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

May 9, 2019

In the Matter of
Alan Marks, Tri Street Partners, LLC

OADR Docket No. WET-2018-009
Ashland, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

The Ashland Conservation Commission ("Commission") filed this appeal to challenge the Superseding Determination of Applicability ("SDA") that the Massachusetts Department of Environmental Protection's Northeast Regional Office ("MassDEP") issued to the Applicant, Alan Marks, Tri Street Partners, LLC ("Tri Street"). The SDA, which was issued pursuant to the Wetlands Protection Act, G.L. c. 131 § 40, and the Wetlands Regulations, 310 CMR 10.00, concerns the Applicant's real property at 0 Tri Street/Charles Street, Ashland, Massachusetts ("the Property").

The SDA concluded that an unnamed stream ("Stream") at, and adjacent to, the Property was intermittent, and not perennial. A perennial stream is one that flows throughout the year, in contrast to an intermittent stream, which does not. The Commission had previously determined that the Stream was perennial, but Tri Street appealed that determination to MassDEP, resulting in the SDA.

In its appeal here, to the Office of Appeals and Dispute Resolution ("OADR"), the Commission admits that the SDA complies with the wetlands regulatory criteria for determining

when an unidentified stream is perennial, and not intermittent. MassDEP found in the SDA that the stream is intermittent because its watershed was not equal to or greater than the minimum regulatory threshold of .5 square miles, while also having a predicted flow rate greater than or equal to 0.01 cubic feet per second at the 99% flow duration using the United States Geological Survey ("USGS") StreamStats method. The Commission asserts that the minimum regulatory threshold for the watershed size conflicts with the enabling legislation, the Rivers Protection Act, Chapter 258 of the Acts of 1996 ("Rivers Act"), because the regulation results in the exclusion of some smaller streams that are in fact perennial. That, the Commission concludes, is arbitrary and capricious, inconsistent with the statutory mandate, and thus invalid. The Commission states that here, in the case of the Stream, only the flow rate should be determinative of its flow status, which would result in a finding that it is perennial.

In response, MassDEP asserts that OADR does not have jurisdiction to adjudicate the Commission's facial challenge to the regulation, contending that such a challenge can only be brought in court. As discussed below, MassDEP's contention is without merit because it goes against, indeed ignores, recent Final Decisions in MassDEP adjudicatory decisions in which it was clearly held that OADR has jurisdiction to adjudicate facial challenges to MassDEP's regulations.

In the alternative, MassDEP argues that the challenged regulation is valid and is a rational exercise of MassDEP's regulatory discretion. Tri Street concurs with MassDEP's position.

There are no genuine issues of material fact, the parties filed cross motions for summary decision, and thus the appeal is ripe for summary decision pursuant to 310 CMR 1.01(11)(f).

After reviewing the parties' pleadings, the applicable law, and the administrative record I recommend that MassDEP's Commissioner issue a Final Decision in this appeal that: (1) reiterates the holdings of the prior Final Decisions affirming that OADR has jurisdiction to adjudicate facial challenges to MassDEP's regulations; and (2) grants summary decision to MassDEP and Tri State affirming the SDA and upholding the validity of the challenged regulation here because the regulation is neither arbitrary nor capricious nor inconsistent with the statutory directive, but instead, is a reasonable regulatory provision that is in harmony with the enabling legislation. As a consequence, the Stream is intermittent because its watershed does not meet the minimum threshold of .5 square miles.

EVIDENCE

The evidence in the administrative record is derived from pre-filed written testimony and exhibits submitted by the parties. The testimony is sworn to under the penalties of perjury, and thus materially equivalent to an affidavit. Pre-filed testimony was filed on behalf of the witnesses identified below.

For the Commission, testimony from the following witness is in the administrative record:

1. Gene F. Crouch. Crouch presently serves as Chairman of the Ashland Conservation Commission, where he has served as a member since 1990. He has acquired since 1974 experience in the consulting, academic, and government arenas related to wetlands, wildlife science, and environmental permitting. He holds a BA degree in biology.

For Tri Street, testimony from the following witnesses is in the administrative record:

1. Vito Colonna. Colonna is a licensed professional engineer who is employed by Connorstone Engineering, Inc. He has over 16 years of experience in permitting related to stormwater and wetlands matters. No information was provided concerning his education.
2. Patrick C. Garner. Garner is a wetlands scientist, professional land surveyor, and hydrologist (with a specialty in streams) with more than 30 years of experience. He is a certified Massachusetts Professional Land Surveyor and Soil Evaluator. He served on the MassDEP Technical Advisory Committee that analyzed how to regulate perennial streams. He was Director of the Massachusetts Association of Conservation Commissions from 1997 to 2000 and again in 2008 and President between 2004-2006 and 2010-2012. He has taught workshops and seminars for the Association of Massachusetts Wetlands Scientists and the Massachusetts Association of Conservation Commissions. He has received a number of accolades related to his wetlands work. He has held several other leadership roles regarding wetlands and hydrology. He holds a BS degree and has taken numerous post graduate courses in wetlands, hydrology, stormwater.
3. Scott Goddard. Goddard holds BS and MS degrees in environmental engineering. He is the principal of Goddard Consulting, LLC. He has served as a full time practicing professional consultant in the field of wetlands science for over 20 years.

For MassDEP, testimony from the following witnesses is in the administrative record:

1. Thomas Maguire. Maguire has been employed with MassDEP since 1989, serving as its Regional Consistency Coordinator for the Wetlands Program since 1996. In that role he promotes consistency in wetlands regulatory decisions and provides technical

support related to hydrology, hydraulics, and stormwater management. He provided substantial technical support and analysis with respect to the Rivers Act regulatory amendments in 1997 and 2002. He holds a master's degree in environmental studies, which included work in advanced water resource engineering, wetlands science, and groundwater hydrology. For that work he modeled the extent of flood prone areas along rivers using the United States Army Corps of Engineers Hydrologic Engineering Center River Analysis System, otherwise known as HEC-RAS software. He has also performed other work, made presentations, and taught classes in fluvial hydrology, including stream flow hydraulics, stream flow measurement, and other hydrologically related matters, particularly with respect to rivers.

2. Heidi Davis. Davis has been employed with DEP in its Division of Wetlands and Waterways Program since 1989. She has substantial experience in wetlands permitting and enforcement matters. She served as the primary point person for MassDEP's Northeast Regional Office in connection with the implementation of the Rivers Protection Act. She provided substantial technical support and analysis with respect to the Rivers Act regulatory amendments in 1997 and 2002. She is a certified wetlands scientist and has a BA in environmental science.
3. Gary Bogue. Bogue has worked in the wetlands program of MassDEP's Northeast Regional Office for 18 years, handling matters with wetlands permitting and enforcement. He has worked for MassDEP in other positions from 1985 until 1998. He holds BA and MS degrees in biology.

BACKGROUND AND REGULATORY FRAMEWORK

This appeal is rooted in the Request for Determination of Applicability ("RDA") that Tri Street filed with the Commission pursuant to 310 CMR 10.05(3). That regulatory provision allows one to obtain a determination from the Commission regarding the extent to which, if at all, the Wetlands Regulations and the Wetlands Act apply to specific areas of land or work that may affect an area of land.

The Stream travels, in part, adjacent to and along the Property, continuing on from there until it meets Beaver Dam Brook. Tri Street's RDA sought a determination that the Stream was intermittent, and not perennial. The Commission determined that the Stream is perennial, i.e. that it flows throughout the year. Tri Street appealed that decision to MassDEP's Northeast Regional Office, which determined that the stream was intermittent (did not flow throughout the year). The Commission lodged an appeal of that decision here, with OADR, arguing that the stream is perennial.

Under the Wetlands Act and Regulations, a river is defined as a natural flowing body of water that empties to any ocean, lake, or other river and which flows throughout the year. G.L. c. 131 § 40 ("River"); 310 CMR 10.58(2)(a)1. Rivers include perennial streams because surface water flows within them throughout the year. Id.; 310 CMR 10.04 (definition of stream); G.L. c. 131 § 40 ("River"); see Matter of Robert Zeraschi, Docket No. 2006-115, Final Decision (December 8, 2008).

Streams are defined as "a body of running water, including brooks and creeks, which moves in a definite channel in the ground due to a hydraulic gradient, and which flows within, into or out of an Area Subject to Protection under M.G.L. c. 131 § 40. . . . Such a body of running water which does not flow throughout the year (i.e., which is intermittent) is a stream

except for that portion upgradient of all bogs, swamps, wet meadows, and marches." 310 CMR 10.04 (Stream). "Intermittent streams are not rivers . . . because surface water does not flow within them throughout the year." 310 CMR 10.58(2)(a)1.

Whether a stream is intermittent or perennial has important regulatory consequences. If a waterbody is perennial, under the Wetlands Regulations and Act it has a regulated bordering land area known as the Riverfront Area. The Riverfront Area is: "that area of land situated between a river's mean annual high-water line and a parallel line located two hundred feet away, measured outward horizontally from the river's mean annual high-water line." G.L. c. 131 § 40; 310 CMR 10.58(2)(a); 310 CMR 10.58(2)(c) ("The boundary of the Riverfront Area is a line parallel to the mean annual high water line, located at the outside edge of the riverfront area. At the point where a stream becomes perennial, the riverfront area begins at a line drawn as a semicircle with a 200 foot (25 foot in densely developed areas; 100 foot for new agriculture) radius around the point and connects to the parallel line perpendicular to the mean annual high water line which forms the outer boundary."); Matter of Skeffington, Docket No. WET 2009-049, Recommended Final Decision (March 30, 2010), adopted by Final Decision (April 9, 2010).

Riverfront Areas generally receive heightened protection which limits development under the Wetlands Act and the Regulations because of the environmental benefits they provide, including: protection of the water supply (including groundwater), flood control, storm damage prevention, protection of wildlife habitat (including fisheries and habitat within the Riverfront Area), and maintenance of water temperatures. They are critical to preventing water pollution by filtering contaminants before they reach the river and groundwater. See generally 310 CMR 10.58(1) (discussing in detail environmental benefits of the Riverfront Area).

This appeal is based upon the Commission's assertion that MassDEP's regulatory provisions for determining whether a stream is perennial conflict with the Rivers Act's mandate for MassDEP to regulate and protect rivers within the Commonwealth. In particular, the Commission contends that MassDEP's regulatory criterion for determining whether a waterbody is perennial, and not intermittent, is under-inclusive and results in the exclusion of waterbodies that are in-fact perennial but excluded by the regulatory test. Specifically, the Commission objects to the regulatory requirement that a stream exceed a certain minimum watershed size to be perennial. This, the Commission concludes, results in a regulation that "contravenes a statutory mandate" and excludes waterbodies that are in-fact perennial. Commission's Motion for Summary Decision, p. 3. The Commission believes that in this case only the "flow rate" regulatory criteria should be determinative.

The Wetlands Regulations provide the following four tests for determining whether a waterbody is perennial. First, "[a] river or stream shown as perennial on the current United States Geological Survey (USGS) or more recent map provided by the Department is perennial." 310 CMR 10.58(2)(a)1.a.

Second, "[a] river or stream shown as intermittent or not shown on the current USGS map or more recent map provided by the Department, that has a watershed size greater than or equal to one square mile, is perennial." 310 CMR 10.58(2)(a)1.b.

The third test is the one challenged by the Commission. It provides that "[a] stream shown as intermittent or not shown on the current USGS map or more recent map provided by the Department, that has a watershed size less than one square mile, is intermittent unless:

> i. The stream has a watershed size of at least 1/2 (0.50) square mile and has a predicted flow rate greater than or equal to 0.01 cubic feet per second at the 99% flow duration using the USGS

> Stream Stats method. The issuing authority shall find such streams to be perennial; or

310 CMR 10.58(2)(a)1.c.i (emphasis added). The fourth test, which is relevant but not directly at issue here, provides:

> ii. When the USGS StreamStats method cannot be used because the stream does not have a mapped and digitized centerline (including but not limited to streams located in the following basins: North Coastal Basin, Taunton Basin, Buzzards Bay Basin, Cape Cod and Islands Basin, and that portion of the South Coastal Basin that is south of the Jones River sub-basin), and the stream has a watershed size of at least 1/2 (0.50) square mile, and the surficial geology of the contributing drainage area to the stream at the project site contains 75% or more stratified drift, the issuing authority shall find such streams to be perennial. Stratified drift shall mean sand and gravel deposits that have been layered and sorted by glacial meltwater streams. Areal percentages of stratified drift may be determined using USGS surficial geologic maps, USGS Hydrological Atlases, Massachusetts Geographical Information System (MassGIS) surficial geology data layer, or other published or electronic surficial geological information from a credible source.

310 CMR 10.58(2)(a)1.c.ii. (emphasis added).

At the time these regulations were promulgated, StreamStats was a "new statistical tool developed by USGS that [could] be accessed through the USGS website." 2002 Regulatory Appendix, § A.2. StreamStats "incorporates watershed size and geology into its calculations, and can be used to analyze the probability that a stream flows on a year-round basis at a particular location." Id.

STANDARD OF REVIEW

The Adjudicatory Rules, 310 CMR 1.01(11)(f), provide for the issuance of summary decision where the pleadings together with the affidavits (or pre-filed written testimony) show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law. See Matter of Papp, Docket No. DEP-05-066,

Recommended Final Decision, (November 8, 2005), adopted by Final Decision (December 27, 2005); Matter of Lowes Home Centers Inc., Docket No. WET-09-013, Recommended Final Decision (January 23, 2009), adopted by Final Decision (February 18, 2009). A motion for summary decision in an administrative appeal is similar to a motion for summary judgment in a civil lawsuit. See Matter of Lowe's Home Centers, Inc., supra. (citing Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, 9 Mass. App. Ct. 775, 785-86 (1980)).

DISCUSSION

I. OADR Has Jurisdiction To Hear This Appeal

MassDEP asserts that OADR does not have jurisdiction to adjudicate facial challenges to MassDEP's regulations. It contends that I "should conclude as a matter of law that the Petitioners present a facial challenge to a duly promulgated regulation, which can not [sic] be reviewed by OADR, but review of which is appropriate only in court[,]" citing Borden, Inc. v. Comm'r of Public Health, 388 Mass. 707, 448 N.E.2d 367 (1983) and Leopoldstadt, Inc. v. Comm'r of Div. of Health Care Fin. and Policy, 436 Mass. 80, 762 N.E.2d 824 (2002). See MassDEP Motion for Summary Decision, pp. 5 and 16. The other parties have not taken a position on this issue. MassDEP's contention is without merit.

Two recent MassDEP adjudicatory decisions that were adopted as Final Decisions held that it is proper for OADR to resolve facial challenges to MassDEP's regulations. See Matter of Boston Environmental Corporation, OADR Docket No. 2013-041, Recommended Final Decision (February 10, 2015), adopted by Final Decision (March 19, 2015); Matter of SEMASS Partnership, OADR Docket No. 2012-015, Recommended Final Decision (June 18, 2013), adopted by Final Decision (June 24, 2013). A third, more recent decision, which was also adopted as a Final Decision, applied this precedent to state that it was appropriate to adjudicate a

facial challenge within OADR. Matter of 104 Stony Brook, LLC, Docket No. WET 2017-021, Recommended Final Decision, n. 4 (May 21, 2018), adopted by Final Decision (July 17, 2018).

In Boston Environmental Corporation both the Petitioner *and* MassDEP challenged OADR's authority to resolve a facial challenge to a regulation. In that decision, which was adopted as a Final Decision by the current MassDEP Commissioner, the Chief Presiding Officer concluded that, absent a statutory prohibition, the agency should have an opportunity to resolve, and is perfectly capable of resolving, challenges to its authority under enabling legislation. Indeed, as the regulatory body with expertise MassDEP is in a superior position to address and attempt to resolve challenges to its regulatory authority. The decision in Boston Environmental Corporation also pointed out that this is consistent with the jurisprudential underpinnings of the administrative exhaustion doctrine, although the exhaustion requirement does not apply under the present circumstances.[1] Boston Environmental Corporation, supra. (citing Gill v. Board of Registration of Psychologists, 399 Mass. 724, 728 (1987) ("where [a] contention is [made] that [a State agency] is acting beyond its jurisdiction, the [agency] should have [the] opportunity to ascertain the facts and decide the question for itself."'); see also SEMASS, supra.

MassDEP's reliance upon Borden and Leopoldstadt is misplaced. Those decisions only state that when judicial review of a challenged regulation is sought in the courts the appropriate avenue is for declaratory relief under G.L. c. 30A § 7 and G.L. c. 231A, with the appropriate standard of review, not a substantial evidence test based upon the administrative record. Borden,

[1] In this appeal MassDEP previously objected to my consideration of the facial challenge. See Department's Request to Reconsider Pre-Screening Conference Report and Order. I denied that objection, citing the recent controlling and persuasive precedent in SEMASS and Boston Environmental Corporation. See Ruling and Order Denying MassDEP's Request to Reconsider Pre-Hearing Conference Report. When MassDEP raised the same objection again in these summary decision proceedings it inexplicably failed to discuss or cite SEMASS and Boston Environmental Corporation, the two decisions I previously relied on in denying MassDEP's objection to consideration of the facial challenge. Instead, it cited two of the same decisions that I had previously considered, Borden, supra. and Leopoldstadt, supra., and rejected when I denied the Motion to Reconsider Pre-Screening Conference Report and Order.

supra; Leopoldstadt, supra. The Massachusetts Administrative Procedure Act does not dictate otherwise. It only provides that "[u]nless an exclusive mode of review is provided by law, judicial review of any regulation . . . may be had through an action for declaratory relief" pursuant to G.L. c. 231A. G.L. c. 30A, § 7 (emphasis added). The standard of review for a facial challenge is of course different; it is a legal determination guided by the principles discussed below, not a decision based upon a preponderance of the evidence or whether there is substantial evidence in the record. Id.; infra. at pp. 15, 19-21, 26-29.

II. The Regulation Is Valid

After finding that OADR has jurisdiction to hear this appeal, I turn to the merits of the Commission's facial challenge.

The Rivers Act. The Commission's facial challenge to the regulations is grounded in the Rivers Protection Act. In 1996, the Wetlands Act, G.L. c. 131 § 40, was amended by the Rivers Protection Act, Chapter 258 of the Acts of 1996 ("Rivers Act"). The Rivers Act defined river as "a natural flowing body of water that empties to any ocean, lake, or other river and which flows throughout the year." Rivers Act, § 18; see also 310 CMR 10.04 (River). The Rivers Act created the Riverfront Area as a new protected resource area under the Wetlands Act. See 310 CMR 10.02(1); 310 CMR 10.58. When it enacted the Rivers Act the legislature stated that its purposes are "to protect the private or public water supply; to protect the groundwater; to provide flood control; to prevent storm damage; to prevent pollution; to protect land containing shellfish; to protect wildlife habitat; and to protect fisheries." Rivers Act, § 1. The Rivers Act is not intended to diminish the protections and exemptions provided in G.L. c. 131 § 40. Rivers Act, § 1.

At the same time it enacted the Rivers Act, the legislature also delegated to MassDEP the obligation to "adopt such regulations as are deemed necessary to carry out the purposes of this act." Rivers Act, § 4 (emphasis added). The legislature also required that the regulations adopted by MassDEP "shall be filed with the joint committee on natural resources and agriculture sixty days prior to their effective date . . . ." Rivers Act, § 4. The Rivers Act further required MassDEP to create a "riverfront advisory committee for the purpose of participating in the review of the rules and regulations promulgated pursuant to the provisions of §4 of the th[e] act." The Act prescribed the committee's membership. Rivers Act, § 11.

MassDEP's Regulatory Promulgation Process. MassDEP followed the legislative directive and amended the Wetlands Regulations with: 310 CMR 10.58, which regulates the Riverfront Area created by the Rivers Act. See Preface: 1997 Regulatory Revisions for the Rivers Protection Act Amendments to the Wetlands Protection Act (summarizing the regulations and the regulatory development process).

The regulations were first promulgated on July 25, 1997, and became effective October 6, 1997. Rivers Act, § 4. In the Preface to the Riverfront Area regulations, MassDEP stated that while it was drafting and promulgating the regulations in 1997 it "received comments expressing many conflicting views of the legislative intent behind the Rivers Protection Act. [MassDEP stated that] [t]he regulations are designed to implement the statute by providing clear procedures and substantive criteria to guide applicants, conservation commissions, and Department staff from project design through the decision making process. The new provisions governing riverfront areas are located at 310 CMR 10.58; the variance provisions formerly at 310 CMR 10.58 and 10.36 have been moved to 310 CMR 10.05 (10)." 1997 Preface, § III. MassDEP added that "[a]lthough Massachusetts has almost 9000 miles of rivers, the riverfront area is less

than one percent of the state's total acreage. The purpose of the Rivers Protection Act is to preserve the natural integrity of rivers and adjacent land for the important values these areas provide to all citizens of the Commonwealth." 1997 Preface, § I.

Here, the Commission challenges the 2002 amendments to 310 CMR 10.58 that resulted in the allegedly invalid watershed requirement. For those 2002 amendments MassDEP also engaged in a robust regulatory development process. Maguire PFT[2], p. 4; Garner Rebuttal PFT, pp. 2-4. The 2002 regulatory amendment process included a Technical Advisory Committee that was comprised of environmental groups, commercial and residential building development groups, members of the scientific community, and representatives of USGS and Massachusetts state agencies. Davis PFT, ¶ 13; Maguire PFT, p. 4, Ex. 5 (listing MassDEP Technical Advisory Committee members). The 2002 Technical Advisory Committee met at least 14 times from 1999 to 2002. Maguire PFT, p. 4; Davis PFT, ¶ 14.

MassDEP also held four public hearings throughout the Commonwealth. Maguire PFT, pp. 6-7. All written and oral comments from those public hearings were distributed to the members of the Technical Advisory Committee. Maguire PFT, p. 7. The Ashland Conservation Commission provided no public comments. The Technical Advisory Committee recommended changes based on the public comments, and MassDEP accepted those changes and the Committee's final recommendations. The 2002 amendments were promulgated on December 20, 2002. Maguire PFT, p. 7.

Application of the Regulatory Exemption. At first blush, the resolution of this appeal would seem to be straightforward: MassDEP followed the broad legislative directive and process to promulgate regulations to implement the "purposes" of the Rivers Protection Act. Ordinarily, and absent an ambiguity, the plain meaning of those regulations is controlling. Matter of

[2] "PFT" is the acronym for pre-filed testimony.

Sullivan, Docket No. WET 2011-013, Recommended Final Decision (May 31, 2011), adopted by Final Decision (June 22, 2011); Matter of Milton, Docket No. WET 2011-030, Recommended Final Decision (March 29, 2012), adopted by Final Decision (April 6, 2012).

The Commission contends, however, that to follow that path in this appeal would be a mistake. It argues that while the regulation at issue may be unambiguous, it is inconsistent with the enabling legislation—the Rivers Act. Thus, the Commission concludes that the applicable regulatory provision is invalid. Given this challenge to the validity of the regulation, I turn to the two-part framework used to determine whether regulations promulgated by an agency are valid.

The first part of the framework is to employ the "conventional rules of statutory interpretation" to determine "whether the Legislature has spoken with certainty on the topic in question." Goldberg v. Board of Health of Granby, 444 Mass. 627, 632-633, 830 N.E.2d 207 (2005); see Mass. Teachers' Ret. Sys. V. Contributory Ret. Appeal Bd., 466 Mass. 292, 994 N.E.2d 355, 362 (2013). When the court determines that a statute is unambiguous the court gives effect to the legislature's intent. Navy Yard Four Associates, LLC v. Department of Environmental Protection, 88 Mass. App. Ct. 213, 37 N.E.3d 46 (2015).

Second, if "the Legislature has not directly addressed the issue and the statute is capable of more than one rational interpretation, [the tribunal must] proceed to determine whether the agency's interpretation may be reconciled with the governing legislation". Biogen IDEC MA, Inc. v. Treasurer & Receiver Gen., 454 Mass. 174, 187, 908 N.E.2d 740 (2009) (quotation and citation omitted); Goldberg, 908 N.E.2d at 213. The "second stage of [the] analysis requires 'substantial deference' to the expertise and statutory 'interpretation of [the] agency charged with primary responsibility' for administering a statute." Goldberg, 908 N.E.2d at 213. "At the second stage, regulations 'are not to be declared void unless their provisions cannot by any

reasonable construction be interpreted in harmony with the legislative mandate.'" Goldberg, 908 N.E.2d at 213 (emphasis added) (quoting Berrios v. Department of Pub. Welfare, 411 Mass. 587, 595, 583 N.E.2d 856 (1992)).

Statutory Ambiguity and Deference. Here, the legislature did *not* speak unequivocally and with "certainty" on how to determine which waterbodies are perennial and thus covered by Riverfront Area protections under 310 CMR 10.58, and which are intermittent. Although the legislature defined a river in the Rivers Act as "a natural flowing body of water that empties to any ocean, lake, or other river and which flows throughout the year," it left undefined what it means for a waterbody to "flow throughout the year." MassDEP, the agency with environmental expertise that was charged with implementing those terms, concluded that they were ambiguous and in need of regulatory refinement for purposes of implementation. Maguire PFT, p. 4. There are several bases for the conclusion that what it means to "flow throughout the year" is ambiguous and in need of clarification.

First, what amounts to "flow" in a waterbody "throughout the year" is not commonly understood nor readily capable of proof. Instead, it is generally a matter of scientific judgment and expertise. See e.g., Matter of Soursourian, Docket No. WET 2013-028, Recommended Final Decision (June 13, 2014), adopted by Final Decision (June 19, 2014).

In fact, in order for water in a waterbody to be considered flowing it must be as a result of hydraulic gradient. See Matter of Pyramid Mall of Hadley Newco, LLC, Docket No. 2006-49, Final Decision (September 24, 2010). Water that moves without hydraulic gradient is not considered to be flowing. Id.

Moreover, water in a waterbody may properly be considered to be flowing even though segments within that waterbody contain pockets of flowing water that are separated by pockets

or pools that are not flowing. Matter of Pyramid Mall, supra. Indeed, the Wetlands Regulations necessarily expound on the concept of flow in this context, stating: "When surface water is not flowing within an intermittent stream, it may remain in isolated pools or it may be absent. When surface water is present in contiguous and connected pool/riffle systems, it shall be determined to be flowing." 310 CMR 10.58(2)(a)1 (emphasis added).

Further, along the entire course of a waterbody it may change from being intermittent to perennial, and vice versa. 310 CMR 10.58(2)(a)1. Indeed, "[r]ivers begin at the point an intermittent stream becomes perennial or at the point a perennial stream flows from a spring, pond, or lake. Downstream of the first point of perennial flow, a stream normally remains a river except where interrupted by a lake or pond. Upstream of the first point of perennial flow, a stream is normally intermittent." 310 CMR 10.58(2)(a)1. Several waterbodies have been determined to change from intermittent to perennial, and vice versa, along their course. See Matter of Martha Jean Eakin, Docket No. 2002-013, Recommended Final Decision, (April 12, 2005), adopted by Final Decision (June 8, 2005) (a stream may vary from being perennial to intermittent and vice versa); Matter of Robert Winter, Docket No. 2002-010, Recommended Final Decision, (May 15, 2003), adopted by Final Decision (August 11, 2003) (same).

The regulations further clarify other areas that are ambiguous for purposes of what it means to flow throughout the year. For example, rivers "include perennial streams that cease to flow during periods of extended drought," as defined in the regulation. 310 CMR 10.58(2)(a)1.f.

There are other factors that may superficially indicate to a layman that a stream is not flowing, even though from a hydrological perspective it does, or should, flow throughout the year, and thus is technically perennial. For example, "[r]ivers and streams that are perennial under natural conditions but are significantly affected by drawdown from withdrawals of water

supply wells, direct withdrawals, impoundments, or other human-made flow reductions or diversions shall be considered perennial." 310 CMR 10.58(2)(a)1.f.

And there are other unusual flow characteristics that may affect the perennial determination. For example, "[a] water body identified as a lake, pond, or reservoir on the current USGS map or more recent map provided by the Department, is a lake or pond, unless the issuing authority determines that the water body has primarily riverine characteristics. When a water body is not identified as a lake, pond, or reservoir on the current USGS map or more recent map provided by the Department, the water body is a river if it has primarily riverine characteristics. Riverine characteristics may include, but are not limited to, unidirectional flow that can be visually observed or measured in the field. In addition, rivers are characterized by horizontal zonation as opposed to the vertical stratification that is typically associated with lakes and ponds. Great Ponds (i.e., any pond which contained more than ten acres in its natural state, as calculated based on the surface area of lands lying below the natural high water mark; a list is available from the Department) are never rivers." 310 CMR 10.58(2)(a)1.h.

Direct Observations. Given the above complications and other hurdles to determining whether a stream flows throughout the year, in the Appendix to the 2002 Regulations MassDEP explained that its Technical Advisory Committee found numerous difficulties with relying upon field observations to predict whether a stream is likely to flow throughout the year. In addition to the practical difficulties of making such observations for the entire course of the stream MassDEP explained that atypical variations in the weather, in addition to the factors discussed above, could influence the recorded observations of flow for that time period; thus, long-term records of observations are necessary. As MassDEP explained, "observations made during this period may not be definitive when the conditions are unusually wet or unusually dry compared to

long-term records." 2002 Regulatory Appendix, § A.1. In fact, an intermittent stream does not have to become dry every year to be declared intermittent. They may become dry on less frequent basis, such as "every third year, or even less frequently." Garner Rebuttal PFT, p. 6. As MassDEP elaborated, "proving that a stream is perennial by direct observation requires multiple observations made in the late summer and early fall months over many years . . . ." 2002 Regulatory Appendix, § A.1 (emphasis added). And that determination must be made along the entire course of the river because flow may vary from one stream segment to another. MassDEP also noted that direct observations over many years is also "unworkable" because of time constraints faced by homeowners, builders, and others when trying to have a project permitted by the regulatory agency. 2002 Appendix, § 10b; Matter of Williamson-Barberry Homes, LLC, Docket WET 2014-014, Recommended Final Decision (March 27, 2015), adopted by Corrected Final Decision (June 1, 2015) ("Unfortunately, proving that a stream is perennial by direct observation requires multiple observations made in the late summer and early fall months over many years, and the Department could not craft a workable provision to accommodate those timeframes. . . . Thus, the absence of a methodology in the regulations to classify a stream as perennial based on field indicators or observations was intentional, and is not susceptible to a contrary interpretation.").

Reconciliation of Regulation with the Rivers Act. Given the ambiguity with how to determine a stream flows throughout the entire year, the second stage of the framework requires me to determine "whether the agency's interpretation may be reconciled with the governing legislation". Biogen IDEC MA, Inc. v. Treasurer & Receiver Gen., 454 Mass. 174, 187, 908 N.E.2d 740 (2009) (quotation and citation omitted); Goldberg, 908 N.E.2d at 213. There must be "substantial deference" to MassDEP's interpretation and the regulations 'are not to be

declared void unless their provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate.'" Goldberg, 908 N.E.2d at 213 (quoting Berrios v. Department of Pub. Welfare, 411 Mass. 587, 595, 583 N.E.2d 856 (1992)).

The *ultimate question* is whether the policy embodied by the agency's interpretation is "reasonable." Biogen, 454 Mass. at 187. Although an agency may only exercise "the powers and duties expressly conferred upon it by statute and such as are reasonably necessary to carry out its mission . . . a plaintiff challenging the validity of an agency's regulations has a formidable burden." Biogen, 454 Mass. at 187 (internal citation omitted).

There are several guideposts—*all* applicable here—to consider in determining whether MassDEP's regulation is reasonable. "In examining the regulatory response to statutory silence or ambiguity, it is unimportant whether [a court] would have come to the same interpretation of the statute as the agency." Goldberg, 908 N.E.2d at 213 (emphasis added). "Statutory silence, like statutory ambiguity, often requires that an agency give clarity to an issue necessarily implicated by the statute but either not addressed by the Legislature or delegated to the superior expertise of agency administrators." Goldberg, 908 N.E.2d at 214. "Administrative agencies are more suited to the task of clarifying the Legislature's plan through specific rules, and more able to provide for 'consistency and coherence,' than are courts. . . . [Judicial] deference is especially appropriate where[, as here,] the statutes in question involve an explicit, broad grant of rule-making authority." Goldberg, 908 N.E.2d at 214.

Additional deference to regulations as being within the legislative intent is accorded when the legislature retains, as here, the opportunity to review the regulations but does not exercise its authority to challenge and alter those regulations. Navy Yard Four, 37 N.E.3d at 55; MRI Assocs., Inc. v. Department of Pub. Health, 70 Mass. App. Ct. 337, 342 n.8, 874 N.E.2d

419 (2007). Further, deference is provided when, as here, "the record indicates that [the regulation] was the product of 'thoughtful, reasoned deliberation,' and not 'rash, uninformed rule making . . . .'" Mass. Teachers' Ret. Sys. V. Contributory Ret. Appeal Bd., 994 N.E.2d at 362.

All of the preceding guideposts militate in favor of upholding MassDEP's challenged regulation: The legislature specifically required MassDEP to draft implementing regulations; MassDEP drafted those regulations; MassDEP utilized a rigorous public deliberative process; the legislature reserved an opportunity to review the regulations prior to becoming effective; and the legislature left the regulations unchanged, indicating its assent. This properly promulgated regulation is "not to be declared void unless [its] provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate." Dowell v. Commissioner of Transitional Assistance, 424 Mass. 610, 613 (1997); Consolidated Cigar Corp. v. Department of Public Health, 372 Mass. 844, 850 (1977) (agency has considerable leeway in interpreting a statute is charged with enforcing).

Here, the 2002 amendment to the regulation was the product of extensive technical deliberations among MassDEP, a diverse group of individuals in the Technical Advisory Committee, and the public. The 2002 Advisory Committee extensively discussed criteria to determine whether a stream "flowed throughout the year." Maguire PFT, pp. 4-5, ¶¶ 15-16, Ex. 7. During the 14 meetings that were held over two and one-half years the Technical Advisory Committee deliberations were "thoughtful, diligent, thorough, and complete." Davis PFT, ¶ 24. Some of the issues the Committee "struggled with included direct observation to prove that a stream is perennial [as discussed above], continued reliance on the USGS topographic maps, and development of a perennial stream base map . . . ." Davis PFT, ¶ 24.

USGS's and MassDEP's analyses of stream data and other research demonstrated drainage area size (watershed) and the presence of stratified drift as the most significant variables in determining whether a stream is perennial. Davis PFT, ¶ 17. There was a direct correlation between flow and watershed size: the larger the watershed size the more likely the stream flows throughout the year, and the smaller the watershed size the less likely the stream flows throughout the year. Maguire PFT, p. 5; 2002 Appendix, § 10b. Also, the more stratified drift in an area, the more likely a stream flows throughout the year. Stratefied drift refers to layers of sand and gravel deposited by glaciers. Davis PFT, ¶ 17; Maguire PFT, p. 5; 310 CMR 10.58(2)(a)1.c. Sand and gravel is highly permeable and thus water can infiltrate more easily to contribute to stream flows. Davis PFT, ¶ 17.

Specifically, statistical review of USGS data showed a strong correlation between a watershed size of greater than one square mile and streams that flowed 99% of the time.[3] Davis PFT, ¶ 17. Even though a one square mile watershed area was representative of most of the state in terms of the watershed threshold below which streams were intermittent, some streams in the Southeast Region under that threshold were perennial because of the large amount of stratified drift in the drainage area in the Southeast Region. Davis PFT, ¶ 23. For the two preceding reasons, MassDEP promulgated the second and third tests for when a stream is perennial: (1) all streams with watersheds greater than one square mile are perennial and (2) those streams with more than 75% stratified drift, in addition to one-half square mile watershed and inapplicability of USGS StreamStats, are perennial. Maguire PFT, p. 5; 310 CMR 10.58(2)(a)1.b and 310 CMR 10.58(2)(a)1.c.ii. Given the reliability of the USGS data, MassDEP also determined that it was appropriate to rely upon the USGS maps perennial stream designation because they are based

[3] The 99% flow duration represented approximately 361 days a year, which was the closest approximation available to flowing throughout the year (99% of 365 days equals 361.35 days). Davis PFT, ¶ 19.

upon sound science. 310 CMR 10.58(2)(a)1.a. Thus, according to the first test, a stream shown on the current or more recent USGS map as perennial is perennial, and any stream not shown or shown as intermittent is intermittent unless it meets the two above tests, or the test at issue, which is discussed below. Maguire PFT, p. 5.

In contrast to the above, and specifically for the issue here, streams with drainage area of less than .5 square miles and insignificant stratified drift were almost always intermittent. Davis PFT, ¶ 18. In fact, the research showed that 92.3% of the streams with watershed size less than .5 square miles "rarely" flowed throughout the year, i.e., had a negative flow. Maguire PFT, p. 6; Davis PFT, ¶ 22. Negative flow is any value below .01 cubic feet per second at the 99 flow duration percentile. Davis PFT, ¶ 22. Positive flow is any value that is at least .01 cfs at the 99 flow duration percentile. Davis PFT, ¶ 22. The rate of flow, .01 cubic feet per second represented the lowest flow rate which could reasonably be measured.[4] Maguire PFT, p. 6.

Given this evidence, the Technical Advisory Committee determined that for streams not shown as intermittent or not shown on the current USGS map, the streams should be determined *not* to flow throughout the year *except* when the watershed is at least .5 square miles and has a predicted flow rate greater than or equal to 0.01 cubic feet per second at the 99% flow duration using the USGS StreamStats methodology. Maguire PFT, p. 6. That is because the research revealed that streams with a watershed size as small as .5 square miles in size could flow throughout the year when other factors, such as steeper mean basin slope and higher percentage of stratified drifter was present. Maguire PFT, p. 6. As a consequence, the Technical Advisory Committee decided to use the more conservative .5 square miles as a threshold, but added the

[4] The 99% flow duration was chosen because it represents flow for 361 days of the year and is the closest statistical representation to a year. The flow rate of .01 cubic feet per second was selected because it represents the lowest flow rate which could reasonably be measured. StreamStats modelling software was selected for use because it provides an objective, automated method to delineate and measure the size of a watershed and provide estimates of streamflow. Maguire PFT, p. 9.

other criteria for positive flow in order to more precisely distinguish between perennial and intermittent streams. Garner Rebuttal PFT, pp. 3-4 "In the Committee's view, use of the .5 square mile threshold accurately determined the vast majority of perennial streams across the state." Davis PFT, ¶ 23.

MassDEP noted that the then-current USGS maps were under-inclusive, but that "USGS continues to refine its statistical methodology to better predict the probability of a stream flowing year-round. Once completed, the Department plans to use this information to produce stream maps that will eliminate reliance on the USGS topographic maps. Since this process will take several years, the regulatory changes described herein are necessary to address perennial versus intermittent determinations during the interim." 2002 Appendix, § 10b.

In promulgating the 2002 amendments, MassDEP also considered the fact that even though intermittent streams do not have Riverfront Areas, they nevertheless receive protection under the Wetlands Act and Regulations because they include other Wetlands Resource Areas: Bank, 310 CMR 10.54, Land Under Water, 310 CMR 10.56, and Land Subject to Flooding, 310 CMR 10.57. Also, the land area within 100 feet of the Bank is protected as a Buffer Zone to the Bank. 310 CMR 10.02 and 10.54. Further, intermittent streams are often associated with Bordering Vegetated Wetlands, which receive additional resource area protections. 310 CMR 10.55. Thus, even if some smaller streams are not encompassed by the .5 square mile watershed and predicted flow rate greater than or equal to 0.01 cubic feet per second at the 99% flow duration, they still receive protection as intermittent streams.

The Commission's Arguments. The Commission argues that MassDEP erred in amending the 1997 regulation to result in the allegedly invalid 2002 regulation. The Commission asserts that the 1997 regulation was in "harmony with the Act and its legislative

mandate to broadly and expansively protect rivers." Commission Motion for Summary Decision, p. 2. The Commission asserts that the 1997 regulation allowed an "evidence based approach" that focused on other factors to more broadly capture perennial streams. Id. at pp. 9-10. The Commission believes that the 2002 amendment for a watershed lower-limit threshold of .5 square miles as "an ultimate and unrebuttable criterion results in flawed and artificial under-inclusion which while perhaps practical from an administrative and permitting perspective, is wholly divergent from the intent and purpose of the Act and the 1997 Regulations." Id. at pp. 2-3. The Commission asserts that the 2002 amendments "arbitrarily exclude rivers that are explicitly protected by the Act." Id. at p. 3. The Commission adds that the 2002 amendments were "interim" because it was understood that this "defect" was in "need of curing." Id. at p. 3. It claims that the "intent was to create official maps that cured the discord created by relying exclusively on USGS maps, watershed, and flow rate." Id. at p. 3.

The Commission is correct that the 1997 regulation included a broader regulatory approach, but that does not render the 2002 amendment invalid. In contrast to the clear, objective criteria adopted by the 2002 amendments, the 1997 regulatory provision included a significantly *larger* minimum watershed size and identified the criteria for whether a waterbody was a river as: "evidence of the presence of aquatic macroinvertebrate species which require perennial flows; evidence of stream order of two or greater; presence of a USGS stream gauge at or upstream of the project location; a watershed size of greater than *three* square miles in any basin except Cape Cod, Taunton, South Coastal, Buzzards Bay, and the Islands, or other evidence." Maguire PFT, pp. 2-3, Ex. 4 (1997 version of 310 CMR 10.58(2)(a)1.a.i.).

There were several problems with the 1997 regulation. The broad, general 1997 regulatory criteria: (1) "[did] not clearly distinguish perennial rivers . . . from intermittent

streams . . . ."; (2) led to numerous appeals; and (3) had an insignificant nexus to whether a stream was perennial. 2002 Appendix, § 10b; Maguire PFT, pp. 3, 8; Davis PFT, ¶ 11; see e.g. Matter of Town of Easton (Ames Free Library), Docket No. 2000-148, Final Decision (2003). For example, the "presence or absence of aquatic macroinvertebrates had no correlation with whether streams flow throughout the year." Maguire PFT, p. 8. Also, "stream order of 2 or greater was not determinative since the USGS maps sometimes do not depict streams in small watersheds." Id. The presence of a USGS stream gauge had no correlation because those gauges recorded no flow. Id. Last, it was believed that the watershed threshold was *too high* because flow throughout the year was observed in watersheds smaller than 3 square miles. Maguire PFT, p. 8.

As a consequence of the above, MassDEP "revisit[ed]" the definition of river in the 1997 regulations in order "to ensure that rivers that 'flow throughout the year' were being defined" in a manner consistent with the Rivers Act. Maguire PFT, pp. 3, 8. The resulting 2002 regulatory promulgation process discussed above therefore led to the removal of the criteria concerning aquatic macroinvertebrates, stream order, and stream gauge from the 2002 regulations. Also, watershed size was reduced from 3 square miles to .5 square miles. Maguire PFT, pp. 8-9. The 2002 amendments were supported by several rational bases to change the 1997 regulation to include clear, objective scientific criteria: watershed size and flow rate.

The Commission's arguments are ironically undermined by the comments that the Commission's Chairman and expert witness, Crouch, co-authored in 1997, critiquing the proposed 1997 regulations. In that context, when Crouch commented from a regulatory perspective, as opposed to viewing the regulations in isolation for a particular waterbody, he was critical of the 1997 Regulations, stating that he:

> strongly urge[d] the DEP to reconsider many of the provisions of the proposed regulations, and produce a revised regulatory program that accomplishes the intent of the Act – that is, to provide enhanced protection for surface waters – and that can be fairly administered without causing undue financial hardship to applicants.
>
> . . .
>
> I recently attended a hearing at which 90 minutes of testimony was presented on whether a ditch in a golf course was a "river." We will see more of this! A more supportable and consistent definition, such as the size of the watershed, would lead to less controversy and more productive use of the Commission's time. The current definition includes any perennial stream, whether 2 feet or 200 feet wide. I do not believe that the legislature intended to create a 200 foot protected zone around a 2 foot wide stream!

Maguire PFT, p. 2, Ex. 3, pp. 1, 2 (definition of river, emphasis added). In response to this and other comments and information, as discussed above, watershed size was included as a factor to consider. Maguire PFT, p. 2.

It is evident that MassDEP engaged in a thorough, thoughtful, rational approach to regulating perennial streams in the 2002 amendments. That the regulation is not perfect because it is under-inclusive when applied in particular instances to streams that may be perennial but do not meet the regulatory test does not render the regulation arbitrary and invalid. As the Supreme Judicial Court stated in American Family Life Assurance Co. v. Commissioner of Ins., 388 Mass. 468, 477-478, 446 N.E.2d 1061, 1067 (1983):

> It is not our function to consider the expediency of an enactment or the wisdom of its provisions." Commonwealth v. Henry's Drywall Co., 366 Mass. 539, 544 (1974). Accordingly, a statute or a regulation is not invalid "merely because the evidence of record suggests that the *'ultimate efficacy' of achieving the statutory purpose is in question, or that the means to achieve the statutory end is rough, illogical or not the best available . . . .*" Shell Oil Co. v. Revere, 383 Mass. 682, 687 (1981). Rather, a plaintiff challenging a regulation as arbitrary and capricious bears the heavy burden of "proving on the record *'the absence of any conceivable* ground upon which [the rule] may be upheld.'" Purity Supreme,

> Inc. v. Attorney Gen., supra at 776, quoting Colella v. State Racing Comm'n, 360 Mass. 152, 156 (1971).

The Court emphasized:

> [J]udicial review of regulations should not become a de novo trial in which the trial judge decides whether a challenged regulation is reasonable based on the evidence presented. Absent some other illegality, the scope of review is limited to the question whether the plaintiff has established that there is *no conceivable basis* on which the agency could have relied, *not whether the plaintiff has shown that the regulations are not supported by other evidence*, no matter how substantial. This deference is necessary to ensure that courts do not interfere with the separation of powers between the Legislature and the judiciary by substituting their judgment for that of the agency charged with the administration of the legislative mandate.

American Family Life, 388 Mass. at 468, 446 N.E.2d at 1068.

The Commission has not met this required showing: it has not shown that "there is no conceivable basis" on which MassDEP relied. In fact, as discussed above, the regulation is supported by a sound rational, scientific basis that resulted from a robust deliberative process. See e.g. Maguire PFT, Davis PFT, Garner PFT, Goddard PFT, Colonna PFT.

The Supreme Judicial Court has also been clear that a regulation is not invalid because it does not perfectly capture or precisely include all that was intended to be regulated. Dowell v. Commissioner of Transitional Assistance, 424 Mass. 610, 615, 677 N.E.2d 213, 217 (1997) ("Although this may be true with respect to those families, we reiterate that to succeed on a facial challenge the plaintiffs must show not that the regulation is unfair as to some families, but rather that the regulation could never be applied on a 'fair, just and equitable basis.'"). Some regulations may not coincide precisely with the intended objective because from a global regulatory perspective that simply is not feasible. As the Court has stated: "It is within the discretion of an agency to determine priorities for allocation of resources among services where

the enabling statute does not itself clearly establish particular priorities." Dowell, 424 Mass. at 615-16, 677 N.E.2d at 217 ("In light of the department's statutory obligation to administer EA within its budgetary constraints, judicial intrusion which directs the department to allocate limited EA resources in designated ways would be improper.") (quoting Williams v. Secretary of Human Servs., 414 Mass. 551, 567, 609 N.E.2d 447 (1993)).

Thus, it is not enough for the Commission to assert that the regulatory test might not capture all of the perennial streams in the Commonwealth. See e.g. Rock v. Massachusetts Comm'n Against Discrimination, 384 Mass. 198, 208, 424 N.E.2d 244 (1981) ("We realize that applications of the regulation to particular facts may prove difficult but that issue is not before us."). The Supreme Judicial Court has been clear that simply because other "approaches to the issue may exist does not invalidate the approach adopted by the department . . . ." City of Salem v. Bureau of Special Educ. Appeals of the Dep't of Educ., 444 Mass. 476, 483, 829 N.E.2d 641, 646 (2005).

The Commission has not shown that the regulation is invalid, and thus it is applicable here. The Commission admits the watershed is less than .5 square miles. Crouch PFT, pp. 3-4. Thus, even though the Stream has a projected flow at the 99th percentile of at least .01 cfs, the stream fails to meet both the criteria that MassDEP deemed necessary from a regulatory perspective to find that the stream is perennial. Maguire PFT, pp. 10-11. The stream is therefore intermittent.[5]

[5] Because stream observations are not relevant under the current regulatory regime to determining whether an intermittent stream is perennial, I excluded and prohibited the submission of such evidence. See Ruling and Order Partially Allowing Tri Street's Motion to Add Witnesses. As a consequence the observational evidence submitted by the Commission and the other parties is irrelevant and stricken from the administrative record. As a side note, however, I discuss the Commission's filing of such evidence to demonstrate the inherent regulatory flaws with its approach: In attempting to show that the stream is in fact perennial and not intermittent, the Commission provided purported evidence of stream flow. Crouch PFT, p. 5-6. But the information provided is only for a limited period of time (2 months) in a single year from a single location. Data was compared to mean rainfall for a limited time period, 2017-2018. Crouch acknowledges, the year of observations (2018) was a "slightly wet year" with 7.06

For all the above reasons, the regulation is not invalid and the stream is intermittent.

CONCLUSION

For all the above reasons, I recommend that MassDEP's Commissioner issue a Final Decision in this appeal that: (1) reiterates the holdings of the prior Final Decisions affirming that OADR has jurisdiction to adjudicate facial challenges to MassDEP's regulations; and (2) grants summary decision to MassDEP and Tri State affirming the SDA and upholding the validity of the challenged regulation here because the regulation is neither arbitrary nor capricious nor inconsistent with the statutory directive, but instead, is a reasonable regulatory provision that is in harmony with the Wetlands Protection Act. As a consequence, the Stream is intermittent because it does not meet the minimum watershed requirement of .5 square miles.

NOTICE- RECOMMENDED FINAL DECISION

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

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inches of rainfall greater than normal. Crouch PFT, p. 7; Colonna PFT, ¶¶ 6-16; Goddard PFT. But as Colonna, Tri-Street's expert, testified, the "rainfall data shows that 2018 was *not only a wet year overall, but it was particularly wet* during the late summer months of August and September during the period when stream channel observations were made." Colonna PFT, ¶¶ 6-16 (emphasis added); Garner Rebuttal PFT, p. 6; Goddard PFT. Over this two month period rainfall was 4.89 inches above the mean, which is an increase of 59%. Id. Thus, as Garner concludes, "observing flow during that period in 2018 in a stream that might, under average conditions, be dry is unsurprising." Garner Rebuttal PFT, p. 6. Despite that, Crouch makes the leap to disregard that information because the months of August and September, the observation period, "rainfall was less than normal by approximately 4.15 inches [for those months], and the month of July prior to the observation period was also below normal by 1.78 inches." Crouch PFT, p. 7. But that testimony is flawed, referring instead to 2017, and not 2018. Colonna PFT, ¶ 11. Crouch also testified that because he observed two wildlife species that require "permanent water," he believes that shows the stream is perennial. Crouch PFT, p. 8. But Crouch is incorrect because "permanent" pools may exist in an intermittent stream. Maguire PFT, pp. 11-12; Garner Rebuttal PFT, p. 6; Goddard PFT. Last, Crouch believes there are three springs that "appear" to contribute flow to the stream, but there is no evidence to show whether that is true and, if so, how much. Crouch PFT, p. 8. Indeed, Garner testified that none of the springs contribute to the stream because the stream is a "gaining stream," meaning that "groundwater contributes to its base flow." Garner Rebuttal PFT, pp. 6-7.

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

Date: 5/9/19

Timothy M. Jones
Presiding Officer

SERVICE LIST

In The Matter Of: Alan Marks, Tri Street Partners, LLC

Docket No. WET-2018-009 File No. SDA Ashland

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Date: May 9, 2019