

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

February 28, 2018

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In the Matter of  
Brian Corey

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OADR Docket No. WET-2016-023  
DEP File No. SE 80-2214  
Westport, MA

**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

In this appeal, the Buzzards Bay Coalition, Inc. (“the Coalition”) and a Citizen’s Group comprised of 12 residents of the Town of Westport, Massachusetts<sup>1</sup> (collectively “the Petitioners”)<sup>2</sup> challenge a Superseding Order of Conditions (“SOC”) that the Southeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the

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<sup>1</sup> The names of the 12 Westport residents comprising the Citizen’s Group are set forth on p. 1 of the Petitioners’ Appeal Notice. The Coalition and the Citizen’s Group have designated Korrin Petersen, Esq., Senior Attorney for the Coalition to serve as their designated representative in the appeal. Petitioners’ Appeal Notice, at p. 1.

<sup>2</sup> In its November 29, 2016 Pre-Hearing Memorandum, at p. 2, the Petitioners stated that the Westport Fisherman’s Association (another party that was originally included in this appeal) was an unincorporated association of individuals which had voluntarily withdrawn from the case because it is well settled that “an unincorporated association cannot be a party to litigation.” Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 675 (1975); Board of Health of Sturbridge v. Board of Health of Southbridge, 461 Mass. 548, 560-61 (2012). However, in its January 24, 2017 Post-Hearing Closing Brief, at pp. 3-4, the Petitioners corrected the record to state that the Westport Fishermen’s Association was at all relevant times “a non-profit corporation in good standing with the Secretary of the Commonwealth.” Notwithstanding this correction of the record, the Petitioners have conceded the Association’s withdrawal from this appeal and continue to assert standing only with respect to the Coalition and the Citizen’s Group. Id.

Department”) issued to the Applicant Brian Corey on August 25, 2016, pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 (“MWPA”), and the Wetlands Regulations, 310 CMR 10.00 et seq. (“the Wetlands Regulations”). The SOC authorized the Applicant’s proposed Project at real property located at 17 Adamsville Road and O Main Road in Westport (“the Property”),<sup>3</sup> specifically, “[the] installation of an access road and public water supply well within [B]ordering [V]egetated [W]etland[s],<sup>4</sup> and “[the] [c]onstruction of 3,234 square feet of a wetland[s] replication area.” SOC, at p. 8.

Previously, the Westport Conservation Commission (“the WCC”) had denied the proposed Project pursuant to 310 CMR 10.05(6)(c) due to the Applicant’s purported failure to present sufficient information to the WCC to enable it to determine whether the Project could be authorized pursuant to the MWPA and the Wetlands Regulations. WCC’s Order of Conditions, February 17, 2016 (“OOC”), at p. 2. However, in issuing its SOC approving the proposed Project, the Department determined that the Applicant had submitted sufficient information to the WCC, and, after review, approved the Project.

The Petitioners challenge the Department’s SOC determination that the Applicant submitted sufficient information to the WCC, contending that the Department did not confine its review based on the information that was before the WCC as required by 310 CMR 10.05(6)(c), but instead improperly relied on additional information that the Applicant purportedly supplied to the Department during its SOC review process. Petitioners’ Pre-Hearing Memorandum, at

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<sup>3</sup> The Property is owned by James Wood (“the Property Owner”). SOC, at p. 1.

<sup>4</sup> The nature of Bordering Vegetated Wetlands (“BVW”) as a protected wetlands resource is discussed below, at pp. 10-13.

pp. 5-9. The Petitioners also contend that the SOC violates the MWPA and the Wetlands Regulations because the Department purportedly “ignored impacts [that the proposed Project will have] to wetlands adjacent to Angeline Brook, a state-designated cold-water fishery [and] . . . Outstanding Resource Water . . . .” Petitioners’ Appeal Notice, at p. 2; Petitioners’ Pre-Hearing Statement, at pp. 2-5; Petitioners’ Pre-Hearing Memorandum, at pp. 9-15. For these reasons, the Petitioners request that the SOC be vacated and that the WCC’s denial of the proposed Project be reinstated. Id.

The Applicant and the Department dispute the Petitioners’ claims and request that the SOC be affirmed, contending that: (1) one or both of the Petitioners lack standing to challenge the SOC;<sup>5</sup> and (2) the Department properly issued the SOC pursuant to the MWPA and the Wetlands Regulations. Applicant’s Pre-Hearing Statement, at pp. 1-3; Department’s Pre-Hearing Statement, at pp. 1-2; Department’s Pre-Hearing Memorandum, at pp. 1-5.

I conducted an evidentiary Adjudicatory Hearing (“Hearing”) to resolve the Petitioners’ appeal of the SOC. Per the standard practice of the Office of Appeals and Dispute Resolution (“OADR”), the Hearing was digitally recorded.<sup>6</sup> At the Hearing, the parties were represented by legal counsel<sup>7</sup> and presented witnesses and documentary evidence in support of their respective

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<sup>5</sup> The Applicant asserts that both the Coalition and the Citizen’s Group lack standing, but the Department asserts only that the Citizen’s Group lacks standing. See below, at pp. 17-25.

<sup>6</sup> Following the Hearing, OADR’s Case Administrator made the digital recording available to the parties for downloading from the internet, which they relied on in drafting and filing their respective Closing Briefs in the case. All of the parties, except the Applicant filed their respective Closing Briefs electronically during business hours on January 24, 2017. The Applicant filed his Closing Brief electronically after business hours that day, at approximately 10:43 p.m. Due to this late filing, Petitioners moved to strike the Applicant’s Closing Brief in full. See January 26, 2017 Petitioners’ Motion to Strike Late-Filed Post-Adjudicatory Hearing Memorandum Of Applicant Brian Corey. The Petitioners’ Motion to Strike is denied because I discern no prejudice to any parties occasioned by the Applicant’s filing of his Closing Brief after business hours on January 24, 2017.

<sup>7</sup> The Applicant is a member of the Massachusetts bar and represented himself at the Hearing.

positions in the case. A total of six witnesses, all of whom had previously submitted sworn Pre-Filed Testimony (“PFT”) on behalf the parties for the Hearing, were made available for cross-examination under oath at the Hearing. The parties’ respective witnesses at the Hearing were as follows.

The Petitioners’ witnesses were:

- (1) Joseph D. Bergin (“Mr. Bergin”), a fisheries biologist and retired staff member of Massachusetts Division of Fisheries and Wildlife (“MassWildlife”), where he was employed for nearly 35 years (1968 to 2002);<sup>8</sup>
- (2) John R. Kastrinos (“Mr. Kastrinos”), a hydrogeologist and private environmental consultant with Haley & Aldrich in Boston with more than 30 years of experience working in the hydrogeology field;<sup>9</sup> and
- (3) Mark Rasmussen (“Mr. Rasmussen”), the Coalition’s President.<sup>10</sup>

The Applicant’s witnesses were:

- (1) Brandon Faneuf (“Mr. Faneuf”), a Professional Wetlands Scientist and private environmental consultant with nearly 20 years of experience in the wetlands field;<sup>11</sup> and
- (2) Garrett Keegan (“Mr. Keegan”), a Professional Engineer (“P.E.”), with nearly 45 years of experience in the environmental engineering and hydrogeology fields.<sup>12</sup>

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<sup>8</sup> Pre-filed Direct Testimony of Joseph D. Bergin, November 29, 2016 (“Mr. Bergin’s Direct PFT”). MassWildlife is a state agency of the Commonwealth “responsible for the conservation of freshwater fish and wildlife in the Commonwealth, including endangered plants and animals . . . .” <https://www.mass.gov/orgs/division-of-fisheries-and-wildlife>.

<sup>9</sup> Pre-filed Direct Testimony of John R. Kastrinos, November 30, 2016 (“Mr. Kastrinos’ Direct PFT”); and Rebuttal Testimony of John R. Kastrinos, January 6, 2017 (“Mr. Kastrinos’ Rebuttal PFT”).

<sup>10</sup> Affidavit of Mark Rasmussen, November 29, 2016 (“Mr. Rasmussen’s Direct PFT”).

<sup>11</sup> Pre-filed Direct Testimony of Brandon Faneuf, Wetland Scientist, December 29, 2016 (“Mr. Faneuf’s Direct PFT”).

<sup>12</sup> Pre-filed Direct Testimony of Garrett Keegan, P.E., December 29, 2016 (“Mr. Keegan’s Direct PFT”).

The Department's witness was Gary J. Makuch ("Mr. Makuch"), an Environmental Analyst in the Wetlands and Waterways Program of the Department's Southeast Regional Office with 30 years of experience in the environmental field.<sup>13</sup>

As discussed in detail below, based upon the testimonial and documentary evidence that the Parties presented at the Hearing and the applicable law, I find that:

- (1) the Coalition has standing to challenge the SOC as "[an] aggrieved person [who] previously [participated] in the permit proceedings" within the meaning of 310 CMR 10.04 and 10.05(7)(j)2(a);
- (2) the Citizen's Group, comprised of the 12 Westport residents, does not have standing to challenge the SOC as a Ten Residents Group pursuant to 310 CMR 10.05(7)(j)2(a) because there is no evidence that any resident participated in the prior permit proceedings in an individual capacity, which is a prerequisite to standing pursuant to 310 CMR 10.05(7)(j)2(a); and
- (3) the Department properly issued the SOC approving the proposed Project pursuant to the MWPA and the Wetlands Regulations.

Accordingly, I recommend that the Department's Commissioner issue a Final Decision affirming the Department's SOC approving the proposed Project.

## **STATUTORY AND REGULATORY FRAMEWORK**

### **I. THE PERMITTING REQUIREMENTS OF THE MWPA AND THE WETLANDS REGULATIONS**

The purpose of the MWPA and the Wetlands Regulations is to protect wetlands and to regulate activities affecting wetlands areas in a manner that promotes the following eight statutory interests:

- (1) protection of public and private water supply;

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<sup>13</sup> Pre-filed Testimony of Gary J. Makuch, January 3, 2017 ("Mr. Makuch's Direct PFT").

- (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.

G.L. c. 131, § 40; 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 (“Webster Ventures I”), Recommended Final Decision (February 27, 2015), 2015 MA ENV LEXIS 14, at 10-11, 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.

The MWPA and the Wetlands Regulations provide that “[n]o person shall remove, fill,

dredge[,] or alter<sup>14</sup> any [wetlands] area subject to protection under [the MWPA and Wetlands Regulations] without the required authorization, or cause, suffer or allow such activity . . . .” G.L. c. 131 § 40, ¶ 32; 310 CMR 10.02(2)(a); Vecchione, 2014 MA ENV LEXIS 76, at 7; Webster Ventures I, 2015 MA ENV LEXIS 14, at 11-12; Elite Home Builders, 22 DEPR at 204; Sunset City, 2017 MA ENV LEXIS 35, at 10. “Any activity proposed or undertaken within [a protected wetlands] area[,] . . . which will remove, dredge or alter that area, is subject to Regulation under [the MWPA and the Wetlands Regulations] and requires the filing of a Notice of Intent (“NOI”)” with the permit issuing authority. 310 CMR 10.02(2)(a). A party must also file an NOI for “[a]ny activity . . . proposed or undertaken within 100 feet of [any protected wetlands]” described as “the Buffer Zone” by the Regulations, “which, in the judgment of the [permit] issuing authority, will alter [any protected wetlands].” 310 CMR 10.02(2)(b).

The “[permit] issuing authority” is either the local Conservation Commission when initially reviewing the applicant’s proposed work in a wetlands resource area protected by the MWPA and the Wetlands Regulations, or the Department when it assumes primary review of the

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<sup>14</sup> The Wetlands Regulations at 310 CMR 10.04 define “alter” as “chang[ing] the condition” of any wetlands area subject to protection under the MWPA and the Wetlands Regulations. Examples of alterations include, but are not limited to, the following:

- (a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas;
- (b) the lowering of the water level or water table;
- (c) the destruction of vegetation;
- (d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water.

310 CMR 10.04. “Dredge” is defined as “deepen[ing], widen[ing], or excavat[ing], either temporarily or permanently” a protected wetlands area, and “[f]ill means to deposit any material [in a protected wetlands area] so as to raise an elevation, either temporarily or permanently.” Id.

proposed work or review on appeal from a local Conservation Commission decision. Healer v. Department of Environmental Protection, 73 Mass. App. Ct. 714, 717-19 (2009). Under the MWPA, a local Conservation Commission may issue an Order of Conditions authorizing or precluding proposed activities in protected wetlands areas and “[is] allowed to ‘impose such conditions as will contribute to the protection of the interests described [in MWPA and the Wetlands Regulations]’” and to require that “‘all work shall be done in accordance’ with the conditions they might impose. . . .” Id.

Orders of Condition, including any findings and wetlands delineations forming the basis of the Orders, are valid for three years from the date of the Orders’ issuance. 310 CMR 10.05(6)(d). However, any “[SOC issued by the Department] shall supersede the prior order of [conditions of] the conservation commission [issued pursuant to the MWPA and the Wetlands Regulations]. . . and all work shall be done in accordance with the [Department’s SOC],” Id., unless the commission has properly denied the proposed project pursuant to a local Wetlands Protection Bylaw that is more protective than the MWPA. Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich, 449 Mass. 859, 866 (2007). This is the case because the MWPA “establishes Statewide minimum wetlands protection standards, [but] local communities are free to impose more stringent requirements” by enacting local Wetlands Protection Bylaws. Oyster Creek, 449 Mass. at 866; Healer, 73 Mass. App. At 716. As a result, an SOC issued by the Department under the MWPA approving proposed work in protected wetlands areas cannot preempt a timely decision of a local conservation commission denying approval of the proposed work based “on provisions of a local bylaw that are more protective than the [MWPA].” Oyster



Creek, 449 Mass. at 866. However, this issue is not present in this case, because the WCC denied the proposed Project pursuant to the MWPA and the Wetlands Regulations.

“[W]hen it receives an SOC request, [the general rule is that] ‘[t]he Department [conducts] a de novo review of [the proposed] [p]roject [at issue],’ meaning that the review of the [p]roject starts anew, and that the Department makes a determination independent of any local conservation commission determination regarding whether the [p]roject should be authorized pursuant to the MWPA and the Wetlands Regulations.” In the Matters of Richard Cuda and Town of Orleans Board of Selectmen, OADR Docket Nos. WET-2015-012 and WET-2016-014 (“Cuda”), Recommended Final Decision (December 13, 2017), at p. 40, adopted as Final Decision (January 8, 2018), citing, In the Matter of Chappaquonsett Realty Trust, OADR Docket No. 1988-222, Order of Dismissal and Grant of Motion to Intervene (July 19, 1989), 7 MELR 1421, 1426 (1989). Under this general rule, the Department may also consider information for a proposed project that was not previously presented to the local conservation commission. Id.

However, when reviewing an SOC request appealing a local conservation commission’s Order of Conditions denying a proposed project pursuant to 310 CMR 10.05(6)(c) due to the project proponent’s purported failure to submit “sufficient [information to the commission] . . . describ[ing] the site, the work or the effect of the work on [wetlands protected by the MWPA and the Wetlands Regulations],” the Department’s review is limited by 310 CMR 10.05(7)(h) “[to] review [of] the information [that the project proponent] submitted to the . . . commission,” and must affirm the commission’s denial if it determines that the project proponent submitted

insufficient information to the commission.<sup>15</sup> If the local conservation commission's denial is affirmed by the Department, the project proponent must re-file its proposed project with the commission and provide it with "the appropriate information" demonstrating that the project comports with the MWPA and the Wetlands Regulations. Id.

If, on the other hand, the Department determines that the project proponent submitted sufficient information to the local conservation commission, the Department is required to review the merits of the project and determine whether to issue an SOC either approving or denying the project on its merits. In the Matter of David A. Bosworth Co., Inc., OADR Docket No. WET-2015-015, Recommended Final Decision (February 17, 2016), 2016 MA ENV LEXIS 12, at 32, adopted as Final Decision (March 14, 2016), 2016 MA ENV LEXIS 10. In this situation, the Department's "review [of the proposed project] may be based upon additional information that was not before the [local conservation] [c]ommission." Id., at 32-33.

## **II. THE NATURE OF BVW AS A PROTECTED WETLANDS RESOURCE**

As previously noted above, the Department's SOC approved: (1) "[the] installation of an access road and public water supply well within [BVW]," a protected wetlands resource area, and (2) "[the] [c]onstruction of 3,234 square feet of a wetland[s] replication area." SOC, at p. 8.

The Wetlands Regulations define BVW as:

freshwater wetlands which border on creeks, rivers, streams, ponds and lakes. The types of freshwater wetlands are wet meadows, marshes, swamps and bogs. [BVW] are areas where the soils are saturated and/or inundated such that they support a predominance of wetland indicator plants. The ground and surface water

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<sup>15</sup> Under 310 CMR 10.05(6)(c), a local conservation commission's Order of Conditions denying a proposed project for insufficient information "shall specify the information which is lacking and why it is necessary." As discussed below, at pp. 13-15, the WCC's Order of Conditions here denying the proposed Project for insufficient information failed to comply with this requirement because the Order failed to "specify the information which [was] lacking and why it [was] necessary." The WCC's failure to comply with this requirement enabled the Department to conduct its review of the Applicant's SOC request under the Department's general de novo review authority. See below, at pp. 15-17, 26-30.

regime and the vegetational community which occur in each type of freshwater wetland are specified in [the MWPA].

310 CMR 10.55(2)(a); In the Matter of Town of Hopkinton, OADR Docket No. WET-2007-010, Recommended Final Decision, 15 DEPR 203, 205 (May 1, 2008), adopted as Final Decision (May 30, 2008), affirmed, Morrison v. Massachusetts Department of Environmental Protection, Middlesex Superior Court, C.A. MICV2008-02876 (October 16, 2009); In the Matter of Ronald and Lois Enos, OADR Docket No. WET-2012-019, 2013 MA ENV LEXIS 21, at 19-20, adopted as Final Decision, 2013 MA ENV LEXIS 20. BVW are likely to be significant to the MWPA interests of protection of public and private water supply, protection of ground water supply, flood control, storm damage prevention, prevention of pollution, and protection of fisheries and to wildlife habitat. 310 CMR 10.55(1); Hopkinton, 15 DEPR at 205; Enos, 2013 MA ENV LEXIS 21, at 20. “The plants and soils of [BVW] remove or detain sediments, nutrients (such as nitrogen and phosphorous) and toxic substances (such as heavy metal compounds) that occur in run off and flood waters.” Id.

Where a proposed activity will alter BVW, the Department is required to presume that the BVW is significant to the MWPA interests set forth above. 310 CMR 10.55(3); Hopkinton, 15 DEPR at 205; Enos, 2013 MA ENV LEXIS 21, at 20-21. “This presumption is rebuttable and may be overcome upon a clear showing that the [BVW] does not play a role in the protection of [those] interests.” Id. Where this presumption “is not overcome, any proposed work in [BVW] shall not destroy or otherwise impair any portion of [the] area.” 310 CMR 10.55(4)(a); Hopkinton, 15 DEPR at 205-206; Enos, 2013 MA ENV LEXIS 21, at 21.

Notwithstanding this prohibition, the Department nevertheless has the discretion to issue an SOC authorizing activities “result[ing] in the loss of up to 5,000 square feet of [BVW] when [the] area

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is replaced in accordance with . . . [seven] general conditions and any additional, specific conditions the [Department] deems necessary to ensure that the replacement area will function in a manner similar to the area that will be lost.” 310 CMR 10.55(4)(b); Hopkinton, 15 DEPR at

206. The seven general conditions are the following:

1. the surface of the replacement area to be created (“the replacement area”) shall be equal to that of the area that will be lost (“the lost area”);
2. the ground water and surface elevation of the replacement area shall be approximately equal to that of the lost area;
3. The overall horizontal configuration and location of the replacement area with respect to the bank shall be similar to that of the lost area;
4. the replacement area shall have an unrestricted hydraulic connection to the same water body or waterway associated with the lost area;
5. the replacement area shall be located within the same general area of the water body or reach of the waterway as the lost area;
6. at least 75% of the surface of the replacement area shall be reestablished with indigenous wetland plant species within two growing seasons, and prior to said vegetative reestablishment any exposed soil in the replacement area shall be temporarily stabilized to prevent erosion in accordance with standard U.S. Soil Conservation Service methods; and
7. the replacement area shall be provided in a manner which is consistent with all other General Performance Standards for each resource area in Part III of 310 CMR 10.00.

310 CMR 10.55(4)(b).

In exercising its discretion under 310 CMR 10.55(4)(b) to authorize the loss of a maximum 5,000 square feet of BVW, the Department must consider the following factors:

1. the magnitude of the alteration and the significance of the project site to the interests identified in [the MWPA];
2. the extent to which adverse impacts can be avoided;

3. the extent to which adverse impacts are minimized; and
4. the extent to which mitigation measures, including replication or restoration, are provided to contribute to the protection of the interests identified in [the MWPA].

310 CMR 10.55(4)(b); Hopkinton, 15 DEPR at 206.

In 2002, the Department adopted the Massachusetts Inland Wetland Replication Guidelines (“Wetlands Replication Guidelines”) “to increase the effectiveness of [wetlands] replication mitigation by providing [project proponents] with an outline of the steps necessary to design an appropriate wetland[s] replication project.” Wetlands Replication Guidelines, § 1.1, at p. 5. The Wetlands Replication Guidelines “also assis[t] [local conservation commissions] and [the] Department . . . in determining if a replication project is designed appropriately, constructed as designed, and adequately monitored to ensure the success of the [replication] project.” Id.

## **FINDINGS**

### **I. PRIOR PROCEEDINGS**

#### **A. The Permitting Proceedings Before The WCC**

In November 2015, the Applicant filed his NOI with the WCC seeking approval of the proposed Project pursuant to the MWPA and the Wetlands Regulations. NOI, WPA Form 3, at p. 8. As noted in both the NOI and the Applicant’s two NOI Project Narratives, the proposed Project includes the construction of an access road and the exploration and installation of a public water supply well within BVW. NOI, Project Summary, October 21, 2015; NOI, at p. 2; February 11, 2015 (sic: 2016) Supplement to NOI (Evaluation of Alternatives for Public Water Supply Well Location). Given that the proposed Project would alter BVW, the NOI classified the proposed activities as a limited project pursuant to 310 CMR 10.53(3)(o), which authorizes,

among other things, “[t]he exploration, development, construction, expansion, maintenance, operation, and replacement of public water supply wells . . .” provided that the ultimate “approval for the water supply has been granted [by the Department] under the Public Water Supply Source Approval Process pursuant to 310 CMR 22.21: Ground Water Supply Protection and/or the Water Management Act, M.G.L. c. 21G.” 310 CMR 10.53(3)(o)1. Due to the fact that the proposed activities would alter approximately 3,220 square feet of BVW, the proposed Project also included the replacement of approximately 3,224 square feet of BVW. NOI, at p. 2.

On December 18, 2015, the WCC’s Conservation Agent conducted a site visit with the Applicant’s Engineer and issued a report that same day, listing a number of concerns associated with the proposed Project and recommending that the WCC request that the Applicant continue the WCC’s public hearing on the Applicant’s NOI in order for the Applicant to “provide more information for the [WCC] to determine[] there [would] be no adverse effects to the interests of the WPA.” February 24, 2016 Applicant’s SOC Request (“SOC Request”), at p. 1; and Exhibit C to SOC Request, at p. 3<sup>16</sup> Later on December 18, 2015, the WCC opened and continued its public hearing on the Applicant’s NOI for the proposed Project. On February 6, 2016, the Applicant submitted a revised plan to the WCC in support of the proposed Project, and also provided the WCC with a “Supplement to [the] Notice of Intent” entitled “evaluation of Alternatives for Public Water Supply Well Location” dated February 11, 2015 [sic: 2016]. Revised NOI Plan, February 6, 2016, by Southcoast Engineering, Exhibit B to SOC Request.

On February 16, 2016, the WCC conducted a public hearing on the Applicant’s NOI for the proposed Project. SOC Request, at p. 1. The next day, the WCC issued its Order of

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<sup>16</sup> Exhibit C to the Applicant’s SOC Request is copy of the WCC’s Conservation Agent’s December 18, 2015 typewritten Report in black ink and the Applicant’s typewritten responses to Agent’s comments in the Report in red ink. The portion of the Report cited above in the text are the Agent’s comments.

Conditions (“OOC”) denying the Applicant’s proposed Project. Exhibit A to SOC Request. Under section B of the OCC entitled “Findings”, the WCC checked box c. under the “Denial” section, which indicated that the basis of the WCC’s denial was pursuant to 310 CMR 10.05(6)(c) as discussed above because “[t]he information submitted by the applicant [purportedly was] not sufficient to describe the site, the work or the effect of the work on the interests identified in the Wetlands Protection Act.” Exhibit A to SOC Request, at p. 2. However, notwithstanding that box c. expressly required the WCC to “**attach[] to [the] Order**” “**[a] description of the specific information which [was] lacking and why it [was] necessary . . . per 310 CMR 10.05(6)(c),**” (bold in original), it is undisputed that the WCC failed to attach to the OOC any written description of the NOI’s purported information deficiencies.

**B.     The Applicant’s SOC Request And The Department’s Issuance Of The SOC**

On February 24, 2016, the Applicant submitted his SOC Request to the Department seeking to overturn the WCC’s OCC denying the proposed Project. The Applicant’s SOC request contended, among other things, that the WCC’s denial was “insufficient” or improper because the WCC “[had] fail[ed] to . . . enumerate and describe the specific deficiencies in the [A]pplicant’s filings” in the OCC, as required by 310 CMR 10.05(6)(c). Attached to the Applicant’s SOC Request were three Exhibits:

- (1) Exhibit A was the WCC’s February 17, 2016 OOC denying the proposed Project;
- (2) Exhibit B was the “Evaluation of Alternatives for Public Water Supply Well Location” NOI Supplement, dated February 11, 2015 [sic: 2016], together with revised NOI plan dated February 6, 2016 (See SOC Request, at p. 1) that the Applicant had submitted to the WCC prior to its denial of the proposed Project; and

- (3) Exhibit C was the WCC Conservation Agent's December 18, 2015 Report, referenced above, which included "red highlighted commentary" on the issues raised by the Report inserted by the Applicant subsequent to the WCC public hearing.<sup>17</sup>

On April 4, 2016, during the pendency of the Department's SOC review, the WCC submitted a letter to the Department which enumerated the specific additional information that the WCC had purportedly requested (but had not received) from the Applicant in connection with the proposed Project. See Exhibit A to Petitioners' Closing Brief. It appears that the April 4, 2016 letter was submitted to enumerate the specific reasons for the WCC's February 17, 2016 OOC denying the proposed Project for "insufficient information." However, it is not clear from the Administrative Record what and/or who prompted the WCC to transmit this correspondence to the Department during the pendency of its SOC review.

On August 25, 2016, the Department issued its SOC approving the Applicant's proposed Project. The Department's transmittal letter accompanying the SOC indicated that the Department's SOC review was limited to the information presented to the WCC "in accordance with 310 CMR 10.05(7)(h)" and as a result of its review, the Department "ha[d] determined that sufficient information ha[d] been submitted with [the Applicant's NOI]" for the proposed Project. Further details of the scope of the SOC's project authorization are discussed in more

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<sup>17</sup> As discussed below, at pp. 30-33, the Petitioners contend that the Applicant's red commentary in Exhibit C means that "[t]he Department reviewed information that was clearly not before the [WCC in violation of 310 CMR 10.05(7)(h)] prior to the Department making its sufficiency determination" in issuing the SOC. Petitioners' Closing Brief, at pp. 9-10. The Petitioners' claim fails for a multitude of reasons as discussed below, at pp. 26-33.



detail below, at pp. 30-44. This appeal of the SOC by the Petitioners then followed.

## **II. THE COALITION HAS STANDING TO CHALLENGE THE SOC, BUT THE CITIZEN'S GROUP DOES NOT**

### **A. The Jurisdictional Nature Of Standing**

Standing “is not simply a procedural technicality.” Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975); In the Matter of Webster Ventures, LLC, OADR Docket No. 2015-014 (“Webster Ventures II”), Recommended Final Decision (June 3, 2016), 2016 MA ENV LEXIS 27, at 19-20, adopted as Final Decision (June 15, 2016), 2016 MA ENV LEXIS 32; 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 18-19, adopted as Final Decision (April 18, 2017), 2017 MA ENV LEXIS 28. Rather, it “is a jurisdictional prerequisite to being allowed to press the merits of any legal claim.” R.J.A. v. K.A.V., 34 Mass. App. Ct. 369, 373 n.8 (1993); Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998) (“[w]e treat standing as an issue of subject matter jurisdiction [and] . . . of critical significance”); see also United States v. Hays, 515 U.S. 737, 115 S.Ct.2431, 2435 (1995) (“[s]tanding is perhaps the most important of the jurisdictional doctrines”). As discussed in detail below, the Coalition has standing to challenge the SOC in this appeal, but the Citizen’s Group does not.

### **B. The Coalition Has Standing To Challenge The SOC As “[An] Aggrieved Person [Who] Previously [Participated] In The Permit Proceedings” Within The Meaning Of 310 CMR 10.04 And 10.05(7)(j)2(a)**

#### **1. The Coalition’s Burden Of Proof On Standing**

The provisions of 310 CMR 10.05(7)(j)2(a) state, in pertinent part, that “[a]ny . . . aggrieved person, if previously a participant in the permit proceedings . . . may request [OADR]

review of a[n] [SOC] by filing an Appeal Notice . . . .” (emphasis supplied). At the Hearing, the Parties agreed that, as a valid corporate entity, the Coalition is a “person” who previously participated in the prior permit proceedings in this matter, as required by 310 CMR 10.04 and 10.05(7)(j)(2)(a). Thus, the only remaining issue for adjudication was whether the Coalition had standing to challenge the SOC as “an aggrieved person,” within the meaning of 310 CMR 10.04 and 10.05(7)(j)(2)(a).

The Wetlands Regulations at 310 CMR 10.04, define a “person aggrieved” as:

any person who because of an act or failure to act by the issuing authority may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in [MWPA]. . . .

“A ‘person aggrieved’ as that term is used in the MWPA must assert ‘a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest. . . . Of particular importance, the right or interest asserted must be one that the statute . . . intends to protect.’” Webster Ventures I, 2015 MA ENV LEXIS 14, at 15; Vacirca, 2017 MA ENV LEXIS 22, at 28-29; Enos, 2013 MA ENV LEXIS 21, at 16-17; In the Matter of Norman Rankow, OADR Docket No. WET-2012-029, Recommended Final Decision (August 6, 2013), 2013 MA ENV LEXIS 45, at 26-27, adopted as Final Decision (August 12, 2013), 2013 MA ENV LEXIS 79; In the Matter of Town of Southbridge Department of Public Works, OADR Docket No. WET-2009-022, Recommended Final Decision, at p. 4 (September 18, 2009), adopted as Final Decision (October 14, 2009); In the Matter of Onset Bay Marina, OADR Docket No. 2007-074, Recommended Final Decision (January 30, 2009), 16 DEPR 48, 50 (2009), adopted as Final Decision (April 1, 2009); Compare, Standerwick v. Zoning Board of Appeals of Andover, 447

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Mass. 20, 27-28 (2006) (definition of “person aggrieved” under G.L. c. 40B).

“For a corporate entity to have aggrieved status and standing ‘it must establish some harm to a corporate legal right.’” Harvard Square Defense Fund, Inc. v. Planning Board of Cambridge, 27 Mass. App. Ct. 491, 496 (1989); In the Matter of Entergy Nuclear Operations, Inc. and Entergy Nuclear Generation Co., OADR Docket No. 2015-009, Recommended Final Decision (February 5, 2016), 2016 MA ENV LEXIS 3, at 27, adopted as Final Decision (February 25, 2016), 2016 MA ENV LEXIS 6. “A mere statement of corporate purpose which expresses a general civic interest in the enforcement of [environmental] laws, or in the preservation of [natural resources], is not enough to confer standing” upon the corporate entity. Id.

“To show standing, [however,] a party need not prove by a preponderance of the evidence [at the evidentiary Adjudicatory Hearing in the appeal] that his or her claim of particularized injury is true.” Webster Ventures I, 2015 MA ENV LEXIS 14, at 16; Vacirca, 2017 MA ENV LEXIS 22, at 29-30; In the Matter of Edward C. Gordon and 129 Racing Beach Trust, OADR Docket No. WET-2009-048, Recommended Final Decision (March 3, 2010), 2010 MA ENV LEXIS 114, at 10, adopted as Final Decision (March 5, 2010), 2010 MA ENV LEXIS 13, citing, Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005); Enos, 2013 MA ENV LEXIS 21, at 16-17; Rankow, 2013 MA ENV LEXIS 45, at 27-28. As the Massachusetts Appeals Court explained in Butler:

[t]he “findings of fact” a judge is required to make when standing is at issue . . . differ from the “findings of fact” the judge must make in connection with a trial on the merits. Standing is the gateway through which one must pass en route to an inquiry on the merits. When the factual inquiry focuses on standing, therefore, a plaintiff is not required to prove by a preponderance of the evidence that his or her claims of particularized or special injury are true. “Rather, the plaintiff must

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put forth credible evidence to substantiate his allegations. [It is i]n this context [that] standing [is] essentially a question of fact for the trial judge.”

63 Mass. App. Ct. at 441; Webster Ventures I, 2015 MA ENV LEXIS 14, at 16-17; Vacirca, 2017 MA ENV LEXIS 22, at 30-31; see also In the Matter of Hull, Docket No. 88-22, Decision on Motion for Reconsideration of Dismissal, 6 MELR 1397, 1407 (July 19, 1999) (party must state sufficient facts which if taken as true demonstrate the possibility that injury alleged would result from the allowed activity); Enos, 2013 MA ENV LEXIS 21, at 17-18; Rankow, 2013 MA ENV LEXIS 45, at 28-29; compare Standerwick, 447 Mass. at 37 (plaintiffs’ case appealing zoning decision cannot consist of “unfounded speculation to support their claims of injury”).

To summarize, in order to demonstrate that it had standing to challenge the Department’s SOC as an “aggrieved person,” the Coalition was required to put forth a minimum quantum of credible evidence supporting the Coalition’s claim that the SOC would or might cause the Coalition to suffer an injury in fact, which would be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interests protected by the MWPA and the Wetlands Regulations. 310 CMR 10.04; Webster Ventures I, 2015 MA ENV LEXIS 14, at 17-18; Vacirca, 2017 MA ENV LEXIS 22, at 31-32; Gordon, 2010 MA ENV LEXIS 114, at 11 and cases cited; Enos, 2013 MA ENV LEXIS 21, at 17-18; Rankow, 2013 MA ENV LEXIS 45, at 29. If the Coalition met that minimal evidentiary threshold, its appeal of the SOC would then proceed “to [the] inquiry on the merits” regarding whether the Department properly issued the SOC in accordance with the MWPA and the Wetlands Regulations. Butler, 63 Mass. App. Ct. at 441.

At the Hearing, the Department did not challenge the Coalition’s assertion of standing as an aggrieved person. See Department’s Closing Brief at p. 4. However, the Applicant

contended that the Coalition had failed to demonstrate “aggrievement,” because it purportedly failed to show how its interests “differ in any material way from those that may be claimed by the general public.” Applicant’s Closing Brief, at p. 3. Based upon my review of the applicable law and the evidence submitted by the Coalition, however, I find, for the reasons set forth in more detail below, that the Coalition submitted the minimum quantum of proof necessary to demonstrate its “aggrievement” to challenge the SOC, as required by 310 CMR 10.04 and 10.05(7)(j)(2)(a).

**2. The Coalition’s Testimonial And Documentary Evidence Supporting Its Standing To Challenge The SOC As An “Aggrieved Person”**

At the Hearing, the Coalition supported its claim of “aggrievement” to challenge the SOC, by presenting as its witness, its President, Mr. Rasmussen. Mr. Rasmussen’s testimony at the Hearing went unchallenged by the Department because it conceded at the Hearing the Coalition had standing to challenge the SOC as an aggrieved person. Department’s Closing Brief, at p. 4. The Applicant, however, did not make the same concession, contending that the Coalition “[had] put forth theories of possible harm that are identical in fact, nature and magnitude to those that the general public could suffer,” and thus, “[had] failed to differentiate by a preponderance of the evidence how [its] claims differ[ed] from those public interests that are enumerated and protected by the [MWPA] and Wetlands Regulations.” Applicant’s Closing Brief, at p. 3. I disagree with the Applicant based on Mr. Rasmussen’s testimony, which the Applicant failed to refute with the sworn PFT of any witnesses. Based on Mr. Rasmussen’s testimony I make the following findings.

The Coalition was founded more than 30 years ago in 1987 as a non-profit corporation dedicated “to the restoration, protection, sustainable use, and enjoyment of Buzzards Bay and its

watershed.” Mr. Rasmussen’s Direct PFT, ¶ 4. “The Coalition works to improve the health of the Buzzards Bay ecosystem for all through education, conservation, research[,] and advocacy.”

Id. Buzzards Bay was designated by the United States Congress in 1985 as an “Estuary of National Significance,” and was further designated by the United States Environmental Protection Agency as a “No Discharge Area” in 2000. Id., ¶ 5. “Buzzards Bay is also a state-designated Ocean Sanctuary, and is home to a variety of threatened and endangered species.” Id.

“The Coalition has more than 8,000 individual, family, business and organizational members and volunteers, the vast majority of whom are active users of Buzzards Bay and its shoreline for a broad variety of recreational and commercial purposes — including swimming, sunbathing, bird-watching, boating, kayaking, windsurfing, fishing, shellfishing, aquaculture, tourism and education.” Id., ¶ 6. “The Coalition and its members have a significant interest in sustaining these uses and protecting Buzzards Bay’s myriad natural resources.” Id. “More than 330 of [the Coalition’s] members are residents of the Town of Westport.” Id.

The Buzzards Bay watershed includes both the East and West Branches of the Westport Rivers and their associated watersheds, and encompasses all of the streams and wetlands that drain into the Westport Rivers, including Angeline Brook, a state designated coldwater fisheries resource and habitat to native sea-run brook trout. Id., ¶¶ 8, 9. Since 2014, the Coalition has actively worked to preserve land along Angeline Brook for permanent conservation, based upon the Brook’s unique natural resource value and its rare and sensitive native Brook Trout population. Id., ¶ 10. The Coalition has also expended considerable time and monetary resources in order to protect Angeline Brook, which has resulted in the permanent protection of

98 acres along the Brook, with the pending addition of protection of four more acres. Id., ¶ 11.

In addition, “the Coalition has invested money (including money received from state and federal grants) as well as significant staff time to purchase land along Angeline Brook to protect the coldwater fishery, wetlands[,] and other natural resources from the impacts of changes in land and water use and to ensure that the land and water resources are available to the public.” Id., ¶ 12.

In sum, the Coalition’s interests are impacted by the proper regulation of work or activities in protected wetlands areas in Buzzards Bay and its watershed because integral to the Coalition’s mission is the protection of Buzzards Bay and its watershed. Compare, Entergy, 2016 MA ENV LEXIS 3, at 30-40 (Jones River Watershed Association, Inc.’s “unique position and mission as an organization to protect the Jones River Watershed” demonstrated standing as “aggrieved person” to challenge c. 91 license issued by Department to operators of Pilgrim Nuclear Power Plant). Simply stated, where the core public mission of a non-profit corporate organization is to protect, preserve and advocate on behalf of one or more interests enumerated in the MWPA and the Wetlands Regulations, decisions involving proposed projects that are issued by the local permitting entity (the local conservation commission) and/or the Department can have a disproportionate impact upon that entity’s core public mission, and may or does constitute a harm that is distinctly greater in kind and magnitude from the harm to the interests to the general public. Id. Based on Mr. Rasmussen’s unrefuted testimony and the legal rules governing standing, I find that the Coalition presented the minimum quantum of evidence demonstrating that it is an “aggrieved person,” within the meaning of 310 CMR 10.04 and 10.05(7)(j)2(a), and therefore, has standing to challenge the Department’s issuance of the SOC

approving the proposed Project.

**C. The Citizen's Group, Comprised Of 12 Westport Residents, Does Not Have Standing To Challenge The SOC As A Ten Residents Group Pursuant To 310 CMR 10.05(7)(j)2(a) Because No Resident Participated In The Prior Permit Proceedings In An Individual Capacity, Which Is A Prerequisite To Standing Pursuant To 310 CMR 10.05(7)(j)2(a)**

In contrast to the Coalition, the evidence presented at Hearing demonstrated that the Citizen's Group, comprised of 12 Westport residents, does not have standing to challenge the SOC as a Ten Residents Group pursuant to 310 CMR 10.05(7)(j)2(a) because none of those residents "participated" in the prior permit proceedings in an individual capacity, as required by the regulation. "Previous participation" in the permit proceedings for purposes of bringing a Ten Residents Group appeal pursuant to 310 CMR 10.05(7)(j)2(a) is defined by the regulation and specifies that at least one of the ten residents must have either: (a) submitted written information to the local conservation commission; (b) requested an action by the Department; or (c) provided written information to the Department prior to the issuance of the SOC. Here, the Citizen's Group claims that the Group has met this "previous participation" requirement because three of the 12 Westport residents comprising the Group are also members of the Coalition, and therefore they "participated" in the permit proceedings as a result of the Coalition's March 23, 2016 letter to the Department during the Department's SOC review requesting affirmance of WCC's OOC denying the proposed Project. Petitioners' Closing Brief, at p. 3. The Citizen Group's claim is without merit for the following reasons.

First, the Coalition's March 23, 2016 letter to the Department did not identify any of the Westport 12 residents by name. Indeed, the letter began with the Coalition stating that "[t]he Buzzards Bay Coalition (Coalition) writes to you . . . in support of the [WCC's] denial of [the



proposed Project].” Moreover, as the Department correctly pointed out at the Hearing, “[t]he filing of comments by the Coalition on behalf of the three residents in a representative capacity does not provide standing to any of the residents in their individual capacities.” Department’s Closing Brief, at p. 4, citing, In the Matter of Massachusetts Department of Transportation, OADR Docket No. 2012-013, Recommended Final Decision, 19 DEPR 134, 137, 2012 MA ENV LEXIS 54 (2012). Due to the residents’ collective failure to participate in the prior permit proceedings in an individual capacity, the Citizen’s Group has failed to meet the Ten Resident standing requirements of 310 CMR 10.05(7)(j)2(a), and therefore, must be dismissed as a party from this Appeal.

### **III. THE DEPARTMENT PROPERLY ISSUED THE SOC**

My finding above that the Coalition has standing to challenge the SOC does not mean that it prevails on the merits of its substantive claims challenging the Department’s SOC authorizing the proposed Project. See below, at pp. 25-44. My finding only means that the Coalition has standing based on the much lower evidentiary threshold that only required the Coalition to put forth a minimum quantum of credible evidence in support of its claim that the proposed Project would or might cause the Coalition to suffer an injury in fact, which would be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interests protected by the MWPA and the Wetlands Regulations. 310 CMR 10.04; Webster Ventures I, 2015 MA ENV LEXIS 14, at 17-18; Vacirca, 2017 MA ENV LEXIS 22, at 31-32; Gordon, 2010 MA ENV LEXIS 114, at 11 and cases cited; Enos, 2013 MA ENV LEXIS 21, at 17-18; Rankow, 2013 MA ENV LEXIS 45, at 29. However, to successfully challenge the SOC, the Coalition had the higher burden of proving by a

preponderance of credible evidence through the sworn testimonial and documentary evidence of its witnesses that the Department erred in issuing the SOC approving the proposed Project. Webster Ventures I, 2015 MA ENV LEXIS 14, at 13-14, 31-37. As explained below, the Coalition did not meet its burden because a preponderance of the evidence introduced at the Hearing demonstrated that the Department properly issued the SOC to the Applicant approving the proposed Project.

**A. The Department Was Authorized To Conduct A De Novo Review Of The Proposed Project Because The WCC Violated 310 CMR 10.05(6)(c) By Failing To “Specify” In Its OOC Denying The Project “The Information Which [Was] Lacking And Why It [Was] Necessary” For Determining Whether The Project Comported With The MWPA And The Wetlands Regulations**

As previously discussed above at pp. 9-10 and 13-16, when issuing an OOC denying a project due to insufficient information, the local conservation commission is required by 310 CMR 10.05(6)(c) to include in its OOC a written statement of reasons why the NOI's information for the project is insufficient and why the missing information is necessary. The regulation makes clear that:

[i]f the conservation commission finds that the information submitted by the applicant is not sufficient to describe the site, the work or the effect of the work on the interests identified in [the MWPA], it may issue an Order prohibiting the work. *The Order shall specify the information which is lacking and why it is necessary.*

(emphasis supplied).

To ensure that local conservation commissions are fully aware of the requirements of 310 CMR 10.05(6)(c), the provisions of the regulation have been incorporated into the Department's WPA Form 5 - Order of Conditions Document, a standard Form used by local conservation commissions in issuing their OOCs to parties. Hence, if a local conservation commission checks

the Form's "denial" box c. on page 2, under Section B. Findings, 2. Denials, for lack of sufficient information, the Form imposes on the commission the requirement of **"attach[ing]"** to its OOC, **"[a] description of the specific information which is lacking and why it is necessary . . . per 310 CMR 10.05(6)(c)."** (emphasis in original).

As previously noted above, at pp. 13-16, the WCC's February 17, 2016 OOC denying the proposed Project for insufficient information violated the requirements of 310 CMR 10.05(6)(c) by failing to include in the OOC a written description of the information that was purportedly lacking in the Applicant's NOI for the Project and why that information was necessary to determine whether the Project could be authorized pursuant to the MWPA and the Wetlands Regulations. As the Department's witness, Mr. Makuch testified, "[t]he [WCC] failed to list the additional information required in order to further describe the work and the effect of the work on the interests identified in the [MWPA]." Mr. Makuch's Direct PFT, ¶10.

At the Hearing, the Coalition did not dispute that the WCC's February 17, 2016 OOC failed to include a written description of the information that was purportedly lacking in the Applicant's NOI for the proposed Project and why that information was necessary to determine whether the Project could be authorized pursuant to the MWPA and the Wetlands Regulations. Petitioners' Closing Brief, at pp. 4-5. The Coalition attempted to excuse the WCC's violation of 310 CMR 10.05(6)(c) by categorizing the violation as a "minor procedural defect [that] . . . did not prejudice the Applicant or the Department . . . ." Petitioners' Closing Brief, at p. 4. The Coalition also more than suggested that the violation was cured by the WCC's submittal of a letter to the Department on April 4, 2016, during the pendency of Department's SOC review, setting forth the WCC's purported reasons for having denied the proposed Project for insufficient

information. Id., at p. 5; Exhibit A to Petitioners' Closing Brief. I reject the Coalition's claims for the following reasons.

First, the WCC's failure to provide a written statement for its denial of the proposed Project at the time it issued its OOC on February 17, 2016 was a substantive violation of 310 CMR 10.05(6)(c), not a minor violation as the Coalition contends because the violation directly impacted the required scope of the Department's review of the Applicant's SOC request. Specifically, the WCC's failure to comply with the requirements of 310 CMR 10.05(6)(c) no longer confined the Department to the rule of 310 CMR 10.05(7)(h) limiting its SOC review of a local conservation commission's "insufficient information" determination to the information that the project proponent previously submitted to the commission, because logic and due process dictate that the rule applies only when the commission has fully complied with 310 CMR 10.05(6)(c) in issuing an OOC denying a project for insufficient information. Where the local conservation commission has failed to comply with 310 CMR 10.05(6)(c), the Department's SOC review is not limited to the information that the project proponent previously submitted to the commission, but rather, is a de novo review, as discussed above, at pp. 9-10, which authorizes the Department to consider information not previously supplied to the commission. Accordingly, in this case, because the WCC failed to comply with the requirements of 310 CMR 10.05(6)(c), it is irrelevant whether the Department actually did consider "additional information" during the course of its SOC review of the proposed Project, since, in any event, the Department legally had the right to conduct its SOC review on a de novo basis.<sup>18</sup>

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<sup>18</sup> As discussed in the next section below, at pp. 30-33, I credit Mr. Makuch's testimony that the Department's SOC review was limited to the information that the Applicant had previously provided to the WCC notwithstanding that "additional information" may have been presented to the Department during the pendency of its SOC review.

I also reject the Coalition's implicit assertion that the WCC's April 4, 2016 letter to the Department purportedly setting forth the WCC's reasons for denying the proposed Project for insufficient information cured the WCC's violation of 310 CMR 10.05(6)(c) because the letter constituted a post hoc rationalization for the action that the WCC took two months earlier on February 17, 2016 in issuing its OOC denying the proposed Project for insufficient information. See NSTAR Electric Company v. Department of Public Utilities, 462 Mass. 381, 387 n.3 (2011) ("an agency's ground of decision must be clear from its own order, not from . . . 'post hoc rationalizations'" in an appeal challenging the decision). I also accord little or no probative value to the WCC's April 4<sup>th</sup> letter because the WCC could have appealed to OADR, but did not appeal, the Department's SOC reversing the WCC's denial of the proposed Project for insufficient information and approving the Project. By not appealing the SOC to OADR, the WCC waived any right to challenge the SOC and may not attack the SOC in this appeal through another party such as the Coalition. Also problematic, is the Coalition's apparent argument (at p. 5 of its Closing Brief) that that the Department's "awareness" of the WCC's April 4, 2016 letter during the pendency of its SOC review provided it with sufficient information of the basis for the WCC's denial of the proposed Project for insufficient information. The Coalition's argument directly contradicts its position in this appeal that the Department was strictly limited in its SOC review, pursuant to 310 CMR 10.05(7)(h), to the Applicant's NOI application submissions before the WCC and the contents of the WCC's OOC denying the proposed Project. Simply stated, the Coalition cannot have it both ways.

In sum, based upon my review and analysis of the evidence introduced at the Hearing, I find that: (1) the WCC did not comply with the requirements of 310 CMR 10.05(6)(c) because it

did not attach a written statement to its OOC denying the proposed Project setting forth the specific information that was lacking in the Applicant's NOI application and why it was necessary; and (2) as a result of the WCC's failure to comply with the requirements of 310 CMR 10.05(6)(c), the Department was not limited in the scope of its review of the Applicant's SOC request by the provisions of 310 CMR 10.05(7)(h), but had the legal right to review the request on a de novo basis.

**B. The Department Confined Its SOC Review To The Information That The Applicant Had Previously Submitted To The WCC**

Notwithstanding that the Department was authorized to conduct a de novo review of the Applicant's SOC request due to the WCC's failure to comply with 310 CMR 10.05(6)(c), the Department's witness, Mr. Makuch, testified that in accordance with 310 CMR 10.05(7)(h), he limited his SOC review to the Applicant's NOI application materials that had been previously submitted to the WCC. Mr. Makuch's Direct PFT, ¶ 11. Specifically, Mr. Makuch testified that:

[he] compared the referenced plans/information listed by the [WCC's OOC] and plans/information available to the Department as submitted with the [NOI] application entitled "Notice of Intent Plan" dated 02/06/16 (Plan of Record)[,]  
[and that] [i]n [his] opinion, the Plan of Record and supporting information referenced by the [WCC's OOC] contain the same information upon which the Department based its SOC review.

Id. He testified that his review of the NOI materials that had been previously submitted to the WCC included:

- (1) the NOI Application, dated November 23, 2015;
- (2) the NOI Plan, dated February 6, 2016;
- (3) the Applicant's Project Summary, entitled "Supplement to Notice of Intent," dated October 21, 2015; and
- (4) the Applicant's "Evaluation of Alternative for Public Water Supply Well

Location,” dated February 11, 2015 [sic: 2016], which is also characterized as the Applicant’s Supplement to Notice of Intent.

Id.

In his testimony, Mr. Makuch described in great detail, how his review of the Applicant’s NOI materials sufficiently provided the Department with the following information:

- (1) the identification and delineation of the pertinent wetlands resource areas at issue (Mr. Makuch’s Direct PFT, ¶¶ 13-14);
- (2) the NOI’s project description and NOI plan demarcation of the proposed Project activities, including the wetlands resources to be altered/impacted by those activities (Mr. Makuch’s Direct PFT, ¶15);
- (3) the description of how the proposed Project will meet the Wetlands Regulations’ Performance Standards, including the proposed replacement/replication of BVW which will be altered as a result of the Project (Mr. Makuch’s Direct PFT, ¶¶ 17-18); and
- (4) an appropriate alternatives analysis describing how, due to the proposed Project’s site constraints, the BVW impacts that will result from the proposed project activities are unavoidable (Mr. Makuch’s Direct PFT, ¶ 19).

Mr. Makuch also testified that he conducted a Site visit to confirm the Applicant’s description of the proposed Project in the field and its proposed wetland impacts as described in the Applicant’s NOI materials. Mr. Makuch’s Direct PFT, ¶ 16. He testified that “[b]ased upon [his] on-site inspection . . . and a review of the Plan of Record submitted with the [NOI] application, an area of 3,040 square feet of [BVW] is proposed to be altered by [the proposed Project] . . . [as] a result of [the] proposed access road and well construction” and that this area “is the only wetland[s] resource area proposed for alteration at the [P]roject site.” Id.

Mr. Makuch also testified that he reviewed “Exhibit C” to the Applicant’s SOC request, which was a copy of the WCC Conservation Agent’s December 18, 2015 Report with the

Applicant's "red highlighted commentary" responding to the Agent's comments in the Report, but in his view, this document "[did] not provide any additional information," with respect to his SOC review. Mr. Makuch's Direct PFT, ¶ 11. In their respective Closing Briefs, the parties have made much of Exhibit C's red highlighted commentary, with the Coalition contending that, based upon its cross-examination of Mr. Makuch at the Hearing, the Department improperly relied upon its content in violation of 310 CMR 10.05(7)(h) when issuing the SOC. See Petitioner's Closing Brief, at pp. 9-10.

However, for the reasons stated above, at pp. 26-30, I find that whether or not the Department relied upon Exhibit C's red highlighted commentary when it conducted its SOC review is irrelevant as a matter of law because the Department had the legal right to conduct its SOC review de novo as a result of the WCC's failure to comply with the requirements of 310 CMR 10.05(6)(c). Moreover, my review of both Mr. Makuch's testimony and the SOC does not provide any evidence that the Department did, in fact, "rely" upon Exhibit C's red highlighted commentary when it issued its SOC vacating the WCC's OOC and approving the proposed Project. As the Department aptly noted in its Closing Brief, the "question is not simply whether additional information was submitted to the Department, but whether the Department relied on it in making its decision." Department's Closing Brief, at p. 7, citing, In the Matter of Browning-Ferris Industries, Inc., DEP Docket No, 2002-233, Ruling On Motion To Dismiss And Order, 10 DEPR 116, 118 (June 5, 2003). I credit Mr. Makuch's testimony that he limited his review to the NOI materials presented to the WCC as required by 310 CMR 10.05(7)(h), and, based upon that review, determined that the NOI materials had provided "sufficient information" about the



proposed Project, the Project's impacts upon wetland resources, and the mitigation measures to address those wetlands impacts, in accordance with the MWPA and the Wetlands Regulations.

**C. The Department's Review, Conditioning Of, And Issuance Of The SOC Approving The Proposed Project Properly Considered All Potential Wetlands Impacts, Including The Potential Impacts To Angeline Brook**

As noted previously above, at pp. 9-10, if the Department makes a determination pursuant to 310 CMR 10.05(7)(h) during the course of its SOC review that a project proponent submitted sufficient information to the local conservation commission regarding the project, the Department's review of the merits of the project (whether the project can be approved pursuant to the MWPA and the Wetlands Regulations) is de novo, and information that was not before the commission may be submitted to and considered by the Department when issuing its SOC.

Bosworth, 2016 MA ENV LEXIS 12, at 33. In reviewing the merits of a project, the Department is not bound by the contents of the NOI application, and may impose conditions or requirements based upon the Department's interpretation of the MWPA and Wetlands Regulations, even if the project proponent had sought project approval based upon different regulatory requirements. See Cuda, at pp. 40-41 (under its de novo review authority "Department could approve . . . [the Town of Orleans'] proposed Project as a limited project pursuant to 310 CMR 10.24(7)(c)1 for the maintenance and improvement of existing public roadways, even though the [Town's] NOI for the Project did not seek the Project's approval pursuant to that regulation"). Likewise, the Department can in its SOC determination limit the scope of the proposed project's activities and require the project proponent to seek additional regulatory approvals for future project activities. Cuda, at pp. 47-56 (Town of Orleans required to adhere to additional Special Conditions designed to further enhance Coastal Dune protection and requiring Town to obtain additional

regulatory approvals from the Department or the Town conservation commission prior to any changes to the project).

In addition, as recently discussed in Cuda, “[i]t is important to recognize that the Department’s de novo review authority carries over to an administrative appeal of an SOC filed with OADR.” Cuda, at pp. 40-41. “During the pendency of the administrative appeal before OADR, the Department ‘is [not] precluded from changing its position [on the SOC because] . . . its [primary] obligation [is] to defend the interests of the [MWPA].’” Cuda, at p. 41, citing, In the Matter of John Soursourian, OADR Docket No. WET-2013-028, Recommended Final Decision (2014), 2014 MA ENV LEXIS 49, at 34-36, adopted as Final Decision, 2014 MA ENV LEXIS 47 (2014). “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.” Id. Also, “[t]he Presiding Officer [responsible for adjudicating the administrative appeal] is not bound by MassDEP’s prior orders or statements [in the case], and instead is responsible . . . for independently adjudicating [the] appeal[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.” Soursourian, 2014 MA ENV LEXIS 49, at 36.

With these precepts in mind, I find, based upon my review of the testimonial and the documentary evidence introduced at the Hearing, that the Department appropriately reviewed,

approved, and conditioned the proposed Project through its issuance of the SOC in accordance with the MWPA and the Wetlands Regulations for the following reasons, which are further discussed below:

- (1) In its SOC, the Department appropriately characterized and restricted the proposed Project activities to be a limited project solely for the construction and installation of a well for exploration of a public water supply, which does not require Public Water Supply Approval pursuant to 310 CMR 22.21;
  - (2) During the course of its SOC review, the Department appropriately considered all potential MWPA impacts of the proposed Project activities, including any potential impacts to Angeline brook, as part of its overall determination that the proposed Project activities were in compliance with the applicable limited project provisions of 310 CMR 10.53(3)(o)2.a-g and the general Performance Standards for BVW replication work as set forth in 310 CMR 10.55(4)(b); and
  - (3) In its SOC, the Department appropriately conditioned the Applicant's future project activities for the development of a permanent public water supply well upon application to the Department for Public Water Supply Approval, together with the filing of a Request for Determination of Applicability and/or Notice of Intent application with the WCC in conjunction with these future activities.
1. **In Its SOC, The Department Appropriately Characterized And Restricted The Proposed Project Activities To Be A Limited Project Solely For The Construction And Installation Of A Well For Exploration Of A Public Water Supply In Accordance With The Requirements Of 310 CMR 10.53(3)(o)1**

The provisions 310 CMR 10.53 authorize the approval of certain "limited projects", including a limited project as set forth in 310 CMR 10.53(3)(o) for "[t]he exploration, development, construction, expansion, maintenance, operation, and replacement of public water supply wells or wellfields[.]" provided that the project satisfies the requirements of 310 CMR 10.53(3)(o)1 and 10.53(3)(o)2. These provisions respectively provide as follows.

Except for limited projects for "[t]he exploration . . . of public water supply wells or

wellfields,” 310 CMR 10.53(3)(o)1 requires that “approval for the water supply has been granted [by the Department] under the Public Water Supply Source Approval Process pursuant to 310 CMR 22.21: *Ground Water Supply Protection* and/or the Water Management Act, M.G.L.

c. 21G.” 310 CMR 10.53(3)(o)2 requires all limited projects, including those for exploration, “be designed, constructed, implemented, operated, and maintained to avoid or, where avoidance is not practicable, to minimize impacts to resource areas, and to meet the following standards to the maximum extent practicable”:

- a. hydrological changes to resource areas shall be minimized;
- b. best management practices shall be used to minimize adverse impacts during construction, including prevention of erosion and siltation of adjacent water bodies and wetlands in accordance with standard U.S.D.A. Soil Conservation Service methods;
- c. mitigating measures shall be implemented that contribute to the protection of the interests identified in [the MWPA];
- d. compensatory storage shall be provided in accordance with the standards of 310 CMR 10.57(4)(a)1 for all flood storage volume that will be lost;
- e. no access road or other structure or activity shall restrict flows so as to cause an increase in flood stage or velocity;
- f. temporary structures and work areas in resource areas, including access roads, shall be removed within 30 days of completion of the work. Temporary alterations to resource areas shall be substantially restored to preexisting hydrology and topography. At least 75% of the surface of any area of disturbed vegetation shall be reestablished with indigenous wetland plant species within two growing seasons and prior to said vegetative reestablishment any exposed soil in the area of disturbed vegetation shall be temporarily stabilized to prevent erosion in accordance with standard U.S.D.A. Soil Conservation Service methods; and
- g. work in resource areas shall occur only when the ground is sufficiently frozen, dry, or otherwise stable to support the equipment being used.

As confirmed by Mr. Makuch in his testimony, the Department’s SOC here “only permits

public water supply well exploration by approving construction of an access road and well to facilitate pump testing.” Mr. Makuch’s Direct PFT, ¶ 22. As Mr. Makuch correctly noted in his testimony, since the Applicant had not yet obtained approval for the public water supply through the Department’s Public Water Supply process required by 310 CMR 22.21, “limited project approval for exploration is all that [the Department could grant in the SOC] in accordance with 310 CMR 10.53(3)(o).” *Id.* In making this determination, the Department correctly interpreted the requirements of 310 CMR 10.53(3)(o)1, which allows limited projects for the exploration of a public water supply well prior to an applicant obtaining the Department’s approval through the Public Water Supply Source Approval Process for the subsequent “development, construction, expansion, maintenance, operation, and replacement of public water supply wells or wellfields . . . .”

Notwithstanding the Coalition’s arguments to the contrary (See Petitioners’ Closing Brief, at pp. 6-10), the Department did not violate its own regulations, or improperly “segment” the Project, by issuing an SOC that limited the Applicant’s proposed activities to the construction of an access road and the exploration of a public water supply well. As noted above, in reviewing the Applicant’s SOC request de novo, the Department appropriately considered the limited project requirements of 310 CMR 10.53(3)(o)1 and 310 CMR 10.53(3)(o)2, and issued an SOC that allowed only those activities that conformed with these regulatory requirements. It is undisputed by all parties that, at the time of his SOC request, the Applicant had not yet obtained the Department’s approval, through the Public Water Supply Source Approval Process, for the “development, construction, expansion, maintenance, operation, and replacement of public water supply wells or wellfields . . . ” required by 310 CMR 10.53(3)(o)1. It is also

undisputed that, under the express provisions of 310 CMR 10.53(3)(o)1, “exploration” is the only limited project activity that does not require Public Water Supply Source Approval (“This general condition shall not apply to exploration”). Therefore, the Department is correct in asserting that the SOC’s authorized exploratory public well activities constitute only “the initial step in the new source approval process,” which “does not [include or] authorize the long-term operation of a public water supply well.” Department’s Pre-Hearing Brief, at p. 4.

In sum, I find that the Department appropriately characterized and restricted the proposed Project activities in its SOC as a limited project solely for the construction and installation of a well for exploration of a public water supply in accordance with the requirements of 310 CMR 10.53(3)(o)1.

**2. During The Course Of Its SOC Review, The Department Appropriately Considered All Potential MWPA Impacts Of The Proposed Project Activities, Including Any Potential Impacts To Angeline Brook, As Part Of Its Overall Determination That The Proposed Project Activities Were In Compliance With The Applicable Limited Project Provisions Of 310 CMR 10.53(3)(o)2.a-g And The General Performance Standards For BVW Replication Work As Set Forth In 310 CMR 10.55(4)(b)**

In issuing its SOC, the Department reviewed and determined that the Proposed Project activities met both the limited project provisions of 310 CMR 10.53(3)(o)2.a-g and the General Performance standards for BVW replication work as set forth in 310 CMR 10.55(4)(b). With respect to the limited project requirements of 310 CMR 10.53(3)(o)2.a-g, Mr. Makuch provided a detailed and persuasive analysis in his testimony at the Hearing regarding how the proposed Project satisfies those requirements as follows. Mr. Makuch’s Direct PFT, ¶¶ 23-24.

First, the proposed Project will minimize “[h]ydraulic changes to the BVW . . . to the maximum extent practicable. [Since] [t]he proposed pump test is temporary[, it is] not expected

to have any long term impact on the wetland resource area.<sup>19</sup> In addition, wetland replication is proposed to mitigate any loss of wetland hydrology.” Mr. Makuch’s Direct PFT, ¶ 24a.

Second, “[b]est management practices, including the [SOC’s] erosion control [requirements] established by Special Conditions [Nos.] 1 through 3 [of the SOC] will be used to minimize adverse impacts during construction.”<sup>20</sup> Mr. Makuch’s Direct PFT, ¶ 24b.

Third, “[m]itigating measures (i.e., wetland replication, temporary seeding and ground stabilization) will be implemented to contribute to the protection of the interests in the [MWPA].” Mr. Makuch’s Direct PFT, ¶ 24c.

Fourth, “[c]ompensatory storage is not required because flood storage volume will not be lost . . . and . . . filling within the proposed roadway area does not require any flood plain compensation.” Mr. Makuch’s Direct PFT, ¶ 24d.

Fifth, the proposed Project’s “[a]ccess roads will not restrict flows . . . to cause an increase in flood stage or velocity. [Furthermore,] [t]here are no streams or drainage ways

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<sup>19</sup> Mr. Makuch’s testimony that the “proposed pump test is temporary” is consistent with the Department’s assertion that the SOC only authorizes well installation for “exploratory” purposes.

<sup>20</sup> Special Conditions Nos. 1-3 of the SOC respectively provide as follows:

- (1) Special Condition No. 1: An erosion control barrier (hay bales and/or siltation fence) shall be installed as shown on referenced plans until all disturbed areas have been stabilized. The erosion control barrier shall also serve as the work limit line as designated on above-referenced plans, with exception the proposed area of alteration of [BVW].
- (2) Special Condition No. 2: All sedimentation barriers shall be maintained in good repair until all disturbed areas have been fully stabilized with vegetation or other means. At no time shall sediments be deposited in a wetland or water body. During construction, the applicant or his/her designee shall inspect the erosion controls on a daily basis and shall remove accumulated sediments as needed. The Applicant shall immediately control any erosion problems that occur at the site and shall also immediately notify the Department, which reserves the right to require additional erosion and/or damage prevention controls it may deem necessary.
- (3) Special Condition No. 3: Bare soil areas shall be mulched within 24 hours and re-vegetated where practicable within 6 months.

which will be affected by placement of fill for the access road.” Mr. Makuch’s Direct PFT, ¶ 24e.

Sixth, since “[t]he proposed roadway will be permanent[, there are no proposed] temporary structures [or] work areas in resource areas . . . and [therefore] there will be no temporary alteration of resource areas.” Mr. Makuch’s Direct PFT, ¶ 24f.

Lastly, “[a]ll w]ork in resource areas will be conducted from the stable platform of the access road after [its construction].” Mr. Makuch’s Direct PFT, ¶ 24g.

Mr. Makuch also testified persuasively that the only wetlands resource area impacted by the proposed Project consists of significant BVW alterations, which triggered the need for the Applicant to comply with the BVW General Performance Standards as set forth in 310 CMR 10.55, as discussed above, at pp. 10-13. Mr. Makuch’s Direct PFT ¶¶ 16-17. To comply with the BVW General Performance Standards requirements, the Applicant’s NOI submissions included an Alternatives Analysis (detailing why the BVW alteration impacts could not be avoided), and a detailed replication plan for BVW replacement of approximately the same area, which included, among other things, a detailed planting plan, grading plan, construction methodology, and erosion control details. Mr. Makuch’s Direct PFT, ¶¶ 18-19. Based upon his review and analysis of the Applicant’s information, Mr. Makuch determined that the proposed replication work met the BVW General Performance Standards replication requirements of 310 CMR 55(4)(b) and the Department’s Wetlands Replication Guidelines. Mr. Makuch’s Direct PFT, ¶¶ 18, 27c.

Contrary to the Coalition’s assertions, the Department appropriately considered whether



the proposed Project would potentially impact Angeline Brook and its coldwater fishery habitat. As an initial matter, I note that the SOC itself does not identify “Fisheries” as a significant MWPA interest that will be impacted by the proposed Project. SOC, Part B. Findings, p. 2. Moreover, Mr. Makuch, after reviewing the PFT of the Coalition’s expert witnesses, Mr. Bergin and Mr. Kastrinos, testified that, while both experts “focus[ed] on the possible effects that a groundwater well may have on stream levels . . . there [was] no specific evidence provided in [their respective] testimony . . . that the proposed well would [in fact] impact wetland[s] groundwater levels.” Mr. Makuch’s Direct PFT, ¶ 25. Mr. Makuch also testified persuasively that “the wetland[s] and ground water level impacts will not be known until pump tests are conducted on the test well installed.” Mr. Makuch’s Direct PFT, ¶ 26. Since concrete data regarding the actual impacts of the “construction and operation” of the public water supply are not yet known, I agree with the Department that Mr. Bergin’s and Mr. Kastrinos’ testimony is speculative in nature and should not be accorded any weight. Department’s Closing Brief, at p. 10, citing, In the Matter of Wannie, DEP Docket No. 94-059, Partial Directed Decision, Decisions on Motions to Strike, and Temporary Stay, 2 DEPR 203, 205-206 (September 7, 1995). I also reached this conclusion for the following additional reasons.

First, while Mr. Bergin is without question a Massachusetts cold water fisheries expert, I agree with the Department that “his testimony regarding the potential impact of groundwater withdrawals on the Coldwater fishery resources of Angeline Brook was stated in general terms and was not supported by any data.” Department’s Closing Brief, p. 9; See Mr. Bergin’s Direct PFT, p. 5, ¶ D. Mr. Bergin further testified that “[i]t [would have been] reasonable and appropriate for the [WCC] to [have given] consideration to the sensitive Coldwater Fishery

Resource in Angeline Brook and request additional information [from the Applicant] in order to determine if construction and operation of the proposed well could negatively impact wetland[s] and fishery resources,” but he did not specify exactly what additional information would be required. Mr. Bergin’s Direct PFT, p. 6, paragraph A; Department’s Closing Brief at p. 9. Also, as the Applicant pointed out in his Closing Brief, on cross-examination at the Hearing, Mr. Bergin admitted that he had not visited the Project site, and had last visited the Angeline Brook area over 25 years ago. Applicant’s Closing Brief, p. 5. He also testified on cross-examination that his assumptions about the proposed Project were based upon fishery data from an area of Angeline Brook that was over three miles from the Project site, and he could not testify as to whether the Angeline Brook area located in proximity to the Project was in fact part of a cold water fishery for Sea-Run Brook Trout, also known as Salter Brook Trout. Applicant’s Closing Brief, p. 5.

As for Mr. Kastrinos, he presented testimony regarding the “potential effects that construction and operation of a public water supply well could have on the flow and temperature of water in adjacent wetlands and nearby streams.” Mr. Kastrinos’ Direct PFT, p. 2, ¶ A. However, as the Applicant pointed out in his Closing Brief, when questioned on cross-examination at the Hearing, Mr. Kastrinos admitted that his opinion was based upon second hand sources, he had never visited the Project site, and his expert conclusions were based solely upon geologic surveys of the area. Applicant’s closing brief, at p. 5. Just as Mr. Bergin, Mr. Kastrinos had no concrete data to support his conclusions, nor had he conducted any independent

tests to validate his opinions. Applicant's closing brief, p. 5.

**3. In Its SOC, The Department Appropriately Conditioned The Applicant's Future Project Activities For The Development Of A Permanent Public Water Supply Well Upon Application To The Department For Public Water Supply Approval, Together With The Filing Of A Request For Determination Of Applicability And/Or Notice Of Intent Application With The WCC In Conjunction With These Future Activities**

Lastly, I find that Department's SOC appropriately conditioned the Applicant's future project activities for the development/construction/installation of a permanent public water supply well upon the application to the Department for Public Water Supply Approval, as required by 310 CMR 10.53(3)(o)1. See SOC, Special Condition No. 12.<sup>21</sup> In addition, the SOC requires that any additional work that is subject to the MWPA shall require the Applicant to file a Request for Determination of Applicability and/or a Notice of Intent with the WCC in accordance with the Wetlands Regulations. See SOC, Special Condition No. 10.<sup>22</sup> Hence, in the event that the Applicant's proposed "exploratory" work for a public water supply well indicates that future development of a well is feasible, the Applicant will be required to comply with both the applicable requirements of the Department's Public Water Supply Approval Process, as well

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<sup>21</sup> Special Condition No. 12 of the SOC provides that "[i]n order to develop a new source public water supply, application must be made in accordance with [Department Form] BRP WS 13 (Exploratory Phase, Site Examination, Land Use Survey[,] and Approval to Conduct Pumping Test)."

<sup>22</sup> Special Condition No. 10 of the SOC provides that "[a]ny additional work that is subject to jurisdiction under the Wetland Protection Act shall require the filing of a Request for Determination of Applicability and/or Notice of Intent Application." As discussed above, at pp. 5-10, these applications are initially filed with the local conservation commission.

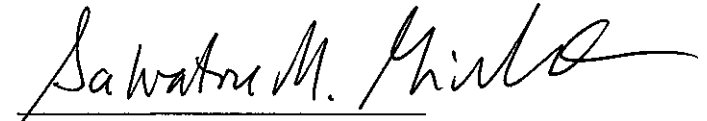
as the requirements of the MWPA and the Wetlands Regulations with respect to these future activities.

### **CONCLUSION**

For the reasons discussed in detail above, I recommend that the Department's Commissioner issue a Final Decision affirming the Department's SOC approving the proposed Project.

Date:

02/28/18

  
Salvatore M. Giorlandino  
Chief Presiding Officer

### **NOTICE-RECOMMENDED FINAL DECISION**

This decision is a Recommended Final Decision of the Chief 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/or 14(e), and may not be appealed to Superior Court pursuant to 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 and no other person directly or indirectly involved in this administrative appeal shall neither (1) file a motion to renew or reargue this Recommended Final Decision or any part of it, nor (2) communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

**In the Matter of Brian Corey, OADR Docket No. WET-2016-023  
Recommended Final Decision**

## SERVICE LIST

**Applicant:** Brian Corey  
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**e-mail:** coreylaw@aol.com;

**Legal representative:** Same as Applicant;

**Property Owner:** James Wood  
17 Adamsville Road  
Westport, MA 02790;

**Legal representative:** None stated in Appeal Notice;

**Petitioners:** Buzzards Bay Coalition; and  
Twelve Residents of the Town of Westport, MA,<sup>23</sup>  
Through their Designated Representative,  
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Senior Attorney, Buzzards Bay Coalition  
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<sup>23</sup> The names of the Twelve Residents are set forth on p. 1 of the Petitioners' Appeal Notice.

[continued from preceding page]

**The Local Conservation Commission:**

Town of Westport Conservation Commission  
c/o Christopher J. Capone, Conservation Agent  
856 Main Road  
Westport, MA 02790

**Legal representative:** None stated in Appeal Notice;

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**In the Matter of Brian Corey, OADR Docket No. WET-2016-023**  
**Recommended Final Decision**