COMMONWEALTH OF MASSACHUSETTS

 EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS

#  DEPARTMENT OF ENVIRONMENTAL PROTECTION

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 April 17, 2015

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 Docket No. WET-2013-022

In the Matter of File No. 201-0745

95 Hayden LLC Lexington

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#  RECOMMENDED FINAL DECISION

The Petitioner, One Ledgemont LLC (“One Ledgemont”), filed this appeal challenging a Superseding Amended Order of Conditions that the Massachusetts Department of Environmental Protection’s Northeast Regional Office issued to 95 Hayden LLC (“95 Hayden”) under the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 and the Wetlands Regulations, 310 CMR 10.00. The Department affirmed the Lexington Conservation Commission’s prior Amended Order of Conditions which approved 95 Hayden’s proposed work at Ledgemont Corporate Center, an office park in Lexington. One Ledgemont had been an applicant for the original Order of Conditions, jointly with Two Ledgemont, 95 Hayden’s predecessor, for the construction of a third office building, Three Ledgemont, in Ledgemont Corporate Center. In this appeal, One Ledgemont claimed that 95 Hayden should have been required to file a new Notice of Intent rather than pursue an Amended Order of Conditions, that 95 Hayden should have been required to obtain the permission of One Ledgemont prior to any submittal for the proposed work, and that the proposed stormwater system did not comply with the applicable standard.[[1]](#footnote-1) I conclude that 95 Hayden’s Request for Amendment was properly accepted and granted. I find that the revisions to the stormwater management system comply with applicable requirements. I recommend to the Department’s Commissioner that an Amended Final Order of Conditions may be issued to 95 Hayden for the proposed project revisions.

ISSUES FOR ADJUDICATION

1. Whether the Department properly exercised its discretion under Wetlands Policy 85-4 to issue a Superseding Amended Order of Conditions for the proposed work, or should have required 95 Hayden to file a new Notice of Intent?
2. Whether 95 Hayden was required to obtain the permission of One Ledgemont for the submittal of a Request for an Amendment (or for a new Notice of Intent, should one be required) because One Ledgemont was a landowner and applicant for purposes of the 2008 Order of Conditions or because work subject to jurisdiction is proposed on One Ledgemont’s property?
3. Whether the proposed work approved under the Superseding Amended Order of Conditions meets the requirements of Stormwater Standard 3? See 310 CMR 10.05(6)(k)(3).

At the Pre-Hearing Conference, the parties agreed that the two issues related to the use of

an amendment and permission for the filing were appropriate for resolution through motion for summary decision, leaving the factual issue of compliance with stormwater management requirements as the single issue for adjudication at a hearing.

**BACKGROUND**

 Ledgemont Corporate Center is a campus-style office park in Lexington, divided into two parcels. Parcel A, 11 acres, is owned by One Ledgemont and Parcel B, 25 acres, is owned by 95 Hayden. A recorded agreement dated September 23, 1986 established easements rights in Parcels A and B. 95 Hayden is the successor-in-interest to Two Ledgemont LLC, after acquiring the property in July 2012. One Ledgemont and Two Ledgemont were co-applicants on a 2008 Notice of Intent and co-permittees on a 2008 Order of Conditions issued by the Lexington Conservation Commission related to Three Ledgemont Center. The proposed work included the construction of Three Ledgemont, with associated driveways, parking, landscaping and stormwater management. All wetlands resource areas and their buffer zones are located on Parcel B owned by 95 Hayden. In 2012, 95 Hayden filed with the Lexington Conservation Commission a request to amend the 2008 Order, its request was accepted for review, and the Amended Order was granted. One Ledgemont did not join in the request to amend. On the contrary, One Ledgemont opposed the Request for Amendment before the Commission and challenged the amendment subsequently granted by the Department in this proceeding.

**STANDARD OF REVIEW**

 One Ledgemont moved for summary decision, arguing that 95 Hayden should have been required to file a new Notice of Intent rather than pursue an Amended Order, and that 95 Hayden should have been required to obtain the permission of One Ledgemont prior to any submittal for the proposed work. The Department’s regulations allow any party to an administrative appeal to file a motion for summary decision. 310 CMR 1.01(11)(f). Summary decision is appropriate where the party seeking summary decision can “demonstrate that there is no genuine issue of material fact and that the party is entitled to a final decision as a matter of law.” 310 CMR 1.01(11)(f). This standard mirrors the standard set forth in Rule 56 of the Massachusetts Rules of Civil Procedure governing the resolution of civil suits in Massachusetts trial courts. Matter of Lowe’s Home Centers, Inc., OADR Docket No. WET-2009-013, Recommended Final Decision (June 19, 2009), adopted by Final Decision (June 30, 2009); Matter of Roland Couillard, OADR Docket No. WET-2008-035, Recommended Final Decision (July 11, 2008), adopted by Final Decision (August 8, 2008).[[2]](#footnote-2) If the moving party meets this burden, the opposing party “may not rest upon the mere allegations or denials of [its] pleading, but must respond, by affidavits or as otherwise provided in 310 CMR 1.01, setting forth specific facts showing that there is a genuine issue for hearing on the merits.” 310 CMR 1.01(11)(f); Lowe’s, supra; Matter of William and Helen Drohan, OADR Docket No. 1995-083, Final Decision (March 1, 1996); cf. Mass. R. Civ. P. 56(e);[[3]](#footnote-3) Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991); Cabot Corp. v. AVX Corp., 448 Mass. 629, 636-37 (2007). A ruling granting or denying summary decision must be made on “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any.” 310 CMR 1.01(11)(f).One Ledgemont filed a Motion for Partial Summary Decision, 95 Hayden and the Department filed Cross-Motions, and One Ledgemont filed an Opposition to the Cross-Motions. I find that there are no genuine issues of material fact and that the Department’s and 95 Hayden’s Cross-Motions may be granted.

Under the Wetlands Regulations, the burden of going forward and the burden of proof are placed upon the party contesting the Department’s position in an appeal. 310 CMR 10.03(2); 310 CMR 10.05(7)(j)3.b. The weight to be attached to any evidence in the record rests with the sound discretion of the Presiding Officer. 310 CMR 1.01(13)(h)1.

**ISSUE 1: USE OF AMENDED SUPERSEDING ORDER OF CONDITIONS**

Neither the Wetlands Protection Act nor the Wetlands Regulations provide for amended orders of conditions. Instead, amended orders are governed by a long-standing policy intended “to avoid unnecessary and unproductive duplication of regulatory effort” in circumstances where project revisions are relatively minor and will have less or unchanged impact on wetlands interests. Wetlands Program Policy 85-4: Amended Orders (Issued September 17, 1985, Revised March 1, 1995). A decision to allow an amendment, as opposed to requiring the filing of a new notice of intent, is at the discretion of the issuing authority (the local Conservation Commission or the Department) which issued the order of conditions. Id. After a request for an amendment is filed, the issuing authority makes a determination as to whether an amendment is appropriate based on factors identified in the Policy. Id. An amendment may be appealed, but the appeal is limited to the revisions allowed by the amendment. The denial of a request to amend may not be appealed. Id. If a request to amend is accepted, the same public notice and abutter notification are required as for a notice of intent, so that interested persons may participate in the decisionmaking. Id. The substantive factors for consideration identified in the Amended Orders Policy are straightforward: 1) whether the project’s purpose has changed, 2) whether the scope of the project has increased, 3) whether the project meets performance standards, and 4) whether the potential for adverse impacts on protected interests has increased. Id.

For this project, 95 Hayden requested an amendment of the Order originally issued by the Lexington Conservation Commission to One Ledgemont and Two Ledgemont, the Commission accepted the request, and the Commission issued an Amended Order of Conditions to 95 Hayden. One Ledgemont requested Department action claiming in part that a new notice of intent should have been required. 95 Hayden filed a legal opinion as to its status as the property owner. The Department affirmed the Commission by issuing a Superseding Amended Order of Conditions. The Department provided an affidavit of Gary Bogue, the wetlands staff who reviewed the project, describing his consideration of the factors identified in the Policy. See Department’s Cross-Motion, Bogue Aff. The Department’s cover letter described in considerable detail its rationale.

One Ledgemont claimed that the use of the amendment procedure by the Department was an abuse of discretion, because the project revisions were not “relatively minor” and did not have the “same or decreased impact” as required by the Department’s Policy. One Ledgemont characterized the revisions as “sweeping deviations” from the 2008 Order because the increased size of the building required the redesign of the stormwater management system, which it alleged is partially located in the buffer zone. One Ledgemont conceded that the Department does not have jurisdiction over the entirety of the project revisions because some are located outside the buffer zone, but argued that the Department should not ignore the magnitude of the proposed changes from the increased building footprint and related impacts. 95 Hayden argued that the project revisions under the amendment are minor, with some allowed under the 2008 Order although not identified in the 2008 Notice of Intent. 95 Hayden conceded that, while the increased building footprint is outside the buffer zone, the revisions will affect the stormwater management system due to the increased impervious surface. However, 95 Hayden argued that the revised design approved through the amendment will further reduce any increase in peak runoff, and that 95 Hayden, not One Ledgemont, has full responsibility for the operation and maintenance plan for the stormwater system, as well as erosion control and drainage at the site.

The Department shared the view of 95 Hayden that the project revisions were either outside jurisdiction or were allowed under the 2008 Order. The Department emphasized that wetlands jurisdiction, including stormwater discharges, is limited to Parcel B owned by 95 Hayden, which is downgradient from Parcel A owned by One Ledgemont, and claimed there would be no adverse impacts because the stormwater will be properly managed. The Department also argued that the Commission and the Department used what they viewed as unappealable discretion in allowing the request for an amendment. Mr. Bogue reviewed the Amended Order according to the Amended Orders Policy and concluded that the project purpose, the construction of an office building, had not changed. Department’s Cross-Motion, Bogue Aff. He stated that the increase in the building footprint was located away from the edge of the wetlands, and noted as particularly important that there was no new work in the buffer zone. Id. He stated that because the 2008 stormwater system had been approved, the 2012 plan relied on those findings, and any additional stormwater would be managed in the same way, he did not foresee any potential for increased impacts. Id. He finally concluded that the Amended Order should be recorded on both parcels, because the 2012 plans superseded the 2008 plans, but that maintenance of the system will fall only on 95 Hayden. Id.

 Distinguishing between the 2008 project and the 2012 proposed revisions is a threshold question in determining whether an amendment was acceptable. One Ledgemont provided a letter prepared by Brian D. Jones, P.E. which identified numerous revisions between the 2008 and 2012 Orders. One Ledgemont Motion, Ex. 2. The revisions were identified by reference to various plans, but did not distinguish between project features that are located within or outside geographic jurisdiction of the Wetlands Regulations. 95 Hayden filed an affidavit of Dominic Rinaldi which described the project revisions and impacts, as depicted on a plan. See Applicant’s Cross-Motion, Rinaldi Aff., Ex. D. This plan showed the design features governed by the 2008 Order, the 2008 and the 2012 Order, and the 2012 Amendment.[[4]](#footnote-4) Of the four revisions identified by One Ledgemont within the buffer zone and therefore subject to jurisdiction, three were included or derived from the 2008 Order: planting locations to control invasive species, a walking trail, and an overhead walkway. Rinaldi Aff., paras. 23-25. In addition, the proposed work related to these project components appeared to be minor and One Ledgemont did not argue otherwise. The fourth revision, to the limit of work, revised the limit so that it is farther from the resource area and therefore reduced alteration within the buffer zone.

Outside the buffer zone, the 2012 Amendment included revisions affecting impervious surfaces, including reconfiguration of parking, an increase in the building footprint of 10,150 sq. ft., and relocation and change in surface of an emergency access road. Rinaldi Aff., para. 15. The infiltration system at the north end of the building is larger and shifted slightly west to accommodate the increase in impervious surface. Id. This infiltration system is outside the buffer zone. The outlet of the infiltration system was also relocated outside the buffer zone in the 2012 amendment. Rinaldi Aff., para. 29. Thus, despite the 2012 project revisions that would allow an increase in the amount of impervious surface at the site and related revisions to the stormwater management system, both the increased impervious surface and the stormwater management system are outside the buffer zone. The only exception is the work to relocate the point of discharge outside the buffer zone and that work will decrease impacts.

One Ledgemont’s opposition includes an affidavit of Brian Jones in which he overlays easements, apparently indicating that additional parking spaces will be required on Parcel B that are not shown on 95 Hayden’s plans and the impacts were not considered for purposes of the requested Amendment. See One Ledgemont’s Opposition, Jones Aff. Most of the parking spaces shown on One Ledgemont’s overlays of the easement rights and the proposed construction were allowed in the 2008 Order and are not proposed in the Request for Amendment. Work allowed in the 2008 Order is not within the scope of this appeal. One Ledgemont is correct, and 95 Hayden and Department agree, that the addition of impervious surface outside the buffer zone may affect the stormwater management system. However, the revisions to the stormwater management system were evaluated as part of the 2012 Request for Amendment.

Under these circumstances, I find no abuse of discretion in the Department’s issuance of an Amended Superseding Order of Conditions. I note that the acceptance of a request to amend leaves to the discretion of a local Conservation Commission or the Department the management of its workload when project revisions occur. The procedures specified in the Policy are intended to ensure that interested persons have notice of project revisions, and clearly here One Ledgemont was notified as an abutter, participated in the Lexington Conservation Commission’s review, participated during the Department’s review, and has pursued this administrative appeal. Even if a new notice of intent had been required and the same work approved in a new order of conditions instead of through an amendment, an appeal by One Ledgemont would be resolved similarly to this proceeding. Thus, One Ledgemont was not prejudiced by this procedure. Most importantly, the requested revisions to the stormwater management system do not represent changes to its purpose or scope. Similarly, there is no evidence to support a conclusion that the requested revisions will result in increased impacts to wetlands or that the interests of the Act will be less protected, as compared to the original stormwater plan. Because an amendment was appropriate, the subject matter of this appeal extends only to the proposed work that is both within jurisdiction *and* approved through the 2012 Request for Amendment. The portions of the 2008 Order of Conditions not revised in 2012 are not subject to this appeal.

**WHETHER FILING FOR THREE LEDGEMONT REQUIRES ONE LEDGEMONT’S CONSENT**

One Ledgemont argued that 95 Hayden was required to obtain the permission of One Ledgemont for the submittal of a Request for Amendment. The 2008 Notice of Intent had been filed jointly by One Ledgemont LLC, owner of Parcel A, and Two Ledgemont LLC, then owner of Parcel B, identified on the document as “Applicant and Owner,” on September 18, 2008 and the Order of Conditions was issued to One Ledgemont LLC and Two Ledgemont LLC. The 2008 Order approved the construction of Three Ledgemont Center on Parcel B. 95 Hayden acquired Parcel B, the Two Ledgemont property which includes the site of Three Ledgemont, in 2012, prior to requesting the amendment. Although work may occur on both parcels to complete the Three Ledgemont project, all wetlands, specifically bordering vegetated wetlands, and buffer zone areas subject to the Department’s jurisdiction are located on Parcel B; none is located on Parcel A.

The resolution of this issue turns primarily on the Department’s jurisdiction. The burden of filing for permission to alter areas subject to protection, i.e., resource areas and the buffer zone, falls on the person proposing to conduct the work. 310 CMR 10.05(4)(a). If the person proposing the work and filing the application, i.e., the applicant, is not the landowner, the “applicant shall obtain written permission from the landowner(s) prior to filing a Notice of Intent for proposed work.” 310 CMR 10.05(4). This provision ensures that if an applicant is proposing work subject to jurisdiction that requires the filing of a notice of intent, the applicant has obtained permission of the landowner. The regulations do not require an applicant to obtain permission of others for work related to a project on land that is not subject to jurisdiction. Work on land outside resource areas and the buffer zone may not be regulated unless and until the work actually results in the alteration of an area subject to jurisdiction. 310 CMR 10.02 (Commentary following para. 5). Thus, work on land outside resource areas and the buffer zone is not subject to pre-construction review and neither the applicant nor the landowner need file for permission to conduct such work.[[5]](#footnote-5)

One Ledgemont does not dispute the geographic jurisdiction of the Department as to the location of resource areas and the buffer zone exclusively on Parcel B owned by 95 Hayden. Instead, One Ledgemont emphasized that work is required on both parcels for construction of Three Ledgemont, and thus permission of One Ledgemont should be required on any filing by 95 Hayden. One Ledgemont alleged that the 2008 filing and Order demonstrate that the project was viewed as requiring the permission of both landowners, so the Amendment must likewise be jointly requested and issued. One Ledgemont noted that the 2012 Amendment must be recorded on both deeds, leaving One Ledgemont potentially liable for the actions of 95 Hayden. Further, One Ledgemont argued that the project cannot go forward as proposed based on a Land Court decision that 95 Hayden has no right to locate parking on Parcel A. One Ledgemont filed an affidavit with exhibits showing overlays of the easements and the proposed work. The overlays identify proposed work that is, in One Ledgemont’s view, outside the scope of the easements.

95 Hayden, however, provided to the Department a legal opinion that it had the authority to complete proposed work. 95 Hayden claimed that One Ledgemont’s agreement to the project is shown by the 2008 joint filing, and the 2012 amendment is limited to its own work on its own land. 95 Hayden further asserted that it has all easements rights required as to drainage on Parcel A to implement its stormwater management system. The Department asserted that it relied on an opinion from 95 Hayden’s attorney as to the rights of 95 Hayden to perform any necessary work on Parcel A related to the stormwater management system on Parcel B, and had met its obligation to ensure that 95 Hayden had a colorable claim of title, the standard set in prior Department decisions and upheld in court. Second, the proposed work shown outside the easements on One Ledgemont’s overlays appears to be outside the Department’s jurisdiction. Whether an applicant has the authority to conduct work necessary to complete a project where the work is outside the Department’s jurisdiction need not be of concern to the Department. An applicant must always obtain other necessary permits.

 Although property disputes may be present or arise during a permitting process, the Department has a long-standing practice of leaving property disputes for the courts to resolve. Tindley v. DEQE, 10 Mass. App. Ct. 623 (1980). For purposes of accepting a notice of intent, a local Conservation Commission or the Department need only look for a colorable claim of title. Id. Typically, neither the Commission nor the Department examine deeds to form an opinion as to the ownership of the property and the name(s) that should have appeared on the notice of intent. 95 Hayden unquestionably owns Parcel B, where the resource areas and buffer zone subject to jurisdiction are located. 95 Hayden therefore had a colorable claim of title sufficient to allow the permitting process to proceed. Further, a Final Order of Conditions does not convey any property rights, and does not allow 95 Hayden to conduct any work to the extent its lacks the requisite property rights. See Matter of John Schindler, Docket No. WET-2011-024 and 026, Recommended Final Decision (December 5, 2011), adopted by Final Decision (December 27, 2011). A Final Order, therefore, would not affect any rights of the parties as to easements, but instead is limited to allowing 95 Hayden to conduct work on its property to the extent it is within the Department’s jurisdiction. The Department properly accepted the request and issued the Superseding Amended Order of Conditions to 95 Hayden without the consent of One Ledgemont.

**ISSUE 3: WHETHER THE PROJECT COMPLIES WITH STORMWATER STANDARD 3**

 The factual issue for hearing addressed whether the Applicant has complied with Standard 3 of the Massachusetts Stormwater Management Standards:

Loss of annual recharge to groundwater shall be eliminated or minimized through the use of infiltration measures including environmentally sensitive site design, low impact development techniques, stormwater best management practices, and good operation and maintenance. At a minimum, the annual recharge from the post-development site shall approximate the annual recharge from pre-development conditions based on soil type. This Standard is met when the stormwater management system is designed to infiltrate the required recharge volume as determined in accordance with the Massachusetts Stormwater Handbook.

310 CMR 10.05(6)(k)(3). The intent of this standard is to ensure that the volume of precipitation infiltrated into the ground under post-development conditions is equivalent or greater than the infiltration volume under pre-development conditions. Handbook, Vol. I, Chapter 1, p. 5. Recharge may be maintained at a site through infiltration measures and site design. The Standard relies on the classification of soils into four hydrologic groups, A thru D. Group A soils typically have the lowest runoff and the highest infiltration rates, while Group D soils have the highest runoff and the lowest infiltration rates. Handbook, Vol. I, Chapter 1, p. 6. Because infiltration of the entire recharge volume may not be possible for sites comprised solely of C and D soils and bedrock, applicants are required to infiltrate the required recharge volume only to the maximum extent practicable for those conditions. Handbook, Vol. I, Chapter 1, p. 7.

For purposes of Standard 3, “to the maximum extent practicable” means that:

* + 1. The applicant has made all reasonable efforts to meet the Standard;
		2. The applicant has made a complete evaluation of all possible applicable infiltration measures, including environmentally sensitive site design that minimizes land disturbance and impervious surfaces, low impact development techniques, and structural stormwater best management practices; and
		3. If the post-development recharge does not at least approximate the annual recharge from pre-development conditions, the applicant has demonstrated that s/he is implementing the highest practicable method for infiltrating stormwater.

310 CMR 10.05(6)(o). Infiltration BMPs must be based on adequate subsurface information about the site, to assess whether the soils are capable of absorbing the recharge volume. Infiltration structures must be able to drain fully within 72 hours and provide at least a two-foot separation between the bottom of the infiltration structure and the seasonal high groundwater table. Runoff from at least 65% of the impervious surfaces must be directed to the infiltration basin for recharge. Handbook, Vol. 3, Chapter1, p. 27.

**Testimony of the Parties**

One Ledgemont filed the testimony of Brian D. Jones, a professional engineer with relevant experience and knowledge of the site. He is qualified as an expert witness. He testified that 95 Hayden had not demonstrated that the proposed stormwater management system meets Standard 3 to the maximum extent practicable. Jones PFDT, para. 4. He identified alternatives that 95 Hayden had not considered. First, he acknowledged that pumping stormwater is costly, but stated that pumping is “routinely used when there are site constraints” similar to this site. Jones PFDT, para. 5. Second, he testified that the design could have incorporated permeable pavement to reduce the amount of impervious surface. Id. Third, he stated that the project could have been reduced in scale to comply with Standard 3. Id. Mr. Jones noted that the location of 15 or more surface parking spaces had not been determined, so it was not possible to assess the effect of any additional impervious surface on compliance with Standard 3. Jones PFDT, para. 6.

95 Hayden filed direct testimony of Dominic Rinaldi, a professional engineer with relevant experience and knowledge of the site. He prepared the plans and reports related to the 2008 Notice of Intent and the 2012 Request for Amendment. He is qualified as an expert witness. He testified that the 2008 and 2012 submissions relied upon the same soils analysis and test pits, the decision not to pump stormwater to the infiltration basin at a higher elevation, and the decision not to use pervious pavement. Rinaldi PFDT, paras. 9-10. The 2012 submission proposed an increase of 2,090 cubic feet of storage capacity to the infiltration field in the approximate location as compared to the 2008 filing. Rinaldi PFDT, para. 11. The design in both submissions was intended to meet Standard 3 to the maximum extent practicable due to the presence of Type C and D soils, as well as bedrock, at the site. Rinaldi PFDT, paras. 8-9. Mr. Rinaldi testified that he followed the requirements of the Stormwater Handbook to determine the required recharge volume, the 72 hour drawdown requirement, and separation from the seasonal high groundwater table. Rinaldi PFDT, paras. 21, 24, 26, 45, and 46. Two sites were considered for infiltration, under the emergency access road and under the existing parking lot. Rinaldi, para. 41. The site under the emergency access road to the northwest of the proposed building was selected for infiltration because concerns about the stability of an existing retaining wall by the parking lot limited its use to detention. Rinaldi PFDT, paras. 42-43.

Mr. Rinaldi testified that in his opinion the system complied to the maximum extent practicable with Standard 3. Rinaldi PFDT, para. 47. The capacity of the infiltration basin exceeds the Department’s requirements, capturing as much runoff as possible through gravity. He testified that pumping of stormwater uphill to capture 100% of the impervious area was possible but not practicable due to the massive volume, great expense, logistics because it would require the removal of ledge, and the likelihood of mechanical problems with a seldom used pump. Rinaldi PFDT, para. 49. He stated that he had never designed a pumped system for stormwater, nor had he seen such a system at his consulting firm or elsewhere. Rinaldi PFDT, para. 50. He testified that porous pavement would provide no benefit at the site due to the Group D soils and ledge, where no infiltration would occur even if porous pavement were installed. Rinaldi PFDT, paras. 51-53.

The Department offered the testimony of Gary Bogue, a wetlands staff person who routinely prepares wetlands permits. He is qualified as an expert witness. He reviewed and agreed with the testimony of Mr. Rinaldi that the project met the requirements of Standard 3 to the maximum extent practicable. Bogue PFDT, para. 16. He accepted the response of Mr. Rinaldi to the alternatives suggested by Mr. Jones of pumping, permeable pavement, or reducing the size of the project. Bogue PFDT, paras 15-16. He testified that during his tenure with the Department’s wetlands program, he had never seen a proposal to pump stormwater. Bogue PFDT, para. 16.

In response to Mr. Rinaldi’s testimony, Mr. Jones pointed to test pit #14 (“TP-14” on the Soils and Test Pit Map dated January 28, 2014) as a potential alternative location for an infiltration basin that would rely on gravity, could accommodate 65% of the impervious surfaces, had a sufficient depth to groundwater, and a more permeable “Ablation” soil type as compared to compact till at the selected site. Jones Reb., para. 2; See Rinaldi PFDT, Ex. 3. He further testified that permeable pavement was an option, because the infiltration basin is proposed for the emergency access road, so that the road could also be suitable for infiltration from porous pavement. Jones Reb., para. 3. Thus, Mr. Jones concluded that the project did not meet the maximum extent practicable standard because the applicant had not made all efforts to meet the Standard or evaluated all possible infiltration measures. Jones Reb., para. 4.

**Discussion**

 A threshold question is whether, in the context of an amendment, the entire stormwater management system is subject to review. 95 Hayden filed a Stormwater Report in 2012 to accompany the Request for Amendment. The 2012 Stormwater Report was comprehensive, and did not simply amend the 2008 Stormwater Report filed with the 2008 Notice of Intent. The amount of impervious surface had increased from 2008 to 2012, however, which would require revisions to the calculations. In addition, the 2012 Report supplemented the Request for Amendment of the 2008 Order of Conditions, which would require a full analysis of the changes to the stormwater management system from 2008 to 2012 to allow the Lexington Conservation Commission to decide whether an amendment was appropriate. A comparison between the two reports demonstrates that they are substantially similar.

The 2012 plans show a somewhat larger basin that is slightly further from the bordering vegetated wetland as compared to the 2008 plans. The section on Stormwater Standard 3 related to recharge in the text is identical with the exception of the sentence on the volume of infiltration exceeding the required recharge volume, i.e., the replacement of the 2008 figures (2,900 cubic feet provided versus 555 cubic feet required) with the 2012 figures (5,576 cubic feet provided versus 694 cubic feet required). 2008 Stormwater Report, 2012 Stormwater Report at HB0037548. Both reports clearly state that “[d]ue to the elevation issues and the expense of pumping stormwater, it is not practical to direct a minimum of 65% of the impervious surfaces to this location as required by Standard 3.” Id. Thus, there is no dispute that the project provided the required recharge volume but did not direct 65% of the impervious surfaces to the infiltration basin as proposed in both 2008 and 2012.

 Indeed, the lack of any significant change is one reason the revisions to the project qualified for an amendment. The review by the Department of the Request for Amendment was limited to the proposed revisions, and did not extend to the entirety of the project proposed in 2008. Similarly, the issues in an appeal of an amended order are limited to the changes, and do not extend to the entire project. The Order of Conditions issued by the Lexington Conservation Commission in 2008 approved the stormwater management system, which would necessarily include a finding that it complies with Stormwater Water Management Standard 3 to the maximum extent practicable. The Department had the opportunity to intervene if it did not concur that the project met the stormwater requirements and did not intervene. See 310 CMR 10.05(7)(a). The Department stated in the cover letter to the Amended Superseding Order of Conditions that the stormwater management system is unchanged from 2008 to 2012. 95 Hayden provided a revised stormwater management report with its Request for Amendment to document the revisions to support its request. The Lexington Conservation Commission and the Department respectively reviewed the submittals and each concluded that an amendment was appropriate.

Either the Lexington Conservation Commission or the Department could have found, based on a review of the 2012 Stormwater Report, that 95 Hayden should have considered other alternatives and denied the Request for Amendment, precluding this appeal. The Department’s witness testified that it was appropriate to review the entire revised Stormwater Management Report in the context of an amendment. However, the project had already been approved and 95 Hayden had a permit to construct the stormwater system with an infiltration basin that captured less than 65% of the impervious surface and the detention basin at the southwest corner of the building. Because the project had been approved and the approval continues to be valid, the question as to stormwater management is whether the revisions proposed in 2012 constitute changes that would nullify the 2008 approval and support a finding that the system does not now comply with Standard 3.

 One Ledgemont, however, did not provide any support for a conclusion that the alleged failure to comply with Standard 3 was due to the revisions in the project. The testimony offered was intended to support a theory that the system did not meet the standard to the maximum extent practicable, specifically that the project proponent failed to evaluate pervious pavement, an alternate location for infiltration, or a reduction in scale. These alternatives were available in 2008. Importantly, in 2008, One Ledgemont was also an applicant for the Notice of Intent of which the Stormwater Report was a part. Applicants are required to sign a notice of intent, certifying under penalty of perjury that the information submitted is true and complete to the best of their knowledge. The submission of the 2008 Notice of Intent constitutes an affirmation by One Ledgemont that the project met Standard 3, together with other applicable regulatory requirements, a position that cannot be reconciled One Ledgemont’s current position as the Petitioner.

At the hearing, One Ledgemont’s counsel drew the attention of Mr. Rinaldi to a project at Winchester Hospital noted on Mr. Jones’ resume that apparently involved the pumping of stormwater. But Mr. Jones as the expert witness did not provide any testimony about the stormwater pumping project that would support a conclusion that pumping was a practicable alternative for this site, nor did he provide any testimony about the project at all. For purposes of resolving whether the pumping of stormwater should have been considered, I return to the language of maximum extent practicable: “reasonable efforts” to meet the Standard and “a complete evaluation of all possible applicable infiltration measures, including environmentally sensitive site design that minimizes land disturbance and impervious surfaces, low impact development techniques, and structural stormwater best management practices.” Handbook, Vol. I, Chapter 1, p. 7. Notably, pumping stormwater is not mentioned in the Department’s Stormwater Handbook, a three volume compendium with an entire volume dedicated to best management practices. If the Department expected applicants to evaluate the pumping of stormwater under all or certain circumstances, it appears likely that it would have been included in the Handbook. There is no evidence that the project at the Winchester Hospital was reviewed by the Department, nor is there any evidence that the Department has ever required the pumping of stormwater. Even if pumping of stormwater were to be considered the highest practicable method for infiltration, which seems unlikely given that it is not covered in the Handbook, One Ledgemont has offered no testimony as to the extent to which the recharge does not approximate pre-development conditions. Although the parties agree that the project design directs less than 65% of the impervious surfaces to the infiltration basin, One Ledgemont did not demonstrate how much below the 65% figure the system as proposed actually is, taking into account the Class D soils and the large size of the infiltration basin. Thus, the evidence does not support a conclusion that pumping should be required for this project.

A second alternative promoted by One Ledgemont is the use of porous pavement, also called pervious or permeable pavement. Although the testimony did not address why porous pavement should not be used throughout the site, the Stormwater Management Standards and Handbook contain applicable requirements. The 2008 and 2012 Stormwater Reports state that the project includes a parking area with more than 1,000 total vehicle trips per day, and therefore is treated as a “land use with higher potential pollutant loads.” 2012 Report, HB0037548. Higher pollutant loads are addressed in Standard 5, which was not an issue for adjudication, but are also a limiting factor for the recharge standard as to the suitability of some structural best management practices described in the Handbook. See Handbook Vol. 1, Chapter 1, p.2. Porous pavement is specifically identified as unsuitable for projects with higher pollutant loads because the stormwater cannot be pretreated prior to infiltration. Handbook Vol. 2, Chapter 2, p. 118 and 120. 95 Hayden properly did not propose porous pavement throughout the project.

95 Hayden provided testimony that pervious pavement was considered and eliminated for the emergency access road because it was opposed by the Lexington Fire Department. One Ledgemont countered that there was no record of the Fire Department’s objection. Mr. Rinaldi also testified that the Group D soils and ledge at the site would defeat the purpose of porous pavement, which is to allow water to pass through and infiltrate into the soil. While the area near the infiltration basin was potentially suitable, other areas have Group D soils and are sloping. Much of the emergency access road is within Rock-Outcrop-Hollis Complex, HSG D. See Soils and Test Pit Map (January 28, 2014), Rinaldi PFDT, Ex. 3. According to the Handbook section on porous pavement, soils must have a permeability of at least 0.17 inches per hour, i.e., not D soils, and slopes cannot exceed 5%. Handbook Vol. 2, Chapter 2, p. 119-120. In addition, winter sanding is not allowed. Handbook Vol. 2, Chapter 2, p. 119. Finally, porous pavement should not be subject to heavy axle loads, which would presumably include fire trucks. Handbook Vol. 2, Chapter 2, p. 120. Given these factors, the use of porous pavement was sufficiently considered and properly eliminated as a means of achieving further compliance with Standard 3.

Whether 95 Hayden should have further evaluated areas of the property, particularly test pit #14, arose in the Petitioner’s rebuttal testimony in response to an exhibit to Mr. Rinaldi’s testimony that showed soils information, including the location of test pits. Mr. Rinaldi testified that this area was not considered because it was wooded and the placement of an infiltration basin would require that trees be removed and the area would have to be maintained without trees. It is obvious from the plans that 95 Hayden chose locations for the infiltration and detention basin that were already developed: under the access road and under a parking area. It is also obvious from the stormwater checklist filed in 2008 and 2012 for the project that the Department requests first the consideration of “LID” or “low impact development” measures. On the list, and checked off by 95 Hayden, is “Minimizing disturbance to existing trees and shrubs.” 2012 Report, HB0037738. Similarly, maximum extent practicable for Standard 3 requires “evaluation of all possible applicable infiltration measures, including environmentally sensitive site design that minimizes land disturbance and impervious surfaces.” Minimizing disturbance of land and removal of trees is consistent with Standard 3, and justifies the exclusion of test pit #14 from consideration as an alternative location for the infiltration basin.

**CONCLUSION**

 I conclude that the use of an amendment to allow the proposed revisions to the project was not an abuse of discretion by the Department. I further conclude that the Department acted properly in reviewing the Request for Amendment filed by 95 Hayden for work potentially affecting wetlands exclusively on its property without the signature of the abutter with which it had jointly filed the original Notice of Intent. After consideration of the evidence, I find that 95 Hayden’s project complies with Stormwater Standard 3. I recommend that the Department’s Commissioner issue a Final Decision which sustains the Department’s Superseding Amended Order of Conditions for this project.

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 Pamela D. Harvey

 Presiding Officer

## NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be

appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner’s Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner’s office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise

1. One Ledgemont and 95 Hayden were engaged in litigation related to a zoning dispute and One Ledgemont also appealed to Superior Court the Lexington Conservation Commission’s decision under the Lexington wetlands bylaw. [↑](#footnote-ref-1)
2. Mass. R. Civ. P. 56(c) provides in relevant part that:

[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for admission[,] . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

 [↑](#footnote-ref-2)
3. Mass. R. Civ. P. 56(e) provides in relevant part that:

[w]hen a motion for summary judgment is made and supported as provided in th[e] rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in th[e] rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. [↑](#footnote-ref-3)
4. Although not challenged by the One Ledgemont, 95 Hayden offered an explanation of what appears to be the most significant revision, to the southern detention basin. Rinaldi Aff., para. 27. This revision stemmed from removal of a downstream concrete swale required by the 2008 Order and did not reflect a change in impact. Id.

 [↑](#footnote-ref-4)
5. The Wetlands Regulations governing orders of conditions similarly state that conditions may be imposed “only upon work or the portion thereof that is to be undertaken within an Area Subject to Protection Under M.G.L. c. 131, s. 40 or within the Buffer Zone.” 310 CMR 10.05(6)(b). Conditions may be imposed on areas outside jurisdiction only when the work has in fact altered a resource area. Id. The regulations specifically allow conditions on point source discharges where the point of discharge is within a resource area or the buffer zone, e.g., stormwater discharges. Id. An issuing authority may therefore review a stormwater management system to ensure that specific stormwater management standards are met. See 310 CMR 10.05(6)(k). [↑](#footnote-ref-5)