COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, S.S.

SUPERIOR COURT
CIVIL NO.
SUCV2008-05688-D

CONSERVATION LAW FOUNDATION AND
TWELVE RESIDENTS OF THE
COMMONWEALTH OF MASSACHUSETTS,
Plaintiffs

v.

DEPARTMENT OF ENVIRONMENTAL
PROTECTION AND SOMERSET POWER, LLC
Defendants

MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS OF CONSERVATION LAW FOUNDATION AND TWELVE RESIDENTS OF THE COMMONWEALTH OF MASSACHUSETTS

I. INTRODUCTION

On November 26, 2008, The Massachusetts Department of Environmental Protection ("Department") issued a final decision that, if it were to stand, would eviscerate the right of affected Massachusetts residents to engage meaningfully in the determination of air pollution control permits. This decision was contrary to the plain language of the Department's own regulations and past practice, the purpose of the state law and the principles articulated in the Massachusetts Administrative Procedure Act ("Massachusetts APA"). Conservation Law Foundation ("CLF") and Twelve Residents of the Commonwealth ("Twelve Residents") now seek relief from this Court to remedy this grave error and affirm the vital role that public participation serves in the administration of environmental protection in the Commonwealth.

II. PROCEDURAL HISTORY

On January 25, 2008, the Department issued two approvals to Somerset Power, LLC ("Somerset Power" or "the Company") that modified the terms for the continued operation of Somerset Station, a 120 megawatt ("MW") coal-fired power plant, to accommodate Somerset Power's plans to convert the plant to an unproven coal gasification technology. (R. 0114, 0144). Within twenty-one days of the issuance of these approvals, in compliance with the terms of the approvals and with 310 CMR 1.01(6)(b), CLF and Twelve Residents (now, collectively "the Plaintiffs") filed a notice of claim for an adjudicatory appeal and simultaneously sought to intervene in the proceeding. (R. 00001).

The crux of the Plaintiffs' claim in that proceeding was that the modified approvals will allow Somerset Station to emit far greater amounts of air pollution than the original approvals would have permitted, thereby violating the Department's obligation to prevent air pollution under the Air Pollution Control Act, G.L. c. 111, § 142A-142N and its regulations at 310 C.M.R. 7.00 *et seq*., as well as the obligation to minimize and prevent damage to the environment under G.L. c. 21A, § 8. (R. 00092-00093). Plaintiffs have alleged that these increases in pollution will result in concrete harms to public health and the environment, particularly within a 30-mile radius of Somerset Station. (R. 00274-00275, R. 00304).

The Department summarily dismissed Plaintiffs' claims on the basis of motions to dismiss filed by the Department and the Company (collective, "Defendants"). (R. 00505). The Presiding Officer issued a Recommended Final Decision on June 13, 2008, concluding that Plaintiffs did not have standing to appeal and had failed to state a claim upon which relief could be granted. (R. 00505). The Recommended Final Decision was adopted by Commissioner Laurie Burt in a Final Decision issued on August 27, 2008. (R. 00524). Following a Final

Decision on Motion for Reconsideration, Plaintiffs filed a timely complaint to this Court seeking judicial review. This memorandum and accompanying motion for judgment on the pleadings are timely filed pursuant to agreement of the parties. See Joint Motion of All Parties to Revise Briefing Schedule (Allowed, July 16, 2009).

III. LEGAL FRAMEWORK

The Department's general regulations governing notice of claims for appeal is clear – "A *person* filing a notice of claim shall include sufficient written facts to demonstrate status as a *person aggrieved* . . . and documentation to demonstrate previous participation *where required*." 310 C.M.R. 1.01(6)(b). In contrast to other Massachusetts environmental regulations, the Air Pollution Control regulations do not contain any provisions regarding appeal. Instead, appeals of decisions made under the Air Pollution Control regulations are governed solely by the Department's general rules for adjudicatory proceedings. See 310 C.M.R. 1.00 *et seq*. Any issues that are not explicitly addressed by these regulations are to be "considered in light of the entire M.G.L. c. 30A." 310 C.M.R. 1.01(1)(b).

The regulations regarding the standard of review for motions to dismiss for failure to state a claim are equally plain: "In deciding the motion, the Presiding Officer shall assume all the facts alleged in the notice of claim to be true." 310 C.M.R. 1.01(11)(d)(2). In connection with resolving Defendants' motion to dismiss in the underlying proceeding, the Department could not lawfully make any factual findings contrary to the facts alleged by Plaintiffs. See Whitinville Plaza Inc. v. Kotseas, 378 Mass. 85, 87 (1979); Nader v. Citron, 372 Mass. 96, 98 (1977) (overruled on other grounds).[1]

[1] Though the Department correctly notes that the Supreme Judicial Court retired the Nader decision with respect to its statement that the complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," this ruling did not upset the requirement that a Plaintiff's claims be taken as true. (R. 0576 n.2) (citing Iannachino v. Ford Motor

Massachusetts regulates the emissions of air pollutants from power plants under a complex framework of state and federal statutes and regulations. The Massachusetts Air Pollution Control Act authorizes the Department to regulate sources of air pollution to "prevent pollution or contamination of the atmosphere." G.L. c. 111, §§ 142A – 142N. Acting pursuant to its authority under the Air Pollution Control Act, the Department has established regulations governing the emissions of air pollutants from power plants. See 310 C.M.R. 7.00 *et seq*. Department decisions must also conform to the requirements set forth at G.L. chapter 21A, Section 8 which requires the Department to take action to prevent and minimize damage to the environment.

In May 2001, the DEP promulgated 310 C.M.R. 7.29, commonly known as the "Filthy Five" regulations, to control emissions of nitrogen oxides, sulfur dioxides, mercury and carbon dioxide from six of the Commonwealth's oldest and highest emitting power plants. Section 7.29 requires any "affected facility" to submit an Emissions Control Plan ("ECP"). See 310 C.M.R. 7.29(6). The regulations provided two "compliance paths" for affected facilities. If a facility owner chose to comply by adding emissions control technologies that did not result in a "repowering" of the facility or require a "plan approval" under 310 C.M.R. 7.02, the facility owner had to comply with the emissions limitations in 310 C.M.R. 7.29(5)(a)1.a and (5)(a)2.a by October 1, 2004 and the emissions limitations in 310 C.M.R. 7.29(5)(a)1.b and (5)(a)2.b by October 1, 2006; if a facility chose to "repower" the facility and submit a plan approval, it received an additional two years to comply with the standards. See 310 C.M.R. 7.29(6)(c). Whenever the Department proposes to approve an amended ECP, the DEP is required to publish a notice of the draft approval and provide a 30-day public comment period in accordance with

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Company, 451 Mass. 623, 636 (2008) (retaining the requirement that the court assume "that all the allegations in the complaint are true (even if doubtful in fact)").

G.L. c. 30A. <u>See</u> 310 C.M.R. 7.29(6)(h). After the public comment period ends, there is an opportunity for adjudicatory appeal which is initiated by a request for an adjudicatory hearing.

IV. STATEMENT OF FACTS

On June 7, 2002, the Department issued an approval of Somerset Station's original ECP. Pursuant to the terms of the ECP, Somerset Power was required to file a "Non-Major Comprehensive Plan Application" ("NMCPA") under 310 C.M.R. 7.02 with the Department for the construction of a natural gas reburn system intended to bring Somerset Station into compliance with the Filthy Five regulations. (R. 00001, 00007, 00092-93, 00180-00214). The Department approved the NMCPA subject to a number of special conditions including the following:

> Somerset Power, LLC *shall repower* Unit 6, in accordance with the provisions of its approved Emission Control Plan, by January 1, 2010, *or terminate any operation of Unit 6 after January 1, 2010* should Somerset Power, LLC fail to repower Unit 6 by January 1, 2010.

(R. 00192, 00208 (emphasis added)). As a result of the "repowering" condition, Somerset Power received the benefit of an additional two years to comply with the stringent emissions limitations of the Filthy Five regulations.

On April 2, 2007, Somerset Power submitted an application to the Department seeking to revoke this condition by allowing it to "convert" the plant to a technology called plasma gasification rather than shutting down or "repowering" the facility (and undergoing the attendant comprehensive environmental review) as required by the 2002 and 2003 approvals. (R. 00032-00033). Despite the failure of this application to conform to the requirements of the original ECP and NMCPA pursuant to the Filthy Five regulations, the Department issued draft approvals for the project on August 21, 2007 and opened a 30-day comment period. CLF and some of the Twelve Residents appeared at the October 1, 2007 public hearing and presented oral and written

comments opposing the approvals on multiple grounds, including the increases in all emissions as compared to the original permits, the potentially large increases in certain pollutants, as well as the potential for toxic emissions from co-firing construction and demolition debris. (R. 00003, 00539-00540). The Department issued final approvals amending Somerset Power's ECP and NMCPA on January 25, 2008. (R. 00114, 00144). These approvals projected increases of up to 81,251 tons per year in carbon dioxide emissions, up to 84.7 tons per year of carbon monoxide, and up to 20.3 tons per year of volatile organic compounds from the proposed Somerset Station project. (R. 00114, 00123-00124, Tables 1-3). Additional relevant facts are set forth in the Procedural History section above.

V. STANDARD OF REVIEW

Pursuant to G. L. c. 30A, § 14(7), which creates a right to judicial review of agency decisions, the Court may "affirm the decision of the agency, or remand the matter for further proceedings before the agency; or the court may set aside or modify the decision, or compel any action unlawfully withheld or unreasonably delayed, if it determines that the substantial rights of any party may have been prejudiced because the agency decision is . . . (c) based upon an error of law . . . or (g) arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." Courts review questions of law in administrative decisions *de novo*. See Electronic Data Systems Corporation v. Attorney General, 454 Mass. 63, 65 (2009). Though an agency's interpretation of its own rule is typically given great weight, courts "will not hesitate to overrule agency interpretations of rules when those interpretations are arbitrary, unreasonable or inconsistent with the plain terms of the rule itself." Moot v. Department of Environmental Protection, 448 Mass. 340 (2007); Boston Police Superior Officers Federation v. Labor Relations Commission, 410 Mass. 890, 892 (1991); Warcewicz v. Department of Environmental

Protection, 410 Mass. 580 (1991); Boston Preservation Alliance, Inc. v. Secretary of Environmental Affairs, 396 Mass. 489, 498 (1986); Finkelstein v. Board of Registration in Optometry, 370 Mass. 476, 478 (1976).

VI. ARGUMENT

A. The Department Erred as a Matter of Law in Rejecting Plaintiffs' Appeal on the Basis of Standing

CLF and Twelve Residents had standing to appeal the approvals issued by the Department pursuant to the Air Pollution Control regulations. In explaining the process for appeal, the approvals on their face set forth the requirements for initiating an adjudicatory appeal: "If you are aggrieved by this decision you may request an adjudicatory hearing." (R. 00042, 00072). The approvals further specified that appeals may be initiated by filing a request for an adjudicatory hearing pursuant to 310 C.M.R. 1.01(6)(b), which requires that a notice of claim for appeal must "demonstrate status as a person aggrieved." Although the regulations do not define the term "person aggrieved," the regulations do provide that any ambiguities should be considered in light of the "entire M.G.L. c. 30A." 310 C.M.R. 1.01(b). Defendants acknowledge that these are the governing rules. (R. 00505, 00515-00516).

Massachusetts courts have determined that status as an "aggrieved person" is not to be given a narrow construction and should be determined by the context of the statute which enabled the challenged agency action. See Shaker Community, Inc. v. State Racing Commission, 346 Mass. 213, 216 (1963); Boston Edison Co. v. Boston Redevelopment Authority, 374 Mass. 37, 44-45 (1977); see also, American Can Co. of Massachusetts v. Milk Control Board, 313 Mass. 156, 161 (1943). Of particular importance here is the requirement that the public be given the opportunity to participate in decisions affecting the emissions of air pollutants. The Boston Edison court held that where the agency has great power and the statute

"contemplates consideration of public opinion in the decision making process, then a *very expansive* conception of standing obtains." 374 Mass. at 44 (emphasis added). There can be no doubt that the Department exercises great power when it approves emissions limitations for power plants, and notably, the regulations at issue here require an opportunity for public participation in the decision-making process through a public hearing and public comment see 310 C.M.R. 7.02(9)(g) and 310 C.M.R. 7.29(6)(e) and (h); in this context, the principles governing status as an "aggrieved person" should not be unduly constrained.

Plaintiffs sought to show that they met the definition of "aggrieved persons" by establishing that they satisfied the standard for intervention under both the Department's regulations and c. 30A, § 10A. (R. 00002-00004). The Department's regulations permit intervention by, *inter alia*, "persons" who are "substantially and specifically affected by the adjudicatory proceeding" or by any group of ten or more persons eligible to intervene under chapter 30A, section 10A in an adjudicatory proceeding in which damage to the environment is or might be at issue. 310 C.M.R. 1.01(7)(d) and (f). Twelve Residents alleged that they would suffer direct, concrete harms, different in magnitude from the general public due to the fact that the increased air emissions allowed by the approvals would have deleterious effects on their health and the environment. (R. 00001). Twelve Residents cited a 2004 study produced by the Clean Air Task Force to support their allegation that the harms to public health from power plant pollution are most acute within 30 miles of the plant. Each of the twelve citizens lives within 30 miles of the plant, and in fact, most live within 2 - 3 miles of the plant. (R. 00005-00006). Plaintiffs also alleged that they would suffer harm from the global warming impacts of increased emissions of carbon dioxide. (R. 00002-00003). CLF alleged that it was substantially and specifically affected in its representative capacity on behalf of its members in Southeastern

Massachusetts and in Rhode Island, including 10 of the 12 residents alleging harm. (R. 00002). The Department's decisions erred as a matter of law by ignoring Plaintiffs' allegations that they would suffer greater harm than the general public. (R. 00516). See Whitinville Plaza, 378 Mass. at 87; Nader, 372 Mass. at 98 (overruled on other grounds).

The Department's Final Decision also erred in concluding that Plaintiffs had no right to initiate an adjudicatory appeal because they had not intervened in the proceeding prior to the issuance of the approvals (R. 00578), despite the lack of any rules governing intervention. Indeed, the Presiding Officer's Recommended Decision questioned whether any person could intervene during a permit proceeding. (R. 00516, 00518).

1. The Standing Decisions Are Erroneous as a Matter of Law Because They Rested on Inapplicable Department Regulations

The Department's decisions improperly imported standing requirements from other environmental regulations rather than applying the standing requirements relevant to the Air Pollution Control regulations. The use of these inapplicable standards resulted in an erroneous conclusion of law regarding the standing of CLF and Twelve Residents. As noted above, the appropriate requirements for standing in this case find their source in the regulations governing adjudicatory proceedings before the Department, 310 C.M.R. 1.01 and G.L. c. 30A, Section 10A. The Department erred by grounding its decision on cases that rely on wholly different statutory and regulatory authority. (R. 00578-00579; R. 00518-00519). The Department's decisions held that CLF and Twelve Residents could not file a request for an appeal or an adjudicatory hearing unless they had properly intervened during the permitting process, that is, unless they were parties. (R. 00518) (noting that CLF and Twelve Residents had not intervened and that G.L. c. 30A, § 10A requires "timely intervention"); (R. 00578). However, the right to request an adjudicatory hearing is nowhere conditioned upon intervening or otherwise having status as a

"party." Rather, the regulations provide that an "aggrieved person" may file a notice of claim for appeal. See 310 C.M.R. 1.01(6)(b).

As the Department noted, although some Department regulations require ten resident groups to submit comments during the public comment period, "no such provision appears in the air pollution regulations." (R. 00519 n. 7). Had the Department intended to require the submission of public comments or attaining party status as prerequisites to a request for an adjudicatory hearing, the Department certainly had the wherewithal to do so. The Department has included such requirements in the waterways regulations.[2] Similar provisions limit the right to request an adjudicatory hearing in proceedings regarding wetlands.[3] In the past, attempts by the Department to inject inapplicable requirements from other regulations have been rejected by the Supreme Judicial Court. See Warcewicz v. Department of Environmental Protection, 410 Mass. 548, 551-52 (1991) (holding that the Department could not lawfully import requirements from its hazardous waste regulations to its wetland protections regulations). Here, the Defendants inappropriately have imported intervention requirements from other regulations to prevent Plaintiffs from exercising their rights under the Air Pollution Control regulations.

2. The Department Misinterpreted G.L. c. 30A, § 10A

The Department also improperly construed the language of c. 30A, § 10A, the statute allowing groups of ten residents of the Commonwealth to intervene in proceedings where damage to the environment is or may be at issue. (R. 00578; R. 00518-519). As set forth above, the Department concluded that intervention during the underlying permit proceeding was a pre-condition that must be met before an appeal could be filed. This conclusion is contrary to the

[2] 310 C.M.R. 9.10(3)(e) providing that failure to submit written comments during the public comment period results in the waiver of any right to an adjudicatory hearing.
[3] 310 C.M.R. 10.05(7)(j)2.a limits the right to appeal to those persons that previously participated in permit proceedings.

statute and the rulings of Administrative Law Judges in past Department appeals.

As with any other case of statutory interpretation, the proper starting point is the language of the statute itself. Here, G.L. c. 30A, § 10A provides:

> Notwithstanding the provisions of section ten, not less than ten persons may intervene in any adjudicatory proceeding as defined in section one, in which damage to the environment as defined in section seven A of chapter two hundred and fourteen, is or might be at issue . . . . Any such intervener shall be considered a party to the original proceeding for the purposes of notice and any other procedural rights applicable to such proceeding under the provisions of this chapter, *including specifically the right of appeal*.

(emphasis added); see also 40 MA Practice, Administrative Law and Practice §1708. This language clearly provides ten residents of the Commonwealth the right to intervene *and* appeal. At least two administrative cases have directly addressed the issue of filing a simultaneous notice to intervene and appeal. See Rocky Mountain Spring Water Company, DEP 2000-106 (June 5, 2001); Riverside Steam & Electric Company, DEP 88-132 (July 15, 1988). These cases stand for the proposition that "ten citizens" groups "need not have intervened prior" to the Department's approval and that any such group could "intervene and request an adjudicatory hearing at the same time." Rocky Mountain at 9; Riverside at 10.

The decision in Riverside Steam & Electric arose out of an application to construct a coal-fired cogeneration plant. A group of citizens filed comments and attempted to intervene, but the Department did not rule on the motion to intervene and instead granted the permit. The Department "notified Citizens by letter of the issuance of the permit" (as the Department did in this case) and "set out the process for appealing the Department's decisions." Riverside Steam & Electric at 1. The Citizens and the City of Holyoke then filed a petition to intervene and an appeal. The applicant in Riverside Steam & Electric raised essentially the same objections that Defendants raised here: namely, "that the right conferred by s. 10A applies to 'adjudicatory

proceedings,' and, according to Riverside, this is not one," and "s.10A applies, if at all, to allow citizen intervention only after one of the original parties to an administrative determination seeks a hearing." Riverside Steam & Electric at 2. Ultimately, the Department was faced with the question of whether "to embark on administrative review" of the Department's decision or "to end the administrative process," and decided that administrative review *was* required. Id. at 3.

Riverside Steam & Electric rejected the legally flawed argument that the applicant "is the only specifically named party whose rights are at issue, and is thus the only party able to ask for a hearing." Riverside Steam & Electric at 7 (internal quotation marks omitted). There, as here, the applicant (in that case Riverside), offered "no cases under c. 30A, s.10A in support of the proposition [that only applicants can seek an adjudicatory hearing]." The Administrative Law Judge ("ALJ") in Riverside Steam & Electric based her decision in that case on the language and purpose of section 10A and a finding that the "fundamental purpose" of intervention in an agency proceeding would be frustrated if only the applicant were allowed to appeal. Id. at 8. The ALJ based her decision to allow intervention and a request for hearing in part on the rationale that:

> It would be wholly anomalous if, as Riverside contends, the special statute designed to allow interveners to raise issues of damage to the environment could be invoked only when an agency had denied a permit application, and the applicant appealed (when by hypothesis the agency took a more environmentally protective position than it might have), but it could not be invoked when a permit is granted (when by hypothesis the agency took a less environmentally protective stance than it might have). In order to make s. 10A's grant of intervention fully effective, it necessarily carries with it the ability not only to intervene, but also to take the steps that are needed to continue the agency process so that the purposes of the intervention can be carried out. *In this case, that means that the interveners must be able to request an adjudicatory hearing, the next step in agency review of the permit decisions*.

Id. at 8-9 (emphasis added). See also, Town of Brookline v. DEQE, 398 Mass. 404 (1986)).

The Department's decisions that are the subject of the present proceeding erred as a matter of law in attempting to distinguish Riverside Steam & Electric on the grounds that the citizens in that case had attempted to intervene earlier in the proceeding; the decision made no such distinction, nor was there a procedure for Plaintiffs in this proceeding to intervene. Moreover, the language of section 10A undercuts any such finding that intervention in an original proceeding is a prerequisite to an adjudicatory appeal. Section 10A provides that an intervenor has the right to appeal and "shall be considered a party to the original proceeding." That language explicitly assumes an intervenor may not have participated in the underlying proceeding.

The ALJ's decision in Rocky Mountain likewise demonstrates that the Department should have reached a different conclusion in this case with respect to Plaintiffs' standing to bring an adjudicatory appeal. As the decision in that case notes: "Rocky Mountain makes much of the fact that the ten citizens entered into this proceeding only to request a hearing, and did not intervene earlier." Rocky Mountain at 8. Yet, the ALJ determined that because the regulations did not address the right to appeal or the role of a citizens group at any stage of the Department's approval process, the Riverside Steam & Electric analysis applied. Rocky Mountain at 7. Accordingly, the "citizens group petitioner need not have intervened prior to the Department's approving Rocky Mountain's application and that the group could, as it did, intervene and request an adjudicatory hearing at the same time." Rocky Mountain at 8.

Further, the Department has established no procedure for intervening in permitting decisions prior to the issuance of a decision, and has declined to rule on such motions to intervene filed by CLF in the past. (R. 00550, 00362-00363). CLF and others attempted to intervene in 310 C.M.R. 7.29 permitting decisions made with respect to Brayton Point Station

and Salem Harbor Station. Rather than issue any ruling on the motions to intervene, the Department recommended that CLF request a hearing in the Salem Harbor case and recommended that CLF file public comments in the Brayton Point case. (R. 00550; R. 00363). This failure by the Department to articulate a clear policy for intervention does not and should not foreclose the right of an aggrieved person to initiate an adjudicatory appeal.

In short, the Department erred as a matter of law in ignoring the plain language of G.L. c. 30A, § 10A, as well as the only precedents that have been established regarding intervention and the right to appeal under the Massachusetts Air Pollution Control regulations. Had the Department correctly interpreted section 10A, it would have found that CLF and Twelve Residents satisfied the requirement to file a notice of claim for an adjudicatory hearing and to intervene. The Department therefore erred as a matter of law in rejecting Plaintiffs' request for an adjudicatory appeal on the basis of lack of standing.

B. The Department Erred as a Matter of Law in Failing to Find that Plaintiffs Alleged Sufficient Facts to State a Claim for Relief

In their Notice of Claim filed with the Department, the Plaintiffs contended that under the Department's modified approvals, Somerset Station would be allowed to emit far greater amounts of air pollution than it would have under its original approvals. (R. 00002-00003). Plaintiffs further alleged that the modified approvals therefore failed to meet the Department's mandate to minimize damage to the environment, violated the terms of the original approvals and contradicted past Department practice. (R. 00009-00014). The Department's errors resulted in a decision that was arbitrary and capricious, an abuse of discretion and contrary to relevant law.

Despite the fact that the Department had favorably disposed of a similar claim in an earlier decision regarding the Salem Harbor Station power plant, as discussed below, it failed to

supply any reasonable rationale for completely deviating here from the standards it had applied in that previous case. In addition, in reaching its decision the Department erred by failing to assume the truth of Plaintiffs' allegations and instead attempting to determine the validity of the claims without offering Plaintiffs an opportunity to present evidence.

1. *Plaintiffs Asserted a Valid Claim that the Department's Grant of Amended Approvals to Somerset Station was Arbitrary and Capricious, an Abuse of Discretion and Otherwise Contrary to Law, Including the Obligation to Minimize or Prevent Damage to the Environment.*

As noted above, the Department's decision to dismiss Plaintiffs' claim rested, in part, on the erroneous premise that Plaintiffs sought to establish that the amended approvals are not "more protective" than the original plan. (R. 00509). As such, the Department never truly reached Plaintiffs' actual claim, which was grounded in the Department's fundamental obligation to take action to prevent or minimize damage to the environment under G.L. c. 21A, § 8 and the Department's failure to uphold that mandate in granting the approvals at issue here. More specifically, Plaintiffs alleged the Department has ignored that mandate by its issuance of the underlying approvals in this case. (R. 00004, 00305, 00311-00312). This claim is based on a comparison of the protection of air quality that would have been achieved under the original approvals to the degradation that would occur under the amended approvals. In addition, it challenges as legally erroneous the Department's position that as long as the approvals include emissions limitations that comply with 310 C.M.R. 7.29, any increases from the original approvals will not result in damage to the environment.

The Department's original approvals would have required either a complete shutdown of Somerset Station or a "repowering" that would have triggered an analysis of best available control technologies ("BACT"). (R. 00310, 00314). Plaintiffs alleged that these conditions would have minimized and prevented damage to the environment to the maximum extent

possible. Plaintiffs further alleged that the Department cannot weaken these conditions without causing greater harm to the environment. (R. 00002-00003; R. 00312). Plaintiffs additionally alleged that subjecting the project to a BACT analysis – which requires evaluation of all available control technologies to reduce emissions – would result in lower emissions of carbon dioxide and criteria pollutants. (R. 00310-00311, 00314). Plaintiffs claimed that by allowing Somerset Power to forgo this analysis, the Department abdicated its responsibility to ensure that its approval of the project will prevent or minimize damage to the environment pursuant to G.L. c. 21A, s. 8. (R. 00311-00312).

Not only were the Department's) decisions actionable under this statutory requirement to minimize damage to the environment, but also they were susceptible to a claim that they were arbitrary and capricious, and reflected an abuse of discretion. As discussed below, Plaintiffs alleged that the arbitrary and capricious nature of the Department's action was poignantly reflected by the inconsistency of the Department's decision in the underlying proceeding here with the Department's earlier decision in response to a request by USGen New England for an amended ECP for the Salem Harbor Station power plant. In that case, the Department found that an amendment must be "at least as protective" as the original ECP. (R. 00281-00282). In support of their allegations, Plaintiffs also relied upon language included in each and every ECP that has been issued by the Department under the Filthy Five regulations:

> Applicable requirements and limitations contained in 310 C.M.R. 7.29 *shall not supersede, relax or eliminate any more stringent conditions or requirements* (e.g., emission limitation(s), testing, record keeping, reporting or monitoring requirements) *established by regulation or contained in a facility's previously issued source specific Plan Approval(s) or Emission Control Plan(s)*.

(R. 00542-00543). Despite this clear prescription, the Department claimed that unlike the Clean Water Act, the Department's emissions standards do not contain anti-backsliding provisions. (R.

00511) ("The Department's emission standards for power plants do not contain a similar provision."). However, the Department's language clearly mirrors the language of the Clean Water Act provision cited by the Department: "A permit may not be renewed, reissued, or modified . . . to contain effluent limitations less stringent than the previous permit." (R. 00511). Indeed, the Department's conclusion in the Salem Harbor Station Decision applied this language in precisely the manner the Plaintiffs assert the Department should in this case.

The facts of the Salem Harbor Station case are instructive: In that case, Salem Harbor Station's owners sought to make changes to the facility that would have required an emissions plan approval under 310 C.M.R. 7.02 and given the plant an additional two years to comply with 310 C.M.R. In exchange for the additional two years of increased emissions, Salem Harbor proposed NOx reductions 10 percent greater than the limits set in the original ECP; nonetheless, the Department found that even these greater reductions would not be as protective as those required by the original ECP because they did not outweigh the harms from the delay of the emissions limitations. (R. 00259).

In its disapproval of Salem Harbor's proposed amendment to its ECP, the Department identified two standards that should be applied: (1) whether any new information or other developments affect the feasibility of the original ECP; and (2) whether, overall, the Amended ECP is more environmentally protective than the original ECP. (R. 00258-00259). In reaching its conclusion, the Department pointed specifically to its obligation under G.L. c. 21A, Section 8 which provides:

> In regulating or approving any pollution prevention, control or abatement plan, strategy, or technology, through any permit, . . . plan approval or other departmental action affecting or prohibiting the emission . . . of any hazardous substance to the environment, . . . the department may consider the potential effects of such plans . . . on public health and safety and the environment that may arise through any environmental medium or route of exposure that is regulated by

> the department pursuant to any statute; and said department *shall act to minimize and prevent damage or threat of damage to the environment*.

(emphasis added). The Department went on to explain that it was appropriate to take into account the delay that would accompany compliance with the emissions limitations under the Amended ECP as compared to the original. Finding that "there is a substantial public health benefit by implementing the original ECP over the Amended ECP," the Department in that case proceeded to disapprove of USGen's proposed amendment to its original ECP. (R. 00259).

A party is entitled to "reasoned consistency" in agency decisionmaking, and although an agency may depart from its prior precedent, it must provide a reason for doing so. See Alliance to Protect Nantucket Sound v. Energy Facilities Siting Board, 448 Mass. 45, 56 (2006); Tofias v. Energy Facilities Siting Board, 435 Mass. 340, 345 (2001); Massachusetts Auto Rating and Accident Prevention Bureau v. Commissioner of Insurance, 401 Mass. 282, 287 (1987); Yet here, the Department has failed to provide a valid reason for abandoning the standard it applied in the Salem Harbor Station decision. The Department attempted to distinguish the Salem Harbor Station Decision by arguing that the facility was not in compliance with the emissions standards in 310 C.M.R. 7.29 at the time of the decision. (R. 00511) ("The Department denied a request for an amendment for another power plant, Salem Harbor, but that facility was not in compliance with the emissions standards at 310 C.M.R. 7.29"). This is not accurate. The relevant emissions standards did not go into effect until 2004, and the Department disapproved of Salem Harbor's amendment in February of 2003. Salem Harbor Station had not failed to comply with the requirements of 310 C.M.R. 7.29 at the time of the Department's decision. Indeed, for all practical purposes, the situation there was no different from the situation faced by the Department in this case. The issues and standards involved in the Salem Harbor case were sufficiently similar to the present case to warrant similar treatment here, certainly including the

application of the same legal standards. The Department's decision nonetheless to ignore its own precedent further reflects that it acted arbitrarily and capriciously, and erred as a matter of law, in both approving a new ECP that is materially less protective than the prior ECP for Somerset Station and in finding that Plaintiffs somehow failed to state a claim on which relief could be granted.

2. *Plaintiffs Also Asserted a Valid Claim that the Department's Decisions Employed the Wrong Standard of Review for Determining Whether Plaintiffs Failed to State a Claim*

The Department further erred by refusing to assume that Plaintiffs' allegations were true. The Department's regulations for adjudicatory appeals set out the standard for reviewing a motion to dismiss for failure to state a claim on which relief can be granted. In deciding such motions, "the Presiding Officer shall assume all the facts alleged in the notice of claim to be true." 310 C.M.R. 1.01(11)(d)(2). This standard has also been affirmed by Massachusetts courts. See Whitinville Plaza, 378 Mass. at 87; Nader, 372 Mass. at 98 (overruled on other grounds). Plaintiffs' claims that the approvals would result in increased criteria air pollutants as well as carbon dioxide and toxic emissions, thereby causing damage to the environment, should have been met with a rigorous inquiry into the underlying facts. At a minimum, the Department was required to have assumed all of the Plaintiffs' factual allegations to be true for the purposes of disposing of the underlying proceeding pursuant to a motion to dismiss. Yet the Department improperly rejected the Plaintiffs' factual assertions, and erroneously found that the amended approvals "will result in no potential increase of any air contaminant." (R. 00576).[4] Not only did the Department err as a matter of law by failing to accept the Plaintiffs' claim as true, but the Department also erred, on this issue, as a matter of fact. The approvals themselves contradict

[4] The Department also erred in this manner by failing to assume the Plaintiffs' allegations regarding the implications of a BACT analysis were significant.

this statement by plainly showing increases in emissions of two criteria pollutants, carbon monoxide and volatile organic compounds.[5]

VII. CONCLUSION

Wherefore, Plaintiffs request that the Court grant their motion for judgment on the pleadings and find that the Department's decision was an error of law, arbitrary and capricious, an abuse of discretion and not in accordance with the law and provide the relief requested in Plaintiffs Complaint.

Respectfully Submitted,

CONSERVATION LAW FOUNDATION
AND TWELVE RESIDENTS,

By their attorney,

Shanna Cleveland (BBO # 647795)
Conservation Law Foundation
62 Summer Street
Boston, MA 02110
617-850-1716
scleveland@clf.org

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[5] See (R. 00053-00054)at Tables 1-3 (noting increases in emissions of carbon monoxide up to 84.7 tons per year and volatile organic compounds of up to 20.3 tons per year).