COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

OFFICE OF APPEALS AND DISPUTE RESOLUTION

June 7, 2019

In the Matter of
Edwin Mroz

Docket No. 2017-021
DEP File No.
UAO-CE-17-6W003
Enforcement Document
No. 00002537

RECOMMENDED FINAL DECISION[1]

INTRODUCTION

In this appeal, the Petitioner Edwin Mroz, proceeding pro se, challenges a Unilateral Administrative Order ("UAO") that the Central Regional Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") issued to the Petitioner on June 22, 2017 for purported violations of 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 Department issued the UAO as a result of the Petitioner's purported unauthorized activities in protected wetlands areas at 5 Burns Coat in Maynard, Massachusetts ("the Property"). See UAO, ¶¶ 4-18. Specifically, the Department asserts in the UAO that the Petitioner performed the following activities in protected wetlands areas at the

[1] The Petitioner has been provided a version of this Order typewritten in the large font size of Times New Roman 24 because the Petitioner has informed MassDEP that he has a vision problem necessitating this large font to enable him to read the document.

Property without prior authorization from the Town of Maynard's Conservation Commission ("MCC") or the Department in violation of the MWPA and the Wetlands Regulations:

A. In or about December 2015, the Petitioner constructed an access road through Bordering Vegetated Wetlands ("BVW") and the Bank of a stream on the Property.[2] UAO, ¶¶ 11, 16.

B. In or about April 2016, the Petitioner operated or allowed the operation of heavy equipment in a stream channel and adjacent wetlands area on the Property which altered the Bank of the stream channel and the BVW on the Property. UAO, ¶¶ 12, 16. The Petitioner operated or allowed the operation of this heavy equipment without erosion controls in place. Id. The Petitioner also placed or allowed to be placed large piles of brush and fill material adjacent to the BVW and within the 100-foot Buffer Zone to the BVW. Id.

C. In or about May 2017, the Petitioner performed filling and grading activities within the 100-foot Buffer Zone to the Bank of the stream and within the BVW on the Property. UAO, ¶¶ 14, 15, 16. "Recent fill material appeared to include broken concrete, stone, woodchips, leaves, and soil." Id., ¶ 15. The Petitioner performed these activities without erosion and sedimentation controls. Id. In performing these activities, the Petitioner parked or allowed to be parked heavy equipment in the 100-foot Buffer Zone to BVW. Id. Upon discovering these violations, Department staff directed the Petitioner to immediately cease all activities in the wetland resource areas and 100-foot Buffer Zone, which included the yard south and east of the house located on the Property. Department staff also directed the Petitioner to cease all grading, equipment operation, and importing or manipulating fill, and to stabilize the disturbed areas with erosion and sedimentation controls. UAO, ¶ 15.

D. The Petitioner's unauthorized work in protected wetlands areas as described above (¶¶ A-C) altered the Bank of a stream, estimated to be between 30 and 100 feet, in violation of the Performance

[2] BVW and Bank are two wetlands resources protected by the MWPA and the Wetlands Regulations. See below, at pp. 8-12.

Standards at 310 CMR 10.54(4) governing activities in Bank. UAO, ¶¶ 16, 17.[3] It also altered BVW at the Property, estimated to be at least 20,000 square feet, in violation of the Performance Standards at 310 CMR 10.55(4) governing activities in BVW. UAO, ¶¶ 16, 18.

The UAO ordered the Petitioner to perform the following remedial actions within prescribed time periods to correct his purported violations of the MWPA and the Wetlands Regulations as described above on pp. 2-3 (¶¶ A-D):

A. Immediately cease and desist from all further activities at the Property within wetland resource areas and all grading, equipment operation, and importing or manipulation of fill within the 100-foot Buffer Zone to Bank or BVW (UAO, ¶ 19A);

B. Immediately implement measures to stabilize all exposed soils at the Property to prevent soil erosion, and install and maintain erosion and sedimentation controls such as silt fencing to prevent further sediment from reaching wetland resource areas (UAO, ¶ 19B);

C. Within 14 days of the UAO's issuance, retain a wetlands specialist and identify all existing and altered wetland resource areas and flag and/or stake all wetland resource area boundaries and parcel boundaries at the Property (UAO, ¶ 19C);

D. Within 21 days of the UAO's issuance, provide the Department with a report prepared by a wetland specialist containing an assessment of the extent of alterations to all wetland resource areas on the Property, including, but not limited to BVW and Bank (UAO, ¶ 19D);

E. Within 30 days of the UAO's issuance, submit to the Department a detailed site plan, prepared and stamped by a Registered Professional Engineer ("RPE") or Registered Land Surveyor ("RLS"), depicting all wetland resource areas, including those that have been altered, on the Property (UAO, ¶ 19E); and

F. Within 30 days of the UAO's issuance, submit to the Department for its review and approval prior to the Petitioner's implementation, a detailed

[3] "Performance Standards" are "th[e] requirements established by [the Wetlands Regulations] for activities in or affecting [specific wetlands areas protected by MWPA]." 310 CMR 10.04.

narrative and plan prepared by a wetland scientist/specialist for the restoration of any and altered wetland resource areas on the Property (UAO, ¶ 19F).

The Petitioner denies the UAO's allegations and requests that the UAO be vacated. Petitioner's Appeal Notice (July 11, 2017).

As discussed in detail below, I recommend that the Department's Commissioner issue a Final Decision affirming the UAO because the Petitioner failed to prosecute his appeal of the UAO by repeatedly failing to comply with my directives to facilitate the appeal's adjudication, including failing to file proper sworn Pre-filed Testimony ("PFT") of witnesses, including the PFT of a wetlands expert, containing admissible evidence supporting the Petitioner's claims in the appeal for the evidentiary Adjudicatory Hearing ("Hearing") that I conducted to adjudicate the appeal. In alternative, I recommend that the Department's Commissioner issue a Final Decision affirming the UAO because, based on a strong preponderance of the evidence presented by the parties at the Hearing and the wetlands governing statutory and regulatory requirements, I find that: (1) the Petitioner violated the MWPA and the Wetlands Regulations as alleged by the Department in the UAO; and (2) the remedial measures in the UAO that the Department ordered the Petitioner to perform to correct his violations are reasonable measures.

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;

(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[4] any [wetlands] area subject to protection under [the MWPA and Wetlands

[4] 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:

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. 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

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(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.

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 a UAO issued by the Department to enforce the

requirements and prohibitions of the MWPA and the Wetlands Regulations.

II. THE PROTECTED WETLANDS AREA OF BVW AND BANK

As discussed above, at pp. 1-3, the Department's UAO asserts that the Petitioner performed certain activities at the Property that impacted the protected wetlands areas of BVW and Bank.

A. BVW

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 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, Recommended Final Decision (February 22, 2013), 2013 MA ENV LEXIS 21, at 19-20, adopted as Final Decision (March 22, 2013), 2013 MA ENV LEXIS 20; In the Matter of Brian Corey, OADR Docket No. WET-2016-023, Recommended Final Decision (February 28, 2018), 2018 MA ENV LEXIS 10, at 16-17, adopted as Final Decision (March 15, 2018), 2018 MA ENV LEXIS 9. 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; Corey, 2018 MA ENV LEXIS 10, at 17-18. "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; Corey, 2018 MA ENV LEXIS 10, at 18. "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; Corey, 2018 MA ENV LEXIS 10, at 18. 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 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; Corey, 2018 MA ENV LEXIS 10, at 18-19. 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; Corey, 2018 MA ENV LEXIS 10, at 20.

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.

B. Bank

The Wetlands Regulations at 310 CMR 10.54(2)(a) define Bank as "the portion of the

land surface which normally abuts and confines a water body," and it "may be partially or totally vegetated, or . . . comprised of exposed soil, gravel or stone." Bank "[is] likely to be significant" to the advancement of all eight MWPA interests listed above. 310 CMR 10.54(1); In the Matter Robert J. Cote, OADR Docket No. WET-2017-014, Recommended Final Decision (August 9, 2018), 2018 MA ENV LEXIS 47, at 13, adopted as Final Decision (August 28, 2018), 2018 MA ENV LEXIS 46. As a result, there is a presumption under the Wetlands Regulations that "[when] a proposed activity involves the removing, filling, dredging[,] or altering of a Bank, the [local conservation commission and the Department must] presume that [the] area is significant to the [advancement of these MWPA] interests . . . ." 310 CMR 10.54(3); Cote, 2018 MA ENV LEXIS 47, at 13-14. However, "[t]he presumption is rebuttable and may be overcome upon a clear showing [by the project proponent] that the Bank 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/or the Department if the project satisfies the General Performance standards in 310 CMR 10.54(4) governing proposed work in Bank. Cote, 2018 MA ENV LEXIS 47, at 14. Specifically, the project can only be approved if it does not impair:

(1) the Bank's physical stability;

(2) the water carrying capacity of any existing channel within the Bank;

(3) groundwater and surface water quality;

(4) the Bank's capacity to provide breeding habitat, escape cover, and food for fisheries;

(5) the Bank's capacity to provide important wildlife habitat functions; and

(6) any stream crossing within the Bank.

310 CMR 10.54(4); Cote, 2018 MA ENV LEXIS 47, at 14-15.

FINDINGS

THE DEPARTMENT'S UAO TO THE PETITIONER SHOULD BE AFFIRMED

I. THE PETITIONER'S APPEAL OF THE UAO SHOULD BE DISMISSED DUE TO THE PETITIONER'S FAILURE TO PROPERLY PROSECUTE THE APPEAL

A. The Presiding Officer's Authority to Facilitate the Adjudication of Administrative Appeals of Department Enforcement Orders

The Petitioner's appeal of the UAO is pending for adjudication before the Office of Appeals and Dispute Resolution ("OADR")[5] and the appeal's adjudication is governed by the

[5] OADR is a quasi-judicial office within the Department, which is responsible for advising the Department's Commissioner in resolving all administrative appeals of Department Permit decisions and enforcement orders in a neutral, fair, timely, and sound manner based on the governing law and the facts of the case. In the Matter of Tennessee Gas Pipeline Company, LLC, OADR Docket No. 2016-020 ("TGP"), Recommended Final Decision (March 22, 2017), 2017 MA ENV LEXIS 34, at 9, adopted as Final Decision (March 27, 2017), 2017 MA ENV LEXIS 38, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7). The Department's Commissioner is the final agency decision-maker in these appeals. TGP, 2017 MA ENV LEXIS 34, at 9, citing, 310 CMR 1.01(14)(b). To ensure its objective review of Department Permit decisions and enforcement orders, OADR reports directly to the Department's Commissioner and is separate and independent of the Department's program offices, Regional Offices, and Office of General Counsel ("OGC"). TGP, 2017 MA ENV LEXIS 34, at 9. OADR staff who advise the Department's Commissioner in resolving administrative appeals are Presiding Officers such as myself. Id. Presiding Officers are senior environmental attorneys at the Department appointed by the Department's Commissioner to serve as neutral hearing officers in administrative appeals. Id. Presiding Officers are responsible for fostering settlement discussions between the parties in administrative appeals, and to resolve appeals by conducting pre-hearing conferences with the parties and evidentiary Adjudicatory Hearings and issuing Recommended Final Decisions on appeals to the Commissioner. TGP, 2017 MA ENV LEXIS 34, at 9-10, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7). The Department's Commissioner, as the agency's final decision-maker, may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision issued by a Presiding Officer in an appeal. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(b). Unless there is a statutory directive to the contrary, the Commissioner's Final Decision can be appealed to Massachusetts Superior Court pursuant to G.L. c. 30A, § 14. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(f).

Adjudicatory Proceeding Rules at 310 CMR 1.01. The Rules contain a number of provisions designed to facilitate the Presiding Officer's adjudication of the appeal, including the provisions of 310 CMR 1.01(5)(a)15 and 310 CMR 1.01(9). The Petitioner was required to comply with these Rules notwithstanding his pro se status in the appeal.[6]

Under 310 CMR 1.01(5)(a)15, the Presiding Officer is authorized to conduct prescreening conferences with the parties to the appeal to discuss potential settlement of the appeal, identify the issues in an appeal, and to "issu[e] orders to parties, including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending prescreening conferences and ordering parties to provide more definite statements in support of their positions."

The provisions of 310 CMR 1.01(9) authorize the Presiding Officer to order the parties to an appeal to appear for a pre-hearing conference prior to an evidentiary Adjudicatory Hearing to:

a. discuss settlement;

b. define contested issues on which evidence will be offered, if not otherwise determined under 310 CMR 1.01(6)(k);[7]

[6] Although a party's pro se status in an appeal accords the party some leniency from the litigation rules, the party is not excused from complying with those rules because "[litigation] rules bind a pro se litigant as they bind other litigants." In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 45-46, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77, citing, Mmoe v. Commonwealth, 393 Mass. 617, 620 (1985) (pro se litigants are required to file court pleadings conforming to the Massachusetts Rules of Civil Procedure); Rothman v. Trister, 450 Mass. 1034 (2008) (pro se litigants are required to comply with appellate litigation rules); Lawless v. Board of Registration In Pharmacy, 466 Mass. 1010, 1011 (2013) (same). Although he proceeded in the appeal pro se, the Petitioner is a very astute and articulate individual based on my observations of and interactions with him at the Pre-Screening/Pre-Hearing Conference of October 27, 2017 and the Hearing of March 19, 2018 discussed below.

[7] 310 CMR 1.01(6)(k) provides that:

> [t]he Presiding Officer shall, absent good cause shown, limit the issues for adjudication to the issues identified in the notice of claim [("Appeal Notice")], more definite statement, and any motions to participate or intervene, or as identified at the prescreening conference.

c. consider the possibility of obtaining stipulations, admissions and agreements that will avoid unnecessary evidence;

d. establish limits on presentations of the parties;

e. establish a schedule for continuing the appeal, including a date for the adjudicatory hearing; and

f. consider any other matters that may aid in the disposition of the adjudicatory appeal.

310 CMR 1.01(9)(a)1. The parties "[must] appear at the prehearing conference with full authority to make binding agreements, including commitments as to scheduling, or shall come to the conference with the name of the person from whom authority is required and be able to communicate directly with the person at the time of the conference." 310 CMR 1.01(9)(a)2. "The parties [must also] be prepared to advise the Presiding Officer as to the prospects of settlement," Id., and "[t]he Presiding Officer may order the parties to meet or confer prior to the date of the conference to discuss settlement or other matters." 310 CMR 1.01(9)(a)3.

Prior to the pre-hearing conference, "[t]he Presiding Officer may order the parties to file a prehearing memorandum" containing:

a. a concise summary of the evidence that will be offered by the parties;

b. the facts agreed upon by the parties;

c. contested issues of fact and law, consistent with 310 CMR 1.01(6)(k);

d. the amount of time necessary for a party to conduct its case, consistent with 310 CMR 1.01(13)(d) relating to time limits;[8]

[8] 310 CMR 1.01(13)(d) provides that:

> 1. Absent agreement of the parties to time limits for the hearing acceptable to the Presiding Officer, the Presiding Officer may establish a limit on the amount of time allotted to each party to present its case and examine witnesses. This time shall be allocated equally among opposing parties, unless the Presiding Officer orders otherwise for good cause. In establishing time limits consistent with administrative

e. a list of witnesses to be called, including the designation of those who will be offered as expert witnesses, and a brief summary of the testimony of each witness;

f. statements of Department policy or guidance that a party intends to cite or introduce into evidence;

g. a statement of need to substitute parties or consolidate proceedings, where the need was not previously identified; and

h. any additional matters likely to facilitate the disposition of the adjudicatory appeal.

310 CMR 1.01(9)(b)1. "At the time of or following the conference the Presiding Officer may issue an order in writing including":

a. a statement of the issues to be tried;

b. a list of witnesses who will offer testimony;

c. limitations in accordance with 310 CMR 1.01(13)(d), (e), and (f);

d. whether any disputed issues will be referred to a factfinder, consistent with 310 CMR 1.01(13)(i);

e. rulings on motions;

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efficiency, fairness to all parties and adequacy for developing the evidence, the Presiding Officer may consider the number, complexity, and novelty of issues presented; the number of witnesses and substance of their testimony; the length of time allocated for appeals of similar scope and complexity; any applicable directive or standing order; and other factors consistent with a just and speedy determination of the appeal. The Presiding Officer is authorized to monitor and enforce time limits.

2. The Presiding Officer may establish time limits at the prehearing conference and may later modify them, as described in 310 CMR 1.01(13)(d)3.

3. The Presiding Officer may grant a request for modification of time limits only for good cause. In determining whether to grant a request to modify time limits, the Presiding Officer may consider: whether or not the requesting party has used the time since the commencement of the hearing in a reasonable and proper way and has complied with all orders regulating the hearing; the requesting party's explanation as to how the requested added time would be used and why it is necessary to ensure a fair hearing; and any other relevant and material facts the requesting or opposing party may wish to present in support of or opposition to the request.

f. a schedule for filing motions, prefiled testimony and exhibits, setting the date of the hearing, and deciding motions;

g. attendance at an alternative dispute resolution information session when the Presiding Officer determines it could aid in the just and speedy resolution of the appeal without a hearing; and

h. incorporation of any matters agreed to by the parties.

310 CMR 1.01(9)(c)1.

To ensure compliance with the Presiding Officer's directives, 310 CMR 1.01(9)(c)2 provides that "[f]ailure of parties to comply with any rule or order issued by the Presiding Officer under 310 CMR 1.01(9) may result in the imposition of sanctions in accordance with 310 CMR 1.01(10)." The provisions of 310 CMR 1.01(10) authorize the Presiding Officer to impose appropriate sanctions on a party "[who] party fails to file documents as required, respond to notices, correspondence or motions, [and] comply with orders issued and schedules established in orders" issued by the Presiding Officer. The Presiding Officer is also authorized to impose appropriate sanctions where the appellant fails to prosecute its appeal, engages in conduct evidencing an intent not to proceed with the appeal or to delay the appeal's resolution, or "fails to comply with any of the requirements set forth in 310 CMR 1.01." 310 CMR 1.01(10). Possible sanctions under 310 CMR 1.01(10) include, without limitation, the Presiding Officer issuing orders:

(a) taking designated facts or issues as established against the party being sanctioned;

(b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;

(c) denying summarily late-filed motions or motions failing to comply with requirements of 310 CMR 1.01(4);

(d) striking the party's pleadings in whole or in part;

(e) dismissing the appeal as to some or all of the disputed issues;

(f) dismissing the party being sanctioned from the appeal; and

(g) issuing a final decision against the party being sanctioned.

In addition to the dismissal authority conferred by 310 CMR 1.01(10)(e) above, under 310 CMR 1.01(11)(a)2.f, a "Presiding Officer may [also] summarily dismiss [an appeal] sua sponte," when the appellant fails to prosecute the appeal or fails to comply with an order issued by the Presiding Officer. For the same reasons, the Presiding Officer may also dismiss an appeal pursuant to the Officer's appellate pre-screening authority under 310 CMR 1.01(5)(a)15 discussed above which authorizes the Officer to "issu[e] orders to parties, including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending prescreening conferences and ordering parties to provide more definite statements in support of their positions."

B. The Petitioner's Failure to Comply with the Adjudicatory Proceeding Rules and the Presiding Officer's Directives to Facilitate the Appeal's Adjudication

1. The Petitioner's Failure to Comply with the Requirements of the Presiding Officer's Scheduling Order

On October 27, 2017, I conducted a Pre-Screening/Pre-Hearing Conference ("Conference") with the Petitioner, several staff of the Wetlands Program in the Department's CERO Office, and the Department's counsel (collectively "the parties") in accordance with 310 CMR 1.01(5)(a)15 and 310 CMR 1.01(9), as discussed above, and a Scheduling Order that I

issued to the parties on September 19, 2017 ("the Scheduling Order").[9] The purpose of the Conference was to determine the potential amenability of the Petitioner's appeal of the UAO to settlement through alternative dispute resolution or other means, and to identify the Issues for Resolution in the Appeal in the event the appeal was not settled by agreement of the parties. Scheduling Order, ¶ 5.

To assist me in ascertaining at the Conference whether there was a reasonable possibility of the appeal being settled by agreement of the parties, the Scheduling Order required "the parties [to] confer [well in advance of the Conference] to discuss the possibility of settlement of th[e] appeal and its amenability to mediation or other forms of alternative dispute resolution." Scheduling Order, ¶ 7. The Scheduling Order imposed "the responsibility [on] the Petitioner to initiate [these] settlement discussions at least ten (10) calendar days prior to the Conference." Id.

The deadline for the Petitioner to initiate the required settlement discussions with the Department was Tuesday, October 17, 2017. By his own admission at the Conference, the Petitioner failed to comply with this requirement.

To assist me in establishing the Issues for Resolution in the Appeal in the event it was not settled by agreement of the parties and required adjudication at the Hearing scheduled for February 2, 2018,[10] ¶¶ 9 and 10 of the Scheduling Order required the Petitioner and the Department to file Pre-Hearing Statements with OADR prior to the Conference setting forth their respective positions in the case and the names of their witnesses for the Hearing. The Petitioner

[9] The original date of the Conference was October 13, 2017, but due to a scheduling conflict was re-scheduled to October 27, 2017.

[10] The Scheduling Order scheduled the Hearing for February 2, 2018 in the event the appeal was not settled by agreement of the parties. Scheduling Order, ¶ 12.

was required to file his Pre-Hearing Statement with OADR at least three business days prior to the Conference containing the following information:

(1) a brief summary of the UAO being appealed in the appeal;

(2) a brief summary of the final relief that the Petitioner was seeking in the appeal;

(3) a brief summary by the Petitioner whether he contested liability for any violations set forth in the UAO, and the legal basis for his position;

(4) a list of disputed relevant facts for resolution in the appeal and the Petitioner's position on each issue (what he expected to prove at the Hearing on the appeal);

(5) a list of legal issues for resolution in the appeal, and the Petitioner's position on the issue; and

(6) the names and addresses of the Petitioner's witnesses, including expert witnesses, who would be filing Pre-filed Testimony supporting the Petitioner's positions at the Hearing.[11]

Scheduling Order, ¶ 10.

The three business day deadline for the Petitioner to file his Pre-Hearing Statement as required by ¶¶ 9-10 of Scheduling Order was Tuesday, October 24, 2017. At no time prior to expiration of the deadline, did the Petitioner inform OADR that he was having difficulty preparing his Pre-Hearing Statement or needed additional time to prepare it. Instead, he failed to file any Pre-Hearing Statement with OADR. The Department, however, complied with the Scheduling Order by filing a Pre-Hearing Statement on October 26, 2017 setting forth its

[11] The Scheduling Order informed the parties that "[t]he only witnesses who [would] be permitted to testify at the Hearing [would be] those individuals who ha[d] filed timely Pre-filed Testimony in the appeal." Scheduling Order, ¶ 10, n.7. The Scheduling Order also informed the parties that "[a] party's failure to list a witness in the Pre-Hearing Statement [could] lead to an order precluding the testimony of that witness unless the party demonstrate[d] good cause for having omitted the individual from the witness list." Id.

position in the case and the names of its two witnesses for the Hearing: wetlands experts, Denise Child ("Ms. Child"), the Section Chief of the Wetlands Program in the Department's Central Regional Office, and Gary Dulmaine ("Mr. Dulmaine"), a senior Wetlands Analyst in the Wetlands Program in the Department's Central Regional Office.

The Petitioner failed to comply with the requirements of the Scheduling Order as described above notwithstanding that the Scheduling Order made it clear that if the Petitioner or the Department "fail[ed] . . . to comply with any requirements of [the Scheduling] Order," they could be sanctioned pursuant to 310 CMR 1.01(5)(a)15, (10), and/or (11)(a)2.f.[12] Scheduling Order, ¶ 6. The range of sanctions that could be imposed was set forth in the Scheduling Order, including, those discussed above, at pp. 16-17. Scheduling Order, ¶ 6; Addendum No. 3, at pp. 43-46 of Scheduling Order, citing 310 CMR 1.01(10). These possible sanctions included dismissal of his appeal of the UAO.

At the Conference, the Petitioner acknowledged his failure to comply with the Scheduling Order and promised to comply with orders or directives of the Presiding Officer in the future. He understood that he had to adhere to these orders or directives notwithstanding his pro se status in the case.[13] I informed him that any future non-compliance by him with orders or directives of the Presiding Officer would likely result in the imposition of sanctions against him pursuant to 310 CMR 1.01(5)(a)15, (10), and/or (11)(a)2.f.

At the Conference, after the parties presented summaries of their respective positions in

[12] The provisions of 310 CMR 1.01(5)(a)15, (10), and (11)(a)2.f as discussed above were set forth in detail in Addendum No. 3 at pp. 43-46 of the Scheduling Order.

[13] See n. 6, at p. 13.

the appeal, I established the following Issues for Resolution in the Appeal in the event that the appeal was not settled by agreement of the parties and proceeded to the Hearing on February 2, 2018 for adjudication:[14]

(1) Whether the Petitioner violated the MWPA and the Wetlands Regulations as alleged by the Department in the UAO? and

(2) If so, whether the remedial measures in the UAO that the Department ordered the Petitioner to perform to correct his violations of the MWPA and the Wetlands Regulations are reasonable remedial measures?

Pre-Screening/Pre-Hearing Conference Report and Order (November 7, 2017) ("Conf. Report & Order"), at pp. 28-30. At the Conference, I also established a schedule for the parties to file PFT of witnesses and Memoranda of Law in support their positions on the Issues for Resolution in the Appeal prior to the Hearing. Conf. Report & Order, at pp. 47-53. At the Conference, the parties were apprised of the Issues for Resolution and the litigation schedule, which were further confirmed in the Conf. Report & Order that I issued to the parties on November 7, 2017. The parties were also informed that the purpose of the Hearing would be the parties' cross-examination of the witnesses who filed PFT on behalf of a party in the appeal. Conf. Rept. & Order, at pp. 32-45.

2. The Petitioner's Failure to File Proper PFT for the Hearing

a. The Petitioner's Failure to File Proper PFT By the Original January 5, 2018 Filing Deadline

Under the litigation schedule that I established at the Conference and confirmed in my Conf. Rept. & Order, the Department, the party with the burden of proof in the appeal,[15] was

[14] See n. 10 above, at p. 18.

[15] The Department's burden of proof was explained in detail at pp. 30-32 of my Conf. Rept. & Order and is explained below, at pp. 28-29.

required to the file the PFT of its witnesses and Memorandum of Law on the Issues for Resolution for the Appeal ("Memorandum of Law") by December 1, 2017. Conf. Rept. & Order, at p. 51. The Department fulfilled its filing obligation on November 30, 2017 when it filed the detailed PFT and supporting documentary evidence of its two wetlands expert witnesses, Ms. Child and Mr. Dulmaine. The Department also filed a Memorandum of Law on the Issues for Resolution in the Appeal.

Under the litigation schedule that I established at the Conference and confirmed in my Conf. Rept. & Order, the Petitioner was required to file the PFT of his witnesses and Memorandum of Law by January 5, 2018, more than 30 days after the Department's filing. Conf. Rept. & Order, at p. 51. The Petitioner's filing deadline was more than reasonable given his near decade involvement with the MCC and the Department regarding wetlands violations at the Property[16] and that when the Department filed its PFT and Memorandum of Law on November 30, 2017, the Petitioner had been on notice of the Department's claims in the UAO for at least four months: since at least July 11, 2017, when he filed this appeal challenging the UAO. He also had been aware since September 19, 2017, when he received the Scheduling Order, that he would be required to file the PFT of witnesses supporting his claims in the appeal. As discussed above, he violated the Scheduling Order by failing to file a Pre-Hearing Statement for the October 27, 2017 Conference setting forth his positions in the case and witnesses for the Hearing. His obligation to file the PFT of witnesses was further explained to him in detail at the Conference and in my Conf. Rept. & Order. At no time prior to expiration of his January 5, 2018 filing deadline to file the PFT of his witnesses and Memorandum of Law, did the Petitioner

[16] As discussed in detail below, at pp. 38-46, wetlands violations at the Property date back to at least September 2008.

seek an extension of the deadline. The Petitioner was required by 310 CMR 1.01(3)(d) to request an extension of time prior to expiration of the January 5, 2018 deadline. It was only on January 16, 2018, nearly two weeks after his filing deadline had expired, that the Petitioner sought an extension of time to file the PFT of his witnesses and Memorandum of Law on the Issues for Resolution in the Appeal. At that time, the Petitioner filed a Motion requesting: (1) a 90 day extension of time to file the PFT of his witnesses and Memorandum of Law on the Issues for Resolution in the Appeal; and (2) a 90 day extension of the February 2, 2018 Hearing date.

At the Conference and in my Conf. Rept. & Order I informed the Petitioner that his obligation to file the PFT of his witnesses for the Hearing was serious in nature and that the failure to file the PFT would result in the dismissal of his appeal. Conf. Rept. & Order, at pp. 32-41. Specifically, I informed the Petitioner that "[u]nder 310 CMR 1.01(12)(f), a party's '[f]ailure to file pre-filed direct testimony within the established time, without good cause shown, [will] result in summary dismissal of the party and the appeal if the party being summarily dismissed is the petitioner.'" Conf. Rept. & Order, at pp. 37-41 (and cases cited). I also informed the Petitioner that "a petitioner's failure to file written direct testimony is a serious default," and "the equivalent of failing to appear at a [judicial proceeding] where the testimony is to be presented live." Conf. Rept. & Order, at p. 39 (and cases cited). I also informed the Petitioner that "[u]nder 310 CMR 1.01(10) a party's failure to file proper Direct Examination or Rebuttal Testimony is subject to sanctions for 'failure to file documents as required, . . . comply with orders issued and schedules established in orders[,] . . . [or] comply with any of the requirements set forth in 310 CMR 1.01.'" Conf. Rept. & Order, at pp. 39-40 (and cases cited). I also informed the Petitioner that "[u]nder 310 CMR 1.01(10), the Presiding Officer may

"issu[e] a final decision against the party being sanctioned, including dismissal of the appeal if the party is the petitioner." Id.

In his January 16, 2018 Motion for Extension of Time, the Petitioner failed to demonstrate good cause justifying why he delayed until that date to request an extension of his January 5, 2018 filing deadline for the PFT of his witnesses and Memorandum of Law. Additionally, the issues and proposed testimony which he raised in his Motion for Extension of Time were not relevant to the Issues for Resolution in the Appeal which were clearly identified at the Conference and my Conf. Rept. & Order. To the contrary, the Petitioner's Motion for Extension of Time asserted what appeared to be several irrelevant and unsubstantiated accusations against the Town of Maynard without any specifics as to how such information would rebut the PFT and documentary evidence of the Department's witness, which was filed on November 30, 2017, regarding the relevant issues for adjudication in this appeal. For these reasons, I would have been well within my authority as Presiding Officer under 310 CMR (10) and/or 310 CMR (11)(a)2.f to issue a Recommended Final Decision recommending that the Department's Commissioner issue a Final Decision granting the Department's Motion to Dismiss the Petitioner's appeal and affirming the UAO. However, exercising my discretion, I issued an Order on January 31, 2018 granting the Petitioner another opportunity to fulfill his obligation to prosecute his appeal of the UAO by: (1) extending the original filing deadline for the PFT of his witnesses and Memorandum of Law by 45 days: from January 5, 2018 to February 20, 2018; and (2) re-scheduling the Hearing by 45 days: from the original date of February 2, 2018 to March 19, 2018. Order Granting In Part, And Denying In Part, Petitioner's Motion for Extension of Time (January 31, 2018) ("January 2018 Order"). My January 2018 Order informed the Petitioner that if he failed to file the PFT of his witnesses and Memorandum

of Law by the new deadline of February 20, 2018, that I would cancel the Hearing and issue a Recommended Final Decision recommending that the Department's Commissioner issue a Final Decision granting the Department's Motion to Dismiss the Petitioner's appeal and affirming the UAO.

b. The Petitioner's Failure to File Proper PFT By the Extended Deadline of February 20, 2018

In response to my January 2018 Order, the Petitioner filed on February 14, 2018, as his PFT, a lengthy e-mail message, which he attested to under the pains and penalties of perjury at the March 19, 2018 Hearing. As discussed in detail below, at pp. 38-46, the Petitioner's e-mail PFT did not address the two Issues for Resolution in the Appeal, but, instead, made baseless claims, including that the Property did not contain protected wetlands areas and that he did not alter these areas in violation of the MWPA and the Wetlands Regulations.

c. The Petitioner's Improper Attempts to Present Evidence at the Hearing and After the Hearing

In his e-mail PFT, the Petitioner did not include any documentary evidence, including photographic evidence, supporting his claims, as required by 310 CMR 1.01(12)(f) and 310 CMR 1.01(13)(h)2. He failed to include such evidence notwithstanding that at the Conference and in my Conf. Rept. & Order, I had informed the Petitioner that the PFT of his witnesses had to include "all exhibits to be offered in evidence," 310 CMR 1.01(12)(f), and "[a]ll evidence, including any records, investigative reports, documents, and stipulations, which [was] to be relied upon in a final decision [in the appeal]. . . ." 310 CMR 1.01(13)(h)2; Conf. Rept. & Order, at pp. 35-36. The Petitioner was warned that any PFT that failed to include that documentary evidence would be incomplete and untimely under 310 CMR 1.01(12)(f) and 310 CMR

1.01(13)(h)2. Conf. Rept. & Order, at p. 37.

However, at the March 19, 2018 Hearing, the Petitioner attempted to introduce documentary evidence, including photographic evidence, in violation of 310 CMR 1.01(12)(f), 310 CMR 1.01(13)(h)2, and my Conf. Rept. & Order. After the Hearing concluded on March 19, 2018, the Petitioner also attempted to introduce that evidence by forwarding e-mail messages to OADR's Case Administrator from at least May 1 to 29, 2018 containing unauthenticated photographs purportedly depicting various portions of Property. I have accorded no weight to any of this documentary evidence due to the Petitioner's failure to comply with 310 CMR 1.01(12)(f) and 310 CMR 1.01(13)(h)2 and my Conf. Rept. & Order.

3. Dismissal of the Petitioner's Appeal Is Warranted

It is well settled that under 310 CMR 1.01(12)(f), a party's "[f]ailure to file pre-filed direct testimony within the established time, without good cause shown, [will] result in summary dismissal of the party and the appeal if the party being summarily dismissed is the petitioner." In the Matter of Ross and Marilyn Wescott, OADR Docket No. 2006-154, Recommended Final Decision (December 8, 2014), adopted as Final Decision (December 22, 2014), 21 DEPR 150, 151 (2014); In the Matter of Autobody Solvent Recovery Corp., OADR Docket No. 2013-046, Recommended Final Decision (May 29, 2014), 2014 MA ENV LEXIS 39, at 8, adopted as Final Decision (June 2, 2014), 2014 MA ENV LEXIS 41; In the Matter of Stephen W. Seney, OADR Docket No. 2012-019, Recommended Final Decision (March 25, 2013), 2013 MA ENV LEXIS 27, at 19, adopted as Final Decision (April 2, 2013), 2013 MA ENV LEXIS 26. Indeed, "a petitioner's failure to file written direct testimony is a serious default," and "the equivalent of failing to appear at a [judicial proceeding] where the testimony is to be presented live." Id., citing In the Matter of Gerry Graves, OADR Docket No. 2007-149, Recommended Final

Decision, 2007 MA ENV LEXIS 66, at pp. 2-3 (November 26, 2007), adopted as Final Decision (February 22, 2008). Under 310 CMR 1.01(10) a party's failure to file proper Direct Examination or Rebuttal Testimony is subject to sanctions for "failure to file documents as required, . . . comply with orders issued and schedules established in orders[,] . . . [or] comply with any of the requirements set forth in 310 CMR 1.01." Wescott, supra, 21 DEPR at 151; Autobody, supra, 2014 MA ENV LEXIS 39, at 8-9. Under 310 CMR 1.01(10), the Presiding Officer may "issu[e] a final decision against the party being sanctioned, including dismissal of the appeal if the party is the petitioner." Id.

Here, as discussed in detail above, the Petitioner failed to file proper PFT of witnesses in support of his appeal challenging the Department's UAO, notwithstanding having been informed of his obligation to file such PFT at the Conference and in my Conf. Rept. & Order. He also failed to file such PFT even though he was provided with more than ample time and multiple opportunities to file the PFT. Accordingly, I recommend that the Department's Commissioner issue a Final Decision dismissing the Petitioner' appeal and affirming the UAO due to the Petitioner's failure to prosecute his appeal, including failing to file proper PFT in support of his claims in the appeal.

II. THE DEPARTMENT PROVED AT THE HEARING THAT: (1) THE PETITIONER VIOLATED THE MWPA AND THE WETLANDS REGULATIONS AS ALLEGED BY THE DEPARTMENT IN THE UAO; AND (2) THE REMEDIAL MEASURES IN THE UAO THAT THE DEPARTMENT ORDERED THE PETITIONER TO PERFORM TO CORRECT HIS VIOLATIONS ARE REASONABLE REMEDIAL MEASURES

In the alternative, I recommend that the Department's Commissioner issue a Final Decision affirming the UAO because, based on a strong preponderance of the evidence presented by the parties at the Hearing and the governing wetlands statutory and regulatory requirements, I

find that: (1) the Petitioner violated the MWPA and the Wetlands Regulations as alleged by the Department in the UAO; and (2) the remedial measures in the UAO that the Department ordered the Petitioner to perform to correct his violations are reasonable measures.

A. The Department's Burden Of Proof At The Hearing

At the Hearing, the Department had the burden of proving through the testimonial and documentary evidence of its witnesses that: (1) the Petitioner violated the MWPA and the Wetlands Regulations as the Department has alleged in the UAO; and (2) the remedial measures in the UAO that the Department ordered the Petitioner to perform to correct his purported violations of the MWPA and the Wetlands Regulations are reasonable remedial measures. In the Matter of West Meadow Homes, Docket Nos. 2009-023 & 024, Recommended Final Decision (June 20, 2011), 2011 MA ENV LEXIS 85, at 4-5, 27-28 adopted as Final Decision (August 18, 2011), 2011 MA ENV LEXIS 84 (remedial measures ordered by UAO affirmed as reasonable to correct party's wetlands violations); In the Matter of Ferry Street Partners Investment Trust and Daniel Messier, Trustee, OADR Docket No. 2015-008, Recommended Final Decision (October 11, 2016), 2016 MA ENV LEXIS 63, at 39-52, adopted as Final Decision (December 14, 2016), 2016 MA ENV LEXIS 62 (remedial measures ordered by UAO affirmed as reasonable to correct party's asbestos and solid and hazardous waste violations).

The relevancy, admissibility, and weight of evidence that the Department and the Petitioner sought to introduce at the Hearing was governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h). 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 . . . rest[ed] within the discretion of the Presiding Officer. . . ." Speculative evidence was accorded no weight given its lack of probative value in resolving the two Issues for Resolution in the Appeal as set forth above. 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").

B. The De Novo Standard of Review of the Department's Determinations and Directives In the UAO

The de novo standard of review has long been the standard of review in administrative appeals of Department enforcement orders, meaning that the Presiding Officer's review of the Department's environmental violation determinations and directives in the enforcement order (i.e. ordering a party to take remedial actions to correct environmental violations and/or pay a civil administrative penalty for the violations) is anew based on a preponderance of the evidence presented by the parties at the evidentiary Adjudicatory Hearing and the governing statutory and regulatory requirements. West Meadow Homes, supra (preponderance of evidence and governing statutory and regulatory requirements supported Department's determination that appellant committed wetlands violations and reasonableness of remedial measures ordered by Department in UAO, but did not support Department's $6,000.00 civil administrative penalty

assessment against appellant for the violations); Ferry Street Partners, supra (preponderance of evidence and governing statutory and regulatory requirements supported Department's determination that appellant committed asbestos and solid and hazardous violations and reasonableness of remedial measures ordered by Department in UAO); In the Matter of Iron Horse Enterprises, Inc., OADR Docket No. 2014-022, Recommended Final Decision (May 2, 2016), 2016 MA ENV LEXIS 23, at 61-65, adopted as Final Decision (May 5, 2016), 2016 MA ENV LEXIS 22 (preponderance of evidence and governing statutory and regulatory requirements supported Department's determination that appellant violated Massachusetts Oil and Hazardous Material Release Prevention and Response Act, G.L. c. 21E and reasonableness of Department's $30,000.00 civil administrative penalty assessment against appellant for violations); In the Matter of Kane Built, Inc., OADR Docket No. 2017-037, Recommended Final Decision (December 18, 2018), adopted as Final Decision (January 17, 2019) (preponderance of evidence and governing statutory and regulatory requirements supported Department's determination that appellant committed asbestos violations and reasonableness of Department's $67,250.00 civil administrative penalty assessment against appellant for the violations). Under this de novo standard of review, the Presiding Officer makes: (1) findings of fact based on a preponderance of the evidence with no deference to any prior factual determinations of the Department; and (2) legal determinations based on the governing statutory and regulatory requirements with deference to the Department's reasonable interpretations or construction of the requirements. In the Matter of Pioneer Valley Energy Center, LLC ("PVEC"), OADR Docket No. 2011-010, Recommended Final Decision (September 23, 2011), 2011 MA ENV LEXIS 109, at 26, adopted as Final Decision (November 9, 2011), 2011 MA ENV LEXIS 108 ("[a]n administrative agency's [reasonable] interpretation of a statute the agency is charged with

enforcing is entitled to 'substantial deference'", citing, Commerce Ins. V. Commissioner of Ins., 447 Mass. 478, 481 (2006)).[17]

The de novo standard of review employed here is similar to the "rational basis test" utilized by Massachusetts conducting judicial review of discretionary decisions of state agencies. As the Massachusetts appellate courts have explained, when a state government agency exercises its administrative discretion in making a determination, the determination should be affirmed by a reviewing court unless "the decision was arbitrary and capricious such that it constituted an abuse of [the agency's] discretion." Frawley v. Police Commissioner of Cambridge, 473 Mass. 716, 728 (2016); Garrity v. Conservation Commission of Hingham, 462 Mass. 779, 792 (2012); Sierra Club v. Commissioner of Department of Environmental Management, 439 Mass. 738, 748-49 (2003); Forsyth Sch. for Dental Hygienists v. Board of Registration in Dentistry, 404 Mass. 211, 217 (1989). This is the rule regardless of whether judicial review is confined to review of the administrative evidentiary record before the agency or is de novo, where the judge makes his or her independent findings of fact based on a preponderance of the evidence

[17] PVEC involved an administrative appeal of the Department's issuance of a Sewer Permit to the proponent of a proposed electricity generating facility in Westfield, Massachusetts that authorized the proponent's discharge of wastewater into Westfield's sewer system. In lieu of an evidentiary Adjudicatory Hearing, the parties in the appeal agreed to submit the case to the Presiding Officer upon the record, which included the sworn pre-filed testimony of witnesses presented by the parties in support of their respective positions in the appeal. After reviewing the record, the Presiding Officer issued a Recommended Final Decision affirming the Department's issuance of the Sewer Permit. The subsequent Final Decision by the Department's then Commissioner, adopted all of the Presiding Officer's findings and rulings of his Recommended Final Decision except for some of the Presiding Officer's reasoning in ruling that the Department sufficiently considered climate change impacts in issuing the Sewer Permit as required by G.L. c. 30, § 61. 2011 MA ENV LEXIS 109, at 4-7. A subsequent court challenge to the Final Decision was dismissed by the Hampden Superior Court. Babinski v. Sullivan, C.A. No. 1179CV00077, Hampden Superior Court, Amended Judgment on Defendants' Motion to Dismiss (February 8, 2012).

presented at trial, because the legal definition of what constitutes arbitrary and capricious governmental action is the same.[18]

A state agency "decision is arbitrary or capricious such that it constitutes an abuse of discretion where it 'lacks any rational explanation that reasonable persons might support'" and "an abuse of discretion occurs when there has been a clear error of judgment in weighing relevant factors such that [the] decision falls outside [the] range of reasonable alternatives[.]" Frawley, 473 Mass. at 729-33 (Cambridge Police Chief's reasons for denying retired police officer's application for "retired [police] officer identification card" authorizing him to carry a concealed weapon lacked a rational basis); Garrity, 462 Mass. at 792-97 (Hingham Conservation Commission's reasons for bringing enforcement action against plaintiff for wetlands violations had rational basis); Sierra Club, 439 Mass. at 748-49 (state agency commissioner's MEPA findings in favor of proposed project had rational basis); Doe v. Superintendent of Schools of Stoughton, 437 Mass. 1, 6 (2002) (high school principal's reasons for suspending student pending resolution of criminal charges against student had rational basis); Forsyth, 404 Mass. at 217-19 (State Board of Registration in Dentistry's reasons for denying dental hygienist school's

[18] The provisions of G.L. c. 30A, § 14(7) governing judicial review of Final Decisions of the Department's Commissioner in administrative appeals of Department permit decisions and enforcement orders provide that judicial review is confined to the administrative evidentiary record before the agency and authorizes seven possible grounds for the reviewing court to overturn a Final Decision, including that the Final Decision is "[a]rbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." G.L. c. 30A, § 14(7)(g). For the essentially same reasons, a reviewing court may overturn a land use decision of a municipal zoning board pursuant to G.L. c. 40A, § 17, which provides for de novo judicial review of the board's decision where the Superior or Land Court judge: (1) "makes his [or her] own findings of fact[,] . . . (2) "'determines the content and meaning of statutes and [local zoning] by-laws [governing the board's decision] and . . . decides whether the board . . . chos[e] from those sources the proper criteria and standards . . . in [making its decision]'"; (3) "accord[s] deference to a local board's reasonable interpretation of its own zoning bylaw . . . with the caveat that an 'incorrect interpretation of a statute . . . is not entitled to deference'" and (4) "determines whether the board has applied [the governing zoning] standards in an 'unreasonable, whimsical, capricious or arbitrary' manner." Doherty v. Planning Board of Scituate, 467 Mass. 560, 566-67 (2014). "The judge . . . should overturn a board's decision when 'no rational view of the facts the court has found supports the board's conclusion.'" Id., at 567.

request to include certain course in its curriculum for dental hygienists had rational basis); City of Brockton v. Energy Facilities Siting Board, 469 Mass. 196, 209-10 (2014) (Energy Facility Siting Board's reliance on Boston Logan Airport meteorological data in approving proposed Brockton energy facility had rational basis because: (1) data "[was] representative of [Brockton meteorological] conditions", (2) "no suitable meteorological data for the Brockton site were available", and (3) Board's governing statute did not require Board to use on-site meteorological data); See also Doherty, 467 Mass. at 566-73 (on de novo judicial review, local planning board's decision denying property owner's application for special permits authorizing construction of residential dwellings on property owner's undeveloped lots affirmed because "board did not [deny property owner's application] in an 'unreasonable, whimsical, capricious or arbitrary' manner," but due to property owner's failure to demonstrate lots were "not subject to flooding" within the meaning of the local zoning bylaw).

A state agency decision, however, "is not arbitrary and capricious if 'reasonable minds could differ' on the proper outcome'" and "[i]t is not the place of a reviewing court to substitute its own opinion for that of the [agency]." Doe, 437 Mass. at 6; Frawley, 473 Mass. at 729. Thus, if an agency's decision has a rational basis, i.e. a sufficient factual and legal foundation, it should be affirmed by the reviewing court notwithstanding that the court might have made a different decision based on the circumstances of the case. Id. For these reasons, "[t]he deference . . . grant[ed] to an agency's determination of questions entrusted to its expertise places a 'heavy burden' on parties challenging the [determination]." NSTAR Electric Co. v. Department of Public Utilities, 462 Mass. 381, 386 (2012). However, "[t]he principle of according weight to an agency's discretion . . . is 'one of deference, not abdication,'" meaning that "courts will not hesitate to overrule agency [determinations that are] . . . arbitrary, unreasonable, or inconsistent

with the plain terms of the [governing regulatory requirements]." NSTAR, 462 Mass. at 386-87; Warcewicz v. Department of Environmental Protection, 410 Mass. 548, 550 (1992); Moot v. Department of Environmental Protection, 448 Mass. 340, 346 (2007).

In sum, in an administrative appeal of a Department enforcement order, while the Presiding Officer's review of the Department's environmental violation determinations and directives in the order is de novo, the Presiding Officer should recommend the order's affirmance by the Department's Commissioner if the Presiding Officer determines based on a preponderance of the evidence presented at the evidentiary Adjudicatory Hearing and the governing statutory and regulatory requirements that the Department's determinations and directives in the order have a rational basis, i.e. a sufficient factual and legal foundation, and recommend otherwise if they do not. West Meadow Homes, supra; Ferry Street Partners, supra; Iron Horse Enterprises, Inc., supra; Kane, supra. It is important to note, however, that notwithstanding the Presiding Officer's determination and recommendation on the propriety of a Department enforcement order, it is the Department's Commissioner, as the final agency decision-maker in the appeal, who has the ultimate authority over the order's fate, and as a result, the Commissioner may affirm the order in whole or in part or vacate the order in its entirety based on the evidentiary record and the governing statutory and regulatory requirements. 310 CMR 1.01(14)(b);[19] In the Matter of Associated Building Wreckers, Inc., OADR Docket No. 2003-132, Final Decision (July 6, 2004), 11 DEPR 176 (2004) (Department's Commissioner

[19] It is a well settled principle that "the [Department's] commissioner determines 'every issue of fact or law necessary to the [final] decision [in an appeal,] [and] . . . may adopt, modify, or reject a [Presiding Officer's] recommended decision, with a statement of reasons.'" Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 231 (2010). "[T]he commissioner's interpretation of [the governing] regulations [and statutes]," and not that of the Presiding Officer, "is conclusive at the agency level, and is the only interpretation that is entitled to deference by a reviewing court" on judicial review pursuant to G.L. c. 30A, § 14. Id., at 457 Mass. at 228.

rejected DALA[20] Administrative Magistrate's recommendation that Department's $2,500.00 penalty assessment against appellant for air pollution violations be reduced from by $625.00 to $1,875.00 after concluding Magistrate erred in determining $2,500.00 penalty amount was excessive); In the Matter of Roofblok Limited, OADR Docket Nos. 2006-047 & 048, Final Decision (May 7, 2010), 17 DEPR 377 (2010) (Department's Commissioner accepted DALA Administrative Magistrate's recommendation that Department's $86,498.50 penalty assessment against appellant for solid waste, hazardous waste, and water pollution violations be vacated, "but for different reasons than those articulated by the DALA Magistrate"); West Meadow Homes, supra (Department's Commissioner accepted Chief Presiding Officer's recommendations that Department's UAO be affirmed because Department's determinations and directives in UAO regarding appellant's violations of the MWPA had a sufficient factual and legal basis but that Department's $6,000.00 civil administrative penalty assessment against appellant for the violations be vacated because Department failed to prove compliance with the Civil Administrative Penalties Act, G.L. c. 21A, § 16, in assessing penalty); Ferry Street Partners, supra (Department's Commissioner accepted Presiding Officer's recommendation that Department's UAO be affirmed because Department's determinations and directives in UAO regarding the appellant's asbestos and solid and hazardous violations had a sufficient factual and legal basis); Iron Horse Enterprises, Inc., supra (Department's Commissioner accepted Presiding Officer's recommendation that Department's $30,000.00 civil administrative penalty assessment for appellant's violations of G.L. c. 21E be affirmed because penalty had a sufficient factual and

[20] "DALA" is the acronym for the Massachusetts Division of Administrative Law Appeals, an agency within the Massachusetts Executive Office of Administration and Finance ("A&F"), that at one time adjudicated administrative appeals of Department permit decisions and enforcement orders.

legal basis); Kane, supra (Department's Commissioner accepted Chief Presiding Officer's recommendation that Department's $67,250.00 civil administrative penalty assessment against appellant's violations of Department's asbestos removal regulations be affirmed because penalty had a sufficient factual and legal basis).

As discussed in detail below, the evidentiary record in this case and the governing wetlands statutory and regulatory requirements warrant the Commissioner's affirmance of the Department's UAO against the Petitioner because the Department's determinations and directives in the UAO have more than a rational basis, i.e. more than a sufficient factual and legal foundation.

C. The Department's Highly Persuasive Evidence At the Hearing Demonstrating the Petitioner's Violations of the MWPA and the Wetlands Regulations and the Reasonableness of the Remedial Measures the Department Ordered the Petitioner to Perform to Address the Violations

At the Hearing, the Department's witnesses, Ms. Child and Mr. Dulmaine, presented highly persuasive testimonial, documentary, and photographic evidence demonstrating that the Petitioner violated the MWPA and the Wetlands Regulations as alleged by the Department in the UAO and that the remedial measures in the UAO that the Petitioner was ordered to undertake to correct the violations are reasonable. Ms. Child and Mr. Dulmaine were more than qualified to provide their respective testimony at the Hearing.

Ms. Child has been employed by the Department for more than 26 years (since February 1993) and her tenure with the Department includes more than two decades of investigative and enforcement experience in the environmental field, including supervising Department staff in this area. Prefiled Direct Testimony of Denise Child for Department of Environmental Protection, November 30, 2017 ("Ms. Child's Direct PFT"), ¶ 1. Since June 2015, she has

served as Chief of the Wetlands Program in the Department's Central Regional Office, responsible for enforcement of the MWPA and the Wetlands Regulations, including investigating complaints of wetlands violations and supervising Department staff in the Wetlands Program. Id., ¶ 2. She holds Bachelor of Arts and Master of Arts Degrees in Environment, Technology, and Society ("ETS") from Clark University in Worcester, Massachusetts. Id., ¶ 3.

Mr. Dulmaine is a wetlands expert and has been an Environmental Analyst in the Wetlands Program of the Department's Central Regional Office for nearly 30 years: since 1991. Pre-filed Direct Testimony of Gary Dulmaine ("Mr. Dulmaine's Direct PFT"), ¶ 1. Mr. Dulmaine has significant experience in wetlands permitting under the MWPA and the Wetlands Regulations. Id., ¶ 2. During his tenure with the Department, Mr. Dulmaine:

> [has] administer[ed] and enforce[ed] the [MWPA and the Wetlands Regulations] .... Performance of these duties [have] includ[ed] technical review of Notices of Intent, Orders of Conditions[,] topographic and engineering plans, hydrologic calculations, stormwater management reports, [and] soil log data[;] [and] analy[zing] vegetation and soils using proper scientific methodologies to determine and verify the identification and boundaries of vegetated wetlands for jurisdictional determinations . . . .

Id. His duties also have "includ[ed] the performance of site evaluations and compliance assessments in connection with the Department's issuance of Superseding Determinations of Applicability, Superseding Orders of Conditions, Superseding Orders of Resource Area Delineations, 401 Water Quality Certifications, Enforcement Orders, Administrative Consent Orders, Notices of NonCompliance, and Civil Administrative Penalty Assessments for violations of the MWPA and the Wetlands Regulations. Id. He also has worked with the Massachusetts Attorney General's Office in bringing civil or criminal prosecutions against parties for violations of the MWPA and the Wetlands Regulations. Id. He also has testified on behalf of the Department in administrative appeals of Department wetlands permits and enforcement orders

and in Massachusetts District and Superior Courts. Id. He holds a Bachelor of Science Degree in Plant and Soil Science from the University of Massachusetts at Amherst. Id.

Ms. Child's and Mr. Dulmaine's testimonial, documentary, and photographic evidence at the Hearing, which the Petitioner failed to refute with credible evidence, demonstrated the following.

The Property consists of approximately 2.68 acres of land. Ms. Child's Direct PFT, ¶ 5; Mr. Dulmaine's Direct PFT, ¶ 5. "The [Property] is a naturally low area that receives water from a multitude of sources," including from "the surrounding natural watershed; manmade roadways and drainage systems (stormwater management); culverts; and groundwater." Mr. Dulmaine's Rebuttal PFT, ¶ 3. According to the MassDEP Wetland data layers in MassGIS,[21] the eastern portion of the Property includes approximately 95,000 square feet of wetland resource areas labeled as shrub swamp, wooded swamp, and shallow marsh. Ms. Child's Direct PFT, ¶ 5; Mr. Dulmaine's Direct PFT, ¶ 5; Mr. Dulmaine's Rebuttal PFT, ¶ 3. The U.S Geological Survey ("USGS")[22] Topographic map layer also shows a similar wetland outline over the eastern portion of the Property. Id. In addition, an un-named stream also traverses the Property. Ms. Child's

[21] A "Geographic Information System" or "GIS" is:

> is a computer system capable of capturing, storing, analyzing, and displaying geographically referenced information; that is, data identified according to location. Practitioners also define a GIS as including the procedures, operating personnel, and spatial data that go into the system.

In the Matter of Jodi Dupras, OADR Docket No. WET-2012-026, Recommended Final Decision (July 3, 2013), 2013 MA ENV LEXIS 40, at 37, adopted as Final Decision (July 12, 2013), 2013 MA ENV LEXIS 61; Vecchione, 2014 MA ENV LEXIS 76, at 21. In the Matter of Francis P. and Debra A. Zarette, Trustees of Farm View Realty Trust, OADR Docket No. WET-2016-030, Recommended Final Decision (February 20, 2018), 2018 MA ENV LEXIS 7, at 39, n.21, adopted as Final Decision (March 1, 2018), 2018 MA ENV LEXIS 6. "MassGIS" is the Commonwealth agency that has created a comprehensive, statewide database of spatial information for mapping and analysis supporting environmental planning and management. Dupras, 2013 MA ENV LEXIS 40, at 37-38; Vecchione, 2014 MA ENV LEXIS 76, at 21; Zarette, 2018 MA ENV LEXIS 7, at 39, n.21.

[22] According to its internet website, the USGS is "the Nation's largest water, earth, and biological science and civilian mapping agency [that] collects, monitors, analyzes, and provides science about natural resource conditions, issues, and problems." https://www.usgs.gov/about/about-us/who-we-are

Direct PFT, ¶ 5; Mr. Dulmaine's Rebuttal PFT, ¶ 3. This stream does not appear on the USGS Topographic map layer, and, as a result, is presumed by the Department to be intermittent. Id. Copies of these MassGIS data layer images of the Property were introduced in evidence at the Hearing as Exhibit 2 to both Ms. Child's and Mr. Dulmaine's respective Direct PFT. Id.; Mr. Dulmaine's Direct PFT, ¶ 5.

A single family home is located on a small upland portion on the farthest western portion of the Property adjacent to Burns Court in Maynard. Ms. Child's Direct PFT, ¶ 5; Mr. Dulmaine's Direct PFT, ¶ 5. Burns Court is an area that has had wetlands for decades. Mr. Dulmaine's Rebuttal PFT, ¶¶ 8A-8B. This is evidenced by two USGS Survey Maps that were introduced in evidence at the Hearing: (1) a USGS Survey Map for Maynard dated 1965 that was photo-revised in 1979 (Exhibit A to Mr. Dulmaine's Rebuttal PFT); and (2) a USGS Survey Map for Maynard dated 1987 (Exhibit B to Mr. Dulmaine's Rebuttal PFT). Id. It is also evidenced by a Soil Survey Map of Middlesex County, Massachusetts (in which Maynard is located) prepared by the U.S. Department of Agriculture's Natural Resources Conservation Service ("NRCS").[23] Id., Exhibit C to Mr. Dulmaine's Rebuttal PFT.

The mapping for the NRCS Soil Survey Map was performed from the 1970's through the 1990's and depicts the area of Burns Court as consisting of Freetown Muck, a hydric soil that "is a very deep[,] nearly level, poorly drained, organic soil in depressions and along streams and rivers." Mr. Dulmaine's Rebuttal PFT, ¶ 8B. A hydric soil is "a soil that is saturated, ponded, or flooded long enough during the growing season to cause anaerobic (lack of oxygen) conditions

[23] According to its internet website, "[the] NRCS provides America's farmers and ranchers with financial and technical assistance to voluntarily put conservation on the ground, not only helping the environment but agricultural operations, too." https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/about.

in the upper part of the soil." Id. Mr. Dulmaine testified that "[s]oils found in wetlands are . . . hydric soils" and that "[the] [a]naerobic conditions [in the soil] produce physical and chemical changes in the soil that are readily observable and serve as hydric soil indicators." Id. He testified that "[h]ydric soils generally take many years to develop," and, [a]s a result, these soils are good indicators of long term hydrology of an area." Id.

Violations of the MWPA and the Wetlands Regulations for unauthorized activities in protected wetlands areas at the Property date back to at least September 2008, when the Town of Maynard Conservation Commission ("the MCC") "discovered that work was . . . taking place on the [Property in violation of the MWPA and the Wetlands Regulations,] includ[ing] filling and grading within the wetland Buffer Zone . . . that was very close and possibly into the [BVW on the Property]." Attachment to MCC's April 28, 2009 OOC, at p. 2. As result, "[the MCC] issued an Enforcement Order ("EO") to [the Petitioner] . . . order[ing] the work to stop [and] erosion controls [at the Property]." Id. The MCC also directed the Petitioner to file an NOI with the MCC pursuant to the MWPA and the Wetlands Regulations "to cover any alterations in the wetland or buffer [zone] areas [at the Property] . . . and that all alterations illegally made within the BVW and any other alterations which could not be approved [by the MCC] would have to be removed and the [Property] restored." Id.

In October 2008, "[the Petitioner] contacted the [MCC] . . . request[ing] permission to bring in more fill [on the Property] and store it in the upland portion of the [Property]." Id. The MCC denied the Petitioner's request and informed him that he had to file an NOI for the proposed work and obtain an OOC from the MCC authorizing the work. Id. Shortly thereafter, several MCC members and the Petitioner met at the Property "to assist [the Petitioner] with re-establishing the previous wetland boundary and to view the [unauthorized] work that had taken

place [at the Property]." Id. The MCC members and the Petitioner "re-established the former location of the edge of the BVW . . . and marked the former location of wetland markers by taping method using the existing house location [on the Property] as control." Id. "The result of that re-establishment of the markers revealed that the [Petitioner's unauthorized] filing had extended beyond the former marker locations and into the BVW in the section from marker M3 to M6." Id. Also, "[s]ome of the fill was . . . relatively new fill." Id. The MCC informed the Petitioner that his NOI "would need to include the removal of the fill in the wetland and if he disagreed with the re-established marker locations, he could hire a land surveyor to stake the locations." Id.

In November 2008, the MCC informed the Petitioner once again of the improper alterations of the protected wetlands at the Property as described above and that all fill in the wetlands would have to be removed as part of any OOC issued by the MCC to the Petitioner. Id. The Petitioner then filed an NOI with the MCC in December 2008 seeking authorization to perform work in wetlands areas at the Property. Id., at pp. 2-3. Following a series of public hearings it conducted on the Petitioner's NOI from December 2008 to April 2009, on April 28, 2009, the MCC issued an OOC to the Petitioner ("the MCC's 2009 OOC"), which approved the delineation of the BVW boundary at the Property (shown on the Petitioner's plan of record for the NOI) that is generally consistent with that shown on the MassGIS data layers discussed above.[24] Ms. Child's Direct PFT, ¶ 6; Mr. Dulmaine's Direct PFT, ¶ 7. The MCC's 2009 OOC also approved the Petitioner's performance of certain work at the Property, including the grading of the yard in the Buffer Zone to BVW, conditioned upon the Petitioner's removal of fill material

[24] A copy of the 2009 OOC was introduced in evidence at the Hearing as Exhibit 3 to both Ms. Child's and Mr. Dulmaine's Direct PFT. Ms. Child's Direct PFT, ¶ 6; Mr. Dulmaine's Direct PFT, ¶ 7.

from, and restoration of, an unspecified area of BVW (OOC Condition No. 23), and the installation of permanent wetlands boundary markers (OOC Condition No. 29). Id. The MCC's 2009 OOC did not approve, however, work, other than BVW restoration, beyond the BVW boundary delineated to the east and south of the existing driveway and yard at the Property. Id.

On May 12, 2009, the Petitioner challenged the MCC's 2009 OOC by filing a request with the Department's Central Regional Office for an SOC approving additional work at the Property that was not approved by the MCC's 2009 OOC.[25] Ms. Child's Direct PFT, ¶ 7; Mr. Dulmaine's Direct PFT, ¶ 8. In making his SOC request, the Petitioner did not dispute the current boundaries of the BVW approved in the MCC's 2009 OOC. Id. Instead, he raised a concern that drainage at the Property had been changed by work on an off-site culvert, conducted by the Town of Maynard approximately 20 years earlier. Id.

On July 20, 2009, while the Petitioner's SOC request was pending before the Department, the Department issued a Notice of Noncompliance to the Petitioner for having conducted unauthorized work in the 100-foot Buffer Zone at the Property. Ms. Child's Direct PFT, ¶ 8; Exhibit 5 to Ms. Child's Direct PFT. Eight days later, on July 28, 2009, the Department issued an SOC ("the Department's 2009 SOC") affirming the MCC's 2009 OOC, which, as discussed above, had approved the grading of the yard in the Buffer Zone to BVW, conditioned upon the Petitioner's removal of fill material from, and restoration of, an unspecified area of BVW (OOC Condition No. 23). Ms. Child's Direct PFT, ¶ 9; Mr. Dulmaine's Direct PFT, ¶ 10. As of August 2, 2012, based on an inspection of the Property that former Department

[25] A copy of the Petitioner's May 12, 2009 SOC request to the Department was introduced in evidence at the Hearing as Exhibit 4 to Ms. Child's Direct PFT. Ms. Child's Direct PFT, ¶ 7; Mr. Dulmaine's Direct PFT, ¶ 8.

Wetlands Analyst MaryAnn DiPinto conducted on that date, the fill material still remained in the BVW.[26] Ms. Child's Direct PFT, ¶ 10; Exhibit 7 to Ms. Child's Direct PFT.

On October 7, 2015, the MCC requested the Department's enforcement assistance regarding the Petitioner's purported continuing unauthorized alterations of wetlands resource areas on the Property and failure to comply with the Department's 2009 SOC affirming the MCC's 2009 OOC . Ms. Child's Direct PFT, ¶ 11; Ms. Child's Rebuttal PFT, ¶ 11; Mr. Dulmaine's Direct PFT, ¶ 10. On the same date, Ms. Child and Mr. Dulmaine attempted to inspect the Property to investigate the MCC's concerns, but the Petitioner denied them access to the Property. Id. The Petitioner, however, admitted to Ms. Child and Mr. Dulmaine of having conducted unauthorized work in the wetlands resource areas at the Property, purportedly to correct drainage problems at the Property. Id.

Pursuant to the Department's request, on December 1, 2015, the Massachusetts State Police ("MSP") conducted a flyover of the Property to obtain aerial photographs of the Property to confirm whether the Petitioner had performed unauthorized work in the protected wetlands areas on the Property. Ms. Child's Direct PFT, ¶ 12; Exhibit 8 to Ms. Child's Direct PFT; Ms. Child's Rebuttal PFT, ¶ 5; Mr. Dulmaine's Direct PFT, ¶ 11; Exhibit 5 to Mr. Dulmaine's Direct PFT. These aerial photographs, which were introduced in evidence at the Hearing as Exhibit 8 to Ms. Child's Direct PFT and Exhibit 5 to Mr. Dulmaine's Direct PFT, confirmed that the Petitioner had constructed an access road on the Property through areas designated as wetlands on the MassGIS map layers discussed above and located beyond the limit of work and wetlands

[26] Ms. DiPinto retired from MassDEP at the end of June 2015.

boundary markers set forth in the Department's 2009 SOC affirming the MCC's 2009 OOC. Id. These aerial photographs also depicted areas within BVW at the Property that had been mowed/altered in violation of the Department's 2009 SOC affirming the MCC's 2009 OOC. Id.

Following receipt of the MSP aerial photographs of the Property, Ms. Child made several requests to the Petitioner for permission to access to the Property to inspect the wetlands violations depicted in the photographs. Mr. Dulmaine's Direct PFT, ¶ 12. The Petitioner rejected all of Ms. Child's requests. Id. As a result, on April 13, 2016, Mr. Dulmaine inspected the Property from abutting land owned by the Town of Maynard. Mr. Dulmaine's Direct PFT, ¶¶ 12-17. During his inspection, Mr. Dulmaine observed the following work or activities on the Property which had not been authorized by the Department's 2009 SOC affirming the MCC's 2009 OOC.

First, Mr. Dulmaine observed that heavy equipment had recently been operated in a stream channel at the Property causing environmental damage and alterations to this wetlands resource area. Id., ¶ 13; Exhibit 6 to Mr. Dulmaine's Direct PFT. The environmental damage and alterations are depicted in photographs that Mr. Dulmaine took of the area during his inspection of the Property, which were introduced in evidence at the Hearing as Exhibit 6 to his Direct PFT. Id. As a result of his inspection, Mr. Dulmaine determined that the operation of the heavy equipment at issue had impaired the physical stability and the water carrying capacity of the Bank, affecting ground water and surface water quality and wildlife habitat functions in violation of the Performance Standards at 310 CMR 10.54(4) for activities in Bank. Id.

Second, Mr. Dulmaine "observed that heavy equipment had recently been operated in BVW causing environmental damage and alteration to [that] wetland resource area . . . ." Mr. Dulmaine's Direct PFT, ¶ 14. Mr. Dulmaine took photographs of the altered BVW and the

photographs were introduced in evidenced at the Hearing as Exhibit 6 to Mr. Dulmaine's Direct PFT.

Lastly, Mr. Dulmaine observed large piles of brush and fill material adjacent to the BVW and within the 100 foot Buffer Zone to the BVW. Mr. Dulmaine's Direct PFT, ¶ 15; Exhibit 6 to Mr. Dulmaine's Direct PFT. He did not observe any erosion controls installed on the Property. Id.

On July 28, 2016, the Department's 2009 SOC affirming the MCC's 2009 OOC expired. Ms. Child's Direct PFT, ¶ 13. As a result of the SOC's expiration, the Petitioner was required to obtain a new OOC from the MCC authorizing any work previously authorized by the SOC. Id. Prior to the SOC's expiration, the Petitioner could have requested that the Department extend the SOC. Id. The Petitioner did not request an extension. Id.

On May 23, 2017, Ms. Child attempted to conduct an inspection of the Property for wetlands violations in response to the MCC's request. Ms. Child's Direct PFT, ¶ 14; Ms. Child's Rebuttal PFT, ¶ 6. When she went to the Property, the Petitioner, in the presence of the MCC's Conservation Agent and a Town of Maynard Police Officer, admitted having conducted recent grading and placement of material in the Buffer Zone to the BVW, but declined to allow Ms. Child to further inspect the Property. Id. Ms. Child observed from the Property's driveway and Burns Court that additional filling and grading activities had occurred at the Property since her October 7, 2015 attempted inspection of the Property, which appeared to be within the 100 foot Buffer Zone to the BVW and the Bank of the unnamed stream, extending into the BVW on the Property. Id. She also observed recent fill material that included broken concrete, stone, woodchips, leaves, and soil. Id. She did not observe any erosion controls or sedimentation controls at the Property. Id. She also observed that heavy equipment was parked in the 100 foot

Buffer Zone. Id. She directed the Petitioner to immediately cease all activity in the wetland resource areas and 100 foot Buffer Zone, which included the yard south and east of the house on the Property. Id. She also directed the Petitioner to cease all grading, equipment operation, and importing or manipulating fill, and to stabilize the disturbed areas with erosion and sedimentation controls. Id. Photographs of Ms. Child's May 23, 2017 inspection of the Property were introduced in evidence at the Hearing as Exhibit 9 to her PFT.

At the Hearing, the Petitioner presented no evidence disproving Ms. Child's and Mr. Dulmaine's testimony that he committed wetlands violations at the Property as alleged by the Department in the UAO. Instead, he made baseless claims, including that "[the] Property was never wetland" in its original state and became a wetland as a result of "the Town [of Maynard's] misjudgments and misbehaviors." The Petitioner's February 14, 2018 E-mail PFT; Mr. Dulmaine's Rebuttal PFT, ¶ 2. His other baseless claim was that "none of the filing of wetland ever happened" at the Property as asserted by the Department in the UAO. The Petitioner's February 14, 2018 E-mail PFT; Ms. Child's Rebuttal PFT, ¶ 6. I accord no weight to these claims because the Petitioner is not a wetlands expert, and, accordingly, he cannot render an expert opinion regarding the nature of the wetlands at the Property and whether they were altered in violation of the MWPA and the Wetlands Regulations. Moreover, the testimonial and documentary evidence that Ms. Child and Mr. Dulmaine presented at the Hearing as discussed above more than demonstrated that protected wetlands have existed at the Property at all times during the Petitioner's ownership and/or control of the Property and that he altered them in violation of the MWPA and the Wetlands Regulations as the Department asserted in the UAO.

As for the remedial measures in the UAO that the Department ordered the Petitioner to

perform to correct his violations of the MWPA and the Wetlands Regulations (see above at pp. 3-4), the Petitioner presented no evidence demonstrating that the measures were unreasonable. Indeed, based on the evidentiary record here as discussed above, the remedial measures were more than reasonable and should be affirmed by the Department's Commissioner.

CONCLUSION

For the reasons discussed in detail above, I recommend that the Department's Commissioner issue a Final Decision affirming the UAO because the Petitioner failed to prosecute his appeal of the UAO by repeatedly failing to comply with my directives to facilitate the appeal's adjudication, including failing to file proper PFT of witnesses, including the PFT of a wetlands expert, containing admissible evidence supporting his claims in the appeal. In the alternative, I recommend that the Department's Commissioner issue a Final Decision affirming the UAO because, based on a strong preponderance of the evidence presented by the parties at the Hearing and the governing wetlands statutory and regulatory requirements, I find that: (1) the Petitioner violated the MWPA and the Wetlands Regulations as alleged by the Department in the UAO; and (2) the remedial measures in the UAO that the Department ordered the Petitioner to perform to correct his violations are reasonable measures.

Date: 06/07/19

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.

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