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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

October 12, 2018

In the Matter of
Christopher N. Colby

OADR Docket No. WET-2016-012
DEP File No. SDA
Attleboro, MA

RECOMMENDED REMAND DECISION

INTRODUCTION

In this appeal, the Petitioner Christopher N. Colby challenges a Superseding Determination of Applicability (“SDA”) that the Southeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to the Petitioner on June 14, 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 SDA concerned the Petitioner’s proposed construction of a single-family home, garage, driveway, septic system, utilities, and grading and landscaping (“the proposed Project”) on a less than one-half (1/2) acre (20,159 square foot) lot¹ located at 46 Berwick Road (Lot 1) in Attleboro, Massachusetts (“the proposed Project Site”). The proposed

¹ One acre contains 43,560 square feet.

Project Site directly abuts Berwick Road, a paved public way in Attleboro, which in turn abuts Mechanics Pond that is surrounded by extensive residential real estate development that has taken place over the past decade or more on Berwick Road and the adjoining streets of Landers Road and Mechanic Street. This extensive residential real estate development, which was approved by the Attleboro Conservation Commission (“ACC”) without objection from the Department, includes moderate to large sized single-family homes and at least two multi-unit residential (condominium) developments “well within 200 feet of Mechanics Pond, with certain structures located as near as approximately 25 feet from the shoreline.” Petitioners’ Closing Brief, at p. 9.

The SDA at issue here affirmed the ACC’s earlier Determination of Applicability (“DA”) that the proposed Project Site is located within Riverfront Area of the Ten Mile River,² and, as a result, the Petitioner was required to obtain a permit known as an Order of Conditions (“OOC”) from the ACC authorizing the proposed Project pursuant to the MWPA and the Wetlands Regulations. At the heart of this determination was both the ACC’s and the Department’s finding that the proposed Project Site “includes Riverfront Area associated with Mechanics Pond [because the Pond is] a branch of the Ten Mile River.” SDA Transmittal Letter, at p. 1. According to the Department, Mechanics Pond is a part of the Ten Mile River because “[the] [w]aters of the . . . River [purportedly] flow into and eventually through Mechanics Pond.” Id.

The Petitioner contends that the ACC and the Department erred in determining that Mechanics Pond is “a branch of the Ten Mile River” and accordingly requests a Final Decision in this appeal: (1) vacating the Department’s SDA and (2) finding that the proposed Project Site is not within Riverfront Area, and, thus, not subject to the permitting requirements of the MWPA

² As discussed below, at pp. 10-13, Riverfront Area is a wetlands area protected by the MWPA and the Wetlands Regulations at 310 CMR 10.58.

and the Wetlands Regulations. Petitioner's Amended Pre-Hearing Statement, at pp. 2-4; Petitioner's Closing Brief, at pp. 2-9. The Petitioner also contends that the Department's SDA should be vacated because the ACC's Orders of Condition during the past decade or longer approving other residential projects in the vicinity of Mechanics Pond and the proposed Project Site demonstrate that the Site is not located within Riverfront Area. Petitioner's Closing Brief, at pp. 9-20. The Petitioner also contends that even if the proposed Project Site is located within the Riverfront Area, "[the Site] does not play a role in [furthering any of the MWPA's eight statutory interests]"³ because of the extensive real estate development that has taken place in the vicinity of Mechanics Pond and the proposed Project Site. Petitioner's Closing Brief, at pp. 20-24.

The ACC and the Department dispute the Petitioner's claims and request the SDA be affirmed. ACC's Closing Brief, at pp. 1-9; Department's Closing Brief, at pp. 1-8.

I conducted an evidentiary Adjudicatory Hearing ("Hearing") to resolve the Petitioner's appeal of the Department's SDA.⁴ Per the standard practice of the Office of Appeals and Dispute Resolution ("OADR"), the Hearing was digitally recorded. Following the Hearing, OADR's Case Administrator made the digital recording available to the parties for downloading from the internet, which the parties relied on in drafting and filing their respective Closing Briefs in the case.

The Issue for Resolution at the Hearing was whether the proposed Project Site is within

³ The eight MWPA statutory interests are discussed below, at pp. 6-7.

⁴ The Hearing took place after the proceedings in the appeal were stayed for a significant period of time to allow the parties to attempt resolution of the appeal by settlement. The Hearing went forward after the parties were unable to reach a settlement of the appeal.

the Riverfront Area of the Ten Mile River, specifically whether the River's waters flow into and eventually through Mechanics Pond. At the Hearing, all of the parties, except the ACC, presented witnesses and documentary evidence in support of their respective positions in the case. Additionally, all of the parties were represented by legal counsel. The witnesses were cross-examined under oath on sworn Pre-filed Testimony ("PFT") that they had filed prior to the Hearing in support of the parties' respective positions in the case. The witnesses who testified at the Hearing were as follows.

The Petitioner's witnesses were:

- (1) Michael A. Trowbridge, a Registered Professional Land Surveyor and Certified Soil Evaluator, and the President of Hutchins-Trowbridge Assoc., a civil engineering and land surveying firm based in Mansfield, Massachusetts, with more than 30 years of experience in engineering and wetlands permitting work;⁵ and
- (2) David R. Wescott, a wetlands scientist for Mason & Associates, a private environmental consulting firm based in Scituate, Rhode Island with more than 30 years of experience in the wetlands field and environmental compliance in several states, including Massachusetts.⁶

Prior to the Hearing, Patrick G. Garner, a Hydrologist, Wetlands Scientist, and Certified Soil Evaluator, also filed PFT on behalf of the Petitioner. However, he did not appear at the Hearing for cross-examination, and, as a result, pursuant to the Adjudicatory Proceeding Rules at 310 CMR 1.01(12)(f) and 13(h)3, his PFT was stricken from the Administrative Record.⁷

The Department's witness at the Hearing was Daniel F. Gilmore, a wetlands expert and

⁵ Pre-filed Direct Testimony of Michael A. Trowbridge ("Mr. Trowbridge's PFT"), ¶¶ 1-2.

⁶ Statement of David R. Wescott, AICP In Support of Petitioner ("Mr. Wescott's PFT"), at p. 1 (1st paragraph).

⁷ Both 310 CMR 1.01(12)(f) and 13(h)3 provide that "[i]f a witness is not available for cross-examination at the hearing, the written testimony of the witness *shall be excluded* from the record unless the parties agree otherwise." (emphasis supplied). I informed the Petitioner of this requirement at the Pre-Hearing Conference that I conducted with the parties approximately two and one-half months prior to the Hearing. At the Hearing, Mr. Garner's PFT was stricken from the Administrative Record pursuant to 310 CMR 1.01(12)(f) and 13(h)3 after the ACC and the Department declined to stipulate to the PFT remaining in the record.

Environmental Analyst in the Wetlands Program of the Department's Southeast Regional Office ("Mr. Gilmore"), with more than 30 years of experience in the wetlands field. Pre-filed Testimony of Daniel F. Gilmore ("Mr. Gilmore's PFT"), ¶¶ 1-4.

The Hearing also included my conducting a view of the proposed Project Site and surrounding area ("the Site Visit") with the parties and their respective legal counsel and wetlands experts pursuant to 310 CMR 1.01(5)(a)14 and 310 CMR 1.01(13)(j) to assist me in "[my] understanding of the evidence that ha[d] been . . . presented" by the parties in the appeal. During the Site Visit, in accordance with 310 CMR 1.01(5)(a)14 and 310 CMR 1.01(13)(j), the parties "point[ed] out objects [at] or features [of the proposed Project Site and surrounding area] that [could] . . . assist [me] in understanding [the] evidence [that was presented in the Hearing by the parties]." In accordance with the same rules, I "rel[ied] on the . . . observations [that I made] during [the Site Visit] as evidence to the same extent permissible as if observed in the hearing room."

As discussed in detail below, based on a preponderance of the expert testimony and documentary evidence presented by the parties at the Hearing, including the observations I made during the Site Visit, I find that the Department properly determined that the proposed Project Site is located within the Riverfront Area of the Ten Mile River. However, I am not recommending that the Department's Commissioner issue a Final Decision affirming the Department's SDA. Instead, I am recommending that the Commissioner remand the matter to the Department's Southeast Regional Office for a determination of whether the proposed Project Site, as an area located within Riverfront Area, is significant to furthering any of the MWPA's eight statutory interests given the extensive residential real estate development that has taken

place in the vicinity of Mechanics Pond and the proposed Project Site that I observed during the Site Visit. In my view, such a determination is necessary for the following reasons.

First, the proposed Project Site is a modest less than one-half (1/2) acre (20,159 square foot) lot that directly abuts Berwick Road, a paved public way in Attleboro, which in turn abuts Mechanics Pond that is surrounded by extensive residential real estate development that has taken place over the past decade or more on Berwick Road and the adjoining streets of Landers Road and Mechanic Street. This extensive residential real estate development took place with the ACC's approval and without objection from the Department in Orders of Condition issued by the ACC that did not state that the development was located in Riverfront Area.⁸ This extensive residential real estate development includes moderate to large sized single-family homes and at least two multi-unit residential (condominium) developments "well within 200 feet of Mechanics Pond, with certain structures located as near as approximately 25 feet from the shoreline." Petitioners' Closing Brief, at p. 9. The existence of this extensive real estate development located much closer to Mechanics Pond than the proposed Project Site raises a valid concern whether the proposed Project Site is significant to furthering any of the MWPA's eight statutory interests, and, accordingly, the Department's Southeast Regional Office should determine that issue on Remand as discussed below.

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

⁸ As discussed below, in n. 13, at p. 17, these prior Orders of Condition are not binding in this case in determining whether Mechanics Pond is part of the Ten Mile River but are relevant in determining whether the proposed Project Site, as an area located within Riverfront Area, is significant to furthering any of the MWPA's eight statutory interests given the extensive residential real estate development that has taken place in the vicinity of Mechanics Pond and the proposed Project Site.

regulate activities affecting wetlands areas in a manner that promotes the following eight statutory interests:

- (1) protection of public and private water supply;
- (2) protection of ground water supply;
- (3) flood control;
- (4) storm damage prevention;
- (5) prevention of pollution;
- (6) protection of land containing shellfish;
- (7) protection of fisheries; and
- (8) protection of wildlife habitat.

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 alter⁹ 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 proposed work or review on appeal from a local Conservation Commission decision. Healer v.

⁹ 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.

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 the 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 Conditions, 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 “order [by the Department] shall supersede the prior order 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] order,” 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, a Superseding Order of Conditions (“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 Petitioner’s appeal concerns an SDA issued by the Department pursuant to the MWPA and the Wetlands Regulations that affirmed the ACC’s DA that the proposed Project Site

is located within Riverfront Area of the Ten Mile River, and, as such, the Petitioner is required to obtain an Order of Conditions from the ACC authorizing the Project pursuant to the MWPA and the Wetlands Regulations.

II. THE PROTECTED WETLANDS AREA OF RIVERFRONT AREA

The Wetlands Regulations define a River as “any natural flowing body of water that empties to any ocean, lake, *pond*, or other river and which flows throughout the year.” 310 CMR 10.58(2)(a)1. (emphasis supplied). “Rivers include the entire length and width to the mean annual high-water line of [] *major rivers*” as defined by the Wetlands Regulations at 310 CMR 10.58(2)(a)1.e. (emphasis supplied). This Regulation lists a number of rivers as major rivers, including the Ten Mile River, which is at issue in this appeal.¹⁰

Riverfront Area is defined by the MWPA and the Wetlands Regulations as “[the] area of land [situated] between a river’s mean annual high water line and a parallel line located [200] feet away measured outward horizontally from the river’s mean high-water line[,]” which “may include or overlap other [wetlands] resource areas or their buffer zones.” G.L. c. 131, § 40; 310 CMR 10.58(2)(a). A buffer zone is within 100 feet of any protected wetlands area. 310 CMR 10.02(2)(b). “[R]iverfront [A]rea does not have a buffer zone.” 310 CMR 10.58(2)(a).

Under the Wetlands Regulations, “Riverfront [A]reas are likely to be significant” to the advancement of all eight MWPA interests listed above. 310 CMR 10.58(1). As a result, there is a presumption under the Wetlands Regulations that “[w]here a proposed activity involves work within the [R]iverfront [A]rea, the [local conservation commission and the Department must] presume that the area is significant to [advancement of these MWPA interests]” 310 CMR

¹⁰ 310 CMR 10.58(2)(a)1.e also lists the following rivers as major rivers: Assabet, Blackstone, Charles, Chicopee, Concord, Connecticut, Deerfield, Farmington, French, Hoosic, Housatonic, Ipswich, Merrimack, Millers, Nashua, Neponset, Parker (Essex County), Quinebaug, Shawsheen, Sudbury, Taunton, and Westfield.

10.58(3). However, “[t]he presumption is rebuttable and may be overcome upon a clear showing [by the project proponent] that the [R]iverfront [A]rea does not play a role in the protection of [these MWPA] interests.” *Id.* In the event the local conservation commission or the Department determines that the project proponent has “overcome” the presumption, it “[must] make a written determination to this effect, setting forth its grounds” on Department Form 6. *Id.*

“Where the presumption . . . is not overcome [by the project proponent],” the project can only be authorized by the local conservation commission and the Department if the project satisfies the Performance Standards in 310 CMR 10.58(4) governing proposed work in Riverfront Area. Specifically, the project can only be approved if the project proponent demonstrates by “a preponderance of the evidence that there are no practicable and substantially equivalent economic alternatives to the proposed project with less adverse effects on the [MWPA] interests . . . and that the work, including proposed mitigation, will have no significant adverse impact on the [R]iverfront [A]rea to protect the [MWPA] interests”¹¹ 310 CMR 10.58(4). The Wetlands Regulations at 310 CMR 10.58(4)(c)1 define a “practicable and substantially equivalent economic alternative” as an alternative that “is available and capable of being done after taking into consideration” four factors: (1) costs, (2) existing technology, (3) proposed use, and (4) logistics, “in light of overall project purposes.”

In evaluating the cost factor in the Alternatives Analysis, the local conservation

¹¹ In addition, if protected wetlands such as Coastal Bank, Salt Marsh, Bordering Vegetated Wetlands, or Land Subject to Flooding are located within the Riverfront Area, the project can only be authorized if it satisfies the Performance Standards for work or activities in those protected wetlands areas. 310 CMR 10.58(4)(a). Also, no project can be authorized in Riverfront Area if the project “will have any adverse effect on specified habitat sites of rare wetland or upland, vertebrate or invertebrate species, as identified by the procedures established [in the Wetlands Regulations at] 310 CMR 10.59 or 10.37, or which will have any adverse effect on [a certified] vernal pool habitat” 310 CMR 10.58(4)(b).

commission and the Department are required “[to] be guided by these principles”:

- (1) the cost of an alternative must be reasonable for the project purpose, and cannot be prohibitive;
- (2) higher or lower costs taken alone should not determine whether an alternative is practicable because an alternative is a practicable and substantially equivalent economic alternative if it will achieve the proposed use and project purpose from an economic perspective;
- (3) in considering the costs to the owner of the real property where the project has been proposed, the evaluation should focus on the financial capability reasonably expected from the type of owner (e.g., individual homeowner, residential developer, small business owner, large commercial or industrial developer) rather than the personal or corporate financial status of that particular owner; and
- (4) documentation of the cost of an alternative may be required of the project proponent and the determination of whether the cost of an alternative is reasonable for the project purpose may be based on descriptions of alternatives, knowledge of alternative sites, information provided by qualified professionals, comparisons to costs normally associated with similar projects, or other evidence.

310 CMR 10.58(4)(c)1.a.i through 1.a.iv.

Evaluation of the three remaining factors in the Alternative Analysis: existing technology, proposed use, and logistics involve the following.

Existing Technology. This includes an evaluation of “[the] best available measures,” specifically, “the most up-to-date technology or the best designs, measures, or engineering practices that have been developed and are commercially available.” 310 CMR 10.58(4)(c)1.b.

Proposed Use. “This term is related to the concept of project purpose. In the context of typical single family homes, the project purpose (construction of a single family house) and proposed use (family home) are virtually identical. In the context of projects where the purpose implies a business component, such as residential subdivision, commercial, and industrial projects, the proposed use typically requires economic viability. Practicable and substantially equivalent economic alternatives include alternatives which are economically viable for the proposed use from the perspective of site location, project configuration within a site, and the scope of the project. In the context of publically financed projects, the proposed use includes consideration of legitimate governmental purposes

(e.g., protection of health and safety, providing economic development opportunities, or similar public purposes).” 310 CMR 10.58(4)(c)1.c.

Logistics. This factor “refers to the presence or absence of physical or legal constraints. Physical characteristics of a site may influence its development. Legal barriers include circumstances where a project cannot meet other applicable requirements to obtain the necessary permits at an alternative site. An alternative site is not practicable if special legislation or changes to municipal zoning would be required to achieve the proposed use or project purpose. An alternative is not practicable if the applicant is unable to obtain the consent of the owner of an alternative site for access for the purpose of obtaining the information required by the [NOI] or of allowing the [local conservation commission and the Department] to conduct a site visit.” 310 CMR 10.58(4)(c)1.d.

III. THE PETITIONER’S BURDEN OF PROOF AT THE HEARING

At the Hearing, the Petitioner had the burden of proving by a preponderance of the evidence that the Department erred in issuing the SDA. See 310 CMR 10.03(2); 310 CMR 10.05(7)(j)2.b.iv; 310 CMR 10.05(7)(j)2.b.v; 310 CMR 10.05(7)(j)3.a; 310 CMR 10.05(7)(j)3.b. Specifically, the Petitioner was required to “produce [at the Hearing] at least some credible evidence from a competent source in support of [his] position” that the Department erred in issuing the SDA. Id. This “credible evidence [had to come] from a competent source in support of each claim of factual error [made against the Department], including any relevant expert report(s), plan(s), or photograph(s).” 310 CMR 10.05(7)(j)3.c. “A ‘competent source’ is a witness who has sufficient expertise to render testimony on the technical issues on appeal.” In the Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 MA ENV LEXIS 89, at 36-37, adopted as Final Decision (August 19, 2010), 2010 MA ENV LEXIS 31. Whether the witness has such expertise depends “[on] whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony.” Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted); see e.g. In the Matter of Carulli, Docket

No. 2005-214, Recommended Final Decision (August 10, 2006)(dismissing claims regarding flood control, wetlands replication, and vernal pools for failure to provide supporting evidence from competent source), adopted as Final Decision (October 25, 2006); In the Matter of Indian Summer Trust, Docket No. 2001-142, Recommended Final Decision (May 4, 2004) (insufficient evidence from competent source showing that interests under MWPA were not protected), adopted as Final Decision (June 23, 2004); In the Matter of Robert Siegrist, Docket No. 2002-132, Recommended Final Decision (April 30, 2003) (insufficient evidence from competent source to show wetlands delineation was incorrect and work was not properly conditioned), adopted as Final Decision (May 9, 2003); Pittsfield Airport Commission, *supra*, 2010 MA ENV LEXIS 89, at 36-39 (petitioner's failure to submit expert testimony in appeal challenging Department's Commissioner's issuance of 401 Water Quality Certification Variance to Pittsfield Airport Commission fatal to petitioner's claims in appeal because Variance was "detailed and technical . . . requiring expert testimony on issues . . . implicated by the Variance," including . . . (1) wetland replication, restoration, and enhancement, (2) mitigation of environmental impacts to streams, and (3) stormwater discharge and treatment[,], [and (4)] . . . runway safety and design").

My review of the evidence presented by the parties at the Hearing was de novo, meaning that my review was anew, irrespective of any prior determination of the Department in issuing the SDA. 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). Put another way, as the Presiding Officer responsible for adjudicating the appeal, "[I was] not bound by MassDEP's prior orders or statements [in the case], [but] instead [was] responsible . . . for independently adjudicating [the] appeal[I] and making a recommendation to MassDEP's Commissioner that [was] consistent with

and in the best interest of the [MWPA] and . . . [the Wetlands] Regulations . . .” Id., 2014 MA ENV LEXIS 49, at 36.

As for the relevancy, admissibility, and weight of evidence that all of the parties presented at the Hearing, this was governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):

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

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

FINDINGS

I. THE DEPARTMENT PROPERLY DETERMINED THAT THE PROPOSED PROJECT SITE IS LOCATED WITHIN RIVERFRONT AREA OF THE TEN MILE RIVER

As discussed above, under the Wetlands Regulations, a River is “any natural flowing body of water that empties to any ocean, lake, *pond*, or other river and which flows throughout the year,” 310 CMR 10.58(2)(a)1, and “[it] include[s] the entire length and width to the mean annual high-water line of [a] *major rive[r]*” as defined by the Wetlands Regulations at 310 CMR

10.58(2)(a)1.e. (emphasis supplied). Undisputedly, the Ten Mile River is considered a major river under 310 CMR 10.58(2)(a)1.e. Thus, the Issue for Resolution here as identified above is whether Mechanics Pond is “a branch of the Ten Mile River,” as the Department determined, specifically whether the River’s waters “flow into and eventually through Mechanics Pond.” SDA Transmittal Letter, at p. 1. Based on a preponderance of the evidence introduced at the Hearing, I find that the Department correctly determined that Mechanics Pond is a branch of the Ten Mile River for following reasons.

First, the Department’s witness, Mr. Gilmore, a highly experienced wetlands expert, provided undisputed testimony at the Hearing that “Mechanics Pond is within the mean annual high-water line of the Ten Mile River.” Mr. Gilmore’s PFT, ¶ 9. None of the Petitioner’s witnesses--Mr. Trowbridge and Mr. Wescott--testified otherwise. Mr. Trowbridge’s PFT, ¶¶ 1-22; Mr. Wescott’s PFT, pp. 1-2; Mr. Wescott’s Rebuttal PFT, pp. 1-2. Indeed, neither Mr. Trowbridge nor Mr. Wescott addressed at all whether Mechanics Pond is within the Ten Mile River’s mean annual high-water line. Id. Instead, their testimony focused on other matters that were not probative on that issue. Id.

In his testimony, Mr. Trowbridge focused on a 15-unit condominium project on Mechanics Pond located at 95 Mechanic Street in Attleboro and in the vicinity of the proposed Project Site, which was authorized by the ACC in a 2002 Order of Conditions (see below, at pp. 21-22), to opine that “the ACC ha[d] never before treated Mechanics Pond as a River having Riverfront Area.” Mr. Trowbridge’s PFT, ¶¶ 13-22. While this testimony is probative to the issue of whether the proposed Project Site, as an area located within Riverfront Area, is significant to furthering any of the MWPA’s eight statutory interests discussed above,¹² it is not

¹² See below, at pp. 20-24.

Mechanics Pond is a branch of the Ten Mile River because, as discussed above, the regulatory definition of a River as set forth in 310 CMR 10.58(2)(a) i.e. of the Wetlands Regulations governs the determination. For the same reason, Mr. Wescott's reliance on: (1) the purported hydrological evidence in Mr. Garner's December 15, 2015 Report entitled "Mechanics Pond, Attleboro[:] River Analysis" ("Mr. Garner's 2015 Report");¹⁴ (2) an undated three meter elevation contours Massachusetts GIS map;¹⁵ (3) a USGS chart purportedly depicting Ten Mile River Gauging Data from 2007 to 2017;¹⁶ (3) newspaper articles from 2007 and 2008 relating to Attleboro's draining of Mechanics Pond;¹⁷ and (4) a July 2015 FEMA Flood Map¹⁸ are not probative. Mr. Wescott's PFT, at p. 1. These materials also have other evidentiary deficiencies.

First, I accord little or no weight to Mr. Garner's 2015 Report because he did not appear at the Hearing for cross-examination. Mr. Wescott's adoption of the Report in his testimony did not eliminate that problem since he did not prepare the Report and was not present during Mr. Garner's inspection of the proposed Project Site. Additionally, Mr. Gilmore effectively refuted the contention of Mr. Garner's 2015 Report that Mechanics Pond is not a branch of the Ten Mile River. Mr. Gilmore's PFT, ¶¶ 8-10, 12. Specifically, Mr. Gilmore testified that Mr. Garner stated in his 2015 Report "that Mechanics Pond has a single northerly connection to the Ten Mile River--which is in effect its inlet--that provides water to the [P]ond[.]" and as a result, "it is

¹⁴ Mr. Wescott's PFT, at p. 1; Attachment 5 to Mr. Wescott's PFT.

¹⁵ Mr. Wescott's PFT, at p. 1; Attachment 6 to Mr. Wescott's PFT.

¹⁶ Mr. Wescott's PFT, at p. 1; Attachment 7 to Mr. Wescott's PFT.

¹⁷ Mr. Wescott's PFT, at p. 2; Attachment 8 to Mr. Wescott's PFT.

¹⁸ Mr. Wescott's PFT, at p. 2; Attachment 9 to Mr. Wescott's PFT.

undisputed that [the] Pond receives water from . . . the Ten Mile River.” Mr. Gilmore’s PFT, ¶ 8. Mr. Gilmore also refuted Mr. Garner’s finding that water from the Ten Mile River does not flow through Mechanics Pond by providing persuasive testimony demonstrating the opposite. Mr. Gilmore’s PFT, ¶ 10. Mr. Gilmore testified that “at the time of [his] onsite inspection [of the proposed Project Site], [he] observed water flowing within the channel [referred to by Mr. Garner as an old oxbow] . . . below [a] culvert [referred to by Mr. Garner as “Old Culvert”] . . . in the southeast corner of Mechanics Pond.” *Id.* He testified that “[t]he water was flowing from the direction of Mechanics Pond in the west towards the Ten Mile River below the dam” and that “[b]ased on the unidirectional flow from [the] Pond toward the Ten Mile River within the old oxbow, [he] concluded that at least some water was exiting [the] Pond recharging the channel.” *Id.*; See also Mr. Gilmore’s PFT, ¶ 12.

As for Mr. Wescott’s reliance on newspaper articles from 2007 and 2008 relating to Attleboro’s draining of Mechanics Pond¹⁹ to support his opinion that the Pond is not part of the Ten Mile River because rivers cannot be drained, Mr. Gilmore aptly noted in his testimony that “[n]either Mr. Wescott nor the articles explain how [Attleboro] drained the pond.” Mr. Gilmore’s PFT, ¶ 12. Mr. Gilmore testified that “[i]n all likelihood, [Attleboro] opened the blocked culvert (Old Culvert [referred in Mr. Garner’s Report] . . . and allowed the water in Mechanics Pond to flow back into the Ten Mile River.” *Id.* Mr. Gilmore supported his testimony by noting that “the photographs . . . in the [newspaper] articles [depicted] a river channel [in the area]. . . indicating that although the . . . elevation [of Mechanics Pond] was lowered, the riverine flow within the waterway was still present” and that “[t]his demonstrated

¹⁹ Mr. Wescott’s PFT, at p. 2; Attachment 8 to Mr. Wescott’s PFT.

that if the artificial obstructions were removed from the culvert, the Ten Mile River would continue to flow through the area at a more significant rate of flow.” Id.

Mr. Gilmore also effectively refuted Mr. Wescott’s testimony that the July 2015 FEMA Flood Map demonstrates that Mechanics Pond is not a branch of the Ten Mile River. Mr. Wescott’s PFT, at p. 2; Mr. Gilmore’s PFT, ¶ 13. Mr. Wescott contended in his testimony that the July 2015 FEMA Flood Map “indicates that the floodway of the [Ten] [M]ile [R]iver does not pass through the Cove at Mechanics Pond, but passes by the cove, over the dam and down river,” and that “[t]his indicates that, even at the 1% flood level (aka the “100 year storm”), the [R]iver does not flow through the Cove.” Mr. Gilmore effectively refuted Mr. Wescott’s testimony by testifying that “FEMA[’s] definition [of] ‘Regulatory Floodway’ does not relate to whether the [Ten Mile] [R]iver flows through the cove but only to how the watercourse and adjacent areas must be regulated to prevent increases in water surface elevations (i.e. more extensive flooding).” Mr. Gilmore’s PFT, ¶ 13. He also testified that “[i]t is clear from the FEMA Flood Map Detail & Flood Insurance Rate Map included in Mr. Wescott’s testimony²⁰ . . . that Mechanics Pond is part of the 100-year flood plain associated with the Ten Mile River.” Id.

II. THE MATTER SHOULD BE REMANDED TO THE DEPARTMENT FOR A DETERMINATION OF WHETHER THE PROPOSED PROJECT SITE, AS AN AREA LOCATED WITHIN RIVERFRONT AREA, IS SIGNIFICANT TO FURTHERING ANY OF THE MWPA’S EIGHT STATUTORY INTERESTS

Although the proposed Project Site is located within Riverfront Area this does not necessarily mean that the Petitioner should be required to file an NOI with the ACC seeking approval of the proposed Project pursuant to the MWPA and the Wetlands Regulations. As

²⁰ Attachment 9 to Mr. Wescott’s PFT.

discussed above, under the Wetlands Regulations there is a presumption that Riverfront Area is likely to be significant to the advancement of all eight of the MWPA's statutory interests, but this is a rebuttable presumption that "may be overcome upon a clear showing [by the project proponent] that the [R]iverfront [A]rea does not play a role in the protection of [these MWPA] interests." 310 CMR 10.58(1), 10.58(3).

Here, the Petitioner presented persuasive evidence at the Hearing demonstrating that extensive real estate development has taken place in the vicinity of Mechanics Pond and the undeveloped and relatively small proposed Project Site. This extensive real estate development, which I observed during the Site Visit, surrounds Mechanics Pond and took place with the ACC's approval and without objection from the Department during the past decade or more in Orders of Condition issued by the ACC that did not state that the developments were located in Riverfront Area.²¹ This extensive real estate development, which includes moderate to large sized single-family homes and at least two multi-unit residential (condominium) developments "well within 200 feet of Mechanics Pond, with certain structures located as near as approximately 25 feet from the shoreline," Petitioners' Closing Brief, at p. 9, gives me pause for concern regarding whether the proposed Project Site is significant to furthering any of the eight MWPA statutory interests. Specifically, this extensive real estate development includes:

- (1) a 15 unit residential condominium complex located at 95 Mechanic Street in Attleboro,²² for which the ACC issued an Order of Conditions on December 18, 2002 (Mr. Wescott's PFT, at p. 2 and Attachment 10 to Mr.

²¹ Under 310 CMR 10.05(7)(a)6, the Department could have unilaterally initiated an SOC review of each Order of Conditions issued by the ACC but did not initiate such a review. Accordingly, the extensive real estate development that occurred around Mechanics Pond as described above occurred without objection from the Department.

²² Mechanic Street leads into or is a connector road to Berwick Road, where the proposed Project Site is located.

Wescott's PFT; Mr. Trowbridge's PFT, ¶¶ 13-14, 17-20 and Exhibits D and E to Mr. Trowbridge's PFT; Petitioner's Exhibit 11);

- (2) an 11 unit residential condominium complex located at 83 Mechanic Street in Attleboro, for which the ACC issued an Order of Conditions on March 8, 2008 (Mr. Wescott's PFT, at p. 2 and Attachment 11 to Mr. Wescott's PFT; Petitioner's Exhibit 11);
- (3) a 4 bedroom, 2,314 square foot home located on a 0.55 acre lot (23,920 square feet) at 131 Berwick Road in Attleboro, for which the ACC issued an Order of Conditions on November 16, 2011 (Petitioner's Exhibit 8)
- (4) a 4 bedroom, 2,146 square foot home located on a 0.47 acre lot (20,436 square feet) at 139 Berwick Road in Attleboro, for which the ACC issued an Order of Conditions on November 16, 2011 and an Amended Order of Conditions on September 14, 2016 (Petitioner's Exhibit 7); and
- (5) a residential subdivision on Landers Road in Attleboro²³ containing at least five homes²⁴ for which the ACC issued Orders of Conditions on November 16, 2011, October 6, 2014, and November 16, 2016 (Mr. Wescott's PFT, at p. 2 and Attachment 12 to Mr. Wescott's PFT; Petitioner's Exhibit 9).

At the Hearing, neither the ACC nor the Department addressed the Petitioner's claim that the proposed Project Site, even if located within Riverfront Area, does not contribute to any of the MWPA's eight statutory interests because of the extensive real estate development that has taken place in the vicinity of Mechanics Pond and the proposed Project Site as discussed above. See ACC's Closing Brief, at pp. 1-9, and Department's Closing Brief, at pp. 1-8. The ACC and

²³ Landers Road intersects Berwick Road.

²⁴ The five homes are located at:

- (1) 9 Landers Road (three bedroom, 2,566 square foot home on a 0.48 acre lot (20,871 square feet));
- (2) 12 Landers Road (three bedroom, 1,736 square foot home on a 0.49 acre lot (21,307 square feet));
- (3) 17 Landers Road (three bedroom, 2,109 square foot home on a 1.2 acre lot (52,272 square feet));
- (4) 20 Landers Road (three bedroom, 1,924 square foot home on a 0.62 acre lot (26,970 square feet));
and
- (5) 25 Landers Road (three bedroom, 1,924 square foot home on 0.76 acre lot (33,068 square feet)).

the Department also did not deny that the ACC issued Orders of Conditions for the real estate development projects at issue, without objection from the Department, and that these Orders did not reflect that the developments were located within Riverfront Area. Indeed, the ACC and the Department admitted that “the [ACC] . . . issued “[these] Orders of Conditions authorizing projects located on . . . properties surrounding Mechanics Pond . . .” ACC’s Closing Brief, at p. 5; Department’s Closing Brief, at p. 6.

Nevertheless, both the ACC and the Department argued at the Hearing that these previous Orders of Conditions are irrelevant in determining whether the Department properly issued the SDA. ACC’s Closing Brief, at pp. 5-8; Department’s Closing Brief, at pp. 6-8. According to the Department, “[t]he relevance of these prior [Orders of Conditions] *is dubious* in light of the determination made by the Department [here], in accordance with its own regulations and [prior Final Decisions of the Department],²⁵ that Mechanics Pond, as part of the Ten Mile River, has Riverfront Area.” Department’s Closing Brief, at p. 6 (emphasis supplied). I disagree with the Department’s assertion that the relevance of the prior Orders of Conditions “is dubious,” because, while the Orders are not binding in this case in determining whether Mechanics Pond is part of the Ten Mile River,²⁶ the Orders *are relevant* in determining whether the proposed Project Site contributes to any of the MWPA’s eight statutory interests. As the Petitioner aptly argued in his Closing Brief: “[i]f projects on lots directly abutting Mechanics Pond have been determined by the ACC as recently as 2016 to have no impact whatsoever on any Riverfront Area, it is unclear how the proposed Project, which is separated from Mechanics Pond by a paved public way,

²⁵ See note 13, at p. 17 above.

²⁶ See note 13, at p. 17 above.

could have an impact.” Petitioner’s Closing Brief, at p. 21.

The Petitioner’s apt argument, however, does not translate into the SDA being vacated at this juncture because none of the parties presented any expert testimony at the Hearing regarding whether the proposed Project Site, as an area located within Riverfront Area, contributes to any of the MWPA’s eight statutory interests given the extensive real estate development that has taken place in the vicinity of Mechanics Pond and the proposed Project Site as discussed above. Accordingly, the matter should be remanded to the Department to make that important determination and issue an amended SDA setting forth that determination according to the time table and procedure I have proposed below.

CONCLUSION

For the reasons discussed in detail above, the Department properly determined in its SDA that the proposed Project Site is located within the Riverfront Area of the Ten Mile River, but I am not recommending that the Department’s Commissioner issue a Final Decision affirming the Department’s SDA because the matter should be remanded to the Department’s Southeast Regional Office for a determination of whether the proposed Project Site is significant to furthering any of the MWPA’s eight statutory interests given the extensive real estate development that has taken place in the vicinity of Mechanics Pond and the proposed Project Site. I recommend that the Commissioner order the Department’s Southeast Regional Office to make this determination according to the following procedure and time table:

1. Within 30 days after the Commissioner’s Decision adopting this Recommended Remand Decision, the Petitioner shall file sworn supplemental PFT with OADR from his wetlands expert containing probative evidence demonstrating or making “a clear showing” within the meaning of 310 CMR 10.58(3) that the proposed Project Site, as an area located

within Riverfront Area, is not significant to furthering any of the MWPA's eight statutory interests due to the extensive real estate development that has taken place in the vicinity of Mechanics Pond and the proposed Project Site.

2. Within 30 days after the Petitioner files the sworn supplemental PFT from his wetlands expert as set forth above, the ACC shall file a Memorandum with OADR indicating whether it agrees or disagrees with the Petitioner's position that the proposed Project Site, as an area located within Riverfront Area, is not significant to furthering any of the MWPA's eight statutory interests due to the extensive real estate development that has taken place in the vicinity of Mechanics Pond and the proposed Project Site. If the ACC disagrees with the Petitioner's position, the ACC, shall also file with its Memorandum the sworn PFT of the ACC's wetlands expert supporting the ACC's contention that the proposed Project Site, as an area located within Riverfront Area, is significant to furthering one or more of the MWPA's eight statutory interests notwithstanding the extensive real estate development that has taken place in the vicinity of Mechanics Pond and the proposed Project Site.

3. Within 30 days after the ACC files its Memorandum and the sworn PFT of its wetlands expert as set forth above, the Department shall issue an Amended SDA setting forth its determination whether the proposed Project Site, as an area located within Riverfront Area, is significant to furthering one or more of the MWPA's eight statutory interests given the extensive real estate development that has taken place in the vicinity of Mechanics Pond and the proposed Project Site.

4. The Department shall file a copy of the Amended SDA with OADR at the same time it issues the Amended SDA to the Petitioner and the ACC. The Department's filing with OADR shall include sworn supplemental PFT of the Department's wetlands expert who

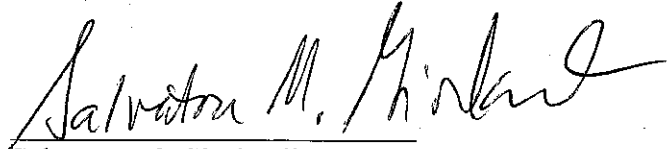
performed and/or oversaw the review of the sworn supplemental PFT submitted by the Petitioner's wetlands expert and the sworn PFT, if any, of the ACC's wetlands expert resulting in the Amended SDA's issuance.

5. Within 30 days after the Department files the Amended SDA and sworn supplemental PFT supporting the Amended SDA, the Petitioner and the ACC shall each file with OADR, written comments indicating whether they agree or disagree in whole or in part with the Amended SDA's determination. The Petitioner's and the ACC's comments shall be supported by the sworn PFT of the wetlands expert or experts who reviewed the Amended SDA.

6. If the Petitioner and/or the ACC file comments supported by sworn PFT disagreeing in whole or in part with the Amended SDA's determination, the Department shall file with OADR within 30 days after the filing, sworn supplemental PFT responding to the comments. The supplemental PFT shall be from the Department's wetlands expert who reviewed and/or oversaw the Department's review of the comments. Within 30 days after the Department files its Supplemental PFT, I will conduct an evidentiary Adjudicatory Hearing to determine whether the Amended SDA's determination is valid. All individuals who filed sworn PFT or supplemental PFT with respect to the Amended SDA shall appear at the Hearing for cross-examination in accordance with the Adjudicatory Proceeding Rules at 310 CMR 1.01. Within 14 days after the Hearing, the parties shall file Closing Briefs with OADR setting forth their respective positions on the validity of the Amended SDA's determination based on the evidence presented at the Hearing. Within 30 days after the Closing Briefs are filed, I will issue a Recommended Final Decision on the validity of the Amended SDA's determination. The

Commissioner will issue his Final Decision within 30 days thereafter on all of the issues adjudicated in the appeal.

Date: 10/12/18


Salvatore M. Giorlandino
Chief Presiding Officer

NOTICE- RECOMMENDED REMAND DECISION

This decision is a Recommended Remand Decision of the Chief Presiding Officer. It has been transmitted to the Commissioner for his consideration. 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.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Remand 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.

The parties are also advised that should the Commissioner adopt this Recommended Remand Decision the Commissioner's Decision will not be appealable pursuant to G.L. c. 30A. See Town of East Longmeadow v. State Advisory Commission, 17 Mass. App. Ct. 939, 940 (1983) ("[a]n administrative order requiring subordinate administrative body to reconsider its order is neither final nor appealable" under G.L. c. 30A); Matter of National Development and NDNE Lower Falls, LLC, Docket No. 2008-073, Recommended Remand Decision (January 26, 2009), Decision Adopting Recommended Remand Decision (January 28, 2009).

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