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February 15, 2023

Rebecca Tepper, Secretary
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Re: *The Ocean Sanctuaries Act's Prohibition of a Planned New Industrial Discharge of
Radioactive Waste From the Decommissioned Pilgrim Nuclear Power Station
Into the Cape Cod Bay Ocean Sanctuary*

Dear Secretary Tepper and Director Engler:

On behalf of the Association to Preserve Cape Cod ("APCC"), we write to request that the Office of Coastal Zone Management ("CZM") in particular, and the Executive Office of Energy and Environmental Affairs ("EEA") in general, exercise the full authority entrusted to your offices under the Commonwealth's Ocean Sanctuaries Act, G.L. c. 132A, §§ 12A-18 ("OSA"), to stop the proposed discharge of an estimated 1.1 million gallons of radioactive waste from the decommissioned Pilgrim Nuclear Power Station ("PNPS") into the Cape Cod Bay Ocean Sanctuary. As you know, the OSA entrusts ocean sanctuaries to CZM's "care, oversight, and control." G.L. c. 132A, § 14.

We have three specific requests, as follows:

1. We ask that CZM issue a letter informing Holtec Pilgrim, LLC and Holtec Decommissioning International, LLC (collectively, "Holtec"), as the owner and operator of PNPS, that the OSA prohibits the planned discharge of radioactive waste – or any new industrial discharge – from PNPS's decommissioning activities into Cape Cod Bay.
2. We ask that CZM advise the Massachusetts Department of Environmental Protection ("MassDEP") that its issuance of any state permit, authorization, or approval of any kind for such a discharge would not be consistent with the OSA. In particular, we ask CZM to notify MassDEP that Holtec's proposed discharge is not eligible for a new or modified Massachusetts Surface Water Discharge Permit, or for a new or modified state Water Quality Certification, which Holtec has announced it will seek in the near future.
3. We ask for an opportunity, at your earliest convenience and before mid-March in any event, to meet with you, and any others whom you may wish to include, to discuss the

Secretary Rebecca Tepper
Director Lisa Berry Engler
February 15, 2023
Page 2

various state actions that may be appropriate to ensure that Holtec will not discharge waste from decommissioning activities at PNPS into a protected ocean sanctuary.

As discussed in further detail below, Holtec has announced its intention to discharge spent fuel pool water and other radioactive waste into Cape Cod Bay as part of the expedited decommissioning, dismantlement, and demolition of PNPS. This would not be an “existing discharge” authorized as of 1971, when the Cape Cod Bay Ocean Sanctuary was created. Nor would this be a discharge associated with the “operation and maintenance” of the coolant system or any other activity, use or facility associated the generation, transmission, and distribution of electricity from an active power generation facility. To the contrary, the radioactive water in question has been generated during decommissioning activities, after PNPS ceased all power-generation operations as of June 1, 2019. A discharge to the Cape Cod Bay Ocean Sanctuary from the decommissioned PNPS would be a *new* industrial discharge, which cannot be authorized by any agency of the Commonwealth consistent with the OSA.

The OSA expressly prohibits any new industrial discharges into protected ocean sanctuaries, with certain narrow exceptions, none of which are applicable to Holtec’s proposed discharge from PNPS of water associated with decommissioning activities. Moreover, the discharge of PNPS’s radioactive waste into Cape Cod Bay is entirely unnecessary. Holtec acknowledges that it has other options to dispose of the radioactive waste that do not violate the OSA, and these options do not involve conducting a decades-long experiment with the unique environment of Cape Cod Bay, the ultimate outcome of which will only be learned long after Holtec has left. To be sure, these other options may involve their own risks and benefits, and additional expense; but that is what Holtec voluntarily assumed when it chose to acquire PNPS – not to operate for the purpose of producing electrical power – but solely for the purpose of profiting from decommissioning the plant.

Cape Cod Bay is a precious resource. Critical natural resources include shellfish beds, commercial and recreational fisheries, wildlife that includes rare, threatened, and endangered species, including the North Atlantic Right Whale, sea turtles, and Atlantic Sturgeon, and miles of coastal habitat including coastal beaches, bays, estuaries and salt marshes. Four state-recognized Areas of Critical Environmental Concern are on or within Cape Code Bay. Holtec acknowledges that it cannot treat the discharge so as to fully remove all radionuclides from the water, even if it meets standards required by Nuclear Regulatory Commission guidelines.

The critical point is this: to conclude that Holtec’s proposed discharge is prohibited, **CZM is not required to find that it would harm, or pose a risk of harm, to human health or the environment, or that it would significantly alter the environment of Cape Cod Bay. The judgment that new industrial discharges pose unacceptable risks was already made by the Legislature, in establishing the Cape Cod Bay Ocean Sanctuary and broadly prohibiting any new discharge of industrial waste** (subject to a few narrow exceptions that do not apply here). No additional findings by CZM are needed or warranted; CZM need only ensure that the existing legislative prohibition is respected.

As an ocean sanctuary vital to the ecological and economic health of the Commonwealth, the Legislature has determined that Cape Cod Bay deserves an extraordinarily high level of public protection. CZM is the agency the Legislature has charged with providing that protection without a requirement that the

Secretary Rebecca Tepper
Director Lisa Berry Engler
February 15, 2023
Page 3

agency first find that a risk of harm is present. While we know CZM has a deep knowledge of the OSA and its legislative history, we think it's helpful to recap the essential legal context, to fully appreciate the Legislature's intention.

1. The History Of The Ocean Sanctuaries Act

1970: As a response to the threat of oil and gas exploitation, Massachusetts' first ocean sanctuary, the Cape Cod Ocean Sanctuary, was created in 1970 and signed into law as an emergency measure to "protect the unique scenic and natural resources of the outer Cape by preventing careless exploitation of the seabed." *See* Chapter 542 of the Acts of 1970. This act also established an initial list of prohibited activities in an ocean sanctuary. These included –

the building of any structure on the seabed or under the subsoil; the removal of any sand, gravel or other minerals, except as hereinafter provided; drilling for subsoil minerals, gases or oils; commercial advertising; **or the dumping of any commercial or industrial wastes**

(Emphasis supplied.) It also provided for allowed activities – for example the laying of cables, sand and gravel extraction for beach restoration purposes, and fish and shellfish harvest – provided these activities had the necessary agency approvals. The Legislature initially placed this first ocean sanctuary under the "care and control" of the Department of Natural Resources, and empowered the Attorney General to "take such action as may be necessary from time to time to enforce the provisions of this [Act]."

1971: In 1971, the Legislature created two more ocean sanctuaries: Cape Cod Bay and Cape and Islands. *See* Chapter 742 of the Acts of 1971.

The 1971 Act prohibited "the dumping of any commercial or industrial wastes" in the Cape Cod Bay Ocean Sanctuary, with exceptions for "such quantities of industrial liquid coolant wastes to be dumped by the division of water pollution control on September the thirtieth, nineteen hundred and seventy-one, in connection with the public and private supply of electrical power." *Id.*

1972: In 1972, the Legislature created the North Shore Ocean Sanctuary. *See* Chapter 130 of the Acts of 1972.

1976: In 1976, the Legislature created the South Essex Ocean Sanctuary. *See* Chapter 369 of the Acts of 1976. In doing so, the Legislature first used the language similar to that found in today's OSA for electrical generating facilities, creating an exception in the South Essex Ocean Sanctuary for the following:

the construction, reconstruction, or operation and maintenance of industrial liquid coolant discharge and intake systems and other facilities and activities in conjunction with the public and private supply of electrical power as allowed and licensed by the division of water pollution control, the

department of environmental quality engineering or the department of environmental management

1977: In 1977, the Legislature comprehensively revised the OSA. *See* Chapter 897 of Acts of 1977. Among other changes, the 1977 amendments generally protected all ocean sanctuaries from “any exploitation, development, or activity that would seriously alter or otherwise endanger the ecology or the appearance of the ocean, seabed, or subsoil thereof, or the Cape Cod National Seashore.”

Whether hitherto, the OSA’s prohibitions and exceptions were codified by individual ocean sanctuaries, the 1977 acts reorganized the OSA such that going forward prohibitions and exceptions applied (unless specified otherwise) to all five ocean sanctuaries.

The Legislature continued to categorically prohibit “the dumping or discharge of commercial or industrial wastes,” except as otherwise provided in the OSA. The 1977 amendments created exceptions allowing “existing municipal, commercial [and] industrial discharges” into an otherwise protected sanctuary. Specifically, the 1977 amendments allowed –

the operation and maintenance of **existing municipal, commercial or industrial facilities** and **existing municipal, commercial or industrial discharges** where such discharges and facilities have been approved and licensed by appropriate federal and state agencies

(Emphasis supplied.)

The 1977 amendments allowing “existing municipal, commercial or industrial discharges” did not define a date for what were then “existing discharges.” The 1977 amendments became effective on December 30, 1977. Thus, the statute as amended can be read as permitting “existing discharges” as of December 30, 1977, or as permitting only those discharges which existed as of 1971, the original enactment of the OSA. St.1977, c. 897.

The 1977 amendments also created an exception for discharges associated with the “planning, construction, reconstruction, operation and maintenance” of facilities associated with the generation of electrical power. Specifically, the 1977 amendments allowed –

the planning, construction, reconstruction, operation and maintenance of industrial liquid coolant discharge and intake systems and all other activities, uses and facilities associated with the **generation, transmission, and distribution of electrical power**, provided that all certificates, licenses, permits and approvals required by law are obtained therefor, and provided, further, that such activities, uses and facilities shall not be undertaken or located except in compliance with any applicable general or special statutes, rules, regulations or orders lawfully promulgated

(Emphasis supplied.)

Secretary Rebecca Tepper
Director Lisa Berry Engler
February 15, 2023
Page 5

The 1977 amendments also created a provision that requires “[a]ll departments, divisions, commissions, or units of the executive office of environmental affairs and other affected agencies or departments of the commonwealth” to issue permits consistently with the Act. In doing so, all permit granting authorities were required to consult with the department of environmental management to ensure compliance.

1989: In 1989, the Legislature again amended the act, and officially named it the “Massachusetts Ocean Sanctuaries Act.” *See* Chapter 728 of the Acts of 1989. It added a definitions section to the statute, establishing an “existing discharge” as one which is –

a municipal, commercial or industrial discharge at the volume and locations authorized by the appropriate federal and state agencies on July fifteenth, nineteen hundred and seventy, in the case of the Cape Cod Ocean Sanctuary; **on December eighth, nineteen hundred and seventy-one, in the case of the Cape Cod Bay and Cape and Islands Ocean Sanctuary;** on June twenty-seventh nineteen hundred and seventy-two in the case of the North Shore Ocean Sanctuary; and on December thirtieth, nineteen hundred and seventy-six, in the case of the South Essex Ocean Sanctuary

(Emphasis supplied.)

2008: The 2008 amendments require the state to create an ocean management plan. Chapter 114 of the Acts of 2008.

2014: The OSA’s most recent amendment in 2014, modified the OSA to allow for new or modified municipal waste discharges from a publicly owned treatment works without a variance, after specific requirements have been met and impact studies have been conducted. Chapter 259 of the Acts of 2014, §§ 28-45.

2. The OSA’s Near-Categorical Ban of New Industrial Discharges Into an Ocean Sanctuary

Today, the OSA severely restricts all municipal, commercial, and industrial discharges into an Ocean Sanctuary. The presumption is that no discharges are permitted, and all are prohibited unless expressly authorized. G.L. c. 132A, § 15 provides that, except as otherwise provided in the OSA, the act prohibits “the dumping or discharge of commercial, municipal, domestic or industrial wastes.”

The only exceptions to this categorical ban of discharges into an ocean sanctuary are the following three activities:

- An existing municipal, commercial or industrial discharge at the volume and locations authorized by the appropriate deferral and state agencies on December eight, nineteen hundred and seventy-one, in the case of the Cape Cod Bay;

Secretary Rebecca Tepper
Director Lisa Berry Engler
February 15, 2023
Page 6

- discharges from municipal wastewater treatment facilities if the discharge is approved under § 16G of the OSA; and
- industrial liquid coolant discharge “associated with the generation, transmission, and distribution of electrical power.”

Because these are exceptions to the general prohibition of discharging of industrial wastes, they must be narrowly and strictly construed. *See Boston Globe Media Partners, LLC v. Department of Public Health*, 482 Mass. 427, 432 (2019) (“statutory exemptions” from the statute “must be strictly and narrowly construed”); *Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co.*, 414 Mass. 609, 614 (1993) (“[s]tatutory exemptions are strictly construed”).

3. The OSA Prohibits Any New Industrial Discharge From the Now-Defunct PNPS

Under the plain terms of the OSA, Holtec is prohibited from discharging pollutants from the spent fuel rods or other pollutants associated with PNPS decommissioning activities into the Cape Cod Bay Ocean Sanctuary. G.L. c. 132A, § 15(4) states, in no uncertain terms, that except as otherwise permitted in the OSA “the dumping or discharge of commercial, municipal, domestic or industrial wastes” “shall be prohibited in an ocean sanctuary.” Holtec’s proposed discharge into the Cape Cod Bay Ocean Sanctuary does not qualify for any of the narrow exceptions to this categorical presumption against the discharge of industrial pollutants to an ocean sanctuary, as explained below.

a. The Proposed Discharge of Waste Generated by Holtec’s Decommissioning Activities at PNPS was Not an Existing Discharge as of December 8, 1971

Holtec’s discharge cannot be considered an “existing discharge” as defined by the statute. This exception allows for “the operation and maintenance of existing municipal, commercial or industrial facilities and discharges where such discharges or facilities have been approved and licensed by appropriate federal and state agencies.” G.L. c. 132A, § 16. The Legislature defined “existing discharge” in the 1989 amendments to mean, in relevant part:

a municipal, commercial or industrial discharge at the volume and locations authorized by the appropriate federal and state agencies...on December eighth, nineteen hundred and seventy-one, in the case of the Cape Cod Bay and Cape and Islands Ocean Sanctuary

G.L. c. 132A, § 12B. *See also* 301 CMR 27.02.

b. The Proposed Discharge of Waste Generated by Holtec’s Post-Operation Activities at a Defunct Power Plant Is Not a Discharge “Associated With the Generation, Transmission, or Distribution of Electrical Power”

Discharges of coolant and other pollutants related to PNPS’s activities when it was generating electrical power may have been authorized under the OSA’s exception for discharges associated with the

Secretary Rebecca Tepper
Director Lisa Berry Engler
February 15, 2023
Page 7

“generation, transmission, and distribution” of electrical power. As EPA, MassDEP, and Holtec have all acknowledged, the proposed discharge related to PNPS’s decommissioning, however, is a new and different kind of discharge, which is not associated with the “generation, transmission, and distribution” of electrical power. As such, it is prohibited by the OSA.

The exception in G.L. c. 132A, § 16 for electrical power facilities states as follows:

Nothing in this act is intended to prohibit...the **planning, construction, reconstruction, operation and maintenance** of industrial liquid coolant discharge and intake systems and all other activities, uses and facilities associated with the **generation, transmission, and distribution** of electrical power, provided that all certificates, licenses, permits and approvals required by law are obtained therefor, and provided, further, that such activities, uses and facilities shall not be undertaken or located except in compliance with any applicable general or special statutes, rules, regulations or orders lawfully promulgated

(Emphasis supplied.)

This exception is noteworthy in the specificity of its requirements. It covers only liquid coolant and other discharges connected with the “planning, construction, reconstruction, operation and maintenance of...uses and facilities associated with the generation, transmission, and distribution” of electrical power. Thus, to fit within this exception, a discharge must satisfy two prongs. *First*, the discharge must be associated with the “planning, construction, reconstruction, operation and maintenance” of a discharging facility. *Second*, the discharge must be from a facility associated with the “generation, transmission, and distribution” of electricity.

Holtec’s proposed discharge from the decommissioned PNPS satisfies neither of these requirements. It is not a discharge connected with “planning, construction, reconstruction, operation and maintenance” of a facility for electrical power generation. Rather, it is associated with *decommissioning* of such a facility. The Legislature included “planning,” “construction,” “reconstruction,” and “maintenance” as activities qualifying for the exception, and it notably did *not* include “decommissioning,” or any term that can fairly be construed to encompass decommissioning. The statute must be interpreted and applied in accordance with its plain terms. *See Water Dep’t of Fairhaven v. Department of Env’t Prot.*, 455 Mass. 740, 744 (2010) (“the language of the statute” is “the principal source of insight into legislative intent”); *Provencal v. Commonwealth Health Ins. Connector Auth.*, 456 Mass. 506, 513 (2010) (“the primary source of insight into the intent of the Legislature is the language of the statute”).

Holtec’s proposed discharge from the decommissioned PNPS is also prohibited because it is not associated with the generation, transmission, or distribution of electrical power. The exception’s reference to the active production of power – “generation, transmission, and distribution of electrical power” –

Secretary Rebecca Tepper
Director Lisa Berry Engler
February 15, 2023
Page 8

confirms the required link to the production or output of electricity and getting that electricity to people. That essential link is missing here.

The current NPDES permit for PNPS reflects the reissuance of an earlier NPDES permit to discharge various wastewaters and stormwater to Cape Cod Bay and to withdraw water from Cape Cod Bay for cooling uses, during PNPS's active operation. The discharges authorized under this NPDES permit may be considered part of the "maintenance" of PNPS. EPA and the Commonwealth re-issued the NPDES permit at a time when it was known that PNPS was to shut down, but the specifics of the decommissioning process were unknown. *See* NPDES Permit No. MA0003557, Part IV.5.1, Response to Comments. ("Neither Entergy nor Holtec...provided sufficient information by which to characterize decommissioning-related discharges.").

The NPDES permit expressly declares that the discharges of pollutants in spent pool water are unauthorized. *Id.* at "Unauthorized Discharges," Part I.B.2. Discharges of pollutants in stormwater associated with construction activity, "including activities...associated with the dismantlement and demolition of plant systems, structures and buildings" are likewise unauthorized. *Id.*, Part I.B.3. And for the avoidance of doubt, discharges of pollutants associated with dewatering, and "including but not limited to physical alterations or additions resulting in the discharge of pollutants associated with the dismantlement and decontamination of plant systems and structures and/or the demolition of buildings" are unauthorized. *Id.*, Part I.B.4.¹

EPA has made clear that coverage for decommissioning discharges requires either a new NPDES permit or a modification of PNPS's existing NPDES permit. *See* June 17, 2022 EPA Letter to Holtec (informing Holtec that its current NPDES permit does not authorize PNPS's decommissioning discharge);² *see also* December 5, 2022 Letter to Holtec from EPA (same). With some apparent reluctance, Holtec has now conceded this point. *See* December 19, 2022 Holtec Letter to EPA ("Holtec determined that it would pursue a modification to the existing NPDES permit to appropriately address such discharges [associated with decommissioning activities]").

Of course, there are sound policy reasons for treating discharges associated with power-generating activities differently from discharges from decommissioned facilities that are no longer operating to power the grid. The Legislature clearly made the determination that electricity from planned and/or active power generation, distribution and transmission facilities is important to the economic health of the Commonwealth

¹ *See also id.* at Part IV.5.1, Response to Comments ("We clarify, therefore, that the Final Permit does not authorize the discharge of pollutants associated with the spent fuel pool water. Similarly, the Final Permit does not authorize the discharge of pollutants associated with other activities related to the decommissioning at PNPS, including, but not limited to, contaminated site dewatering, pipeline and tank dewatering, collection structure dewatering, dredge-related dewatering, or dismantlement and decontamination of plant systems and structures.").

² This letter suggests that EPA, too, considers decommissioning to be a different activity than operation and maintenance. *See* page 2 of the June 17, 2022 Letter ("[P]ast discharge practices' occurred under a different NPDES Permit, specifically a Permit issued in 1990 when the facility was operational and generating electricity, not when it was being decommissioned.").

Secretary Rebecca Tepper
Director Lisa Berry Engler
February 15, 2023
Page 9

and the well-being of its residents. Those interests are not present, or certainly not as compelling, with a facility that has been permanently taken out of service.

In sum, because it does not fall under the OSA's three exceptions, any decommissioning process discharge that Holtec may wish to make is prohibited by the OSA. As the Energy Facilities Siting Board has noted, the language of the OSA is "not ambiguous." *In Re Cape Wind Assocs., LLC*, No. EFSB 02-2, 2005 WL 1264241 (May 10, 2005). Under the plain terms of the statute, discharges into Cape Cod Bay associated with a nuclear power plant's decommissioning and shutdown are not allowed.

4. CZM Should Inform Holtec That its Planned Radioactive Discharge From PNPS is Prohibited Under the OSA

Because the OSA clearly forbids Holtec's planned discharge of an estimated 1.1 million gallons of radioactive decommissioning process waste, CZM should inform Holtec in writing that it is not permitted to make such a discharge into the Cape Cod Bay Ocean Sanctuary, as a matter of state law.

Holtec is responsible for deciding how it will manage radioactive material in its liquid effluent, and it has other options, including some used at other decommissioned facilities, including: (1) shipment for off-site disposal; (2) evaporation of the liquid and disposal of the resulting solid waste; or (3) safe storage at the PNPS facilities. To be sure, these other options come with potential risks as well as potential relative benefits. But these other options do not involve discharge into an ocean sanctuary. Holtec well understood, when it voluntarily purchased PNPS for the sole purpose of profiting from the decommissioning of the facility, that it would be obligated to accomplish that decommissioning in accordance with all applicable state laws, including the OSA. Holtec has always known, or should have known, that it would need to dispose of its decommissioning process waste by some means other than dumping it into Cape Cod Bay.

5. EEA and CZM Should Ensure That No State Agencies Permit or Otherwise Authorize the Discharge Into Cape Cod Bay

Section 14 of the OSA provides that, "[a]ll ocean sanctuaries...shall be under the care, oversight, and control" of CZM. Section 12C provides that, "[CZM] shall integrate its implementation, administration and enforcement of the [OSA] with other programs and agencies responsible for the protection of the public health, safety, welfare and the environment."

And Section 18 requires that "[a]ll departments, divisions, commissions, [and] units of [EEA] and other affected agencies or departments of the commonwealth shall issue permits or licenses for activities...consistently with the act, and shall not permit or conduct any activity which is contrary to the provisions of the Act." Section 18 further directs "other departments, divisions, commissions, units, or other agencies" to "confer and consult" with CZM to "ensure compliance" with the OSA.

By virtue of these provisions, the Legislature has made CZM the trustee for the ocean sanctuaries, and given CZM the tools to protect them. It is incumbent on CZM, and all permitting agencies, to make certain that no state permits or licenses authorize activities prohibited under the OSA. *See* G.L. c. 132A, § 18. Accordingly, CZM should not only make clear to Holtec that the OSA forbids its proposed new

Secretary Rebecca Tepper
Director Lisa Berry Engler
February 15, 2023
Page 10

discharge, but also notify all pertinent state agencies that they should not issue any kind of permit, approval, or authorization for such a discharge. In particular, but without limitation, we ask CZM, backed by EEA, to advise MassDEP that Holtec is not eligible for a new or modified state Surface Water Discharge Permit under the Massachusetts Clean Waters Act, G.L. c. 21, §§ 26-53 and 314 CMR 3.00, for its proposed new discharge of decommissioning process waste from PNPS into Cape Cod Bay, which Holtec has announced it will seek in the near future, together with a modified NPDES permit. Likewise, we ask CZM, backed by EEA, to advise MassDEP that Holtec is not eligible for a state Water Quality Certification under G.L. c. 21, § 27 and 314 CMR 3.07.

6. Conclusion

Sanctuaries are places of refuge, where flora, fauna, and their ecosystems are supposed to be protected from threats. The Ocean Sanctuaries Act provides strong protections – such as an outright prohibition on most discharges – and CZM is entrusted with the authority and responsibility for ensuring that those protections are honored and respected by all state agencies. If Holtec’s proposed new radioactive discharge into the Cape Cod Bay Ocean Sanctuary is allowed by state agencies, the Bay will become a sanctuary in name only. We ask CZM to exercise the power the Legislature has given to the agency, to the fullest extent possible, to keep the Cape Cod Bay Ocean Sanctuary from becoming a hollow designation.

We urge you to confirm to Holtec that the Ocean Sanctuaries Act prohibits Holtec’s planned new discharge of decommissioning process waste from PNPS into Cape Cod Bay. We also encourage you to provide clear guidance and specific advice to MassDEP and other agencies on this same point. Thank you for your thoughtful consideration of these requests, and for the anticipated opportunity to meet with you to discuss these matters and such further actions as may be appropriate to protect Cape Cod Bay Ocean Sanctuary. We look forward to hearing from you.

Sincerely,

/s/ Lisa C. Goodheart
Lisa C. Goodheart

/s/ Dylan Sanders
Dylan Sanders

/s/ Alessandra Wingerter
Alessandra Wingerter

cc: The Honorable Maura Healey, Governor of the Commonwealth of Massachusetts
Gary Moran, Acting Commissioner, Department of Environmental Protection
The Honorable Andrea Joy Campbell, Attorney General for the Commonwealth of Massachusetts
Seth Schofield, Senior Appellate Counsel, Energy & Env’t Bureau, Office of the Attorney General