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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 25, 2022

In the Matter of
Garnet Brown

OADR Docket No. WET-2022-009
DEP File No. 006-1720
Readville, Hyde Park

RECOMMENDED FINAL DECISION

INTRODUCTION

The Readville Residents Group, c/o Martha McDonough and Francis O'Brien ("the Petitioner"), brought this appeal to challenge the Superseding Order of Conditions ("SOC") issued by the Northeast Regional Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") on March 4, 2022 to Garnett Brown ("the Applicant"), pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 ("MWPA") and the Wetlands Regulations, 310 CMR 10.00 et. seq. ("the Wetlands Regulations"). The SOC approved the construction of a 3-unit condominium building within 100 feet of Sprague Pond ("the proposed Project"), and within the 100-foot Buffer Zone to the Bordering Vegetated Wetlands ("BVW") on real property located at 0-4 Lakeside Avenue, Readville, Hyde Park, Massachusetts ("the Property"). The Property is located within the Fowl Meadow and Ponkapoak Bog Area of Critical Environmental Concern ("Fowl Meadow ACEC").

MassDEP issued the SOC after concluding that the proposed Project, as conditioned, protects the statutory interests identified in the MWPA because the proposed work does not “destroy or otherwise impair any portion of BVW that is with an Area of Critical Concern.” As discussed more fully below, the Petitioner has failed to satisfy its burden of proof in challenging the SOC, and accordingly I recommend that MassDEP’s Commissioner issue a Final Decision granting the Applicant’s Motion for Directed Decision and affirming the SOC.

I. EVIDENCE¹

A. Witnesses

The evidence in the administrative record consists of pre-filed, sworn written testimony and exhibits submitted by the Parties’ respective witnesses, who were as follows:

For the Petitioner:

1. Paul Sutton: Mr. Sutton is the Urban Wilds Program Manager for the City of Boston. His responsibilities include protecting and managing City owned urban wilds and other natural areas and advocating for the long-term protection of such areas not owned by the City.
2. Ian Cooke: Mr. Cooke has been the Executive Director of the Neponset River Watershed Association since 1993. Mr. Cooke is responsible for the Watershed Association’s science, education, and advocacy programs.
3. Sylie Agudelo: Ms. Agudelo is an independent contractor, strategist, researcher, project manager and designer. Ms. Agudelo has completed some environmental science course work.

¹ Throughout this Recommended Final Decision, the witnesses’ Pre-Filed Direct Testimony will be referred to as “[Witness] PFT at ¶” and Pre-Filed Rebuttal Testimony will be referred to as “[Witness] PFR at ¶.” Exhibits to testimony are referred to as “[witness] Ex. X”.

For the Applicant:

1. Gregory J. Hochmuch: Mr. Hochmuch is a Senior Ecological Scientist with Williams & Spragues, LLC. Mr. Hochmuch has worked for more than 24 years as an ecological scientist and 19 years as a soil evaluator and is a certified wetland scientist.

For MassDEP:

1. Kyle Lally: Mr. Lally is an Environmental Analyst III with MassDEP's Northeast Regional Office wetlands program. He has been a wetlands scientist since 2016.

B. Proposed Project Description

All Parties agree that the Property is within the Fowl Meadow ACEC. Hochmuch PFT ¶ 8; Lally PFT ¶¶ 12, 18; Cooke PFT ¶A6. See also SOC, page 2. The Property is also within an Environmental Justice Community², Lally PFT, ¶ 33, which no Party disputes. The proposed Project includes a 3-unit condominium building with driveways, utilities, and stormwater measures within the 100-foot Buffer Zone³ to Sprague Pond. Hochmuch PFT, ¶ 8. Related work is limited to the Buffer Zone of the BVW and proposes no alteration of BVW. Hochmuch PFT, ¶ 8. The proposed Project is not subject to MassDEP stormwater management standards⁴ because it is a residential use with fewer than four units. Hochmuch, ¶ 11. However, to mitigate the addition of impervious area, the proposed Project includes Best Management Practices (“BMPs”) for stormwater management such as trench drains and subsurface infiltration systems. Hochmuch, ¶ 11. The BMPs have been designed to remove pollutants from stormwater runoff

² An EJ population is defined by the Chapter 8, Section 56 of the Acts of 2021 (“Chapter 8”). See below, at pp. 14-16. The 2021 Environmental Justice Policy of Executive Office of Energy and Environmental Affairs (“EEA”) implements Chapter 8 and governs the regulatory actions of all EEA agencies, including MassDEP. Id. In this Recommended Final Decision I refer to this Policy as “EEA’s 2021 EJ Policy.”

³ Buffer Zone means that area of land extending 100 feet horizontally outward from the boundary of any area specified in 310 CMR 10.02(1)(2). See 310 CMR 10.04.

⁴ See 310 CMR 10.05(6)(1)(3).

and attenuate peak flows from the 2-, 10-, 20-, 50-, and 100- year storm events. Hochmuch, ¶ 11; Lally PFT, ¶ 15. The stormwater and erosion controls within the Buffer Zone will protect the interests of the BVW. Lally, ¶ 31. The vegetative buffer along Sprague Pond is proposed to be preserved to the maximum extent practicable, and only a small portion of grading is proposed in the 100-foot Buffer Zone to BVW. Lally PFT ¶ 8; SOC, page 1. Approximately 4,380 sf of BVW enhancement is proposed through the planting of native species, in an area currently dominated by invasive species. Lally PFT ¶15, 30; Hochmuch PFT, ¶ 9. The stormwater and erosion controls and the planting of native species will benefit the overall ecological health of the BVW and promote protection of the interests of the Act and there will be no environmental burdens to jurisdictional resources. Lally ¶, 35. The Petitioner's witnesses did not offer testimony contradicting these facts as testified to by the Applicant's and MassDEP's witnesses, and as such, the Petitioner failed to effectively refute this testimony.

The Boston Conservation Commission ("BCC") initially approved the proposed Project by issuing an Order of Conditions ("OOC") to the Applicant pursuant to the MWPA and the Wetlands Regulations. The Petitioner challenged the approval by filing a timely request with MassDEP's Northeast Regional Office seeking a Superseding Order of Conditions denying the proposed Project. Lally PFT ¶¶ 8-9; Hochmuch PFT, ¶ 13; SOC page 1. MassDEP's wetlands expert, Mr. Lally, conducted a site visit on December 21, 2020 at which the Applicant's, the Petitioner's, and the BCC's respective representatives were present. Lally PFT, ¶ 20; SOC, page 2. Mr. Lally testified in his sworn pre-filed testimony ("PFT") on behalf of MassDEP that he observed that the site consists of a cleared, grassy upland area and that the BVW located along Sprague Pond and the vegetation within the BVW and the Buffer Zone mainly consisted of invasive species. Lally PFT, ¶ 21. He observed the wetland flags and that the BVW was clearly

defined by hydrophytic vegetation and an obvious change in slope where the BVW transitioned to upland. As a result of his site inspection, Mr. Lally concluded that the limits of the BVW had been properly delineated by the Applicant. Lally PFT ¶ 22; SOC, page 2. The Petitioner's witnesses did not offer any testimony regarding these facts, and as such, failed to effectively refute the Applicant's and MassDEP's witness's testimony.

Work in the Buffer Zone to the BVW, and any impacts to the BVW, are limited to the BVW enhancement through the planting of native species. Lally PFT, ¶ 27. The native species include new native tree and shrub species, scarify and seed with a native conservation/wildlife mix, and to manage invasive species. Hochmuch PFT, ¶ 9. These locations are labeled as waterfront/wetland enhancement areas on the approved permit site plans. Hochmuch, Ex. 2. The Petitioner's witnesses did not offer any testimony contradicting these facts as testified to by the Applicant's and MassDEP's witnesses, and as such, failed to effectively refute the testimony.

The Applicant filed an Environmental Notification Form ("ENF") with the Massachusetts Environmental Policy Act Office ("MEPA Office"), as mandated for a project within an ACEC that requires a state permit approval. Hochmuch PFT, ¶ 15. The MEPA Office is within the Massachusetts Executive Office of Energy and Environmental Affairs ("EEA"). In accordance with MEPA requirements, the EEA Secretary issued a MEPA Certificate on November 8, 2021 concluding that the proposed Project did not require additional MEPA review and that "the Project will enhance existing BVW to minimize impact to the ACEC." Hochmuch PFT ¶ 16; Hochmuch Ex. 3; SOC, page 2. Further, the MEPA Certificate concluded that there would be no construction in the BVW. Hochmuch PFT Ex. 3; Lally PFT ¶ 31; SOC, page 2. The Certificate further stated that, "[t]he site is located within an Environmental Justice (EJ) population characterized as Minority and within one mile of a population designated as Minority and

Income. According to the ENF, the proposed Project is not expected to have adverse impacts on EJ populations due to its small size and impacts that are limited to the proposed Project site. Hochmuch Ex. 3. The Petitioner's witnesses did not offer any testimony contradicting these facts as testified to by the Applicant's and MassDEP's witnesses, and as such, failed to effectively refute the testimony.

As is appropriate in the de novo review of this SOC, Mr. Lally and Mr. Hochmuch testified as to whether the SOC comports with Chapter 8 and EEA's 2021 EJ Policy regarding the protection of wetlands resources. In his PFT Mr. Lally's testified that the aspects of the proposed Project that are jurisdictional under the Wetlands Protection Act are limited to the work in the Buffer Zone that will affect the adjacent BVW and the plantings of native species in the Buffer Zone and BVW intended to promote the health of the BVW, resulting in environmental benefits. Lally PFT, ¶¶ 26-27, 34-35; See also Hochmuch PFT, ¶ 23; SOC, page 2. Mr. Lally further testified that the proposed Project has been designed to ensure that the activities in the Buffer Zone will not impair the BVW and that Stormwater will be infiltrated so that the BVW will not be harmed by stormwater quantity or quality, and flooding will not occur in the 25-, 50-, or 100-year storms; appropriate project design and construction measures will prevent erosion and sedimentation. Lally PFT, ¶ 34. Mr. Lally testified that as a result, jurisdictional project activities will not cause "environmental burdens" as defined by G.L. c. 30, § 62 and EEA's 2021 EJ Policy. Lally PFT, ¶ 35; See also Hochmuch PFT, ¶ 24. The Petitioner's witnesses did not offer any testimony contradicting these facts as testified to by Mr. Lally and Mr. Hochmuch, and as such, the Petitioner failed to effectively refute this testimony.

The PFT filed by the Petitioner's witness, Mr. Cooke, addressed the role the Neponset River Watershed Association ("NepRWA") played in the nomination of the Fowl Meadow

ACEC. He testified that the Sprague Pond site⁵ was intentionally included in the Fowl Meadow ACEC designation because of its exceptional environmental, recreational, and cultural significance. Cooke PFT, ¶ A9. While he did not assert in his testimony that he is a wetlands scientist, and did not include a resume with his testimony, Mr. Cooke did testify that he is responsible for all NepRWA's science, education, and advocacy programs in his role as Executive Director, a position he has held since 1993, which lends him credibility as a professional with relevant expertise. However, his testimony made no reference to the SOC, and offered no testimony, factual or opinion, regarding whether the SOC satisfies the performance standard of 310 CMR 10.55(4)(e) (Issue 1 for Adjudication), or whether the SOC comports with Chapter 8 and EEA's 2021 EJ Policy regarding the protection of wetlands resources (Issue 2 for Adjudication). In sum, Mr. Cooke's testimony was deficient as a matter of law to satisfy the Petitioner's burden of proof on Issues 1 and 2.

The PFT of the Petitioner's witness, Mr. Sutton, stated that "the purpose of [his] testimony [was] to offer MassDEP relevant expert evidence concerning the Cit[y] [of Boston's] Urban Wild Program and specifically the Lakeside Avenue site at Sprague Pond in Readville." Sutton PFT, ¶ A3. Attachment A to Mr. Sutton's PFT is a document entitled "Paul Sutton City of Boston Urban Wilds Manager Evaluation and recommendations to the City of Boston Conservation Commission Concerning the Notice of Intent for 0-4 Lakeside Avenue, June 20, 2022." Sutton Ex. A.⁶ Mr. Sutton testified that he provided Attachment A to the BCC when it

⁵ The term "Sprague Pond site" is not defined in Mr. Cooke's testimony. Given the context of his testimony in Cook PFT, ¶A6, related to the two ACECs NepRWA nominated, and the fact that elsewhere in his testimony and the Petitioner's filings the Property is referred to as the "Lakeside Avenue" property or site, it is reasonable to assume he is referring to Sprague Pond itself, rather than the Property.

⁶ This exhibit recommends additional planning regarding natural resources, a land scape plan and a natural resource management plan.

was reviewing the proposed Project. Sutton PFT, ¶ A4. He testified that the recommendations contained in Attachment A, should be included in the SOC. Sutton PFT, ¶ A6.⁷ However, Mr. Sutton's testimony did not assert that he is a wetlands scientist, nor did he include a resume with his testimony. Regardless, he did not provide testimony, factual or opinion, on the issue of whether the SOC satisfies the performance standard of 310 CMR 10.55(4)(e) (Issue 1 for Adjudication), or on whether the SOC comports with Chapter 8 and EEA's 2021 EJ Policy regarding the protection of wetlands resources (Issue 2 for Adjudication). In sum, Mr. Sutton's testimony was deficient as a matter of law to satisfy the Petitioner's burden of proof on Issues 1 and 2.

The PFT of the Petitioner's witness, Ms. Agudelo, states that she is very familiar with the Lakeside Avenue Site. Agudelo PFT, ¶ A2. The remainder of her testimony consists of attached documents without explanation or testimony as to relevance. Agudelo PFT, ¶ A4.⁸ Ms. Agudelo did not assert in her testimony that she is a wetlands scientist, although she included among her qualifications the completion of some environmental science course work. However, her testimony neither referred to nor offered any testimony, factual or opinion, regarding whether the SOC satisfies the performance standard of 310 CMR 10.55(4)(e) (Issue 1 for Adjudication); or whether the SOC comports with Chapter 8 and EEA's 2021 EJ Policy regarding the protection of wetlands resources (Issue 2 for Adjudication). In sum, Ms. Agudelo's testimony was deficient as a matter of law to satisfy the Petitioner's burden of proof on Issues 1 and 2.

C. Procedural Background

⁷ Mr. Sutton recommends additional information on natural resources, a landscape plan, a natural resource management plan, and a conservation plan for an abutting property. See Sutton Exhibit 1

⁸ Ms. Agudelo's PFT attachments include: Agudelo Qualifications; Exhibit A, ACEC Designation Fowl Meadow; Exhibit B, 4-8 Lakeside MLS copy; Exhibit C, Deed for 0-4 Lakeside; Exhibit D, Lakeside Sprague Information prepared by the Hyde Park Historical Society, June 2022.

In accordance with the Adjudicatory Proceeding Rules at 310 CMR 1.01(5)(a)15, the Wetlands Permit Appeal Regulations at 310 CMR 10.05(7)(j), I issued a Scheduling Order on May 25, 2022 establishing the schedule for adjudication of this appeal, including a Pre-Hearing Conference (“PHC”) which I conducted with the Parties on June 9, 2022. The purpose of the PHC was to establish the issues for adjudication in the appeal and the schedule for the Parties to file the PFT of their respective witnesses on the Issues for Adjudication prior to the evidentiary Adjudicatory Hearing (“Hearing”).

The day before the PHC, on June 8, 2022, the Applicant filed a “Motion to Dismiss Petitioners’ Appeal for Failure to Cite Justiciable Claim.” The Motion to Dismiss was discussed briefly at the PHC, but given the timing of the filing, the Petitioner and MassDEP were not prepared to respond at that time. Following the PHC, I issued a Pre-Hearing Conference Report and Order on June 10, 2022 identifying the issues for adjudication at the Hearing, and establishing the schedule for filings by the Parties, including in response to the Applicant’s Motion to Dismiss.⁹

At the PHC, I conducted an in-depth discussion with the Parties regarding the proposed issues for adjudication that the Petitioner had submitted in its Prehearing Conference Statement. Based upon the discussion at the PHC, I framed the issues for adjudication as follows:¹⁰

1. Does the SOC satisfy the performance standard for proposed work with an Area of Critical Environmental Concern (“ACEC”) set out at 310 CMR 10.55(4)(e)?

⁹ The Petitioner filed an opposition to Applicant’s Motion to Dismiss on June 17, 2022 noting that the outcome of the PHC resulted in the identification of two justiciable issues sufficiently stated. MassDEP did not file a response. I did not rule on the Motion to Dismiss prior to the submittal of PFT by the Parties’ respective witnesses.

¹⁰ A number of the Petitioner’s proposed issues for adjudication were outside the jurisdiction of the MWPA and the Wetlands Regulations, and as such, could not be adjudicated in this forum. These issues include those related property boundaries, street mapping, and landscape planning, and roadway improvements where no such work is proposed in the resource area or approved in the SOC. Also discussed was future work. I informed the Petitioner of the fact that the SOC approved only the work identified in the SOC and that an Applicant would have to file a new Notice of Intent to conduct any future work in a wetlands resource area.

2. Did MassDEP's SOC approving the proposed Project comport with EEA's 2021 EJ Policy regarding the protection of wetlands resources?

- (a) Will the proposed Project provide environmental benefits?
 - i. If so, what are the environmental benefits and will they be equitably distributed?
- (b) Will the proposed Project cause environmental burdens?
 - i. If so, what are the environmental burdens and will they be equitably distributed?

I also informed the Petitioner that although some of the Petitioner's other proposed issues for adjudication may have relevance to wetlands resources, they nevertheless lacked specificity sufficient to make that determination that they relate to the SOC. As a result, the Petitioner was afforded an opportunity to file a More Definite Statement addressing these issues and to identify with specificity those witnesses who would testify as experts on the identified issues.¹¹

The Petitioner filed a More Definite Statement regarding potential Issues Nos. 3-5, to which the Applicant and MassDEP replied. On August 3, 2022 I issued an Order in which I denied the Petitioner's request to include Issues Nos. 3-5 for adjudication after I determined that the Petitioner had failed to demonstrate that those Issues should be included for adjudication in the appeal.¹²

¹¹ The Petitioner's proposed issues for adjudication Nos. 3-5 ("Issues Nos. 3-5"), as identified in the Pre-Hearing Conference Report and Order, were as follows:

- 3. Requirement for a baseline resource inventory – Petitioner should identify with specificity the Wetlands Regulations requirement for a wetlands resource inventory and the alleged error in the SOC.
- 4. Requirement for a resource management plan - Petitioner should identify with specificity the Wetlands Regulations requirement for a wetlands resource management plan and the alleged error in the SOC.
- 5. Stormwater – Petitioner should identify with specificity the potential affects to a critical area subject to the Act, of stormwater discharges pursuant to 310 CMR 10.05(6)(1).3. and the alleged error in the SOC.

¹² With respect to proposed Issues Nos. 3 and 4, the Petitioner acknowledged that there is no wetlands regulatory requirement for such inventory or plan, arguing that MassDEP should exercise discretion to require them. The Petitioner did not provide any basis for how an inventory or plan would address an error in the SOC, if MassDEP

In the August 3, 2022 Order, I also established dates for each party to submit their witnesses' PFT on Issues 1-2, and their memoranda of law addressing Issues 1-2, for the Petitioner to file Rebuttal PFT and memorandum of law, and for the Applicant to renew his Motion to Dismiss after all Parties had filed their PFT, memoranda of law and the Petitioner had filed its Rebuttal PFT and memorandum of law. The Parties subsequently timely submitted their PFT and memoranda of law on the Issues for Adjudication. However, the Petitioner did not file Rebuttal PFT from any witnesses responding to the testimony of the Applicant's and MassDEP's respective witnesses.

On October 4, 2022, the Applicant renewed his Motion to Dismiss by filing, "Applicant's Directed Decision Memorandum to Dismiss Petitioners' Case for Failure to Cite a Justiciable Claim and Failure to Present Credible Evidence from A Competent Source To Support Its Claims Pursuant To 310 CMR 1.01(11)(e)." MassDEP responded with assent to the relief requested by Applicant, that the Petitioners' appeal should be dismissed pursuant to 310 CMR 1.01(11)(e).¹³ The Petitioner did not file a response to the Applicant's motion.¹⁴

were to exercise of such discretion. With respect to proposed Issue No. 5, potential impact of stormwater on critical areas, the Petitioner failed to show that the proposed Project includes a critical area as that term is defined at 310 CMR 10.04, nor did the Petitioner allege any error in the SOC relative to stormwater impacts.

¹³ MassDEP's assent expressly excluded "the [Applicant's] Memorandum's characterization of the pro se Petitioners' appeal as "frivolous," or to the Memorandum's unnecessarily adversarial statements regarding the Petitioners." MassDEP stated that it "takes very seriously the rights of all parties to be heard in this [OADR] forum." See, "Department of Environmental Protection's Assent to Relief Requested By Applicant's Motion to Dismiss For Failure To Sustain Case," page 2.

¹⁴ 310 CMR 10.1(11)(a)(1) provides parties with seven (7) business days to file written objection to a motion. See also 310 CMR 1.01(3)(b), excluding weekends and holidays from computation of time relative to time periods of seven (7) days or less. As such, taking the October 10, 2022 Columbus Day Holiday into account, responses to the Applicant's motion were due by Friday, October 14, 2022. As noted above in the text, the Petitioner did not file a response to the Applicant's Motion. On Saturday, October 15, 2022, the Chief Presiding Officer confirmed that the Petitioner had not filed a response to the Applicant's Motion. As a result, on my behalf, on October 15th the Chief Presiding Officer informed the Parties by e-mail that the evidentiary Adjudicatory Hearing ("Hearing") that was scheduled to take place on Tuesday, October 18th, was cancelled and that I would issue an Order stating the reasons for the cancellation on Monday, October 17th.

As a result of the deficiencies of the testimony of the Petitioner's witnesses and the Petitioner's failure to respond to the Applicant's Motion to Dismiss as discussed above, on October 17, 2022, consistent with the Chief Presiding Officer's prior notice to the Parties,¹⁵ I issued an Order informing the Parties that: (1) the Petitioner had failed to substantiate its claim that MassDEP improperly issued the SOC; (2) as a result of such failure by the Petitioner, I intended to issue a Recommended Final Decision, within 30 days, recommending that MassDEP's Commissioner issue a Final Decision granting the Applicant's Motion for Directed Decision and affirming the SOC; and (3) the Hearing which had been scheduled for October 18, 2022 was cancelled because such a Hearing would have been pointless given the Petitioner's failure to satisfy its burden of proof as discussed above.¹⁶

II. DISCUSSION

A. The Directed Decision Standard of 310 CMR 1.01(11)(e)

The Petitioner has the burden of proof on all the issues for Adjudication.¹⁷ Specifically, had this appeal proceeded to the Hearing for adjudication, the Petitioner would have been required to prove by a preponderance of the credible evidence through the sworn testimonial and documentary evidence of competent witnesses, including expert witnesses, that MassDEP erred in issuing the SOC.

¹⁵ See n. 14 above.

¹⁶ The Applicant also filed a Motion to Strike Petitioner's October 6, 2022 notice of public hearing concerning public access to Sprague Pond. Because the Applicant is correct that access to Sprague Pond is not an issue in this appeal and the motion is granted.

¹⁷ See 310 CMR 10.03(2); 310 CMR 10.05(7)(j)2.b.iv; 310 CMR 10.05(7)(j)2.b.v; 310 CMR 10.05(7)(j)3.a; 310 CMR 10.05(7)(j)3.b.

The Adjudicatory Proceeding Rules at 310 CMR 1.01 govern the adjudication of this appeal. Specifically, the regulations at 310 CMR 1.01(11)(e) provide:

[u]pon the petitioner's submission of prefiled testimony , . . . any opposing party may move for the dismissal of any or all of the petitioner's claims, on the ground that upon the facts or the law the petitioner has failed to sustain its case; or the Presiding Officer may, on the Presiding Officer's own initiative, order the petitioner to show cause why such a dismissal of claims should not issue. Decision on the motion or order to show cause may be reserved until the close of all the evidence

(emphasis supplied). "Dismissal [of an appeal pursuant to 310 CMR 1.01(11)(e)] for failure to sustain a case, also known as a directed decision, is appropriate when a party's direct case - generally, the testimony and exhibits comprising its prefiled direct testimony - presents no evidence from a credible source in support of its position on the identified issues." See In the Matter of Thomas Vacirca, Jr., OADR Docket No. WET-2016-017, Recommended Final Decision (April 11, 2017), 2017 MA ENV LEXIS 22, at 14-15, adopted as Final Decision (April 18, 2017), 2017 MA ENV LEXIS 28. In essence, a directed decision should be entered against the appellant in the appeal when the appellant does not have a reasonable likelihood of prevailing on its claims in the appeal because the appellant's evidentiary submissions are deficient as a matter of law. Id.

B. The Performance Standard of 310 CMR 10.55(4)(e)

The regulations governing projects proposed in an in an ACEC are set out at 310 CMR 10.55(4)(e) and provide as follows:

Any proposed work shall not destroy or otherwise impair any portion of a Bordering Vegetated Wetland that is within an Area of Critical Environmental Concern designated by the Secretary of Energy and Environmental Affairs under M.G.L. c. 21A, § 2(7) and 301 CMR 12.00: Areas of Critical Environmental Concern. 310 CMR 10.55(4)(e):

1. supersedes the provisions of 310 CMR 10.55(4)(b) and (c);

2. shall not apply if the presumption set forth at 310 CMR 10.55(3) is overcome;
3. shall not apply to work proposed under 310 CMR 10.53(3)(1); and
4. shall not apply to maintenance of stormwater detention, retention, or sedimentation ponds, or to maintenance of stormwater energy dissipating structures, that have been constructed in accordance with a valid order of conditions.

With respect to a BVW presumed to be significant to the identified interests, located in an ACEC, no such loss and replacement is allowed. Any proposed project in a BVW, located within an ACEC, may not destroy or otherwise impair any portion of the BVW. See 310 CMR 10.55(4)(e) (emphasis supplied); See also In the Matter of Jon Van Loan, OADR Docket WET 2009-0167, Recommended Final Decision, (May 14, 2010), 2010 MA ENV LEXIS 190, at 34, adopted by Final Decision, (May 21, 2010), 2010 MA ENV LEXIS 213(holding that installation of a piling in a BVW will destroy the BVW); and In the Matter of Devon Road Nominee Trust, Docket No. 2000-161, Recommended Final Decision, (July 25, 2002), 2002 MA ENV LEXIS 135, at 12, adopted by Final Decision, (August 14, 2002), 2002 MA ENV LEXIS 140 (work outside ACEC, with potential to impact to BVW within the ACEC, was appropriately conditioned to meet regulatory requirement under 310 CMR 10.55(4)(e)). This performance standard is more protective and is a more stringent than the standard for BVW outside of an ACEC and is consistent with the “close scrutiny” applicable to ACECs as prescribed in 301 CMR 12.00.

C. Chapter 8 and EEA’s 2021 EJ Policy regarding the protection of wetlands resources

Chapter 8¹⁸ amended the Massachusetts Environmental Policy Act (“MEPA”), to incorporate environmental justice considerations into project reviews conducted pursuant to

¹⁸ See Chapter 8, Sections 55-60 of the Acts of 2021 Chapter 8 of the Acts of 2021 entitled “An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy.”

MEPA and other activities under the authority of the EEA Secretary.¹⁹ As a result of Chapter 8's MEPA amendments Environmental Benefits and Environmental Burdens are now defined terms,²⁰ as is Environmental Justice Population.²¹

¹⁹ See G.L. c. 30, §§ 62, 62B and 62E, as amended, and new §§ 62J, 62K, and 62L.

²⁰ "Environmental Benefits" are defined as:

the access to clean natural resources, including air, water resources, open space, constructed playgrounds and other outdoor recreational facilities and venues, clean renewable energy sources, environmental enforcement, training and funding disbursed or administered by the executive office of energy and environmental affairs.

St. 2021, c. 8, § 56; G.L. c. 30, § 62 (definition of "environmental benefits" (emphasis supplied); G.L. c. 30, § 62K. "Environmental Burdens" are defined as:

any destruction, damage[,] or impairment of natural resources that is not insignificant, resulting from intentional or reasonably foreseeable causes, including but not limited to, climate change, . . . activities that limit access to natural resources and constructed outdoor recreational facilities and venues, . . . reduction of ground water levels, impairment of water quality, increased flooding or storm water flows, and damage to inland waterways and waterbodies, wetlands, marine shores and waters, forests, open spaces, and playgrounds from private industrial, commercial or government operations or other activity that contaminates or alters the quality of the environment and poses a risk to public health.

St. 2021, c. 8, § 56; G.L. c. 30, § 62 (definition of "environmental burdens" (emphasis supplied); G.L. c. 30, § 62K.

²¹ An "Environmental Justice Population" is defined as a neighborhood, specifically a census block group of persons defined by the United States Census Bureau, but not including persons living in college dormitories and persons "under formally authorized, supervised care or custody, including federal, state[,] or county prisons" that meets one or more of the following criteria:

- (i) the annual median household income is not more than 65 per cent of the statewide annual median household income;
- (ii) minorities comprise 40 per cent or more of the population;
- (iii) 25 per cent or more of households lack English language proficiency; or
- (iv) minorities comprise 25 per cent or more of the population and the annual median household income of the municipality in which the neighborhood is located does not exceed 150 per cent of the statewide annual median household income

St. 2021, c. 8, § 56; G.L. c. 30, § 62 (definitions of "environmental justice population" and "neighborhood"). The MEPA Amendments provide that "[if] a neighborhood that does not meet [one or more of the four] criteria [set forth above], but a geographic portion of that neighborhood meets at least [one] criterion, the [EEA] secretary [is authorized to] designate that geographic portion as an environmental justice population upon the petition of at least 10 residents of the geographic portion of that neighborhood meeting any such criteria" *Id.*

Chapter 8’s MEPA amendments direct the EEA Secretary to consider environmental justice principles and to direct EEA agencies, which include MassDEP, to do the same in taking agency action related to a project review that is likely to affect environmental justice populations.²² To implement these statutory directives, EEA issued its 2021 EJ Policy.²³ EEA’s 2021 EJ Policy requires that environmental justice principles shall be an integral consideration, to the extent applicable and allowable by law, in making any policy, making any determination or other action related to a project review.²⁴ In the context of the SOC at issue, the environmental justice principles are applicable to the impacts of permitted activities on the wetlands resources within MassDEP’s jurisdiction. Environmental burdens are “destruction, damage or impairment of natural resources that is not insignificant.”²⁵

²² Chapter 8’s MEPA Amendments defined “environmental justice principles” as:

principles that support protection from environmental pollution and the ability to live in and enjoy a clean and healthy environment, regardless of race, color, income, class, handicap, gender identity, sexual orientation, national origin, ethnicity or ancestry, religious belief[,], or English language proficiency, which includes:

- (i) the meaningful involvement of all people* with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies, including climate change policies; *and*
- (ii) the equitable distribution of energy and environmental benefits and environmental burdens.*

St. 2021, c. 8, § 56; G.L. c. 30, § 62 (definition of “environmental justice principles” (emphasis supplied)); G.L. c. 30, § 62K.

²³ EEA’s first established its Environmental Justice Policy in 2002 and revised it in 2017 after Governor Deval Patrick issued Executive Order 552, An Executive Order on Environmental Justice, in 2014. EEA’s 2021 EJ Policy replaced EEA’s 2017 EJ Policy.

²⁴ EEA’s 2021 EJ Policy, at p. 4 (definition of “Environmental Justice Principles”; and p. 5 (Statement of Purpose) (emphasis supplied). The “environmental justice principles” under EEA’s 2021 EJ Policy that EEA agencies, including MassDEP, must apply to its environmental policy decisions and development, implementation, and enforcement of environmental laws, regulations, and policies are those established by Chapter 8’s MEPA Amendments discussed above. The definitions of “Environmental Benefits” and “Environmental Burdens” in EEA’s 2021 EJ Policy are same as Chapter 8’s MEPA Amendments’ definitions of those terms discussed above. EEA’s 2021 EJ Policy, at p. 3 (definition of “Environmental Benefits”) and p. 4 (definition of “Environmental Burdens”).

²⁵ St. 2021, c. 8, § 56; G.L. c. 30, § 62 (definition of “Environmental Burdens” (emphasis supplied); G.L. c. 30, § 62K; EEA’s 2021 EJ Policy, at p. 4 (definition of “Environmental Burdens”).

D. The Petitioner does not have a reasonable likelihood of prevailing on the merits in the appeal

The Petitioner's appeal fails on the merits for the following reasons. First, none of the PFT filed by the Petitioner's witnesses provided any expert testimony on the two Issues for Adjudication in the appeal: (1) whether the SOC satisfies the performance standard for proposed work in an ACEC as set out at 310 CMR 10.55(4) (Issue 1); and (2) whether the SOC comports with Chapter 8 and EEA's 2021 EJ Policy regarding the protection of wetlands resources (Issue 2). The Petitioner also failed to address the Issues for Adjudication by failing to file the sworn rebuttal PFT of any witnesses responding to the pre-filed testimony of the Applicant's and MassDEP's respective witnesses on the Issues for Adjudication.

To sum up, there are no facts or expert opinions in the record contradicting the testimony of MassDEP's and the Applicant's respective witnesses that the SOC complies with the relevant performance standard (Issue 1 for Adjudication) and comports with Chapter 8 and EEA's 2021 EJ Policy regarding the protection of wetlands resources (Issue 2 for Adjudication). MassDEP's and the Applicant's respective witnesses are credible, experienced experts whose testimony addressed the issues for adjudication in the appeal. The Petitioner did not challenge their expertise or credibility. Except for one of the Petitioner's witnesses, Mr. Cooke, none of the Petitioner's witnesses were wetlands experts. Assuming only for the sake of argument that all the Petitioner's witnesses were wetlands experts, none of them, including Mr. Cooke offered any testimony on the issues identified for adjudication. Additionally, the Petitioner did not oppose the Applicant's Motion to Dismiss, to which MassDEP assented relative to the relief requested.

III. CONCLUSION

I find that Petitioner has failed to present sufficient evidence that the SOC does not satisfy the performance standard for proposed work within an ACEC set out at 310 CMR 10.55(4)(e).

The uncontradicted testimony of MassDEP's and the Applicant's respective witnesses is that the work to be conducted in the Buffer Zone is designed to protect the interests of the BVW, will not impact the BVW, and that the planting of native species will promote the interests of the MWPA as they pertain to BVW, providing an overall benefit to the ecological health of the BVW. As a result, there will be no environmental burdens to the jurisdictional wetlands resources and the proposed Project comports with Chapter 8 and EEA's 2021 EJ Policy. Accordingly, I recommend that MassDEP's Commissioner issue a Final Decision granting the Applicant's Motion to Dismiss and affirming the SOC.

Date: October 25, 2022



Margaret R. Stolfa
Presiding Officer

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.

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