COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS

DEPARTMENT OF ENVIRONMENTAL PROTECTION

100 CAMBRIDGE STREET, BOSTON, MA 02114 617-292-5500

[THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

June 25, 2024

In the Matter of AD Makepeace Company Federal Road	OADR WET 2022-030,31 DEP File No. SDA Plymouth, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

This appeal was initiated by Save The Pine Barrens and a Ten-Residents Group from the Town of Plymouth (collectively the "Petitioners") challenging the Denial of a Superseding Determination of Applicability ("SDA") issued by the Massachusetts Department of Environmental Protection's Southeast Regional Office ("MassDEP"). The Petitioner, Save the Pine Barrens, sought the SDA to challenge the negative Determination of Applicability issued by the Plymouth Conservation Commission ("Commission") on September 1, 2022, to Save the Pine Barrens regarding the work described in a 2012 Expanded Environmental Notification Form ("EENF")

filed by AD Makepeace Company ("ADM") on its property located off Federal Road in Plymouth, Massachusetts (the "Property"). ADM has updated its plans over the past 10 years to improve efficiencies in water consumption, labor and costs to increase yields, including relocation of a drainage canal, developing smaller bogs and removing a bog from production. All these changes are proposed within the original footprint of the bog project.

The Petitioners contend that in reviewing their SDA request, MassDEP failed to make its determination based on the 2012 Massachusetts Environmental Policy Act ("MEPA") Plan, failed to determine wetland delineations and incorrectly determined that the proposed work is Normal Improvement of Land In Agricultural Use and therefore exempt from wetlands permitting. ADM and MassDEP contend that MassDEP appropriately based its determination on the 2013 Request for Determination of Applicability ("RDA") Plans, provided to MassDEP by ADM during its SDA review, which correctly show wetland delineations and that the proposed work is Normal Improvement of Land In Agricultural Use and therefore exempt from wetlands permitting.

As discussed in detail below, I conducted an evidentiary adjudicatory hearing ("Hearing") to adjudicate the appeal. Based on a preponderance of the evidence submitted by the Parties at the Hearing and the governing Wetlands statutory and regulatory requirements, I recommend that the Commissioner issue a Final Decision affirming the SDA with respect to Tailwater Pond 1 and Proposed Tailwater Pond 3 and excluding Proposed Tailwater Pond 2, which is no longer Land in Agricultural use and is subject to wetlands permitting review under the Massachusetts Wetland Protection Act, G.L. c. 131, § 40 ("MWPA") and Wetlands Regulations, 310 CMR 10.00.

EVIDENCE

I. Witnesses[1]

The evidence in the administrative record that was presented at the Hearing consists of pre-filed, sworn written testimony and exhibits submitted by witnesses on behalf of the Parties. The witnesses below were available for cross-examination at the Hearing.[2]

On behalf of the Petitioners:

1. Brandon Faneuf: Mr. Faneuf is the president of Ecosystem Solutions, Inc., an environmental consulting firm. He received a Bachelor's degree in wildlife biology and a Master's degree in wetlands conservation from the University of Massachusetts, Amherst. He is a certified wetland scientist, soil scientist, and wildlife biologist, and has worked in these fields on a full-time basis for more than 25 years. He has performed hundreds of wetlands studies and over 2,000 wetland delineations in New England. Mr. Faneuf is qualified as an expert witness.
2. Patrick C. Garner: Mr. Garner is the principal of Patrick C. Garner Co., Inc., an environmental consulting firm. He received a Bachelor's degree from Georgia State University. He is a wetland scientist, professional land surveyor, river expert, and hydrologist with over 30 years of experience. He is a peer reviewer for numerous conservation commissions in Massachusetts and the author of 20 continuing education courses in the areas of

[1] Throughout this Recommended Final Decision, the witnesses' Pre-Filed Direct Testimony will be referred to as "[Witness] PFT, ¶ X" and Pre-Filed Rebuttal Testimony will be referred to as "[Witness] PFR, ¶ X." Exhibits to testimony are referred to as "[Witness] Ex. X".

[2] The Hearing was conducted in person in the Department's office at 100 Cambridge Street in Boston, Massachusetts. The Petitioner provided a stenographer, Katherine A. Tevnan, for the Hearing who provided a certified transcript on January 12, 2024. Throughout this Recommended Final Decision, the witnesses' Cross-Examination and Redirect Testimony will be referred to as "[Witness], page: lines."

wetland science, hydrology, and land surveying. He has also been the president of the Association of Massachusetts Wetland Scientists and the Massachusetts Association of Conservation Commissions. Mr. Garner is qualified as an expert witness.

On behalf of the ADM:

1. William Madden: Mr. Madden is the Principal Civil Engineer and owner of GAF Engineering, Inc. He received a Bachelor of Science degree in civil engineering from the University of Massachusetts, Dartmouth. He is a registered professional engineer with over 43 years of experience as a civil engineer, including 35 years of experience designing cranberry bogs and projects associated with cranberry cultivation. He has overseen the design of 50 large-scale cranberry bog construction or renovation projects and many other projects involving smaller cranberry bog sites. Mr. Madden is qualified as an expert witness.
2. Stacy Minehane: Ms. Minehane is a principal of Beals and Thomas, Inc., an environmental consulting firm. She received a Bachelor of Arts in biology and environmental studies from Bowdoin College. She is certified as a professional wetland scientist and has worked in the fields of land use permitting, environmental planning, and wetland science for 20 years. She is responsible for project direction, project management, land use permitting, environmental planning, and wetland science services for a variety of projects. She is currently the president of the Massachusetts Association of Wetland Scientists. Ms. Minehane is qualified as an expert witness.

On behalf of MassDEP:

1. Nathan Corcoran: Mr. Corcoran is an environmental analyst with the Department. He

received a Bachelor of Science in geology from University of Connecticut and a Master of Science in coastal geology from University of New Hampshire. He has worked for the Department since 2019. His responsibilities include administering and enforcing the Wetlands Protection Act and its implementing regulations by reviewing Notices of Intent ("NOI"), site plans, and wetland resource area delineations; conducting on-site inspections; and writing SOCs. During his tenure with the Department, he has conducted over 80 on-site inspections, including 7 for Superseding Determinations of Applicability involving work on cranberry farms. Mr. Corcoran is qualified as an expert witness.

Background

The Property

The proposed Project area is 140 acres on land located off Federal Road in Carver, Massachusetts owned by ADM. Madden PFT, ¶ 16; Final MEPA Record of Decision, February 13, 2013, page 3; SDA Request letter, page 2. ADM is a cranberry grower. Madden PFT, ¶ 5.

The Proposed Work

ADM planned to construct 140 acres of "new style" cranberry bogs by replacing existing flow-through style bogs with more efficient rectangular bogs planted with high producing cultivars. Madden PFT, ¶ 16.[3] The plan was initially to construct 40-acre bogs with five cranberry bog sections in each block. Madden PFT, ¶ 16. The plan was to be implemented in multiple phases and included unimproved bog roads, landing areas, drainage/flowage canals, a by-pass canal, tailwater recovery ponds, and pump stations. Madden PFT, ¶ 16.

[3] Mr. Madden's testimony refers to 136 acres. The RDA request and the EENF included therein as an exhibit refer to the area as 140 acres. RDA request, page 2; RDA Ex. 7, EENF, page 2-3.

MEPA Process

In 2012, ADM filed an EENF with the MEPA office related to work proposed in Plymouth, Carver, and Wareham, Massachusetts. The EENF addressed the development of 6,107 acres proposed as a phased development over a 25-year period and included the Property: "Phase C-2 Proposed Cranberry Bogs/Infrastructure ADM Tihonet Mixed Use Development" ("Phase C-2") which "consists of the construction of a 140-acre bog to be built out as older run-of-river bogs are abandoned" and included "construction of a bypass canal around the Frogfoot Bogs and construction of a soil blending facility." Final MEPA Record of Decision, February 13, 2013, page 2.

The EENF identified the work to be conducted in the 140-acre bog as being work in wetland resource areas subject to the exemption for Normal Improvement of Land In Agricultural Use as defined in 310 CMR 10.04: Agriculture(c). This work included "three tailwater ponds which are planned to be converted from bogs as the normal improvement of land in agricultural use: 1) a portion of the westerly existing Wankinco bog system; 2) the down-gradient thirteen-acre Frogfoot Bog; and 3) the down-gradient five-acre Frogfoot Bog." RDA Ex. 7, EENF, page 2-10. The EENF identified other components of the cranberry bog system that would occur within resource areas that ADM did not consider Normal Improvement of Land in Agricultural Use and ADM determined would require submittal of a NOI. RDA, Ex. 7, EENF, page 2-10.

2012 MEPA Plan

The EENF submitted by ADM included exhibits prepared by Beals & Thomas, Inc. ("B+T") including a plan dated October 2012. RDA, Ex. 4-3 ("2012 MEPA Plan"). ADM's expert witness, Ms. Minihane, testified that she oversaw and prepared the EENF and its exhibits

which show the general location of wetland resource areas. Minihane PFT, ¶ 8. Ms. Minihane testified that the 2012 MEPA Plan was not intended or purposed to depict a comprehensive, formal field delineation of wetland resource areas, such as would typically be submitted with an RDA requesting confirmation of the extent of resource areas. Madden PFT, ¶ 21; Minihane PFT, ¶¶ 14-15. She testified that the 2012 MEPA Plan was prepared at an appropriate level, accurate with regard to existing conditions and proposed conditions for MEPA purposes. Minihane, page 30:4-15. Some wetland resource areas on the EENF exhibits were field delineated and others were based on available desktop information, such as MassGIS. Minihane PFT, ¶ 15. On behalf of MassDEP, Mr. Corcoran testified that the 2012 MEPA Plan does not contain the field delineations or stamp from a Professional Engineer or Professional Land Surveyor necessary for permitting review. Corcoran PFT, ¶ 10.6.i.3.

2013 RDA Plan

In 2013, ADM filed a Request for Determination of Applicability ("2013 RDA") with the Commission for the Phase C-2 work which included the conversion of two active cranberry bogs to tailwater recovery ponds and the construction of a bypass canal as improvement of Land in Agricultural Use. Madden PFT, ¶¶ 17-18. The 2013 RDA request included Proposed Cranberry Bog Development Plan, G.A.F Engineering, William F. Madden, P.E., October 21, 2013 ("2013 RDA Plan"). Madden PFT, ¶ 14. The Commission issued a negative Determination of Applicability ("DOA") for this work concluding that the work described in the RDA was outside jurisdictional wetlands ("2013 DOA"). Madden PFT, ¶ 20; RDA Narrative, page 2.

On behalf of ADM, Mr. Madden testified that the work addressed in the 2013 RDA has been updated and does not include the work Petitioners wanted reviewed in the SDA request. Madden PFT, ¶ 40. None of the proposed changes affect the original footprint of the bog project

as a whole and reflect ADM's efforts to increase efficiency in water consumption, labor and cost for the purpose of increasing yield. Madden PFT, ¶ 49. The changes from the 2013 RDA Plan include elimination of Tailwater Pond 2 from production, which occurred between 2013 and 2015. Madden PFT, ¶¶ 42, 48. Other changes include developing smaller bogs within the original 40-acre rectangle bogs shown on the 2013 RDA Plan because they are a more efficient design for irrigation purposes and overall crop management. Madden PFT, ¶ 50. To minimize construction cost and labor, a drainage canal has also been relocated having no impact on the footprint of the project. Madden PFT, ¶ 51. To decrease maintenance costs, and to improve the irrigation efficiencies, the changes include a proposed irrigation pond, with several pumps, in the center portion of the main bog complex. Madden PFT, ¶ 52.[4]

The 2022 SDA Request

Petitioners submitted an RDA to the Commission seeking a determination[5] that the activity described therein as "a 217-acre earth removal and purported agricultural project" required ADM to file Notice of Intent ("NOI") with the Commission seeking approval for the proposed project pursuant to the MWPA and the Wetlands Regulations. RDA Narrative, page 1. The Petitioners included with their request the 2012 MEPA Plan for review.

In response to the Petitioners' RDA, the Commission issued a negative Determination of Applicability ("2022 DOA") and thereafter the Petitioners filed an SDA request with the Department's Southeast Regional Office seeking review of the Commission's decision. SDA

[4] Mr. Madden included in his testimony the general schematic of these changes on the October 2023 Plan included in his testimony. See Madden Ex. B, Conceptual Cranberry Bog Development Plan, GAF Engineering, Inc., 10/4/23 ("2023 Concept Plan"). The Concept Plan shows several changes to the 2013 RDA Plan, that ADM has not yet implemented. Madden PFT, ¶ 40.

[5] The RDA also sought enforcement of the bylaw, which is not within the Department's jurisdiction.

Request letter, September 16, 2022. The SDA request sought review of the Commission's negative DOA contending that the Commission wrongly concluded that work in the Buffer Zone will not alter the area subject to the jurisdiction of the MWPA, did not determine the accuracy of the boundaries shown on the plans and failed to determine if any of the work shown in the RDA is exempt as Normal Improvement of Land In Agricultural Use. SDA Request letter, page 1.

The SDA request contended that the Commission's negative determination should be reversed because ADM's "Phase C-2 work" is within wetlands resource areas, does not fall within the agricultural exemption, and the resource areas were not delineated. SDA Request letter, page 3. The SDA request included a copy of the RDA request which included the 2012 MEPA Plan. RDA, Ex. 4-3; Madden PFT, ¶ 21.

During its review of the SDA request, MassDEP Environmental Engineer Gary Makuch ("Mr. Makuch")[6] conducted a site visit on November 3, 2022. The site visit was attended by ADM's expert witness, Mr. Madden, and Petitioners' counsel. Madden PFT, ¶ 23; Corcoran PFT, ¶ 7. The Petitioners' expert, Brandon Faneuf, attended the on-site meeting but ADM did not allow him to enter the site. Faneuf PFT, ¶ 22.

At the site visit, ADM provided MassDEP with copies of the 2013 RDA Plan. Madden PFT, ¶ 23; Corcoran PFT, ¶ 10.7.i.; Basic Documents, November 3, 2022 letter from Foley & Lardner LLP to MassDEP SERO. ADM did not provide a copy of the 2013 RDA Plans to the Petitioner. Faneuf PFT, ¶ 32.

[6] Mr. Corcoran testified that Mr. Makuch had retired and that he, Mr. Corcoran, was assigned by the Department when the Petitioners' appeal was filed. Mr. Corcoran testified that he consulted with Mr. Makuch before he retired and reviewed all background documents with him. Corcoran PFT, ¶ 9 n.2.

The Department subsequently issued an SDA that was (1) positive for a portion of the site, confirming the extent and boundaries of BVW and Riverfront Area depicted on the 2013 RDA Plan; and (2) negative for the work described in the RDA. SDA cover letter, page 1. The Department based its determination on its review of the documents, including the 2013 RDA Plan, and the site inspection. SDA cover letter, page 1. The Department determined that the earth removal activities and the proposed construction of cranberry bogs shown on 2013 RDA Plan are within upland areas. SDA cover letter, page 1.

The Department concluded that the construction of a by-pass canal or tail water recovery system was Normal Improvement of Land in Agricultural Use, where a new pond constructed within existing Land in Agricultural Use, is an exempt activity pursuant to 310 CMR 10.04: Agriculture(c)(1)e. In support of this finding the Department also referred to the "Farming in Wetland Resource Area: A Guide to Agriculture and the Wetlands Protection Act" [revised 1992] (the "Guidance"),[7] Case Study #3. SDA cover letter, page 2. The SDA concluded that the construction of water management systems such as canals, cross ditches, and water transport systems are Normal Improvement of Land in Agricultural Use in accordance with 310 CMR 10.04: Agriculture:(c)(1)g. SDA cover letter, page 2.

The SDA "confirms the extent and boundaries of Bordering Vegetated Wetlands [310 CMR 10.55] and Riverfront Area [310 CMR 10.58] as depicted in the above-referenced Site Plans." SDA cover letter, page 1. The Site Plans referenced in the SDA are those associated with the 2013 RDA issued to ADM labeled, "Proposed Cranberry Bog Development Plan, prepared for ADM Cranberry Company, LLC, dated October 21, 2013." SDA cover letter, page 1.

[7] See Corcoran Ex. C.

2023 Site Visit

After this administrative appeal was initiated, Mr. Corcoran, conducted a site visit on July 27, 2023, attended by ADM, its counsel, and its experts Ms. Minihane and Mr. Madden, and Petitioners' counsel, and Petitioners' experts, Mr. Faneuf and Mr. Garner. Madden PFT, ¶ 25; Minihane PFT, ¶ 19; Corcoran PFT, ¶ 10-12; Faneuf PFT, ¶ 27; Garner PFT, ¶ 11. The site visit included the three tailwater ponds.[8] The record includes the following facts:

Tailwater Pond 1 (Big ADM Bog), is a cranberry bog that has been converted into a tailwater recovery pond. Madden PFT, ¶¶ 41, 47; Minihane PFT, ¶ 22.a.; Corcoran PFT, ¶ 14.1. Tailwater Pond 1 is currently used in the production of cranberries or associated with the production of cranberries. Corcoran PFT, ¶ 29. Tailwater Pond 1 consistently appears to be a flooded body of water. Minihane PFT, ¶ 22.a; Cororan PFT, ¶ 14.1. A pump house is located on Pond 1. Faneuf PFR, ¶ 23. The pump house was heard to be running at the November 30, 2023 site view. Faneuf, 25:10-23. Mr. Fanuef testified to observing the topography and vegetation only. Fanuef PFT, ¶ 30. Mr. Faneuf also testified that aerial photographs show that this bog was flooded over time between 2009 and 2021. Faneuf PFT, ¶ 38.[9] Because the wetland vegetation appeared to be established, Mr. Corcoran concluded that it indicated that the area has been flooded continuously long enough to establish a fringe BVW and exhibited the characteristics of an active tailwater recovery pond. Corcoran PFT, ¶ 14.1.

[8] Other areas of the property were viewed during the site 2023 site visit, however, the Petitioners' experts provided testimony regarding Tailwater Pond 1, Proposed Tailwater Pond 2 and Proposed Tailwater Pond 3.

[9] Mr. Faneuf testified that the undated MassGIS aerial photographs in his exhibits are from 2009 (Ex. 6) through 2021 (Ex. 7, 8, 9, and 10). Faneuf PFT, ¶ 38.

Proposed Tailwater Pond 2 (5 acre Bog), was removed from production sometime after 2013. Madden PFT, ¶¶ 42, 48. The Parties agree that Tailwater Pond 2 is not used as a cranberry bog and is no longer Land in Agricultural Use. Minihane PFT, ¶ 22.b.; Madden PFT, ¶¶ 42, 48; Faneuf PFT, ¶¶ 29.a, 31, 40; Garner PFT, ¶¶ 12, 15; Corcoran PFT, ¶¶ 14.2, 29, 30. Proposed Tailwater Pond 2 has reverted to BVW since it was abandoned. Madden PFT, ¶ 42.

Proposed Tailwater Pond 3 (13 acre Bog), is an active cranberry bog. Madden PFT, ¶ 43; Corcoran PFT, ¶ 14(c); Faneuf PFT, ¶ 39.[10] This cranberry bog was observed to be in multiple stages of harvest and is in or associated with the production of cranberries. Corcoran PFT, ¶¶ 14(3), 29. The bog vegetation was dominantly cranberry and had Frogfoot Brook meandering through it. Corcoran PFT, ¶ 14.3; Faneuf PFT, ¶ 30. The Petitioners' experts took soil borings at Tailwater Pond 3 which included hydric soils that they concluded demonstrate that the bog is BVW. Faneuf PFT, ¶ 30; Garner PFT, ¶¶ 16-18. Ms. Minihane agreed that Tailwater Pond 3 continues to have evidence of hydrophytic vegetation, soils and hydrology. Minihane PFT, ¶ 22.c. Ms. Minihane testified that the 2012 EENF acknowledged that Tailwater Pond 3 was proposed within an active cranberry bog that was likely historically wetland. Minihane PFT, ¶ 22.c.

Procedural Background

The Petitioners filed a timely Notice of Claim (administrative appeal) challenging the SDA on December 22, 2023. In response to the January 20, 2023 Scheduling Order I issued in this appeal, the Parties filed a Joint Status Report on February 10, 2023, indicating that they had

[10] Mr. Faneuf refers to this cranberry bog section as FR35c (10.42 ac.) and FR31b (4.3 ac.). Faneuf PFT, ¶ 27; Madden PFT, ¶ 43. Mr. Faneuf states that these identifiers are taken from an ADM document. Faneuf PFT, ¶ 26.*l.* While the document is not in the record, Mr. Madden's testimony appears to corroborate the reference.

conferred and that settlement discussions were ongoing. I granted their request to stay the deadlines in the Scheduling Order for the Parties to continue discussions until March 10, 2023. On March 9, 2023, the Parties submitted a Joint Status Report stating that settlement discussions continued and requesting an extension of the stay until March 24, 2023. The Parties filed a Joint Status Report on March 24, 2023 indicating that their settlement discussions had reached an impasse and requested until March 27, 2023, to file a Proposed Appeal Resolution Schedule. On March 27, 2023, they jointly filed a Joint Status Report and Proposed Appeal Resolution Schedule which included alternative dates for the Pre-Hearing Conference, a site view of the Property,[11] and the evidentiary Adjudicatory Hearing ("Hearing"), indicating their availability on all proposed dates. Also included was a list of the Parties' witnesses and proposed issues for adjudication in the appeal, although without agreement among the Parties.[12]

On March 30, 2023, I vacated the stay and adopted the Parties' proposed appeal resolution schedule. The Pre-Hearing Conference was conducted on May 4, 2023, at which the issues for adjudication were discussed and the Parties were given an opportunity to comment on the issues as set out in the Pre-Hearing Conference Report and Order.[13] The Parties were also directed to confer and to use their best efforts to present a unified approach for a proposed

[11] See 310 CMR 1.01(5)(a)14. See also 310 CMR 1.01(13)(j) which provides as follows:

> The parties may request and the Presiding Officer may order that a view be taken of a site, property or other places and things that are relevant to an appeal to promote understanding of the evidence that has been or will be presented. Notice and a reasonable opportunity to be present shall be given to all parties. Parties shall not present evidence during the view, but may point out objects or features that may assist the Presiding Officer in understanding evidence. The Presiding Officer may rely on the Presiding Officer's observations during a view as evidence to the same extent permissible as if observed in the hearing room.

[12] The Joint Status Report indicated that ADM intended to pursue a protective order related to the site visit.

[13] Following my review of the Parties comments, the Amended Issue Statement was issued on May 30, 2023.

"protective order" concerning the site view that is consistent with the requirements of the MWPA, the Wetlands Regulations, and the Adjudicatory Proceeding Rules at 310 CMR 1.01(13)(j) governing site views.

On September 8, 2023, the Petitioners and ADM filed a joint motion to enter a stipulated protective order by way of a written Agreement. The Agreement identified the Petitioners' representatives who would participate in a site visit and site view and would bind ADM and the Petitioners relative to disclosure and use of information obtained during the site visit and site view. The Agreement broadly defined protected information but did not identify any trade secrets or information otherwise deemed confidential. The Department was not a signatory to the motion or Agreement and filed neither support nor opposition. By its terms, ADM and the Petitioners agreed that the Agreement was binding upon them regardless of whether it was issued as a Protective Order.

I conducted a Status Conference on September 14, 2023, for ADM, the Petitioners, and the Department to explain the need for a Protective Order. The Petitioners stated that there did not appear to be any confidential information subject to the Department's regulations at 310 CMR 3.00 as referenced in the Agreement governing the confidentiality of records and files obtained by the Department in a particular matter. ADM did not disagree. The Department offered no opinion regarding the Agreement or more specifically, the proposed procedure for OADR to implement review under the Department's Regulations at 310 CMR 3.00. or how an order could be granted limiting or changing those procedures. No Party identified any precedent for granting a protective order for information that the Parties had not demonstrated was a trade secret or otherwise confidential, and for which they had already agreed to confidentiality in an

Agreement binding and enforceable between themselves. As such, while the Agreement is part of the administrative record as a duly filed Motion it was not issued as a Protective Order.

The Parties filed their Pre-filed Testimony and Memoranda of Law, the last filing being made by the Petitioners on November 27, 2023, with the filing of their Rebuttal Pre-filed Testimony.[14] On December 8, 2023, three (3) business days before the scheduled Hearing, ADM and MassDEP jointly moved to dismiss the appeal for failure to sustain a case ("Joint Motion to Dismiss"). I took the Joint Motion to Dismiss under advisement and held the Hearing as previously scheduled, in-person at MassDEP's Boston office on December 14, 2023.[15] The Petitioners arranged for a transcript of the Hearing, in lieu of a digital recording of the Hearing.[16]

I did not rule on the Joint Motion to Dismiss at the Hearing and, without objection, allowed the Petitioners additional time to respond to the Motion. The Petitioners filed their Opposition on January 5, 2024, and the Parties submitted their post-hearing briefs on February 5, 2024. I address the Motion to Dismiss and the Petitioners Opposition to it in the discussion below.

ISSUES FOR ADJUDICATION

The Issues for Adjudication in these proceedings are as follows:

1. Whether the Department was correct in determining that the wetlands resource boundaries of BVW, Bank, BLSF, and LUWB were accurately delineated in the

[14] Exhibit A to Garner's PFT, his CV, was filed on December 13, 2023.

[15] The May 15, 2023 Pre-Hearing Conference Report and Order directed MassDEP to confirm the availability of the Department's Lakeville Office for the Hearing. On October 30, 2023, MassDEP reported that the Lakeville Office was not available. After initial disagreement, the Parties agreed to an in-person Hearing in the Department's Boston Office.

[16] At the close of the Hearing, the stenographer stated that the transcript would be available within ten (10) business days which was on or about December 29, 2023, given the intervening holiday. On January 12, 2024, following my inquiry, the Petitioners' counsel acknowledged receipt of the transcript on December 29, 2023, and stated the delay was due to vacation schedules and then circulated the transcript to OADR and the other Parties.

plans presented for review to the Department in the Superseding Request for Determination of Applicability pursuant to G.L. c. 131, § 40 and the Wetlands Regulations.

a. Did the Department appropriately substitute the 2013 plan provided by AD Makepeace in its review of the SDA, with or without consulting the Petitioners?

b. If not, what impact, if any, does that have on whether the SDA was appropriately issued under the Wetlands Regulations and the Wetlands Act?

2. Whether the Department accurately determined that Frogfoot Reservoir is a reservoir pursuant to 310 CMR 10.58(2)(a)1.g and h, as being shown on a USGS map as a reservoir, and whether in doing so made a determination that the water body does not have primarily riverine characteristics.

    a. If not, what impact, if any, does that have on whether the SDA was appropriately issued under the Wetlands Regulations and the Wetlands Act?

3. Whether the Department was correct in determining that construction of a bypass canal, tail water recovery ponds, and water management systems described in the Request for the Superseding Determination of Applicability did not require a Wetlands Permit because there is relevant land that is "Land in Agricultural Use" as defined in 310 CMR 10.04: Agriculture.

    a. If not, is the proposed work "Normal Improvement of Land In Agricultural Use" subject to 310 CMR 10.04: Agriculture, subparagraph (c)?

    b. If not, what impact, if any, does that have on whether the Project should be approved under the Wetlands Regulations and the Wetlands Act?

STATUTORY & REGULATORY FRAMEWORK

The Massachusetts Wetlands Protection Act and the Wetlands Regulations have as their purpose the protection of wetlands and the regulation of activities affecting wetlands areas in a manner that promotes the following interests:

(1) protection of public and private water supply;

(2) protection of ground water supply;

(3) flood control;

(4) storm damage prevention;

(5) prevention of pollution;

(6) protection of land containing shellfish;

(7) protection of fisheries; and

(8) protection of wildlife habitat.

MWPA; 310 CMR 10.01(2); In the Matter of Gary Vecchione, OADR Docket No. WET -2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 6-7, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77; In the Matter of Webster Ventures, LLC, OADR Docket No. WET-2014-016, Recommended Final Decision (February 27, 2015), 2015 MA ENV LEXIS 14, at 10-11 ("Webster Ventures I"), adopted as Final Decision (March 26, 2015), 2015 MA ENV LEXIS 10; In the Matter of Elite Home Builders, LLC, OADR Docket No. WET-2015-010, Recommended Final Decision (November 25, 2015), adopted as Final Decision (December 17, 2015), 22 DEPR 202, 204 (2015); In the Matter of Sunset City, Inc., OADR Docket No. WET-2016-016, Recommended Final Decision (March 31, 2017), 2017 MA ENV LEXIS 35, at 9-10, adopted as Final Decision (April 21, 2017), 2017 MA ENV LEXIS 33.

Superseding Determinations of Applicability ("SDA"):

The issues in this appeal concern the Department's discretion in reviewing requests for Superseding Determinations of Applicability. The Wetlands Regulations provide that,

> "Any person(s) permitted to request the Department to act under 310 CMR 10.05(7)(a) may request the Department to issue a Superseding Determination of

> Applicability or to issue a Superseding Order, whichever is appropriate, whenever a conservation commission has . . . issued a Determination of Applicability." 310 CMR 10.05(7)(b)1.
>
> The Wetlands Regulations also provide that,
>
> "After receipt of a request for a Superseding Determination or Order, the Department may conduct an informal meeting and may conduct an inspection of the site. In the even an inspection is conducted, all parties shall be invited in order to present any information necessary or useful to a proper and complete review of the proposed activity and its effects upon the interests identified in M.G.L. c. 131, sect. 40. Any party presenting information as a result of such a meeting shall provide copies to the other parties." (Emphasis supplied)

See 310 CMR 10.05(7)(i).[17]

Land in Agricultural Use and Normal Improvement of Land in Agricultural Use:

The issues in this appeal also concern the application of the definitions in 310 CMR 10.04: Agriculture of "Land in Agricultural Use" and "Normal Improvement of Land in Agricultural Use." The so-called "agricultural exemption" at issue in this appeal has its roots in the MWPA which provides that "[t]he provisions of this section shall not apply to … maintenance of drainage and flooding systems of cranberry bogs, to work performed for normal maintenance or improvement of land in agricultural use or in aquacultural use…." The statute further directs the Department to promulgate rules and regulations "which shall establish definitions for the term 'normal maintenance or improvement of land in agricultural, or in aquacultural use.'" In commenting on the agricultural exemption, the Supreme Judicial Court, quoting from the MWPA's legislative history stated:

> The exemption was necessary to balance the need to protect wetlands and other fragile habitats with the "future economic viability of . . . farms [in the Commonwealth]." St. 1991, c. 141, § 1. Those farmers, however, "are faced with a growing morass of regulation and restriction which is increasing the cost of

[17] ADM and MassDEP also cite to 310 CMR 10.05(7)(g); however, that regulatory provision applies to the Department's actions when a Superseding Order of Resource Area Delineation is requested.

> farming." Id. Although the Act had exempted "'work performed for normal maintenance or improvement of land in agricultural use[,'] many routine and long standing farm operations [were] being challenged by local and state agencies, creating confusion, frustration and . . . costly delays." Id. In order to correct this problem, the Legislature directed that "a uniform definition" be established "to assist the agricultural community in complying with the [Act] and reducing the current uncertainty that exists." Id.

Commonwealth v. Clemmey, 447 Mass. 121, 125, 849 N.E.2d 844 (2006). The court in Clemmey noted that in the Acts 1991, c. 141, § 1 the Legislature stated:

> Farmers across the state are faced with the growing morass of regulations and restrictions which is increasing the cost of farming and jeopardizing the future economic viability of our farms . . . . Although the Wetland Protection Act exempts "work performed for normal maintenance or improvement of land in agricultural use" many routine and long-standing farm operations are being challenged by local and state agencies, creating confusion, frustration and in some cases costly delays. The intent of this act is to establish a uniform definition to assist the agricultural community in complying with the Wetland Protection Act and reducing the current uncertainty that exists.

The Wetlands Regulations define Land in Agricultural Use to mean "land within resource areas[18] or the Buffer Zone presently or primarily used in producing or raising one of more of the [listed][19] commodities for commercial purposes." 310 CMR 10.04: Agriculture(a) (emphasis supplied). Additionally, "Land in Agricultural Use" includes supporting land, land that is customarily and necessarily used in production, that is "land within resource areas or the Buffer Zone presently and primarily used in a manner related to, and customarily and necessarily used

[18] Resource Area means any of the areas specified in 310 CMR 10.25 through 10.35 and 10.54 through 10.58. It is used synonymously with Area Subject to Protection under G.L. c. 131, § 40, each one of which is enumerated in 310 CMR 10.02(1). See 310 CMR 10.04: Resource Area.

[19] Those commodities include fruits, vegetables, berries, nuts, maple sap, and other foods for human consumption, and feed, seed, forage, tobacco, flowers, sod, nursery or greenhouse products, and ornamental plants or shrubs. See 310 CMR 10.04: Agriculture(a)1 and 2.

in, producing or raising such commodities."[20] (Emphasis supplied). Land in Agricultural Use may lie inactive for up to 5 consecutive years. [21] See 310 CMR 10.04: Agriculture(a); See Guidance, page 2-3.

"Normal improvement of land in agricultural use" includes but is not limited to:

> the following activities when they occur on land in agricultural use or when they occur within the Buffer Zone or Bordering Land Subject to Flooding that is not land in agricultural use, when they are directly related to production or raising of the agricultural commodities referenced in 310 CMR 10.04: Agriculture(a), and when they are undertaken in such a manner as to prevent erosion and siltation of adjacent water bodies and wetlands and the activity is conducted in accordance with federal and state laws: . . .
>
> e. the construction of by-pass canals/channels and tail water recovery systems; . . .
>
> g. the construction of water management system such as a reservoirs, farm pond, irrigation system, field ditch, cross ditch, canal/channel, grass waterway, dike, sub-surface drainage system, watering facility, water transport system, vent, or water storage system, or of a livestock access; . . . .

310 CMR 10.04: Agriculture(c)(1)[22] (emphasis added). Normal improvement "in all cases does not include filling or dredging a Salt Marsh." Id.

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[20] These uses include but are not limited to: existing access roads and livestock crossings; windbreaks; hedgerows; field edges; bee yards; sand pits; landings for forest products; fence lines; water management projects such as reservoirs, farm ponds, irrigation systems, field ditches, cross ditches, canals/channels, grass waterways, dikes, sub-surface drainage systems, watering facilities, water transport systems, and water storage systems; agricultural composting sites; agricultural storage and work areas; and land under farm structures. 310 CMR 10.04: Agriculture(a). (Emphasis supplied).

[21] "Land in agricultural use may lie inactive for up to five consecutive years unless it is under a United States Department of Agriculture (USDA) contract for a longer term pursuant to the Conservation Reserves Program (the Food Securities Act of `985, as amended by the Food, Agriculture, Conservation and Trade Act of 1990; and 7 CFR 1410), or it is used for the forestry purposes described in 410 CMR 10.04: Agriculture(b)14. through 17. The issuing authority may require appropriate documentation, such as a USDA Farm Plan or aerial photography, to demonstrate agricultural use.

[22] 310 CMR 10.04:Agriculture(c)1. is referred to throughout this Recommended Final Decision as "subpart (c)1."

"Normal improvement of land in agricultural use" also includes,

> The reconstruction of existing dikes, the reconstruction and expansion of existing ponds and reservoirs, and the construction of tailwater recovery ponds and by-pass canals/channels occurring partly or entirely within a BVW, when directly related to production or raising of the agricultural commodities referenced in 310 CMR 10.04: Agriculture(a).

310 CMR 10.04: Agriculture(c)(2) [23] (emphasis added).

The Guidance explains that the exemption applies to the work or activity, not the land. See Guidance, Chapter 2. As a result, a resource area may be Land in Agricultural Use but a particular activity may not qualify as a normal improvement activity. Id.; In the Matter of Peter and Betsy Wild/Idlewild Acres, LLC, OADR Docket No. WET-2019-019 and 020, Recommended Final Decision (February 14, 2024)("Idlewild").[24] For an activity to claim the agricultural use exemption, it must satisfy two requirements: it must take place on "Land In Agricultural Use," which by definition is wetland resource area, and it must be "Normal Improvement of Land in Agricultural Use."

Land subject to jurisdiction under the MWPA that has been "out of production for longer than five years (without being under USDA contract)" is considered "new land." As a result, activities thereon require wetlands permit review under the MWPA and Wetlands Regulations. 310 CMR 10.04: Agriculture(a); See Guidance, at page 2-3.

[23] 310 CMR 10.04:Agriculture(c)2. is referred to as "subpart (c)2 throughout this Recommended Final Decision.

[24] The Recommended Final Decision ("RFD") in Idlewild is currently under review by MassDEP's Commissioner who is the Final Decision-Maker in every administrative appeal filed with OADR unless she designates an alternative final decision-maker in the appeal. 310 CMR 1.01(14)(b). The RFD in Idlewild provides persuasive authority regarding the "Land In Agricultural Use" provisions of the Wetlands Regulations and supports my finding and recommendation in this appeal that the Department properly construed the provisions in issuing its negative SDA to the Petitioners.

The Guidance provides further explanation as to whether an activity is "normal": "[a] 'normal' practice may not always be considered a 'best practice'"; "[n]ormal practices don't necessarily look nice"; "[a] normal practice may cause impacts to resource areas"; "[t]o be normal, a practice must fit the scale and the scope of an operation"; and "[w]hat is normal may involve change." See Guidance, page 2-1. "Improvement activities involve change" that "may enhance growing conditions" including "building a by-pass channel/canal to improve water quality in a cranberry system." See Guidance at 2-2; subpart (c)(1).

Some normal improvement activities are exempt without the need to comply with any specific conditions. Subpart (c)(1); See Guidance at 2-8. Certain other water-management projects that occur partly or entirely within a BVW qualify as "exempt" activities when part of a farm Conservation Plan[25] that has been approved by SCS and submitted to the Conservation Commission for review and comment. Subpart (c)(2); See Guidance at 2-8.

PETITIONERS' BURDEN OF PROOF

In addition to the Adjudicatory Proceeding Rules at 310 CMR 1.01, the Wetlands Permit Appeal Regulations at 310 CMR 10.05(7)(j), and the requirements of the MWPA and the Wetlands Regulations govern resolution of the Petitioners' appeal of the SDA. Under 310 CMR 10.05(7)(j), the Petitioners have the burden of proof on all Issues for Adjudication in the Appeal. See 310 CMR 10.03(2); 310 CMR 10.05(7)(j)2.b.iii; 310 CMR 10.05(7)(j)2.b.v; 310 CMR 10.05(7)(j)3.a; 310 CMR 10.05(7)(j)3.b.

To prove their contention that the Department erred in issuing the SDA, the Petitioners were required to "produce [at the Hearing] at least some credible evidence from a competent source in support of [their] position[.]" See 310 CMR 10.03(2); 310 CMR 10.05(7)(j)2.b.iv; 310

[25] The Conservation Plan is approved by the USDA Soil Conservation Service. See Guidance at 1-1.

CMR 10.05(7)(j)2.b.v; 310 CMR 10.05(7)(j)3.a; 310 CMR 10.05(7)(j)3.b. The Petitioners had to present "credible evidence from a competent source in support of each claim of factual error [made against the Department], including any relevant expert report(s), plan(s), or photograph(s)." 310 CMR 10.05(7)(j)3.c. "A 'competent source' is a witness who has sufficient expertise to render testimony on the technical issues on appeal." In the Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 MA ENV LEXIS 89, at 36-37, adopted by Final Decision (August 19, 2010), 2010 MA ENV LEXIS 31. Whether the witness has such expertise depends "[on] whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony." Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted); see e.g. In the Matter of Carulli, Docket No. 2005-214, Recommended Final Decision (August 10, 2006) (dismissing claims regarding flood control, wetlands replication, and vernal pools for failure to provide supporting evidence from competent source), adopted by Final Decision (October 25, 2006); In the Matter of Indian Summer Trust, Docket No. 2001-142, Recommended Final Decision (May 4, 2004) (insufficient evidence from competent source showing that interests under MWPA were not protected), adopted by Final Decision (June 23, 2004); In the Matter of Robert Siegrist, Docket No. 2002-132, Recommended Final Decision (April 30, 2003) (insufficient evidence from competent source to show wetlands delineation was incorrect and work was not properly conditioned), adopted by Final Decision (May 9, 2003).

STANDARD OF REVIEW

My review of the evidence presented at the Hearing is *de novo*, meaning that my review is anew, irrespective of any prior determination of the Department in issuing the SDA. See In

the Matter of Kristen Kazokas, OADR Docket No. WET-2017-022, Recommended Final Decision (August 29, 2018), 2018 MA ENV LEXIS 67, at 29, adopted by Final Decision (September 18, 2019), 2019 MA ENV LEXIS 93. "Hence, if during the pendency of an administrative appeal, '[the Department] becomes convinced' based on a different legal interpretation of applicable regulatory standards, new evidence, or error in its prior determination, 'that the interests of [MWPA] require it to take a different position from one that it had adopted previously [in issuing the SOC],' the Department is authorized to, and should change its position." In the Matter of Algonquin Gas Transmission, LLC, OADR Docket No. WET-2016-025, Recommended Final Decision (October 16, 2019), 2019 MA ENV LEXIS 106, at 15, adopted by Final Decision, (October 24, 2019), 2019 MA ENV LEXIS 104. Additionally, as the Presiding Officer responsible for adjudicating this appeal "[I am] not bound by MassDEP's prior orders or statements [in the case], and instead [I am] responsible . . . for independently adjudicating [the] appea[l] and [issuing a Recommended Final Decision] to MassDEP's Commissioner that is consistent with and in the best interest of the [MWPA, the Wetlands] Regulations, and MassDEP's policies and practices." In the Matter of Francis P. and Debra A. Zarette, Trustees of Farm View Realty Trust, OADR Docket No. WET 2016-030, Recommended Final Decision (February 20, 2018), 2018 MA ENV LEXIS 7, at 16, adopted by Final Decision (March 1, 2018), 2018 MA ENV LEXIS 6.

The relevancy, admissibility, and weight of the evidence presented at the Hearing are governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):

> [u]nless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether

offered on direct examination or cross-examination of witnesses.

Under 310 CMR 1.01(13)(h), "[t]he weight to be attached to any evidence in the record . . . rests within the sound discretion of the Presiding Officer. . . ." See In the Matter of Sawmill Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), 2015 MA ENV LEXIS 63, at 84 (petitioners' expert testimony "that pharmaceuticals, toxins, and other potentially hazardous material would be discharged from effluent generated by . . . proposed [privately owned wastewater treatment facility] . . . was speculative in nature and not reliable"), adopted by Final Decision (July 7, 2015), 2015 MA ENV LEXIS 62.

DISCUSSION

1. The Joint Motion to Dismiss was timely filed

Regarding the Joint Motion to Dismiss the Petitioners' appeal which ADM and MassDEP filed prior to the Hearing, the Petitioners oppose the Motion contending that the Wetlands Permit Appeal Regulations at 310 CMR 10.05(7)(j)7.d[26] prohibit the parties to an appeal from filing motions if no date for such filing has been set by the Presiding Officer at the prescreening (pre-hearing) conference ("the Conference"). In response, ADM and MassDEP contend that the Presiding Officer has broad discretion to rule on a motion to dismiss at any time pursuant to 310 CMR 10.05(7)(j)2.[27] I agree with ADM and MassDEP for the following reasons.

[26] "Parties may file motions regarding jurisdictional defects such as standing or timeliness by a date set by the presiding officer before the prescreening. Motions for directed verdict or summary decision may be filed by a date set by the presiding officer at the prescreening. Motions will not change the schedule of the prescreening conference or the hearing." See 310 CMR 10.05(7)(j)7.d

[27] For example, the Presiding Officer may rule on the timeliness, standing, and compliance with the requirements of 310 CMR 10.05(7)(j)3.b *sua sponte* (on the Presiding Officer's own initiative), and provide a prompt ruling to the parties; or if in response to a motion, within ten days of the filing of such motion. See 310 CMR 10.05(7)(j)2.h.

The Wetlands Permit Appeal Regulations place on the Petitioners the burden of going forward and proving their direct case by a preponderance of the evidence.[28] The Presiding Officer has broad authority to take any action authorized by G.L. c. 30A to conduct a just, efficient, and speedy adjudicatory appeal and to write a fair and impartial recommended decision in the appeal for consideration by MassDEP's Commissioner, the Final Decision-Maker in the appeal.[29] Within this authority is the discretion to rule on a motion to dismiss, or to act on her own initiative, and to provide a prompt ruling to the parties.[30] Allowing parties to file a motion to dismiss is consistent with the Petitioners' burden of going forward pursuant to 310 CMR 10.03(2), and proving its direct case by a preponderance of the evidence.[31]

The regulatory provision the Petitioners rely on was added to the Wetlands Permit Appeal Regulations in October 2007 as part of the effort to eliminate delays in the resolution of wetlands permit appeals without reducing the level of environmental protection.[32] With respect to the prescreening (pre-hearing) provision in the Wetlands Permit Appeal Regulations that the Petitioners have cited in opposing ADM's and MassDEP's Joint Motion to Dismiss, the provision was intended to put the parties to the appeal on notice that motion practice

[28] "The Petitioner has the burden of going forward pursuant to 310 CMR 10.03(2), and proving its direct case by a preponderance of the evidence." See 310 CMR 10.05(7)(j)3.b.

[29] See 310 CMR 1.01(5)(a), Powers of the Presiding Officer.

[30] See 310 CMR 10.05(7)(j)2.h, which provides, "The Presiding Officer may rule on the timeliness, standing and compliance with the requirements of 310 CMR 10.05(7)(j)3.b., *sua sponte*, and provide a prompt ruling to the parties; or, if in response to a motion, within ten days of the filing of such motion." (Emphasis supplied.)

[31] In this case, rather than stay the Hearing date to allow the Petitioners seven (7) days to respond, I exercised my discretion to proceed with the Hearing and allowed the Petitioners, without objection from ADM and MassDEP, extra time to respond to the Joint Motion.

[32] "On March 1, 2007 Governor Patrick directed MassDEP to reform the wetlands appeals process to allow for more timely action on these appeals, without reducing the level of environmental protection." See Wetlands Appeal Streamlining Regulations Response to Comments (October 3, 2007), page 1.

would not delay appeal proceedings and was not intended to prohibit dispositive motions.[33] In sum, the Wetlands Permit Appeal Regulations do not limit a party's ability to file a dispositive motion or the Presiding Officer's authority to rule on a motion. For these reasons, ADM's and MassDEP's Joint Motion to Dismiss was properly filed.

3. The Petitioners failed to sustain their case

The Adjudicatory Proceeding Rules at 310 CMR 1.01 govern the adjudication of this appeal. The Rules at 310 CMR 1.01(11)(e) provide that:

> [u]pon the petitioner's submission of prefiled testimony, . . . any opposing party may move for the dismissal of any or all of the petitioner's claims, on the
>
> ground that upon the facts or the law the petitioner has failed to sustain its case; or the Presiding Officer may, on the Presiding Officer's own initiative, order the petitioner to show cause why such a dismissal of claims should not issue.
>
> Decision on the motion or order to show cause may be reserved until the close of all the evidence. . . .

(emphasis supplied). "Dismissal [of an appeal pursuant to 310 CMR 1.01(11)(e)] for failure to sustain a case, also known as a directed decision, is appropriate when a party's direct case - generally, the testimony and exhibits comprising its prefiled direct testimony - presents no evidence from a credible source in support of its position on the identified issues." A directed decision should be entered against the petitioner in the appeal when the petitioner does not have

[33] Motion practice was addressed in the response to comments regarding the Wetlands Appeal Streamlining Regulations and expresses the intent that motion would not be prohibited. The comments provide as follows:

> "Comment: Does the regulation allow motion practice?
>
> "Response: While the draft regulation was silent on motion practice, the final regulation does include language regarding motions, making clear that dispositive motions can be filed. However, motions will not alter the appeal schedule." (Emphasis supplied.)
>
> See Wetlands Appeal Streamlining Regulations, 310 CMR 10.05 and 310 CMR 1.00 Response to Comments, October 3, 2007, page 6.

a reasonable likelihood of prevailing on its claims in the appeal because the petitioner's evidentiary submissions are deficient as a matter of law. In the Matter of James Valis, OADR Docket No. 2021-015, Recommended Final Decision (July 7, 2022), 2022 MA ENV LEXIS 23, *3-5, affirmed, Page v. Massachusetts Department of Environmental Protection, Suffolk Superior Court C.A. No. 2284CV01940, Memorandum of Decision and Order on Cross-Motions for Judgment on the Pleadings (March 27, 2024) and Final Judgment (April 2, 2024); [34]; In the Matter of Thomas Vacirca, Jr., OADR Docket No. WET-2016-017, Recommended Final Decision (April 11, 2017), 2017 MA ENV LEXIS 22, at 14-15, adopted as Final Decision, (April 18, 2017), 2017 MA ENV LEXIS 28.

Here, the Petitioners' appeal of the SDA was scheduled for a Hearing on December 14, 2023, at which the Parties expert witnesses were to appear for cross examination under oath on the sworn PFT and documentary evidence that they had filed supporting their respective positions in the appeal. In my discretion I deferred my decision on ADM's and MassDEP's Joint Motion to Dismiss until the close of all evidence. As discussed herein, having considered all evidence in the record, I have determined that the Petitioners' have failed to present sufficient evidence to support their appeal of the SDA.

2. MassDEP has discretion to base its SDA determination on the 2013 RDA Plans in its review of the Petitioners' 2022 SDA request

The Wetlands Regulations provide that:

> "Any person(s) permitted to request the Department to act under 310 CMR 10.05(7)(a) may request the Department to issue a Superseding Determination of Applicability or to issue a Superseding Order, whichever is appropriate, whenever a conservation commission has . . . issued a Determination of Applicability."

[34] On April 23, 2024, the Petitioners in Valis appealed the Suffolk Superior Court's judgment affirming the Final Decision in Valis.

310 CMR 10.05(7)(b)1.

The Wetlands Regulations also provide that,

> "After receipt of a request for a Superseding Determination or Order, the Department may conduct an informal meeting and may conduct an inspection of the site. In the event an inspection is conducted, all parties shall be invited in order to present any information necessary or useful to a proper and complete review of the proposed activity and its effects upon the interests identified in M.G.L. c. 131, § 40. Any party presenting information as a result of such a meeting shall provide copies to the other parties." (Emphasis supplied.)

310 CMR 10.05(7)(i).[35]

The Petitioners contend that MassDEP must review and rule on the 2012 MEPA Plan they submitted and cannot, without their permission, accept other filings into an SDA review.[36] Faneuf PFT, ¶ 32; Faneuf PFR, ¶ 18[37]; Garner PFT, ¶ 20, 28; Garner PFR, ¶ 16[38]; Pet. Closing at 10.[39] At the same time, the Petitioners' experts concede that MassDEP has broad discretion under the Wetlands Regulations to consider additional information in the course of its review.

[35] ADM and MassDEP also cite to 310 CMR 10.05(7)(g); however, this regulatory provision applies to the Department's actions when a Superseding Order of Resource Area Delineation is requested.

[36] The other plans submitted by Petitioners with the 2022 SDA request include: Ex. 1, a County of Plymouth assessor's map; Ex 2-1, a map that appears to be a rough copy of the site map submitted with ADM's 2013 RDA, and Ex. 4-1, 4-2. 4-3, 4-4, 2012 MEPA Plans; MassMapper documents which are aerial screen shots with notations added by Petitioners; screen shots of various Google Earth aerial images. See also Corcoran PFT, ¶ 10.6

[37] Mr. Faneuf testified that "[he] disagree[d] that the Department can decide to make its formal determination on such additional information instead of making its formal determination on the information contained in the Request." Faneuf PFR, ¶ 18

[38] Mr. Garner testified that "the Department cannot base its official determination on a set of plans that differ from those cited in the Request for Determination of Applicability . . . unless it has permission from the person making the request." Garner PFR, ¶ 16

[39] Petitioners also cite 310 CMR 10.05(3), but this provision addresses submissions to the Conservation Commission, not the Department.

Faneuf PFR, ¶ 18[40]; Garner PFR, ¶ 16.[41]

ADM and MassDEP contend that Petitioners' claim is without merit as a matter of law because not only does the Department have discretion to review any information it determines to be necessary, but the Wetlands Regulations specify that in exercising its discretion MassDEP may collect relevant information from any party and may include in its review a site inspection as well as information provided by others that is "necessary or useful to a proper and complete review of the proposed activity and its effects" on the relevant resource areas. See 310 CMR 10.05(7)(i); Corcoran PFT, ¶¶ 17-21; Corcoran PFR, ¶ 43.[42]

The Department contends that the Wetlands Regulations do not limit the Department's discretion in determining what information to review "to determine whether the area on which the proposed work is to be done is significant" to the interests protected by the MWPA. Mr. Corcoran testified for the Department that he routinely asks for additional information, including plans,[43] and that he also often will submit questions to the requester for response. Corcoran PFT, ¶ 17. Mr. Corcoran testified that "[a] determination would not be accurate, according to the [Wetlands] Regulations, if the Department was unable to review any information beyond the

[40]Mr. Faneuf testified that '[he does] not dispute that the Department can request or consider additional information in its process of making a determination." Faneuf PFR, ¶ 18

[41] Mr. Garner testified that "Mr. Corcoran's statements in paragraphs 56 and 57 that [Mr. Garner] stated in [his] paragraphs 20, 22, and 28 that the Department lacks discretion to review all and any relevant information is wrong [because he purportedly] did not say any such thing '[and] know[s] that the Department has such discretion." Garner PFR, ¶ 16

[42] See also Joint Motion to Dismiss, page 6; MassDEP's Memo. of Law in Support of its Direct Case at 7-8; A.D. Makepeace Co.'s Pre-Hearing Memo. of Law on the Issues for Adjud. at 14-15.

[43] The Wetlands Regulations define "Plans" as "such data, maps, engineering drawings, calculations, specifications, schedules and other materials, if any, deemed necessary by the issuing authority to describe the site and/or the work, to determine the applicability of [the MWPA] or to determine the impact of the proposed work upon the interests identified in [the MWPA]." 310 CMR 10.04: Plans (emphasis supplied).

original request." Corcoran PFT, ¶ 18. Mr. Corcoran also testified that the 2012 MEPA Plan does not contain a stamp from a Professional Engineer or Professional Land Surveyor necessary for permitting review. Corcoran PFT, ¶ 19; see 310 CMR 10.05(4)(h). As a result, they lack the detail and field delineations required for permitting review. Corcoran PFT, ¶ 19. MassDEP further contends that the Department, not the party requesting review, determines what information that it reviews is relevant to make its decision. Corcoran PFT, ¶¶ 21, 56.

I agree with ADM and MassDEP that the Wetlands Regulations do not constrain the Department's review as suggested by the Petitioners. The Petitioners acknowledge that the Department has discretion to request and review additional information, but argue, without any supporting citation, that the requester can then somehow limit the data on which the Department will base its determination. The contradiction inherent in the Petitioners' position would place the Department in the position of utilizing its limited public resources to request and review information, only to then disregard it, unless authorized by the requester to include it. Nothing in the regulations supports such a position.

It was reasonable for MassDEP to rely on the 2013 RDA Plans instead of the 2012 MEPA Plan.[44] The 2013 RDA Plan was prepared and signed by a registered professional engineer for the purpose of providing a resource area delineation for proposed work. Madden PFT, ¶¶ 14,

[44] At the site inspection conducted by MassDEP on November 3, 2022, ADM provided MassDEP with copies of the 2013 RDA Plans. Corcoran PFT, ¶ 7; Madden PFT, ¶ 23; Faneuf PFT, ¶ 32. The Petitioners contend that they did not receive a copy of the plans at the site visit. It appears from this record, however, that the Petitioners had a copy of the 2013 RDA plans because they had a copy of the 2013 RDA which they reference in the 2022 SDA request. Further, despite apparently knowing that plans were provided to MassDEP at the site visit, there is nothing in the record to indicate that the Petitioners requested copies of the plans ADM provided to MassDEP at the site visit or at any time thereafter, despite their acknowledgement that ADM provided copies to MassDEP at that time. As a result, ADM's failure to provide copies to the Petitioners at the site inspection does not appear to have deprived them of any relevant information. The Petitioners cannot now claim an unidentified harm when they knew plans had been provided, that they did not receive copies at the site inspection and did nothing to either obtain copies or to confirm that the copies provided to MassDEP at the site visit were the 2013 RDA Plans.

31; Corcoran PFT, ¶ 19; Pet. Closing Br., at 7.[45] The 2012 MEPA Plan was prepared by B+T on behalf of ADM for MEPA's "informal administrative process" rather than for permitting purposes. Minihane PFT, ¶ 14.[46] As such, the 2012 MEPA Plan did not include a field delineation of all the identified wetland resource areas. Minihane PFT, ¶ 15; Madden PFT, ¶ 29; Minihane, 30:8-10[47]; Corcoran PFT, ¶ 19. Ms. Minihane testified that in preparing the 2012 MEPA Plan delineations, B+T did not intend to depict ADM's fully designed or final Project plans. Minihane PFT, ¶ 16. She testified that some of the work depicted in the 2012 MEPA Plan delineation, including potential pump stations, were planned for later phases of the multi-phase Project. Minihane PFT, ¶ 16. In sum, it was reasonable and appropriate for MassDEP to determine that the 2013 RDA Plans were necessary to its review of the SDA request and to rely on them as the plans in the record with an actual resource area delineation that identified relevant proposed work activities.[48]

4. <u>MassDEP accurately delineated resource areas</u>

The Petitioners contend that because the 2012 MEPA Plan does not show the same resource areas as delineated on the 2013 RDA Plans, MassDEP failed to accurately delineate the

[45] The Petitioners note in their closing brief that the Department never requested that they provide plans stamped by a professional engineer or land surveyor. Pet. Closing Br. at 8; Corcoran, 34:15-35:15. Mr. Corcoran testified on cross examination that he was not aware of the Petitioners having been asked for any additional information or plans. Corcoran, 35:6-10. He also testified that he was not aware of whether Mr. Makuch asked for any more information at the site visit he attended. Corcoran, 34:15-35:5. It was reasonable for MassDEP to rely on relevant plans stamped by a professional engineer from the property owner without requesting another from the Petitioner.

[46] <u>See</u> 301 CMR 11.01(1)(b), which provides in relevant part, "MEPA review is an informal administrative process that is intended to involve any interested Agency or Person as well as the Proponent and each Participating Agency."

[47] Ms. Minihane testified on cross-examination: "They were prepared for a MEPA filing, at an appropriate level for that, with regard to existing conditions and proposed conditions." Minihane, 30:8-10.

[48] The Petitioners' contention that MassDEP must review the hypothetical work they identified and not the work identified by ADM is without merit. MassDEP is not required to utilize its limited resources to evaluate activities identified in a 2012 MEPA filing instead of the current activities proposed by a property owner.

resource areas. Faneuf PFT, ¶ 32; Garner PFT, ¶¶ 21-28; Pet. Closing Br., at 8. To support their position, the Petitioners contend that Mr. Corcoran acknowledged on cross-examination that the 2012 MEPA Plan submitted for review showed different resource areas than those shown on the 2013 RDA Plan provided by ADM. Corcoran, 36:16-43:9, 44:20-45:24.[49] The Petitioners also cite to Mr. Corcoran's admission that no BVW boundary flags were shown on the 2013 RDA Plan (other than isolated BVW),[50] and his testimony that he did not see any flags to indicate the boundary of resource areas when he attended the July 27, 2023 site visit or the November 30, 2023 site view.[51] The Petitioners contend therefore that the Department's position that it affirmed the boundaries of any resource areas at the site lacks credibility. Pet. Closing Br., at 8. These arguments do not persuade me that the Department's delineation is inaccurate.

The Department relied on the stamped 2013 RDA Plan which, unlike the 2012 MEPA Plan, includes a field delineated resource area designation and the engineering calculations associated with the construction of the proposed project. Corcoran PFT, ¶ 20. MassDEP contends that its experts twice confirmed the wetland resource area delineations depicted on the 2013 RDA Plan. First, Mr. Makuch, an environmental engineer with over 30 years of experience in the Department's wetlands program, confirmed the delineations during his site visit on November 3, 2022. Corcoran PFT, ¶¶ 7, 21. Second, Mr. Corcoran, an Environmental

[49] Mr. Corcoran testified on cross-examination that the 2012 MEPA Plan showed BLSF and Bank while the 2013 RDA Plan showed only isolated BVW. Corcoran, 39:18-40:1, 45:8-10.

[50] Corcoran, 45:8-13. (Q: "Those resource areas that are flagged [on the 2013 RDA Plan], are those all isolated vegetative wetland?" A: "Yes, I believe so." Q: "So there are no bordering vegetative wetlands that are flagged?" A: "No.")

[51] Cororan, 46:2-47:9. (Q: "At the July site visit did you observe any flags placed at the site to indicate the boundary of any resource areas?" A: "Not that I can recall.")

Analyst with four (4) years of experience confirmed the delineations during his site visit on July 27, 2023. Corcoran PFT, ¶¶ 10, 21.[52]

In sum, the Department confirmed the extent and boundaries of BVW and Riverfront Area depicted on the 2013 RDA Plan through site visits by its experts. The Petitioners did not challenge the expertise of the Department's witnesses, either in their ability to review the 2013 RDA Plan or to confirm those delineations through their in-the-field observations. The Petitioners' arguments rely on their position that the Department was required to limit its determination to the 2012 MEPA Plan because it did not authorize MassDEP to consider the 2013 RDA Plan. As discussed above, the Petitioners' argument that MassDEP must rely only on the plan they submitted is not persuasive. A preponderance of the evidence presented by the Parties at the Hearing supports a finding that MassDEP accurately delineated the wetland resource areas.

5. Petitioners Have Failed to Produce Any Evidence on Issue 2 Regarding Frog-foot Reservoir.

At the Hearing, the Petitioners did not submit any evidence addressing Issue 2.[53] The Petitioners had the burden to present credible evidence at the Hearing that Frogfoot Reservoir has riverine characteristics under the Wetlands Regulations. See 310 CMR 10.03(2),

[52] The Parties cite, In 223 Concord Road Wayland, MA, DEP Docket no. 88-830, (February 11, 1991) differently. The Petitioners contend that this decision supports their position that the type of wetland resource and their boundaries must be verified in order to determine the applicability of the exemption. ADM contends that it supports their position because the decision stated that "[u]ntil the exemption no longer applies to the fields, the Commission and the Department are without authority to determine the limits of wetland areas which may lie within the cultivated fields." While this decision preceded the current regulations, in applying the statutory exemption, it concluded that the exemption applied to cultivated fields and that until a change in use that would remove the exemption, it was premature to determine the resource area boundaries of the cultivated fields. The current regulations and Guidance are consistent with this interpretation.

[53] The only reference in the Petitioners' testimony is in Mr. Garner's PFT in which he refers to Frogfoot Reservoir as a reservoir in reference to the locations he and Mr. Faneuf visited. Garner PFT, ¶¶ 12, 27.

10.05(7)(j)3.b. Specifically, the Petitioners needed to prove by a preponderance of the credible evidence, through the sworn testimonial and documentary evidence of competent witnesses, that the Department erred in determining that Frogfoot Reservoir is a reservoir pursuant to 310 CMR 10.58(2)(a)1.g and h in issuing the SDA. The Petitioners had more than adequate prior notice of the Wetlands Regulations requiring Petitioners to support their position with sworn testimony from wetlands experts.[54] Because they presented no evidence on Issue 2, the Petitioners have failed to sustain their burden of going forward on Issue 2. In sum, I find, based upon the evidentiary record, that the Petitioners waived the issue of whether the Department accurately determined that Frogfoot Reservoir is a reservoir by failing to present any probative evidence on the issue.[55]

6. The SDA accurately determined that the proposed activities are exempt Normal Improvement of Land In Agricultural Use subject to subpart (c)1

A. Land In Agricultural Use

The Wetland Regulations define Land In Agricultural Use to mean wetland resource areas or the Buffer Zone that are presently and primarily used in agricultural production. See 310 CMR 10.04: Agriculture(a).[56] Land In Agricultural Use also includes supporting land, that is

[54] Scheduling Order, January 20, 2023; Pre-Hearing Conference Report and Order, May 15, 2023; See also 310 CMR 1.01(13)(h)1, 310 CMR 1.01(12)(f), 310 CMR 1.01(13)(h)2.

[55] See In the Matter of Ali and Elaine Bigdeliazari, OADR Docket No. WET-2016-027, Recommended Final Decision (May 8, 2018), 2018 MA ENV LEXIS 29, at 32 (Petitioners waived issue where they failed to present any probative evidence), adopted by Final Decision (May 15, 2018), 2018 MA ENV LEXIS 28.

[56] "Land In Agricultural Use means land within resource areas or the Buffer Zone presently and primarily used in producing or raising one or more of the following agricultural commodities for commercial purposes." 310 CMR 10.04: Agricultural (a). For discussion of agricultural commodities for commercial purposes see the discussion in the Idlewild, at *22.

customarily and necessarily used in agricultural production. Id.[57]; See Guidance, page 2-2. Related or supporting land includes those areas where water management activities take place. Id.[58] While land may be inactive for five consecutive years without losing its status as Land in Agricultural Use, after that time it is considered "new land" and is subject to wetland permitting. Id.[59]; See also Guidance, pages 2-2, 2-3.

The Guidance explains, and the Parties agree, that the exemption applies to the work or activity, not the land. See Guidance, Chapter 2.[60] As such, a piece of land may be in agricultural use, but a particular activity may not qualify for the exemption. Id. For an activity to claim the agricultural use exemption, it must satisfy two requirements: it must take place on "Land in Agricultural Use" and it must be "Normal Maintenance or Improvement of Land in Agricultural Use."

Contrary to the Petitioners' argument that the Guidance should not be followed,[61] the long-standing legal principle has been that agencies must follow their own internally promulgated policies.[62] "[T]he Department's own documents, such as decisions

[57] "Additionally, land in agricultural use means land within resource areas of the Buffer Zone presently and primarily used in a manner related to, and customarily and necessarily used in, producing or raising such commodities . . . ." 310 CMR 10.04: Agriculture(a).

[58] "[W]ater management projects such as reservoir, farm ponds, irrigation, systems, field ditches, cross ditches, canals/channels, grass waterways, dikes, sub-surface drainage systems, water facilities, water transport systems, and water storage systems . . . ." 310 CMR 10.04: Agriculture(a).

[59] See 310 CMR 10.04: Agriculture(a), absent other conditions that do not apply here.

[60] Faneuf PFR, ¶ 4; Garner PFR, ¶ 5; Minihane PFT, ¶¶ 26-31; Corcoran PFT, ¶ 25.

[61] "Ms. Minihane and Mr. Corcoran, in their PRT (sic) refer to the document 'Farming in Wetland Resource Areas: A Guide to Agriculture and the Wetlands Protection Act' (Revised 1996). This is a guide, not a regulation, and should not be used as a kind of way to get out of having to adhere to [310 CMR 10.04: Agriculture](c)(2)." Faneuf PFR, ¶ 13(e). Nonetheless, Mr. Faneuf's list of relevant documents reviewed in this matter includes the Guidance. Faneuf PFT, ¶ 26(k).

[62] See In the Matter of Martin Burke and Melmar Properties, LLC, OADR Docket No. WET 2021-031, Recommended Final Decision (November 28, 2023), 2023 MA ENV LEXIS 60, at 22 (MassDEP presentation

and guidance documents, would be the best evidence of its policy or practice." In the Matter of Cohasset Heights, Ltd., Docket No. 97-170, Rulings on Applicant's Witnesses and Proposed Witness Testimony (July 2, 1998), 1998 MA ENV LEXIS 819, at 18. Further, MassDEP has discretion to interpret the regulatory language, which it has done consistently over time. As long as the interpretation is not arbitrary and capricious such that it constitutes an abuse of the agency's discretion, it should be upheld.[63]

The Guidance has long been relied upon in adjudicatory proceedings to interpret the agricultural exemption. Idlewild, at *22; In the Matter of Lowell C. Spring, LLC, Docket No. WET 2014-019, Recommended Final Decision (June 30, 2015), 2015 MA ENV LEXIS 65, at 8 (regulations and Guidance explain the exemption in practice), adopted as Final Decision (July 17, 2015), 2015 MA ENV LEXIS 70; In the Matter of Gary Vecchione, Docket No. WET 2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 31 (Department's Guidance affirms the necessity of active agricultural use in order to maintain the exemption), adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77; In the

provides guidance interpreting regulatory performance standard), adopted as Final Decision (January 11, 2024), 2024 MA ENV LEXIS 3; Biogen IDEC MA, Inc. v. Treasurer & Receiver General, 454 Mass. 174, 186 (2009) (State Treasurer was bound by his predecessor Treasurer's policy because "[a]dministrative agencies must abide by their own internally promulgated policies"); In the Matter of Cohasset Heights, Ltd., Docket No. 97-170, Rulings on Applicant's Witnesses and Proposed Witness Testimony (July 2, 1998), 1998 MA ENV LEXIS 819, at 18.

[63] In the Matter of Palmer Renewable Energy, LLC, OADR Docket No. 2021-010, Recommended Final Decision (September 30, 2022), 2022 MA ENV LEXIS 39, *52-53, adopted as Final Decision (November 28, 2022), 2022 MA ENV LEXIS 35, citing, Frawley v. Police Commissioner of Cambridge, 473 Mass. 716, 728 (2016); Garrity v. Conservation Commission of Hingham, 462 Mass. 779, 792 (2012); Sierra Club v. Commissioner of Department of Environmental Management, 439 Mass. 738, 748-49 (2003); Forsyth Sch. for Dental Hygienists v. Board of Registration in Dentistry, 404 Mass. 211, 217 (1989); Contrast, In the Matter of Brockton Power Co,, LLC, OADR Docket Nos. 2011-025 & 026, Recommended Final Decision (July 29, 2016), 2016 MA ENV LEXIS 66, *19-141, adopted by MassDEP Commissioner's Interlocutory Decision (March 13, 2017), 2017 MA ENV LEXIS 21, *5-6 (no deference accorded to MassDEP's interpretation that OADR lacked jurisdiction to adjudicate federal Title VI discrimination claims arising out of MassDEP's issuance of air permit authorizing proposed natural gas power plant in environmental justice community where MassDEP lacked a formal Title VI Grievance Policy required by USEPA regulations to review such claims).

Matter of Adelaide Realty Trust, Docket No. WET-2009-065, Recommended Final Decision (April 26, 2010), 2010 MA ENV LEXIS 51, at 29 (Department's Guidance affirms the regulatory requirement that commodities be produced for commercial purpose), adopted as Final Decision (May 4, 2010), 2010 MA ENV LEXIS 100; In the Matter of Howard and Andrea Fease, Trustees of the Burdon Pond Realty Trust, Docket No. 2011-020, Recommended Final Decision (March 2, 2012), 2012 MA ENV LEXIS 45, at 16 (Department Guidance affirms the necessity of active agricultural use in order to maintain the Agricultural Use Exemption), adopted as Final Decision (March 8, 2012), 2012 MA ENV LEXIS 43.

B. Normal Improvement of Land in Agricultural Use

"Normal improvement of land in agricultural use" includes but is not limited to certain activities "when they occur on land in agricultural use or when they occur within the Buffer Zone or Bordering Land Subject to Flooding that is not land in agricultural use, when they are directly related to production or raising of the agricultural commodities referenced in 310 CMR 10.04: Agriculture(a), and when they are undertaken in such a manner as to prevent erosion and siltation of adjacent water bodies and wetlands and the activity is conducted in accordance with federal and state laws." 310 CMR 10.04: Agriculture(c) (emphasis added). Normal improvement "in all cases does not include filling or dredging a Salt Marsh." Id. "Improvement activities involve change" that "may enhance growing conditions" including "building a by-pass channel/canal to improve water quality in a cranberry system." See Guidance at 2-2.

1. Normal Improvement activities under subpart (c)1.

Included in the first category of normal improvement activities are those that occur wholly within Land in Agricultural Use. Relative to supporting water management, these activities include "the construction of by-pass canals/channels and tail water recovery systems";

subpart (c)1.e; and "the construction of water management system such as a reservoirs, farm pond, irrigation system, field ditch, cross ditch, canal/channel, grass waterway, dike, sub-surface drainage system, watering facility, water transport system, vent, or water storage system, or of a livestock access." subpart (c)1.g (emphasis supplied).

2. Normal Improvement activities under subpart (c)2

Included in the second category of normal improvement activities are those that occur "partly or entirely within a Bordering Vegetated Wetland"; in other words, wetland resource lands that are not already in agricultural production but are customarily and necessarily supporting agricultural production. Subpart (c)2 (emphasis supplied).

The Petitioners contend that the proposed tailwater recovery pond work is subject to the second category of normal improvement activities subject to subpart (c)2. Garner PFT, ¶¶ 29-33; Faneuf PFT, ¶¶ 36-37, 41, 44. The Petitioners contend that this is so because the cranberry bogs and tailwater ponds are all BVW. Faneuf PFT, ¶ 30; Garner PFT, ¶ 18. The Petitioners contend that because BVW is not expressly referenced in subpart (c)1, any Normal Improvement activity in a resource area identified as BVW is subject to the requirements of subpart (c)2. Pet. Pre-Hearing Mem. Of Law, page 11.

ADM and MassDEP contend that the Petitioners' analysis fails to take into account whether the land is Land in Agricultural Use before evaluating whether the activity is Normal Improvement. ADM Pre-Hearing Mem. Of Law, at 12; MassDEP Pre-Hearing Mem. Of Law, at 10-12. ADM and MassDEP contend that subpart (c)2 applies to land that is not already wholly in agricultural use. For the following reasons, I agree that the proposed activities are Normal Improvement that would occur on land already in agricultural production that is therefore Land in Agricultural Use and subject to the exemption under subpart (c)1.

First, that the cranberry bogs are within a wetland resource area is not in dispute. Faneuf PFT, ¶¶ 30-31; Garner PFT, ¶ 18; Minihane PFT, ¶ 27; Corcoran PFT, ¶ 28. Nor is it in dispute that the cranberry bogs are in agricultural production. Garner PFT, ¶ 12; Madden PFT, ¶ 18; Corcoran PFT, ¶ 38. Therefore, the cranberry bogs, except for Bog 2 as discussed below, are Land in Agricultural Use. The Wetlands Regulations define resource areas in agricultural production, without any exclusion of BVW, as resource areas that are "Land in Agricultural Use" and subject to the permitting exemption. As such it is necessary to start by asking whether the resource area is Land in Agricultural Use. The Petitioners neglect this first step by reading into "resource area" an exclusion of BVW which does not exist in the regulations. See 310 CMR 10.04: Agriculture(a) and subpart (c)1. The reference to BVW in subpart (c)2 must be applied after first considering whether the resource area is Land in Agricultural Use.[64]

Next, it is necessary to consider whether the proposed Normal Improvement on Land in Agricultural Use is an activity that would "occur partly or entirely within a BVW." If any part of such Normal Improvement activities would occur outside Land in Agricultural Use, and in BVW, then the conditioned exemption as set out in subpart (c)2 applies. The case studies in the Guidance illustrate the relevant distinction.[65]

Case Study 1A addresses active cranberry bogs that are resource areas in Agricultural Use, and therefore are Land In Agricultural Use. This case study discusses a dike and water

[64] See also Corcoran PFT, ¶ 34.

[65] "Farming and Wetlands: Case Studies. The Following examples highlight agricultural work (maintenance and improvement activities) in wetland resource areas. These are cases designed to help the reader understand how the agricultural revisions apply to the Wetlands Protection Act Regulations. These examples do not reflect all the possible applicably farming situations that may arise. (These case studies are from the original document and do not reflect more recent regulatory revisions.)" Guidance, App. H, Case Studies, page A-38.

control structure, regrading and replanting and states that these Normal Improvement activities are exempt from wetland permitting as long as they occur within active cranberry beds. The Guidance explains that these water management activities are Normal Improvement activities subject to subpart (c)1.[66] See Guidance, App. H, page A-40.

In contrast, Case Study 2 discusses a farm pond expansion into BVW. See Guidance, App. H, page A-41. The Guidance describes the resource area, the BVW, as land that is not already actively in use in agricultural production. The Guidance explains that the proposed expansion into BVW is subject to the requirements of subpart (c)2 because it is "outside any currently productive or related land." Id. Instead, these Normal Improvement activities are subject to the conditioned exemption in subpart (c)2 because farm pond expansion is one of the few activities necessary to support existing production that is exempt with an approved conservation plan if the BVW alteration is less than 10,000 square feet. Id.; subpart (c)2.a-d. See also Corcoran PFT, ¶ 36.

To further explain the distinction, Case Study 2A, describes a cranberry farmer adding a by-pass channel to one side of active cranberry bog, that will alter 5,000 square feet of BVW. See Guidance, App. H, page A-42. The Guidance explains that the portion of the project that is within the cranberry bog is Land in Agricultural Use and that the portion of the project that is within the BVW is not Land in Agricultural Use. The bog and the BVW in this case study are continuous BVW, but the Land in Agricultural Use exemption applies to the portion of BVW that is already in agricultural production.[67] Because the activities are necessary and related to

[66] The referenced non-water management activities are subject to 310 CMR 10.04: Agriculture(b), which is not relevant in this case.
[67] "This delineation shows that although the entire area is a continuous BVW, the Land In Agricultural Use supersedes as the jurisdictional area within the cranberry bog." Corcoran PFT, ¶ 36.

production, it is exempt under the second category of Normal Improvement activities if the work is planned and carried out under a Conservation Plan and if the BVW alteration is less than 5,000 square feet. Id.; subpart (c)2.a-d. See also Corcoran PFT, ¶ 36; SDA cover letter, page 2.

By way of further example, in Case Study 3, a farmer proposed to excavate a new irrigation pond of 15,000 square feet in BVW adjacent to crop land, therefore outside of Land in Agricultural Use. This activity would not be exempt. However, the discussion points explain that if the new irrigation pond was constructed within existing Land in Agricultural Use it would be exempt under subpart (c)1.g. In the present case, the work proposed is within the existing footprint of Land in Agricultural Use,[68] and like the new pond constructed within Land in Agricultural Use in the Case Study 3 discussion points, it is exempt from wetlands permitting pursuant to subpart (c)1.e and g. See also Corcoran PFT, ¶ 37.

In sum, it is necessary to first evaluate whether the land in question is Land in Agricultural Use. Under the regulatory exemption, a resource area, including BVW, that is in agricultural production is Land in Agricultural Use. Normal Improvement activities listed in subpart (c)1 may take place on such Land in Agricultural Use without wetlands permitting. Any resource area outside of that area is not Land in Agricultural Use; a limited category of Normal Improvement activities that are customarily and necessarily used in support of agricultural production may be subject to the exemption with added planning and alteration limitations detailed in subpart (c)2. Consequently, Normal Activities that extend from Land in Agricultural Use into BVW that is not already Land In Agricultural Use is subject to the conditions detailed in subpart (c)(2).

[68] ADM's 2023 Concept Plan, which updates the 2013 RDA Plan, proposes all activities within the original footprint. Madden PFT, ¶ ¶ 49-52; Corcoran PFT, ¶ 39.

3. The proposed Normal Improvement Activities

a. Tailwater Pond 1 (Big ADM Bog), was a cranberry bog that has been converted into a tailwater recovery pond and is currently used in the production of cranberries or associated with the production of cranberries. Conversion of this bog to a tailwater recovery pond was Normal Improvement activity of Land in Agricultural Use that was exempt from wetlands permitting pursuant to subpart (c)1.e.

b. Proposed Tailwater Pond 2 (5 acre Bog), was removed from production sometime after 2013 and is no longer Land in Agricultural Use. As a result, it is "new land" and any proposed activities thereon are subject to wetlands permitting review under the MWPA and Wetlands Regulations. 310 CMR 10.04: Agriculture(a).

c. Proposed Tailwater Pond 3 (13 acre Bog), is an active cranberry bog observed to be in multiple stages of harvest and is in or associated with the production of cranberries. Therefore, Proposed Tailwater Pond satisfies the definition of Land in Agricultural Use. Conversion of this bog to a tailwater recovery pond is a Normal Improvement activity of Land in Agricultural Use and is therefore exempt from wetlands permitting pursuant to subpart (c)1.e.

d. Frogpond Reservoir: The Petitioners presented no evidence regarding whether Frogfoot Reservoir has primarily riverine characteristics or what impact, if any, the Department's determination confirming the Riverfront Area had on whether the SDA was appropriately issued. Petitioners have failed to sustain their

burden of proof and have, therefore, waived Issue 2. See In the Matter of Robert J. Cote, OADR Docket No. WET-2017-014, Recommended Final Decision (August 9, 2018), 2018 MA ENV LEXIS 47, at 31, adopted as Final Decision (August 28, 2018), 2018 MA ENV LEXIS 46 (Petitioners waived issue by failing to present any expert testimony or documentary evidence).

e. Construction of by-pass canal(s) and construction of water management systems [canals, drainage systems, water transport system, etc.] are exempt from wetlands permitting pursuant to subpart (c)1.e and g. The Petitioners provided no testimony on this topic and have waived any objection. In the Matter of Robert J. Cote, supra.

CONCLUSION

I find that the Petitioners failed to sustain their case and that by a preponderance of the evidence presented by the Parties at the Hearing, the Department (1) acted within its discretion to base its determination relative to the proposed Normal Improvement activities on the 2013 SDA Plan filed by ADM during MassDEP's review of the Petitioners SDA request that it review the 2012 MEPA Plan; and (2) correctly concluded that the Tailwater Recovery Pond 1 and Proposed Tailwater Recovery Pond 3 did not require a wetlands permit. The proposed activities are Normal Improvement of Land in Agricultural Use subject to the exemption in subpart (c)1; (3) the agricultural use of Proposed Tailwater Pond 2, or cranberry bog 2, ceased more than 5 years ago and the bog has reverted to BVW, any future work proposed in that resource area is no longer subject to the exemption as Land in Agricultural Use and is "new land" subject to the permitting requirements of the MWPA and the Wetlands Regulations; and

(4) because the Petitioners failed to provide testimony regarding any other proposed work discussed in the 2022 SDA request, and failed to allege any facts relative to the Frogfoot Reservoir, they have waived any such claims.

Accordingly, I recommend that the Commissioner issue a Final Decision affirming the SDA with respect to Tailwater Pond 1 and Proposed Tailwater Pond 3 and excluding Proposed Tailwater Pond 2, which is no longer Land in Agricultural use and is subject to wetlands permitting review under the MWPA and Wetlands Regulations.

Date: June 25, 2024

Margaret R. Stolfa
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 her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), 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 her sole discretion, directs otherwise.

SERVICE LIST

Petitioners:
(1) Save the Pine Barrens, Inc.
(2) 10 Residents Group

Representative:
Nathaniel Stevens
Gregor McGregor
McGregor Legere & Stevens PC
15 Court Square, Suite 660
Boston, MA 02108
email: nstevens@mcgregorlaw.com
email: gimgc@mcgregorlaw.com

Property Owner:
AD Makepeace Company

Representative:
Michael K. Crossen, Esq.
Foley & Lardner, LLP
111 Huntington Ave
Boston, MA 02199
email: mcrossen@foley.com

MassDEP:
Daniel Gilmore, Wetlands Section Chief
Nathan Corcoran, Environmental Analyst
MassDEP/Southeast Regional Office
20 Riverside Drive
Lakeville, MA 02347
email: Daniel.Gilmore@mass.gov
email: Nathan.Corcoran@mass.gov

Representative:
Brett Hubbard, Esq.
Office of General Counsel
MassDEP/Office of General Counsel
100 Cambridge Street, 8th Floor
Boston, MA 02114
email: Brett.Hubbard@mass.gov
cc: Jakarta Childers, Paralegal
email: Jakarta.Childers@mass.gov

Shaun Walsh, Chief Regional Counsel
MassDEP/Southeast Regional Office
email: shaun.walsh@mass.gov

Continued on next page:

Continued from previous page:

Conservation Commission: Conservation Commission Town Plymouth
26 Court Street
Plymouth, MA 02360
rvacca@plymouth-ma.gov