cognizable under the Wetlands Regulations and the case presented in this instance, regarding the impact of vibration on wildlife habitat, included only cursory and conclusory witness statements. No quantitative vibration estimates or assessments were performed. *In the Matter of Town of Milton (Final Decision)*, 19 DEPR 106 (2012).

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