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# 'Moot v. DEP': where we are today

By **Deborah A. Eliason**

On Feb. 12, the Supreme Judicial Court invalidated a regulatory exemption promulgated by the Department of Environmental Protection under G.L.c. 91, the waterways statute, relative to "landlocked tidelands." *Moot v. Department of Environmental Protection*, 448 Mass. 340 (2007).

This decision appears to have invalidated the exemption relied upon for the construction of many existing projects on landlocked tidelands and has created enormous uncertainty for new projects proposed to be constructed in landlocked tideland areas.

The case involved a challenge to a DEP decision holding that the construction of a multi-use project was exempt from the licensing requirements of Chapter 91 because it involved a landlocked tideland.

The roughly triangular project site consisted of a 48-acre abandoned rail yard and industrial land located in East Cambridge, bounded by the Monsignor O'Brien Highway, the Gilmore Bridge and the Massachusetts Bay Transportation Authority rail lines and maintenance facility. The site contained approximately 13 acres of filled commonwealth tide-lands originally filled under a Chapter 91 license issued in 1962 to the Boston and Maine Railroad. Under the original license, drainage culverts were constructed beneath the site and the Millers River, which is no longer visible on the site, currently flows through these culverts.

Under the public trust doctrine, the commonwealth holds tidelands in trust for the use of the public for fishing, fowling and navigation. Through Chapter 91, the Legislature expressly mandated that any non-water-dependent use of the tidelands serve a proper public purpose. The obligation to ensure that the public interest and public trust are protected lies with the DEP.