

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
98 North Washington Street, Fourth Floor
Boston, Massachusetts 02114
Tel.: 617-727-7060 Fax: 617-727-7248

May 7, 2008

In the Matter of

MICHAEL GASPARD

DALA Docket No. DEP-07-61
DEP Docket No. 2006-155
DEP File No. SE3-4391
Barnstable

RECOMMENDED FINAL DECISION

WETLANDS - appeal from a superseding order of conditions. Sole issue is whether a large water body adjacent to the project site is a river or a pond. Evidence demonstrates the absence of unilateral flow in the water body, and hence it is a pond and not a river. Because the water body is not a river, there is no riverfront area on applicant's property and his project is not required to meet riverfront area performance standards.

Charles M. Sabatt, Esq. (Ardito, Sweeney, Stusse, Robertson & Dupuy, P.C.), West Yarmouth, for applicant Michael Gaspard.

Paul Revere III, Esq., (Law Offices of Paul Revere III), Hyannis, for petitioner Ellen Burkhardt.

Rebecca Cutting, Esq., Boston, for the Department of Environmental Protection.

JAMES P. ROONEY, Administrative Magistrate.

Introduction

Is a body of water to the south of wetlands permit applicant Michael Gaspard's house a river or a pond? This is the issue that was addressed at a hearing in an appeal by his neighbor Ellen Burkhardt of the wetlands permit DEP issued to him. It matters, because if the water body is a river, as defined in the Wetlands Protection Act, M.G.L. c. 131, §40, and its implementing regulations, 310 CMR 10.00, then any work Gaspard proposes within 200 feet of the mean annual high water line of the river will be subject to review for compliance with the riverfront area general performance standards set forth at 310 CMR 10.58(4), a review it has yet to receive.

After the hearing, I conclude that the water body is a pond, not a river, and hence I affirm the permit.

Background

Gaspard owns a house at 356 Bay Lane in Centerville, not far from the south shore of Cape Cod. To the west and north of the site – but more than 200 feet away – are, respectively, a river known as the Bumps River and a body of water known as Scudder Bay that is part of the Bumps River. The Bumps River flows generally south into the Centerville River and then into Centerville Harbor. On the southern side of the site is a marshy area vegetated with *Phragmites* reeds. A small stream flows westerly into this area and opens into a broader body of water about one-half mile long and with a surface area of 267,000 square feet. The western end of this water body extends to Bay Lane. There, the water flows over a weir, through a culvert under Bay Lane, and within 40 or 50 feet joins the Bumps River.

A U.S. Geologic Survey map of the area from 1893 does not show a large water body south of the site. Rather, it depicts a narrow stream line flowing west through a marsh to the Bumps River. This stream can be seen in an aerial photograph from 1960, but by then small, man-made channels were visible extending north and south of the stream's main stem. Some of these channels extended into the *Phragmites* close to what is now Gaspard's house. The channels were evidently associated with cranberry growing that took place in this area and that would have required the area to be flooded on occasion. This could be achieved by manipulating flashboards at Bay Lane. Although cranberries are no longer grown in the immediate vicinity, the flashboards remain high enough to impound water, flood the tributary stream and the channels branching out from it, and create the extensive water body now there.¹

When Gaspard sought a wetlands permit from the Barnstable Conservation Commission

¹ Who controls the flashboards to keep water impounded is not in the record. The only evidence is that the Town of Barnstable does not control the flashboards.

for work he proposed on an existing house, he did not identify the water body as a river. Rather, he informed the Commission that the marshy area on the south side of his site was a bordering vegetated wetland and that none of the work he proposed – the addition of a second story, a deck, and a porch, the removal of a greenhouse, and the remodeling of a basement – would take place within this wetland, although, because the whole site is within the coastal floodplain, all of it would occur within that wetland resource area.²

The Commission issued a permit for the project. Ellen Burkhardt, who owns a house south of the marshy area and the water body, asked DEP to supersede the Commission's decision based upon Gaspard's failure to designate the stream that flows through the marshy area as a river.

On September 18, 2006, DEP issued a permit approval. In a cover letter, DEP stated that as far as the riverfront issue was concerned:

The Department has determined that the man-made ditch close to the project site [i.e., one of the cranberry bog channels] is not a river pursuant to the Rivers Protection Act. Further, the Department has determined that the main channel of this coastal river is more than 350-feet from the project area. Consequently, the project does not contain a Riverfront Area.

Burkhardt appealed. After DEP determined that Burkhardt had standing to appeal and that an issue she raised concerning the adequacy of the existing septic system at the site did not state a wetlands-related claim, the matter was transferred to the Division of Administrative Law Appeals. I held a prehearing conference with the parties on March 26, 2007, and established as the sole issue for hearing whether any of the work proposed by Gaspard was to occur within a riverfront area.³

² The site also contains a discontinuous coastal bank. No issues have been raised in this appeal regarding any coastal wetlands resource areas.

³ Burkhardt also claimed that planned bedrooms in Gaspard's basement will need a zoning variance. I informed her that this issue would not be pertinent to a wetlands permit appeal unless Gaspard had failed to apply for a necessary local permit, as required by 310 CMR 10.05(4)(e). I told her that she could file a motion concerning this issue, if she wished, although I did not specifically schedule a date for such filing. She did not to file a motion prior to the hearing.

At the time of the conference, DEP continued to believe that the water body contained a river, but that the limit of the “main channel” of this river, which was the channel of the tributary that was now entirely under water, was too far away from the project site for riverfront area to extend on to it. DEP later changed its position and concluded that the water body is a pond and consequently has no riverfront area. The testimony of its analyst, James Mahala, reflects DEP’s most recent position.

Robert Gatewood, the Barnstable Conservation Administrator, also filed testimony on behalf of DEP in which he stated that it has been his and the Conservation Commission’s long-held opinion that the water body is not a river. Gaspard’s witness, civil engineer Robert Perry, filed testimony in which he concluded as well that the water body is a pond, not a river.

Burkhardt filed opposing testimony from coastal geologist Peter Rosen and from professional engineer and professional land surveyor Michael McGrath. Rosen opined that the water body is a river with a constriction created by the weir; McGrath surveyed the river boundary as flagged by Rosen.

I held a hearing on July 17, 2007. At the invitation of the parties, I viewed the site on July 10, 2007 as well as the two other nearby creeks suggested by Burkhardt – Stewart’s Creek and Snow’s Creek.

Discussion

The Wetlands Protection Regulations define both river and pond. A river is “any natural flowing body of water that empties to any ocean, lake, pond or other river and which flows throughout the year.” 310 CMR 10.58(2)(a)1. Rivers include perennial streams. A stream, in turn, is defined as a “body of running water, including brooks and creeks, which moves in a definite channel in the ground due to a hydraulic gradient.” 310 CMR 10.04. In contrast, an inland pond is:

an open body of fresh water with a surface area observed or recorded within the last ten years of at least 10,000 square feet. Ponds may be either naturally occurring or man-made

by impoundment, excavation, or otherwise.

310 CMR 10.04.

If a river flows into a pond, then the “riverfront area stops at the inlet and begins at the outlet” of the pond. 310 CMR 10.58(2)(h). Doubt may exist as to whether an open stretch of water into which a river flows is a pond or simply a broad section of the river. The Regulations provide an approach to resolving such a quandary as follows:

A water body identified as a lake, pond, or reservoir on the current U.S.G.S. map or more recent map provided by the Department, is a lake or pond, unless the issuing authority [the local conservation commission or DEP] determines that the water body has primarily riverine characteristics. When a water body is not identified as a lake, pond, or reservoir on the current U.S.G.S. map or more recent map provided by the Department, the water body is a river if it has primarily riverine characteristics. Riverine characteristics may include, but are not limited to, unidirectional flow that can be visually observed or measured in the field. In addition, rivers are characterized by horizontal zonation as opposed to the vertical stratification that is typically associated with lakes and ponds.

310 CMR 10.58(2)(h).

While straightforward enough on paper, determining whether a stretch of water is part of a river has presented some difficulty in practice, as DEP’s change of position in this matter and prior administrative decisions illustrate. For example, Magistrate Bonney Cashin found that a body of water in Wayland called Mill Pond exhibited characteristics of both a pond and a river, but that pond characteristics predominated, a conclusion that was rejected by the DEP Commissioner who thought the water body was a river. Matter of Gilbert, Docket No. DEP-04-237, Recommended Final Decision, 12 DEPR 18 (Mass. Div. of Admin. App., Feb. 24, 2005), modified by Final Decision, 12 DEPR 74 (Mass. Dep’t. of Env’tl. Prot., May 31, 2005). In the same vein, I found that a water body called the West Branch of the Westport River that is as wide as 4,000 feet is exclusively an estuary, while the Commissioner found it to be a river. Matter of Kamionek, Docket No. 2001-075, Recommended Final Decision, 11 DEPR 245 (Mass. Div. of Admin. App., Dec. 10, 2004), rejected by Final Decision, 12 DEPR 9 (Mass. Dep’t. of Env’tl.

Prot., Feb. 14, 2005).

Here, the parties agree that the manner in which a water body is depicted by U.S.G.S., a factor that is the starting point under the regulatory scheme, does not help to resolve the nature of the water body because it is inaccurate. The latest U.S.G.S. map continues to show a narrow main stream with small channels on either side of it. The parties agree, however, that this entire area has been inundated since at least 1989.

The parties also agree that the mere fact that the water body has a surface area greater than 10,000 square feet and has existed that way for at least ten years does not automatically make it a pond. It can be either a pond or a river depending on whether it exhibits predominantly riverine characteristics. On that score, the parties introduced evidence concerning features that may play a role in determining whether the water body is predominantly riverine, including the location of the banks of the water body (and whether they are parallel), the nature of the zonation (if any) within the water body, the influence of tides there, and flow within the water body. They also introduced delineations of the water body's mean annual high water line, which would become significant if a river were to be found to exist there.

I find the testimony on flow within the water body to be the most significant and the most persuasive factor in determining that the water body is a pond, but I begin by commenting briefly on the remainder of the testimony.

A. Banks and the Shape of the Water Body

Rivers tend to have parallel banks while ponds and lakes tend to have curvilinear shores, according to the DEP Commissioner. See Matter of Kamionek, Final Decision, 12 DEPR at 9. The parallel banks of a river serve to confine the channelized flow that is the central feature of rivers.

Here, the stream that feeds into the water body from the east is about ten feet wide while the impounded area is in places 100 feet or more wide. The body of water curves slightly north then slightly south before it reaches the weir at Bay Lane. Its overall shape was accurately

described by DEP witness James Mahala as most closely resembling an oblong. But it is hardly a perfectly regular shape. Aerial photographs show along the north and south shores of the water body large curved embayments and narrower protrusions of water into the *Phragmites*.

If one were to look at the general shape rather than the indentations, an approach suggested by Burkhardt's witness, Dr. Peter Rosen, then the shores of the water body are roughly parallel, which is a riverine characteristic. That the shores of this water body are far wider apart than the stream that feeds into it does not necessarily change the significance of the nature of the shores within the water body itself, at least in light of the DEP Commissioner's prior decision that the West Branch of the Westport River, a water body fed by a similarly small stream that expands in width to more than one half mile wide (which is wider than the Mississippi River at New Orleans) is a river with parallel shores. See Matter of Kamionek, Final Decision, 12 DEPR at 12.

Yet the indentations are significant. The irregular nature of the shoreline gives this water body the appearance of a flooded area into which water flowed where it could across a low, flat topography. The shore hardly resembles banks that serve to confine a channelized, downhill flow of river water. Rather, it looks like a long, irregular shallow pond.

Burkhardt argues that an irregular shoreline and the width of the water body hardly preclude a finding that the water body is a river. She points to nearby Scudder's Bay, just north of the site, which is a nearly circular body of water within the Bumps River. Dr. Rosen also points out two nearby creeks called Stewart's Creek and Snow's Creek, both of which are about ten feet wide at their mouths at the shore, but are more than four hundred feet wide and irregularly shaped just inland of the road along the coast under which these streams are culverted.

Each of the water bodies mentioned is within a river, as determined by DEP, but there is nothing in the record to show that either the local conservation commission or DEP has found that the broad areas of water within these rivers that Burkhardt focuses on are rivers rather than ponds. Still, though the exact status of these water bodies has not been shown, Burkhardt's point remains valid. Sections of a river may widen beyond what is otherwise typical for the river and still retain

a predominantly riverine characteristic.

In the final analysis, the shape of the water body's shore is not very helpful in determining whether it is a river or a pond. The shores are roughly parallel, as they might be in a river, but are far apart and irregular, suggesting a flooded water body like a man-made pond.

B. Zonation within the Water Body

Examining the zonation – or lack thereof – in the water body is not very helpful either. As the Regulations describe it, ponds tend to have “vertical stratification,” while rivers exhibit “horizontal zonation.” 310 CMR 10.58(2)(h). There is no evidence of vertical stratification in the water body. Deep ponds and lakes tend to have different temperature strata, for example. But with a depth of no more than three feet, this water body is simply too shallow for such stratification to occur.

According to the DEP Commissioner, a river may exhibit “differing zones across or along the horizontal axis of the water body.” Matter of Gilbert, Final Decision, 12 DEPR at 74. No party introduced any evidence of any zonation across the water body. Burkhardt attempted to demonstrate the existence of horizontal zonation along the length of the water body. To that end, Dr. Rosen measured salinity and temperature from the headwaters of the tributary of the stream that feeds the water body all the way to the confluence of the Bumps and Centerville Rivers.

Rosen's temperature readings taken on May 2, 2007 show a consistent warming trend from the headwaters (11°C) to the mouth of the confluence of the Bumps and Centerville Rivers (14°C). His salinity readings also show that water becomes progressively saltier closer to the ocean. At the headwaters, no salt was detected; in the unnamed tributary, salt was detectable at 0.75-1.0 parts per trillion (ppt). On the upstream side of the culvert, salinity rose slightly to 2 ppt. From there seaward, salinity rose dramatically: 7.5 ppt on the downstream side of the culvert, 12 ppt at the confluence of the tributary and the Bump River, and 34 ppt at the confluence of the Bumps and Centerville Rivers.

The temperature readings do not show a horizontal gradient within the water body itself.

Only two were taken in that water body or its immediate vicinity. One reading was taken in the tributary leading to the water body, the other on the upstream side of the culvert. Rosen testified that he took no readings within the rest of the water body because he had no access to it on the day he was there. The readings in the tributary and on the upstream side of the culvert were both 13.5 degrees Celsius. So few readings are hardly determinative, but what they suggest is a water body with a uniform temperature, rather than one with a horizontal temperature gradient.

There is a salinity gradient within the water body, but it is minor, rising only one part per trillion from the unnamed tributary to the upstream side of the culvert. The evidence shows that this difference is attributable to the limited range of tidal influence in the water body. Tidal flow never reaches very far up into the water body, and hence it is to be expected that the eastern end of the water body that never experiences tides would have virtually no salt while the western end that occasionally experiences tides is very slightly salty. This minor difference in salinity between the two ends of the water body does not appear to have much to do with whether the water body is a river or a pond.

C. Tidal Influence in the Water Body

But even if salinity offers no compelling evidence of zonation, Dr. Rosen believes salinity is an important factor in understanding the nature of the water body because the presence of salt proves that the water body is influenced by the tide. That the tide enters the water body and brings salty water sufficient to allow crabs and clams to inhabit the western end of the water body shows, in Dr. Rosen's opinion, that the water body is an estuary and therefore must be a river.

There is no dispute that the tide enters the water body occasionally. And there is also no dispute either that rivers when they enter the sea are tidal – and thus salty to some degree -- or that the regulatory definition of river includes that portion of a river that is tidal. Cf. 310 CMR 10.58(2)(a)2.c.

Gaspard's engineer, Robert Perry, calculated mean high tide in this vicinity at elevation 2.0 and a tidal range of 2.5 feet. The weir elevation is 2.26 feet and, according to Perry, water

flows over the weir to a typical depth of 3.5 inches. Thus, some tides that are above mean high tide, but within the normal tidal range, enter the water body.

The extent of this tidal influence is limited, probably to little more than 100 feet into the water body, which is the length of a sandy lobe at the western end of the water body that Dr. Rosen posited was created by tidal forces. The salinity level there is not enough to support salt marsh growth, in contrast with the Bumps River where the divide between high and low salt marsh was used by Perry to calculate the elevation of mean high tide. Indeed, salinity is so low that the water in the western end of the water body is not even salty enough to be brackish.

The DEP Commissioner has expressed considerable skepticism that salinity can be used to determine where a river ends and the ocean begins. See Matter of Bornstein, Docket No. 98-168, Final Decision, 8 DEPR 85 n.1 (Mass. Dep't. of Env'tl. Prot., April 9, 2001)(salinity is highly variable in tidal rivers, which means that it “may not be a reliable indicator of riverine characteristics”) and Matter of Kamionek, Final Decision, 12 DEPR at 9 (the mixing of freshwater and saltwater in estuaries makes a distinction between a river and the ocean on the basis of salinity scientifically unsound). But that is not the question here. To the extent the Commissioner’s decisions have a bearing on the issue of whether the water body is a river or a pond, they tend to reinforce the notion that Massachusetts rivers near the ocean are salty.

But can ponds be salty as well? The regulatory definition of inland ponds describes them as bodies of “fresh water.” The Regulations mention salt ponds, which are “shallow enclosed or semi-enclosed bod[ies] of saline water that may be partially or totally restricted by barrier beach formation.” 310 CMR 10.33(2). This latter definition appears to exclude the water body here, which is neither truly saline nor immediately separated from the ocean by a barrier beach. In any event, no party argues that the water body is a salt pond.

The definition of inland pond also provides that ponds can be natural or manmade, including by impoundment. See 310 CMR 10.04. Here the estuarine portion of the unnamed tributary of the Bumps River appears to have been dammed, creating an impounded water body.

The question then is whether placing an impoundment within the estuarine portion of a stream alters the analysis of whether the impounded area has become a pond or remains a river, if the water above the impoundment is salty to any degree.

If Rosen's opinion is accepted, then so long as an impoundment is low enough to allow some salty tide water to overtop it, the water body so created cannot be a pond at all, regardless of its other characteristics, because it retains some characteristics of a riverine estuary. While the evidence does demonstrate that some portion of the water body here retains estuarine characteristics, Rosen's opinion places too much emphasis on one factor – a factor discounted here by DEP's witness James Mahala and the Conservation Commission agent Robert Gatewood. Moreover, Rosen's analysis depends heavily on dam height. If the flashboards were raised slightly higher, the tide would not enter the water body and Rosen's analysis would not apply. But reducing the minuscule amount of salt in the water body in this manner would simply make the water body a little larger without otherwise altering its essential nature.

If an impoundment did not substantially interfere with tidal flow in and out of a water body that prior to the impoundment had been considered a river, then evidence of the persistence of tidal exchange would be strong evidence that the water body remained a river. Here, however, the tide enters the water body infrequently and reaches not much more than 100 feet into a half-mile-long water body. It barely alters the salinity of the water there, so that for all intents and purpose, the water body remains fresh water. And, as shall be seen, the tide has no impact on the height to which water rises on the shore of the water body. Under these circumstances, tidal exchange does not by itself demonstrate that this water body is a river. Nor does it preclude the possibility that this body of substantially fresh water might be a pond.

D. Unidirectional Flow

The telling point in resolving this issue is whether flow exists in the water body. Rivers are characterized by downhill flow. Rivers drop in elevation over their run, causing the water in the river to flow downhill. Ponds and lakes tend to be relatively flat and have no internal current.

The identification of flow has been the key factor in resolving past disputes concerning the status of a water body. In Matter of Gilbert, Magistrate Cashin found that Mill Pond exhibits a “thread of unidirectional flow,” 12 DEPR at 21, which was enough to convince the DEP Commissioner that this water body is a river. 12 DEPR at 74. In reaching this conclusion, the Commissioner commented that “unidirectional flow ... has proven to be the most important factor” in deciding whether a water body is a river.” Id. Similarly, in Matter of Kamionek, in which I had found the flow in the relevant stretch of the West Branch of the Westport River to be entirely tidal, 11 DEPR at 249-250, the Commissioner noted that one of the witnesses who had sampled the water body for salinity had recorded a three knot current in a channel in a portion of the water body that was one-half mile wide and one-and-one-half miles from the stream that fed into the water body. The Commissioner read the tide charts as showing that the tide was slack at the time of the sampling, and therefore concluded that this swift current must have been caused by downhill riverine flow, thereby making this estuary a river. 12 DEPR at 9-10.

Here, there is no dispute that water flows into the water body at its eastern end and flows out of its at its western end. But these facts alone do not help resolve the dispute because they are equally consistent with the water body being a pond or a river. What resolves it is the absence of unidirectional flow in the center of the water body. If the water body were a river, then somewhere within it would be a flow of water from east to west.

Perry, on June 4, 2007, and Perry and Mahala, on June 6, 2007, conducted tests within the water body to determine if there was any flow. They used both oranges and colored dyes to test for flow direction. On June 4, Perry placed an orange in the water not far from the headwall where water flows over the weir. The orange did not float towards the weir; rather, it headed north, perpendicular to the presumed direction of flow. On June 6, at approximately 11:45 a.m. when the wind was from the east-northeast, Mahala placed two oranges in the center of the pond off the Gaspard property. These oranges moved in a generally westerly direction toward shore and then in the direction of the weir. Mahala and Perry next performed a dye test at the same

location. Dye, unlike the oranges, tends to sink completely. The dye dispersed to the south. At 1:15 p.m., they placed two oranges near the eastern headwaters of the water body. After 45 minutes, these oranges had moved south 30-40 feet toward the eastern shore. At 3:00 p.m., when the wind had shifted to the northwest, they tried another dye test in the middle of the water body. This time the dye drifted south and southeast.

Mahala thought that the first test with oranges he conducted might have shown a general flow tendency toward the weir. But after the conducting the remaining tests, he concluded that the direction in which the oranges floated was heavily influenced by the wind – though he had chosen oranges because they tend to float low in the water and are therefore less likely to be influenced by the wind than floating wood, for example.

But whether the wind influenced Mahala’s first test or not, it was the only test that showed any real tendency of an object in the water body to move from east to west. The remaining tests, even those conducted closest to the weir and the headwaters where directional flow might be expected to be most evident, failed to turn up any clear unidirectional flow. Movement in the water body was far more random.

The results of these tests show a lack of unidirectional flow in the water body. I conclude that the absence of this key feature of rivers demonstrates that the water body is not a river.

E. Mean Annual High Water Line

My conclusion that the water body is a pond is reinforced by the parties’ efforts to determine what the mean annual high water line of the water body would be if it were a river. The mean annual high water line of a river has importance under the regulatory scheme because it is from this line that the riverfront area is measured. See 310 CMR 10.58(2)(a)2. If the portion of the river of interest is not tidal, then water reaches its mean annual high during seasons in which rain or snow melt increase the volume of water in the river. This line can be determined by looking for “changes in [bank] slope, changes in vegetation, stain lines, ..., changes in bank materials, or bank undercuts.” 310 CMR 10.58(2)(a)2. If, on the other hand, the relevant portion

of the river is tidal, the mean annual high water line is coincident with the “mean high water line” as set forth in the regulatory section defining coastal wetland resources terms. See 310 CMR 10.58(2)(a)2.c. The mean high water line is “the arithmetic mean of the high water heights observed” over a specific 19 year period. See 310 CMR 10.23. In other words, the mean annual high water line in a tidal section of a river is determined not by how high water flows annually during periods when a high volume of water enters the river from upstream, but rather from a long-term evaluation of the height of the tide in that section of the river.

Here, Michael McGrath, working for Burkhardt, concluded that the water body is non-tidal because the tide rarely enters. He therefore attempted to determine the high water line appropriate for a non-tidal river. He concluded that the divide between the *Phragmites* and open water is the mean annual high water line.

While the Regulations state that a vegetation change can be an indicator of a mean annual high water line, that is not quite the circumstance here. The Regulations contemplate that a potentially relevant change in vegetation would be one that occurs on a river bank. See 310 CMR 10.58(2)(a)2. But there is little that can be described as a river bank along the edge of the water body where the elevation of the water body and the wetland dominated by *Phragmites* differs by only a few inches. The absence of a higher riverbank for such a large water body suggests that the water body does not behave as would a river.

Although the tide enters the water body for a short distance, an effort to determine the annual high water line using the analysis appropriate for a tidal stretch of a river leads to an even less plausible result. Perry endeavored to do this. He calculated that the mean high tide for this vicinity would be at elevation 2.0 and concluded that the edge of Gaspard’s property is not in a riverfront because it is more than 200 feet from where water would flow in the water body if the impoundment were removed and water rose only to the height of the tide. The Regulations do not, however, contemplate that a determination of the mean annual high water line will be based on such a hypothetical scenario. As it stands, the weir impounds water and the elevation of that

water is normally a few inches higher than the elevation Perry calculated as the mean high tide line. Using as the annual high water line an elevation that is consistently underwater year round makes no sense and demonstrates that viewing the water body, as it exists now, as simply a tidal river leads to results that are inconsistent with both the facts and the Regulations.

Accordingly, I conclude that the water body adjacent to Gaspard's property is a pond. Because it is not a river, it does not have a riverfront area and Gaspard need not demonstrate that his project conforms to the regulatory standards for work in a riverfront area.

Conclusion

Having found after hearing that the project need not comply with riverfront area performance standards because it has no riverfront area, I affirm the wetlands permit DEP issued to Michael Gaspard.

Notice

This decision is a recommended final decision of the Administrative Magistrate. It has been transmitted to the Commissioner for her final decision in this matter. The decision is therefore not a final decision subject to reconsideration, 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 may file a motion to renew or reargue this recommended final decision or any portion of it, and no party shall communicate with the Commissioner's office regarding the decision unless the Commissioner, in her sole discretion, directs otherwise.

James P. Rooney
Administrative Magistrate