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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2284CV02926

PALMER RENEWABLE ENERGY, LLC,

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

MEMORANDUM OF DECISION AND ORDER ON CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS

Plaintiff, Palmer Renewable Energy, LLC ("Palmer"), brings this action challenging a final decision of the Office of Appeals and Dispute Resolution of the Massachusetts Department of Environmental Protection ("MassDEP"). Before the Court are cross-motions for judgment on the pleadings. Palmer seeks an order vacating MassDEP's Revocation Order and MassDEP seeks affirmation of its determination.

A non-evidentiary hearing was held on March 7, 2024. For reasons discussed below, Palmer's motion for judgment on the pleadings is **ALLOWED** and MassDEP's motion for judgment on the pleadings is **DENIED**.

Background

The following background is taken from Palmer's Amended Complaint, the administrative record, and the parties' briefs, with some details being reserved for the legal discussion.

The subject of this matter is the construction and operation of a 35-megawatt biomass-fired power plant (the "Facility") at 1000 Page Boulevard a/k/a 400 Cadwell Drive, Springfield, Massachusetts.

On November 21, 2008, Palmer submitted an application to MassDEP for an air pollution control permit known as a Comprehensive Plan Approval ("CPA"). On October 28, 2009, MassDEP issued Palmer a draft CPA approving the project and a Provisional Beneficial Use Determination authorizing Palmer to use recycled wood as fuel. However, in December 2009, MassDEP rescinded the Provisional Beneficial Use Determination and permanently suspended its review of Palmer's application for a CPA because of concerns regarding the use of recycled wood as biomass fuel.

On September 30, 2010[1], Palmer submitted a Notice of Project Change ("NPC") to MassDEP describing a proposed change in fuel to remove recycled wood, proposed emissions controls, and evaluating the environmental and public health impacts of the Facility. On the following day, Palmer submitted a revised CPA of the Facility as modified and described in the NPC to MassDEP. On November 19, 2010, Palmer received an NPC Certificate determining the proposed changes to the Facility reduced the environmental impacts of the project and that no environmental impact report ("EIR") was required.

On June 30, 2011, MassDEP issued a draft CPA titled "Conditional Approval" to Palmer authorizing the construction and operation of the Facility. Shortly thereafter, a citizens group and several environmental and social justice organizations (collectively the "citizen groups") challenged the approval of the CPA by filing an administrative appeal with MassDEP's Office of Appeals and Dispute Resolution ("OADR"). On November 30, 2011, OADR issued a Recommended Final Decision recommending that MassDEP's Commissioner issue a Final Decision dismissing the appeal due to the citizen groups' lack of standing to challenge the CPA.

[1] In August 2010, to combat the Great Recession, the Massachusetts Legislature enacted St. 2010, c. 240, §173 (the "Permit Extension Act"), which tolled the expiration of virtually all permits or approvals in effect or existence as of August 15, 2008, through August 15, 2010. The tolling period was later extended through August 15, 2012. St. 2012, c. 238, §74.

In response, on December 6, 2011, the Commissioner issued an Interlocutory Remand Decision deferring a ruling on whether the citizen groups lacked standing to challenge the Initial Plan Approval and remanding the appeal to the presiding officer to conduct an evidentiary Adjudicatory Hearing and adjudicate the merits of the citizen groups' claims challenging the Initial Plan Approval.

On July 9, 2012, the presiding officer issued a Recommended Final Decision After Remand dismissing the appeal due to the citizen groups' lack of standing and upholding the CPA.[2] On September 11, 2012, the Commissioner issued a Final Decision (the "2012 Final Decision") rejecting the presiding officer's finding that the citizen groups lacked standing but adopting the presiding officer's determination that the CPA complies with law and regulation. The citizen groups timely appealed the 2012 Final Decision to the Hampden Superior Court. On January 3, 2017, the Hampden Superior Court entered judgment on the pleadings in Palmer's favor affirming the 2012 Final Decision. The citizens groups did not appeal the Hampden Superior Court's ruling by the March 6, 2017, deadline.

After the Hampden Superior Court decision, and by 2019, Palmer: (i) negotiated for the acquisition of two properties[3] adjacent to the Facility site to provide construction officers and a laydown area and storage for recycled asphalt on the Facility site; (ii) negotiated a property swap with Eversource to facilitate construction of a new substation next to the facility site; (iii) selected an engineering, procurement, and construction contractor, and negotiated a contract; (iv) selected the boiler and air quality control system equipment supplies for the Facility, and negotiated a contract; (v) selected the steam turbine supplier for the Facility and negotiated a contract; (vi)

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[2] Specifically, the presiding officer found that the CPA complies with the applicable law and regulation.

[3] The properties are located at 365 and 400 Cadwell Avenue in Springfield.

performed asbestos remediation and demolished a pre-existing building located on the Facility site that was necessary to open up the Facility site for the completion of construction for the site grading, storm water control, and the stack foundation; (vii) entered into project financing agreements for the construction of the Facility; and (viii) constructed a new road for Eversource to reach its utility office complex and completed a land swap with Eversource that reallocated the control of the roadways. Following these developments, in February 2020, Palmer signed power purchase agreements with eight municipalities.

In March 2020, the former Massachusetts Governor declared a state of emergency due to the COVID-19 pandemic.[4] As a result, Palmer lost its financing arrangement. On December 24, 2020, Senator Warren and Senator Markey wrote a letter to MassDEP requesting that MassDEP suspend Palmer's CPA. As a result, Palmer met with MassDEP's then Commissioner and department staff and provided information regarding the status of construction of the Facility as well as updated ambient air quality monitoring results. Rather than revoke or suspend its CPA, Palmer requested MassDEP reopen its CPA to address the concerns raised by MassDEP.

On April 2, 2021, MassDEP revoked (the "Revocation Order") the CPA because it found palmer had failed to commence construction within two years of the 2017 Superior Court decision. On April 7, 2021, Palmer filed a Notice of Claim for an adjudicatory hearing on the validity of the Revocation Order. On September 30, 2022, OADR issued a Recommended Final Decision, which opined that that the revocation should be upheld. In issuing the Recommended Final Decision, the presiding officer relied on evidence that was not introduced by either party before or during the adjudicatory hearing. Specifically, after the close of the record, the presiding officer found that

[4] As a result of the COVID-19 pandemic, the Massachusetts Legislature enacted St. 2020, c. 53, § 17 (the "Covid Extension Act"), which tolled the expiration all permits in effect or existence as of March 10, 2020, until June 15, 2021, during the COVID-19 state of emergency.

the Revocation Order was proper because Palmer's witnesses failed to discuss a study issued by the Clean Air Scientific Advisory Committee ("CASAC") in 2020 criticizing whether the 2012 National Ambient Air Quality Standards ("2012 NAAQS') sufficiently protected the public. On November 28, 2022, the Recommended Final Decision (the "2022 Final Decision") was adopted.

DISCUSSION

I. Standard of Review

In reviewing an agency's decision pursuant to G. L. c. 30A, § 14(7), the court will uphold the decision "unless it is based on an error of law, unsupported by substantial evidence, unwarranted by facts found on the record as submitted, arbitrary [or] capricious, an abuse of discretion, or otherwise not in accordance with law." *Energy Express, Inc.* v. *Dep't of Pub. Utils.*, 477 Mass. 571, 575 (2017), quoting *Bay State Gas Co.* v. *Dep't of Pub. Utils.*, 459 Mass. 807, 814 (2011). "A party challenging an administrative agency's decision 'bears a heavy burden, for we give due weight to the [agency's] expertise, as required by [G. L. c. 30A,] § 14 (7).'" *Freiner* v. *Sec'y of the Exec. Office of Health & Human Servs.*, 494 Mass. 198, 204 (2024), quoting *Welter* v. *Board of Registration in Med.*, 490 Mass. 718, 724 (2022). An agency's reasonable interpretation of a statute is granted deference. See *Harnett* v. *Contributory Retirement Appeal Board*, 494 Mass. 612, 616 (2024), citing *Alves's Case*, 451 Mass. 171, 173 (2008). "The principle of according weight to an agency's discretion, however, is 'one of deference, not abdication, and [the] court will not hesitate to overrule agency interpretations of statutes or rules when those interpretations are arbitrary or unreasonable.'" *Moot* v. *Dep't of Envtl. Prot.*, 448 Mass. 340, 346 (2007), quoting *Boston Preservation Alliance, Inc.* v. *Secretary of Envtl. Affairs*, 396 Mass. 489, 498 (1986).

II. Analysis

A. *Permit Extension Act*

"Questions of statutory interpretation … are questions of law and thus are reviewed de novo." *D.F.* v. *Dep't of Developmental Servs.*, 102 Mass. App. Ct. 508, 513 (2023), quoting *DiMasi* v. *Secretary of the Commonwealth*, 491 Mass. 186, 191 (2023). The court's "primary goal in interpreting a statute is to effectuate the intent of the Legislature." *Conservation Comm'n of Norton* v. *Pesa*, 488 Mass. 325, 331 (2021), quoting *Casseus* v. *Eastern Bus Co.*, 478 Mass. 786, 795 (2018). Thus, the "analysis begins with 'the principal source of insight into legislative intent' — the plain language of the statute." *Patel* v. *7-Eleven, Inc.*, 489 Mass. 356, 362 (2022), quoting *Tze-Kit Mui* v. *Massachusetts Port Auth.*, 478 Mass. 710, 712 (2018).

"Ordinarily, where the language of a statute is plain and unambiguous, it is conclusive as to legislative intent." *Vita* v. *New England Baptist Hosp.*, 494 Mass. 824, 834 (2024), quoting *Six Bros., Inc.* v. *Brookline*, 493 Mass. 616, 622 (2024). The court "do[es] not 'interpret words in a statute in isolation'; rather, [the court] 'must look to the statutory scheme as a whole so as to produce an internal consistency within the statute.'" *Vita* v. *New England Baptist Hosp.*, 494 Mass. 824, 834 (2024), quoting *Outfront Media LLC* v. *Assessors of Boston*, 493 Mass. 811, 818 (2024).

a. *Exemption Provision*

The Court must first determine whether Palmer's CPA falls within the Permit Extension Act's (the "Act") exemption provision. In pertinent part, the Act provides that it will not apply to a "permit or approval issued by the government of the United States or an agency or instrumentality of the government of the United States or to a permit or approval, of which the duration of effect or the date or terms of its expiration are specified or determined by or under law or regulation of the federal government or any of its agencies or instrumentalities." St. 2010, c. 240, §173(b)(2)(i). It further provides that "[n]othing in this section shall be construed or implemented in such a way as to modify a requirement of law that is necessary to retain federal delegation to, or assumption

by, the commonwealth of the authority to implement a federal law or program." St. 2010, c. 240, §173(b)(6).

Said another way, the Act does not apply to a permit or approval: (i) issued by the federal government or one of its agencies; or (ii) if any deadlines for the permit or approval, interim or otherwise, are set by a federal law or regulation. Accordingly, the exemption provision is clear and unambiguous.

MassDEP argues that the exemption provision should be construed broadly to include permits or approvals issued "pursuant to" federal law. To defend its departure from the statutory text, MassDEP relies on two guidance documents related to the Act: one is its own guidance document, and the other was published by the Massachusetts Permit Regulatory Office.[5] MassDEP defends their decision to consider extra-statutory language by arguing that the broader interpretation of the exemption provision is consistent with the Act's purpose.

While this inclusion of this extra-statutory language would certainly give weight to MassDEP's interpretation "[g]iven the absence of such words from the text, however, [the court] cannot interpret the provision as if it contained them." *DiMasi*, 491 Mass. at 192. See *Simmons* v. *Clerk-Magistrate of Boston Div. of Hous. Court Dep't*, 448 Mass. 57, 64 (2006) ("We will not add words to a specific statute that the Legislature did not put there, either by inadvertent omission or by design"). Accordingly, the Court declines to make non-legislative modifications to the plain language of the statute.

Even if the language of the Act was ambiguous, MassDEP's interpretation does not give effect to the Legislature's intent. See *Marengi* v. *6 Forest Road LLC*, 491 Mass. 19, 25 (2022),

[5] Both guidance documents provide that permits issued "pursuant to" federal law are exempt from the Permit Extension Act.

quoting *Worcester* v. *College Hill Props., LLC*, 465 Mass. 134, 139 (2013) (when plain language is ambiguous, "we look to external sources, including the legislative history of the statute, its development, its progression through the Legislature, prior legislation on the same subject, and the history of the times"). The Act was signed into law in direct response to the Great Recession. It was approved in 2010 as part of legislation designed to stimulate job growth and promote long-term economic recovery.[6] Logically, as the purpose of the Act is to promote economic growth and broadening the exemption provision would ultimately hinder economic growth, MassDEP's interpretation contradicts the Legislature's intent.

Regardless, because the Act's exemption provision is unambiguous, the Court rejects MassDEP's interpretation. See *Franklin Office Park Realty Corp.* v. *Comm'r of the Dep't of Envtl. Prot.*, 466 Mass. 454, 460 (2013) ("If [the court] conclude[s] that a statute is unambiguous, we will reject any interpretation by an agency that does not give effect to the Legislative intent").

In further support of its contention that Palmer's CPA is exempt from the Act, MassDEP states that federal law dictates the interim deadlines in the relevant regulations, such as the two-year construction period reflected in 310 Code Mass. Regs. § 7.02(3)(k). If this were true, then MassDEP would be correct in finding that Palmer's CPA was exempt from the Act because the CPA's duration of effect or the date or terms of its expiration would be set by federal law. MassDEP argues this, however, without providing a citation to where the federal Clean Air Act provides for the two-year construction deadline.[7]

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[6] The preamble to Chapter 240, entitled "An Act Relative to Economic Development and Reorganization," states:

> "The deferred operation of this act would tend to defeat its purpose, which is to provide forthwith a business-friendly environment that will stimulate job growth and improve the ease with which businesses can operate in the markets they serve, and to coordinate economic development activities funded by the commonwealth, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience."

[7] The Court reviewed the federal Clean Air Act and did not locate a provision that provided for a two-year construction deadline that would be applicable to Palmer's CPA. Additionally, MassDEP's assertion seems implausible because

b. *Approval*

Now, the Court must determine whether the Conditional Approval issued on June 30, 2011, is an "approval" within the purview of the Act. MassDEP contends that the Conditional Approval cannot be an "approval" because it was not a "final decision," which MassDEP did not issue until September 11, 2012. As such, the CPA was never "in effect or existence," during the qualifying period. Palmer counters that the Conditional Approval is an "approval" under the Act and that because it was issued during the qualifying period, the CPA was "in effect or existence." The Court agrees that the Conditional Approval is an "approval," that was "in effect or existence" during the qualifying period.

In considering the meaning of "approval," as used in the Act, the Court first looks to the definition provided in the statute. See *Bulger* v. *Contributory Retirement Appeal Bd.*, 447 Mass. 651, 660 (2006), quoting *Perez* v. *Bay State Ambulance & Hosp. Rental Serv., Inc.*, 413 Mass. 670, 675 (1992) ("[A] definition [that] declares what a term means … excludes any meaning that is not stated"). The Act broadly defines "approval" to mean "any permit, certificate, order, excluding enforcement orders, license, certification, determination, exemption, variance, waiver, building permit, or other approval or determination of rights from any municipal, regional or state governmental entity, including any agency, department, commission, or other instrumentality of the municipal, regional or state governmental entity, concerning the use or development of real property." St. 2010, c. 240, §173(a). See *Kaplan* v. *Ramsdell*, Mass. Land Ct., No. 14 MISC 488186, 2015 WL 7196465 at * 8 (Nov. 16, 2015); *Town of Wellesley Dept. of Pub. Works, Water*

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the relevant section of MassDEP's regulation states that MassDEP "may" revoke a permit, not "shall" revoke a permit if construction has not commenced within two years of the issuance of the permit. See 310 Code Mass. Regs. § 7.02(3)(k). Indeed, MassDEP, by its own admission, admitted that it "has the discretion to extend the construction start date under 310 Code Mass. Regs. §7.02(3)(k) for a party to commence construction of a facility approved by MassDEP's issuance of an air permit if a court appeal resulting in the air permit's affirmance was protracted in nature." Administrative Record ("A.R.") at 3006. If the two-year deadline was promulgated pursuant to the federal Clean Air Act, then it would not provide MassDEP with discretion to permit an extension.

Div. v. *Mass. Dept. of Envt'l Prot.*, Mass. Super., Nos. 140055, CV2017-1944, 2018 LEXIS 68, *3 (May 17, 2018).[8] The Legislature's use of "the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." *Patel* v. *7-Eleven, Inc.*, 494 Mass. 562, 567 n.14 (2024), quoting *Dep't of Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125, 131 (2002).

For the "approval" to qualify for the extension, it must have been "in effect or existence" during the qualifying period. "The word 'or' is given a disjunctive meaning unless the context and the main purpose of all the words demand otherwise." *Commonwealth* v. *Halstrom*, 84 Mass. App. Ct. 372, 382 (2013), quoting *Commonwealth* v. *Davie*, 46 Mass. App. Ct. 25, 27 (1998). The Act does not define the phrase "in effect or existence." In the absence of an express statutory definition of the phrase, the court "use[s] 'ordinary principles of statutory construction' to determine the meaning of the phrase." *Eastern Point, LLC* v. *Zoning Bd. of Appeals*, 74 Mass. App. Ct. 481, 486 (2009), quoting *Framingham Clinic, Inc.* v. *Zoning Bd. of Appeals of Framingham*, 382 Mass. 283, 290 (1981). "We derive the words' usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions." *Curtatone* v. *Barstool Sports, Inc.*, 487 Mass. 655, 658 (2021). The Merriam-Webster Online Dictionary defines "effect" as "the quality or state of being operative," https://www.merriam-webster.com/dictionary/effect, and "existence"[9] as "actual or present occurrence." https://www.merriam-webster.com/dictionary/existence. Therefore, it is reasonable to interpret

[8] The Act also defines "permit" as "a permit, formal determination, order of conditions, license, certificate, authorization, registration or other approval or determination with respect to the use or development of land, buildings or structures required by an issuing authority." St. 2010, c. 240, §1.

[9] The additional definitions are "reality as opposed to appearance," "reality as presented in experience," "the totality of existent things," "a particular being," "sentient or living being," "the state or fact of being that is common to every mode of being," "being with respect to a limiting condition or under a particular aspect." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/existence.

the phrase "in effect or existence," to mean that the approval would need to be either operative or it must physically exist in some form to qualify.

MassDEP insists the CPA was not in effect or existence because the final decision as to the CPA was not issued until after the qualifying period. In support of this contention, MassDEP relies on a guidance document issued by the Massachusetts Executive Office of Housing and Economic Development ("EOHED"), that states, "[a] permit or approval that was pending [in an administrative] appeal during the qualifying period [of August 15, 2008 through August 15, 2012 was] not extended [by the Permit Extension Act] because it [was] not a final permit or approval and as such [it was] not 'in effect or existence.'" However, this interpretation overlooks the fact that nowhere in the statute does the Legislature state the approval must be a final decision. Importantly, MassDEP's own regulations do not conflate a "plan approval" with a "final decision." Rather, the regulations provide that a "plan approval" is "the written approval by the Department of a comprehensive plan application." 310 Code Mass. Regs. 7.00.[10] And a "final decision" is "the decision issued by the Commissioner, consistent with the requirements of 310 CMR 1.01(14)(b), from which any party may seek judicial review pursuant to M.G.L. c. 30A, § 14(1)." 310 Code Mass. Regs. §1.01(1)(c). Moreover, MassDEP's assertion that the conditional approval is not an "approval" is contradicted by the fact that MassDEP has considered a "conditional approval" an "approval" in the past. See Matter of Brockton Power Co., LLC, Department of Environmental Protection, Office of Appeals and Dispute Resolution, OADR Docket Nos. 2011-

[10] The regulation also provides that "approve or approval" is "the approval or approval with conditions of an application for a permit, plan approval, an emission control plan, a restricted emissions status, an operating permit, an emission reduction credit or other type of approval issued by the Department pursuant to 310 CMR 7.00." 310 Code Mass. Regs. §7.51(1).

25, 2011-26, at 1 (July 29, 2016) (MassDEP "approved the proposed Power Plant on July 11, 2011 when it issued … a Conditional Approval of the Major Comprehensive Plan Application").

Here, MassDEP issued a written Conditional Approval to Palmer for its CPA on June 30, 2011. Although the CPA was not "in effect" during the qualifying period because it was not operative until March 2017, it was "in existence" during the qualifying period. The Act provides that "an approval in effect or existence during the tolling period shall be extended for a period of [4] years, in addition to the lawful term of the approval."[11] St. 2010, c. 240, §173(a).

The presiding officer found, and the Court agrees, that the two-year construction start period began to run on March 7, 2017, the day after the citizens groups could have appealed the Hampden Superior Court's decision to uphold Palmer's CPA.[12] Without the benefit of the four-year extension provided for by the Act, the two-year construction deadline would have ended on March 7, 2019. However, with the four-year extension, Palmer had until March 7, 2023, to begin construction of the Facility. Consequently, MassDEP was premature in its determination to revoke Palmer's CPA on April 2, 2021.

B. *Revocation Order*

MassDEP revoked Palmer's CPA, in part, because Palmer had not started construction and because of the issuance of an updated Environmental Justice Policy in 2017 ("2017 EJ Policy").[13] Specifically, MassDEP asserts that, because of the amount of time that has lapsed since it issued Palmer's CPA, it was justified in revoking Palmer's CPA and require Palme to submit a new air

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[11] As originally enacted, the Act extended for two years any approvals in effect or existence during the tolling period. St. 2010, c. 240, §173(b)(1). In 2012, the length of the extension was doubled to four years. St. 2012, c. 238, §75.

[12] The presiding officer found that "MassDEP having agreed to a more than two and one-half year stay" to the Hampden Superior Court case, the construction period did not begin until the day after the Citizens Group could appeal that decision. A.R. at 3006-3007.

[13] In 2021, after the issuance of the Revocation Order, the Massachusetts Executive Officer of Energy and Environmental Affairs ("EEA") issued an updated EJ policy ("2021 EJ Policy").

permit application containing an updated air modeling study of the Facility. Palmer counters that MassDEP's decision to revoke its permit was largely due to a letter sent by Senators Markey and Warren urging MassDEP suspend Palmer's permit.

When reviewing a penalty imposed by an administrative agency, the court is not "free to substitute its own discretion as to the matter; nor can the reviewing court interfere with the imposition of a penalty by an administrative tribunal because in the court's own evaluation of the circumstances the penalty appears to be too harsh." *Massachusetts Elec. Co.* v. *Dep't of Pub. Utils.*, 469 Mass. 553, 576 (2014), quoting *Vaspourakan, Ltd.* v. *Alcoholic Beverages Control Comm'n*, 401 Mass. 347, 355 (1987). "In order to overturn [an agency's decision], the applicants must establish that it was arbitrary and capricious or unsupported by substantial evidence." *Rodgers* v. *Conservation Comm'n*, 67 Mass. App. Ct. 200, 204 (2006), quoting *Dubuque* v. *Conservation Comm'n of Barnstable*, 58 Mass. App. Ct. 824, 828-829 (2003). When an agency acts on reasons that "are related … to an ad hoc agenda, then that agency has acted arbitrarily because the basis for action is not uniform, and, it follows, is not predictable." *Fafard* v. *Conservation Commn. of Reading*, 41 Mass. App. Ct. 565, 568 (1996). "An agency should strive to act on bases that are uniform and predictable," and when it does not, it "courts scrutiny under the arbitrary and capricious standard." *Hercules Chem. Co.* v. *Dep't of Envtl. Protection*, 76 Mass. App. Ct. 639, 643 (2010).

Here, MassDEP's decision to revoke Palmer's CPA and require Palmer to apply for a new one was arbitrary and capricious. The decision to investigate Palmer's CPA was due to the letter the then commissioner received from Senators Markey and Warren rather than substantial evidence that the Facility would not comply with applicable standards. A.R. at ps. 3016, 3069 n.167, 2089 n. 213. In similar matters, where the commissioner has not received such political pressure, such

as in Matter of Brockton Power Co., LLC, Department of Environmental Protection, Docket Nos. 2011-25, 2011-26, at 2 (March 13, 2017), MassDEP has opted to remand the matter "to ensure compliance with the updated" 2017 EJ Policy. After remand, MassDEP issued a revise plan approval which was contested by citizen groups. Thereafter, in 2019, a recommended final decision was issued upholding the plan approval and finding compliance with the 2017 EJ Policy. See In the Matter of Brockton Power Co., LLC, Department of Environmental Protection, Docket Nos. 2011-25, 2011-26 (Feb. 28, 2019). For some reason, the former Commissioner waited until 2021 to issue a decision. By then, the 2021 EJ Policy was in effect. As a result, in 2021, the matter was remanded again to determine whether the revised plan approval complied with the 2021 EJ Policy and for the purpose of having a health impact assessment performed. See In the Matter of Brockton Power Co., LLC, Department of Environmental Protection, Docket Nos. 2011-25, 2011-26 (Nov. 12, 2021) (collectively, "Brockton Matters").

As for Palmer's CPA, MassDEP opted to revoke the CPA rather than remand to ensure the CPA complied with the updated EJ Policies. MassDEP decided this course of action only after it received a letter from Senators Edward J. Markey and Elizabeth Warren urging MassDEP to consider Palmer's CPA. Even though MassDEP has discretionary power to revoke Palmer's CPA, the decision nevertheless is still arbitrary and capricious because MassDEP acted on reasons that "are related …to an ad hoc agenda" making its decision to revoke "not uniform … [and] not predictable." *Fafard* v. *Conservation Comm'n*, 41 Mass. App. Ct. 565, 568 (1996). "An agency should strive to act on bases that are uniform and predictable." *Hercules Chem. Co.* v. *Dep't of Envtl. Protection*, 76 Mass. App. Ct. 639, 643 (2010).

MassDEP has not explained why it decided to revoke Palmer's CPA rather than remand the issue as it has many times in the Brockton Matters. Such a decision is arbitrary. See *Bask, Inc.*

v. *Municipal Council of Taunton*, 490 Mass. 312, 321 (2022), quoting *Vazza Props., Inc.* v. *City Council of Woburn*, 1 Mass. App. Ct. 308, 312, (1973) ("without additional credible explanation for the distinction made between the two applicants, indicates that the decision was made for 'reasons not related to the purposes of the zoning law'").

C. *Due Process*

After the close of the agency adjudicatory hearing, the presiding officer introduced evidence regarding an updated study that criticized the 2012 NAAQS. The presiding officer did this without providing Palmer an opportunity to review and challenge the evidence and then expressly relied on that evidence in its discretion to uphold the revocation of Palmer's CPA. The presiding officer's actions violated Palmer's right to a full and fair hearing as guaranteed by G. L. c. 30A, § 10. See G. L. c. 30A, § 11 (4) ("All evidence . . . in the possession of the agency of which it desires to avail itself as evidence in making a decision, shall be offered and made a part of the record in the proceeding, and no other factual information or evidence shall be considered"); 310 Code Mass. Regs. § 1.01(13)(h)(2) ("All evidence, including any records, investigative reports, documents, and stipulations, which is to be relied upon in a final decision must be offered and made a part of the record"); 310 Code Mass. Regs § 1.01(13)(n)(2) ("No evidence shall be admitted after completion of a hearing or after a case has been submitted on the record, unless otherwise ordered by the Presiding Officer or the Commissioner"). As such, the procedure employed by the presiding officer deprived Palmer of the opportunity to rebut the information contained in the updated air modeling study.

ORDER

For the foregoing reasons, Palmer's motion for judgment on the pleadings is **ALLOWED**. MassDEP's motion for judgment on the pleadings is **DENIED**. MassDEP's Revocation order of Palmer's CPA is **VACATED,** and this matter is **REMANDED** for further review consistent with this decision.

Christopher P. Belezos
Associate Justice of the Superior Court

Dated: January 28, 2025