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

February 17, 2022

In the Matter of
James Rodriguez

OADR Docket No. WET-2020-016
DEP File No. SDA
Norwell, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

James Rodriguez ("Petitioner" or "Rodriguez") filed this appeal concerning the real property at Parcel A, Barrel Lane, Map 59, Parcel 56, Norwell, Massachusetts ("the Property"). Rodriguez challenges a Superseding Determination of Applicability ("SDA") that the Massachusetts Department of Environmental Protection's Southeast Regional Office ("MassDEP") issued for the Property, pursuant to the Wetlands Protection Act, G.L. c. 131, § 40, and the Wetlands Regulations, 310 CMR 10.00.

The appeal is rooted in Rodriguez's receipt of a December 12, 2018, Forest Cutting Plan ("FCP") that was issued by State Forester Joseph Perry on behalf of the Massachusetts Department of Conservation and Recreation ("DCR"), pursuant to the Forest Cutting Practices Act, G.L. c. 132, and that Act's implementing regulations, 302 CMR 16.00.[1] Rodriguez PFT[2], Ex. C. Rodriguez is Massachusetts licensed timber harvester (License # 2018-1761). See 310

[1] The 2018 FCP is on a five-page DCR form with the effective date of January 1, 2004. See Rodriguez PFT, Ex. C; https://www.mass.gov/doc/forest-cutting-plan/download (accessed February 4, 2022).
[2] "PFT" is the acronym for the pre-filed testimony that each party filed on behalf of their witnesses in this adjudicatory proceeding.

CMR 16.08 ("Timber Harvester License").[3] At the heart of this appeal is the regulatory interplay between wetlands protection and forest management as an agricultural practice.

The SDA was issued pursuant to 310 CMR 10.05(3), which enables one to file a request for determination of applicability regarding whether the Wetlands Act and Wetlands Regulations apply to certain land or activities on that land. The SDA, like the Norwell Conservation Commission's ("Commission") Determination of Applicability that preceded it, determined that the forestry activities in the FCP were not agriculturally exempt from the Wetlands Act and Regulations. Those decisions were based upon the conclusions that Rodriguez had not shown the Property was land in agricultural use under 310 CMR 10.04 (agriculture), and thus the agricultural exemption of the Wetlands Act and Regulations did not apply.

Rodriguez appealed the SDA here, to the Office of Appeals and Dispute Resolution ("OADR"). After I held a Pre-Hearing Conference with the parties, MassDEP conducted further research concerning the applicability of the agricultural exemption under 310 CMR 10.04 (agriculture). As a result of that research, it determined that the forestry activities approved by DCR in the FCP were exempt. Consequently, MassDEP filed a proposed Final Determination of Applicability reflecting its changed position. The Commission and Rodriguez contested certain components of the proposed Final Determination of Applicability.

After holding an adjudicatory hearing, I recommend that MassDEP's Commissioner issue a Final Decision adopting this decision and issuing the proposed Final Determination of Applicability. The activities approved in the FCP are deemed as a matter of law to be work on land in agricultural use, and thus they are exempt from the Wetlands Act and Regulations.

[3] The requirements to obtain a Massachusetts Timber Harvester License are minimal, requiring: payment of the annual fee; submission of an application; a certificate of compliance with various laws; and "evidence that the applicant is familiar with, and has consistently complied with, the Massachusetts and applicable federal laws governing forest land, forestry, and forest harvesting." 302 CMR 16.08(1).

Rodriguez's additional claim to perform certain forest mulching work not approved by the FCP is not exempt from the Wetlands Act and Regulations.

EVIDENCE

The evidence in the administrative record includes pre-filed testimony and exhibits from the witnesses who testified on behalf of the parties and testimony that was elicited on cross examination at the adjudicatory hearing. The following witnesses testified:

The Petitioner, Rodriguez, testified on his behalf. He is a licensed timber harvester, whose training includes attending the forestry workshop presented by the DCR and a workshop presented by the Massachusetts Forestry Alliance on road building as part of the continuing education requirements of his timber harvester license.

The MassDEP witness was:

1. Gary J. Makuch. Makuch has been employed as an environmental engineer and analyst with MassDEP since 1986 in its wetlands and waterways program. He holds a BS degree in environmental science and an MS degree in environmental pollution control.

The DCR witness was:

1. James Rassman. Rassman has been employed for several years as a Service Forester with DCR. He has many years of experience in forestry and natural resource management. He holds a BS degree in forestry and an MS degree in natural resource management.

The Commission's witnesses were:

1. Will Saunders. Saunders is employed as the Commission's Conservation Agent. He holds a BS degree in ecology and environmental science and an MS degree in forest

resources management. He has significant experience in ecological and forest management and restoration.

2. Marynel Wahl. Wahl testified in her capacity as Chair of the Norwell Conservation Commission. She has served on the Commission since 2011, and has been its Chair since 2014.

REGULATORY FRAMEWORK

Wetlands Protection Act. This decision arises in an adjudicatory proceeding for a wetlands permit appeal, filed under the Wetlands Protection Act and the Wetlands Regulations. The purpose of the Wetlands Act and the Wetlands Regulations is to protect wetlands and to regulate activities affecting wetlands areas in a manner that promotes the following:

> (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).

BVW. The wetlands at issue here are known as "Bordering Vegetated Wetlands," or BVW, which are defined as follows: "Bordering vegetated wetlands are freshwater wetlands which border on creeks, rivers, streams, ponds and lakes. The types of freshwater wetlands are wet meadows, marshes, swamps and bogs. Bordering vegetated wetlands are areas where the soils are saturated and/or inundated such that they support a predominance of wetland indicator plants. The ground and surface water regime and the vegetative community which occur in each type of freshwater wetland are specified in M.G.L. c. 131, § 40." 310 CMR 10.55(2)(a). "Bordering Vegetated Wetlands are likely to be significant to public or private water supply, to ground water supply, to flood control, to storm damage prevention, to prevention of pollution, to

the protection of fisheries and to wildlife habitat." 310 CMR 10.55(1). "The plants and soils of Bordering Vegetated Wetlands remove or detain sediments, nutrients (such as nitrogen and phosphorous) and toxic substances (such as heavy metal compounds) that occur in run off and flood waters." Id. "Prevention of Pollution means the prevention or reduction of contamination of surface or ground water." 310 CMR 10.04 ("Prevention of Pollution"). "Significant means plays a role. A resource area is significant to an interest identified in M.G.L. c. 131, § 40 when it plays a role in the provision or protection, as appropriate, of that interest. . . ." 310 CMR 10.04 ("Significant").

Forest Cutting Practices Act. In addition to the Wetlands Act, this appeal involves the application of the Forest Cutting Practices Act, which is administered by DCR. The Forest Cutting Practices Act 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 Forest Cutting Practices Act, it requires the filing of a Forest Cutting Plan with DCR and the local conservation commission at least ten business days before the proposed start date.[5]

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

[4] https://www.mass.gov/guides/forest-cutting-practices-act#:~:text=The%20Forest%20Cutting%20Practices%20Act,a%20continuous%20supply%20of%20wood.

[5] https://www.mass.gov/guides/forest-cutting-practices-act#:~:text=The%20Forest%20Cutting%20Practices%20Act,a%20continuous%20supply%20of%20wood.

or mitigate wetlands impacts. In sum, the Forest Cutting Plan specifies what work may be performed and how it will occur.

BACKGROUND

The activities in the FCP include forest harvesting and management work on the Property in a BVW and Buffer Zone to the BVW. See 310 CMR 10.02 (discussing wetlands jurisdiction and Buffer Zone); 310 CMR 10.53(1) (discussing activities in the Buffer Zone); 310 CMR 10.55 (discussing BVW performance standards). The work proposed for the Buffer Zone is identified as tree stand 1 ("ST-1" or "Stand 1"), which consists of approximately 1 acre; the work proposed for the BVW is identified as tree stand 2 ("ST-2" or "Stand 2"), and is approximately 5.9 acres. Rodriguez PFT, Ex. C.

The FCP provides that Stand 1 will be clear-cut for commercial harvesting, generating approximately 15 cords of wood, consisting of white pine, red oak, and "other hardwood." The FCP indicates that the landowner's forest cutting objective is "LT" or "long term management." As part of that long-term management, the "Source of [Forest] Regeneration" after the clear cut is designated as "PL," which means "plant." It will be replanted with American Chestnut and Sugar Maple seedlings.

In furtherance of long-term management, the FCP has provisions on page 1 specifying what is meant by the binding obligation for long-term forest management:

> The Massachusetts Forest Cutting Practices Act (the "Act") requires the improvement, maintenance, and protection of forest lands for the purpose of conserving water, preventing floods and soil erosion, improving the conditions for wildlife and recreation, protecting and improving air and water quality, and providing a continuing and increasing supply of forest products. The Act requires that a Forest Cutting Plan be filed with the appropriate Department of Conservation and Recreation (DCR) Regional office before harvesting timber to ensure that these values are protected. The cutting plan is meant to satisfy the law, reflect **your objectives for your land**, and help you understand the proposed harvest.

> Your Objectives: The most important information on a Forest Cutting Plan is the landowner's objectives. You will be asked to choose between Long-term Forest Management or a Short-term Harvest. This choice will determine which trees will be harvested and which will remain; **this decision will also determine the future condition of the forest for decades to come.** You will indicate your objective by checking one of two boxes in the Landowner Signature Section on page 4. Information on the two choices is provided below.
>
> . . . . Long-term Forest Management means the planned management of the forest to achieve one or more of the following objectives: produce immediate and maximize long-term income from harvesting activity, maintain or enhance wildlife habitat, improve recreational opportunities, protect soil and water quality, or produce forest specialty products such as maple syrup.
>
> This strategy employs the science and art of forestry to help you manage your property to achieve multiple objectives, preserve future management options, and maximize economic return. (emphasis in original and added)

For Stand 2, the FCP indicates that the landowner's forest cutting objective is also "LT" or "long term management." However, the FCP limits cutting authorization in Stand 2 to "NT," which means non-commercial thinning of Stand 2. The Best Management Practices or "BMPs" section on the FCP for protection of the BVW in Stand 2 states: "Non-commercial thin in Stand 2 . . . will occur when the ground is dry or frozen. Marked trees will be girdled and left standing. No heavy logging equipment will be used for the harvest in [Stand 2]."[6] The FCP later repeats the following (among other information) on the addendum titled "Forest Cutting Plan Narrative": "There will be no heavy logging equipment allowed in any wetland areas. . . . All activities on the site will adhere to the requirements of the Massachusetts Forestry Best Management

[6]"Girdling, also called ring-barking, is the complete removal of the bark (consisting of cork cambium or "phellogen", phloem, cambium and sometimes going into the xylem) from around the entire circumference of either a branch or trunk of a woody plant. Girdling results in the death of the area above the girdle over time. A branch completely girdled will fail and when the main trunk of a tree is girdled, the entire tree will die, if it cannot regrow from above to bridge the wound. Human practices of girdling include forestry, horticulture, and vandalism. Foresters use the practice of girdling to thin forests." https://en.wikipedia.org/wiki/Girdling; see also "Tree Girdling Tools" https://www.fs.fed.us/eng/pubs/pdfpubs/pdf99242809/pdf99242809pt01.pdf

Practices Manual." Rodriguez PFT, Exhibit C. The Plan proposes access to the landing area along Barrell Lane.[7]

The FCP also provides the following important long-term management information in a section titled "Landowner Signature," where Rodriguez signed the FCP:

> The most important information on a cutting plan is the Landowner's objective, as this will determine which trees will be harvested and which will remain; **this decision will also determine the future condition of the forest for decades to come.** After having read the Massachusetts Forest Cutting Plan Information Sheet on page one, indicate your objective by checking the appropriate box below. (emphasis in original and added)

Following that provision, there is a checked box for "LT – Long-term Forest Management," which states:

> planned management of the forest to achieve one or more of the following objectives: produce immediate and maximize long-term income from harvesting activity, maintain or enhance wildlife habitat, improve recreational opportunities, protect soil and water quality, or produce forest specialty products.

Last, the signature section also includes (among other provisions) the following: "I (we) certify that I (we) have notified the Conservation Commission in the town in which the operation is to take place . . . ."[8]

A forest cutting plan exists to promote the silvicultural system to be used to "ensur[e] that forest land is cut in such a manner so as to maintain or regenerate a stand of healthy, vigorous growing trees so that the values listed in 302 CMR 16.01(1) are not jeopardized." 302 CMR

[7] There is an ongoing dispute between the Town of Norwell and Rodriguez concerning whether he has legal authority to use Barrell Lane for access. The FCP states that "approval of this Plan does not, by implication or explicitly, grant the right to use Barrell Lane or any other access to the Plan site." Rodriguez PFT, Exhibit C. This tribunal has no jurisdiction to litigate property disputes. Moreover, there is no allegation or evidence that use of the access road would implicate issues concerning the Wetlands Act or the Wetlands Regulations. There is therefore no jurisdiction in this tribunal to litigate Rodriguez's desire to use the access road.

[8] Perry extended the duration of the 2018 FCP to December 12, 2021. See Rassman, June 9, 2021 letter to Rodriguez.

16.05(1)(a). Importantly, the regulations provide: "Clearing lands for the purpose of changing land use" is not eligible for a forest cutting plan. 302 CMR 16.02(3)(e).

When Rodriguez received the FCP, Norwell Town Counsel, Robert W. Galvin, sent a letter to Rodriguez, stating that because the work in the FCP includes work in a wetlands resource area (BVW) and its Buffer Zone, Rodriguez was required to file a Notice of Intent with the Norwell Conservation Commission ("Commission") prior to performing any work. Rodriguez PFT, Ex. D; see 310 CMR 10.02 (discussing Notice of Intent filing requirements). Galvin's letter then notified Rodriguez that for his work to be exempt from the Wetlands Act and Regulations, he must show that the work is: "on forest land that is 'land in agricultural use,' meaning land presently and primarily used to grow forest products such as biomass, sawlogs, and cordwood." Galvin added: "There is no evidence that [the Property] has ever been land in agricultural use by you or anyone else and accordingly your work there is not permitted." Rodriguez PFT, Ex. D. The letter also notified Rodriguez that if he performed any work on the Property without sufficient town authorization, the Commission would require restoration and pursue "other permissible sanctions, including without limitation, fines and penalties permitted by law." Id.

In response to Galvin's assertions that the work authorized by the FCP was not exempt from the Wetlands Act and Regulations, Rodriguez filed a Request for a Determination of Applicability with the Commission. Rodriguez sought a determination from the Commission that the forestry activities in the FCP was agricultural work that was exempt from the Wetlands Protection Act and the Wetlands Regulations, 310 CMR 10.04 (agriculture). See 310 CMR 10.05(3) (procedure for requesting Determination of Applicability).

The Commission issued a positive Determination of Applicability, determining the work was not exempt from the Wetlands Act and Regulations because it did not satisfy the agricultural

exemption requirement that the work be "normal maintenance of land in agricultural use"; specifically, there was no evidence that the Property was "land in agricultural use." Thus, the Commission determined that Rodriguez was required to file a Notice of Intent ("NOI") to perform the proposed tree cutting work in the BVW and the Buffer Zone to the BVW.

Rodriguez appealed the Commission's Determination of Applicability to MassDEP, requesting an SDA that the proposed work is exempt from the Wetlands Act and Regulations. MassDEP denied the request, finding the proposed work was not exempt from the Wetlands Act and Regulations. The SDA determined the work was not exempt because it did not satisfy the agricultural exemption requirement that the work be "normal maintenance of land in agricultural use"; specifically, there was no evidence that the Property was "land in agricultural use." Rodriguez PFT, Ex. F. MassDEP also noted that Rodriguez failed to specify what if any BMP measures would be taken to prevent the BVW from being adversely affected by erosion and sedimentation that would result from forestry work in the Buffer Zone and BVW.

Rodriguez appealed the SDA here, to the Office of Appeals and Dispute Resolution ("OADR"). After holding a Pre-Hearing Conference with the parties the issues for adjudication were framed as follows:

1. What, if any, work does the [2018 FCP] authorize in Wetlands Resource Areas or the buffer zone for those Resource Areas under 310 CMR 10.00?

2. To what extent, if any, is that authorized work exempt from regulation pursuant to 310 CMR 10.00 and G.L. c. 131 § 40 because it is work allegedly on land in agricultural use under 310 CMR 10.04 (agriculture)?

Soon after that, I allowed multiple MassDEP requests to stay this appeal for it to revisit and research its policies concerning forestry activities in wetland resource areas, which included consultations with DCR and analysis of the Forestry Memorandum of Understanding ("MOU") between MassDEP and DCR, entered in 1995 and revised in 2018. This MOU is a pivotal document, as discussed below.

During the same period, DCR Service Forester James Rassman issued a letter to Mr. Rodriguez dated June 9, 2021, clarifying the scope of the work approved by the FCP ("Rassman Clarification").[9] In sum, the Rassman Clarification addressed, among other things, the following issues:

1. "A noncommercial thinning in Stand 2 that is designated by marking . . . the trees to be girdled and left standing[] with white paint. Since these trees are to be girdled and left standing, there would be no equipment needed or operating in the wetland areas."

2. "These two activities [clear cutting Stand 1 and girdling specific trees in Stand 2] . . . are the only activities that would be exempt under the Wetlands Protection Act."

3. "If you desire to undertake forest mulching or another type of operation in the wetland area (Stand 2), you will need to seek approval for this work from the Norwell Conservation Commission under the Wetlands Protection Act."[10]

Based upon the Rassman Clarification and MassDEP's renewed legal analysis and consultation with DCR, MassDEP altered its position from the SDA: it determined based primarily on the MOU that the work approved in the FCP (with the Rassman Clarification) is exempt from the Wetlands Act and Regulations because MassDEP believed that DCR's approval in the FCP renders it "normal maintenance and improvement of land in agricultural use," if conducted in accordance with the requirements of the FCP, the Forest Cutting Practices Act, and the requirements regarding forestry activities at 310 CMR 10.04, "Agriculture," (b)14-17. Makuch PFT, ¶¶ 32-33. In accord with that change in position, MassDEP requested that this matter be resolved by the issuance of a proposed negative Final Determination of Applicability ("Proposed FDA") solely for the work approved in the FCP, and pursuant to the Rassman Clarification.

[9] The State Forester who issued the 2018 FCP, Joseph Perry, was and has been unavailable to participate in this proceeding. Consequently, DCR designated Rassman to serve in place of Perry.
[10] The FCP also provides that "no heavy logging equipment will be used for the harvest" in Stand 2.

The Commission took issue with MassDEP's new position. The Commission asserted that "[t]he existence of an agreement [in the MOU] by and between MassDEP and DCR to treat a FCP as evidence of land in agricultural use should not be a substitute for actual evidence of land in agricultural use." Commission Memorandum of Law (July 9, 2021). The Commission requested that Rodriguez "provide that evidence underlying the FCP [i.e. evidence of land in agricultural use] or else be required to file a Notice of Intent." Id. In the alternative, the Commission stated that it would support MassDEP's request for issuance of a negative Final Determination of Applicability for the work approved by the FCP (with the Rassman Clarification). Id.

In response to MassDEP and the Commission, Rodriguez asserted that MassDEP's Proposed FDA was insufficient with respect to Stand 2. He focused on allegedly receiving authorization in the FCP to use a forest mulcher as part of the non-commercial thinning work in Stand 2: he asserted that the FCP indicates that "the work authorized in the FCP clearly included the thinning of 5.9 acres using a forest mulcher" in Stand 2, which is in the BVW. He argued that even if the FCP did not authorize that activity, the activity nonetheless qualified as "normal maintenance of land in agricultural use" under 310 CMR 10.04 (Agriculture, (b)17). Petitioner Memorandum of Law, pp. 3-8 (July 30, 2021).

Given MassDEP's changed position, the Commission's opposition to that, and Rodriguez's continued challenge with respect to Stand 2, I held a status conference with the parties. Based on discussions at that conference I issued a Memorandum and Order Clarifying Status of Appeal. The parties agreed that Rodriguez's claim that his proposed work to use a forest mulcher to "thin" the 5.9 acres in Stand 2 is agriculturally exempt could be adjudicated in this appeal.

Thus, the overarching issues below are: (1) what forestry activities were approved in the FCP?; (2) whether the FCP-approved activities are on land in agricultural use as a matter of law?; (3) if they are, is that interpretation consistent with the regulatory framework?; and (4) whether a forestry activity not approved in the FCP—Rodriguez's proposed use of a forest mulcher in Stand 2—is exempt from the Wetlands Act and Regulations?

THE BURDEN OF PROOF

As the party challenging MassDEP's issuance of the SDA in this de novo appeal, Rodriguez had the burden of going forward by producing credible evidence from a competent source in support of his position. 310 CMR 10.03(2); see Matter of Town of Freetown, Docket No. 91-103, Recommended Final Decision (February 14, 2001), adopted by Final Decision (February 26, 2001) ("the Department has consistently placed the burden of going forward in permit appeals on the parties opposing the Department's position."). So long as the initial burden of production or going forward is met, the ultimate resolution of factual disputes depends on where the preponderance of the evidence lies. Matter of Town of Hamilton, DEP Docket Nos. 2003-065 and 068, Recommended Final Decision (January 19, 2006), adopted by Final Decision (March 27, 2006).

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

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

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

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

DISCUSSION

I. The Scope Of The FCP

The parties disagree about what DCR authorized in the FCP. MassDEP and the Commission assert that the Rassman Clarification is a binding clarification of the FCP because DCR is responsible for administering the Forest Cutting Practices Regulations and issuing forest cutting plans. MassDEP Closing Brief, p. 7. Rodriguez disagrees, and believes the FCP authorized the use of a forest mulcher and the Rassman clarification is not binding as to what is authorized under the FCP in Stand 2.

MassDEP's and the Commission's argument is persuasive and is grounded in the regulations themselves, which provide: "Approved Forest Cutting Plan means a forest cutting plan which has been approved by the Director or the Director's Agent pursuant to 302 CMR 16.04 in the form it was submitted or together with amendments and requirements added by the Director or the Director's agent as conditions for approval. An approved forest cutting plan shall meet the requirement for a final work order required under M.G.L. c. 132, §§ 40 through 46." 302 CMR 16.03.

Rodriguez has not offered a persuasive explanation why the Rassman Clarification is not binding as a clarification of the FCP. Consequently, the FCP will be interpreted and applied in light of the Rassman Clarification, which collectively are the "Final FCP."

Rodriguez testified during the hearing that he intended to adhere to the Final FCP but then equivocated: "Well in terms of - the only issue raised by the DCR is thinning and pruning. So if their interpretation is that the only thing that I can thin is the girdling of six white pine trees, then that's what I will do under the authority of the DCR. But that doesn't necessarily mean that that is the only work that I will be doing on that land in agricultural use." Hearing[11], 1:41:54 - 1:42:31.

Contrary to Rodriguez's unsupported assertions, the Final FCP clearly does not authorize use of a forest mulcher for non-commercial thinning in Stand 2. The Final FCP directs in no uncertain terms that "no equipment would be needed or operating" in Stand 2 and "[i]f you desire to undertake forest mulching or another type of operation in the wetland area (Stand 2), you will need to seek approval for this work . . . ."

II. The Activities Authorized In The Final FCP Are Exempt From The Wetlands Act Because They Would Occur On Land In Agricultural Use

A. MassDEP and DCR Regulatory Authority

MassDEP's and DCR's Overlapping Jurisdiction. Much of the litigation in this appeal has resulted from ambiguities at the intersection of DCR's authority to regulate forest management and cutting practices and MassDEP's authority to regulate activities in and around wetlands.

MassDEP's authority to determine when agricultural activities are exempt from the Wetlands Act and the Wetlands Regulations is rooted in the Wetlands Act as follows: "The provisions of this section shall not apply to . . . work performed for normal maintenance or improvement of land in agricultural use or in aquacultural use . . . ." G.L. c. 131 § 40, ¶ 24 (emphasis added). "Within one hundred and twenty days of the effective date of this act, the

[11] "Hearing" refers to the video and audio recording of the adjudicatory hearing.

department, upon the advice and consent of the Commissioner of the Department of Food and Agriculture, shall promulgate rules and regulations pursuant to this section which shall establish definitions for the term "normal maintenance or improvement of land in agricultural, or in aquacultural use", for each agricultural commodity, or where appropriate because of similarities in cultural practices, groups or commodities in the Commonwealth." G.L. c. 131 § 40, ¶ 25 (emphasis added). DCR's authority is rooted in the Forest Cutting Practices Act, G.L. c. 132, §§ 40-46, which governs forest cutting practices.

With the above statutory authority, MassDEP and DCR have separately promulgated the Wetlands Regulations, 310 CMR 10.00, and the Forest Cutting Practices Regulations ("Forestry Regulations"), 302 CMR 16.00, respectively. Both agencies jointly issued the MOU between DCR and MassDEP to define the scope of forest cutting agricultural work that is exempt from the Wetlands Act and Wetlands Regulations. At issue here is primarily what constitutes "land in agricultural use."

MassDEP's Applicable Regulations. Pursuant to the Wetlands Act, MassDEP's Wetlands Regulations define "land in agricultural use" to include "land within resource areas or the Buffer Zone presently and primarily used in producing or raising...forest products on land maintained in forest use, including but not limited to biomass, sawlogs, and cordwood..." They go on to state that "[l]and in agricultural use may lie inactive for up to five consecutive years unless…it is used for the forestry purposes described in 310 CMR 10.04: Agriculture (b)14. through 17." 310 CMR 10.04 (Agriculture (a) Land in Agricultural Use (emphasis added)). The last provision relating to inactivity indicates that land in agricultural use for forestry purposes may lie inactive for a longer period than the limit of up to five years. As discussed below, that is because forest management practices generally involve long-term management plans, in contrast, for example, to typical shorter-term agricultural activities like growing crops such as corn.

For the commercial harvesting of trees, the Wetlands Regulations define "normal maintenance of land" in agricultural use as "the cutting and removal of trees for the purpose of selling the trees or any products derived therefrom, when carried out in accordance with a Forest Cutting Plan approved by the Department of Environmental Management (DEM)[12] under the provisions of M.G.L. c. 132, §§ 40 through 46," "when undertaken in such a manner as to prevent erosion and siltation of adjacent water bodies and wetlands," and in accordance with federal and state laws, and subject to certain listed requirements. 310 CMR 10.04 (Agriculture, (b)(14)) (emphasis added). In contrast, for non-commercial harvesting it defines "normal maintenance of land in agriculture use" as "non-harvest management practices for forest products on land maintained in forest use limited to pruning, pre-commercial thinning or planting tree seedlings." 310 CMR 10.04 (Agriculture, (b)(17)).

These regulations leave unanswered what it means for "land in agricultural use" to be "land within resource areas or the Buffer Zone presently and primarily used in producing or raising...forest products on land maintained in forest use, including but not limited to biomass, sawlogs, and cordwood..." 310 CMR 10.04 (Agriculture (b)14. through 17). In particular, what is meant by "presently and primarily" in the context of an agricultural activity like forest management that generally requires long-term management and growth, in contrast to shorter-term commodities, like corn? DCR's regulations and the MOU shed light on that question, as discussed below.

DCR's Applicable Regulations. DCR's Statement of Jurisdiction for its Forestry Regulations state that they apply to "all land devoted to forest growth owned or administered by private persons, corporations or organizations or by any federal, state, county, municipal or other public agency." 302 CMR 16.02(1). The activities on that land that are subject to DCR's

[12] DEM was the predecessor agency to DCR.

jurisdiction include "any commercial cutting of a volume of products equivalent in volume to more than 25,000 board-feet or 50 cords on any parcel of land at any one time." 302 CMR 16.02(2).

In the same jurisdictional section, the regulations expressly address the agricultural exemption requirement under the Wetlands Act and Regulations that the land be "presently and primarily" used in raising forestry products, stating: "[a]pproval of a forest cutting plan under M.G.L. c. 132 means that the land is presently and primarily used in raising forest products and shall be maintained as forest land and continue to provide values as listed in 302 CMR 16.01(1)." 302 CMR 16.02(2) (emphasis added). Thus, as MassDEP argues, these regulations provide that the Final FCP operates to deem the approved activities to be exempt as a matter of law.

Other DCR regulations are consistent with and clarify this interpretation. Section 302 CMR 16.02(4) of DCR's regulations, titled "Forest Cutting Practices and M.G.L. c. 131, § 40, the Wetlands Protection Act," is specific to forestry activities in wetlands resource areas. Pursuant to 302 CMR 16.02(4)(b) "a forest cutting which is usually subject to" the Wetlands Act is "exempt" if: "1. wetland resource areas are properly identified in the forest cutting plan; 2. the forest cutting plan is approved by the Director or the Director's Agent; 3. the forest cutting plan is filed with the local Conservation Commission(s) as required under 302 CMR 16.04(2) allowing for an opportunity for comment; 4. the Director or the Director's Agent sends the approved forest cutting plan to the appropriate DEP regional office; and 5. the landowner faithfully executes the forest cutting plan." (emphasis added)

Reconciliation of Overlapping Jurisdiction. To clarify their overlapping jurisdiction for wetlands and forestry management, in 1995, MassDEP and the Massachusetts Department of Environmental Management ("DEM" – the predecessor agency to DCR) entered the MOU, addressing the interplay between the Wetlands Act's agricultural exemption for forestry work

and the Forest Cutting Practices Act. The MOU was updated in 2018. MassDEP Memorandum of Law (July 9, 2021), Attachment 4.

The 2018 MOU, § III, states: "Forestry activities subject to the [Forest Cutting Practices Act] that occur in Resource Areas and Buffer Zones are exempt from the general performance standards of the [Wetlands Regulations] if conducted in accordance with an approved forest cutting plan and the requirements of 310 CMR 10.04 Agriculture (b)14 through 16. An affirmatively approved FCP is one that has been reviewed and approved by a DCR Service Forester." (emphasis in original) Thus, the MOU coincides with the Forest Cutting Regulations provision that "[a]pproval of a forest cutting plan under M.G.L. c. 132 means that the land is presently and primarily used in raising forest products and shall be maintained as forest land and continue to provide values as listed in 302 CMR 16.01(1)." 302 CMR 16.02(2) (emphasis added).

MassDEP's Changed Position Regarding The Effect Of The Final FCP Is Persuasive. Based upon the above provisions, MassDEP has persuasively asserted that work approved in the Final FCP is exempt from the Wetlands Act and Regulations because DCR's approval in the Final FCP renders it "normal maintenance and improvement of land in agricultural use," if conducted in accordance with the requirements of the Final FCP, the Forest Cutting Practices Act, and the requirements regarding forestry activities at 310 CMR 10.04 ("Agriculture," (b)14-17). Makuch PFT, ¶¶ 32-33. The Forest Cutting Regulations and the MOU support MassDEP's position, evidencing a clear intent to exempt activities approved in a forest cutting plan from the Wetlands Act and Regulations if those activities are implemented in accordance with all other applicable laws, particularly those specifying BMPs that must be implemented for the protection of wetlands.

B. The MOU Provision Is Valid And Binding

The Commission has taken issue with the above provisions' interpretation and application of MassDEP's Wetlands Regulations which define the statutory agricultural exemption term "land in agricultural use" to be "land within resource areas or the Buffer Zone presently and primarily used in producing or raising...forest products on land maintained in forest use, including but not limited to biomass, sawlogs, and cordwood..." 310 CMR 10.04 (Agriculture (b)14. through 17 (emphasis added)).

In particular, the Commission takes issue with: (1) DCR's regulatory provision in 302 CMR 16.02(2) providing that "[a]pproval of a forest cutting plan under M.G.L. c. 132 means that the land is presently and primarily used in raising forest products and shall be maintained as forest land and continue to provide values as listed in 302 CMR 16.01(1)" (emphasis added); and (2) the analogous MOU provision providing: "[f]orestry activities subject to the [Forest Cutting Practices Act] that occur in Resource Areas and Buffer Zones are exempt from the general performance standards of the [Wetlands Regulations] if conducted in accordance with an approved forest cutting plan and the requirements of 310 CMR 10.04 Agriculture (b)14 through 16." (emphasis added).

The Commission's argument is that the Wetlands Regulations exemption requirement in 310 CMR 10.04 (agriculture) for land to be "presently and primarily used in raising forest products" requires evidence of land being "presently and primarily" used for raising forest products. The Commission contends that there is no evidence of present use, or even past use, for raising forest products on the Property. Indeed, that evidentiary void is not genuinely disputed.[13] Despite that, the Forest Cutting Regulations and the MOU provide by operation of law that an approved forest cutting plan deems the approved activities to constitute a present and

[13]Rodiguez's submission of evidence showing that the Property was less forested many years ago is not, standing alone, probative that it was or is land in agricultural use. See e.g. Matter of James Rodriguez, Recommended Final Decision, Docket No. WET-2014-024 (April 09, 2015), adopted by Final Decision (June 10, 2015).

primary use for raising forest products on the Property. The Commission argues that this interpretation is contrary to the Wetlands Act and the Wetlands Regulations.

MassDEP disagrees with the Commission. It asserts that its interpretation is one that is reasonable and consistent with its regulations, as demonstrated by the 2018 MOU. It adds that the 2018 MOU "is an update to a longstanding MOU between DEP and DCR that was the product of a comprehensive effort to achieve consistency and cooperation" on matters of overlapping jurisdiction. It contends the MOU is reasonable and consistent with the applicable statutes, regulations, and guidance; and it is designed to facilitate streamlined and coordinated implementation of each agency's regulations. Given this, MassDEP concludes the MOU provides a reasonable interpretation of its Wetlands Regulations and is valid under applicable case law, including MassDEP adjudicatory decisions. MassDEP Closing Brief, pp. 10-11.

MassDEP points out that "[c]ourts have recognized that government agencies may enter into memoranda of understanding or coordinated guidance with each other to facilitate cooperation on matters of joint responsibility," citing as examples: Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 457 Mass. 663, 667-669 (2010) (MOU between Cape Cod Commission and Massachusetts Executive Office of Energy and Environmental Affairs regarding joint review of Cape Wind project); Commonwealth v. Lawrence L., 439 Mass. 817, 819-822 (2003) (MOU among school district and law enforcement agencies to coordinate response to certain activities by students); see also Matter of Town of Plymouth, Docket No. WET-2009-016, Recommended Final Decision (Feb. 18, 2010), adopted by Final Decision (March 16, 2010) (MassDEP guidance incorporating guidelines developed by the Natural Heritage and Endangered Species Program of the Division of Fish and Wildlife).

MassDEP also persuasively explained that interpretive guidance for MassDEP's regulations has been upheld if it is reasonable and does not contradict the regulation, citing:

Matter of Comley, Docket Nos. DEP-04-1129/1130, Partial Summary Decision (March 29, 2007) (deferring to MassDEP's regulatory interpretation in Farming in Wetland Resource Areas guidance document because it was "not inconsistent with either the Act or the Wetlands Regulations"); Matter of Brennan, Docket No. 2002-069, Recommended Final Decision (May 6, 2003), adopted by Final Decision (August 11, 2003) ("The Coastal Bank Policy to which the Brennans object is simply a written expression of the Department's interpretation of its own regulations. … So long as that interpretation is reasonable, I will apply it."); see also Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 99 (1995) (a "prototypical example of an interpretive rule issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers").

MassDEP contends that the MOU, § III provision exempting activities approved in a forest cutting plan is a reasonable provision that is consistent with its regulations. As the MOU states: It "identifies the roles that each agency will play to ensure that forestry practices are conducted in a manner consistent with the [Wetlands Act], [Forest Cutting Practices Act], and the regulations at 310 CMR 10.00 and 302 CMR 16.00." MOU, § II. MassDEP's 1996 guidance document titled Farming in Wetland Resource Areas provides (at § 5- 1) a history of the effort that led to the development of the original 1995 MOU:

> In 1991, the Massachusetts Legislature established the Farmland Advisory Committee (FAC) and directed the Department of Environmental Protection (DEP) to clarify the definition of "normal maintenance or improvement of land in agricultural use" as it applies to the exemption under the Wetlands Protection Act. DEP adopted regulatory language related to the agricultural exemption for row crops, cranberries, and other commodities in May 1993. The revised Wetlands Protection Regulations for forestry activities (310 CMR 10.00) were adopted in November 1995. In addition to addressing a legislative mandate, the forestry regulations are part of DEP's continuing effort to streamline permitting and provide a better understanding of the standards while maintaining wetlands protection. In 1993, the FAC established a forestry subcommittee to work with DEP to review

> the Wetlands Protection Regulations. This subcommittee also reviewed the Department of Environmental Management (DEM) Forest Cutting Practices Act Regulations (304 CMR 11.00) at the same time. The subcommittee included representatives from DEM, DEP, the Massachusetts Department of Food and Agriculture, the Massachusetts Division of Fisheries and Wildlife, and other environmental and forestry agencies and groups. The subcommittee proposed amendments to the regulations for both the Wetlands Protection Act and Forest Cutting Practices Act (FCPA). The amendments to the FCPA Regulations strengthen environmental protection for surface waters and wetlands during forest harvesting operations. This protection has been accomplished in the FCPA Regulations through increased emphasis on Best Management Practices (BMPs) and clarification of the standards for cutting, and engineering and logging. The relationship between the Forest Cutting Practices Act and the Wetlands Protection Act has been greatly improved by regulatory changes in notification requirements, agency and landowner responsibilities, and definitions of terms and practices. A strong spirit of cooperation among local, state, and federal environmental agencies and organizations has been formed as a result of the work of the forestry subcommittee and will continue through outreach and training efforts. A Memorandum of Understanding between DEM and DEP further defines each agency's role and encourages this cooperation in the future.

MassDEP compellingly adds that the intersection of forestry and agriculture presents regulatory issues that are not present with other agricultural commodities. The above regulatory provisions and the MOU recognize that the analysis for "Land in Agricultural Use" is inherently different for most forest products. For agricultural activities except foresting, the definition of "Land in Agricultural Use" limits the time that such land may lie inactive to five years, but that limit does not apply to land "used for the forestry purposes described in 310 CMR 10.04: Agriculture (b)14. through 17." 310 CMR 10.04 (Agriculture (a)). The Farming in Wetland Resource Areas guidance acknowledges the difficulty with making a determination for forestry that certain land is "presently and primarily used in producing or raising...forest products on land maintained in forest use." This is largely due to the long time-period required to manage and harvest trees, in stark contrast to most other crops. The Farming in Wetland Resource Areas

guidance (at § 5-4) states: "Forest management may involve an orderly plan for achieving the objectives of the landowner or it may involve a decision to not conduct an active management plan. In either case, the forest may be considered land in agricultural use." (emphasis in added) "It is the activity, or the work, that is exempt, not the land." Farming in Wetlands Resource Areas, § 5-7 (emphasis added).

MassDEP asserts that given the "inherent difficulty in determining whether land is devoted to continued production of forest products and the need to provide clear and workable criteria for making this determination, it was reasonable for MassDEP and DCR to identify Forest Cutting Plans as sufficient evidence – which the regulatory framework clearly does." MassDEP Closing Brief, p. 14.

MassDEP cites additional support for this from Farming in Wetlands Resource Areas, which states (at § 5-7):

> For an activity to qualify for an exemption it must take place on forest land that is "land in agricultural use," meaning land presently and primarily used to grow forest products such as biomass, sawlogs, and cordwood. Because forest products take a long time to grow, it is sometimes difficult to show active use. Nonetheless, for the forestry activity to qualify for the exemption, the land must be devoted to **continued** production of forest products. Evidence of such committed use would include, for example, a 10-year Forest Management Plan such as required for Chapter 61 or enrollment in a federal or state program to improve forest resources such as the Stewardship Incentive Program. A Forest Cutting Plan approved by DEM also is evidence of continued forest land use. However, lack of these formal plans does not necessarily mean the land is not devoted to continued production of forest products. (emphasis in original and added)

DCR's 2004 "Ch. 132 Guidance Document" states:

> For a forest harvest to qualify for the [Wetlands Act] exemption, the land must be devoted to continued production of forest products. An approved forest cutting plan, because it is designed to reflect principles of silviculture and forest management, is evidence of this continued forest land use. Land being cut for a

> change from forest to some other use, however, does not qualify as land maintained in forest use. (emphasis added)

In accord with the above provisions, the Final FCP is sufficient evidence that the activities approved in the Final FCP will be conducted on land in agricultural use. This is a reasonable interpretation, given the difficulties with demonstrating long term forestry management and the Wetlands Regulations' ambiguous use of "presently and primarily" in the agricultural exemption. It enables a landowner to *initiate* and engage formally in silviculture and forestry management by obtaining a forest cutting plan that officially establishes *from the execution of that plan into the future* that the approved foresting activities will be on land "presently and primarily" used in producing or raising forest products.

This interpretation is consistent with the DCR Service Forester's testimony. Rassman testified that he was not aware of any information concerning historical forestry use of the Property, but that is also not something for which he would be searching. Hearing, 4:12:30-4:12:58; 4:17:10. He testified that historical foresting information is not required because *long-term agricultural use* is established through forest management plans and forest cutting plans. The land is only in agricultural use and exempt from the Wetlands Act as to those specific activities approved in a forest cutting plan. Id. at 4:14 - 4:15; 4:24 - 4:25, 4:55:10 - 4:55:55. Once the plan is executed the forest management plan must continue for the approved activities. Id. at 4:14 – 4:16. Only the approved forest agricultural activities are exempt, not the land. Hearing, 4:27-29; 4:54-56.

With respect to the Commission's concerns that Rodriguez may attempt to develop the land after it is harvested, the party bound by the forest cutting plan must acknowledge and formally commit to the forestry management objective, whether long-term or short-term.[14] The

[14] The Commission asserted this concern with supporting evidence in another appeal involving Mr. Rodriguez. See Matter of James Rodriguez, Recommended Final Decision, Docket No. WET-2014-024 (April 09, 2015), adopted by Final Decision (June 10, 2015).

Farming in Wetland Resource Areas guidance also states that for "forestry activity to qualify for the exemption, the **land must be devoted to continued production of forest products**." Farming in Wetland Resources, § 5-7 (emphasis in original). That same guidance states "[l]and undergoing a change from forest to development or to open land for farming and forests used only for recreation or scenic amenity do not qualify as 'land maintained in forest use.'" Farming in Wetland Resource Areas, § 5-7; also see Matter of James Rodriguez, Recommended Final Decision, Docket No. WET-2014-024 (April 09, 2015), adopted by Final Decision (June 10, 2015). "While a change of agricultural commodity within a wetland (e.g. from corn to tomatoes) is exempt under the Agricultural Regulations, changing from forest production or sap production to another agricultural commodity is not exempt. For example, changing from forest use within a wetland to a pasture or cropfield requires a permit." Farming in Wetland Resource Areas, § 5-7.

Just as important, execution of a forest cutting plan also engages DCR, MassDEP, and conservation commissions in a process to regulate the forestry activities with the forest cutting plan and enforcement mechanisms to permit only forestry activities that are consistent with wetlands protection in agricultural areas. MOU, § III. The failure to comply with the forest cutting plan and applicable laws triggers numerous enforcement mechanisms to bring the land and activities back into compliance and deter noncompliance in the future. Id.; 302 CMR 16.04(9) ("Landowner's Compliance with an Approved Forest Cutting Plan"); 302 CMR 16.04(11) ("Inspection by Director or Director's Agent and Issuance of Stop Orders"). It remains "DEP's responsibility to enforce the [wetlands] regulations and to determine if forest cutting activities are in compliance with the provisions of 310 CMR 10.04, Agriculture." MOU, ¶ III, §13. "Failure to comply with the wetlands provisions of the forest cutting plan and 302 CMR 16.00 shall void the exemption from M.G.L. c. 131, § 40." 302 CMR 16.02(4)(g).

III. Work Not Approved In The Final FCP Is Not Exempt From The Wetlands Act And Regulations

MassDEP persuasively asserted that it would be possible for activities outside the scope of the Final FCP to be considered and approved as exempt from the Wetlands Protection Act as normal maintenance or improvement of land in agricultural use as part of this appeal of a request for determination of applicability. Supplemental Pre-Filed Direct Testimony of Gary Makuch at ¶ 2; 310 CMR 10.05(3)(a)1. However, that determination must be consistent with the objectives of the applicable forest cutting plan and all other applicable laws.[15] The benefits must outweigh the impacts and be consistent with the long-term management plan. Hearing, 4:57-59 (Rassman testimony).

MassDEP and the Commission assert that the Final FCP authorizes only the girdling of approved trees in Stand 2. Hearing, 1:35. Rodriguez disagrees, believing that the Final FCP includes thinning of Stand 2, without limitation as to methodology, which may include use of a forest mulcher. Hearing, 1:39. Rodriguez's assertion is without merit.

Rassman testified that a forest mulcher was not approved as part of the Final FCP. Hearing, 4:19. That is consistent with the Final FCP, which clearly and repeatedly prohibits use of heavy equipment or machinery, such as a forest mulcher, in Stand 2.

Even though the Final FCP did not authorize use of a forest mulcher, Rodriguez contends that his proposed use of a forest mulcher to mulch and remove forest undergrowth and trees less than 5 inches in diameter within the BVW is exempt under subsection (b)(17) of the definition of "Normal Maintenance of Land in Agricultural Use" at 310 CMR 10.04. To be exempt under that subsection, the work must: (1) be "non-harvest management practices for forest products on land maintained in forest use limited to pruning, pre-commercial thinning or planting of tree

[15] Rodriguez raises for the first time in his closing brief the argument that the wetlands on the property are isolated wetlands that are not jurisdictional under the Wetlands Protection Act. Because this argument (1) was not previously waived, (2) lacks support in the administrative record, and (3) is undermined by the Final FCP showing wetlands, I will not consider it here.

seedlings"; and (2) meet the "Normal Maintenance of Land in Agricultural Use" definition of being "directly related to the production or raising of the agricultural commodities referenced in 310 CMR 10.04 Agriculture (a)," and be "undertaken in such a manner as to prevent erosion and siltation of adjacent water bodies and wetlands" and "conducted in accordance with federal and state laws." See 310 CMR 10.04 (Agriculture (b)); Supplemental Pre-Filed Direct Testimony of Gary Makuch at ¶ 3.

An overwhelming preponderance of the evidence demonstrates that Rodriguez's proposed use of a forest mulcher is not exempt. Makuch persuasively testified that Rodriguez had not provided sufficient information to demonstrate that the proposed use of a forest mulcher met the above criteria for "normal maintenance of land in agricultural use." Makuch, Supplemental Pre-Filed Direct Testimony, ¶ 3. Also, insufficient information had been provided regarding erosion and sedimentation controls and the effects of mulching on the wetlands. Makuch expressed concern that mulching would serve as fill of the wetland, which would have negative effects on the wetlands, and that the use of heavy equipment could damage the wetland. Hearing Recording 3:19:50 – 3:22:00. In addition, there is inadequate evidence to show that the use of a forest mulcher was directly related to the continued production of forest products at the Property. Makuch opined that the use of a forest mulcher was different from thinning, and that activities such as cleaning, weeding, and pruning were only exempt if they were necessary and related to the crop in production. Hearing, 3:34:15 – 3:36:27.

Norwell Conservation Agent Will Saunders (who has a MS degree in forest resources management) described his personal experience with the use of a forest mulcher in a wetland. The mulcher was used for the specific purpose of removing invasive species for an ecological restoration project for a long-term restoration plan. He testified that, regardless of the operator's best efforts and even though the ground was frozen, the machinery damaged the wetland by

disturbing roots, soil, and desirable plants. It also led to erosion and sedimentation in the wetlands. He testified that use of a forest mulcher under the circumstances here would not be appropriate. There is inadequate information regarding the need for the mulcher and BMPs that would be employed to avoid impacts to the BVW. Hearing, 2:38:09 – 2:42:13; 2:49-2:52. see also Wahl PFT, ¶¶ 15-20; Saunders PFT.

Rassman's position was that use of a forest mulcher is not part of the Final FCP and would be counter to the long-term objectives of that plan. He testified that the determination whether an activity can be permitted under the Forest Cutting Practices Act relies primarily on two factors, whether: (1) the land is devoted to the continued production of forest products, and (2) the proposed activity is consistent with principles of silviculture and forest management. Hearing Recording 4:14:40 – 4:15:10.

Rassman testified that there was insufficient evidence for him to determine whether Rodriguez's proposed use of a forest mulcher satisfied the preceding criteria. Hearing, 4:52-54. The determination would require substantially more information on how it would promote silviculture and forest management. Hearing, 4:52-54, 4:56:19–4:57:00; 4:59-5:00. He added that the Final FCP allowed only the specified girdling work and did not permit the use of a forest mulcher. Id. at 4:19 to 4:20.

Applicable guidance also cautions against use of machinery in wetlands. "Typically, it is harvesting activities, which involve equipment, that can impact wetland resource areas." Farming in Wetland Resource Areas, § 5-4. Moreover, "[t]he soils in wetlands typically cannot support commercial timber harvesting equipment. However, impacts to these areas can be minimized by using best management practices (BMPs)." Farming in Wetland Resource Areas, § 5-2.

CONCLUSION

For all the above reasons, I recommend that MassDEP's Commissioner issue a Final Decision adopting this decision and issuing the proposed Final Determination of Applicability filed by MassDEP. The activities approved in the Final FCP are deemed as a matter of law to be work on land in agricultural use, and thus exempt from the Wetlands Act and Regulations. Rodriguez's additional claim to perform certain forest mulching work not approved by the Final FCP is not exempt from the Wetlands Act and Regulations.

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect. Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

Date: February 17, 2022

Timothy M. Jones
Presiding Officer

SERVICE LIST

In the Matter of: **James Rodriguez**

Docket No. WET-2020-016 **File No. SDA**
Norwell, MA

Representative	Party
James Rodriguez 9 Lake Street Halifax, MA 02338 jmrodz0@gmail.com	APPLICANT/PETITIONER
Rebekah Lacey, Counsel Office of General Counsel MassDEP - Boston One Winter Street Boston, MA 02108 Rebekah.Lacey@mass.gov	DEPARTMENT
Robert W. Galvin, Esq. Norwell Town Counsel Galvin & Galvin, PC 10 Enterprise Street, Suite 3 Duxbury, MA 02332 rwgalvin@comcast.net	CONCOMM Norwell Conservation Commission
Cc: Shaun Walsh, Chief Regional Counsel MassDEP/Southeast Regional Office 20 Riverside Drive Lakeville, MA 0234 Shaun.Walsh@mass.gov	DEPARTMENT
Daniel Gilmore, Section Chief Bureau of Water Resources MassDEP/Southeast Regional Office 20 Riverside Drive Lakeville, MA 0234 Daniel.Gilmore@mass.gov	DEPARTMENT
Gary Makuch, Engineer Bureau of Water Resources MassDEP/Southeast Regional Office 20 Riverside Drive Lakeville, MA 0234 Gary.Makuch@mass.gov	DEPARTMENT
Leslie DeFillipis, Paralegal MassDEP/Office of General Counsel One Winter Street Boston, MA 02108 Leslie.Defillipis@mass.gov	DEPARTMENT
James Rassman, Service Forester MA Department of Conservation and Recreation james.rassman@mass.gov	DCR