COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

September 23, 2020

In the Matter of
James Rodriguez

OADR Docket No. WET-2018-012
Superseding Determination of Applicability
Mount Blue Street, Map 5, Lot 17
Norwell, MA

RECOMMENDED FINAL DECISION

Introduction

In this appeal, James Rodriguez ("the Petitioner" or Rodriguez") challenges a Superseding Determination of Applicability ("SDA") issued to him by the Southeast Regional Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 ("MWPA"), and the Wetlands Regulations, 310 CMR 10.00 et seq. ("the Wetlands Regulations"). Rodriguez sought a determination for a proposed project at property located at Mount Blue Street, Map 5, lot 17 in Norwell ("the Property"). The proposed project involves constructing a farm pond and biomass drying shed within Bordering Vegetated Wetlands. The SDA affirmed a Positive Determination of Applicability ("DOA") issued by the Norwell Conservation Commission ("NCC"). The SDA determined that the agricultural exemption at 310 CMR 10.04 Agriculture of the Wetlands Regulations was inapplicable to his proposed

project. In his appeal of the SDA Rodriguez claims that MassDEP misinterpreted the land use defined by his Forest Cutting Plan and "did not give due diligence" in interpreting the applicable regulations. Notice of Claim at p. 1.

MassDEP has moved to dismiss the appeal on the basis that the issues presented and the claims asserted are barred by the doctrine of *res judicata*. The NCC joins MassDEP's motion. The Petitioner opposes it, asserting the doctrine does not apply. I recommend that MassDEP's commissioner issue a Final Decision affirming the SDA and dismissing the appeal. The motion to dismiss is persuasive. The issues and claims raised in this appeal were fully litigated in Matter of James Rodriguez, OADR Docket No. WET-2014-024, Recommended Final Decision, 2015 MA ENV LEXIS 19 (April 9, 2015), adopted by Final Decision, 2016 MA ENV LEXIS 18 (April 14, 2015), reconsideration denied, Recommended Final Decision on Reconsideration, 2015 MA ENV LEXIS, adopted by Final Decision on Reconsideration (June 10, 2015)("Rodriguez I"), and so are precluded from being re-litigated in this appeal.

Background

This is the second administrative appeal brought by the Petitioner involving the same property after positive determinations of applicability were issued in 2014 and 2018 for work he proposed to do on property in Norwell. The facts are not in dispute. The Property is Lot 17, Map 5, Mount Blue Street in Norwell. It consists of 18.64 undeveloped acres with about 143 feet of frontage on Mount Blue Street. At all times relevant to this appeal, the Property was owned by Donald Shute, with whom Rodriguez has entered a purchase and sale contract to buy the Property. The Property contains a large wetlands area adjacent to Mount Blue Street.

Rodriguez is a licensed forester. In 2014 he applied for and received a Forest Cutting Plan ("the 2014 FCP") issued by the Department of Conservation and Recreation pursuant to the

Forest Cutting Practices Act, M.G.L. c. 132 ("FCPA"). An FCP is required for forest harvesting activity that is not exempt under the FCPA. See 302 CMR 16.06(2)(FCPA regulations). Rodriguez intended to clear-cut two specified acres on the Property, designated as Stand #1 on the 2014 FCP. The work he proposed in Stand #1 did not involve any wetlands impacts and the 2014 FCP was specifically conditioned on Rodriguez avoiding wetlands alterations and accessing Stand #1 via a cart path through abutting upland properties owned by others.[1] After obtaining the 2014 FCP, Rodriguez filed a Request for a Determination of Applicability ("RDA") with the NCC for a proposed project to thin and prune trees in a wetland resource area. He sought a determination of whether the agricultural exemption at 310 CMR 10.04(b) Agriculture applied to his proposal. He maintained that the work he proposed was exempt as normal maintenance of land in agricultural use. The NCC issued a positive determination of applicability, determining that Rodriguez failed to show that the project was on land in agricultural use and failed to provide a wetlands delineation showing where the work was to occur and what wetlands alterations would result. Rodriguez I at *8. MassDEP affirmed the NCC's determination after Rodriguez requested a Superseding Determination of Applicability ("SDA"). The result of that positive SDA was that Rodriguez was required to file a Notice of Intent with the NCC and obtain an Order of Conditions (wetlands permit) if he intended to proceed with his project.

Rodriguez appealed the SDA to the Office of Appeals and Dispute Resolution ("OADR"). After an adjudicatory hearing at which witnesses testified and evidence was presented, the Presiding Officer found that the proposed project was not exempt from the

[1] A prior application for a FCP was rejected by DCR because it included a proposed landing area for forest products and a proposed access through the wetlands area on Mount Blue Street. DCR specifically did not allow any work in the wetlands area.

MWPA and the Wetlands Regulations. Rodriguez I, supra, Recommended Final Decision at *1. He determined that an overwhelming preponderance of the evidence demonstrated that the wetlands area was not land in agricultural use, but was, instead, an area that had lain dormant and undeveloped for many years. Rodriguez did not appeal the Final Decision to Superior Court.

In 2017 Rodriguez filed a new application for an FCP with DCR, again proposing to clear cut two acres of forest in Stand #1. The FCP Application stated that the purpose of the FCP was to clear cut two acres for commercial harvesting. The FCP Application included a plan depicting five stands identified as Stand #s 1 through 5; except for Stand #1, the plan states "No Harvesting" in the other stands. The Service Forester's notes on his approval of the plan state "[h]arvesting will not occur in or near Resource areas, so no confirmation of wetland boundaries was done." With the 2017 FCP in hand, Rodriguez again submitted an RDA to the NCC, this time seeking a determination whether his proposal to construct a 4,200 square foot farm pond in the wetland of Stand #5 and a 24' x 36' biomass drying shed in the wetland of Stand #3 was subject to the MWPA. His RDA described the property as "18.64 acres of land in agricultural use." The Petitioner again maintained that his proposed Project was exempt from the MWPA because it was normal improvement of land in agricultural use under 310 CMR 10.04 Agriculture. There is no dispute that at the time of this RDA filing the property remained as it had been in 2015 when Rodriguez I was decided: a dormant, undeveloped forest left in its wild state. Rodriguez I, supra, Recommended Final Decision at *12.

The NCC determined that the area described on the plans submitted by Rodriguez was subject to the MWPA and the proposed project required filing a Notice of Intent. The NCC noted that the boundaries of the Resource Areas listed were not confirmed by its Determination and found that Rodriguez's proposed project was in the same area that was at issue in Rodriguez I.

Determination of Applicability ("DOA") at Section B.2b. Rodriguez appealed the Positive DOA to MassDEP's Southeast Regional Office. In his request for the SDA he asserted that the proposed work on forest land was exempt as normal improvement of land in agricultural use, citing 310 CMR 10.04 Agriculture. He further asserted that "[t]he existence of the approved [FCP] should have been adequate evidence that the land is in agricultural use, nonetheless I also included a 1957 USGS aerial photo as recommended in 310 CMR 10.04(Agriculture) showing trees have been growing ever since." Request for SDA at ¶ 8.[2]

MassDEP reviewed Rodriguez's request for the SDA, including an in-depth review of the file, a request for, and review of, additional information from Rodriguez, and an on-site inspection of the project location. Among the information requested was additional information documenting that the proposed Project was to be conducted on "land in agricultural use." See MassDEP's Request for Additional Information, Basic Documents. Ultimately, MassDEP issued the positive SDA at issue in this appeal, based on all the information before it. MassDEP determined that the proposed construction of the farm pond and biomass drying shed were not agriculturally exempt activities because they were not proposed on land in agricultural use. While the 2017 FCP depicts five forest stands, only Stand #1 met the MWPA definition of Land in Agricultural Use under 310 CMR 10.04 Agriculture because that was the only one of the five stands on which harvesting was permitted by the FCP. Therefore, Stands #2-5 were not presently and primarily used for producing forest products for commercial purposes; were not Land in

[2] As noted in the discussion below, the Petitioner submitted aerial photos of the property in Rodriguez I and the Presiding Officer stated that "…the mere fact that the area has not been developed and the trees have grown over the years is not probative, standing alone, that the Property has been devoted to the continued production of forest products. Indeed, approximately 60% of Massachusetts is covered by forests, resulting in large part from the vegetation being permitted to grow unencumbered."

Agricultural Use; and the proposed project was therefore not an exempt agricultural activity.[3] This appeal followed.

I conducted a pre-hearing conference with the parties and it was agreed that the issues to be resolved were whether the Final Decision in Rodriguez I precluded the Petitioner's claims in this appeal, and whether the 2017 FCP impacts this determination. Thereafter MassDEP moved to dismiss the appeal based on the doctrine of *res judicata*, joined by the NCC.

DISCUSSION

In its motion to dismiss, the Department contends that Rodriguez I determined that the subject property "is not presently and primarily used in producing or raising one or more…agricultural commodities for commercial purposes pursuant to 310 CMR 10.04 (a) Agriculture in a fully litigated adjudicatory hearing that resulted in a Final Decision against the Petitioner on the issue of the Ag. Exemption on the same site." The Department contends that as a result, the appeal is barred by both issue preclusion and claim preclusion. Massachusetts Department of Environmental Protection's Motion to Dismiss at p. 2. The Petitioner asserts that his appeal is not barred because the 2017 FCP identified different land devoted to forest growth than the 2014 FCP, and therefore "renders all of the designated tree stands depicted in the 2017 FCP as 'land presently and primarily used in raising forest products' under 302 CMR 16.02(2), and qualifies this land as 'land in agricultural use' under 310 CMR 10.04 Agriculture (a) 4." Petitioner's Opposition to Department's Motion to Dismiss at p. 2.

[3] MassDEP also found that the proposed activities did not meet the requirements of 310 CMR 10.04 Agriculture because they would not minimize the impacts to wetland resource areas; could not be considered minor and temporary; and because the property is 18.64 acres with only a small portion of that wetlands, the impacts could be avoided or minimized with careful planning and operation.

For the reasons discussed below, I agree with the Department that the finding in Rodriguez I that the property is not "land in agricultural use" bars the present appeal based on both claim preclusion and issue preclusion. The 2017 FCP does not transform regulated wetlands into exempt agricultural land, which is the essence of the Petitioner's argument. Before he can reach the question of whether the specific activities he proposes in the wetlands area in the RDA are exempt pursuant to 310 CMR 10.04 Agriculture, he must first overcome the threshold question of whether the wetland area where he proposes to do these activities is "in agricultural use." Rodriguez I determined that the wetland area is not land in agricultural use. The 2017 FCP depicts additional forest stands on a plan but authorizes no activity in them. It authorizes only the same activity as the 2014 FCP in the exact same location (Stand #1), an upland, and therefore it does not alter the determination that the wetland area is not land in agricultural use. Notably, the 2017 FCP specifically does not authorize any work in the wetland area and clearly states that "no confirmation of wetlands boundaries was done." Department's Motion to Dismiss, Ex. 3 (2017 FCP).

Standard of Review on a Motion to Dismiss

Pursuant to 310 CMR 1.01, on a Motion to Dismiss the Presiding Officer shall assume all facts alleged in the Notice of Claim to be true, but the same assumption shall not apply to conclusions of law. As noted above, the parties do not dispute the relevant facts, I have assumed them to be true, and the only question to be decided is one of law: whether Rodriguez I determines the outcome because it bars litigation of the issues and/or claims asserted. As discussed below, I find that it does.

The Doctrine of Res Judicata

"The doctrine of res judicata is based on '[c]onsiderations of fairness and the requirements of efficient judicial administration,' which 'dictate that an opposing party in a particular action as well as the court is entitled to be free from attempts to relitigate the same claim.'" DeGiacomo v. Quincy, 476 Mass. 38, 63 N.E. 3d 365 (2016), quoting Wright Mach. Corp. v. Seaman-Andwall Corp., 364 Mass. 683, 688, 307 N.E.2d 826 (1974). It is "a rule of public policy founded on the established principle that it is in the interest of the parties and for the public welfare that litigation once decided on its merits should end." Biggio v. Magee, 272 Mass. 185, 188, 172 N.E. 336 (1930), quoted in DeGiacomo, supra. Res judicata includes issue preclusion and claim preclusion. Kobrin v. Bd. Of Registration in Medicine, 444 Mass. 837, 832 N.E. 2d. 628 (2005). In Kobrin the court stated:

> The term "res judicata" includes both claim preclusion and issue preclusion. See Heacock v. Heacock, 402 Mass. 21, 23 n.2, 520 N.E.2d 151 (1988). "Claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and prevents relitigation of all matters that were or could have been adjudicated in the action." O'Neill v. City Manager of Cambridge, 428 Mass. 257, 259, 700 N.E.2d 530 (1998), quoting Blanchette v. School Comm. of Westwood, 427 Mass. 176, 179 n.3, 692 N.E.2d 21 (1998). This "is 'based on the idea that the party to be precluded has had the incentive and opportunity to litigate the matter fully in the first lawsuit.'" O'Neill v. City Manager of Cambridge, supra, quoting Heacock v. Heacock, supra at 24. The invocation of claim preclusion requires three elements: "(1) the identity or privity of the parties to the present and prior actions, (2) identity of the cause of action, and (3) prior final judgment on the merits." DaLuz v. Department of Correction, 434 Mass. 40, 45, 746 N.E.2d 501 (2001), quoting Franklin v. North Weymouth Coop. Bank, 283 Mass. 275, 280, 186 N.E. 641 (1933).
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> Similarly, issue preclusion "prevents relitigation of an issue determined in an earlier action where the same issue arises in a later action, based on a different claim, between the same parties or their privies." Heacock v. Heacock, supra at 23 n.2. Before precluding a party from relitigating an issue, "a court must determine that (1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication was identical

> to the issue in the current adjudication." Tuper v. North Adams Ambulance Serv., Inc., 428 Mass. 132, 134, 697 N.E.2d 983 (1998), and cases cited. "Additionally, the issue decided in the prior adjudication must have been essential to the earlier judgment." Id. at 134-135, and cases cited. Issue preclusion can be used only to prevent relitigation of issues actually litigated in the prior action. See Fidelity Mgt. & Research Co. v. Ostrander, 40 Mass. App. Ct. 195, 199, 662 N.E.2d 699 (1996). Accordingly, we look to the record to see what was actually litigated. See Gleason v. Hardware Mut. Cas. Co., 324 Mass. 695, 699, 88 N.E.2d 632 (1949).

Kobrin, supra, 444 Mass. 837, 843. A final decision of an administrative agency after an adjudicatory proceeding can also have preclusive effect. Id., citing Tuper v. North Adams Ambulance Serv., Inc., 428 Mass. 132, 135, 697 N.E. 2d 983 (1998). Claim preclusion can extinguish a claim even where a Petitioner is prepared to present new evidence, grounds or theories not presented in the prior case. See Massaro v. Walsh, 71 Mass. App. Ct. 62, 884 N.E. 2d 986 (2008); see also Heacock v. Heacock, 402 Mass. 21, 24, 520 N.E. 2d 151 (1988)(Claim preclusion applies even though the claimant is prepared in a second action to present different evidence or legal theories to support his claim); Charlette v. Charlette Bros. Foundry, Inc., 59 Mass. App. Ct. 34, 44, 793 N.E. 2d 1268 (2003).

Rodriguez I

Rodriguez I involved the same parties – Rodriguez, the NCC and MassDEP. Each had an opportunity to present testimonial and documentary evidence from witnesses. The issues were fully litigated, and a Final Decision was issued. The question of whether the property was "land in agricultural use" was litigated, decided against the Petitioner, and essential to the Final Decision. It is this essential finding that Rodriguez now seeks to relitigate. It was essential to the prior Final Decision because it was the key to the finding that the project was not exempt from the MWPA and the Wetlands regulations. Rodriguez I, Recommended Final Decision, supra, at *17.

The application and interplay of the FCPA and the MWPA were at issue in Rodriguez I as they are in this appeal. The Presiding Officer in Rodriguez I described the FCPA's regulatory regime at length and because the Petitioner raises the same arguments here, I include some of that description:

> The FCPA protects the benefits of forests through a permitting process.[4] It is applicable to timber harvesting on both public and private forestland. It "regulates any commercial timber cutting of wood products greater than 25 thousand board feet or 50 cords on any parcel of land at any one time." Id. If a forest harvesting activity is not exempt under the FCPA, it requires "the filing of a Forest Cutting Plan with the [Massachusetts] Department of Conservation and Recreation [DCR] and the local conservation commission at least ten business days before the proposed start date."[5]
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> "The filing of a Cutting Plan not only helps the private landowner by achieving a better job through planning but also helps ensure the continued public benefits of our state's forests, by protecting our wetlands and water resources, mitigating or eliminating potential impacts on Rare and Endangered Species, and regenerating our forests. " Id. Conditions may be imposed to avoid or mitigate wetlands impacts. In sum, the Forest Cutting Plan specifies what work may be performed under the FCPA and how it will occur.

Rodriguez I, 2015 MA ENV LEXIS 19, *4. In Rodriguez I, Rodriguez's proposed project was located in a wetland resource area but he asserted it was exempt agricultural activity under the MWPA which exempts "work performed for normal maintenance or improvement of land in agricultural use." Id. at *7 (citing Rodriguez's pre-filed testimony and a hearing exhibit). In Rodriguez I, Rodriguez had the burden of producing credible evidence from a competent source in support of his position that the property was "land in agricultural use." As the Presiding Officer explained,

[4] http://www.mass.gov/eea/agencies/dcr/conservation/forestry-and-fire-control/chapter-132-ma-forest-cutting-practices-act.html

[5] http://www.mass.gov/eea/agencies/dcr/conservation/forestry-and-fire-control/chapter-132-ma-forest-cutting-practices-act.html

> "Land in agricultural use" means "land within resource areas or the Buffer Zone presently and primarily used in producing or raising one or more" of the specified agricultural commodities for commercial purposes. 310 CMR 10.04 (Agriculture (a)4) (emphasis added); Farming in Wetland Resource Areas, ch. 5, p. 5-7. [6] The specified commodity in this case includes: "forest products on land maintained in forest use, including by not limited to biomass, sawlogs, and cordwood . . . ." 310 CMR 10.04 (Agriculture (a)4). Further, to be "land in agricultural use" it must be "devoted to continued production of forest products. Evidence of such committed use would include, for example, a 10-year Forest Management Plan . . . or enrollment in a federal or state program to improve forest resources." Farming in Wetland Resource Areas, ch. 5, p. 5-7. An approved Forest Cutting Plan is also evidence, id., but only with respect to the area approved in the Cutting Plan.

During its site visit before the SDA was issued, MassDEP did not identify any evidence of continued forest production in wetlands areas, and there was no evidence of a Forest Management Plan, particularly for the wetlands area. Id. at *13. Other support for the Presiding Officer's finding included no evidence that the land is subject to M.G.L. c. 61, governing the classification, taxation and designation of forest lands for the production of forest products; current abutters having no awareness that the property had ever been used for the agricultural production of forest products; and evidence that the property was destined to be developed for residential housing associated with agricultural uses. Id. at *17-18.

In the prior appeal, Rodriguez pointed to two types of evidence, neither of which the Presiding Officer found to be probative of the wetland area and land in proximity to it being used presently and primarily, or even historically, for the continued production of forest products. This evidence included aerial photographs from 1957 and 1978 and the 2014 FCP. As to the aerial photographs, the Presiding Officer noted that "[t]he only inference that can be drawn from the photographs submitted by Rodriguez is that the land has been left to grow in its wild state, and nothing more. There is no evidence of forestry management or harvesting, particularly under

[6] "Farming in Wetland Resource Areas, A Guide to Agriculture and the Massachusetts Wetlands Protection Act," 1996, is a guidance document that was jointly promulgated by DEP, the Massachusetts Department of Environmental Management (now DCR), and the Massachusetts Department of Food and Agriculture.

310 CMR 10.04(agriculture (a)(last paragraph) and (b)14-17)." Id. at *14. Notably, the 2014 FCP in Rodriguez I did not allow Rodriguez to conduct any work in the wetland area of the property, it only allowed him to harvest in two areas of upland, over 700 feet away from the wetlands. Id. at *15. "That is the only portion that may be put to agricultural use." Id.[7] The essential finding of the decision in Rodriguez I was that the area where the proposed project would take place was not "land in agricultural use" and therefore was not exempt from the MWPA and the Wetlands Regulations. Id. at *19-20.

To reiterate: in 2015, after an evidentiary adjudicatory hearing at which witnesses for each party presented testimonial and documentary evidence, the Presiding Officer found that the subject wetlands area was not "land in agricultural use" but was, instead, a wetlands area that had lain dormant and undeveloped for many years. Because the wetland area was not "land in agricultural use", the Presiding Officer found that the agricultural exemption did not apply to Rodriguez's proposed project to prune and thin trees in the wetlands area. In his Motion for Reconsideration in Rodriguez I, Rodriguez argued that his 2014 FCP and historical photographs show that the entire parcel is land in agricultural use. The Presiding Officer disagreed, stating that this argument was "at the heart of the adjudicatory hearing and the RFD." Rodriguez I, RFD on Reconsideration. The Presiding Office noted that the argument was thoroughly considered and discussed in the RFD, and so recommended that the Motion for Reconsideration be denied.

It is this same argument that the Petitioner advances in this appeal. As discussed below, the doctrine of *res judicata* bars re-litigation both of the issue and claim advanced in this appeal

[7] Additionally, Rodriguez pointed to a property in Hanover, Massachusetts where MassDEP allowed him to perform work in a wetlands area under 310 CMR 10.04 Agriculture as "non-harvest management practices for forest products on land maintained in forest use limited to pruning, pre-commercial thinning or planting of tree seedlings." His reliance on this matter was found to be misplaced in Rodriguez I because the FCP for that property "*specifically* designated the [wetland] area as having approved forest stand areas 2, 3, 4 and 5."

– that the wetlands area is land in agricultural use and therefore entitled to the agricultural exemption – and that the 2017 FCP renders the wetland area land in agricultural use.

The Petitioner's Appeal is Barred

Rodriguez asserts that "[t]he designation of stands in resource areas on an approved forest cutting plan has the legal effect of rendering the land upon which those stands are located as 'land presently and primarily used in raising forest products' and exempt under the WPA as such." Petitioner's Opposition to Department's Motion to Dismiss at p. 2. He claims that the entire 18-acre property is Land Devoted to Forest Growth because his 2017 FCP designated it as such. Id. at 6. "Where, as here, the wetlands area upon which work is proposed [in the RDA] is part of the 2017 FCP, that land is deemed to be exempt as land in agricultural use under 310 CMR 10.04 Agriculture. Id. at 8. He asserts that the work he proposes now differs from the scope of work he proposed in his RDA in 2014. He argues that "[w]hether he has proposed to engage in exempt uses today is not precluded by the issue resolved in [Rodriguez I]" Id. at p. 9. Finally, he argues that his claim cannot be barred because he could not have raised a claim arising out of the 2017 FCP because it did not exist when Rodriguez I was decided.

Claim Preclusion

Claim preclusion requires that three elements be established. DeGiacomo, supra. They are all present in this appeal. These elements are:

(1) The identity of privity of the parties to the present and prior actions. Here, the parties are the same: Rodriguez, the NCC and MassDEP.

(2) The identity of the cause of action. Here, an effort to obtain a negative determination of applicability. The Petitioner is claiming that his FCP renders his property land in

agricultural use and that the work he proposes is exempt as normal maintenance of land in agricultural use. This claim is identical to the claim he brought in Rodriguez I.

(3) A Final Judgment on the merits. Here, as noted above, after an adjudicatory hearing at which witnesses testified and documentary evidence was presented, a Final Decision on the merits was issued adverse to the Petitioner.

Claim preclusion makes this valid, final judgment binding on the parties and prevents relitigation of matters that were or could have been adjudicated in the prior action. DeGiacomo, 63 N.E. 3d 365, 369, citing Kobrin, supra. Rodriguez argues that his claim is not precluded because the 2017 FCP did not exist at the time. However, "[w]ith respect to the second element, claim preclusion will apply even though a party is prepared in a second action to present different evidence or legal theories to support his claim or seeks different remedies." Charlette v. Charlette Bros. Foundry, Inc., 59 Mass. App. Ct. 34, 44, 793 N.E. 2d 1268 (2003).

Further, the 2017 FCP no more authorizes work in the wetland area than the 2014 FCP did. In fact, it specifically does not authorize any activity in the area where Rodriguez proposes his farm pond and biomass drying shed. Rather, he proposed to DCR in 2017 exactly what he proposed in 2014: a two-acre clear cut in Stand #1, which is indisputably not in the wetland area. The only difference is that the 2017 FCP identifies additional forest stands yet it specifically notes "No Harvest" in those other stands. It does not approve any work in those stands and none was proposed. As a result, a claim that the 2017 FCP could not have been adjudicated in the prior action is without merit because it does not change the analysis. As the Department correctly asserts, the same analysis undertaken by the Presiding Officer in Rodriguez I applies to this appeal, with the same result. The land is not presently and primarily in agricultural use and thus the claim that a negative determination should issue is barred.

Issue Preclusion

Issue preclusion requires the following elements, each of which is present in this appeal:

(1) there was a final judgment on the merits of the issue in the prior adjudication,

(2) the party against whom preclusion is asserted was a party to the prior adjudication,

(3) the issue in the prior adjudication is identical to the issue in the current adjudication; and

(4) the issue decided in the prior adjudication was essential to the earlier judgment.

See Green v. Town of Brookline, 53 Mass. App. Ct. 120, 123, 757 N.E. 2d 731, 734 (2001), cited in Matter of Stephen F. and Marcia Sullivan, OADR Docket No. WET-2011-033, 2011 MA ENV LEXIS 139, Recommended Final Decision (December 19, 2011).

Here, there is no question that there was a final judgment on the merits in the prior appeal, making a finding that the subject property was not "land in agricultural use." Rodriguez was a party to that prior appeal, as the petitioner. The issue in the two cases is identical: whether the land is presently and primarily land in agricultural use and the agricultural exemption applies to the proposed activities. The issue decided in Rodriguez I was a determination that no portion of the property is land in agricultural use, and therefore the agricultural exemption did not apply to the proposed work. Whether it was the 2014 FCP or the 2017 FCP, the result is the same. Before the exemption can be applied to permit proposed activities as "normal maintenance", there must be a threshold finding that the land is "presently and primarily" in agricultural use. Matter of Gary Vecchione, OADR Docket No. WET-2014-008, 2014 MA ENV LEXIS 76, Recommended Final Decision (August 28, 2014). This issue was decided in Rodriguez I and contrary to Rodriguez's argument, that finding was essential to the outcome of the appeal. The elements of issue preclusion are all present.

CONCLUSION

For the foregoing reasons, I recommend that the Department's Commissioner issue a Final Decision affirming the SDA and dismissing the appeal. The doctrine of *res judicata* bars relitigation of the claims and issues presented.

Date: 9/23/2020

Jane A Rothchild
Presiding Officer

NOTICE- RECOMMENDED FINAL DECISION

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

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

SERVICE LIST

In the Matter of
James Rodriguez

Docket No. WET-2018-012

Petitioner:
James Rodriguez, Pro Se
9 Lake Street
Halifax, MA 02338
jmrodz@gmail.com

The Department:
Daniel Gilmore, Wetlands & Waterways Program
MassDEP/Southeast Regional Office
20 Riverside Drive
Lakeville, MA 02347
daniel.gilmore@mass.gov

Legal Representative:
MacDara Fallon, Esq., Senior Counsel
MassDEP Office of General Counsel
One Winter Street
Boston, MA 02108
macdara.fallon@mass.gov

Conservation Commission: Town of Norwell Conservation Commission
345 Main Street, Room 112
Norwell, MA 02061

Legal Representative:
Robert W. Galvin, Esq., Town Counsel
Galvin & Galvin, PC
10 Enterprise Street, Suite 3
Duxbury, MA 02332-3315
rwgalvin@comcast.net

cc: Shaun Walsh, Chief Regional Counsel
MassDEP/Southeast Regional Office
Office of General Counsel
20 Riverside Drive
Lakeville, MA 02347
shaun.walsh@mass.gov

Leslie DeFilippis, Paralegal
MassDEP/Office of General Counsel
One Winter Street
Boston, MA 02108
Leslie.defilippis@mass.gov