Commonwealth of Massachusetts
Executive Office of Energy & Environmental Affairs

Department of Environmental Protection
One Winter Street Boston, MA 02108 • 617-292-5500

Charles D. Baker
Governor

Karyn E. Polito
Lieutenant Governor

Matthew A. Beaton
Secretary

Martin Suuberg
Commissioner

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

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

DEPARTMENT'S FINAL BRIEF

Introduction.

Putting this Waterways license appeal into perspective, one may take notice that M.G.L. c.91 strongly promotes and supports water-dependent projects, because they serve a proper public purpose and benefit the public's rights in tidelands. M.G.L. c.91, secs. 14 and 18. Public rights are additionally enhanced when a project provides a means by which members of the public may use and enjoy tidelands as a shared resource. A water transportation facility is a significant and preferred tidelands benefit that a project can provide in order to balance "detriments to public rights associated with facilities of private tenancy, especially those which are nonwater-dependent." 310 CMR 9.53 (introduction) and (2)(a). Because they provide such significant tidelands benefits, water transportation facilities are often included in c.91 applications as a way to effectively mitigate the detriments of nonwater-dependent use projects that otherwise would

have no relation to water- related activities, but which nevertheless are compliant with the regulations because they provide additional benefits than outweigh the detriments to the public in tidelands. See In the Matter of Wynn, LLC, Recommended Final Decision, July 15, 2016. In contrast, this project's primary, if not sole purpose, is to provide water- related tidelands benefits to the public through a water transportation facility, and it does so on a very large scale, constituting a substantial tidelands benefit. It is reasonable to suggest that this may be the largest, most important water transportation facility in the Commonwealth. While there are other ferries and excursion vessels in other locations throughout Massachusetts, there is none operating on such a scale, serving so many people who not only utilize it in the pursuit of recreation and tourism, but also rely on it as transportation for the necessities of their lives as residents of Martha's Vineyard and Nantucket. It appears very unlikely that there is a facility that moves more people & goods over Massachusetts waterways than the Steamship Authority.

Viewed in this legal and factual context, it is difficult to give credence to Petitioner's arguments that more "mitigation" is needed in order to make this license comply with the regulations. What would it be? Allowing more access to the public? Providing an additional water-transportation facility? These are what the project provides, in an unequalled order of magnitude. Moreover, the legal argument that additional mitigation is required is misplaced. The language in 310 CMR 9.35(1) does not require a benefits package, but only makes a general statement of overall approach and offers guidance to "assessing the significance of any interference with public rights pursuant to 310 CMR 9.35(2) and(3)," which are the performance standards relating to navigation, fishing and public access. It does not articulate a separate and additional performance standard. The phrase "greatest extent deemed reasonable" is no more a performance standard than is "the overall public trust in waterways is best served." Any arguments or citations to prior decisions that suggest a different interpretation should be dismissed from consideration.

Seen in this way, one understands in a broad sense why the regulations contain no requirement to compensate or mitigate for any detriments, because there are next to none, and because the benefits to the public in tidelands provided by the project are of an exceedingly large magnitude, such that no credible argument can be made for any deficiency in benefits to the public's rights in tidelands. It is hard to imagine any project that would exceed this one in terms of providing public access to tidelands and in terms of promoting and providing the means to use and enjoy

the areas of both filled and flowed tidelands from the historic high water mark out toward the limits of state jurisdiction in Vineyard and Nantucket Sound.

Petitioners' attempt to show a deficiency in satisfying the performance standards for navigation and public access were unsuccessful, inasmuch as what is occurring on the site has been taking place for nearly 150 years and has only provided great benefit to the public in tidelands, with virtually no evidence of detriment. The changes accomplished by the renovated and redesigned project, along with the terms and conditions of this modern license, only enhance those benefits, which as described above, are already far beyond what is needed for compliance. This license protects the public from any significant interference with navigation or deficiency in rights of public access to tidelands, in compliance with the actual performance standards of 310 CMR 9.35(2) and (3), which only require that the project avoid significant interference, not that it provide additional benefits.

Finally, the Petitioners object to the public benefits provided by this project, claiming that the majority of those benefits do not benefit the public, but rather only the traveling public and the Applicant. First, the traveling public is the public. Any project that is providing public benefits cannot be expected to provide every possible benefit imaginable to the public, and water transportation is a significant tidelands benefit, as discussed above. It is available to the all members of the public, without limitation and without discrimination. Second, the applicant is allowing all members of the public onto the site, even those who are not traveling, and signage is being included to inform them of that fact. Third, arguing that the benefits are inappropriately experienced by the Applicant misunderstands the legal standard being applied and the rationale behind it. The law does not begrudge any benefit, in the form of monetary compensation or otherwise, resulting to the Applicant, but rather measures only tidelands benefits and detriments to the public. All water-dependent projects, even if private, are presumed to serve a proper public purpose that provides greater benefits than detriments. 310 CMR 9.31(2)(a). Moreover, the Steamship Authority appears to be a "public agency" overseeing a "public service project" as those terms are defined in 310 CMR 9.02, created by the Massachusetts Legislature. In 1960, the Legislature created the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority to provide for "adequate transportation of persons and necessaries of life for the Islands of Nantucket and Martha's Vineyard." This legislation empowered the Steamship Authority to

acquire, maintain and operate a boat line between the mainland ports of Woods Hole (Falmouth) and Hyannis (Barnstable) on the one hand, and the Islands of Martha's Vineyard and Nantucket, on the other. https://www.steamshipauthority.com/about/history. As a "Public Agency" (310 CMR 9.02), the benefits accruing to the Authority are secondary to its duty to the public as articulated by the legislature. It is hard to imagine any project in Massachusetts that, in its totality, provides greater benefits and fewer detriments to the public in tidelands, while serving a wholly "public purpose," consistent with its legislative origin.

1. **Petitioners have standing to appeal the determination's provisions regarding navigation and access.**

The Department hereby reiterates its Prehearing Memorandum. In addition, the Department states the following.

The Parties take divergent views on how to interpret alleged violations of 310 CMR 9.00 in relation to this issue. The Applicant and Petitioner seem to suggest that these c.91 public trust claims relating to navigation and public access rights have no relationship to environmental protection and therefore cannot constitute "damage to the environment." Both seem to focus instead on wetlands protection to argue the issue of standing in a waterways appeal. The Department sees the issue from a different viewpoint, consistent with the findings in Matter of Webster Ventures, Docket No. 2015-014. The Petitioners allege sufficient facts to show damage to the environment as does any Petitioner who alleges a violation of public trust rights under c.91, including the most typical allegations of interference with navigation and public access rights, and therefore qualify for standing on this basis, for several reasons, listed below.

First, the plain language and apparent intent of the regulations themselves must be observed and followed. 310 CMR 9.00 regulates public rights in tidelands, primarily focused on navigation and public access. A violation of the performance standards in Department regulations is in almost all cases properly viewed as a violation of navigation, littoral rights, or rights of public access to tidelands and other waterways. If c.91 values were not viewed as compatible or part of c.214m Sec. 7A, 310 CMR 9.17(1)(c) would not have been included. Therefore, this is the equivalent of a facial attack on the regulations at the administrative level. To say that this section can't be invoked for appealing issues related to the core interests in c.91 and 310 CMR

9.17 is to say that 310 CMR 9.17(1)(c) is inappropriately included in the regulations and should be stricken as contrary to its statutory authority. [1]

Second, this is really a statutory question, and to the extent there is a significant question of law and not fact to be decided, it shouldn't be adjudicated at the administrative level. All of the language quoted in 310 CMR 9.17(1)(c) is directly quoting from both c.30A, sec.10A and from G.L. c.214, sec.7A. While it grants appeal rights to those who qualify under these statutes, it does not add any additional regulatory language that DEP would construe on its own. To the extent it is an issue of statutory law, it is more appropriate for such an issue to be determined in the courts. The issue is whether allegations of damage to rights of navigation, public access and other public trust rights in tidelands constitute "damage to the environment" pursuant to c.214, Sec. 7A. Whatever determination the Department makes in this case would not be entitled to deference from the courts. Generally when the meaning or application of a statute is challenged at the administrative level, that question is preserved for appeal, but not adjudicated. It would seem that approach is appropriate here for the same reasons.

Third, even if it were deemed appropriate to rule on these issues, the plain language of G.L. c.214, sec.7A allows for such a claim. Note the words "impairment" to any "water resources, open spaces, natural areas." Surely Commonwealth Tidelands qualify as one or more of these three descriptors. "Impairment" has a broad meaning including weakening, having a negative effect on. Synonyms to "impair" are diminish, reduce, weaken, lessen, decrease, impede, hinder. It is simple to conclude that significant interference with and impairment of (see 310 CMR 9.35(2)(a)1(e) public rights in tidelands can fit this definition perfectly. Impairments that adversely affect human use and enjoyment by causing a danger or other lessening of use and enjoyment fit the definition perfectly, and just because it is human activity that is being protected, this should not create doubts about its application. Impairment that affects humans' use and enjoyment of natural resources are just as much damage as an impairment effecting plants, animals or water quality. Placing fill or structures in tidelands virtually always contains

[1] Facial attacks on the substance, validity, or the adequacy of the Department's regulations cannot be adjudicated at the administrative level and must instead be brought, if at all, in the Superior Court. See Matter of Milwaukee Metropolitan Sewerage District, Docket No. 97-165, Final Decision-Order of Dismissal, 1998 MA ENV LEXIS 926 (June 23, 1998), aff'd sub nom. Milwaukee Metropolitan Sewerage District v. Department of Environmental Protection, C.A. No. 98-3867, Memorandum of Decision and Order on Cross-Motions for Partial Judgment on the Pleadings (Suffolk Super. Ct., July 26, 1999)

an element of "impairment," because it eliminates the area displaced, making it less available during the license term for unrestricted public use, including fishing, fowling, navigating and any other lawful use.

Fourth: The word "Environment" is broadly defined as "the totality of surrounding conditions" and is not limited to ecology. http://www.thefreedictionary.com/environment. See Black's Law Dictionary definition of "environment," including physical, cultural, economic, social, and aesthetic considerations. See Massachusetts Constitution Article XCVII, fostering the "right of the people to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of the environment." Environmental protection is not limited to pollution of air, water and earth. The origins of environmental protection can be traced to the Institutes of Justinian, circa 530 A.D., the precursor of the public trust doctrine, which stated: "By natural law itself, these things are the common property of all: air, running water, the sea and with it the shore of the sea."

Fifth, even if one did not conclude that the right is squarely within the plain language of the statute, it appears that this statute is meant to be broad and inclusive when it adds the phrase "including but not be limited to. " This clearly means that the maxim "*EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS"* [2] does not apply. It would therefore be proper to include any negative effect on any other resource or part of the environment viewed as not expressly included.

Sixth, as a remedial statute[3] c.214, sec. 7a should be liberally construed, according to that maxim of statutory interpretation. Therefore it can be read to include aspects of environmental protection not otherwise stated. The Massachusetts SJC has interpreted this statute as containing a "broad remedial purpose," saying "The legislative intent underlying section 7a is broadly stated in the title under which it was enacted: 'An Act establishing a cause of action in behalf of certain persons and political subdivisions for the purpose of protecting the natural resources and environment of the Commonwealth.' We believe that these broad statements of purpose are

[2] a principle in law: when one or more things of a class are expressly mentioned others of the same class are excluded. Hagen v. Com., 772 N.E.2d 32, 2002

[3] *A law enacted for the purpose of correcting a defect in a prior law, or in order to provide a remedy where none previously existed.*

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incompatible with a narrow, technical interpretation of 7a." City of Boston v. Massachusetts Port Authority, 364 Mass. 639, (1974)

Seventh, in terms of specific reference to c.91 public trust values, it should be noted that in c.30A, sec. 10A, the only statute referenced in regard to persons having the ability to bring a claim under c.30A, sec. 10A and c.214m Sec. 7A for damage to the environment, is M.G.L. c.91. It would be contradictory to conclude that the legislature did not intend for claims of violating the public trust rights in tidelands under chapter 91 to satisfy the pleading requirements of c.214m Sec. 7A after making c.91 the only statute referenced therein. The amendment specifically referencing c.91 claims was passed in 2006, just eleven years ago, with input from the Department.

Eighth: Taking the position that aspects of c.91 don't involve damage to the environment may have unintended consequences, such as limiting MEPA jurisdiction over c.91 projects, where MEPA uses this same phrase, verbatim, in its statute, M.G.L. c.30, sec.61. Excluding interests that seems to benefit humans rather than only some unduly narrow definition of the "environment" would conceivably eliminate as "environmental" other DEP regulatory programs or portions thereof, including those which protect economic development (Brownfields-21E), aesthetics(Clean Water Act), and other examples.

Ninth: Applicant's argument that 310 CMR 9.33 (entitled "environmental protection standards") describes and limits the violations that could be considered under c.214, sec. 7a is incorrect. First, there is no explicit or implicit association or relationship between 310 CMR 9.33 and either 310 CMR 9.17(1)(c) or c.214, sec. 7a. Second, the same objections made about c.91 not being closely related to pollution and ecology could also be made to some of the other "environmental protection standards" of 310 CMR 9.33, such as the Massachusetts Historical Commission Act, the Underwater Archeological Resources Act, and the State Highway Curb Cuts statute.

Accordingly, Petitioners did not need to introduce evidence regarding wetlands resources; and the Department did not offer any such evidence either in support or opposition. Such evidence does not seem relevant to either standing or the other designated issues below. Nevertheless,

Petitioners have standing to appeal pursuant to 310 CMR 9.17(1)(c).by virtue of their alleging that there have been violations of the performance standards relating to navigation and public access found in 310 CMR 9.00.

2. **The project meets the requirements of 310 CMR 9.35(2), including the requirements contained in 310 CMR 9.35(2)(a)(1)(g) that the project not generate water-borne traffic that would substantially interfere with other water-borne traffic in the area at present, or in the future, as may be evidenced by documented projections.**

The Department hereby reiterates its Prehearing Memorandum. Department witness Dave Hill applies the correct standard to determine substantial or significant interference with navigation. (Hill PFT, par. 13). The purpose of the project is to reconfigure and refurbish the existing terminal. Therefore there is no new water-borne traffic being generated. It is essentially similar traffic that has been present for over a century. Even if the existing traffic were viewed as newly generated, it would not substantially interfere with other water-borne traffic in the area at present or in the future. Dave Hill's testimony provides the relevant facts and expert opinion to demonstrate this, as well as that there are no other violations of 310 CMR 9.35(2) by this Project. As he explains: "Insignificant interference caused by any structure or fill will affect any and all users passing the area on a waterway. Depending on the waterway, this can be hundreds or thousands of people or vessels. Having multiple parties experience and acknowledge this insignificant interference does not make that rise to the level of a significant interference. I do not utilize these considerations to engage in any separate balancing test or determination of whether the "overall public trust is best served" pursuant to 310 CMR 9.35(1). I would consider a "significant interference with navigation" to involve the significant risk of a truly harmful consequence, whether it is damage to person or property, significant economic loss, complete blockage of a waterway or other serious detriment." (Hill PFT, par.13, page 8.) Nothing in the pre-filed testimony or live cross examination came close to describing or establishing the existence of any of those scenarios.

In general, the Petitioner was unsuccessful in establishing that slip number 3 would be busier than the other slips, or cause any more interference than at present. Petitioner certainly did not establish that any interference would be significant, bearing in mind that any structure causes some interference but nevertheless may be allowed. (310 CMR 9.35(1))

More specifically, while Mr. Lamson admits that slip #3 will be having more regular ferry traffic than currently and the slip will be closer to the WHOI pier and Eel Point Channel at certain points, Transcript p.48, there is no testimony by which one could conclude that this amounts to a *significant* interference with navigation. Mr. Iwerks testified that slip #3 could not accommodate as many vessels as the other slips. Transcript p. 87. So it is logical to conclude that slip #3 will be used less often than slips #1 and #2. Petitioner tried to establish how often slips can be used, but that is very hard to predict. Petitioner tried to critique the current report modeling, but didn't really undercut its validity in any substantial way through its questions to Mr. Iwerks. Transcript p. 100. It appeared that any errors in currents were nowhere near the facility. Transcript p. 103-4. Captain Gifford did not see any serious problems even if slip 3 was a little closer at points and a little busier (Transcript p. 142-3), seeing "an extremely small percentage as an interference." He noted that "the unspoken turning basin remains the same, but we will still not be spending much time in that turning basin backing out. And if anything, maybe a little bit less, because the slips are further out, and they don't have to back out as far." Transcript p. 144. Regarding the entrance to Eel Pond, Captain Gifford states "there's not many more than six smaller vessels going into Eel Pond at any given time. Those vessels are able to get out of the way if an Authority vessel is heading into its staging area." Transcript p. 154. Six vessels having to occasionally change location slightly is not a significant interference, and obviously such pleasure boats are limited to the summer months. Although some of those vessels could be a sailboat up to 40 feet (Hill, Transcript p.163), under those circumstances you would expect such a vessel to typically have auxiliary power and operate as a powerboat. Hill, Transcript p. 168. As Hill stated in par. 12 of his pre-filed testimony: "there is ample open water adjacent to the SSA Terminal to accommodate safe navigation for the ferries along with recreational boaters, commercial vessels and research vessels."

3. The project meets the requirements of 310 CMR 9.35(3), relating to public rights of fishing, fowling, and on-foot passage

The Department hereby reiterates its Prehearing Memorandum. Petitioners seem to confuse the standards for nonwater-dependent uses with water-dependent uses. In section 310 CMR 9.35(3), relating to water-dependent uses, the standard is to avoid significant interference with fishing and on-foot access. It does not require actively building any kind of facility unless that is needed to avoid significant interference. In relation to the flowed tidelands at the site, Dave Hill's testimony explains why this is not an active fishing area; nor would the project interfere with fishing, and that it therefore complies with 310 CMR 9.35(3)(a), (Hill PFT par. 22.), which only requires that fishing can take place in the flowed tidelands "adjacent to the project site." Moreover, it poses no obstacles to on foot passage, and is therefore in compliance with 310 CMR 9.35(3)(b)2.b. (Hill PFT par. 24.) This section requires that the public access be provided in a way that will "avoid undue interference with the water-dependent uses in question" and gives examples of appropriate access as limited to "allowing the public to pass laterally along portions of the project shoreline." The regulation balances the need for access with smooth operation of the licensed water-dependent use. It acknowledges that sometimes only part of the project site can accommodate lateral access along the shoreline. One can see that the access provided in this license is fully compliant with this section. Nothing in the other Parties' pre-filed testimony or live cross examination came close to establishing a violation of those regulatory standards. Petitioners seem to believe that facilities such as walkways and fishing platforms have to be built, but this would only be true in the case of nonwater-dependent projects. This distinction is made very clearly in 310 CMR 9.35(3)(b)2a and b. The only possible exception to this is found for private recreational boating facilities on Commonwealth Tidelands, pursuant to 310 CMR 9.35(4); but while this is Commonwealth Tidelands, it is not a private recreational boating facility.

The cross-examination of the witnesses did not yield any new evidence pointing to a different conclusion. Mr. Las admits that there are several provisions in the license that confer and protect the public rights of passage on the site, and that those provisions were similar to other licenses that the witness supported as correct. Transcript, p. 32-36. While Mr. Las acknowledged that there will be some limitations on the public's access to the site, Transcript, p.42, it is clear from

all the testimony that this is due to the need to provide safety and security to the general public. The plans don't need to show specific facilities for lateral access down to the adjacent beach, Mr. Lamson, Transcript, p. 58, because the requirements are stated in the license and will be further defined in a management plan pursuant to 310 CMR 9.35(5). While a fair amount of time is spent examining the feasibility of additional benefits such as walkways and fishing platforms (Mr. Lamson, Transcript, p 63), these are not required under the regulations.

4. **The project meets the requirements of 310 CMR 9.35(5) relating to public rights of access to tidelands.**

The Department hereby reiterates its Prehearing Memorandum. 310 CMR 9.35(5) is the last subsection under 9.35, and applies to "Any project that includes tidelands or Great Ponds accessible to the public, in accordance with any of 310 CMR 9.35(1) through (4)." It requires a management plan be established separate from the license, requires signage in some cases, and prohibits "gates, fences, or other structures (that) may be placed on any areas open to public access in a manner that would impede or discourage the free flow of pedestrian movement thereon…unless otherwise authorized in writing by the Department."

This section clearly contemplates the need for a management plan to be established subsequent to licensing.[4] The testimony demonstrates that SSA must operate under certain security restraints but that the management plan must be approved by the Department and that it will attempt to maximize reasonable public access, as SSA has in the past. In any such plan, the Department and SSA must comply with all other provisions of 310 CMR 9.35(5) besides the management plan required by 310 CMR 9.35(5)(a). Petitioners complain of the absence of a timeline for the plan, but do not cite to any regulatory requirement or violation. The regulations seem to recognize that each site will be different and allow for flexibility to account for the unpredictability of construction schedules and other variables.

Nothing in the other Parties' pre-filed testimony or live cross examination came close to establishing a violation of those regulatory standards. While Mr. Lamson admits that there is nothing in the plan showing any lateral access from the Steamship Authority to the adjacent beach, Transcript, p. 58, he states that the Steamship Authority will allow members of the public

[4] 310 CMR 9.35(5)(a) states: "reasonable rules and regulations governing public use of such areas may be adopted by the licensee, and may be subject to review and approval by the Department, or its designee, if so provided in the license."

– even those who are not buying a ticket to go on the ferry – to come and spend time on the site, enjoying the scenery, strolling and spending time there, except during these higher security levels, where we would have to be screening passengers and people that are coming onto the terminal --on the property. He reiterates that all members of the public are allowed on the site. Transcript, p. 72. He acknowledges that there is currently a fence along the property line near an adjacent beach and, recognizing the applicability of 310 CMR 9.35 (5)(c) to this license, proposes that "there could be a ladder or something put down off the bulkhead to permit public access onto the beach. Transcript, p. 74.

Regarding the need for signage, although the facility has always been "open and welcoming to the general public," (Hill PFT par. 23), Department witness Dave Hill testifies in par. 28 of his Pre-filed Direct Testimony that signage should be required, and that the Department recommends an additional license condition to require specific signage, clarifying that non-paying members of the public are welcome on the project site in addition to paying customers, in case it is unclear to anyone that they are welcome. The Department proposes the following to replace current Special Condition #1:

"1. In accordance with any license condition, easement, or other public right of lateral passage that exists in the area of the subject property lying between the high and low water marks, the Licensee shall allow the public in the exercise of such rights to pass freely over or around all structures within such intertidal area and historic filled tidelands. Accordingly, the Licensee shall place and maintain, in good repair, a sign at each main entry point to the facility to provide information about public access to and along the water's edge. At a minimum, the public access signs shall be posted at each property line adjacent to the mean high water shoreline and at the facility entrances at the intersection Railroad Street & Luscombe Avenue, at Cowdry Road, and at the bike path. Said signs, designed in accordance with the signage specifications provided by the Department, shall be posted within thirty (30) days of the License issuance date. Nothing in this condition shall be construed as preventing the Licensee from excluding the public from portions of said structure(s) or property not intended for lateral passage."

5. **The Petitioners may not obtain, as part of their relief, the carrying forward of prior restrictions contained in license No. 1960.**

The Department hereby reiterates its Prehearing Memorandum. As a matter of law, there is no requirement or preference in 310 CMR 9.00, or elsewhere, that any provisions from prior licenses be inserted into subsequent licenses. Changing conditions will often require different conditions in a new license for the same area. This issue does not refer to any specific regulatory violation, such as would state a claim upon which relief can be granted. To the extent any other party, such as the Naushon Trust, may be potentially aggrieved, Petitioner does not have standing to bring Naushon's claim, and it is too late for Naushon to do so, even if they wanted to, which apparently they don't. In paragraphs 31 and 32 of his Pre-filed Testimony, Department witness Dave Hill describes the referenced restrictions contained in License no. 1960 as pertaining solely to protecting the Naushon Trust dock from possible violations under 310 CMR 9.36. He explains that the representatives of the Naushon Trust property no longer have any such concerns, and that the only comment received from the Naushon Trust focused on the redirection of flood water, which the Authority responded to by revising the grading adjacent to the Naushon property. Mr. Hill notes the existing distances and increased offsets resulting from the redesign of slip #3. In paragraph 34 he explains that the "relocation of Slip 3 will improve the safety of the vessels approaching and leaving the terminal site." Therefore such restrictions as were included in the prior license are not needed. Nothing in the other Parties' pre-filed testimony or live cross examination provided a basis for establishing a violation of any regulatory standards that might be applicable to this analysis.

6. Conclusion

For the reasons stated above, the Department requests that the appeal be dismissed and that the license, as modified, be issued.

Respectfully Submitted,

Samuel J. Bennett

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Samuel J. Bennett
Senior Counsel
MassDEP