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

October 19, 2018

In the Matter of
FTO Realty Trust

OADR Docket No. WET-2015-024RM
Tewksbury, MA

RECOMMENDED FINAL DECISION AFTER REMAND

INTRODUCTION

This appeal originated with FTO Realty Trust's ("Petitioner" or "FTO") challenge in Docket No. WET-2015-024 to the Superseding Order of Conditions ("SOC") issued by the Massachusetts Department of Environmental Protection's Northeast Regional Office ("DEP") concerning the real property at 20 Riverview Avenue, Tewksbury ("the Property" or "Site"). The SOC was issued pursuant to the Wetlands Protection Act, G.L. c. 131 § 40, and the Wetlands Regulations, 310 CMR 10.00. The Property lies adjacent to the Shawsheen River, and it contains the following wetlands resource areas: Bordering Land Subject to Flooding ("BLSF"), Riverfront Area, and Bordering Vegetated Wetlands ("BVW"). See 310 CMR 10.02, 10.55, 10.57, 10.58. The Property is within the Zone AE on the preliminary United States Federal Emergency Management Agency ("FEMA") Flood Insurance Rate Map ("FIRM"), dated February 11, 2011.

The SOC relates to FTO's proposed project for the Property, consisting primarily of a single-family house with driveway, deck, retaining wall, some site clearing and grading, and related appurtenances ("the Project"). The house and foundation are proposed to be elevated on

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6 feet of fill and encircled by a 5 foot high retaining wall for protection from flooding, all within BLSF and Riverfront Area. As a consequence, FTO's final plans proposed filling approximately 21,504 cubic feet of BLSF for the house, with approximately 21,599 cubic feet of proposed compensatory flood area. See October 6, 2015 SOC denial.

In March 2015, the Tewksbury Conservation Commission ("Commission") executed an Order of Conditions ("OOC") approving the Project. DEP appealed the OOC, and issued the SOC denying the Project[1]; FTO then appealed the SOC here, to the Office of Appeals and Dispute Resolution ("OADR"). During that appeal, FTO filed a new Notice of Intent (or "NOI") with the Commission to address issues raised by DEP ("second Notice of Intent"). The Commission approved the second Notice of Intent in the second OOC, which was then appealed by DEP.

After I allowed the parties' request for a lengthy stay to attempt to reach a settlement agreement in this appeal concerning the first OOC, I issued a Recommended Final Decision to dismiss the appeal based on the election of remedies provision in DEP's "Wetlands Program Policy 88-3: Multiple Filings." The Multiple Filings Policy generally provides that an applicant who files multiple Notices of Intent concerning the same project must choose within 21 days of the Conservation Commission's subsequent Order of Conditions which Notice of Intent to pursue, or, have the first Notice of Intent involuntarily dismissed. The policy's intent is to focus review on only one project, instead of multiple projects, in order to conserve resources.

After FTO made multiple representations that it would be content pursuing either Notice of Intent that received final approval and after FTO declined to choose which appeal to pursue

[1] Under 310 CMR 10.05(7)(a)6, DEP may unilaterally appeal or initiate an SOC review of each Order of Conditions issued by a local conservation commission within ten business days under 310 CMR 10.05(1). See infra. at pp. 23-27. The time lag here between the Commission's execution of the OOC and the Department's initiation of the SOC appeal is one of the subjects of this administrative appeal pending before me. Id.

under the Multiple Filings Policy, I issued the Recommended Final Decision for dismissal of this appeal concerning the first Notice of Intent, in accord with the Multiple Filings Policy. That Recommended Final Decision was adopted by DEP's Commissioner in a Final Decision.

FTO appealed the Final Decision to the Massachusetts Superior Court, which issued a ruling in FTO's favor. See Memorandum of Decision and Order on Plaintiff's Motion for Judgment on the Pleadings, Docket No. 16-3604-D, Essex Superior Court (October 18, 2017) ("Superior Court Decision"). The Superior Court (Douglas H. Wilkins, J.) remanded the matter back to OADR to hold an adjudicatory hearing on FTO's claim that DEP's appeal of the OOC on the first Notice of Intent was untimely.

After holding an adjudicatory hearing on that issue and the merits of the Project in the first Notice of Intent, I recommend that the DEP Commissioner issue a Final Decision affirming the SOC based upon the merits and, alternatively, based upon the equitable doctrine of judicial estoppel.

On the merits, a preponderance of the evidence, including significant evidence from the Commission itself, demonstrates that DEP filed a timely appeal of the Order of Conditions approving the first Notice of Intent. The evidence shows that the Commission failed to mail the Order of Conditions to DEP. Because the Commission had a statutory obligation to mail the Order of Conditions to DEP, the ten business day appeal period was tolled until DEP knew or should have known of the Commission's Order of Conditions. A preponderance of the evidence also demonstrates that the Project does not comply with the applicable wetland performance standards. The Project design includes multiple hydraulic restrictions on the compensatory flood area and components that will lead to an increase in flood stage and velocity.

The doctrine of judicial estoppel is an alternative ground for affirming the SOC. Judicial estoppel is intended to prevent a party from using inconsistent positions to "manipulate" and "play fast and loose" with the judicial system. Otis v. Arbella Mut. Ins. Co., 443 Mass. 634, 640-41, 645-646, 824 N.E.2d 23, 32 (2005). Here, the doctrine bars FTO from continuing this appeal because the administrative record demonstrates inconsistent positions and other conduct before and after remand that warrant dismissal on estoppel grounds.

I also recommend that the DEP Commissioner address the Superior Court's comments on DEP's regulatory requirements for issuance of Orders of Conditions. In particular, 310 CMR 10.05(6)(e) requires that Conservation Commissions mail or hand deliver Orders of Conditions to DEP but there is no requirement for proof or documentation of such delivery. In contrast, the regulation requires that the Order of Conditions be sent certified mail (return receipt requested) or hand delivered to the applicant. This discrepancy should be remedied by DEP amending 310 CMR 10.05(6)(e) to require that the Order of Conditions be sent certified mail (return receipt requested) or hand delivered to DEP with proof of service.

STANDARD OF REVIEW AND BURDEN OF PROOF

The standard of review should begin with a recitation of the fundamental notions of fairness and due process that were recently articulated by the Massachusetts Court of Appeals in Doe, Sex Offender Registry Bd. No. 29481 v. Sex Offender Registry Bd., 84 Mass. App. Ct. 537, 541-542, 998 N.E.2d 793, 796, (2013). As it aptly explained, in reliance upon the Supreme Judicial Court, "hearing officers, like judges, are held to 'high standards [which] are reflective of the constitutional rights of litigants to a fair hearing, as established in art. 29 of the Declaration of Rights of the Constitution of this Commonwealth, viz.: '. . . It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.'" . . . .

Moreover, as this court recently stated: "actual impartiality alone is not enough. Our decisions and those of the Supreme Judicial Court have commented often and in a variety of contexts on the importance of maintaining not only fairness but also the appearance of fairness in every judicial proceeding. In order to preserve and protect the integrity of the judiciary and the judicial process, and the necessary public confidence in both, even the appearance of partiality must be avoided.'" Id. (internal citations omitted).

OADR is a quasi-judicial office within DEP, which is responsible for advising DEP's Commissioner in resolving all administrative appeals of DEP permit decisions and enforcement orders in a neutral, fair, timely, and sound manner based on the governing law and the facts of the case. Matter of Tennessee Gas Pipeline Company, LLC, Docket No. 2016-020, Recommended Final Decision (March 22, 2017), adopted by Final Decision (March 27, 2017). DEP's Commissioner is the final agency decision-maker in these appeals. Id. To ensure its objective review of DEP permit decisions and enforcement orders, OADR reports directly to DEP's Commissioner and is separate and independent of DEP's program offices, Regional Offices, and Office of General Counsel ("OGC"). Id.

OADR staff who advise DEP's Commissioner in resolving administrative appeals are Presiding Officers. Id. Presiding Officers are senior environmental attorneys at DEP appointed by DEP's Commissioner to serve as neutral hearing officers; they are responsible for fostering settlement discussions between the parties in administrative appeals and resolving appeals by conducting pre-hearing conferences and evidentiary adjudicatory hearings, and issuing Recommended Final Decisions on appeals to the Commissioner.[2] Id. DEP's Commissioner, as the agency's final decision-maker, may issue a Final Decision adopting, modifying, or rejecting a

[2] I am one of three Presiding Officers in OADR. Each of us has been a member of the bar for at least 28 years. The Chief Presiding Officer, who is the head of OADR and supervises the OADR staff, has been a member of the bar for 32 years (since 1986).

Recommended Final Decision issued by a Presiding Officer in an appeal. Id. 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. Id.

Adjudication of administrative appeals requires the careful balancing of a number of considerations. I am required to provide a "just," "efficient," and "speedy" adjudicatory appeal process and write a fair and impartial Recommended Final Decision, in accord with the Adjudicatory Proceeding Rules, 310 CMR 1.01(1)(b) and (5)(a), and the Wetlands Regulations, 310 CMR 10.05(7)(j). I must also afford all parties a reasonable opportunity for a fair hearing. 310 CMR 1.01. Wetlands permit appeals, like this one, are also subject to the regulations expediting the appeals and requiring a prompt resolution. See 310 CMR 10.05(7)(j).

Burden of Proof. As the party challenging the Department's issuance of the SOC in this *de novo* appeal, FTO had the burden of going forward by producing credible evidence from a competent source in support of its positions. 310 CMR 10.03(2); see Matter of Town of Freetown, Docket No. 91-103, Recommended Final Decision (February 14, 2001), adopted by Final Decision (February 26, 2001) ("the Department has consistently placed the burden of going forward in permit appeals on the parties opposing the Department's position."). Specifically, FTO was required to present "credible evidence from a competent source in support of each claim of factual error, including any relevant expert report(s), plan(s), or photograph(s)." 310 CMR 10.05(7)(j)3.c. So long as the initial burden of production or going forward is met, the ultimate resolution of factual disputes depends on where the preponderance of the evidence lies. Matter of Town of Hamilton, DEP Docket Nos. 2003-065 and 068, Recommended Final Decision (January 19, 2006), adopted by Final Decision (March 27, 2006).

"A party in a civil case having the burden of proving a particular fact [by a preponderance of the evidence] does not have to establish the existence of that fact as an absolute certainty. . . . [I]t is sufficient if the party having the burden of proving a particular fact establishes the existence of that fact as the greater likelihood, the greater probability." Massachusetts Jury Instructions, Civil, 1.14(d).

The relevancy, admissibility, and weight of evidence that the parties sought to introduce in the Hearing were governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):

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

Under 310 CMR 1.01(13)(h), "[t]he weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. . . ."

BACKGROUND AND PRIOR PROCEEDINGS

The Property is approximately 23,669 square feet in size, or one-half of an acre. Merrill PFT[3], p. 2; Hanley PFT, p. 1. It is at the corner of Riverview Avenue and Bridget Street with abutting residential properties to the northeast and west. The Shawsheen River abuts the Property on its southern border, where the river begins flowing west after meandering from north to west. Merrill PFT, p. 2. The Project includes demolition of an existing 825 square foot cottage that is on pilings approximately 10 feet from the river and restoration of the disturbed Riverfront Area. No one has lived in the cottage since about 1987. Bruce PFT.

[3] "PFT" is the acronym for the pre-filed testimony submitted on behalf of each witness.

The Property contains a number of protected Wetlands Resource Areas, including 19,575 square feet of BLSF, 21,275 square feet of Riverfront Area, 4,180 square feet of Bordering Vegetated Wetlands, and 15,125 square feet of Buffer Zone to BVW. The southwest corner of the Property is located within the floodway designated by FEMA. Maguire PFT, p. 4. The majority of the Property is located within BLSF, having a 100 year flood elevation of 87 North American Vertical Datum ("NAVD") and a 10 year flood elevation of 84. Merrill PFT, p. 2; Maguire PFT, p. 5. The area within the 10 year floodplain is considered significant to the protection of wildlife. 310 CMR 10.57(1)(a)3.

On about December 9, 2014, FTO filed its first NOI with the Commission, proposing site clearing and grading and construction of a single family house with a driveway, deck, retaining wall, and utilities. The NOI was accompanied by a plan entitled "Site Plan" dated December 4, 2014, prepared by Civil Design Consultants, Inc. The Tewksbury Zoning Board of Appeals ("ZBA") rejected that proposed project when it denied FTO's variance request due to local front yard setback requirements and opposition from the abutters. Hanley PFT, p. 2. After that denial, FTO created a new plan dated February 16, 2015, amending the original NOI and relocating the house, deck, retaining wall, and driveway closer to BVW and the river, and entirely within BLSF, Riverfront Area, and Buffer Zone to BVW. Merrill PFT, p. 3; Maguire PFT, p. 5; Hanley PFT, pp. 2-3.

On February 24, 2015, while the Project was still pending before the Commission, DEP Wetlands Analyst Nancy White reviewed the original NOI and plan, dated December 4, 2014, and made the following comments on DEP's NOI database: "Please provide narrative explaining how project meets Riverfront Area and BLSF performance standards." Merrill PFT, p. 4. In fact, the NOI did not mention that the BLSF would be altered or filled. Merrill PFT, p. 4. This

DEP review was part of DEP's daily general oversight of the hundreds of conservation commissions in the Commonwealth. On about March 25, 2015, the Commission executed an OOC approving the Project pursuant to 310 CMR 10.05(6), despite opposition from the abutters. Hanley PFT, p. 3.

On May 1, 2015, Bruce, a direct abutter to the Property, reported to DEP what he believed were ongoing wetlands violations at the Property. DEP reviewed the Wetlands Program database and confirmed that DEP had not received an OOC authorizing any wetlands work at the Property. As a consequence, and in accord with protocol, DEP wetlands analyst Heidi Davis contacted the Tewksbury Conservation Agent, Kyle Boyd, to discuss Bruce's report and ask if an OOC had been executed by the Commission authorizing the work. Davis learned that the Commission had executed an OOC, and Boyd subsequently emailed it to DEP. Merrill PFT, p. 4. The OOC indicated that it had been executed on March 25, 2015, approving the February 16, 2015, FTO plans.

On May 4, 2015, the Commission issued an enforcement order against FTO for unlawful tree removal within the Riverfront Area, Buffer Zone to BVW, and BLSF and the lack of proper and approved erosion controls. Merrill PFT, p. 7. Approximately twenty four trees had been removed. Merrill PFT, p. 9; Hanley PFT, p. 3. On May 13, 2015, FTO agreed to restore the degraded area by planting 12 additional trees, and the Commission consequently lifted the enforcement order. Hanley PFT, p. 3.

On May 7, 2015, Merrill met with Bruce to discuss Bruce's concerns for the asserted wetlands violations and historic flooding at the Property. He provided Merrill with photographs of that flooding from 2010 showing inundation of much of the Property. Merrill PFT, p. 5, Ex. 5. Those photographs were from a 52 year flood, which is also the flood of record. DEP's

immediate follow-up investigation revealed that the 100 year flood elevation was actually 87 NAVD, 1.8 feet higher than what was shown on FTO's February 16, 2015, plan that was approved by the Commission. Merrill PFT, pp. 5-6, 9, Ex. 6, 6A, 7.

Because of the flood plain elevation error, the Commission's OOC included an incorrect BLSF boundary. Therefore, for that and other reasons, on May 13, 2015, DEP appealed the first OOC pursuant to 310 CMR 10.05(7)(a), on the grounds that the floodplain elevation was not accurate, additional filling of BLSF would occur, the additional filling had not been quantified, and compensatory flood area had not been provided in accordance with 310 CMR 10.57(4)(a). Merrill PFT, p. 6. In addition, the Commission's OOC did not indicate that the project would alter or fill BLSF. Thus, the OOC did not authorize any filling of BLSF, which is indisputably contrary to the project design that included substantial filling of BLSF. Merrill PFT, p. 8. As a consequence, the OOC did not authorize all the work that it purported to approve.

During its ongoing review of the first OOC, DEP continued to investigate the Project proposed for the Property and provide information to FTO concerning flood elevations. In response, FTO submitted revised plans (dated June 30, 2015), which included changing the flood elevation to 86.5 and other changes to address the previously incorrect flood plain elevation. Those changes included: (1) placing the house on 6 feet of fill instead of 4, (2) encircling the fill and house with a 5 foot retaining wall instead of a 3 foot wall, (3) increasing the total amount of BLSF filling to 18,131 cubic feet, and (4) increasing the total proposed compensatory flood storage to 18,310 cubic yards. Merrill PFT, pp. 10-11.

Following the above plan changes and the receipt of more information from DEP, FTO recognized the correct flood elevation of 87 and submitted further revised plans (dated August 7, 2015), now depicting the 100 year flood elevation at 87, resulting in the additional filling of

3,373 cubic feet of BLSF for an overall total of 21,504 cubic feet of filling. A total of 21,599 cubic feet of compensatory flood area was proposed. Merrill PFT, p. 9-12.

DEP and Bruce, the abutter, continued to have significant concerns whether the project complied with the BLSF performance standards and would cause displacement and deflection of flood waters onto Riverview Avenue and the other abutting properties as a consequence of the proposed retaining wall and allegedly incorrectly designed compensatory flood area. Merrill PFT, pp. 10-15, Ex 10-11. Of particular concern is that the compensatory flood area would not function as required by having an unrestricted hydraulic connection to the river. Id.

On October 6, 2015, DEP issued the SOC denying the proposed project under 310 CMR 10.57(4)(a); DEP found the project would impede flood waters, restrict the hydraulic connection to the river, and result in flooding to nearby Riverview Avenue. See October 6, 2015 SOC denial; Merill PFT, pp. 14-15. FTO appealed the SOC denial here, to OADR.

OADR Appeal. Within about one month of the appeal's filing, I issued a Scheduling Order and held a Pre-Hearing Conference.[4]

The issues for adjudication were identified and agreed to by the parties as follows:

1. Whether DEP is entitled to tolling of the ten day appeal period in 310 CMR 10.05(7)(c).

2. Whether the proposed work complies with the requirement in 310 CMR 10.57(4)(a)1 that the compensatory flood storage volume have an unrestricted connection to the river.

3. Whether the proposed work complies with 310 CMR 10.57(4)(a)2 requirement that the proposed work not restrict flows that result in an increase in flood stage or velocity.

As provided in the Pre-Hearing Conference Report and Order, the parties were to file their pre-filed written testimony by the established deadlines and the adjudicatory hearing was to

[4] See Scheduling Order (October 29, 2015); Pre-Hearing Conference Report and Order (November 23, 2015).

be held on February 11, 2016, unless the appeal was settled by agreement of the parties or resolved by dispositive motions.[5]

Parties Engage in Settlement Discussions. Within about two weeks, the parties filed a joint motion to extend deadlines for pre-filed testimony because the parties were engaged in settlement discussions and FTO had agreed to file a revised plan with the Tewksbury Zoning Board of Appeals.[6] I allowed that motion.

Over the next three months, FTO filed motions on behalf of the parties or assented to by all parties requesting stays for additional time to continue settlement discussions.[7] I allowed those motions.

On March 1, 2016, DEP filed a status report representing that a settlement was unlikely and it requested that I issue a schedule with deadlines for filing testimony and an adjudicatory hearing date. In response, FTO filed its Status Report By The Appellant, requesting (with the Commission's assent) an additional two weeks to engage in settlement discussions with DEP. FTO, however, stated that it did not oppose resetting the hearing schedule, as requested by DEP.

As a consequence, less than a week later on March 7, 2016, I issued a Second Scheduling Order, giving FTO and the Commission until April 8, 2016, to file their pre-filed direct testimony. DEP's testimony was due on May 6, 2016, and FTO's and the Commission's rebuttal testimony were due on May 20, 2016. The adjudicatory hearing was rescheduled for June 7, 2016.

Settlement Discussions Fail. On April 28, 2016, DEP requested an extension of time from Friday, May 6, until Monday, May 9, 2016, to file its direct and rebuttal testimony because

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[5] Pre-Hearing Conference Report and Order (November 23, 2015).
[6] See Joint Motion to Amend Schedule (December 10, 2015).
[7] See Joint Stay to Settle (December 21, 2015); Petitioner's Motion to Further Stay By One Week Assented to by All Parties (January 29, 2016); Motion for Status Conference and Continued Stay Consented to by All Parties (February 5, 2016).

of a previously scheduled hearing in another matter and the need to coordinate testimony from several witnesses. To address any prejudice to FTO and the Commission, DEP proposed that their deadlines for rebuttal testimony be extended from May 20 to May 23, with the adjudicatory hearing to remain scheduled on June 7, 2016. The Commission assented to the motion. FTO opposed it, stating:

> Petitioner opposes DEP's request for a one day extension of time to file its pre-filed direct testimony in the above referenced matter. Petitioner has endured over a year of delay in this proceeding and does not agree to the extension. Petitioner has already agreed not to oppose other deadline issues and sees no valid reason offered by DEP for why this extension request should be supported. Petitioner respectfully requests that DEP's request for extension be denied.[8]

FTO opposed DEP's requested one day extension and made these representations of "delay" notwithstanding that it had previously requested and/or assented to the requests for extensions of the litigation schedule that I had established. On April 29, 2016, I allowed DEP's requested extension, and simultaneously gave FTO an extension of three business days, or until Wednesday, May 25 (five full days including the weekend), to file its rebuttal testimony. The adjudicatory hearing date remained unchanged.

FTO's and Commission's Requested Stay Based on Multiple Filings Policy. Less than one month later on May 18, 2016, FTO and the Commission filed a Motion for Stay of All Pending Deadlines and the Upcoming Hearing. The motion for stay was based upon FTO's prior filing of a new Notice of Intent ("second Notice of Intent") for a similar project at the same property but with changes apparently intended to satisfy DEP's disapproval of the project in the first Notice of Intent. Notably, the motion stated: "So far, counsel for [DEP] has not answered a written request for a clear statement regarding DEP's policy on a pending NOI [the second NOI]

[8] FTO's Opposition to One Day Extension (April 28, 2016).

for the same site, *which if approved would obviate the need for a hearing*." (emphasis added) The motion concluded: "Accordingly, to conserve all resources, a stay is requested until [DEP] issues a file number for the new Notice of Intent (thus far withheld), the Conservation Commission issues a decision, and the appeal period expires such that the Order is final." In sum, FTO and the Commission represented that an adjudicatory hearing on the first Notice of Intent would not be necessary if the project proposed in the second Notice of Intent were approved and allowed to be built. Accordingly, FTO and the Commission requested a stay of the appeal to allow processing of the second Notice of Intent by the Commission and DEP.

The next day, May 19, 2016, DEP filed its opposition to FTO's and the Commission's motion for stay.[9] In that opposition, DEP demonstrated that the second Notice of Intent had been prepared by April 11, 2016, and filed with the Commission on April 19, 2016; however, the second Notice of Intent was not submitted to DEP until about May 3, 2016 and the DEP Northeast Regional Office, which was handling the appeal, became aware of the new Notice of Intent on Friday, May 6, 2016, one business day before DEP's pre-filed testimony was due. The regulations provide that the second Notice of Intent should have been sent "concurrently" via hand delivery or certified mail to DEP when it was filed with the Commission. 310 CMR 10.05(4)(a). DEP has since pointed out that there has been no explanation from FTO concerning why the second Notice of Intent was not sent concurrently and why DEP did not receive it until two weeks after its filing, and shortly before its testimony was due, in apparent noncompliance with the regulatory requirement.[10]

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[9] See Opposition to Applicant's Motion for Stay; Department's Request that Stay Be Imposed After The Filing of Applicant's Rebuttal Testimony.

[10] See Department's Motion for Issuance of An Order to Show Cause Pursuant to Wetlands Program Policy 88-3 or Dismissal of This Appeal, n. 1.

DEP opposed a stay, citing its delayed receipt of the second Notice of Intent until shortly before DEP filed its testimony and exhibits on the project in the first Notice of Intent and the delayed filing of the motion for stay. DEP pointed to the expenditure of resources that occurred in connection with its testimony on the project in the first Notice of Intent, while all along FTO had been preparing and filing the second Notice of Intent with the Commission based upon another project proposal. DEP also requested that FTO not be relieved from filing its pre-filed rebuttal testimony, which was due about a week later (May 25, 2016), in order to close the administrative record and avoid "reward[ing]" FTO for, DEP argued, strategically timing its second Notice of Intent filing to the detriment of DEP. DEP also asserted that the rebuttal testimony would be relevant to any review of the second Notice of Intent.

The next day, May 20, 2016, FTO strongly opposed DEP's opposition. FTO asserted *again* that if the project in the second Notice of Intent were ultimately approved and allowed to be built, further testimony and thus the adjudicatory hearing in this appeal would be unnecessary and thus a waste of FTO's resources. As FTO stated: "There is no reason to force the expense of completing the record for the sake of completing the record, it is illogical."[11] FTO then invoked the Multiple Filing Policy, arguing that an immediate stay should be entered pursuant to that policy until the Commission "issues a decision, and the appeal period expires such that the Order is final, or the Petitioner withdraws the Notice of Intent." Id. at p. 3.

Stay Based on Multiple Filing's Policy and Representations of Dismissal. On May 23, 2016, in reliance upon FTO's representations and its invocation of the Multiple Filing Policy, I ruled against DEP's opposition and issued the Ruling and Order Allowing FTO's Motion to Stay

[11] Petitioner's Rebuttal to DEP's Opposition to Petitioner's and Conservation Commission's Motion for Stay, p. 1 (May 20, 2016).

Appeal.[12] I particularly focused on avoiding the further expenditure of resources and FTO's representations that if the project in the second Notice of Intent is approved, the adjudicatory hearing in this appeal would be unnecessary, stating:

> Nevertheless, the circumstances do not warrant casting aside the Multiple Filings policy and causing the unnecessary expenditure of additional resources. FTO can provide DEP with information regarding the merits of the project without incurring resources to file formal testimony. This appeal is therefore stayed and *the parties are ordered to comply with the Multiple Filings Policy*. In light of this ruling and order, no hearing will be held on FTO's motion to stay. (emphasis added)

Election of Remedies Provision. On July 11, 2016, the Commission issued an Order of Conditions ("second OOC") approving, with changes, the second Notice of Intent. On about July 21, 2016, DEP and abutters to the Property appealed the second OOC. On August 2, 2016, while the appeal was still stayed, DEP moved that I apply the election of remedies provision in the Multiple Filings Policy that FTO and the Commission relied upon in requesting the stay.[13] The election of remedies provision provides: "In the case of adjudicatory hearings, the applicant has 21 days from the date of issuance of the Order of Conditions to withdraw, in writing, one of the two Notices of Intent. Failure to do so will result in the applicant being required to show cause why the earlier filed Notice of Intent should not be dismissed." DEP decisions have been faithful to this policy, stating that in the absence of a showing of good cause and the applicant's failure to designate which Notice of Intent to pursue, the earlier Notice of Intent should be dismissed. See e.g. Matter of Sampson, Docket No. 2001-108, Recommended Final Decision (January 24, 2002), adopted by Final Decision (January 30, 2002); Matter of Costello, Trustee,

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[12] Through oversight and the recognition that the pleadings urging a stay were apparently drafted by FTO counsel I incorrectly referenced the motion as FTO's motion in a prior ruling, even though it was filed jointly by FTO and the Commission.

[13] See Motion for Issuance of An Order to Show Cause Pursuant to Wetlands Program Policy 88-3 or Dismissal of This Appeal.

William Realty Trust, Docket Nos. 92-047/048, Final Decision-Order of Dismissal (April 28, 1995).

FTO opposed DEP's reliance on the election of remedies provision, arguing primarily that it should not apply because the second OOC was under review by DEP and not final. Instead, it argued, that either the stay should be lifted and the hearing should proceed or, alternatively, the stay should remain in place *until one of the OOCs becomes final.*[14] The parties filed further pleadings on the issue: FTO argued that the policy should not apply until at least one of the OOCs is final; DEP argued that the policy applies to multiple Notices of Intent in order to avoid having to review multiple projects, and the policy is not dependent upon whether there is a final order.[15]

Recommended Final Decision Applying the Policy's Election of Remedies Provision. On September 12, 2016, I issued a Recommended Final Decision, recommending dismissal of the appeal based on the first Notice of Intent. I pointed out that: FTO had invoked the Multiple Filings Policy; FTO had long been on notice of the unambiguous election of remedies provision in that policy; and my order allowing the joint request for a stay required compliance with the Multiple Filings Policy. See Matter of FTO Realty Trust, Docket No. WET 2015-024, Recommended Final Decision (September 12, 2016), adopted by Final Decision (September 19, 2016), Recommended Final Decision on Reconsideration (October 24, 2016), adopted by Final Decision on Reconsideration (October 27, 2016). Indeed, FTO could have simply filed a motion to amend the plans on file for the original Notice of Intent to reflect changes in the project, but instead FTO filed an entirely new Notice of Intent (the second Notice of Intent). The Policy

[14] See Petitioner's Opposition to Department's Motion for Issuance of an Order to Show Cause or, in the Alternative, a Show of Cause (August 5, 2016).
[15] See Department's Response to Petitioner's Show of Cause or in the Alternative, Response to Petitioner's 8/5/16 Opposition (August 19, 2016); Petitioner's Rebuttal to Department's Response to Petitioner's Show of Cause or in the Alternative, Response to Petitioner's 8/5/16 Opposition (August 24, 2016).

therefore required that when, as here, there are two Notices of Intent and pending requests for SOC or adjudicatory hearing the applicant (FTO) must elect which Notice of Intent to pursue within 21 days of issuance of the Commission's Order of Conditions on the second Notice of Intent. Failure to make that election will result in dismissal of the first Notice of Intent. Because FTO had knowingly pursued a course of action that invoked the Multiple Filing Policy, I recommended dismissal of the first Notice of Intent and the appeal that emanated from it after FTO refused to make the required election of remedies. The DEP Commissioner issued a Final Decision adopting the Recommended Final Decision on September 19, 2016.

FTO's Superior Court Appeal. On about November 25, 2016, FTO appealed the Final Decision to the Superior Court pursuant to G.L. c. 30A.

On April 18, 2017, while the appeal was pending, DEP issued the SOC approving the project in the second OOC.

On October 23, 2017, the Superior Court (Wilkins, J.) issued the Memorandum of Decision on Plaintiff's Motion for Judgment on the Pleadings. The Superior Court vacated the DEP Final Decision and remanded the matter to OADR for further proceedings. The Court ruled that the Multiple Filings Policy did not apply under the circumstances of this case and noted the problematic nature of DEP's regulations regarding issuance of Orders of Conditions by conservation commissions (discussed below). The Court determined that for the Multiple Filings Policy to apply it should first be determined whether DEP's appeal of the first OOC was valid. The Court pointed out that whether DEP validly appealed the first Order of Conditions turns on when the Order of Conditions for the first Notice of Intent was issued to DEP, i.e. mailed by the Commission. It therefore remanded the matter for further proceedings to determine if and when the Order of Conditions was mailed to DEP.

Remand, Mootness, and FTO's Misstatements Concerning the Superior Court Record.

On November 8, 2017, I held a telephone status conference to establish a schedule for resuming the remanded appeal. Each party engaged in a colloquy with me about how the appeal should proceed. At the outset, FTO requested my recusal from the remand proceedings because, in its view, I was biased in favor of DEP. Although FTO's claim of bias was unfounded, I informed FTO that it could file a motion to recuse and I would rule upon it.

After hearing from the parties regarding how they desired to proceed I requested an update on the status of the second OOC. FTO informed me that DEP had issued an SOC approving the project in the second OOC and that FTO had completed site preparation and had commenced construction of the approved project. FTO also stated that it *intended to complete construction of the home* in accord with project plans approved in the *second* SOC.[16] This is the same position that FTO previously assumed in writing on May 18, May 20, August 5, 2016—that it would pursue whichever project received a final approval. Supra. at pp. 13-17. Because this was the same project that was the subject of the first OOC and first SOC (with some design changes to address DEP's regulatory concerns), I questioned whether this appeal of DEP's SOC denial for the first Notice of Intent was moot, but I stated that I was not going to decide the issue then, and would require briefing on it.

On November 13, 2017, I issued the Order After Remand and Second Scheduling Order, setting deadlines for briefing on the recusal and mootness issues. The parties subsequently briefed both issues.

FTO filed a motion for recusal with a supporting affidavit from its legal counsel in this appeal.[17] In both documents, and apparently in response to my inquiry regarding mootness, FTO

[16] See Ruling and Order Denying FTO's Motion for Recusal, pp. 17-18 (December 8, 2017).
[17] DEP opposed the motion and the Commission took no position.

asserted that Judge Wilkins and DEP counsel, Assistant Attorney General Turner Smith ("AAG Smith"), made certain statements during the Superior Court hearing regarding how the appeal should proceed on remand. FTO Counsel stated in her affidavit:

> During the argument, Judge Wilkins specifically asked opposing counsel, Turner Smith, Esq. to confirm that if the matter were remanded to the Department, that the Department would not seek to dismiss the matter because a second Order of Conditions was already issued and Attorney Smith replied, 'no, the Commonwealth would not.'

To clarify what transpired during the Superior Court hearing the transcript was obtained for the administrative record. The transcript does not contain the statements that FTO counsel attributed to Judge Wilkins and AAG Smith. The only related discussion occurred when the Court asked whether the administrative record presently contains any evidence that FTO's ongoing construction pursuant to the second OOC "would foreclose going forward on the first [OOC] if it turns out" it was a valid OOC that was not validly appealed. Superior Court Transcript, p. 1-27 (October 4, 2017). To which Assistant Attorney General Smith responded: "Not to my knowledge, Your Honor."

Motion for Recusal is Denied as Being Without Foundation. On December 9, 2017, I issued the Ruling and Order Denying FTO's Motion for Recusal. That 32 page ruling and order explains in detail how FTO's assertions were without foundation and not substantiated by the administrative record. For example, FTO asserted it was biased for me to: (1) sua sponte[18] raise

[18] In other cases I have sua sponte raised mootness as an issue in the interest of avoiding the unnecessary expenditure of scarce resources, both public and private. See generally Matter of Joe Wilkinson Excavating, Inc., Docket No. 2010-064, Recommended Final Decision (March 8, 2011), adopted by Final Decision (April 5, 2011); Matter of City of Gloucester, Docket No. 2014-009, Recommended Final Decision (July 9, 2014), adopted by Final Decision (July 17, 2014). In Wilkinson, I raised the issue, after which DEP moved for dismissal, which was opposed by Wilkinson because, among other things, Wilkinson alleged a "personal stake" in the outcome. Although I dismissed the appeal as moot, I ruled against DEP's request to keep the order alive and final, and instead ruled that it should be vacated. In Gloucester, I raised the mootness issue, and Gloucester did not oppose dismissal if the order was vacated, as in Wilkinson. DEP opposed dismissal, but its opposition was untimely and ultimately withdrawn.

the mootness issue[19]; (2) schedule an adjudicatory hearing on whether and when the first OOC was mailed to DEP, even though the Superior Court explicitly remanded the matter for that purpose; (3) mistakenly identify a motion as filed by FTO because it was jointly filed by FTO and the Commission; and (4) discuss and balance the hardships realized by all parties as a consequence of FTO's late filing of the motion to stay and invocation of the Multiple Filing Policy when I allowed the joint motion for a stay.

I subsequently held an adjudicatory hearing on all outstanding issues. The parties submitted pre-filed testimony from witnesses who were available for cross examination at the adjudicatory hearing.

FTO's witnesses were:

1. James P. Hanley. Hanley is president of Civil Design Consultants, Inc., a two-person civil engineering and project management consulting firm handling land development and municipal infrastructure projects. He has owned the firm since 2008. Hanley has "worked with the Wetlands Protection Act on a daily basis for nearly twenty years and [he has] been directly involved with the design and permitting of well over 100 [Wetlands Protection Act] filings with local conservation commissions and [DEP]." Hanley PFT, p. 1. He holds a bachelor's degree in civil engineering technology and an associate's degree in architectural engineering technology. He has been a civil engineer since 1997 and is a licensed professional civil engineer in Massachusetts and New Hampshire.

See Ruling and Order Regarding MassDEP's Motion for Reconsideration (September 5, 2014) and DEP's Withdrawal of Motion for Reconsideration (October 2, 2014).

[19] In fact, FTO had previously suggested in a prior motion that if the second NOI became final, this appeal would be moot. See supra. at pp. 13-14 (counsel stated that approval of the second NOI "would obviate the need for a hearing.") (emphasis added).

2. James Mackey. Mackey testified as a representative of FTO and manager of the Project. No information concerning his background was filed with his pre-filed testimony.

DEP's witnesses were:

1. Thomas Maguire. Maguire has been employed with DEP since 1989, serving as its Regional Consistency Coordinator for the Wetlands Program since 1996. In that role he promotes consistency in wetlands regulatory decisions and provides technical support related to hydrology, hydraulics, and stormwater management. He holds a master's degree in environmental studies, which included work in advanced water resource engineering, wetlands science, and groundwater hydrology. For that work he modeled the extent of flood prone areas along rivers using the United States Army Corps of Engineers Hydrologic Engineering Center River Analysis System, otherwise known as HEC-RAS software. He has also performed other work, made presentations, and taught classes in fluvial hydrology, including stream flow hydraulics, stream flow measurement, and other hydrologically related matters, particularly with respect to rivers. Maguire PFT, pp. 2-3; Tr[20], p. 72.
2. Pamela Merrill. Merrill has been employed with DEP's Northeast Regional Office since 2007, serving presently as Environmental Analyst III for the Wetlands and Wastewater Program, and previously as a Circuit Rider for the program. Between 2002 and 2007, she was employed in various roles outside of DEP, including Conservation Field Inspector, Associate Wetlands Scientist, and Conservation Agent. She holds an associate's degree in applied science and urban and community forestry.

[20] "Tr" refers to the written transcript of the adjudicatory hearing.

3. Rachel Freed. Freed is employed in DEP's Northeast Regional Office as the Deputy Regional Director for the Bureau of Water Resources (BWR). She also serves as the Section Chief for the Wetlands Program. She has worked in these positions, or in the position of an Environmental Analyst III or IV, since August, 1990. Freed holds a master's degree in dispute resolution, a master's degree in urban affairs and environmental planning, and a bachelor's degree in urban studies and public policy.
4. John D. Viola. Viola has served as the Deputy Regional Director of Operations and Customer Service in DEP's Northeast Regional Office for the last 12 years. In that position he manages and supervises the mail processing procedures, among other responsibilities. For the last 25 years he has worked in other administrative leadership positions at DEP, including Assistant Deputy Commissioner for Administration and Commissioner's Chief of Staff. The administrative record contains no information concerning Viola's educational background.
5. James Bruce. Bruce is a retired firefighter. He testified as an owner of residential property that abuts the Property. He has lived there since 1987.

The following witness testified for the Commission:

1. Kyle Boyd. Boyd is employed as the Town Planner/Conservation Agent for the Tewksbury Conservation Commission. More information concerning his background is provided at pages 25-27 of this decision.

DISCUSSION

I. DEP Validly Appealed the First OOC

It is undisputed that DEP did not appeal the first OOC within ten business days of March 25, 2015, the date that the OOC was signed and hand delivered to FTO, as generally required by

310 CMR 10.05(7)(a). DEP contends, however, it did not receive the OOC because it was not mailed to DEP by the Commission, and thus it had no knowledge of the OOC. DEP adds that unfortunately it is not unusual for the Commission to have mailing and other administrative problems; in fact, DEP contends that its research demonstrated it did not receive 17 out of 52 orders that were issued by the Commission during a three year period around when the first OOC should have been received. DEP concludes that it appealed the first OOC within ten business days of when it finally learned of the OOC and thus according to principles of equitable tolling, its appeal is timely. FTO and the Commission disagree, arguing that the first OOC was mailed to DEP, the appeal period should run from the time that it was mailed, and thus DEP's appeal is untimely.

A preponderance of the evidence introduced at the adjudicatory hearing demonstrates that the first OOC was not mailed to DEP and that DEP timely appealed within ten business days of learning about the OOC.

The Wetlands Regulations require that when, as here, the Commission issues an order of conditions it must do so within 21 days of the close of the public hearing to both the Applicant and DEP. It must do that pursuant to 310 CMR 10.05(6)(e), which provides "[the order of conditions] shall be signed by a majority of the conservation commission and shall be mailed by certified mail (return receipt requested) or hand delivered to the applicant or his or her agent or attorney, *and a copy mailed or hand delivered at the same time to the Department. . . .*" (emphasis added) The requirement to simultaneously send the OOC to DEP originates in the Wetlands Protection Act itself, which requires that after an OOC is signed, "a copy thereof shall be sent forthwith to the applicant and the department." G.L.c. 131, § 40, ¶ 18. "In order to be properly "issued", an Order of Conditions must be mailed or hand-delivered by the conservation

commission both to the applicant and to the Department." Matter of Chase, Docket No. 89-159, Final Decision (September 3, 1992).

The Wetlands Regulations at 310 CMR 10.05(7)(a) and the Wetlands Act, G.L.c. 131, § 40, ¶ 19, specify the parties that may appeal the order of conditions to and request a superseding order of conditions from DEP. Those parties, which includes DEP, must "sen[d]" the appeal by "certified mail or hand delivered within ten days of issuance of the" order of conditions. 310 CMR 10.05(7)(c) (emphasis added). Because the period is ten days or less, only business days are counted. 310 CMR 10.05(1).

Consistent with applicable case law and regulations, the Superior Court stated that the date of issuance is the date on which the order is mailed, citing Regan v. Conservation Commission of Falmouth, 77 Mass App. Ct. 485, 489 (2010), Oyster Creek Preservation, Inc. v. Conservation Comm'n. of Harwich, 449 Mass. 859, 863 (2007), and 310 CMR 10.04. Superior Court Decision, pp. 4-8. More specifically, the Wetlands Regulations provide that the date of issuance "means the date an Order is mailed, as evidenced by a postmark, or the date it is hand delivered." 310 CMR 10.04 (emphasis added). To be clear, and as the Superior Court explained, "issuance" of an order is not synonymous with receipt because the regulation requires mailing, not receipt. The appellate time period is not explicitly dependent upon receipt, but instead is dependent upon mailing of the order. Superior Court Decision, p. 10. However, evidence of lack of receipt is a probative piece of evidence of a failure to mail.[21] Here, the

[21] See generally Mutual Bank for Sav. v. Silverman, 13 Mass. App. Ct. 1059, 1060-1061, 434 N.E.2d 1027, 1029 (1982) (appeals court reversed entry of summary judgment when defendant had introduced an affidavit denying receipt); compare Carmel Credit Union v. Bondeson, 55 Mass. App. Ct. 557, 561, 772 N.E.2d 1089, 1092-1093, (2002) (reversing Silverman "[t]o the extent that the opinion in Silverman . . . . can be read to require proof of receipt . . . .; the statute "does not demand that the mortgagee ensure or prove . . . actual receipt of the notice by the party to be charged.'").

ultimate questions are whether and when the first OOC was deposited in the United States mail to DEP.

Evidence of Mailing. I begin with the evidence that Boyd, the Tewksbury Conservation Agent, purportedly mailed the first OOC to DEP. Boyd was the individual primarily responsible for mailing the OOC. He began working for the Town of Tewksbury on May 18, 2012, about three years before the facts in this cast transpired. He testified that since that time he has held the position of Town Planner/Conservation Agent for the Conservation Commission and the Community Development Department. Boyd PFT, p. 1. He holds bachelors degrees in regional planning and environmental science and a masters degree in regional and environmental planning. Tr, p. 67.

Boyd was responsible for the Commission's day to day business and for sending certain Commission orders to the required recipients. Boyd PFT, p. 2. This includes mailing orders of conditions. He testified in his pre-filed testimony that it is his standard practice to make two photocopies of the original signed order of conditions, one for the Commission file and one for DEP; the original order of conditions is provided to the applicant. Boyd PFT, p. 2.

Boyd testified that it is his practice to send the order to DEP simultaneously with issuance to the applicant. Boyd PFT, p. 3. He does not have administrative staff so he is responsible for "addressing the envelopes, affixing postage, and then placing the mail place [sic] in an 'outgoing' mail bin located in the office of Community Development." Boyd PFT, p. 3. He testified that it is his "understanding that the mail is [eventually] taken from the outgoing mail bin and deposited in the Town Manager's office, where it is then picked up by the U.S. Postal Service." Boyd PFT, p. 3.

For the first OOC in this case, Boyd testified that he does not have "any specific recollection regarding the mailing . . . but [he also has] no recollection of deviating from [his] practice of notifying interested parties . . . [and he does] not know of any reason why [he] would have deviated from [his] usual practice." Boyd PFT, p. 4. He also testified that he does not specifically recall not mailing the first OOC. Tr, p. 68.

Boyd testified that he recognized his handwriting for the handwritten check-mark in the box on page 11 of the first OOC and below that the handwritten date of "3/25/15." He testified that this indicates he hand delivered it to FTO when Mackey came to pick it up from him at Boyd's office. Tr, pp. 71, 74, 76-77. According to Boyd, if he had followed his standard practice, he would have simultaneously deposited the first OOC in the outgoing mail bin in the office of Community Development. Tr, p. 78.

Evidence the First OOC was not Mailed. There is substantial evidence that Boyd actually had no standard practice for mailing orders of conditions, undermining his statement that it would have been his standard practice to mail the order to DEP. In fact, Boyd's testimony revealed that he was professionally inexperienced with administrative procedures and protocols; and his testimony was internally contradictory, equivocal, and halting, leading me to attach little weight in and have very little confidence in the reliability of his testimony.

Boyd's position with the Town was his first full-time professional position after receiving his educational degrees. Other than internships, he generally had no full-time relevant professional experience between when he graduated and when he commenced employment with the Town. Tr, pp. 42-43. He testified that he generally trained himself when he first commenced his position with the Town. This included training himself on how to handle issuance of orders of conditions. Tr, pp. 43-44. He testified that it was not "always easy." Tr, p. 44. It was always

just him handling the orders of conditions unless he was sick or on vacation, in which case the town administrator, Linda Diprimio, would handle them. Tr, p. 45. There may have been occasions when Diprimio handled putting postage on and mailing orders of conditions in his absence or if there was not money at the time for postage. Tr, pp. 58-59, 61-62. During the spring of 2015 there were periods when he was absent, "a week here and there," but he believes he was not absent between March 25 to April 25, 2015. Tr, pp. 60, 69.

Boyd testified that generally he would find out from the applicant whether the applicant would pick up the order of conditions from Boyd's office, and thus receive it via hand delivery, or whether Boyd should mail it. Tr, p. 54. He did not recall when he would typically deposit the order in the outbox for mailing to DEP, i.e. whether he would wait for the order to be picked up by the applicant or whether he would deposit it for mailing when the applicant indicated he or she would pick it up from Boyd. Tr, p. 54, ll. 18-24. He believes that he may have generally waited until the order was picked up by the applicant before depositing it for mailing to DEP. Tr, pp. 56-57. He could not recall if it was his practice to check off the "hand delivery" box on page eleven of the order when the person actually picked it up or when they indicated over the telephone or some other way that they would come by to pick it up. Tr, p. 74. He added that it was "all situational really." Tr, pp. 54-55. He confirmed that he had no system of recording whether and when each order of conditions was deposited by him for mailing to DEP. Tr, p. 55-56.

Even if Boyd did follow his asserted mailing practice, there is no evidence that such practice would have reliably led to the order being deposited in the U.S. Mail. That is because Boyd's only responsibility was to deposit his outgoing mail in the mail bin in the Office of Community Development. There is no evidence establishing a complete chain of custody from

when Boyd believes he may have deposited the first OOC in the 'outgoing' mail bin located in the office of Community Development to when that mail was taken from the outgoing mail bin and deposited in the Town Manager's office, where it is then purportedly picked up by the U.S. Postal Service.

Shedding further doubt on the reliability of the Commission's mailing of orders is DEP's investigation into the Commission's files; it revealed unrebutted evidence that DEP did not receive 17 out of 52 orders from the Commission for the period of November 26, 2012 to October 22, 2015. Merrill PFT, p. 17; Freed PFT, p. 3. DEP used that time period in its investigation because it covered the period from when FTO first filed its NOI until FTO filed its Superior Court appeal. Merrill PFT, p. 16. Unfortunately, this type of problem—failure to mail orders—is not uncommon with Tewksbury. Freed testified that DEP has had a "lot of problems" with Tewksbury's handling of matters and mailing orders to DEP over the years. Tr, pp. 293-99. A "couple" of other towns have had similar problems over the years. Id.

DEP investigated the missing orders of conditions by reviewing the 21 relevant case files at the Town's offices. Merrill PFT, p. 17. The DEP investigation revealed further irregularities with Boyd's asserted standard practice, further undermining his credibility and reliability. DEP's review disclosed that for 5 of the 17 files where orders were not received by DEP (including the present case) the full size photocopy of the order of conditions did not exist in the Commission's files. Merrill PFT, p. 17. Boyd admitted that if he had followed his asserted practice, those files would have contained a full size photocopy, instead of the smaller print-out from the registry of deeds that was found in the files. Tr, pp. 19-20. Boyd did not have a specific recollection why there was this variation from his asserted practice. Tr, pp. 47-48. He testified that before DEP conducted its file investigation, he searched through each of the subject 17 files to prepare them

for DEP. He recalled going through some of the files and not finding a photocopy of the orders of conditions, which should have been in there if he had followed his standard practice. Tr, p. 50, ll. 14-18. For files with missing orders of conditions he used the internet to do a registry search and obtain the smaller registry print-out of the orders of conditions from the registry. Tr, p. 50, ll. 18-24. He may have also obtained some registry copies from applicants. Tr, pp. 51-52, 72. He admitted that before DEP conducted its file review he "went through to try to make the files as clean as possible and organize them in a way that made them as accurate as possible . . . ." Tr, p. 50, 51. He does not specifically recall for how many files he had to perform this procedure. Tr, p. 51. He was not sure why a photocopy of the order of conditions would not have been in the file. But he testified it was possible he had never made a photocopy to put in the file, another variation from his asserted practice of making a photocopy for the file and DEP. Tr, p. 52, ll. 3-6.

DEP's investigation also revealed further irregularities in the 17 files for which DEP did not receive an order. Some of the orders lacked important information, including: (1) the DEP file number, (2) the date the public hearing was closed, (3) the date of issuance, (4) a citation or reference to the approved plan, and (5) pages that were required to be a part of the orders. Merrill PFT, p. 17.

In fact, the first OOC in this case contains a number of errors, further undermining Boyd's reliability and credibility. On cross examination, Boyd testified that the typed date of issuance on page 2 of the OOC is March 24, 2015, but the handwritten date of issuance on page 11 is March 25, 2015. Tr, pp. 14-15. The March 25 date was 21 days from the date of the public hearing closed on March 4, so it was the last possible date to issue the first OOC. Id. More importantly, the first OOC also did not correctly identify the wetlands resource areas affected; it

wholly omitted that BLSF was affected, despite BLSF covering a majority of the Property and the proposed impacts to BLSF being a significant issue in this case. First OOC, p. 3; Tr, p. 20; Merrill PFT, p. 2.

There is additional evidence undermining Boyd's reliability and credibility. It is undisputed that on three separate occasions from about May 2015 to July 2015, Mackey, on behalf of FTO, sent correspondence in which he threatened to bring legal action against the Town and Boyd. Boyd admitted to having previously seen the documents, vaguely remembering them, and being aware that Mackey had threatened litigation. Tr, pp. 23, 25-30, 33-41; Ex. ID #1, #2, #3; Mackey Ex. A1 or A2. The Mackey correspondence is relevant for two reasons. First, it is relevant because in it Mackey insinuates that he believes Boyd and the Town are responsible for DEP not receiving the first OOC. The Mackey correspondence asserted that the first OOC specifically required Boyd to notify DEP of the OOC. The letter then threatens legal action against the Town and Boyd "for failing their responsibilities in this process." Mackey added that he "understand[s] mistakes happen and people forget, But [sic] [he] cannot legally be held accountable for the incompetence or errors of others."

Second, the correspondence is relevant because it could be reasonably inferred that the threat of litigation against Boyd and the Town affected Boyd's credibility and reliability as a witness. Boyd answered "no" when Town and FTO counsel asked him if he would "lie under oath" or change the "way . . . [he] normally conduct[s] [him]self as a professional Town employee" because of a "potential of lawsuit threat." He hesitated and equivocated, however, when FTO counsel later asked him if he would "change what [he] said to anybody or did in the course of this extremely long proceeding based on the threat of the entity or yourself being sued

as a result of allegations made"; he stated only: "Not - - not that I'm aware of, no." Tr, pp. 40-41.

In contrast to the above evidence, DEP provided consistent: (1) evidence that it had not received the first OOC *and* several other orders from the Tewksbury Conservation Commission during the relevant time period and (2) testimony of formal written protocols and standard operating procedures that existed since 2013 for receiving and handling mail, for the chain of custody for receiving U.S. Mail from the U.S. Postal Service to when it is distributed to appropriate wetlands staff. Freed PFT; Viola PFT, Ex. 2; Tr, p. 326-27. The standard operating procedure for receiving mail was previously formalized in writing and includes formal training and supervision. Viola PFT, p. 1, Ex. 2. DEP testified to no variations in the protocols and operating procedures for handling mail during the time period when the first OOC should have been received; it established that it is very unlikely that mail is misallocated within DEP. Freed PFT; Viola PFT, p. 1. This evidence bolsters DEP's claim that it never received the first OOC, which is probative evidence that it was never mailed. Freed PFT.

FTO contends Merrill made an inculpatory statement that shows DEP is blameworthy for losing the first OOC. Hanley testified that during a DEP view of the Property on June 10, 2015, he had a discussion with Merrill about how "the Conservation Commission Agent [Boyd] would have sent the Order to DEP as usual . . . ." Hanley PFT, p. 4. He claims Merrill responded: "it's no surprise, we lose things all the time." There are several reasons why I do not credit this testimony. First, the date on which it was purportedly made came over a month after DEP took the opposite position and asserted that it never received the first OOC. Second, the statement is hearsay from witnesses with bias and reliability issues for which there are no indicia of

reliability.[22] See infra. at pp. 41-49 (discussing credibility and reliability issues with Hanley). Third, the purported statement was contradicted by Merrill, Viola, and Freed. Merrill denied making the statement and Viola and Freed testified in detail concerning the elaborate mail receipt procedures to avoid losing mail. Merrill Rebuttal PFT, ¶ 58. Fourth, there is no evidence in the administrative record that Hanley reported the alleged statement to anyone until about one year afterwards when he submitted his pre-filed testimony. Mackey did not report hearing the alleged statement until about three years later when he filed rebuttal testimony to Merrill, and simply stated that he heard the same comment. Mackey Rebuttal PFT, p. 5, ¶ 10. And that contradicts Mackey's contemporaneous written accusations that Boyd and the Town were blameworthy. Fifth, the other individual present at the meeting, Boyd, did not testify to hearing the alleged statement by Merrill. Boyd PFT. Boyd has a direct interest in supporting a finding that DEP lost the first OOC, instead of him failing to mail it, but he made no mention of the comment.

For all the above reasons, I find the first OOC was not mailed to DEP. In sum, the only evidence of mailing was Boyd's halting and equivocal testimony that he believes he followed his purported practice of mailing. But the countervailing evidence substantially undermines whether Boyd had a standard practice at all and Boyd's reliability and credibility. On top of that, was evidence demonstrating ad-hoc administrative controls under Boyd's management, a lack of attention to details, missing documentation and information in the Commission's files, and the failure of DEP to receive 17 orders during the relevant time period from the Commission. That is about the same period during which Boyd began his first full-time professional employment with the Commission, the same time that he testified he generally trained himself. There was no evidence demonstrating a chain of custody from when Boyd would have deposited the order in

[22] See generally Matter of Franklin Office Park Realty Corp., Docket No. 2010-016, Recommended Final Decision (February 24, 2011), adopted by Final Decision (March 9, 2011) (discussing hearsay standard).

the outgoing mail bin in the Office of Community Development, which was then purportedly transferred to the Town Manager's Office, where it is supposed to be picked up by the U.S. Post Office. Even Mackey's own *contemporaneous* correspondence on behalf of FTO demonstrates Mackey's belief that the Commission did not mail the order, leading him to threaten litigation against the Town and Boyd. A preponderance of the evidence demonstrates that DEP never received the first OOC because the Commission never mailed it, contrary to both statutory and regulatory requirements.

Consequences of Commission's Failure to Mail the First OOC. The Commission's failure to mail the first OOC was in noncompliance with the Wetlands Regulations and the Wetlands Protection Act, both requiring that the OOC be sent simultaneously to DEP and the Applicant. See supra. at pp. 23-25. DEP did not learn that the first OOC had issued until May 1, 2015, when Bruce, a direct abutter to the Property, reported what he believed were wetlands violations at the Property. Merrill PFT; Freed PFT; Bruce PFT. There is no evidence that DEP should have known of the OOC before May 1, 2015. Bruce was told over the telephone that DEP had not received an OOC and no work should be taking place at the Property. Bruce PFT, pp. 1-2. DEP reviewed the Wetlands Program database and confirmed that DEP had not received an OOC for the Property. As a consequence, and in accord with protocol, DEP wetlands analyst Heidi Davis contacted Boyd to discuss Bruce's report and asked if an OOC had been issued by the Commission. Merrill PFT, p. 4; Boyd PFT, p. 2. Davis learned that the Commission had issued an OOC, and Boyd subsequently emailed it to DEP. Merrill PFT, p. 4. The OOC indicated that it had been issued to FTO on March 25, 2015, approving the February 16, 2015, plan.

On May 13, 2015, DEP appealed the first OOC on the grounds that the floodplain elevation was not accurate, additional filling of BLSF had not been quantified, and compensatory flood storage had not been provided in accordance with 310 CMR 10.57(4)(a). Merrill PFT, p. 6. In addition, the OOC did *not* indicate that the project would alter or fill BLSF, and thus the OOC did not authorize any filling of BLSF, contrary to the project design that was purportedly approved by the Commission. Merrill PFT, p. 8; see First OOC, p. 3; Tr, p. 20; Merrill PFT, p. 2 (first OOC omitted that BLSF was affected, despite BLSF covering a majority of the Property and the potential for substantial impacts to BLSF being a significant issue in this case).

DEP appealed the first OOC on May 13, 2015, within ten business days of when it first learned of the OOC.[23] And thus the appeal was timely, according to a long line of adjudicatory decisions dating back to at least 1989 that have applied the equitable tolling doctrine that allows parties *entitled* to notice (including petitioners, applicants, DEP, and conservation commissions) to appeal within the required time period from when they first learned of the notice that they were legally entitled to but did not receive.[24] See M.G. Hall Company, Docket No. WET-2012-023, Recommended Final Decision (May 7, 2013) (citing prior decisions), adopted by Final Decision (March 19, 2014).

II. The Project in the First OOC Does Not Comply With the Performance Standards for BLSF

Having found that the Commission failed to mail the first OOC to DEP, I now turn to whether the Project complies with the applicable wetland performance standards. As discussed in detail below, a preponderance of the evidence demonstrates that the Project does not comply with the applicable wetland performance standards. The Project design includes multiple

[23] 310 CMR 10.05 (time period for appeal of OOC includes only business days).
[24] FTO correctly points out that DEP and OADR have dismissed late-filed appeals in other matters. But FTO fails to acknowledge that in those cases there was no dispute that the appealing party had received timely notice of the decision to be appealed.

hydraulic restrictions on the compensatory flood area and components that will lead to an increase in flood stage and velocity in violation of the performance standards.

A. The proposed project does not comply with the requirement in 310 CMR 10.57(4)(a)1 that the compensatory flood area have an unrestricted hydraulic connection to the river.

BLSF. BLSF is "an area with low, flat topography adjacent to and inundated by flood waters rising from creeks, rivers, streams, ponds or lakes. It extends from the banks of these waterways and water bodies . . . ." 310 CMR 10.57(2)(a)1. "Such areas are likely to be significant to flood control and storm damage prevention." 310 CMR 10.57(1)(a). BLSF provides a "temporary storage area for flood water which has overtopped the bank of the main channel of a creek, river or stream or the basin of a pond or lake. During periods of peak run-off, flood waters are both retained (i.e., slowly released through evaporation and percolation) and detained (slowly released through surface discharge) by [BLSF]." 310 CMR 10.57(1)(a).

Building in BLSF areas leads to "incremental filling [which] causes increases in the extent and level of flooding by eliminating flood storage volume or by restricting flows, thereby causing increases in damage to public and private properties." 310 CMR 10.57(1)(a). "The boundary of Bordering Land Subject to flooding is the estimated maximum lateral extent of flood water which will theoretically result from the statistical 100-year frequency storm." 310 CMR 10.57(2)(a)3. It is determined by reference to the most recently available FEMA flood profile data prepared for the community within which the work is proposed. 310 CMR 10.57(2)(a)3. For Tewksbury that is the preliminary information dated July 6, 2016, which became effective on that date for flood insurance purposes. Maguire PFT, p. 4. It was

previously published and made available publicly by FEMA on February 11, 2011, July 8, 2011, and April 29, 2015.[25] Maguire PFT, p. 5.

The protection of BLSF is increasingly important as the Commonwealth experiences the impacts of Climate Change, which include more severe storms, increased intensity of precipitation events, and, consequentially, more severe flooding. "More winter rain is expected to drive more high-flow and flooding events during the winter, earlier peak flows in the spring, and extended low-flow periods in the summer months."[26]

BLSF Performance Standards. The BLSF performance standards provide that "[c]ompensatory storage shall be provided for all flood storage volume that will be lost as the result of a proposed project within Bordering Land Subject to Flooding, when in the judgment of the issuing authority said loss will cause an increase or will contribute incrementally to an increase in the horizontal extent and level of flood waters during peak flows." 310 CMR 10.57(4). Applying this regulation, DEP determined that compensatory flood storage must be provided for the Project because construction of the building with underlying fill, deck, and retaining wall will cause an increase or will contribute incrementally to an increase in the horizontal extent of flood waters during peak flows. FTO does not dispute the finding that compensatory storage is required. What is disputed, however, is whether the proposed compensatory area complies with the performance standards in 310 CMR 10.57.

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[25] Hanley incorrectly identified the flood profile in the July 7, 2014, Flood Insurance Study for Middlesex County, as the most recent FEMA Flood Insurance Study. Maguire PFT, p. 13. After learning about this error from DEP, Hanley subsequently adjusted the FEMA flood elevation on the Site Plans to conform to the most recent preliminary data issued by FEMA.

[26] https://www.mass.gov/service-details/climate-change-in-massachusetts-and-its-impacts (accessed August 2018); "Average annual precipitation in the Northeast increased 10 percent from 1895 to 2011, and precipitation from extremely heavy storms has increased 70 percent since 1958. During the next century, average annual precipitation and the frequency of heavy downpours are likely to keep rising. Average precipitation is likely to increase during winter and spring, but not change significantly during summer and fall. Rising temperatures will melt snow earlier in spring and increase evaporation, and thereby dry the soil during summer and fall. So flooding is likely to be worse during winter and spring, and droughts worse during summer and fall." https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/climate-change-ma.pdf (accessed August 2018).

The regulations at 310 CMR 10.57 specify that the compensatory area must:

1. be a volume not previously used for flood storage;
2. be incrementally equal to the theoretical volume of flood water at each elevation, up to and including the 100-year flood elevation, which would be displaced by the proposed project;
3. have an unrestricted hydraulic connection to the same waterway or water body; and
4. be provided within the same reach of the river, stream or creek.

Unrestricted Hydraulic Connection to River. DEP asserts that the compensatory area for the Project in the first OOC does not comply with the requirement that there be an unrestricted hydraulic connection to the river.

There is no definition of "unrestricted hydraulic connection" in the Wetlands Regulations or Wetlands Protection Act. DEP interprets it to mean a connection to the same waterbody at all elevation increments that does not hydraulically impede or constrict the movement of flood waters. Maguire PFT, p. 7. This definition is consistent with the plain meaning of "restriction, which is "confined; limited,"[27] and the definition of unrestricted, which is "not restricted or limited in any way . . . ."[28] The term hydraulic, which generally refers to liquids in motion[29], further emphasizes the connection must be a direct connection to the waterway.

The Property is located between FEMA cross sections D and E for the Shawsheen River. The FEMA flood profile elevation is 87 North American Vertical Datum (NAVD) for the 100

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[27] Dictionary.com Unabridged
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[28] Collins English Dictionary - Complete & Unabridged 2012 Digital Edition
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year flood and elevation 84 NAVD for the 10 year flood. Maguire PFT, p. 5. Approximately one-half of the proposed building and the entire proposed driveway are located below elevation 84, within the 10 year floodplain portion of BLSF. Maguire PFT, p. 5. The 100 year flood has a 1% likelihood of being equaled or exceeded in any one year. The 10 year flood has a 10% likelihood of being equaled or exceeded in any one year. Being partially located in the 10 year flood plain means that the building footprint has flooded and will continue to flood on a regular and frequent basis, with the risk being 65%. Maguire PFT, pp. 5-6.

The Property is located on the northwest side of a bend in the river where the river's direction changes course from flowing north to flowing northwest. The Property gradient increases from about elevation 77 at the riverbank to approximately elevation 84 at the entrance to the proposed compensatory area. The proposed retaining wall begins at approximately elevation 82. The wall rises vertically to elevation 87.5 and encircles the proposed house which is elevated on top of the proposed fill. As a consequence of the gradient and the natural flow of the river the flood waters will generally flow across the property from east to west in a curvilinear path. Maguire PFT, p. 7, Ex. 4; Site Plans; Chalk #1.

The proposed compensatory area is approximately 80 feet from the river. It is located behind the proposed house and wall to the northwest, in the upper northwest corner of the lot. On the south side of the compensatory area and abutting the west side of the retaining wall is a 21 foot wide opening to the compensatory area. The compensatory area is partially located within BLSF, Riverfront Area, and Buffer Zone to BVW.

The east side of the compensatory area is comprised of the wall and a berm that extends northward behind the house at the elevation range of approximately 86 to 89/90. It intersects the retaining wall directly behind the house at elevation 87.5. The west and north ends of the

compensatory area are similarly comprised of a berm that ranges in elevation from about 86 to 89/90 at the rear of the Property. Presently, the gradient generally increases from approximately elevation 82 at the southern border of the wall to approximately elevation 90 to 92 at the rear of the Property. The 21 foot opening to the compensatory area is at the most southern point of the compensatory area and faces due south on the west side of the wall, almost directly perpendicular to the flow path of the river from east to west across the site during a flood. Maguire PFT, p. 7, Ex. 4; Site Plans; Chalk #1.

DEP's Evidence. Maguire testified that the southern face of the wall spans across approximately 49% of the lot width to the south. Maguire PFT, p. 6. He testified that because the top of the retaining wall is .5 feet above the elevation of the 100 year flood it will restrict the flow of flood waters up to and including the 100 year flood. Maguire PFT, p. 6. This will result in the loss of 21,504 cubic feet of flood storage. Maguire PFT, p. 6.

The east sides of the retaining wall and the adjoining compensatory basin to the rear of the house are at elevations ranging from 87.5 to 89. They will therefore act as a barrier that will: (1) impede the natural path of flood waters from flowing in a curvilinear east to west path into the basin and (2) deflect flood waters toward the abutting Costa property to the northeast where the boundary elevations are at approximately elevation 75 to 81. Maguire PFT, p. 8, Ex. 4; Site Plans; Chalk #1. Although flood waters would presently flow towards the Costa property because of gradient, the increase in gradient for the wall and the outside of the storage basin will cause more water to be deflected towards the Costa property, i.e. water that would normally pass unrestricted from east to west across the site will be blocked by the east side of the wall and berm for the compensatory area, and deflected towards the Costa property to the northeast. Maguire PFT, p. 8, Ex. 4; Site Plans; Chalk #1. In order for flood waters that are not deflected to

the northeast to enter the storage area they must generally reach the retaining wall and then flow around it on the south side from east to west. As a consequence, the project would significantly obstruct the flow of the river from its current path, causing a restricted hydraulic connection to the compensatory area. Id.

The second restriction to the storage results from the orientation of the 21 foot opening to the storage area. Because it is relatively narrow and opens due south where the flow path of the flood waters is generally from east to west, there is not an unrestricted hydrologic connection between the compensatory area and the river. Instead, the floodwaters will strike the east side of the wall and deflect to the north, east, and south. Some of that deflected water will flow to the west around the southern side of the wall, perpendicular to the 21 foot opening that lies to the west side of the wall and house and past that opening. In fact, because the waters would generally not flow south to north across the site, there would have to be a backwater or eddy effect for the water to flow north into the storage area. Maguire PFT, p. 8, Ex. 4; Site Plans; Chalk #1. As a consequence of the narrow opening, the direction it faces, and its location abutting the west side of the wall and house, there is not an unrestricted hydraulic connection between the compensatory area and the river. Maguire PFT, p. 8, Ex. 4; Site Plans; Chalk #1; Tr, pp. 387-89, 391-94; 396.

In addition to the above, there is yet another hydraulic restriction to the proposed compensatory area. That restriction emanates from the unusual design of the storage area. Typically, compensatory areas are designed close to the river as a simple depression or excavated area (open void), with no barriers to water flowing in or out on any side. This enables the water to flow through, unimpeded, without any hydraulic restriction. Tr, pp. 464-65; Maguire, Tr, p. 388-89, 442; Maguire PFT, ¶ 49. Maguire has reviewed approximately 50

compensatory areas and he has never seen one designed like the one at issue, where it is located far from the river and limits in-flow and out-flow to a relatively narrow passage that is perpendicular to the flow of flood waters. Tr, p. 434.

In fact, the compensatory area in this case has one entry or exit point on the south side at elevation 84. The remainder of the compensatory area is encircled by berms on all sides that generally range in elevation from 86 to 90 at the north end. As a consequence, if flood waters fill up the compensatory area, additional flood waters will be impeded from passing into or through the area, creating another hydraulic restriction into the area and causing further deflection of the waters to the surrounding area. Thus, the single opening creates a confined storage area that will further restrict the flow of flood waters. Maguire PFT, p. 8, Ex. 4; Site Plans; Chalk #1; Tr, pp. 386-90.

FTO's Evidence. FTO's expert, Hanley, disagrees with DEP's definition of "unrestricted hydraulic connection," by claiming only that the "regulations do not require a completely unimpeded flow path . . . only an unrestricted hydraulic connection." Hanley Rebuttal PFT to Maguire, pp. 2-4; Hanley PFT, pp. 6-7. Hanley's position mischaracterizes DEP's position, which is that the Project is designed and situated such that it is not only an impediment to flow, it is a restriction on flow to the compensatory area. FTO responds that the 21 foot entrance to the compensatory area is more than sufficient, and thus it is not a restriction. Hanley asserts that the flood plain will rise at a rate of approximately 1.3 CFS and the entrance to the storage area has a capacity of approximately 297.5 CFS. Hanley Rebuttal PFT to Maguire, p. 3; Hanley PFT, pp. 8, 9. Hanley asserts that this is 2,000% more capacity than the maximum anticipated flow into the storage area during a 100 year storm event. Hanley PFT, pp. 8, 9. In fact, Hanley asserts

without explanation, that the house and retaining wall will not in any way hydraulically restrict the storage area. Hanley Rebuttal PFT to Maguire, p. 3.

Hanley's model and calculations, however, suffer from a fundamental design flaw. Hanley relies upon the "basic principle of open channel flow." He testified that it is "standard engineering practice to assess the capacity of any conduit (pipe, swale, river, etc.) by analyzing the cross sectional area of the conduit perpendicular to the direction of flow." Hanley Rebuttal to Maguire, p. 5. From that he determined the volume flow rate, measured in cubic feet per second, based upon the velocity of the liquid in the conduit and the cross sectional area of the conduit. Hanley Rebuttal to Maguire, p. 1.

Hanley's analytical model is flawed because it assumes that there will be direct, unimpeded, open-channel flow from the south (instead of east to west curvilinear flow) and slow rise of flood waters into the storage area. Hanley Rebuttal to Maguire, pp. 5-6. Hanley asserted that Maguire's east-to-west, curvilinear flow vector is a "theoretical representation of the water movement that is not consistent with how the flood plain actually behaves . . . ." Hanley Rebuttal to Maguire, pp. 5-6. There are several reasons why this assertion is incorrect, undermining the premise upon which Hanley's open channel flow model is based.

First, Maguire's projected flow is corroborated by the flow of the water course itself. The river will continue to flow in roughly the same direction (turning from north to west) as a consequence of momentum and gradient, and thus it will achieve a curvilinear pattern that roughly follows the current bend, but not as tightly.

Second, Bruce, the abutting neighbor who has resided there 30 years, corroborated Maguire's model. Over that time period he has observed severe flooding on the Property. Bruce PFT, pp. 2-3. He testified that under flood conditions, including those depicted by photographs

of a 52 year flood, the flood waters are deep, strong, and flowing through the Property from east to west, including some that were "strong enough" to carry debris, boats, trees, and toys through the lot, near the proposed location of the house. He testified that the flood waters also arrive from the south, from the river itself, as it flows north before turning west at the site. Bruce PFT, pp. 2-3, Ex. 1-5A. The waters have flooded his own property, and he is concerned that the proposed project will displace and deflect more flood water onto his property, as water flows across the Property and then onto his lot, from east to west. Id. He has observed flood waters that were so high, they entered the windows of the cottage on the Property, where no one has lived since about 1987. Bruce PFT, p. 3.

Third, the curvilinear, east to west flow pattern was supported by Hanley himself under cross examination. Tr, p. 233. He agreed that the flood waters will flow east to west in a curvilinear pattern. Tr, p. 233. Hanley also admitted that floodwaters that flow in a curvilinear path up to elevation 87 will not be able to flow into the compensatory area. Tr, p. 223. He believes, however, that water will slowly enter the compensatory area as a consequence of the head. Id.

Thus, contrary to Hanley's analysis the water will not flow due north directly into the 21 foot opening as he posited; instead, it will be restricted by the wall and the momentum from the east-west direction of flow to moving mostly across the opening at roughly a right angle, and with flow patterns generated by the wall that have not been considered by him. This is precisely the type of hydraulic restriction for waters entering the compensatory area that the regulations are intended to avoid. The regulations are designed to encourage the development of compensatory areas that function predictably and sufficiently without limitation during flooding

events. The compensatory area for this Project has hydraulic restrictions that limit its use and create unknown obstacles to ordinary flow patterns that FTO has not yet addressed. [30]

There are several other considerations that cause me to question Hanley's credibility and reliability and attach little weight to his testimony, particularly when compared to Maguire's analysis. Hanley raised credibility issues by relying upon his visual observations of photographs of flooding conditions to assess river velocity. Hanley Rebuttal PFT to Maguire, p. 4; Tr, 229. He testified that certain photographs of a 52 year flood at the site depict "a calm, stagnant flood plain with no visual evidence of river velocity." Id. He asserts that the flow where the house is proposed would be "nearly stagnant, acting like a pond, with almost no movement of flood waters downstream." Id. at p. 4. He testified that because the water surface of flood waters appeared calm in photographs of the 52 year flood, there was minimal velocity in the river. TR, p. 262; Bruce PFT, Ex. 3-4. He testified that it is just a "gut" way of assessing velocity. Id.

Hanley's conclusion is at odds with the relatively widely accepted understanding that the velocity of a river cannot be discerned from the surface appearance. For example, Maguire testified credibly based upon this experience with dye tests that surface appearance is not indicative of velocity. Tr, p. 374-378. He also added that surface velocity tends to be slower because it is at a boundary with the air. Tr, p. 375.

In addition, compared to Maguire, Hanley exhibited a relative lack of knowledge regarding the flood plain and fluvial flow with respect to rivers. Hanley failed to use the correct FIS to determine the 100 year flood elevation at the Property. He did not use FEMA's "most

[30] FTO argues that the 21 foot opening to the storage area is not a restriction; it contends that this is established by comparing storage areas on other properties accepted by DEP that are "much smaller" than the 21 foot opening. Hanley PFT, pp. 8, 9. FTO also contends that DEP has accepted "flow-through foundations" on other properties, which evidence "the irrationality of DEP's refusal to accept a 21 foot opening . . . ." Hanley PFT, p. 11-14. These arguments, however, are not persuasive because there has been no showing that the other purportedly similar projects are similar to the one in this case in all material respects. See Matter of Fuhrman, Docket No. 2013-037, Recommended Final Decision (February 19, 2015) (discussing evidentiary showing required for similar projects), adopted by Final Decision (April 8, 2015).

recently available flood profile data prepared for the community within which the work is proposed," as required by 310 CMR 10.57(2)(a)3. At times during the hearing, Hanley admitted that he used the incorrect FIS, and at other times he disputed those admissions. Compare Tr, p. 142, ll. 18-19; p. 144, ll. 21-22; p. 145, ll. 13-14 with Tr, p. 147. As a consequence of Hanley's elevation error, the Commission approved the incorrect BLSF boundary, which was 85.2, instead of 87. That 1.8 foot difference would have led to an insufficient compensatory area and a retaining wall that would have been exceeded by certain floodwaters. At one point in the hearing, Hanley dismissed his error by stating "Have you seen how thick an FIS is . . . and how many volumes there are?" Tr, p. 141-143. He continued this error when he submitted his exhibits, attaching the incorrect FIS study. Hanley PFT, Exhibit 5. Hanley also referred to the proposed residence as being in the velocity zone, but velocity zones are only associated with coastal flood plains.[31] Hanley PFT, p. 2, ¶ 3. Hanley was unaware of the USGS Federal Highway Cowan method to calculate Manning's n for floodplains. Tr, p. 158. Hanley also incorrectly relied upon the FEMA floodway fringe designation in the FIS. That was incorrect because Massachusetts laws are more strict and do not have different performance standards for the floodway fringe. Hanley Rebuttal Exhibit 3, p. 111, Ex. 8, p. 3-19. Massachusetts has a no-rise standard across the entire BLSF area. Tr, pp. 418, 429-431.

Hanley also failed to notice that the Commission's executed OOC failed to specify any proposed work was to be done in the BLSF. He explained this at the hearing by simply stating: "I am not analyzing the Commission's work. That's not part of my purview." Tr, p. 122. Unfortunately, however, these errors were not raised until DEP noticed them and appealed the

[31] DEP also asserts that Hanley failed to identify the 10 year floodplain and its significance to wildlife habitat. Merrill PFT, ¶ 64; DEP Closing Brief, p. 39. Hanley admits that the 10 year flood plain should have been identified, but he admits to not knowing whether it was done with the NOI. Tr, p. 148. Because DEP did not raise this as an issue for adjudication, it has been waived and will not be addressed as a substantive issue. It is, however, relevant to Hanley's credibility and reliability because he was responsible for preparing the Notice of Intent. Tr, p. 150.

OOC. Without DEP ascertaining these errors, Hanley's oversight could have led to his client performing unauthorized wetlands work.

For all the above reasons, a preponderance of the evidence shows that the proposed compensatory area does not have an unrestricted hydraulic connection to the river.

B. The proposed project does not comply with the requirement in 310 CMR 10.57(4)(a)2 that there be no flow restrictions that result in an increase in flood stage or velocity.

The regulations at 310 CMR 10.57(4)(a)2 also require that the "[w]ork within [BLSF] . . . shall not restrict flows so as to cause an increase in flood stage or velocity." DEP contends that the Project will increase both flood stage and velocity of the flood waters, FTO disagrees.

Maguire used Manning's equation to analyze the changes in water velocity that would occur across the site as a consequence of the project. That equation takes into account the amount of friction from ground and channel surfaces, slope, and the cross sectional flow area. Maguire PFT, pp. 10-11, Ex. 7. The equation uses the variable n to denote the roughness coefficient, or measure of friction, for ground and channel surfaces. Maguire PFT, p. 11, Ex. 7. It is often referred to as Manning's n. The higher the value of n, the higher the friction.

Maguire compared present circumstances, where the flood plain area is primarily lawn, to the proposed area, where the flood waters will encounter grass and the retaining wall. Because flood waters will pass along and around the wall, a surface with less friction than existing conditions, flood water velocity at the Property will increase. Maguire PFT, pp. 12, Ex. 7. He also considered decreased values for the hydraulic radius, otherwise known as the cross sectional flow area (area through which the water must flow) and the slope. He calculated that the flood water velocity in the area of the project would increase from 3.78 FPS to 5.2 FPS. Maguire PFT, p. 12.

Hanley used Manning's equation, but he used an imprecise n value that is not based upon the conditions at the Property. He used a Manning's n of .035 based on his projected flow depth "in excess of $1/10^{th}$ of a foot," which led him to use the Manning's n for a cover type of "flood plain – short grass." Hanley Rebuttal to Maguire PFT, p. 6, Ex. 11. However, no floodplain grasses were ever identified at the site. Tr, p. 152. Moreover, it is not clear how tall or short the "short grass" is. In addition, Hanley derived his n value from a study of the entire watershed, not the Property. Tr, p. 365-66, 446. The n value he used generally represents an average for a very large area of varying surfaces. Tr, p. 366, 419-420. In addition, Hanley used a FEMA cross section of the river that was derived from approximately 1500 feet away. Hanley Rebuttal PFT, Ex. 4.

In contrast, Maguire's analysis is much more persuasive because it is more site specific. He selected the ground cover for Manning's n based upon his observation of the site conditions, which is primarily lawn. Maguire PFT, p. 11. Maguire also based his analysis on a specific cross-section of the river that intersects the location of the proposed house on the site to analyze localized site conditions using the HEC-RAS computer program. It had more site specific data than the cross section used by Hanley. Tr, p. 163, 408-09, 422, 444; Maguire PFT, pp. 10-12, Ex. 7. As a consequence, his analysis is more representative of the conditions at the site. Tr, p. 359, 365-66. Further, Maguire's cross sectional area is approximately perpendicular to the flow of the river. In contrast Hanley's cross section EE is not perpendicular to the river flow. Tr, p. 422-423.

In addition to flood water velocity increasing from the Project there will also be an increase in flood stage. The proposed site grading for the berm on the eastern side of the storage area and the retaining wall will obstruct flood waters from flowing unimpeded to the west, as

they do now. Instead, the wall will cause floodwaters to deflect and build up behind it; there will be an increase in flood stage and flood waters that are deflected and dispersed to the northeast, increasing the likelihood of flood damage to the abutting residence to the northeast. Maguire PFT, pp. 12, Ex. 7; TR, 436-37, 392-94. Hanley acknowledged this but stated on cross examination: "I don't think there's a requirement that floodwaters flow freely." Tr, p. 216. The fault in Hanley's approach, however, is that in this instance the hindrance to free flow will cause an obstruction that will increase flood stage in the area proximate to the northeast side of the Property, deflecting and dispersing flood waters in that location that presently flow across the site. The source of Hanley's error may be that he was unaware that the 310 CMR 10.57 establishes a no-rise standard across the entire BLSF, whereas FEMA has a no-rise standard only in the floodway itself. Hanley Rebuttal PFT, Ex. 3, p. 111; Tr, p. 436. In fact, one of Hanley's own exhibits explains that Massachusetts requires no rise in flood elevations for projects in the floodplain. Hanley PFT, Ex. 5, p. 108.

For all the above reasons, a preponderance of the evidence shows the Project in the first OOC will result in an increase in velocity and flood stage in the vicinity of the Project.

III. FTO is Judicially Estopped from Continuing the Appeal

The administrative record reveals an additional basis or alternative ground for dismissal of FTO's appeal of DEP's SOC overturning the first OOC: judicial estoppel.

"Judicial estoppel is an equitable doctrine that precludes a party from asserting a position in one legal proceeding that is contrary to a position it had previously asserted in another proceeding." Blanchette v. School Comm. of Westwood, 427 Mass. 176, 184, 692 N.E.2d 21 (1998). The doctrine is designed to bar litigants from "manipulating" the judicial process. See Canavan's Case, 432 Mass. 304, 308, 733 N.E.2d 1042 (2000). "The primary concern of the

doctrine . . . is to protect the integrity of the judicial process." Correia v. DeSimone, 34 Mass. App. Ct. 601, 614 N.E.2d 1014 (1993) (quoting United States v. Levasseur, 846 F.2d 786, 792 (1st Cir. 1988)). Although the doctrine has been considered and applied in Massachusetts, its specific requirements have never been precisely defined. Tinkham v. Jenny Craig, Inc., 45 Mass. App. Ct. 567, 574, 699 N.E.2d 1255, 1259 (1998) (inconsistent representations to courts concerning amount in controversy constituted "'playing fast and loose' with the jurisdiction of the courts").

The general elements of a judicial estoppel claim are that (1) a litigant has asserted a position that is inconsistent with, i.e., mutually exclusive of, the litigant's position in a prior proceeding and (2) the litigant succeeded in the prior proceeding in convincing the court to accept its position. The prior inconsistent statement need not be made under oath. Otis v. Arbella Mut. Ins. Co., 443 Mass. 634, 640-41, 645-646, 824 N.E.2d 23, 32 (2005).

"[T]he broader purpose of the doctrine is to protect the integrity of the judicial system, and parties who play 'fast and loose' with that system by means of any device, be it testimony under oath or arguments asserted by their counsel, may be subject to judicial estoppel." Otis, 443 Mass. at 646. "In deciding whether a party should be judicially estopped, [courts] look to see whether that party is seeking to use the judicial process in an inconsistent way that courts should not tolerate." East Cambridge Sav. Bank v. Wheeler, 422 Mass. 621, 623, 664 N.E.2d 446 (1996). For example, the courts have applied judicial estoppel when a party attempted to reopen a case based on contradictory verbal representations to the court that a settlement agreement had been satisfactorily reached. See Dominick v. Dominick, 18 Mass. App. Ct. 85, 463 N.E.2d 564 (1984) (representations to a judge concerning an oral agreement was binding on the parties and parties were estopped from asserting a contrary position in a motion to reopen the

proceedings); Correia v. DeSimone, 34 Mass. App. Ct. 601, 614 N.E.2d 1014 (1993) (defendants were judicially estopped from denying an oral settlement agreement represented to the court during a trial even though "there [was] some question whether th[e] case constitute[d] a subsequent proceeding").

The circumstances here concerning FTO's actions and representations during the course of its appeal of the Department's SOC overturning the first OOC warrant application of judicial estoppel. FTO previously represented on multiple occasions a position that is inconsistent with, i.e., mutually exclusive of, positions it has taken in this remand proceeding after issuance of the Recommended Final Decision. Based on the Massachusetts appellate court decisions discussed above involving the judicial estoppel doctrine, there is also evidence that FTO has been "playing fast and loose" with the adjudicatory process to "manipulate" it to its advantage. Otis, 443 Mass. at 646. The prior inconsistent representations begin with the following:

1. On May 18, 2016, FTO and the Commission invoked the Multiple Filings Policy and moved to stay the prior proceedings and cancel the adjudicatory hearing based on the representation that if the second OOC received final approval it would "obviate the need for a hearing" because FTO would build the house approved in the second OOC.[32] (emphasis added)
2. On May 20, 2016, FTO asserted again in response to DEP's strong opposition to the requested stay that if the second OOC were finally approved it would render an adjudicatory hearing unnecessary in this appeal.[33]

In reliance upon FTO's and the Commission's representations, I issued an order allowing the requested stay and cancelled the adjudicatory hearing.[34] I concluded the order by stating:

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[32] Supra. at pp. 16-18.
[33] Supra. at pp. 16-19; Petitioner's Rebuttal to DEP's Opposition to Petitioner's and Conservation Commission's Motion for Stay, p. 1 (May 20, 2016).

"This appeal is therefore stayed and the parties are ordered to comply with the Multiple Filings Policy."

FTO remained steadfast in its representations that it was willing to pursue either the first or second OOC, whichever was approved and became final. In opposition to DEP's motion to dismiss based on the Multiple Filings Policy FTO represented that a stay should remain in place until either one of the OOCs became final, or, alternatively, the hearing should proceed.[35]

On April 18, 2017, DEP issued the second SOC approving the project that was the subject of the second OOC. That SOC was not appealed, and accordingly FTO received the final order it sought. Shortly thereafter, and consistent with its above representations, FTO commenced site preparation and construction of the house approved in the final SOC for the second Notice of Intent.

After the Superior Court remanded the appeal back to OADR I held a status conference on November 8, 2017, and inquired about the status of the second SOC.[36] FTO updated me on the status of the second SOC, stating site preparation work had been completed and FTO had commenced construction of the residence. As I stated in the order I issued summarizing that conference, FTO stated that it "*intends to complete construction of the home* in accord with project plans approved in the second SOC."[37] I therefore queried why that did not moot the present appeal.

FTO offered no argument in opposition to mootness, but I stated that I was going to allow the parties an opportunity to brief the issue, which I did. FTO then filed a motion to recuse me

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[34] Supra. at pp. 16-19.
[35] Supra. at pp. 16-19; See Petitioner's Opposition to Department's Motion for Issuance of an Order to Show Cause or, in the Alternative, a Show of Cause (August 5, 2016); Petitioner's Rebuttal to Department's Response to Petitioner's Show of Cause or in the Alternative, Response to Petitioner's 8/5/16 Opposition (August 24, 2016).
[36] Supra. at pp. 18-19.
[37] Order After Remand and Second Scheduling Order (November 13, 2017), p. 2 (emphasis added); supra. at pp. 15-16.

and an affidavit from FTO counsel that were without foundation and misstated the record from the Superior Court with respect to the mootness issue. Supra. at pp. 19-21.

At some point in November or December 2017, around the time I had inquired with the parties on November 8, 2017 about mootness, FTO ceased all construction at the Property with respect to the project approved by the second SOC and it has persisted in pursuing this litigation despite its representations above in May and August 2016 and on November 8, 2017 to the contrary.[38] The completed but suspended construction consists of site clearing and installing the foundation and plumbing. At the adjudicatory hearing, FTO represented that it ceased construction because it wants to pursue the project approved in the first OOC, which is the subject of this appeal, because the design and location are more desirable.[39] Tr, pp. 92-95. In pre-filed testimony, Mackey testified that FTO wants to allow a buyer to choose the building location. Mackey PFT, p. 7. FTO asserted that it installed the foundation approved in the second OOC in order to "protect [its] rights." Tr, p. 95. However, to build the project approved in the first OOC, FTO would have to incur additional costs of approximately $15,000.00 to 20,000.00 to remove the foundation and prepare the site. Tr, p. 98.

Based on all the above, FTO should be judicially estopped from continuing to pursue this appeal in contravention of its representations that if the project in the second OOC received final approval, that would "obviate the need for a hearing" and the appeal would no longer be necessary.

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[38] Supra. at pp. 16-21.

[39] In light of this evidence, I ruled at the conclusion of the adjudicatory hearing that the appeal was not moot.

CONCLUSION

For all the above reasons, I recommend that the DEP Commissioner issue a Final Decision affirming the SOC based upon the merits and, alternatively, based upon the equitable doctrine of judicial estoppel.

On the merits, a preponderance of the evidence, including significant evidence from the Commission itself, demonstrates that DEP filed a timely appeal of the Order of Conditions approving the first Notice of Intent. The evidence shows that the Commission failed to mail the Order of Conditions to DEP. Because the Commission had a statutory obligation to mail the Order of Conditions to DEP, the ten business day appeal period was tolled until DEP knew or should have known of the Commission's Order of Conditions. A preponderance of the evidence also demonstrates that the Project does not comply with the applicable wetland performance standards. The Project design includes multiple hydraulic restrictions on the compensatory flood area and components that will lead to an increase in flood stage and velocity.

The doctrine of judicial estoppel is an alternative ground for affirming the SOC. Judicial estoppel is intended to prevent a party from using inconsistent positions to "manipulate" and "play fast and loose" with the judicial system. Otis, 443 Mass. 640-41. Here, the doctrine bars FTO from continuing this appeal because the administrative record demonstrates inconsistent positions and other conduct before and after remand that warrant dismissal on estoppel grounds.

I also recommend that the DEP Commissioner address the Superior Court's comments on DEP's regulatory requirements for issuance of Orders of Conditions. In particular, 310 CMR 10.05(6)(e) requires that Conservation Commissions mail or hand deliver Orders of Conditions to DEP but there is no requirement for proof or documentation of such delivery. In contrast, the regulation requires that the Order of Conditions be sent certified mail (return receipt requested)

or hand delivered to the applicant. This discrepancy should be remedied by DEP amending 310 CMR 10.05(6)(e) to require that the Order of Conditions be sent certified mail (return receipt requested) or hand delivered to DEP with proof of service.

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

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

Date: 10/19/18

Timothy M. Jones
Presiding Officer

SERVICE LIST

In The Matter Of:	FTO Realty Trust (Remand)
Docket No. WET-2015-024RM	File No. 305-0982 Tewksbury
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Date: October 19, 2018