

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

100 CAMBRIDGE STREET, BOSTON, MA 02114 617-292-5500

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

November 28, 2025

**In the Matter of
Jake Tamposi Comprehensive Land,
Holdings, LLC**

**OADR Docket No. WET-2024-033; 034
MassDEP File No. 046-0615
Milton, MA**

RECOMMENDED FINAL DECISION

The Conservation Commission for the Town of Milton (“Commission” or “MCC”) and a 10 Resident Group¹ (the “Petitioner”; collectively, “Petitioners”) timely filed appeals with the Massachusetts Department of Environmental Protection’s Office of Appeals and Dispute Resolution (“OADR”)² challenging the Superseding Order of Conditions (“SOC”) issued by the Department of Environmental Protection’s Northeast Regional Office (the “Department” or “MassDEP”).³ The Department issued the SOC to Comprehensive Land Holdings, LLC (“Applicant”) to construct a multi-family residential development consisting of eleven (11) buildings and associated infrastructure (“proposed Project”) located at 648 and 652 Canton Avenue in Milton, Massachusetts (collectively, the “Property”). The Applicant sought the SOC to

¹ The 10 Resident Group Notice of Appeal identified 20 residents of Milton as group members, as listed in Addendum No. 1.

² OADR is an independent quasi-judicial office in the Massachusetts Department of Environmental Protection (“MassDEP”) which is responsible for advising MassDEP’s Commissioner (or an alternative agency Final Decision-Maker where the Commissioner is recused) in resolving all administrative appeals of MassDEP Permit Decisions, Environmental Jurisdiction Determinations, and Enforcement Orders.

³ I consolidated these appeals pursuant to my authority as the Presiding Officer in this appeal, in accordance with the requirements of 310 CMR 1.01. Scheduling Order, November 26, 2025.

challenge the Order of Conditions denial issued by the Commission. The Petitioners contend that the SOC is in error, because the Commission’s denial identified the information lacking in the Applicant’s submittals and why that information was necessary for the Commission to issue a determination, information the Department also sought from the Applicant. The Petitioners further contend that the Department improperly failed to review stormwater components of the proposed Project originating outside of the 100-foot Buffer Zone and failed to properly enforce compliance with the applicable Municipal Separate Storm Sewer Systems (“MS4”) General Permit.

The Parties filed a Joint Statement of Stipulated Facts⁴ after which all Parties submitted Cross-Motions for Summary Decision. For the following reasons, I recommend that MassDEP’s Commissioner issue a Final Decision: (1) denying the Petitioner’s and the Commission’s Motions for Summary Decision; (2) granting the Applicant’s and MassDEP’s Motions for Summary Decision on all issues, (3) affirming the SOC, and (4) dismissing this appeal.

BACKGROUND

The Property

The Property has a total area of approximately 7.7 acres located at 648 and 652 Canton Avenue, Milton, Massachusetts. Exhibit A, Notice of Intent Package, Drainage Report, p. 2-1. The Property is currently being used as residential properties, supporting two dwellings, a separate garage, a tennis court, and two driveways. Exhibit A, Notice of Intent Package, Drainage Report, p. 2-1. A majority of the Property remains in its natural wooded state. Exhibit A, Notice of Intent Package, Drainage Report, p. 2-1. The wetland resource areas on the Property include Bordering Vegetated Wetlands (“BVW”) and Bank associated with an intermittent stream

⁴ The Exhibits referenced herein are those referenced in the Joint Statement of Facts and referenced in the Index of Appendix Materials in Support of the Parties’ Joint Statement of Stipulated Facts.

on adjacent properties; the 100-foot Buffer Zone to the BVW and Bank extends onto the Property. Statement of Facts, ¶ 3; Exhibit A, Notice of Intent Package, Drainage Report, p. 2-3. These wetland resource areas have been established by an Order of Resource Area Delineation (“ORAD”) issued by the MCC on January 9, 2020, which was effective for five years.⁵ Schomer Aff., ¶ 3; Exhibit A, Notice of Intent, Project Narrative.

The Proposed Project

The proposed Project involves the construction of an 11-building, 116-unit, multi-family residential development, including construction of 5 residential stacked-flat buildings, 36 townhouse units within 5 buildings, a clubhouse, an access road, sidewalks, 186 parking spaces, stormwater management utilities, and other related infrastructure. Joint Statement of Facts, ¶ 1. The existing conditions are accurately depicted on the NOI Site Plans. Joint Statement of Facts, ¶ 2. See Exhibit B, NOI Site Plans. A portion of the work will occur in the 100-foot Buffer Zone to BVW and Bank. Joint Statement of Facts, ¶ 3. The work that will occur within the Buffer Zone consists of clearing and grubbing of trees; the construction of a portion of Buildings 1, 3, 5, 7, and 9; the construction of a transitional slope to blend the proposed site grades to the existing topography; building adjacent sidewalks, a stormwater outfall, and a paved portion of the emergency fire access driveway (“Emergency Access Drive”) near Building 7; and the construction of a sidewalk and transition grading near Building 9. Joint Statement of Facts, ¶ 4; see Exhibit A, Notice of Intent, Project Narrative; Exhibit B, NOI Site Plans.

The stormwater management system includes four subsurface infiltration basins labeled SS-1, SS-2, SS-3, and SS-4. Joint Statement of Facts, ¶ 5; Exhibit B, NOI Site Plans. SS-1 is to

⁵ The ORAD was effective for three years by its own terms and was extended for an additional two years by St. 2024, c. 238, § 280, which extended all orders and determinations issued under G.L. c. 131 in effect between January 1, 2023, and January 1, 2025, by two years. 310 CMR 10.05(6)(a)3; 310 CMR 10.05(6)(d).

be located partially within the Buffer Zone, and discharges to the Resource Area. Joint Statement of Facts, ¶ 6; Exhibit B, Notice of Intent Site Plans, Grading and Drainage Plan, C-108. A rip-rap energy dissipator will be placed at the point of discharge. Exhibit B, Grading and Drainage Plan, C-108. SS-2, SS-3, and SS-4 are all located outside the Resource Area and Buffer Zone and connect to the Town of Milton’s Municipal Separate Storm Sewer System (“MS4 Pipe”) at a point which is also located outside the Resource Area and Buffer Zone. Joint Statement of Facts, ¶ 7; Exhibit B, Notice of Intent Site Plans, Grading and Drainage Plan, C-107 and C-108. The MS4 Pipe discharges to the Neponset River approximately 700 feet away from the connection point. Joint Statement of Facts, ¶ 8. The Town of Milton operates the MS4 Pipe pursuant to a general permit issued under the federal National Pollutant Discharge Elimination System (“NPDES”) and the Massachusetts Clean Waters Act (“MCWA”), G.L. c. 21, § 26 et seq. Joint Statement of Facts, ¶ 8.

Procedural History

The Applicant filed its initial Notice of Intent (“NOI”) for the proposed Project on February 25, 2022. Joint Statement of Facts, ¶ 1. The MCC retained the environmental engineering firm GZA GeoEnvironmental, Inc. (“GZA”) to review the NOI. Joint Statement of Facts, ¶ 9. GZA provided comments to the MCC on December 16, 2022 identifying 13 issues that needed to be addressed. Joint Statement of Facts, ¶ 9; Exhibit D, GZA review letter December 16, 2022. The Applicant responded on December 23, 2022, providing responses to each issue raised by GZA. Joint Statement of Facts, ¶ 10; Exhibit G, Response to Comments, December 23, 2022. On February 7, 2023, GZA provided its review of the Applicant’s response in which it requested additional information to address issue 6 (project site test pit data) and issue 13 (stormwater infiltration analysis and potential for mounding). Joint Statement of Facts, ¶ 15; Exhibit E, GZA review letter, February 7, 2023. The Applicant responded on March 7, 2023.

Joint Statement of Facts, ¶ 16; Exhibit C, Response letter, March 7, 2023. On March 14, 2023, GZA provided its review of the Applicant’s response in which it again concluded that additional test pit data was needed⁶ and contended that the methodologies used in the Applicant’s infiltration analysis could not sufficiently predict the potential for excessive mounding.⁷ Joint Statement of Facts, ¶ 9; Exhibit F, GZA review letter, March 14, 2023

The MCC held a public hearing on March 14, 2023, at which the Applicant declined to provide the additional test pit, monitoring well data, and additional subsurface data or modeling and requested that the public hearing be closed. Joint Statement of Facts, ¶¶ 13, 17. On April 4, 2023, the MCC issued an OOC denying the proposed Project for insufficient information. Joint Statement of Facts, ¶ 18, Exhibit H, OOC denial.

The OOC stated that the information provided by the Applicant was not sufficient to describe the site, the work, or the effect of the work on the interests identified in the MWPA on the following topics:

- (1) the complexity of the site, including the proposed elevation changes requiring the introduction of nearly 52,000 cubic yards of fill over approximately 5 acres;
- (2) the methodology utilized to predict the volume of water being collected and discharged from the drainage and recharge systems;
- (3) the on and offsite impact of storm water both on and off of the subject property;
- (4) the site soil’s conductivity and permeability analyses;
- (5) the need for hydraulic conductivity tests;
- (6) the need for additional test pits and monitoring wells in the vicinity of the proposed subsurface infiltration system to ensure the accuracy of the estimated seasonal high groundwater table;
- (7) the need for site specific data to support the mounding analysis, including lack of scientific support to confirm the efficacy of the Hantush modeling design and the need for additional site specific data to support a three dimensional mounding analysis;
- (8) the efficacy of utilizing a three dimensional numerical modelling system – utilizing site specific

⁶ Response to Comment 6 “e), GZA recommends that the Applicant obtain additional test pit information, specifically test pits excavated within the footprint of the proposed subsurface infiltration systems, to better define the estimated seasonal high groundwater table.”

⁷ Response to Comment 13, “It is GZA’s opinion that the methodologies used can not sufficiently predict the potential for excessive mounding, given the limited depth-to-groundwater information and the complexity and size of the proposed infiltration gallery system.”

data – to better predict mounding of groundwater both at the project and offsite;
(9) the extent, scope and bases for the mounding analysis.

Exhibit H, OOC denial. Further, to support its finding of insufficient information, the OOC states that the MCC considered the strong recommendations of its hydrology consultant, GZA, and referenced the GZA letters that requested specific additional scientific data, some of which, as noted above, the Applicant did not provide.

The Applicant filed a request for an SOC with MassDEP on April 18, 2023. Joint Statement of Facts, ¶ 19; Exhibit I. Tyler Ferrick, the MassDEP analyst assigned to review the SOC request, initially reviewed only the information submitted to the MCC. Ferrick Aff., ¶ 8.⁸ He also reviewed the OOC, which he concluded did not specify the documents or plans that were reviewed and relied upon by the MCC in making its decision. Ferrick Aff., ¶ 9. Mr. Ferrick listened to the recording of the June 28, 2022 MCC public hearing, from which he determined that the MCC intended to access the materials prepared by the Applicant’s consultant, Tetra Tech, for the Milton Zoning Board of Appeal’s review of the Applicant’s comprehensive permit under 40B. Ferrick Aff., ¶ 11. Neither the recording nor the ZBA peer review is included in the joint exhibits filed by the Parties. Mr. Ferrick reviewed the OOC under MassDEP’s Wetlands Program Policy 08-1: Lack of Information Necessary for Conservation Commission Decisions (“Insufficient Information Policy”),⁹ which explains how MassDEP will review requests for and

⁸ These documents included the following Exhibits: Exhibit A, NOI Application; Exhibit B, NOI Site Plans; Exhibit C, Applicant response letter 03-07-2023; Exhibit D, GZA review letter, 12-16-2022; Exhibit G, Applicant response letter, 12-23-2022; Exhibit E, GZA review letter, 02-07-2023; and Exhibit F, GZA review letter, 3-14-2023. See Ferrick Aff., ¶ 8.

⁹ <https://www.mass.gov/info-details/wetlands-program-policy-08-1-lack-of-information-necessary-for-conservation-commission-decisions>.

issuance of an SOC when a commission has denied an OOC due to insufficient information.

Ferrick Aff., ¶ 14.¹⁰

Mr. Ferrick determined that the OOC failed to describe the purportedly lacking information that was necessary to determine if the proposed Project's stormwater management system complies with the MWPA and the Stormwater Standards at 310 CMR 10.05(6)(k). Ferrick Aff., ¶ 15. Mr. Ferrick concluded that the majority of the information requested by the MCC was related to stormwater structures located outside of MWPA jurisdiction, but that the issuing authority can review the "point of discharge" when it is located within a jurisdictional area to determine if the stormwater standards are met. Ferrick Aff., ¶ 16. Mr. Ferrick determined that only the discharge of SS-1, located near the "Emergency Access Drive," was within jurisdiction because the remaining stormwater would be discharged to the MS4 Pipe. Ferrick Aff., ¶ 16.

On September 13, 2023, MassDEP issued an Information Request Letter ("Information Request") stating that review of stormwater structures in non-jurisdictional areas is appropriate where the "point of discharge" is within a jurisdictional area to determine whether the Stormwater Standards have been met. The Information Request stated that following its review of the records MassDEP concluded that the OOC did not qualify as a denial for insufficient information, and that therefore MassDEP would review the proposed Project on the merits and was requesting additional information from the Applicant. Joint Statement of Facts, ¶¶ 20-21; Exhibit J, MassDEP Information Request letter, September 13, 2023; Ferrick Aff., ¶¶ 15-18. Specifically, MassDEP requested information related to the proposed Emergency Access Drive

¹⁰ Agencies are bound to follow their own internal policies although such policies do not have the equivalent force of law as a statute or regulation. See Fairhaven Housing Auth. v. Commonwealth, 493 Mass. 27, 33 n.14 (2023)(agency guidelines not required to go through notice and comment, where guidelines affect only the internal management or discipline of the agency or entities subject to its supervision, and did not purport to directly regulate public conduct); In the Matter of John and Margaret Reichenbach, OADR Docket No. WET-2011-012, Recommended Final Decision (October 20, 2011), 2011 WL 6019099, *8 n.10, adopted as Final Decision (November 2, 2011), 2011 WL 6019098, citing Macioci v. Commissioner of Revenue, 386 Mass. 752, 763 (1982).

stormwater treatment train, identified as the SS-1, which would require revision because it did not meet Stormwater Standard 4 for Total Suspended Solids (“TSS”) removal. The Applicant responded on September 19, 2023, and provided a supplemental response on January 2, 2024. Joint Statement of Facts, ¶ 22; Exhibits K and L. On February 22, 2024, the Department issued a second Information Request that sought additional information regarding SS-1, concluding that it did not meet Stormwater Standard 2, and directing the Applicant to propose an alternative system or supplement the existing proposal to meet Stormwater Standard 2. The Applicant responded on March 14, 2024. Joint Statement of Facts, ¶¶ 24-25, Exhibits N and O. MassDEP issued a third Information Request on June 7, 2024, to which the Applicant responded on June 19, 2024. Joint Statement of Facts, ¶¶ 27-28; Exhibits Q and R. Mr. Ferrick concluded that the specific information he requested related to project elements within jurisdiction that he determined were not encompassed by the MCC’s review requests, which he described as broad and vague and related to non-jurisdictional elements of the proposed Project. Ferrick Aff., ¶¶ 21-22.

On October 5, 2024, MassDEP issued an SOC overturning the OOC and approving the proposed Project. Joint Statement of Facts, ¶ 29; Exhibit S. The Petitioner filed this appeal on November 20, 2024. Joint Statement of Facts, ¶ 29. On December 31, 2024, the Parties filed a Joint Status Report indicating that they were engaging in settlement discussions, and I granted the first of two stays to allow their discussions to continue. On March 24, 2025, the Parties filed a Joint Status Report indicating that they wished to proceed with the appeal and proposing three Issues for Adjudication as follows:

1. Whether the Department as a matter of law properly concluded in its November 5, 2024 Superseding Order of Conditions (“SOC”) that the Milton Conservation Commission (“MCC”)’s denial “does not qualify as a ‘lack of information denial’” within the meaning of 310 CMR 10.05(6)(c) because “the majority of information requested by the MCC [was] related to activities outside the jurisdiction of the Act”, even though, among other reasons, certain Project

components ultimately discharge into the municipal storm sewer in Canton Avenue.

2. Whether as a matter of law, the Department properly exercised its authority under 310 CMR 10.05(7)(h) in reaching the merits of the Applicant's request for a SOC notwithstanding the MCC's lack of information denial pursuant to 310 CMR 10.05(6)(c) related to portions of the Project's stormwater management system that discharge to a buffer zone to a wetlands resource area, and other regulations and requirements.
3. Whether as a matter of law, the Department properly applied the Department's Wetlands Program Policy 91-1 (Plan Changes) in considering a plan change submitted by the Applicant in the course of its request for a SOC rather than remanding the matter back to the MCC for further consideration.

The Joint Status Report also indicated that the Parties wished to resolve the appeal via cross-motions for summary decision. I held a Status Conference on March 26, 2025, after which I adopted the Parties' proposed Issues for Adjudication and schedule for filing Motions or Summary Decision. The Parties filed the Joint Statement of Facts and list of exhibits on April 18, 2025. On May 23, 2025, the Applicant filed its Motion for Summary Decision and the Affidavit of Philip Cordeiro. On June 6, 2025, MassDEP filed its Motion for Summary Decision and the Affidavit of Tyler Ferrick. On June 20, 2025, the Petitioner filed its Motion for Summary Decision and the Affidavit of John Chessia and the MCC filed its Motion for Summary Decision and the Affidavit of Marina Fernandes. On July 3, 2025, the Applicant filed a reply to the Petitioner's and the MCC's Motions for Summary Decision and the Affidavit of Jesse Schomer.

LEGAL FRAMEWORK

The MWPA

The MWPA and the Wetlands Regulations have as their purpose the protection of wetlands and the regulation of activities affecting wetlands areas in a manner that promotes the following interests: (1) protection of public and private water supply; (2) protection of ground water supply; (3) flood control; (4) storm damage prevention; (5) prevention of pollution; (6)

protection of land containing shellfish; (7) protection of fisheries; and (8) protection of wildlife habitat. G.L. c. 131, § 40; 310 CMR 10.01(2); see In the Matter of Kristen Kazokas, OADR Docket No. WET-2017-022, Recommended Final Decision (August 29, 2018), 2018 WL 9847851, *3, adopted by Final Decision (September 18, 2019), 2019 WL 5209254, citing Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 224 (2010).

Some wetlands resource areas protected by the MWPA and the Wetlands Regulations, including BVW, have a Buffer Zone that is defined as an area of land extending 100 feet horizontally outward from the resource area boundary.¹¹ The Wetlands Regulations address work “which, in the judgment of the issuing authority, will alter wetlands resource areas and requires the filing of a Notice of Intent.” In the Matter of Diane Mercadante, OADR Docket No. WET-2009-029, Recommended Final Decision (November 12, 2009), 2009 WL 5698021, *5, adopted as Final Decision (November 23, 2009), 2009 WL 5865650. As a result, the Buffer Zone may generally be altered if it will not alter a Resource Area, as determined by the issuing authority.¹⁷ Work in the Buffer Zone does not invoke the performance standards applicable to adjacent resource areas as a matter of law. See In the Matter of Burley Street, LLC, OADR Docket No. 2005-228, Final Decision (October 17, 2008), 2008 WL 5071124, *4. An activity occurring outside of any resource area or Buffer Zone “is not subject to regulation under” the MWPA “unless and until that activity actually alters an Area Subject to Protection under M.G.L. c. 131, § 40.” 310 CMR 10.02(2)(d).

Stormwater runoff from projects occurring in resource areas or the Buffer Zone is regulated by the stormwater regulations located at 310 CMR 10.05(6)(k)-(q). 310 CMR 10.05(6)(k) provides in relevant part: “[e]xcept as expressly provided, stormwater runoff from all

¹¹ See 310 CMR 10.02(2)(a); 310 CMR 10.02(2)(b)3; 310 CMR 10.03(1)(a).

industrial, commercial, institutional, office, residential and transportation projects that are subject to regulation under M.G.L. c. 131, § 40 including site preparation, construction, and redevelopment and all point source stormwater discharges from said projects within an Area Subject to Protection under M.G.L. c. 131, § 40 or within the Buffer Zone shall be provided with stormwater best management practices to attenuate pollutants and to provide a setback from the receiving waters and wetlands” in accordance with the ten Stormwater Management Standards located at 310 CMR 10.05(6)(k)1-10 (“Stormwater Standards”) as further defined and specified in the Massachusetts Stormwater Handbook (“Stormwater Handbook”). In the Matter of Ronald and Lis Enos, and Eighteen Burgess Point Realty Trust, OADR Docket No. WET 2012-019, Recommended Final Decision (February 22, 2013), 2013 WL 1702133, *12, adopted as Final Decision (March 22, 2013), 2013 WL 1702130.

Insufficient Information

The Wetlands Regulations provide that, “[i]f the conservation commission finds that the information submitted by the applicant is not sufficient to describe the site, the work or the effect of the work on the interests identified in M.G.L. c. 131, § 40, it may issue an Order prohibiting the work. The Order shall specify the information which is lacking and why it is necessary.” 310 CMR 10.05(6)(c).

When an Order of Conditions denying a project pursuant to 310 CMR 10.05(6)(c) is due to the purported failure to submit “sufficient information to the commission” the Department’s review is limited by 310 CMR 10.05(7)(h) “[to] review [of] information [that the project proponent] submitted to the conservation commission,” and must affirm the commission’s denial if it determines that the project proponent submitted insufficient information to the commission. 310 CMR 10.05(7)(h). The Wetlands Regulation goes on to provide that, “[i]f the Department determines that sufficient information was submitted, it shall so inform the applicant and the

conservation commission, and shall proceed to issue a Superseding Order as provided in 310 CMR 10.05.” 310 CMR 10.05(7)(h); see also In the Matter of Brian Corey, OADR Docket No. WET 2016-023, Recommended Final Decision (February 28, 2018), 2018 WL 2002973, *16, 43-48, adopted as Final Decision (March 15, 2018), 2018 WL 2002972.

An OOC denying a proposed Project for insufficient information must satisfy the requirements of 310 CMR 10.05(6)(c) by including in the OOC a written description of the information that was purportedly lacking in the NOI and why that information was necessary to determine whether the project could be authorized pursuant to the MPWA and the Wetlands Regulations. See 310 CMR 10.05(6)(c); see also Corey, *45. “The use of [a denial for insufficient information] rather than [a denial on the merits] determines both the scope of project review and the remedy available in an adjudicatory appeal. The distinction is therefore important. Accordingly, information which, in the opinion of the issuing authority, would not support the issuance of an Order of Conditions—and on the basis of which a project should be denied—must be distinguished from a lack of sufficient information as the term is used in 310 CMR 10.05(7)(h). A denial based on what is perceived to be inaccurate information cannot be substituted for a denial based on the applicant’s failure to provide sufficient information for the Department to make any determination at all.” In the Matter of Zora Enterprises, Docket No. 90-206, Final Decision (October 14, 1994), 1994 WL 761987, *3.

In its review of a denial for insufficient information, MassDEP follows its internal guidance for departmental staff review of such orders.¹² In evaluating whether such a denial is reasonable under the MWPA, MassDEP “looks for documentation by the commission that identifies the “information which is lacking and why it is necessary in accordance with the

¹² See n. 9,10. Ferrick Aff., ¶ 14.

requirements of 310 CRM 10.05(6)(c)” and in the interest of fairness to the applicant encourages commissions to coordinate with other town agencies reviewing the project. Ferrick Aff., ¶ 14. The Insufficient Information Policy directs the Department’s review of such denials to assess the adequacy of the proponent’s submission to the commission, the degree to which the application involves technical and complex questions, the need for an outside consultant to address those questions, the capability of a typical commission to meaningfully review the submissions and other pertinent factors. Id.

Summary Decision Standard of Review

A motion for summary decision in an administrative appeal is akin to motion for summary judgment made in court in a civil suit that “is . . . designed to avoid needless [evidentiary] adjudicatory hearings” in administrative appeals. In the Matter of Michael Gleason, OADR Docket No. WET-2017-019, Recommended Final Decision (December 4, 2019), 2019 WL 8883856, *5, adopted as Final Decision (January 7, 2020), 2020 WL 2616480; Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, 9 Mass. App. Ct. 775, 785-86 (1980). Summary decision is appropriate where the party seeking summary decision can “show that there is no genuine issue of material fact and that the party is entitled to a final decision as a matter of law.” 310 CMR 1.01(11)(f). “A party opposing the motion may not rest upon the mere allegations or denials of said party’s pleadings, but must respond by affidavits or as otherwise provide in 310 CMR 1.01 . . . setting forth specific facts showing there is a genuine issue for hearing on the merits.” Id. See also In the Matter of David Kindred c/o The Morin Cameron Group, 66 Elm Street, Danvers, MA 01923, OADR Docket No. WET-2022-023, Recommended Final Decision (September 1, 2023), 2023 WL 11228778, *3, adopted as Final Decision (April 2, 2024), 2024 WL 1915684.

DISCUSSION

I. Whether the Department as a matter of law properly concluded in its November 5, 2024 SOC that the MCC’s denial “does not qualify as a ‘lack of information denial’” within the meaning of 310 CMR 10.05(6)(c) because “the majority of information requested by the MCC [was] related to activities outside the jurisdiction of the Act,” even though, among other reasons, certain Project components ultimately discharge into the municipal storm sewer in Canton Avenue.

a. The point of discharge is the MS4 Pipe connection.

Issue 1 involves the extent, if any, to which SS-2, SS-3, and SS-4 fall within the jurisdiction of the MWPA. Central to this dispute is the location of the point of analysis for their discharges. It is undisputed that SS-2, SS-3, and SS-4 are located outside of any resource area and the Buffer Zone; that SS-2, SS-3, and SS-4 discharge to the MS4 Pipe at a point outside of any resource area and the Buffer Zone; and that the MS4 Pipe discharges to the Neponset River, a resource area, at a point 700 feet away from the aforementioned connection point. The Petitioners argue that the appropriate point of analysis is the point at which the MS4 Pipe discharges to the Neponset River, while the Applicant and MassDEP argue that the appropriate point of analysis is the point at which SS-2, SS-3, and SS-4 connect to the MS4 Pipe.

This question was addressed in In the Matter of Swansea Residents Group, OADR Docket No. WET-2009-056, Recommended Final Decision (March 10, 2010), 2010 WL 1782303, adopted as Final Decision (April 9, 2010), 2010 WL 1782302. In that case, the applicant intended to perform work on the stormwater management system at a mall. All the work would take place outside of any resource area and the Buffer Zone, but the stormwater management system would connect to existing pipes that discharged into a resource area. This decision held that the only “activities” that could be attributed to the applicant for purposes of 310 CMR 10.02(2) were the changes being made to the stormwater management system outside of the resource areas and the Buffer Zone, as “[a]ny work or ‘activities’ to install any portion of

the stormwater conveyance system within the buffer zone or resource areas was completed when the Swansea Mall was built in the 1970s” and “the discharge of the additional stormwater within a buffer zone or resource area cannot extend the reach of the geographic limitation set by the regulations.” Accordingly, the applicant could only be subject to wetlands jurisdiction under 310 CMR 10.02(2)(d), which states that an activity outside any resource area and the Buffer Zone “does not require the filing of a Notice of Intent unless and until that activity actually alters” a resource area. Consistent with this application of jurisdiction, the Stormwater Handbook includes “Regulatory Requirements After the Fact,” which provides: “Issuing authorities also have authority to regulate activities outside Wetlands jurisdiction, when additional stormwater is routed through an existing outfall pipe *and results in an alteration of a wetland resource area.*” Stormwater Handbook, Vol. 1, Ch. 2, p. 5 (emphasis supplied).¹³

The present case is comparable to Swansea Residents Group. The Applicant is seeking to construct a stormwater management system that will connect to an existing pipe. The only activities that can be attributed to the Applicant are the installations of SS-2, SS-3, and SS-4, and the fact that the stormwater which passes through them will flow to and through the existing pipe. That the stormwater will eventually reach a resource area does not “extend the reach of the geographic limitation set by the regulations.” Accordingly, the appropriate point of analysis is the point at which SS-2, SS-3, and SS-4 connect to the MS4 Pipe. This point is not within any resource area or the Buffer Zone. Therefore, contrary to the Petitioners’ position relative to this connection, the Applicant can only be subject to “after-the-fact” jurisdiction, which does not

¹³ The Stormwater Handbook additionally states in the following, “Project proponents and municipal officials should work together to ensure adequate pretreatment prior to discharge to the municipal storm drain system.” Stormwater Handbook, Vol. 1, Ch. 1, p. 5. This statement is a recommendation not a requirement, and it does not grant jurisdiction over project components located outside of any resource area and the Buffer Zone.

apply unless and until the Applicant's activities actually alter a resource area, consistent with 310 CMR 10.02(2)(d) and the Stormwater Handbook.

There are other pragmatic reasons why the point of analysis should be the point at which SS-2, SS-3, and SS-4 connect to the MS4 Pipe. If the point of analysis were the point at which the MS4 Pipe discharges to the Neponset River, the Applicant would effectively be responsible for ensuring that all storm water discharged from the MS4 Pipe meets the Stormwater Standards despite the fact that the Applicant has no control over the MS4 Pipe or the other stormwater sources that flow through the MS4 Pipe. This result would be illogical and cannot be the intention of the MWPA and the Wetlands Regulations. See Commonwealth v. Yasir Y., 494 Mass. 432, 441-42 (2024) ("our respect for the Legislature's considered judgment dictates that we interpret the statute[s] to be sensible, rejecting unreasonable interpretations unless the clear meaning of the language requires such an interpretation"). Accordingly, the appropriate point of analysis is the point at which the stormwater exits the Applicant's stormwater management system, which here is the point at which SS-2, SS-3, and SS-4 connect to the MS4 Pipe.

Additionally, analyzing the stormwater being discharged from the MS4 Pipe for compliance with the Stormwater Standards would be inconsistent with the dual regulatory scheme under the MCWA. G.L. c. 21, § 43, provides:

No person shall discharge pollutants into waters of the commonwealth nor construct, install, modify, operate or maintain an outlet for such discharge or any treatment works, without a currently valid permit issued by the director. No person shall engage in any other activity that may reasonably be expected to result, directly or indirectly, in discharge of pollutants into waters of the commonwealth, nor construct, effect, maintain, modify or use any sewer extension or connection, without a currently valid permit issued by the director, unless exempted by regulation of the director.

The implementing regulation at 314 CMR 3.04(1) expands:

No person shall engage in any other activity, other than those described in 314 CMR 3.03, which may reasonably result, directly or indirectly, in the discharge of

pollutants into waters of the Commonwealth, without a currently valid permit from the Department, pursuant to 314 CMR 3.00 and 2.00, unless exempted in 314 CMR 3.05. Any person who engages or proposes to engage in such activities may apply for an individual permit or, if applicable, apply to obtain coverage under a general permit under 314 CMR 3.06, by filing the appropriate application forms in accordance with 314 CMR 3.00 and 2.00.

In this case, the Applicant will apply for coverage under the MS4 Permit, which is a general permit. Finally, 310 CMR 10.03(4) provides:

If the Department has issued a permit pursuant to M.G.L. c. 21, § 43, in conjunction with a federal NPDES (National Pollutant Discharge Elimination System) permit for any new point-source discharge of pollutants, or will issue such a permit, prior to commencement of the discharge, the effluent limitations established in the permit shall be presumed to protect the eight interests identified in M.G.L. c. 131, § 40 with respect to the effects of the discharge on water quality. . . . This presumption may be overcome only by credible evidence from a competent source that said effluent limitations will not protect the interests identified in M.G.L. c. 131, § 40.

Under this process, MassDEP will determine whether the stormwater discharges from the Property into the MS4 Pipe comply with the MS4 Permit. If so, those discharges are presumed to comply with the MWPA as well.

b. The MS4 Pipe is not identified as a stream on the ORAD.

Alternatively, the Petitioners argue that the MS4 Pipe is itself a stream, which they refer to as Merjwood Stream, with associated resource areas. Therefore, they contend, SS-2, SS-3, and SS-4 all discharge directly into a resource area. This argument must fail because the ORAD issued by the MCC on January 9, 2020, is binding as to the location of resource areas identified by the proponent. 310 CMR 10.05(6)(a)3. The plan associated with the ORAD does not designate the MS4 Pipe as a stream and does not indicate any resource areas in the vicinity of the MS4 Pipe. Schomer Aff., Exhibit 2.¹⁴ The ORAD was not appealed and remained in effect at the

¹⁴ The Petitioners contend that the pipe is in fact the convergence of two streams and that streams need not be natural, citing In the Matter of Harry F. Papp, Requestor, OADR Docket No. 2005-066, Recommended Final Decision (November 8, 2005), 2005 WL 4124604, *10 (“[t]he Wetlands Protection Regulations do not define ‘stream’ relative to whether it is natural or manmade, and do not define a bordering vegetated wetland based upon

time the NOI was filed.¹⁵ The Applicant is entitled to rely on its determinative effect with respect to the resource areas on the Property and the Petitioners cannot, through this SOC appeal, contend that there are additional resource areas not depicted on the ORAD.¹⁶

c. The MWPA does not employ the County of Maui approach to discharges.

Finally, the Petitioners compare this case to County of Maui v. Hawaii Wildlife Fund, 590 U.S. 165 (2020). In that case, the Supreme Court considered whether a discharge of pollutants from a point source which is conveyed to a navigable water via a nonpoint source fell within the federal Clean Water Act’s prohibition on the addition of pollutants from a point source to navigable waters. The Supreme Court rejected an interpretation that would bring a discharge into any amount of groundwater before reaching a navigable water outside the scope of regulation, as such an approach “would risk serious interference with EPA’s ability to regulate ordinary point source discharges.” The Supreme Court also rejected an approach that would bring any discharge into a navigable water that was “fairly traceable” to a point source within the scope of regulation, as that would give the EPA more authority over groundwater than the Clean Water Act intended. The Supreme Court settled on an interpretation that would regulate “functional equivalents of a direct discharge,” and laid out seven factors to consider in determining whether there is the functional equivalent of a direct discharge. The Petitioners contend that in applying the Wetlands Regulations, the public purpose of the MWPA and the Stormwater Standards should be considered in the same manner as in County of Maui. In doing so, the Petitioners conclude that

whether it borders on a natural or manmade stream”). While they are correct that a stream does not need to be natural, the MS4 Pipe is not designated as a stream by the ORAD.

¹⁵ See *supra*, p. 3 n.5.

¹⁶ In the Matter of John Hasenjaeger, OADR Docket No. WET 2021-024, Recommended Final Decision (January 27, 2022), *2, adopted as Final Decision (January 28, 2022), 2022 WL 2389053 (ORADs are generally entitled to preclusive effect for a period of three years, or longer if they are extended, and cannot be challenged in an appeal of an SOC).

the point source discharge language in the regulations is not intended to limit jurisdiction of stormwater management systems at the connection point if the stormwater is purposely channeled through the pipe to be discharged in a resource area.

While the County of Maui approach makes sense for the federal Clean Water Act, it is expressly rejected in the Stormwater Handbook for implementation of the MWPA: “[A] conservation commission or MassDEP does not have jurisdiction over a stormwater discharge pipe located 105 feet from a bordering vegetated wetland or 205 feet from a perennial stream.” Stormwater Handbook, Vol. 1, Ch. 2, p. 5. Any perceived loophole created by this provision is closed with the Wetlands Regulations provision at 310 CMR 10.02(2)(d), which provides that work outside jurisdiction is not regulated unless and until it impacts a resource area. The Stormwater Handbook notes that becoming subject to after-the-fact jurisdiction may be more costly for developers than designing a project to comply with the Stormwater Standards even when not required, so “a prudent developer should be proactive and implement stormwater management practices to prevent any unauthorized wetland alterations.” The concern in County of Maui that discharges of pollutants could go unregulated is even less relevant in this particular case, as the stormwater discharged from SS-2, SS-3, and SS-4 will enter the MS4 Pipe, which is strictly regulated.

SS-2, SS-3, and SS-4 are all located entirely outside of any wetland resource area and the Buffer Zone, and the point of analysis for the stormwater they discharge is also located outside of any wetland resource area or Buffer Zone. Accordingly, SS-2, SS-3, and SS-4 do not fall within the jurisdiction of the MWPA, and so information pertaining to them was not necessary to determine whether the proposed Project complies with the MWPA.

II. Whether as a matter of law, the Department properly exercised its authority under 310 CMR 10.05(7)(h) in reaching the merits of the Applicant’s request for an SOC notwithstanding the MCC’s lack of information denial pursuant to 310 CMR

10.05(6)(c) related to portions of the Project's stormwater management system that discharge to a buffer zone to a wetlands resource area, and other regulations and requirements.

Issue 2 effectively asks whether the MCC's denial for insufficient information was proper with respect to SS-1, the only portion of the proposed stormwater management system that would discharge into a wetlands resource area or Buffer Zone. When a conservation commission denies a project for insufficient information, MassDEP may only reach the merits of a request for an SOC if it determines that the project proponent did provide sufficient information to the conservation commission for it to make a determination approving or denying a project. 310 CMR 10.05(7)(h); Brian Corey, 2018 WL 2002973, *15.

a. Jurisdiction over SS-1

The Parties dispute the extent, if any, to which SS-1 falls within the jurisdiction of the MWPA. SS-1 is an infiltration and detention basin located entirely outside of wetland resource areas and the Buffer Zone. However, it is undisputed that its outlet pipe discharges into the Buffer Zone. Joint Statements of Facts, ¶ 6; Cordeiro Aff., ¶ 10; Ferrick Aff., ¶ 16. The Stormwater Handbook discusses the extent of jurisdiction over such a structure:

In some cases, a stormwater discharge to Wetland Resource Areas may originate outside any Wetland Resource Area and outside the Buffer Zone. Consistent with 310 CMR 10.05(6)(b)(1), local conservation commissions and MassDEP have the authority to impose conditions on the quality and quantity of the discharge even though it comes from a source that is located outside wetlands jurisdiction. In light of this authority, the Final Order of Conditions should require that the stormwater be managed so that when the stormwater is discharged within the Wetland Resource Area or Buffer Zone, it complies with the Stormwater Management Standards. Moreover, the Final Order of Conditions should include this requirement, even if the project proponent has to install additional stormwater BMPs in an area outside Wetlands jurisdiction.

For example, a developer proposes to locate an overflow discharge pipe within the Buffer Zone from an extended dry detention basin that is installed outside the Buffer Zone. Although the issuing authority cannot regulate the extended dry detention basin, the Final Order of Conditions should require that the Stormwater Management Standards be met at the point of discharge, since the overflow pipe is

located within jurisdiction. To ensure that the discharge can meet this requirement, the developer should design the extended dry detention basin in accordance with the specifications and procedures set forth in Volumes 2 and 3 of the Stormwater Management Handbook, and the issuing authority should request information about the design of the extended dry detention basin during the permitting process.

Stormwater Handbook, Vol. 1, Ch. 2, p. 4.

The Petitioners contend that this section indicates that the issuing authority does have jurisdiction under the MWPA over structures located outside wetland resource areas and the Buffer Zone if they discharge into wetland resource areas or the Buffer Zone. As such, they assert that the Applicant's failure to provide information regarding the stormwater structures located outside of the Buffer Zone and wetland resource area supports the MCC's denial for insufficient information. The Applicant and MassDEP contend that this section indicates that the issuing authority has jurisdiction only to impose conditions on the quality and quantity of the discharge to ensure that the discharge would comply with the Stormwater Management Standards. MassDEP contends that it asked for information about SS-1 to ensure compliance with the stormwater management standards because the discharge is proposed to the Buffer Zone. MassDEP and Applicant contend that it was not necessary for the Applicant to provide additional information requested by the Commission regarding the stormwater structure itself, located outside of MPWA jurisdiction.

In giving the example of an extended dry detention basin, the Stormwater Handbook clearly states that "the issuing authority cannot regulate the extended dry detention basin." As for the extent of jurisdiction, the Handbook uses the phrase "quality and quantity of the discharge." The phrase "quality and quantity" is used (albeit in reverse order) in 310 CMR 10.05(6)(b), which states, "The Order shall impose conditions setting limits on the quantity and quality of discharge from a point source . . . when said limits are necessary to protect the interests identified in M.G.L. c. 131, § 40; provided, however, that the point of discharge falls within an Area

Subject to Protection under M.G.L. c. 131, § 40 or within the Buffer Zone” This language has generally been interpreted as being synonymous with the Stormwater Standards.¹⁷ Thus, a reasonable reading of the Handbook is that the issuing authority has jurisdiction to ensure that the discharge complies with the Stormwater Standards.

To that end, the issuing authority may request information about stormwater management structures located outside of wetland resource areas and the Buffer Zone to the extent that such information is necessary to determine whether the discharge will comply with the Stormwater Standards. An applicant is required to provide information about the structure that is directly relevant to determining whether the discharge into the wetland resource area or Buffer Zone complies with the Stormwater Standards. However, this circumstance does not authorize the issuing authority to impose conditions on the structure itself, located outside of jurisdiction. The issuing authority can and should request information to determine whether the discharge meets the Stormwater Standards and approve or deny accordingly.

b. Validity of Denial for Insufficient Information

To determine if the MCC’s denial for insufficient information was valid, I examine each ground the MCC provided for its denial and determine whether it (1) satisfies the requirement in 310 CMR 10.05(6)(c) that it “shall specify the information which is lacking and why it is necessary,” (2) specifies information that the Applicant actually had not provided to the MCC, and (3) specifies information that is directly relevant to determining whether the discharge from

¹⁷ See In the Matter of Scott Nielsen and the Levi-Nielsen Company, Inc., Docket No. WET-2008-046, Recommended Final Decision (April 12, 2010), 2010 WL 2209457, *6, adopted as Final Decision (May 11, 2010), 2010 WL 2209456 (“When the source of the alleged alteration is a point discharge in the Buffer Zone, the wetlands regulations require that wetland permits ‘impose conditions setting limits on the quantity and quality of discharge from a point source . . . when said limits are necessary to protect the interests [of the Act]; provided, however, that the point of discharge falls within [a resource area] or the buffer zone’ When the point source results from a stormwater system, MassDEP’s Stormwater Policy and Standards are applicable.”); Stormwater Handbook, Vol. 1, Ch. 1, p. 1 (“[t]he Stormwater Management Standards address water quality (pollutants) and water quantity (flooding, low base flow and recharge)”).

SS-1 into the Buffer Zone complies with the Stormwater Standards.¹⁸ Information sought beyond this scope is patently unreasonable and places an undue burden on the applicant to expend time and resources unnecessarily.

The OOC listed nine topics it deemed insufficiently addressed, which the OOC states were discussed at the March 14, 2023 public hearing and on which the Applicant declined to provide the additional information requested for each topic.¹⁹ The OOC also states that the specific additional scientific data the Commission requested was expressly identified in the GZA review letters of December 16, 2022, February 7, 2023, and March 14, 2023.

The first GZA review letter (Exhibit D) identified thirteen specific comments and requested additional information to address each comment. After the Applicant's first response, the second review letter confirmed that the Applicant had addressed all except two comments. Cordeiro Aff., ¶ 15. GZA comment 6 relates to the grade and subsurface infiltration basins and GZA comment 13 relate to volume of stormwater to be infiltrated potential groundwater mounding Ex. D. the Applicant's response to comments was followed by modified comments in the following GZA review letters (Exhibits E and F) which requested additional information related to soil characteristics, test pits, and the groundwater mounding analysis of the subsurface infiltration systems.

The OOC does not specifically list the documents the MCC reviewed but states that “[a]ll reports from the Applicant, the Neighborhood Opponents and the MCC consultant were made part of the public record” and that “[t]he reports from all interested parties became part of the

¹⁸ See Exhibit H, OOC Denial, pp. 5-6.

¹⁹ The OOC includes two #3's, so while the numbering only goes up to #8, there are actually 9 topics listed.

public record and are incorporated by reference herein.” Mr. Ferrick’s affidavit states his review included listening to the recording of the March 14, 2025 public hearing at which the Applicant’s submittals to the ZBA were discussed, that the submittals were available to the MCC and that it was clear that the MCC intended to review these materials. Ferrick Aff., ¶ 11. He stated that as a result he included those documents in his review of the materials before the Commission, although, as noted, they are not in the record. Id. Mr. Ferrick’s affidavit states that he determined that (1) sufficient information was provided that described the site, the proposed work and the effect of the work on the interests of the MWPA; and (2) the denial failed to describe why the purportedly lacking information was necessary to determine if the proposed Project’s stormwater management system complies with the Wetland Regulations. Ferrick Aff. ¶ 15.

Mr. Ferrick stated that the majority of the information requested by the Commission related to the underground infiltration structures located beyond the 100-foot Buffer Zone to BVW and Bank and therefore are not subject to MWPA and Wetlands Regulations jurisdiction. Ferrick Aff., ¶ 16. Mr. Ferrick’s affidavit states that the Commission can review the point of discharge of such systems when located within jurisdictional area to determine if stormwater has been met and noted that the only such discharge is identified as SS1. Id. He also concluded the SS-1 discharge was not de minimis and therefore did not meet Stormwater Standard 4 and requested changes. Ferrick Aff., ¶ 23, Ex. J.

The topics listed in the OOC as being the subject of the MCC requests for additional data are addressed as follows:

- 1. The complexity of the site, including the proposed elevation changes requiring the introduction of nearly 52,000 cubic yards of fill over approximately 5 acres.**

This statement does not indicate what information was lacking, it is merely a general contention that the site is complex. It does not constitute a proper grounds to deny the proposed Project for insufficient information.

2. The methodology utilized to predict the volume of water being collected and discharged from the drainage and recharge systems.

The NOI included calculations of the discharge rate from SS-1 performed in HydroCAD, software commonly used by engineers to model flow through stormwater management systems.²⁰ The first GZA review letter (Exhibit D) identified as Comment 8, “GZA recommends that the Applicant provide calculations demonstrating that the calculated Water Quality Volume is provided within each infiltration system below the system’s outlet.” The Applicant responded and GZA concluded that the issue was addressed. See Exhibit E, p. 6. As a result, this statement in the OOC does not support the MCC conclusion that the information provided and reviewed as addressed was insufficient. It was reasonable for the Department to determine that sufficient information was provided on this topic.

3. The on and offsite impact of stormwater both on and off of the subject property.

This statement is too vague to identify what information the Commission deemed insufficient and why it was necessary. It was reasonable for the Department to conclude that this statement did not support a finding of insufficient information.

4. The site soil’s conductivity and permeability analyses.

The conductivity and permeability of the Property’s soil is relevant to Stormwater Standard 3, which involves eliminating or minimizing the loss of annual recharge to

²⁰ See In the Matter of AP Cambridge Partners II, LLC, OADR Docket No. WET-2008-072, Recommended Final Decision (April 2, 2010), 2010 WL 2209447, *16, adopted as Final Decision (May 13, 2010), 2010 WL 2209449 (referring to HydroCAD as “widely accepted computer modeling software”).

groundwater.²¹ Compliance with Stormwater Standard 3 involves the use of infiltration basins that are capable of infiltrating a certain volume of stormwater, that volume being dependent on the area of impervious surfaces and the properties of the soil. Stormwater Handbook, Vol. 1, Ch. 1, p. 6. Thus, the conductivity and permeability of the soil on the Property would be relevant to determining whether SS-1, an infiltration basin, is capable of infiltrating the required volume, to the extent that the infiltration volume would affect whether the discharge to the Buffer Zone would meet stormwater standards.

Regarding permeability, GZA did not specifically request that the Applicant analyze the permeability of the soil on the Property.²² While GZA did request “site-specific soil properties”; Exhibit E, p. 11; this request is too vague to let the Applicant know that the MCC specifically wanted permeability data, or why it was necessary.

GZA requested “[s]ite specific estimates of hydraulic conductivity . . . collected throughout the Site representative of the proposed locations of the infiltration galleries and the surrounding areas.” Exhibit D, p. 4. However, as discussed previously, the MCC had jurisdiction to request information pertaining only to the discharge of SS-1, not to any of the other three infiltration basins. In denying for insufficient information, it was incumbent upon the MCC to identify the missing information and why it is necessary to determine whether the discharge from SS-1 into the Buffer Zone complies with the Stormwater Standards.²³

²¹ Stormwater Standard 3, 310 CMR 10.05(6)(k)3, provides: “Loss of annual recharge to ground water shall be eliminated or minimized through the use of infiltration measures including environmentally sensitive site design, low impact development techniques, stormwater best management practices and good operation and maintenance. At a minimum, the annual recharge from the post-development site shall approximate the annual recharge from the pre-development conditions based on soil type. This Standard is met when the stormwater management system is designed to infiltrate the required recharge volume as determined in accordance with the Massachusetts Stormwater Handbook.”

²² The only use of the word “permeability” in any of GZA’s review letters is in the February 7, 2023 review letter, in which GZA stated that “lower permeability overburden deposits” were present on the Property. Exhibit E, p. 10.

²³ See Exhibit H, OOC Denial, pp. 5-6.

5. The need for hydraulic conductivity tests.

This topic is duplicative of the previous topic, which also asserted that the Applicant had failed to provide sufficient hydraulic conductivity data. As previously stated, GZA's overly broad request for hydraulic conductivity information on behalf of the Commission did not trigger Applicant's responsibility to provide that information to the Commission.

6. The need for additional test pits and monitoring wells in the vicinity of the proposed subsurface infiltration system to ensure the accuracy of the estimated seasonal high groundwater table.

The seasonal high groundwater table is relevant to Stormwater Standard 3, which requires that there be at least 2 feet of separation between the bottom of an infiltration structure and the seasonal high groundwater table. Stormwater Handbook, Vol. 1, Ch. 1, p. 7. As none of the proposed infiltration structures are located within a wetlands resource area or the Buffer Zone, they are not required to comply with Stormwater Standard 3. Nevertheless, it would be appropriate for the MCC to inquire regarding the seasonal high groundwater table to the extent that it was necessary for its review of whether the discharge from SS-1 to the Buffer Zone would comply with the Stormwater Standards. However, as with the hydraulic conductivity inquiry, GZA's request for test pits was broad, requesting that test pits be "excavated within the footprint of the proposed subsurface infiltration systems." Exhibit F, p. 7. Once again, this request for additional information extends well beyond what is reasonable for the MCC to request and would result in undue burden on the Applicant to expend time and resources unnecessarily. It was reasonable for the Department to conclude that sufficient information had been provided to the Commission and that the Commission's denial failed to describe why the purportedly lacking

information was necessary to determine whether the proposed Projections' stormwater system compliance with the MWPA and the Wetlands Regulations.

7. The need for site specific data to support the mounding analysis, including lack of scientific support to confirm the efficacy of the Hantush modeling design and the need for additional site specific data to support a three dimensional mounding analysis.

Mounding is relevant to Stormwater Standard 3. “[T]he mounding analysis must demonstrate that the Required Recharge Volume (e.g., infiltration basin storage) is fully dewatered within 72 hours (so the next storm can be stored for exfiltration). The mounding analysis must also show that the groundwater mound that forms under the recharge system will not break out above the land or water surface of a wetland (e.g., it doesn’t increase the water sheet elevation in a Bordering Vegetated Wetland, Salt Marsh, or Land Under Water within the 72-hour evaluation period).” Stormwater Handbook, Vol. 3, Ch. 1, p. 28.

The Applicant used the Hantush method for its mounding analysis.²⁴ The Stormwater Handbook states that the Hantush method “may be used to conduct the mounding analysis” and puts no limitations on its use. Stormwater Handbook, Vol. 3, Ch. 1, p. 29. GZA asserted in its second review letter that “because the assumptions required to use the analytical (Hantush) method are not supported by the available site data and design of the proposed stormwater management system, use of the method is not appropriate and therefore does not meet the regulatory requirements.” Exhibit E, p. 11. If the MCC believed that the Applicant’s mounding analysis did not meet the regulatory requirements, that could have been a reason to deny the proposed Project on the merits for failure to meet the Stormwater Standards. Alternatively, if the MCC believed that the Hantush method resulted in incorrect outputs, that could similarly have

²⁴ “The Hantush method predicts the maximum height of the groundwater mound beneath a rectangular or circular recharge area. It assumes unconfined groundwater flow, and that a linear relation exists between the water table elevation and water table decline rate. It results in a water table recession hydrograph depicting exponential decline.” Stormwater Handbook, Vol. 3, Ch. 1, p. 29.

been a reason to deny the proposed Project on the merits. However, there was no justification to deny the proposed Project for failure to provide sufficient information; the Applicant performed a mounding analysis using a method recognized by the Stormwater Handbook and provided its results to the MCC. See Zora Enterprises, 1994 WL 761987, *3 (“[a] denial based on what is perceived to be inaccurate information cannot be substituted for a denial based on the applicant’s failure to provide sufficient information for the Department to make any determination at all”).²⁵ As a result, it was reasonable for the Department to determine that the Commission had sufficient information to grant or deny approval.

8. The efficacy of utilizing a three dimensional numerical modelling system – utilizing site specific data – to better predict mounding of groundwater both at the project and offsite.

As previously stated, the Applicant did submit a mounding analysis to the MCC. If the MCC believed that the Applicant should have used a different methodology or that the results of the mounding analysis were inaccurate, it could have denied the proposed Project on the merits. Zora, supra. However, alleging inaccurate information does not justify denial of the proposed Project for insufficient information. As a result, it was reasonable for the Department to determine that the Commission had sufficient information to grant or deny approval.

9. The extent, scope and bases for the mounding analysis.

As previously stated, the Applicant did submit a mounding analysis to the MCC. If the MCC believed that the Applicant should have used a different methodology or that the results of the mounding analysis were inaccurate, it could have denied the proposed Project on the merits. However, alleging that the Applicant provided inaccurate information does not justify denial of the proposed Project for insufficient information. As a result, it was reasonable for the

²⁵ Whether the Applicant’s mounding analysis satisfies the Stormwater Standards is not an issue for adjudication in this case and I do not address it.

Department to determine that the Commission had sufficient information to grant or deny approval.

In sum, the Department properly determined that the MCC had sufficient information to approve or deny an order of conditions. Consequently, the Department appropriately exercised its authority to proceed to an examination of the Applicant's request for an SOC on the merits.

A. Department Information Requests

The Petitioners argue that MassDEP's information requests during its SOC review prove that the MCC had insufficient information. They contend that MassDEP requested information about the same topics that the MCC specified was missing, and MassDEP would not have needed to request that information if it had been provided to the MCC. This argument would have merit only if MassDEP requested the same information on topics on which the MCC also requested information and on which the Applicant failed to provide the requested information. I will examine MassDEP's information requests under that framework.

1. Information Request 1²⁶

In Information Request 1, MassDEP stated that the treatment train associated with the Emergency Access Drive, which would discharge into the Buffer Zone, was listed in the NOI as removing only 53% of the TSS in the runoff despite Stormwater Standard 4 requiring stormwater management systems to remove 80% of TSS in runoff.²⁷ The Applicant had previously claimed that the flow from the Emergency Access Drive qualified as *de minimis* and therefore was not required to achieve 80% TSS removal under Stormwater Standard 4. Exhibit G, p. 2. MassDEP disagreed that the discharge was *de minimis* and requested that the Applicant provide additional

²⁶ See Exhibit J, MassDEP Information Request, September 13, 2025.

²⁷ Stormwater Standard 4, 310 CMR 10.05(6)(k)4, provides in relevant part: "Stormwater management systems shall be designed to remove 80% of the average annual post-construction load of Total Suspended Solids (TSS)."

TSS removal to meet the 80% removal requirement, revise the stormwater report, and demonstrate how discharge from the treatment train meets the Stormwater Standards. Cordeiro Aff., ¶ 34; Ferrick Aff., ¶ 23. The Applicant responded on September 19, 2023, stating that 1,781 square feet of the fire access road had been converted to pervious pavement. Exhibit K, p. 1. In the course of the SOC review, following concerns raised by the Petitioners that the use of pervious pavement did not comply with the Stormwater Standards, the Applicant submitted revised plans on January 2, 2024, which replaced the pervious pavement with asphalt and directed stormwater to a 2-foot-wide stone rip-rap spillway that flowed into a 4'x 4' Filterra Bioscape unit. Exhibit L, pp. 1-2.

As MassDEP pointed out in Information Request 1, the plans attached to the NOI did not comply with Stormwater Standard 4, as they provided for less than 80% TSS removal. This fact would have given the MCC grounds to deny the proposed Project on the merits for failure to meet the Stormwater Standards. However, it did not give the MCC grounds to deny the proposed Project for insufficient information. The MCC had sufficient information to determine that the proposed Project did not comply with Stormwater Standard 4; the NOI expressly stated that the proposed Project did not provide for 80% TSS removal. “[I]nformation which, in the opinion of the issuing authority, would not support the issuance of an Order of Conditions—and on the basis of which a project should be denied—must be distinguished from a lack of sufficient information as the term is used in 310 CMR 10.05(7)(h).” Zora Enterprises, 1994 WL 761987, *3. Therefore, MassDEP’s Information Request 1 covered a topic about which the MCC did have sufficient information to make a decision. It was therefore appropriate for MassDEP to request information to address this issue.²⁸

²⁸ The failure of the proposed Project to meet Stormwater Standard 4 was cured by the Applicant’s plan changes, which, as discussed *infra*, complied with the Plan Change Policy.

2. Information Request 2²⁹

In Information Request 2, MassDEP noted that SS-1, a subsurface infiltration system, was credited as attenuating the post-development peak discharge rate for purposes of Stormwater Standard 2 in the Stormwater Report.³⁰ However, the Stormwater Handbook, Vol. 2, Ch. 2, p. 103, provides that subsurface infiltration structures do not receive credit for attenuating the post-development peak discharge rate, and therefore the proposed Project did not comply with Stormwater Standard 2. MassDEP thus requested that the Applicant substitute an alternative stormwater system or supplement the existing system, revise the stormwater report, and demonstrate how the stormwater management system meets the Stormwater Standards. The Applicant responded on March 14, 2024,³¹ clarifying that SS-1 acted as both infiltration and detention. The Applicant described how SS-1 had been sized to provide for the required volume of infiltration below the outlet elevation and to provide for retention to achieve peak flow attenuation above the outlet elevation. The Applicant also revised the plans to describe SS-1 as a “subsurface infiltration and detention system.”

At no point did any of GZA’s information request letters seek information regarding this issue, nor did the MCC assert that the proposed Project did not comply with Stormwater Standard 2 because it was attempting to credit a subsurface infiltration system as attenuating the post-development peak discharge rate. Therefore, it was appropriate for MassDEP to request information on this topic.

²⁹ See Exhibit N, MassDEP Information Request, February 2, 2024.

³⁰ Stormwater Standard 2, 310 CMR 10.05(6)(k)2, provides in relevant part: “Stormwater management systems shall be designed so that post-development peak discharge rates do not exceed pre-development peak discharge rates.”

³¹ See Exhibit O, Applicant’s Response, March 14, 2024.

3. Information Request 3³²

a. Test pits

In Information Request 3, MassDEP noted that the revised plans the Applicant had submitted in response to Information Request 1 did not include any test pits in the location of SS-1, with the closest test pit being more than 60 feet away. MassDEP stated that the Stormwater Handbook, Vol. 3, Ch. 1, p. 10, requires that test pits be performed in the location where recharge is proposed. MassDEP requested that the Applicant evaluate the soils in the location of SS-1 and provide the location, tabulated data for each test pit, and a description of the soils. The Applicant responded³³ stating that only a single test pit was required to comply with the Stormwater Handbook, providing updated plans denoting a test pit in the location of SS-1, and describing the soil.³⁴

The Petitioners contend that the MCC had explicitly requested test pit and soil data from the footprint of the proposed subsurface infiltration systems and the Applicant had refused to provide it. Thus, the fact that MassDEP needed this data to come to its decision proves that the Applicant had provided the MCC with insufficient information. The Applicant responds that the test pit data was not necessary for MassDEP to approve the proposed Project and the Applicant provided that data simply to be cooperative.³⁵

³² See Exhibit Q, MassDEP Information request, June 7, 2024.

³³ See Exhibit R, Applicant Response, June 19, 2024.

³⁴ In its Motion for Summary Decision, the Applicant claimed that it had not provided test pit data to MassDEP and MassDEP had issued the SOC regardless. App. Mot., p. 12 n.6. In its reply to the Petitioner's and the MCC's cross-motions for summary decision, the Applicant stated that it had been mistaken and that it had provided test data to MassDEP in response to Information Request 3. App. Reply, p. 13 n.11.

³⁵ Applicant Reply Brief, pp. 12-13.

The Petitioners are correct that the MCC specifically requested additional test pits and soil data in the footprint of the proposed subsurface infiltration systems. GZA mentioned test pits and soil data in its comments³⁶ and the MCC mentioned having insufficient information relating to test pits and soil data in its fourth, fifth, and sixth grounds for denial. It is appropriate for the issuing authority to request information about the design of stormwater structures located outside of jurisdiction when they discharge into a resource or the Buffer Zone, for the purpose of ensuring the discharge quantity and quality complies with the stormwater management standards.³⁷ However, as discussed previously, the test pit and soil data requests from GZA and the MCC extended well beyond its jurisdiction. In requesting test pits and soil data from all four subsurface infiltration systems despite having jurisdiction to request information about only one of them for the purpose of evaluating the discharge, their request for information was patently unreasonable and placed an undue burden on the Applicant to expend time and resources unnecessarily. By contrast, MassDEP requested test pits specifically within the footprint of SS-1, an area about which MassDEP did have jurisdiction to request information in order to ensure that the discharge from SS-1 to Buffer Zone would comply with the stormwater management requirements. Accordingly, even if these test pits and soil data were necessary to describe the site, the work, or the effect of the work on the interests identified in the MWPA, the MCC's overbroad request was ineffective and did not explain need for it to determine compliance. Accordingly, it was appropriate for MassDEP to request the limited and focused information on this topic.

³⁶ See Exhibit D, pp. 3-4; Exhibit E, pp. 10-11.

³⁷ See *supra*, pp. 19-22, discussion of Stormwater Handbook, Vol. 1., Ch. 2, p. 4.

b. Discharge Velocity

Information Request 3 also requested that the Applicant provide the discharge velocity of outlet PFES-1, the outlet from SS-1. The Applicant responded that the maximum discharge velocity of outlet PFES-1 was 2.97 feet per second. GZA did not request this information in its comments and the OOC did not assert that this information was missing. If the MCC intended to assert that it needed the discharge velocity in its second ground for denial, which stated that “the methodology utilized to predict the volume of stormwater being collected and discharged from the drainage and recharge systems” was missing, the vague reference to “methodology” was not sufficiently clear to describe what information was missing and necessary to determine if the proposed Project’s stormwater management system complies with the Wetland Regulations. Therefore, the MCC did not specify that this information was missing in its OOC, and it was not duplicative for MassDEP to request it.

c. Level Spreader Sizing

Finally, Information Request 3 requested that the Applicant detail how the level spreader associated with SS-1 was sized to prevent erosion. The Applicant provided a spreadsheet detailing how the rip-rap energy dissipator pad was sized. GZA also requested this information in its comments from December 16, 2022 (Exhibit D). GZA’s first comment stated, “GZA recommends that the Applicant provide calculations demonstrating that the riprap pad downgradient of the proposed stormwater outfall PFES 1 has been sized to prevent scour or erosion to downstream areas.” The Applicant responded on December 23, 2022 (Exhibit G), with the same kind of rip-rap sizing spreadsheet it provided to MassDEP. In GZA’s comments from February 7, 2023 (Exhibit E), GZA replied, “Addressed; GZA has no further comment.” Therefore, the MCC did have sufficient information on this topic.

In sum, the record supports the finding that all of MassDEP’s information requests concerned topics on which the MCC had sufficient information to approve or deny the proposed Project on the merits or topics on which the MCC did not validly specify that information was missing. Therefore, MassDEP’s information requests were proper and do not support the Petitioners contention that the Applicant provided insufficient information to the MCC.

III. Whether as a matter of law, the Department properly applied the Department’s Wetlands Program Policy 91-1 (Plan Changes) in considering a plan change submitted by the Applicant in the course of its request for a SOC rather than remanding the matter back to the MCC for further consideration.

Issue 3 addresses whether the Department appropriately applied the Wetlands Program Policy 91-1: Plan Changes (“Plan Change Policy”) in accepting for review the revisions the Applicant made to its project plans following the issuance of the OOC. While policies do not have the binding force of a regulation, they promote consistency and establish the criteria that an agency will use in decision-making. Agencies are bound to follow their own policies in their internal management.³⁸

The Plan Change Policy provides that:

The primary purpose of this policy is to promote the intent of the [MWPA], to ensure thorough local review of work proposed in or near wetland resource areas by identifying those circumstances in which the Department will consider changes to plans filed under [NOIs] which are before the Department under appeal for [an SOC] or for which [an administrative appeal] has been filed This policy specifically distinguishes those plan changes which are substantial, and will require a new NOI filing [with the local Conservation Commission], from those plan changes which are deemed insubstantial and thus may be considered as part of the appeal review process.

Plan Change Policy, ¶ 1. The Plan Change Policy specifically precludes “[t]he Department [from] . . . considering plan changes . . . which are deemed to be substantially different from the plan acted upon by the [local] Conservation Commission and which are

³⁸ See, n. 10.

referenced in the Order of Conditions. Substantial plan changes are deemed to be those changes [1] which significantly modify the project configuration and [2] which result in increased impacts to wetland resource areas.” *Id.*, ¶ 5 (numerical references supplied).

Under the Plan Change Policy, “[t]he Department may consider plans which contain insubstantial changes from the plans acted upon by the Conservation Commission and referenced in the Order of Conditions. Insubstantial plan changes are limited to those changes which involve unchanged or decreased impacts but which do not constitute significant changes from the project configuration acted upon by the Conservation Commission” *Id.*, ¶ 6. “[T]he burden is on the project proponent to demonstrate that the plan change is insubstantial. Specifically, the project proponent must show that the plan change results in [1] an unchanged, or not significantly changed, project configuration and [2] unchanged or decreased impact to any wetland resource areas as compared to the plan acted upon by the Conservation Commission and referenced in the Order of Conditions.” *Id.*, ¶ 7 (numerical references supplied). The Department may exercise this broad discretion at any stage of an appeal.³⁹ This discretion is limited only by 310 CMR 10.05(7)(h) which precludes the Department from considering new information when a conservation commission has denied the project for lack of such information and the Department concurs that the information is necessary in order for the conservation commission to have made a decision.

The Petitioners argue that MassDEP is prohibited from accepting plan changes because the denial was for insufficient information. As discussed *supra*, the MCC’s denial for lack of

³⁹ See *In the Matter of Robert Rinaldi*, Docket No. 2008-058, Recommended Final Decision (February 18, 2009), 2009 WL 1035545, *10, adopted by Final Decision (March 12, 2009), 2009 WL 1035546 (discussing acceptance of plan changes at late stages in an appeal, including “at any time prior to a Final Decision”); *In the Matter of Princeton Development, Inc.*, Docket No. 2006-157, Final Decision (February 5, 2009), 2009 WL 1404101, *5 (citing *Citizens for Responsible Environmental Management v. Attleboro Mall, Inc.*, 400 Mass. 658, 673-74 (1987)).

sufficient information was not supported, so this provision does not apply to limit the Department's discretion to review the proposed plan change. Therefore, it must be determined if the plan changes the Applicant made following the issuance of the OOC were substantial or insubstantial.

The only changes the Applicant made to the proposed Project occurred in the vicinity of the Emergency Access Drive. The changes converted 1,781 square feet of the driveway from GrassPave to asphalt, added a rip-rap spillway and a Filterra Bioscape unit, and sloped the driveway to direct runoff towards the spillway and Filterra Bioscape unit.⁴⁰ Exhibit L, p. 1; Cordeiro Aff., ¶¶ 31-32. These changes increased the TSS removal rate at the Emergency Access Drive from 53% to 80%. Exhibit L, p. 3. Regarding impacts to wetland resource areas, the changes decreased impacts by increasing the TSS removal rate. As for modifications to the project configuration, the change from GrassPave to asphalt did not affect the proposed Project configuration at all, and the addition of the spillway and the Filterra Bioscape unit changed a few square feet of a multi-acre project. The changes qualify as insubstantial and MassDEP had discretion to consider them without remanding to the MCC.

CONCLUSION

In sum, based on the evidence introduced by the Parties into the record as discussed above, I find that (1) MassDEP properly determined that the OOC did not qualify as a lack of information denial within the meaning of 310 CMR 10.05(6)(c); (2) MassDEP properly exercised its authority under 310 CMR 10.05(7)(h) in reaching the merits of the Applicant's request for a SOC; and (3) the Department properly applied the Plan Change Policy in considering a plan change submitted by the Applicant in the course of its request for an SOC.

⁴⁰ Intermediate changes that were not incorporated into the plans approved by the SOC are omitted.

There is no genuine issue of material fact and the Applicant and MassDEP are entitled to a decision in their favor as a matter of law. Accordingly, I recommend that MassDEP's Commissioner issue a Final Decision denying the Petitioners' motions for summary decision on all issues, granting the Department's and the Applicant's motions for summary decision on all issues, affirming the SOC and dismissing the appeal.

Date: November 28, 2025



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 her 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 her sole discretion, directs otherwise.

SERVICE LIST

Petitioner:	10 Resident Group
Representative:	10 Resident Group Daniel C. Hill, Esq. Elizabeth Pyle, Esq. Hill Law 6 Beacon Street/Suite 600 Boston, MA 02108 dhill@danhilllaw.com elizabeth.m.pyle@gmail.com
Applicant:	Comprehensive Land Holdings, LLC
Representative:	Kate Moran Carter, Esq. Jesse D. Schomer, Esq. DAIN, TORPY, LE RAY, WIEST & GARNER, P.C. 175 Federal Street, Suite 1500 Boston, MA 02110 kcarter@daintorpy.com jschomer@daintorpy.com
Conservation Commission	Milton Conservation Commission
Representatives:	Peter Mello, Esq. Madison Harris-Parks, Esq. Murphy, Hesse, Toomey, & Lehane, LLC 50 Braintree Hill Office Park, Suite 410 Braintree, MA pmello@mhtl.com mhparks@mhtl.com John Kiernan, Chairman 629 Randolph Avenue Milton, MA 02186 jkiernan@kiernantrebach.com

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MassDEP

Jill Provencal, Section Chief
Tyler Ferrick, Wetlands Analyst
Heidi Zisch, Legal Counsel
Wetlands Program, Northeast Regional Office
Department of Environmental Protection
150 Presidential Way
Woburn, MA 02114
Email: Jill.provencal@mass.gov
Email: tyler.ferrick@mass.gov
Email: Heidi.Zisch@mass.gov

Representatives:

Peter Tison, Esq.
Jakarta Childers, Paralegal
Massachusetts Department of Environmental
Protection Office of General Counsel
100 Cambridge Street, 8th Floor
Boston, MA 02114
Email: Peter.Tison@mass.gov
Email: Jakarta.childers@mass.gov