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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
1884CV02132-BLS1
1884CV02144-BLS1

KATHARINE ARMSTRONG[1] & others,[2]

vs.

KATHLEEN THEOHARIDES[3] & others,[4]

(and a companion case).[5]

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

These two actions involve a dispute over a proposed development on the Boston, Massachusetts waterfront. The plaintiffs in the first action, *Armstrong* v. *Theoharides*, Case No. 1884CV02132-BLS1 (the "*Armstrong Case*"), are members of the Harbor Towers condominium community that is situated on Boston Harbor immediately adjacent to the Rose

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[1] As a Trustee of the Harbor Towers II Condominium Trust.

[2] Michael Burkin, Neal Hartman, Matthew Rubins, and Pran Tiku, as Trustees of the Harbor Towers II Condominium Trust; Robert Gowdy, Lee Kozol, Frank Mairano, Norman Meisner, and Gary Robinson, as Trustees of the Harbor Towers I Condominium Trust; and Julie Mairano and Marcelle Willock, as Members of the Garage Committee of the Harbor Towers I Condominium Trust and Harbor Towers II Condominium Trust.

[3] In her Official Capacity as Secretary of the Executive Office of Energy and Environmental Affairs.

[4] Martin Suuberg, in his Official Capacity as Commissioner of the Department of Environmental Protection, and RHDC 70 East India, LLC.

[5] Conservation Law Foundation, on behalf of itself and its adversely affected members; and Bradley M. Campbell, Carol Renee Gregory, Gordon Hall, Priscilla M. Brooks, David Lurie, Karl See, Erica A. Fuller, Kirstie L. Pecci, Lara G. DeRose, Edward T. Goodwin, Carol A. Goodwin, Jamie Goodwin, and Parcesa Charmchi, residents of the Commonwealth of Massachusetts vs. Kathleen Theoharides, in her official capacity as Secretary of the Executive Office of Energy and Environmental Affairs and Martin Suuberg, in his official capacity as Commissioner of the Massachusetts Department of Environmental Protection.

Kennedy Greenway (the "Harbor Towers Plaintiffs"). The Harbor Towers Plaintiffs contend, among other things, that defendant RHDC 70 East India, LLC's ("RHDC") planned construction of a 600-foot-tall tower on the current site of the Harbor Garage -- in which Harbor Towers residents currently park their vehicles -- will unlawfully interfere with their parking rights in the garage and harm the environment. They further contend that the decisions of defendant Kathleen Theoharides,[6] as Secretary of the Executive Office of Energy and Environmental Affairs (the "Secretary"), and, to some extent, defendant Martin Suuberg, as Commissioner of the Department of Environmental Protection (the "Commissioner") (collectively, the "State Defendants" or, with RHDC, simply the "Defendants"), to approve the City of Boston's "Downtown Waterfront District Municipal Harbor Plan" (the "Downtown MHP" or "MHP") and thereby open the door to the construction of RHDC's planned 600-foot-tall tower, are *ultra vires*. More specifically, the Harbor Towers Plaintiffs seek a declaratory judgment from this Court holding that certain Waterways Regulations contained within Chapter 310 of the Code of Massachusetts Regulations, in which the Massachusetts Department of Environmental Protection ("DEP") relinquishes, to the Secretary, its authority to make particular licensing determinations for structures on tidelands pursuant to G.L. c. 91, § 18, in the context of an approved municipal harbor plan, are invalid and *ultra vires*.[7]

The plaintiffs in the second action, *Conservation Law Foundation* v. *Theoharides*, Case No. 1884CV02144-BLS1 (the "*CLF Case*"), are the Conservation Law Foundation ("CLF") itself and thirteen of its allegedly adversely affected members (collectively, the "CLF

[6] In May of 2019, Secretary Theoharides succeeded Matthew A. Beaton, the prior Secretary of the Executive Office of Energy and Environmental Affairs who originally approved the City of Boston's Downtown Waterfront District Municipal Harbor Plan.

[7] Tidelands are statutorily defined as "present and former submerged lands and tidal flats lying below the mean high water mark." G.L. c. 91, § 1.

Plaintiffs" or, with the Harbor Towers Plaintiffs, simply "Plaintiffs"). The CLF Plaintiffs also challenge the approval of the Downtown MHP, and they further challenge the validity of the municipal harbor plan regulatory framework under the Commonwealth's "Waterways" regulations, which appear at 310 Code Mass. Regs. §§ 9.00, *et seq.* (the "Waterways Regulations"), and the Commonwealth's "Review and Approval of Municipal Harbor Plans" regulations, which appear at 301 Code Mass. Regs. §§ 23.00, *et seq.* (the "MHP Regulations").

This Court previously addressed these cases in a lengthy decision and order on the Defendants' various motions to dismiss, issued on October 17, 2019. See Memorandum of Decision and Order on Defendants' Motions to Dismiss (the "Prior Decision and Order," *Armstrong Case*, Docket Entry No. 28; *CLF Case*, Docket Entry No. 20). The cases came before the Court again most recently on the parties' cross-motions for partial summary judgment. The specific motions currently before the Court are: (1) in the *Armstrong Case*, the Harbor Towers Plaintiffs' Motion for Partial Summary Judgment (Docket Entry No. 44); (2) in the *Armstrong Case*, the State Defendants' Cross-Motion for Partial Summary Judgment (Docket Entry No. 45); (3) in the *CLF Case*, the CLF Plaintiffs' Motion for Summary Judgment on Count I of their Amended Complaint Pursuant to Mass. R. Civ. P. 56 (Docket Entry No. 30); and (4) in the *CLF Case*, the Defendants' Cross-Motion for Partial Summary Judgment on Count I of the Amended Complaint (Docket Entry No. 30).[8]

[8] The Boston Redevelopment Authority, now known as the "Boston Planning and Development Agency" ("BPDA"), sought and was granted leave by this Court to file a Memorandum on Summary Judgment as Amicus Curiae in Support of Massachusetts Department of Environmental Protection's Waterways Regulations and the Municipal Harbor Planning Process (*Armstrong Case*, Docket Entry No. 46). The Court acknowledges the BPDA's amicus brief.

The Court conducted a virtual hearing on the parties' cross-motions for partial summary judgment on October 20, 2020. All sides attended and participated in the hearing. Upon consideration of the written materials submitted by the parties, the information provided at the motion hearing, and the oral arguments of counsel, as to the *Armstrong Case*, the Harbor Towers Plaintiffs' Motion for Partial Summary Judgment is **ALLOWED**, and the State Defendants' Cross-Motion for Summary Judgment is **DENIED**. As to the *CLF Case*, the CLF Plaintiffs' Motion for Summary Judgment on Count I of their Amended Complaint Pursuant to Mass. R. Civ. P. 56 is **ALLOWED**, and the Defendants' Cross-Motion for Partial Summary Judgment on Count I of the Amended Complaint is **DENIED** for the reasons discussed below.

Factual Background

The undisputed facts, as revealed by the summary judgment record, are fairly summarized as follows.[9]

The Harbor Towers Plaintiffs are trustees and residents of the Harbor Towers I Condominium Trust and Harbor Towers II Condominium Trust, an adjacent condominium community located at 65 and 85 East India Row in Boston. Consolidated Statement of Material Facts Relating to the Parties' Cross-Motions for Partial Summary Judgment on Count IX of the Second Amended Complaint ("SOF"), ¶ 2. Defendant RHDC owns the Harbor Garage, a parking garage located at 70 East India Row, which is located on the waterfront in downtown Boston. SOF, ¶ 1. The Harbor Garage Parcel is located on filled tidelands within 100 feet landward of the Boston Harbor high water mark. *Id.*, ¶ 5.

[9] Additional information concerning the history of the Harbor Towers project, the Harbor Garage, and the Downtown MHP is provided in the Court's Prior Decision and Order. See *Armstrong* v. *Beaton*, 2019 WL 6524671 (Mass. Super. Ct. Oct. 17, 2019), reconsideration denied *sub nom. Conservation Law Found.* v. *Beaton*, 2019 WL 7707964 (Mass. Super. Ct. Dec. 24, 2019). Familiarity with that Prior Decision and Order is presumed for purposes of this Decision and Order.

Under regulations promulgated by DEP, a "nonwater-dependent" development on tidelands -- such as a residential/office building -- generally must be no more than 55 feet in height within 100 feet of the shore, but may step up in height one foot for every six inches thereafter. *Id.*, ¶ 6. Specifically, 310 Code Mass. Regs. § 9.51(3)(e) ("Section 9.51(3)(e)") provides, in part, that,

> new or expanded buildings for nonwater-dependent use shall not exceed 55 feet in height if located over the water or within 100 feet landward of the high water mark; at greater landward distances, the height of such buildings shall not exceed 55 feet plus 1/2 foot for every additional foot of separation from the high water mark; as provided in 310 CMR 9.34(2)(b)1....

310 Code Mass. Regs. § 9.51(3)(e).

Section 9.51(3)(e) contains a height exemption, however, for tidelands projects that "conform[] to a municipal harbor plan" that has been approved, in advance, by the Secretary. The exemption reads,

> the Department *shall waive* such height limits if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative height limits and other requirements which ensure that, in general, such buildings for nonwater-dependent use will be relatively modest in size, in order that wind, shadow, and other conditions of the ground level environment will be conducive to water-dependent activity and public access associated therewith, as appropriate for the harbor in question;

Id. (emphasis added).

In May 2017, the Boston Planning and Development Agency approved the Downtown MHP. See *Armstrong Case* Joint Appendix ("Armstrong JA"), Exhibit 6. The entire planning area covered by the MHP is comprised of current or former tidelands. CLF's Consolidated Statement of Material Facts Relating to the Parties' Cross-Motions for Partial Summary

Judgment on Count I of the Amended Complaint ("CLF's SOF"), ¶ 1. All told, the MHP encompasses approximately 42 acres of flowed or filled tidelands on the Boston waterfront running along Atlantic Avenue and near the Rose Kennedy Greenway. CLF's SOF, ¶ 2. Of particular significance to this litigation, the MHP singles out the Harbor Garage Parcel for an "alternative" height limitation of 600 feet, which is approximately eleven times the standard 55 foot height limit set out in Section 9.51(3)(e). Armstrong JA, Exhibit 6. SOF, ¶ 7.

The City of Boston submitted the MHP to the Secretary for his formal approval in March 2017. Armstrong JA, Exhibit 7 at 1. Ben Lynch, Program Chief of DEP's Waterways Regulation Program, subsequently recommended approval of the MHP in a letter he sent to the Secretary on April 30, 2018. *Id.*, Exhibit 7 at 57-58. The Secretary approved the MHP in a written decision issued the same day, and denied a later petition for reconsideration submitted by a group of Harbor Towers residents on June 11, 2018.[10] *Id.*, Exhibits 7-8. The CLF Plaintiffs participated actively in the review and approval process undertaken by the Secretary in connection with the MHP review. CLF's SOF, ¶ 8.

The Secretary's approval of the MHP has profound implications for the development of the Harbor Garage Parcel. As a consequence of that approval, DEP is *required* by its own regulations to disregard the usual 55-foot height limit for tidelands projects set out in Section 9.51(3)(e) in all future proceedings involving the Harbor Garage Parcel, and to "apply" the 600-foot "substitute" height allowance contained in the MHP with respect to any

[10] As "offsetting measure[s]" for the dramatically increased building height limit that the Secretary approved for the Harbor Garage Parcel, the Secretary required the site developer to deposit $300,000 into an escrow fund "to be managed and overseen by a Downtown Municipal Harbor Plan Operations Board," and to provide $10,000,000 "towards the design and construction of public realm improvements for the New England Aquarium's 'Blueway,'" which is a proposed "public park that extends from the Rose Kennedy Greenway to the water's edge at the far end of Central Wharf...." Armstrong JA, Exhibit 7 at 21.

development at that site. The specific DEP regulatory requirement, which appears at 310 Code Mass. Regs. § 9.34(2)(b)(1) ("Section 9.34(2)(b)(1)"), states,

> [i]f the project conforms to the municipal harbor plan the ... [DEP] shall:
>
> 1. apply the use limitations or numerical standards specified in the municipal harbor plan as a substitute for the respective limitations or standards contained in 310 CMR 9.32(1)(b)3., 9.51(3), 9.52(1)(b)1., and 9.53(2)(b) and (c), in accordance with the criteria specified in 310 CMR 9.32(1)(b)3., 9.51(3), 9.52(1)(b)1., and 9.53(2)(b) and (c) and in associated plan approval at 301 CMR 23.00: *Review and Approval of Municipal Harbor Plans* and associated guidelines of CZM;

310 Code Mass. Regs. § 9.34(2)(b)(1) (emphasis in original).

On January 22, 2020, RHDC filed a lengthy Project Notification Form ("PNF") describing its proposed redevelopment plan for the Harbor Garage Parcel. Armstrong JA, Exhibit 9. CLF's SOF, ¶ 29. RHDC's redevelopment plan, not coincidentally, calls for the construction of a 600- foot, 865,000-square-foot, mixed-use tower on the site. *Id.* This is the plan that the Harbor Towers Plaintiffs and the CLF Plaintiffs oppose.

The parties agree that the foregoing facts justify the entry of summary judgment on at least some of the pending claims in this litigation as a matter of law; they simply differ as to who should prevail. In the *Armstrong Case*, the Harbor Towers Plaintiffs seek partial summary judgment on Count IX of their Second Amended Complaint, which requests the issuance of a declaratory judgment pursuant to G.L. c. 231A, §§ 1 & 2. Count IX states,

> 262. General Laws c. 91, the Public Waterfront Act, delegates exclusive authority to the DEP to permit development projects on tidelands.
>
> 263. Chapter 91 does not authorize or permit any government entity apart from the DEP to make regulations or licensing

determinations related to achieving the purposes of Chapter 91 to protect tidelands.

264. DEP has improperly delegated its authority over the state's waterways and tidelands by permitting municipalities, with the Secretary's approval, to enact an MHP that purportedly binds DEP's future decisions about waterfront development.

265. DEP's regulations, 310 CMR 9.34(2) and other related sections of the Waterway Regulations require it to grant a license for any proposed waterfront development project that meets the standards of an approved MHP, even if the proposed project violates DEP's regulations such that it would otherwise deny the license.

266. By virtue of 310 CMR 9.34(2) and other related sections of the Waterway Regulations the DEP has unlawfully relinquished its obligations under c. 91 to the Secretary.

267. There is an actual controversy between the parties as to the legality of DEP's delegation of its statutory obligation under c. 91 to the Secretary and the municipal harbor planning process.

268. DEP's delegation of its statutory responsibility under c. 91 to exercise all public trust duties associated with the terms and conditions of licensing under the Public Waterfront Act for development on tidelands to the Secretary without retaining approval oversight and control over the outcome is *ultra vires* and exceeds DEP's statutory authority.

269. No other permit, approval, or condition can correct the Secretary's unlawfully delegated decision to approve alternative regulations for the use limitations and numeric standards contained in the Waterways Regulations.

270. The errors of law committed by the Commissioner in making this unlawful delegation harms the rights and interests of the public, including Plaintiff's rights and interests in their use and enjoyment of public tidelands.

271. A declaratory judgment is necessary to protect the public interest and the rights and interests of Plaintiffs.

Harbor Towers Plaintiffs' Second Amended Complaint, ¶¶ 262-271. See Harbor Towers Plaintiffs' Motion for Partial Summary Judgment, at 1-2 ("The court should issue a declaratory judgment holding that the waterways regulations contained within Chapter 310 of the Code [of] Massachusetts Regulations that require the Department of Environmental Protection to relinquish its authority to make licensing determinations for structures in tidelands pursuant to G.L. c. 91, § 18 to the Secretary of Energy and Environmental Affairs in the context of an approved municipal harbor plan, including but not limited to 310 CMR 9.34(2)(b)(1), and 9.51(3)(a)-(e), are invalid and *ultra vires*.").

The State Defendants, in turn, have filed a cross-motion seeking the entry of partial summary judgment in their favor on Count IX of the Harbor Towers Plaintiffs' Second Amended Complaint, asserting, in part, that,

> [t]he Waterways Regulations and MHP Regulations were duly promulgated in accordance with the broad statutory authority granted to DEP and EEA by the Legislature pursuant to c. 91 and G.L. c. 21A, and the regulatory structure established by these regulations does not result in any delegation of DEP's authority to make the determinations of proper public purpose required by [G.L. c. 91,] Section 18.

State Defendants' Memorandum of Law in Support of their Opposition to Plaintiffs' Motion for Partial Summary Judgment and in Support of Their Cross-Motion for Partial Summary Judgment on Count IX of the Second Amended Complaint ("State Defendants' Memo.") at 2. RHDC also filed a memorandum in opposition to the Harbor Towers Plaintiffs' Motion for Partial Summary Judgment and in support of the State Defendants' Cross-Motion for Partial Summary Judgment on Count IX.

Likewise, in the *CLF Case*, the CLF Plaintiffs have moved for the entry of summary judgment in their favor on Count I of their Amended Complaint, which requests the issuance of a declaratory judgment similar to the declaratory judgment that the Harbor Towers Plaintiffs seek in Count IX of their Second Amended Complaint. Specifically, the CLF Plaintiffs ask the Court to declare that,

> DEP's delegation of its core [G.L. c. 91,] Section 18 powers to the Secretary through the MHP [R]egulations is *ultra vires* and beyond DEP's authority ... [and] the Secretary is not authorized by the Legislature to make substitute proper public purpose and public benefit determinations for use in DEP's licensing of tidelands projects within the Downtown MHP and the provisions of the Secretary's Decision on the Downtown Waterfront District Municipal Harbor Plan that purport to do so are null and void.

CLF Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment at 20. As before, the State Defendants have filed a cross-motion seeking the entry of partial summary judgment in their favor on Count I of the CLF Plaintiffs' Amended Complaint. RHDC, conversely, has not filed an opposition to the CLF Plaintiffs' Motion for Summary Judgment because it is not a party to the *CLF Action*.

The net effect of the parties' respective motions and cross-motions is that both sides seek a determination, as a matter of law, regarding the validity and enforceability of DEP's Waterways Regulations to the extent that those regulations purport to grant the Secretary authority to make binding determinations on material aspects of tidelands projects through his or her approval of a municipal harbor plan. It is to this question the Court now turns.

Discussion

I. The Applicable Standard of Review.

Summary judgment is appropriate when, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cargill, Inc.* v. *Beaver Coal & Oil Co.*, 424 Mass. 356, 358 (1997). A party who does not bear the burden of proof at trial may demonstrate the absence of a genuine issue of material fact either by submitting affirmative evidence negating an essential element of the nonmoving party's case, or by showing that the non-moving party has no reasonable expectation of proving an essential element of his or her case at trial. See *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 716 (1991). "[W]here the single issue raised" on cross-motions for summary judgment is "one of statutory interpretation, one of the parties [is] entitled to judgment as a matter of law." *Ciani* v. *MacGrath*, 481 Mass. 174, 177 (2019).

A party challenging the validity and enforceability of a governmental regulation in this Commonwealth bears a heavy burden. The Massachusetts Supreme Judicial Court ("SJC") has stated that "[a] highly deferential standard of review governs a facial challenge to regulations promulgated by a government agency," *Massachusetts Fed'n of Teachers, AFT, AFL-CIO* v. *Board of Educ.*, 436 Mass. 763, 771 (2002), and that "a properly promulgated regulation has the force of law ... and must be accorded all the deference due to a statute," *Borden, Inc.* v. *Commissioner of Pub. Health*, 388 Mass. 707, 723, cert. denied sub nom.; *Formaldehyde Inst., Inc.* v. *Frechette*, 464 U.S. 936 (1983) ("*Borden*"). The proper application of this standard requires a reviewing court to "apply all rational presumptions in favor of the validity

of the administrative action and not declare it void unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate." *Consolidated Cigar Corp.* v. *Department of Pub. Health*, 372 Mass. 844, 855 (1977) ("*Consolidated Cigar*").

The SJC also has declared, however, that "the principle of [judicial] deference is not one of abdication," and a governmental regulation "that is irreconcilable with an agency's enabling legislation cannot stand." *Quincy* v. *Massachusetts Water Resources Auth.*, 421 Mass. 463, 468 (1995) ("*Quincy*"). See also *Greater Boston Real Estate Bd.* v. *Department of Telecommunications & Energy*, 438 Mass. 197, 204 (2002) (holding that agency regulations that were "designed to regulate private property owners who do not fall within the class of persons that the Legislature has authorized the department to regulate ... are ultra vires of the enabling legislation"); *Berrios* v. *Department of Pub. Welfare*, 411 Mass. 587, 596 (1992) ("*Berrios*") (enforcement of regulations should be refused only if they are "plainly in excess of legislative power"). According to the SJC, "[w]hen an agency's interpretation of its regulation cannot be reconciled with the governing legislation, that interpretation must be rejected." *Nuclear Metals, Inc.* v. *Low-Level Radioactive Waste Mgmt. Bd.*, 421 Mass. 196, 211 (1995).

II. Massachusetts Law Regarding the Protection of Tidelands.

The Commonwealth of Massachusetts has long recognized tidelands as a "special form of property of unusual value" that is "subject to different legal rules from those which apply to inland property." *Boston Waterfront Dev. Corp.* v. *Commonwealth*, 378 Mass. 629, 631 (1979). All tidelands in Massachusetts, regardless of their location, "are held in the public trust." *Alliance to Protect Nantucket Sound, Inc.* v. *Energy Facilities Siting Bd.*, 457 Mass.

663, 677 (2010) ("*Alliance*"). Under the "public trust doctrine," the Commonwealth itself "holds tidelands in trust for the use of the public for, traditionally, fishing, fowling, and navigation." *Moot* v. *Department of Envtl. Prot.*, 448 Mass. 340, 342 (2007) ("*Moot I*"). The SJC has stated unequivocally that "only the Commonwealth, or an entity to which the Commonwealth has delegated authority *expressly*, may act to further public trust rights." *Fafard* v. *Conservation Comm'n of Barnstable*, 432 Mass. 194, 197 (2000) ("*Fafard*") (emphasis added). This "express delegation principle" is "strictly" enforced. *Commercial Wharf E. Condominium Ass'n* v. *Boston Boat Basin, LLC*, 93 Mass. App. Ct. 523, 529 (2018) ("*Commercial Wharf*").

General Laws c. 91, the "Waterways Act," represents the "encapsulation of the Commonwealth's public trust authority and obligations." *Fafard*, 432 Mass. at 200 n.11. In enacting the Waterways Act, the Legislature expressly delegated "[t]he obligation to preserve the public trust and to protect the public's interest" to DEP. *Moot I*, 448 Mass. at 342. See also *Alliance*, 457 Mass. at 678 ("The Legislature has designated DEP as the agency charged with responsibility for protecting public trust rights in tidelands through the c. 91 licensing program...."). In this regard, Section 2 of the Waterways Act explicitly states, in part, that DEP,

> shall, except as otherwise provided, have charge of the lands, rights in lands, flats, shores and rights in tide waters belonging to the commonwealth, and shall, as far as practicable, ascertain the location, extent and description of such lands; investigate the title of the commonwealth thereto; ascertain what parts thereof have been granted by the commonwealth; the conditions, if any, on which such grants were made, and whether said conditions have been complied with; what portions have been encroached or trespassed on, and the rights and remedies of the commonwealth relative thereto; prevent further encroachments and trespasses;

> ascertain what portions of such lands may be leased, sold or improved with benefit to the commonwealth and without injury to navigation or to the rights of riparian owners; and may lease the same....
>
> In carrying out its duties under the provisions of this chapter, the [DEP] shall act to preserve and protect the rights in tidelands of the inhabitants of the commonwealth by ensuring that the tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose.[11]

G.L. c. 91, § 2.

Section 18 of the Waterways Act sets out the statutory procedures that DEP must follow in considering an application to build or perform other work on tidelands property. Under Section 18, DEP may license a non-water-dependent use of tidelands (except for landlocked tidelands) only if it first has made a written determination, after a public hearing, that the proposed structure or work,

> serve[s] a proper public purpose and that said purpose shall provide a greater public benefit than public detriment to the rights of the public in said lands and that the determination is consistent with the policies of the Massachusetts coastal zone management program.

G.L. c. 91, § 18. See also *Moot I*, 448 Mass. at 343-344 (explaining that DEP may "license nonwater-dependent uses of tidelands [under Section 18, as amended] ... if, and only if, the department has made a written determination, following a public hearing, that the structure or

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[11] "Water-dependent uses" are,

> those uses and facilities which require direct access to, or location in, marine or tidal waters and which therefore cannot be located inland, including but not limited to: marinas, recreational uses, navigational and commercial fishing and boating facilities, water-based recreational uses, navigation aids, basins, and channels, industrial uses dependent upon waterborne transportation or requiring large volumes of cooling or process water which cannot reasonably be located or operated at an inland site.

G.L. c. 91, § 1.

fill 'shall serve a proper public purpose and that said purpose shall provide a greater public benefit than public detriment to the rights of the public in such lands'").

Moreover, DEP possesses "broad discretion in the regulations that it promulgates under G.L. c. 91, § 18...." *Moot I*, 448 Mass. at 349. That discretion, however, is not unlimited. The SJC explicitly has held that DEP "does not have the authority to relinquish or extinguish the public's rights in any of the Commonwealth's tidelands, except on terms expressly authorized by the Legislature." *Id.* More specifically, "[t]he rights of the public in Commonwealth tidelands -- filled, landlocked, or otherwise -- cannot be relinquished by ... [DEP] regulation, regardless of the fact that ... [DEP] has proffered potentially worthy public policy rationales in this regard." *Id.* at 353.

III. The DEP's Partial Relinquishment of Its Authority over Tidelands in Favor of the Secretary.

As previously noted, the Harbor Towers Plaintiffs and the CLF Plaintiffs argue that certain aspects of the DEP's Waterways Regulations -- in particular, 310 Code Mass. Regs. §§ 9.34(2)(b)(1) and 9.51(3)(a)-(e) (collectively, the "Municipal Harbor Regulations") -- are invalid and *ultra vires* because they "improperly delegate the solemn obligation of ... [DEP] to protect the public trust in these lands to the ... [Secretary], who has no legislative authority to exercise such power." Memorandum of Law in Support of [Harbor Towers] Plaintiffs' Motion for Partial Summary Judgment at 1. They contend, in words or substance, that,

> the regulations force the DEP to apply "alternative" (more lenient) standards for building heights and densities on waterfront properties if they are set forth in a city-proposed and Secretary-approved "Municipal Harbor Plan." The regulations are *ultra vires* because the Legislature has given DEP—not the Secretary or municipalities—the power to make these decisions, and otherwise protect the public trust in tidelands. Only an entity to

> which the Legislature has delegated authority expressly, may act to further public trust rights.

Id. (internal quotation marks omitted).

Giving "all the deference due" to DEP and the Waterways Regulations as a whole, see *Borden*, 388 Mass. at 723, the Court nonetheless is constrained to agree with the Harbor Towers Plaintiffs that the challenged Municipal Harbor Regulations unlawfully cede to the Secretary part of DEP's exclusive authority over tidelands that DEP, acting on its own, lacks the power to relinquish.

The starting point for the Court's analysis is the language of the Waterways Act. The "Department" (*i.e.*, DEP) and the "Secretary" are separately defined in Section 1 of the Waterways Act, and their proper, respective roles under that statute could not be clearer. Section 2 of the Waterways Act charges DEP -- not the Secretary -- with "[t]he obligation to preserve the public trust and to protect the public's interest" in tidelands. *Moot I*, 448 Mass. at 342. This means that DEP -- not the Secretary -- is the entity that has been legislatively empowered to "administer public trust rights." *Fafard*, 432 Mass. at 199.

Similarly, Section 18 of the Waterways Act gives DEP -- not the Secretary -- responsibility for deciding whether a structure or work that is proposed for tidelands property "serve[s] a proper public purpose and ... provide[s] a greater public benefit than public detriment to the rights of the public in said lands...." G.L. c. 91, § 18. The decision whether to grant a license for a particular tidelands project is unambiguously described in Section 18 as a decision to be made by *DEP*, not the Secretary. See *id.* ("The *department* shall take into consideration the recommendation of the local planning board in making *its decision whether to grant a license.*") (emphasis added).

The Secretary does have a designated statutory role with respect to tidelands development, but that role has been limited by the Legislature to conducting an independent "public benefit review" of any proposed project and preparing a separate "public benefit determination," which the Secretary is obligated to "provide ... to ... [DEP], and if there is an appeal of a decision or license issued by ... [DEP], to the division of administrative law appeals." G.L. c. 91, § 18B. The DEP, in turn, is obligated only to "incorporate the public benefit determination of the secretary in the official record." *Id.*

The foregoing, statutorily-defined roles of the DEP and the Secretary under the Waterways Act are dramatically modified, however, by the challenged Municipal Harbor Regulations. For example, rather than recognizing the DEP's authority to determine whether the height of a planned tidelands structure "serve[s] a proper public purpose and ... provide[s] a greater public benefit than public detriment to the rights of the public in said lands" as provided in G.L. c. 91, § 18, Section 9.51(3)(e) of the challenged Municipal Harbor Regulations confers upon the Secretary -- not the DEP -- the authority to decide what building height is appropriate to be exercised by the Secretary in the context of his or her review, and potential approval, of a proposed municipal harbor plan. 301 Code Mass. Regs. § 9.51(3)(e) ("[T]he Department shall waive ... [its typical building] height limits if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative height limits and other requirements...."). The DEP's Municipal Harbor Regulations further make whatever decision the Secretary -- not the DEP -- reaches in this regard (such as, in this case, the Secretary's decision to replace the DEP's standard 55 foot building height limit with a 600 foot building height limit) *binding* upon the DEP. 310 Code

Mass. Regs. § 9.34(2)(b)(1) ("If the project conforms to ... [an approved] municipal harbor plan the ... [DEP] *shall ... apply* the use limitations or numerical standards specified in the municipal harbor plan as a substitute for the respective limitations or standards contained in 310 CMR ... 9.53(2)(b) and (c)...."') (emphasis added). Once the Secretary makes his or her own decision as to what building height will be permitted on tidelands property under a particular municipal harbor plan, there is no "wiggle room" under the Municipal Harbor Regulations for the DEP to decide or order otherwise. See *id.*

The Court has carefully compared the DEP's Municipal Harbor Regulations to the clear requirements of the Waterways Act, applying "all rational presumptions in favor of the [regulations'] validity...." *Consolidated Cigar*, 372 Mass. at 855. Despite its best efforts, the Court is unable to summon up any reasonable construction of the challenged Municipal Harbor Regulations that is "in harmony" with the explicit "legislative mandate" given to DEP in the Waterways Act. See *id.* The Legislature decreed in that statute that the job of deciding whether a particular structure or project that is proposed for tidelands property "serve[s] a proper public purpose and ... provide[s] a greater public benefit than public detriment to the rights of the public in said lands" belongs solely to DEP. G.L. c. 91, § 18. Other entities, such as local planning boards and the Secretary, may provide *input and advice* to the DEP for consideration in its decision-making process, but the proverbial buck, by statute, stops with the DEP.

Massachusetts law is equally clear that DEP "does not have the authority to relinquish ... the public's rights in any of the Commonwealth's tidelands" to any other entity -- including the Secretary – "except on terms expressly authorized by the Legislature." *Moot I*, 448 Mass.

at 349. See also *Fafard*, 432 Mass. at 196 ("Only the Commonwealth or its express designee may act to further public trust rights."). This means that DEP may not delegate or relinquish to the Secretary any of the oversight responsibilities entrusted to it by the Legislature in the Waterways Act, unless that delegation or relinquishment has been expressly authorized by the Legislature. No such express authorization exists, however. To the contrary, as noted above, the Legislature has explicitly chosen to limit the Secretary's role with respect to tidelands development to one that is strictly *advisory* in nature. See G.L. c. 91, § 18B. Thus, by adopting the challenged Municipal Harbor Regulations, DEP has acted in a manner that is "irreconcilable with ... [its] enabling legislation," as well as the express terms of the Waterways Act. *Quincy*, 421 Mass. at 468. For this reason, to the extent that DEP's Municipal Harbor Regulations purport to give the Secretary binding authority to decide whether any aspect of a structure or project that is proposed for tidelands property (including, without limitation, building height, setback, or dimensions) is permissible under G.L. c. 91, the regulations "cannot stand." *Id.*

The Court notes, in support of the foregoing ruling, that this is not the first time that a DEP regulation concerning the proper use of tidelands has been found to be *ultra vires*. In *Moot I*, the plaintiffs appealed from a DEP decision that exempted the construction of a multiuse project from the licensing requirements of G.L. c. 91. *Moot I*, 448 Mass. at 341. The project's developer sought to "turn approximately forty-eight acres of abandoned rail yards and industrial land into residential, office, retail, and park space" in East Cambridge, Massachusetts. *Id.* The project site consisted, in part, of filled tidelands. *Id.* DEP had promulgated regulations that exempted all landlocked tidelands from "any and all licensing

requirements." *Id.* at 345. In response to the developer's proposed project, the plaintiffs filed a request with DEP for a determination of the applicability of G.L. c. 91 to the filled tidelands on the project site. *Id.* DEP applied its regulations and "issued a negative determination of applicability" based on the fact that the site was located on landlocked tidelands and that, pursuant to the landlocked tidelands exemption promulgated by DEP, the project was not subject to any licensing and permitting requirements involving DEP. *Id.*

The plaintiffs appealed and the question before the SJC was DEP's "authority to promulgate the landlocked tidelands exemption, 310 Code Mass. Regs. § 9.04(2)." *Id.* at 346. The plaintiffs argued that DEP's "decision was based on an unauthorized regulatory exemption and in excess of the department's authority." *Id.* at 341. The SJC agreed and held that DEP exceeded its authority under the Waterways Act by promulgating a regulation that exempted "tidelands—landlocked and filled or otherwise" from the licensing requirements of G.L. c. 91, § 18. *Id.* at 350-352. As a result, the SJC invalidated the regulation, stating "[t]he rights of the public in Commonwealth tidelands -- filled, landlocked, or otherwise -- cannot be relinquished by departmental regulation, regardless of the fact that the department has proffered potentially worthy public policy rationales in this regard." *Id.* at 353.

This case stands on all fours with the SJC's decision in *Moot I*. The Waterways Act unambiguously designates DEP as the Legislature's chosen guardian of "[t]he rights of the public in Commonwealth tidelands." *Id.* at 342-343, 353. See also G.L. c. 91, §§ 12 & 18. Notwithstanding any "potentially worthy public policy rationales" that DEP may offer for its decision to delegate a portion of that responsibility and authority to the Secretary by means of its Municipal Harbor Regulations, DEP simply does not have the power to override the

Legislature's choice. *Moot I*, 448 Mass. at 353. In attempting to do so, DEP "has exceeded its authority by promulgating a regulation that relinquishes its obligations under G.L. c. 91...." *Id.* Accordingly, an order invalidating the offending portion of the Municipal Harbor Regulations is required.

IV. Defendants' Arguments to the Contrary.

Defendants make five principal arguments as to why the Court should conclude that DEP's decision to relinquish a portion of its authority over tideland properties to the Secretary in its Municipal Harbor Regulations is valid and enforceable.[12] The Court finds none of these arguments to be persuasive for the reasons discussed, briefly, below.

First, Defendants assert that DEP's Municipal Harbor Regulations do not, in fact, delegate any of DEP's decision-making authority with respect to tidelands projects to the Secretary. As articulated by RHDC, the Secretary's April 2018 decision approving the Downtown MHP for the City of Boston,

> expressly and unambiguously states that it is *not* an authorization of any kind for any project but, instead, serves as guidance to DEP in the exercise of its exclusive Chapter 91 licensing authority for future projects within the area subject to the Downtown MHP.

RHDC Memo. at 12 (emphasis in original).

This assertion by Defendants, however, is plainly wrong. The Municipal Harbor Regulations make it absolutely clear that any decision by the Secretary to approve alternative

[12] The arguments set out in RHDC's opposition to the Harbor Towers Plaintiffs' Motion for Partial Summary Judgment are generally similar to the arguments contained in the State Defendants' motion papers. See, e.g., Memorandum of RHDC East India LLC in Opposition to Plaintiffs' Motion for Partial Summary Judgment ("RHDC Memo.") at 20 ("Plaintiffs cannot sustain their claim that DEP has unlawfully delegated its Chapter 91 licensing authority to the Secretary. DEP's comprehensive regulations governing its licensing decisions clearly retain for DEP the authority to make a written determination of proper public purpose, net public benefit, and consistency with coastal zone management policies."). For this reason, the Court refers to and addresses the Defendants' legal arguments as a collective whole.

height limits for a project on tidelands property in the context of his or her approval of a proposed MHP is *binding* upon DEP. Section 9.51(3)(e) of the Municipal Harbor Regulations expressly states that DEP "*shall waive*" the standard height limitation for tidelands projects set out elsewhere in that section (*i.e.*, "55 feet in height" for structures "located over the water or within 100 feet landward of the high water mark," and "55 feet plus 1/2 foot for every additional foot of separation from the high water mark" for structures "at greater landward distances") "if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, ... [is] appropriate for the harbor in question...." 310 Code Mass. Regs. § 9.51(3)(e) (emphasis added). The binding nature of the Secretary's MHP decision is reconfirmed in Section 9.34(2)(b)(1) of the Municipal Harbor Regulations, which states that DEP "*shall ... apply* the use limitations or numerical standards specified in ... [an approved] municipal harbor plan as a substitute for the respective limitations or standards contained in," *inter alia*, "[Section] 9.51(3)...." 310 Code Mass. Regs. 9.34(2)(b)(1) (emphasis added).

DEP's use of the mandatory term "shall" in Sections 9.34(2)(b)(1) and 9.51(3)(e) of the Municipal Harbor Regulations demonstrates that the Secretary's approval of an MHP serves as more than mere "guidance to DEP in the exercise of its exclusive Chapter 91 licensing authority," as suggested by Defendants. Rather, the language of the challenged Municipal Harbor Regulations undeniably establishes that DEP has, in a very real manner, tied its own hands when it comes to deciding what "limitations or numerical standards" will apply to a proposed tidelands project that falls within an MHP which has succeeded in obtaining the Secretary's independent approval. This is precisely the sort of "relinquish[ment] by

departmental regulation" on the part of DEP that the SJC held was unlawful and invalid in *Moot I*. See *Moot I*, 448 Mass. at 353.

Second, Defendants assert that certain sections of the General Laws can and should be read by this Court as a delegation of authority by the Legislature to the Secretary to further public trust rights in tidelands. State Defendants' Memo. at 15-18. The specific sections cited by the Defendants are: (1) G.L. c. 91, § 18, which is part of the Waterways Act; (2) G.L. c. 21A, §§ 2 & 4, which address the powers, functions, and duties of the Commonwealth's Executive Office of Energy and Environmental Affairs; and (3) G.L. c. 6A, § 4, which designates each secretary appointed by the Governor as the "executive officer" of his or her respective executive office, and generally defines his or her duties and responsibilities. *Id.* The Court has carefully reviewed each of the sections looking, as it must, for language disclosing an "express legislative directive" granting the Secretary the authority to "license 'structures' in the Commonwealth's tidelands...." *Alliance*, 457 Mass. at 677-678. See also *Fafard*, 432 Mass. at 196 ("Only the Commonwealth or its express designee may act to further public trust rights."). No such language exists in any of the sections cited by the Defendants. This result is not surprising, however, given that the Waterways Act explicitly and unambiguously "delegate[s] to *DEP* the authority to license 'structures' in the Commonwealth's tidelands" (see *Alliance*, 457 Mass. at 677, citing G.L. c. 91, § 14 (emphasis added)), and, at the same time, explicitly and unambiguously limits the Secretary's involvement in the tidelands licensing process to the role of *advisor to the DEP* (see G.L. c. 91, § 18B). The Legislature's intent in this regard is clear and must be honored by this Court. See *Russell* v. *Boston Wyman, Inc.*, 410 Mass. 1005, 1006 (1991) ("Where, as here, the

statutory language is clear and unambiguous," the courts "do not look beyond that language to interpret it.").

Third, Defendants argue that it is permissible for DEP to relinquish a portion of its tidelands responsibilities to the Secretary because DEP "always has been a department within and subject to the control of EEA [*i.e.*, the Executive Office of Environmental Affairs], and that the Legislature has expressly authorized and commanded EEA to share responsibility for all of DEP's programs, including the c. 91 program." State Defendants' Memo at 14-15. According to the State Defendants,

> the duties assigned to DEP under c. 91 by the Legislature were granted to DEP as a department *within EEA*, not to the Commissioner individually and not to DEP independent of the supervisory powers and duties of the Secretary and EEA.

Id. at 16 (emphasis in original).

Defendants' third argument, however, runs headlong into the same problems that sink their second argument; *i.e.*, the strictly-enforced requirement that "[o]nly the Commonwealth or its express designee may act to further public trust rights" (see *Fafard*, 432 Mass. at 196), and the distinctly different roles that the Legislature gave to DEP and the Secretary for protecting public trust rights in tidelands in the Waterways Act (compare G.L. c. 91, § 14 with § 18B). As previously noted, DEP and the Secretary are separately defined in the Waterways Act (see G.L. c. 91, § 1), and they have separately defined statutory duties and responsibilities. Certainly, if the Legislature believed DEP and the Secretary to be one-in-the-same for purposes of protecting the Commonwealth's tidelands, it would not have enacted the Waterways Act in its current form. Defendants' suggestion that the Court should overlook, in the present case, the clear distinction and division of responsibility that the Waterways Act

makes between DEP and the Secretary "is essentially a request that this court rewrite or ignore the plain language" of the Act. *Bratcher* v. *Galusha*, 417 Mass. 28, 30-31 (1994). The Court, however, "decline[s] to intrude on the Legislature's function or to disregard the plain meaning of the statute." *Id.* at 31.

Fourth, the Defendants argue that, irrespective of whether the Municipal Harbor Regulations are deemed to relinquish a part of DEP's obligations under G.L. c. 91 to the Secretary, the regulations constitute "a reasonable and permissible exercise by DEP of the broad authority granted to it by the Legislature in 1986 to adopt regulations to implement [G.L.] c. 91." State Defendants' Memo. at 12. They contend that "DEP could have refrained from adopting numerical criteria altogether and opted to promulgate regulations that would require case-by-case determinations of dimensional standards," but instead "chose to craft regulations with the baseline standards, but recognizing that one size would not fit *all* tidelands for *all* time in *all* waterfront communities, [and] DEP chose to design the regulations with a relief valve." *Id.* at 13 (emphasis in original). According to the State Defendants,

> [t]he relief valve is the MHP process, which allows a coastal community to propose modifications to the baseline standards for its own waterfront through a locally-proposed plan that contains offsetting benefits to promote the public's interests in tidelands. DEP's adoption of regulations that incorporate an MHP, approved by the Secretary with the involvement of ... [the Office of Coastal Zone Management] and DEP, as part of DEP's licensing process is *how DEP chose to exercise* its broad authority to adopt regulations, and not a delegation of its duty to make determinations of proper public purpose, as the Plaintiffs allege. Given expansive discretion by the Legislature to adopt regulations that further the goals of c. 91, DEP reasonably chose to include the substitute criteria in approved MHPs, which reflect substantial public input and state and local involvement, as part of the criteria DEP uses in making proper public purpose determinations.

Id. (emphasis in original).

As before, the basic flaw in the Defendants' fourth argument is that the so-called "relief valve" DEP has chosen to adopt (*i.e.*, the Municipal Harbor Regulations) puts a significant portion of DEP's authority to make substantive decisions affecting "public trust rights in tidelands through the [G.L.] c. 91 licensing program" into the hands of the Secretary, who is not legally authorized by the Legislature to make such decisions. See *Alliance*, 457 Mass. at 678. Longstanding Massachusetts law holds that an agency "has no authority to promulgate rules and regulations which are in conflict with the statutes or exceed the authority conferred by the statutes" under which the agency operates. *Telles* v. *Commissioner of Insurance*, 410 Mass. 560, 564 (1991), quoting *Bureau of Old Age Assistance of Natick* v. *Commissioner of Pub. Welfare*, 326 Mass. 121, 124 (1950). Thus, DEP's "relief valve," however well-intentioned, is unlawful.

Lastly, the Defendants argue that the Municipal Harbor Regulations, including the particular provisions that the Harbor Towers Plaintiffs and CLF Plaintiffs challenge in this case, must be considered valid and enforceable because DEP submitted those regulations (along with the rest of its Waterways Act regulations) to the Legislature for review and, presumably, its implied approval. See G.L. c. 91, § 18 ("The department shall submit any regulations promulgated under the provisions of this chapter to the joint legislative committee on natural resources and agriculture, to the senate committee on ways and means and to the house committee on ways and means, for their review within sixty days prior to the effective date of said regulations."). See also *Navy Yard Four Assocs., LLC* v. *Department of Envtl. Protection*, 88 Mass. App. Ct. 213, 223 (2015) ("DEP's interpretation is also buttressed by the process prescribed for DEP's rulemaking authority, which reserves oversight of promulgated

regulations for the Legislature."). The State Defendants assert that "[t]here is no question that these submissions validated DEP's regulations." State Defendants' Reply Memorandum of Law in Response to Plaintiffs' Opposition to State Defendants' Cross-Motion for Partial Summary Judgment on Count IX of the Second Amended Complaint at 7.

While there may be some initial, superficial appeal to Defendants' implied validation argument, the Legislature's apparent lack of action on DEP's Municipal Harbor Regulations cannot serve as a substitute for the *express* delegation of authority that is required before the Secretary "may act to further public trust rights" in the Commonwealth's tidelands. *Fafard*, 432 Mass. at 196. Nor can the Legislature's lack of action overcome the plain terms of the Waterways Act, which (as we have seen) "designate[] DEP as the agency charged with responsibility for protecting public trust rights in tidelands through the c. 91 licensing program...." *Alliance*, 457 Mass. at 678. Arguing that the Municipal Harbor Regulations trump the Waterways Act impermissibly puts the regulatory cart before the statutory horse. Traditional rules of construction require the courts to "interpret a regulation in the same manner as a statute," not vice versa. *Warcewicz* v. *Department of Environmental Protection*, 410 Mass. 548, 550 (1991). Rather, where, as here, DEP's Municipal Harbor Regulations give the Secretary powers that are "plainly in excess" of the carefully-circumscribed authority that the Legislature granted to the Secretary in the Waterways Act, the regulations are, by necessity, "void."[13] *Berrios*, 411 Mass. at 595-596. See *Quincy*, 421 Mass. at 468 (a governmental regulation "that is irreconcilable with an agency's enabling legislation cannot stand").

[13] It is worth noting in this context that the Legislature's similar review and implied approval of DEP's regulation exempting "tidelands -- landlocked and filled or otherwise" from the licensing requirements of G.L. c. 91 was insufficient to prevent the SJC from invalidating that regulation in *Moot I*. See *Moot I*, 448 Mass. at 350-352.

under G.L. c. 91, § 18, to the Secretary of Energy and Environmental Affairs through the municipal harbor plan regulations is *ultra vires* and beyond the Department's authority. The Secretary is not authorized by the Legislature to make substitute proper public purpose and public benefit determinations for use in the Department's licensing of tidelands projects within the Downtown Waterfront District Municipal Harbor Plan. The provisions of the Secretary's Decision on the Downtown Waterfront District Municipal Harbor Plan that purport to do so are null and void.

Brian A. Davis
Associate Justice of the Superior Court

Date: April 1, 2021

Order

For the foregoing reasons, **IT IS HEREBY ORDERED THAT**:

(1) With respect to the *Armstrong Case*, Case No. 1884CV02132-BLS1, the Harbor Towers Plaintiffs' Motion for Partial Summary Judgment (Docket Entry No. 44) is **ALLOWED**, and the State Defendants' Cross-Motion for Partial Summary Judgment on Count IX of the Second Amended Complaint (Docket Entry No. 45) is **DENIED**. A declaration shall enter declaring that: The Waterways Regulations contained within Chapter 310 of the Code of Massachusetts Regulations that require the Massachusetts Department of Environmental Protection to relinquish its authority to make licensing determinations for structures in tidelands pursuant to G.L. c. 91, § 18, to the Secretary of Energy and Environmental Affairs in the context of an approved municipal harbor plan, including, but not limited to, 310 Code Mass. Regs. §§ 9.34(2)(b)(1) and 9.51(3)(a)-(e), are invalid and *ultra vires*;

(2) With respect to the *CLF Case*, Case No. 1884CV02144-BLS1, the CLF Plaintiffs' Motion for Summary Judgment on Count I of their Amended Complaint Pursuant to Mass. R. Civ. P. 56 (Docket Entry No. 30) is **ALLOWED**, and the Defendants' Cross-Motion for Partial Summary Judgment on Count I of the Amended Complaint (Docket Entry No. 30) is **DENIED**. A declaration shall enter declaring that: The Massachusetts Department of Environmental Protection's delegation of its core powers