

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF APPEALS AND DISPUTE RESOLUTION

In the Matter of:
Holtec Decommissioning International, LLC

OADR Docket No. 2024-025
Surface Water Discharge Permit
No. MA0003557
Plymouth, MA 02360

**MEMORANDUM IN SUPPORT OF
THE APCC GROUP'S MOTION TO INTERVENE**

Pursuant to G.L. c. 30A, § 10A and 310 CMR 1.01(7), the Association to Preserve Cape Cod, Inc., Cape Cod and Islands Association of Realtors®, Cape Cod Chamber of Commerce, Inc., Cape Cod Commercial Fisherman's Alliance, Sally Andreola, Wayne Bergeron, Dylan Fernandes, Owen Fletcher, Trish Kellinui, Steve Koppel, Jack Looney, Sheila Lyons, Elyse Magnotto-Cleary, Robert Mills, William C. Mills, Rick Sawyer, Emily Sumner, David Weeden, and Taryn Wilson (collectively the "APCC Group") submit this memorandum in support of their Motion to Intervene in this adjudicatory proceeding.

As set forth in the motion, the APCC Group seeks to intervene in support of upholding and seeing ratified, as a final agency decision, the Final Determination of the Massachusetts Department of Environmental Protection ("MassDEP") to deny the request of Holtec Decommissioning International, LLC ("Holtec") to modify its Surface Water Discharge Permit No. MA0003557. By its permit modification application, Holtec seeks authorization to discharge of up to 1.1 million gallons of treated industrial wastewater from the now-defunct Pilgrim Nuclear Power Station. Damage to the environment "is or might be" at issue in this proceeding because Holtec seeks to make an unprecedented discharge of contaminated industrial wastewater from facility decommissioning processes into Cape Cod Bay, a protected ocean

sanctuary. At issue is the proposed release of a new source of water pollution that would injure and destroy precious water resources and other natural resources, as a matter of fact and law.

This constitutes “damage to the environment,” for purposes of G.L. c. 30A, § 10A and 310 CMR 1.01(7), as well as a violation of the Ocean Sanctuaries Act, G.L. c. 132A, §§ 12 – 18.

The APCC Group

The APCC Group is comprised of 19 entities and individuals having an interest in this proceeding, who jointly seek a recommended final decision by the Chief Hearing Officer, and a final agency decision by the Commissioner of MassDEP, to uphold the July 18, 2024 denial of Holtec’s request for modification MassDEP’s Final Determination. Affidavits from the members of the APCC Group are attached to the group’s Motion to Intervene, and the APCC Group offers the following additional information about its members:

- 1) **Association to Preserve Cape Cod, Inc.** - The Association to Preserve Cape Cod is the region’s leading nonprofit environmental organization, working for the adoption of laws, policies and programs that protect and enhance Cape Cod’s natural resources and quality of life. Since 1968, APCC has been Cape Cod’s voice for the environment. APCC’s efforts have led to landmark achievements in water resource protection, land preservation and smart growth, earning APCC the reputation as Cape Cod’s most prominent and influential environmental advocacy group.
- 2) **Cape Cod and Islands Association of Realtors®** – The Cape Cod and Islands Association of Realtors® is the local organization supporting realtors across Cape Cod, Martha’s Vineyard, and Nantucket by empowering professionalism and advocating for the real estate industry across the region. It is a not-for-profit and

membership-based organization governed by a volunteer member Board of Directors and run by a professional staff led by the Chief Executive Officer. It provides benefits to members and advocates on behalf of its members, the industry, and its members' home buying and selling clients.

- 3) **Cape Cod Chamber of Commerce, Inc.** – The Cape Cod Chamber of Commerce, Inc. is a Massachusetts non-profit, membership organization that advocates on behalf of businesses to strengthen and promote regional economic vitality while addressing related cultural, environmental and community concerns.
- 4) **Cape Cod Commercial Fisherman's Alliance** – The Cape Cod Commercial Fishermen's Alliance is an alliance of fishermen, community members, public officials, and scientists working together to build creative strategies, advocate for improved marine policies, protect the ocean ecosystem, and ensure the viability and future of Cape Cod's fisheries.
- 5) **Sally Andreola** – Sally Andreola is a shellfish grower in Brewster, who harvests from Cape Cod Bay.
- 6) **Wayne Bergeron** – Captain Wayne Bergeron is a charter fisherman who fishes in Cape Cod Bay.
- 7) **Dylan Fernandes** – Rep. Dylan Fernandes is a member of the Massachusetts House of Representatives and represents Falmouth, Martha's Vineyard, and Nantucket. He is currently running for election to a seat in the Massachusetts Senate, to represent Plymouth, Pembroke, Plympton, Kingston, Sandwich, Mashpee, Bourne, and Falmouth.

- 8) **Owen Fletcher** – Owen Fletcher is the Clerk of the Assembly of Delegates for Barnstable County. He is currently running for election to be the state Representative in the 5th Barnstable District, which includes Sandwich and parts of Barnstable and Bourne.
- 9) **Trish Kellinui** – Trish Kellinui is a member of the Mashpee Wampanoag Tribe.
- 10) **Steve Koppel** – Steve Koppel is the President of APCC’s Board of Directors. He lives in Brewster and is an avid photographer, as well as the owner of a photography gallery that showcases pictures depicting the beauty of Cape Cod’s waters and tidal flats.
- 11) **Jack Looney** – Jack Looney lives in Mashpee. An environmental attorney, he previously served as an Assistant Attorney General for the State of Connecticut and as an attorney for the Connecticut Fund for the Environment/Save the Sound. He is the Clerk of APCC’s Board of Directors.
- 12) **Sheila Lyons** – Sheila Lyons lives in Wellfleet and is a member of the Wellfleet Selectboard. She previously served as a Barnstable County Commissioner.
- 13) **Elyse Magnotto-Cleary** – Elyse Magnotto-Cleary is Vice President of APCC’s Board of Directors.
- 14) **Robert Mills** – Robert Mills is a lifelong resident of the Cape and a member of the Wampanoag Tribe. He grew up in Falmouth and currently resides in Mashpee.
- 15) **William C. Mills** – William C. Mills is a member of the Mashpee Wampanoag Tribe.

16) **Rick Sawyer** – Rick Sawyer is president of A.R.C. Shellfish Hatchery. A.R.C., which stands for Aquacultural Research Corporation, is an aquaculture and shellfish research, farming, and distribution company on Cape Cod.

17) **Emily Sumner** – Emily Sumner is a shellfish grower who harvests from Cape Cod Bay.

18) **David Weeden** – David Weeden is a member of the Mashpee Wampanoag Tribe.

19) **Taryn Wilson** – Taryn Wilson was raised on Cape Cod, lives in Dennis, and is Treasurer of APCC’s Board of Directors.

This is a distinguished group of entities and individuals who have a strong interest in protecting Cape Cod Bay and its associated natural resources from the damage to the environment that is threatened by Holtec’s requested permit modification and its proposed new discharge of pollutants to a protected ocean sanctuary.

Argument

1. The APCC Group Has A Statutory Right To Intervene As A Ten-Person Group Because “Damage To The Environment” “Is Or Might Be” At Issue.

By statute, the APCC Group is entitled to intervene in this adjudicatory proceeding.

Under G.L. c. 30A, § 10A,

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[.]

Through § 10A, the Legislature created an explicit, non-discretionary statutory right for a group of ten persons to intervene in an adjudicatory proceeding in which “damage to the environment” “is or might be at issue.”

G.L. c. 214, § 7A defines “damage to the environment” as follows:

any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth, whether caused by the defendant alone or by the defendant and others acting jointly or severally. Damage to the environment shall include, but not be limited to...water pollution...destruction of seashores, dunes, wetlands, open spaces, natural areas, parks or historic districts or sites. Damage to the environment shall not include any insignificant destruction, damage or impairment to such natural resources.... Nothing contained in this section shall be construed so as to impair, derogate or diminish any common law or statutory right or remedy which may be available to any person, but the cause of action herein authorized shall be in addition to any such right or remedy.

Here, it is obvious that “damage to the environment” “is or might be at issue” if MassDEP’s July 18, 2024 permit modification denial is not upheld as the agency’s final decision, following an adjudicatory hearing.

As a factual matter, Holtec’s proposed discharge entails a new discharge of water pollution that would adversely impact important water resources and seashores, dunes, open spaces, or natural areas. The wastewater stream at issue has been shown to contain pollutants such as suspended solids, oil and grease, copper, zinc, lead, nickel, boron, and phenol. The potential release of decommissioning process wastewater from the spent pool fuel water and other sources at the Pilgrim Nuclear Power Station into Cape Cod Bay may have multiple negative impacts to the Bay, its natural resources, and the people who use and depend on them. These include, without limitation, the following:

- *Seafood safety:* Pollutants in Holtec’s decommissioning process wastewater can accumulate in seafood, which can affect its quality and safety.
- *Marine animal and/or organism health:* Pollutants in Holtec’s decommissioning process wastewater can have long-term unknown effects on the health of marine animals and/or organisms.

- *Human health risks:* Pollutants in Holtec’s decommissioning process wastewater may increase the risk of human exposure to dangerous contaminants.
- *Consumer rejection:* Consumers may reject local seafood over fears of contamination. Tourists, upon which the Cape Cod economy relies, may choose to vacation elsewhere because they may reject recreating in the Cape Cod Bay due to fears of human exposure to dangerous contaminants in Holtec’s decommissioning process wastewater.

The above-described damage to the environment, without more, is sufficient to support the APCC Group’s intervention under G.L. c. 30A, § 10A and 310 CMR 1.01(7). There is no need or requirement for the APCC Group or any of its members to show that that they are substantially and specifically affected by this proceeding and the decision that will result from it. Nevertheless, the APCC Group wishes to emphasize that Holtec’s proposed new discharge of decommissioning process wastewater, if allowed, would certainly cause very real, substantial, and specific harm to members of the APCC Group. Specifically, some of the APCC Group’s members are Cape Cod Bay commercial fishermen and shellfish growers. Their livelihood is dependent on a healthy ecosystem. Other APCC Group members are professionals associated with the tourist economy on the Cape, which would be harmed if tourists seek to vacation elsewhere in light of the discharge and its short- and long-term impacts. Similarly, many APCC Group members, among other activities, enjoy Cape Cod Bay through swimming, sunning, fishing, photography, and other recreational activities. This recreation may be harmed by the proposed discharge

In any event, and more fundamentally, the APCC Group contends that the requisite “damage to the environment” is placed at issue in this proceeding *as a matter of law*, and so need

not be established by specific evidence. That is, in the unique circumstances of this case, Holtec’s proposed discharge constitutes *per se* “damage to the environment” because, if allowed, it would violate the Ocean Sanctuaries Act, G.L. c. 132A, §§ 12 – 18. Not every violation of every environmental statute necessarily results in environmental damage, but the Ocean Sanctuaries Act is a special statute. It reflects a clear determination by the Massachusetts Legislature – which must be respected – that *any* new discharge into the Cape Cod Bay Ocean Sanctuary *shall be assumed* to result in an unacceptable and significant alteration or other endangerment of the ecology or the appearance of the ocean, the seabed, or subsoil thereof.

Section 15(4) of the Ocean Sanctuaries Act states that, except as otherwise permitted, “the dumping or discharge of commercial, municipal, domestic or industrial wastes” “shall be prohibited in an ocean sanctuary.” This prohibition works in service of the Ocean Sanctuaries Act’s essential goal and mandate, which is that the ocean sanctuaries “shall be protected from any exploitation, development, or activity that would significantly alter or otherwise endanger the ecology or the appearance of the ocean, the seabed, or subsoil thereof.” G.L. c. 132A, § 14. Simply stated, “the dumping or discharge of commercial, municipal, domestic or industrial wastes” into Cape Cod Bay must be treated as *per se* damage to the environment, because Cape Cod Bay has been designated as a protected ocean sanctuary, for purposes of the Ocean Sanctuaries Act.

Holtec’s proposed discharge does not qualify for any of the narrow exemptions laid out in the Ocean Sanctuaries Act. Of those few exemptions, only two warrant consideration here.

First, the Ocean Sanctuaries Act 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;

see also 301 CMR 27.02. “Existing discharge” is a defined term under § 12B, and, in the case of Cape Cod Bay, it means a discharge that is “a municipal, commercial or industrial discharge at the volume and locations authorized by federal and state agencies” on December 8, 1971. Holtec’s proposed discharge of the industrial wastewater generated by decommissioning processes that it commenced only after the shutdown of the Pilgrim Nuclear Power Station cannot be treated as an “existing discharge” because such discharge was not authorized by federal and state authorities as of December 8, 1971.

Second, the Ocean Sanctuaries Act allows for discharges “associated with the generation, transmission, or distribution of electrical power.” G.L. c. 132A, § 16. Discharges of coolants and other pollutants were accordingly allowed while the Pilgrim Nuclear Power Station was in operation, because such discharges were “associated with the generation, transmission, or distribution of electrical power.” Here, by contrast, Holtec’s proposed discharge is of contaminated wastewater generated through the decommissioning of a plant that once provided – but no longer provides – electrical power. This fact takes Holtec’s discharge totally out of the scope of permitted discharges under G.L. c. 132A, § 16. Simply stated, the Ocean Sanctuaries Act reflects a deliberate balancing of competing policies: the Legislature, on behalf of the people of the Commonwealth, decided to allow discharges into an ocean sanctuary to the extent that the discharges contribute to the greater good of supplying electrical power to residents. But once that source ceases to supply electrical power, however, any further discharge is prohibited, as it cannot produce any continuing energy benefits to the residents of the Commonwealth.

2. The APCC Group Will Add Value As A Party Intervenor, By Contributing Constructively To The Development Of The Record And The Analysis Of Novel And Important Legal Issues.

The APCC Group seeks to intervene in this proceeding for purposes of seeking a

recommended final decision by the Chief Hearing Officer, and a final agency decision by the Commissioner of MassDEP, to uphold the July 18, 2024 denial of Holtec’s request for modification of Surface Water Discharge Permit No. MA0003557. It does so for purposes of protecting the environment and the natural resources of Cape Cod Bay and its surrounding areas. Intervention “to address perceived damage to the environment” is “quite clearly allow[ed]” under G.L. c. 30A, § 10A. *Somerset Power LLC*, DEP Docket No., 2008-054, Recommended Final Decision (June 13, 2008) at 8 and n.6, adopted by Final Decision (August 19, 2008) (discussing ordinary understanding of intervention, as entering into a lawsuit as a third party to protect an alleged interest). Intervenors often provide helpful testimonial and documentary evidence, as well as legal analysis, in adjudicatory proceedings. *See, e.g., Patricia A. Angelini*, OADR Docket No. WET-2008-057, Recommended Final Decision (April 16, 2009), adopted by Final Decision (April 17, 2009).

The APCC Group is comprised of respected and prominent individuals of the Cape Cod community. They have the ability to offer their unique perspective and to marshal important information for consideration as part of this adjudicatory proceeding, because of their strong concern and engagement, and also because their interests are particularly impacted by the proceeding’s outcome. In addition, they have engaged experienced legal counsel who will be able to assist them in presenting useful advocacy in a constructive way, in this proceeding.

Finally, the issues raised by Holtec on this adjudicatory appeal are both novel and important. The APCC Group believes that it can offer, through its counsel, helpful legal analysis, which will enhance the decision-making process. The proper interpretation and application of the Ocean Sanctuaries Act is one such issue. Holtec’s bold and sharply disputed contention that MassDEP’s authority is entirely preempted by the Atomic Energy Act is another.

These are serious issues with major implications for the protection of the environment within the Commonwealth of Massachusetts. The APCC Group wishes to engage as a party in the development of the record and the advancement of legal arguments in this proceeding, and it believes it can add value as an intervenor party.

Conclusion

For all of the foregoing reasons, the APCC Group requests that its Motion to Intervene be ALLOWED.

ASSOCIATION TO PRESERVE CAPE COD,
INC., CAPE COD ASSOCIATION OF
REALTORS®, CAPE COD CHAMBER OF
COMMERCE, INC., CAPE COD COMMERCIAL
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Dated: September 19, 2024

CERTIFICATE OF SERVICE

I, Alessandra W. Wingerter, hereby certify that I served a copy of the foregoing document upon counsel of record for all parties listed in the September 5, 2024 Scheduling Order, at the email addresses provided therein.

/s/ Alessandra W. Wingerter
Alessandra W. Wingerter