

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

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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

November 26, 2025

**In the Matter of
JD Raymond Transport, Inc.**

**OADR Docket No. WET 2024-019
DEP File # NERO-055-0907
Peabody, MA**

RECOMMENDED FINAL DECISION

INTRODUCTION

Michael Weiss, the manager of The Residence at Farm Avenue, LLC (the “Petitioner”), on June 26, 2024, filed an appeal with the Office of Appeals and Dispute Resolution (“OADR”) to challenge a Superseding Order of Conditions (“SOC”) issued by the Northeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or the “Department”) on June 12, 2024. The SOC affirmed the Order of Conditions issued by the Peabody Conservation Commission (“Commission”) to JD Raymond Transport, Inc. (the “Applicant”) approving the project at 25 Farm Avenue in Peabody (the “Property”). The Property is used for processing and bulk storage associated with a wood mulch operation. The SOC approved, with conditions, the construction of two stormwater management basins to be located in the Buffer Zone of Bordering Vegetated Wetlands (“BVW”) (“proposed Project”). The Petitioner claims standing as a person aggrieved by the SOC approval.

After thoroughly reviewing the administrative record, I recommend that the Department’s Commissioner issue a Final Decision affirming the SOC as to Basin #1 which is located within MWPA jurisdiction, but not as to Basin #2 which is not within MWPA jurisdiction and therefore is not subject to the stormwater standards.

WITNESSES¹

The evidence in the administrative record includes the Department's basic records and the pre-filed, sworn written testimony and exhibits submitted by witnesses on behalf of the Parties. The witnesses below submitted pre-filed direct testimony.

For the Petitioners:

1. Luke Fabbri, LSP: Mr. Fabbri is a geologist, with 38 years of experience in conducting environmental assessments, including in solid waste management and hydrology. Mr. Fabbri has been a Massachusetts Licensed Site Professional since 1996 and has worked on numerous sites managed under the Massachusetts Waste Site Cleanup Program. Mr. Fabbri is qualified as an expert witness.
2. Anthony M. Capachietti, PE: Mr. Capachietti is a Professional Engineer licensed in Massachusetts and has over 25 years of civil engineering and land surveying experience, designing and permitting residential and commercial developments of different sizes in the Commonwealth. Mr. Capachietti has delineated and reviewed delineations of resource areas in a professional capacity and previously served as a Commissioner on the Town of North Andover Conservation Commission. He is qualified as an expert witness.

For the Applicant:

1. Guy Dalton, LSP: Mr. Dalton is a Professional Engineer licensed in New Jersey and Vermont and has over 36 years of experience in environmental site investigation, remedial action and closure projects. Mr. Dalton has been a Massachusetts Licensed Site Professional since 2013. He is qualified as an expert witness.

¹ Throughout this Recommended Final Decision, the witnesses' Pre-Filed Direct Testimony is referred to as "[Witness] PFT, ¶ X" and Pre-Filed Rebuttal Testimony will be referred to as "[Witness] PFR, ¶ X." Exhibits to testimony are referred to as "[Witness] Ex. X." The witnesses' cross examination testimony at the Hearing is referred to as "[Witness], page:lines."

2. Stephen D'Ambrosio: Mr. D'Ambrosio is a Professional Engineer licensed in Massachusetts with over 25 years of experience in private and public projects. Mr. D'Ambrosio's work has involved site design and permitting, hydrologic and hydraulic modeling and design of stormwater management systems. He has experience reviewing, interpreting and drafting plans and has served as a third-party peer reviewer for Conservation Commissions and Planning Boards. He is qualified as an expert witness.
3. Joseph Rogers: Mr. Rogers is a Wetlands Scientist and Senior Project Manager with GZA GeoEnvironmental ("GZA") and holds a certificate from the Society of Wetland Scientists as of May 2020. He is certified in erosion sediment and stormwater inspection by EnviroCert International, Inc., as of January 2020. He has served on a conservation commission since 2010. Mr. Rogers has been involved in hundreds of private and public projects, the majority of which involve wetlands delineations and MWPA permitting. He is qualified as an expert witness.

For the Department:

1. Philip DiPietro: Mr. DiPietro has been employed by the Department since 1982 and has been in the position of Environmental Engineer IV since 1989. His responsibilities include review of topographic plans, hydrologic calculations, floor storage volume calculations, pipe sizing calculations, watershed analysis, etc., for projects subject to the MWPA and the Wetlands Regulations. His responsibilities include preparing SOCs, SDA and WQCs, participating in adjudicatory proceedings, conducting inspections and taking enforcement actions for violations under the MWPA and Wetlands Regulations. Mr. DiPietro is qualified as an expert witness.

BACKGROUND

The Property

The project property is located at 25 Farm Avenue in Peabody (the “Property”). The 12.6-acre lot is principally used for processing and bulk storage associated with a log storage and sorting yard that imports raw wood and bark for the processing of mulch on the Property and distributes mulch. SOC cover letter, p. 1; DiPietro PFT, ¶ 3; Rogers PFT, ¶ 8; D’Ambrosio PFT, ¶ 8; Capachietti PFT, ¶ 3. The processing and storage occur on upland portions of the Property with wetland resources located to the east, north, and west. SOC cover letter, p. 1; DiPietro PFT, ¶ 3. The Property contains Bordering Vegetated Wetlands (“BVW”) and Bank associated with an intermittent stream, which are presumed to protect one or more statutory interests identified in the Regulations and noted in the attached SOC. SOC cover letter, p. 2; DiPietro PFT, ¶ 4.

The Isolated Vegetated Wetlands (“IVW”) on the Property are identified on Sheets EX-1, C-1, and C-2 of the NOI plans. Petitioner Ex. 20. The IVW is located east of Basin #1, and Basin #1 is partially located within the Buffer Zones of BVW to its north and southeast. DiPietro PFT, ¶¶ 10-11. Basin #2 is not located within Buffer Zone or wetlands jurisdictional resource area. DiPietro PFT, ¶ 9.

Abutting Property

The Petitioners’ abutting property is located at 27R Farm Ave, Peabody (“27R Farm Ave”). In 2022 the Petitioners sought an SOC for a project at 27R Farm Ave and 0 Forest Street, DEP File # 055-0914, for the construction of a multi-family residential development. DiPietro PFT, ¶ 10; Capachietti PFT, ¶ 2; Petitioner Ex. 17, pp. 7-8. The 2013 ACOP included wetlands replication areas that are located on this abutting parcel. DiPietro PFT, ¶ 8. The filings for this

abutting project included site plans dated August 19, 2022,² which identified some of the same wetland resource areas identified on the NOI plans for the proposed Project.³ Some of these resource areas are identified thereon as IVW. DiPietro PFT, ¶¶ 9-10.

Proposed Project

The April 14, 2022 Notice of Intent (“NOI”) for the proposed Project depicts the wetlands delineation prepared in April 2011 in response to an Administrative Consent Order with Penalty between JD Raymond and the Department dated January 24, 2013 (“2013 ACOP”). Capachietti PFT, ¶ 5; DiPietro PFT, ¶ 8; Rogers PFT, ¶ 10. The 2013 ACOP was related to previously filled wetland areas and required wetland resource area replication and monetary penalties. The Department’s witness in this proceeding, Phil DiPietro, participated in the 2011 and 2012 site walks. DiPietro PFT, ¶ 9; DiPietro, 121:11-18; Rogers PFT, ¶ 10. Mr. DiPietro also participated in site visits on December 20, 2018, December 28, 2021, and September 7, 2023. DiPietro PFT, ¶ 2. The Applicant’s consultant, GZA, confirmed the 2013 ACOP delineation prior to filing the NOI. Rogers PFT, ¶ 12; Petitioner Ex. 1, NOI, p. 1. The wetlands delineation was also confirmed by the Commission’s third-party reviewer, Horsley Witten Group (“HWG”). Rogers PFT, ¶ 13; Petitioner Exs. 21, 23, 25, 27 and 28. HWG staff conducted a site visit of the Property on July 11, 2022, “to confirm the existing site conditions and to verify field assumptions reported in the Applicant’s submission package. HWG also viewed the resource areas on the abutting property.” Petitioner Ex. 21, p. 2; Rogers PFT, ¶ 13. The wetlands delineation was not flagged. Capachietti PFT, ¶ 5.

The NOI included the construction of two stormwater infiltration basins, a concrete block wall, a proposed water main, and a fire hydrant. DiPietro PFT, ¶ 3; D’Ambrosio PFT, ¶ 8;

² DiPietro PFT, ¶ 10, citing MassDEP Exs. 2 and 3, Existing Conditions, Plan to Accompany NOI, the Residences at Farm Avenue, Peabody Mass., dated August 19, 2022.

³ See Petitioner Ex. 20.

Capachietti PFT, ¶ 4. The NOI plans also include a perimeter fence, water line, and fire hydrant that were constructed in August 2023. Petitioner Ex. 20, Sheet C-1; DiPietro PFT, ¶ 3; Capachietti PFT, ¶¶ 4, 36.⁴ The use of the Property is considered a “land use Associated with higher potential pollutant loads” (“LUHPPL”). SOC cover letter, p. 3; DiPietro PFT, ¶ 24; D’Ambrosio PFT, ¶ 4; Capachietti, PFT, ¶ 29. The proposed infiltration basins include a sediment forebay and a proprietary separator to treat stormwater runoff for hydrocarbons and to provide additional total suspended solid (“TSS”) removal required for LUHPPLs. SOC cover letter, p. 3; DiPietro PFT, ¶ 26; D’Ambrosio PFT, ¶¶ 28-29; Capachietti PFT, ¶ 30.

Fill material was encountered within test pits excavated within the footprint of Basin #1. DiPietro PFT, ¶ 30. The Parties contest the characterization of this fill material, which the SOC referred to as solid waste. SOC cover letter, p. 3. The Applicant’s experts testified that the proper classification of the materials is “soil and debris, historical fill.” Dalton PFT, ¶ 14; Dalton, 80:22-81:2; D’Ambrosio PFT, ¶ 32; D’Ambrosio, 108:9-16. The Petitioner’s experts concluded that the material is fill and solid waste materials that must be evaluated by an LSP. Fabbri PFT, ¶¶ 18, 35; Capachietti PFT, ¶ 39; Capachietti, 44:10-15. The SOC requires the over excavation of the areas in which the infiltration basins will be located by a minimum of two (2) feet below the proposed bottom of the basins to be replaced with “Clean Imported Fill.” DiPietro PFT, ¶ 31; Petitioner Ex. 20, Sheet C-3. The Department approved the Project with conditions and issued a SOC on June 12, 2024. Petitioner Ex. 4.

Procedural Background

I issued a Scheduling Order in this appeal on July 10, 2024, which directed the Parties to confer regarding the possibility of settlement, and to file a Joint Status Report informing me of

⁴ The Department issued a Notice of Noncompliance for the water line and fire hydrant activities which requires compliance with the conditions set forth in the SOC. DiPietro PFT, ¶ 3.

the status of their settlement discussions, and if settlement would not go forward, to include a joint list of Issues for Adjudication and a proposed schedule for adjudication. On August 5, 2025, the Parties filed a Joint Status Report requesting an extension to continue settlement discussions which I granted. The Parties filed a second Joint Status Report on September 6, 2025, requesting a further extension to submit a Joint Status Report with Issues for Adjudication. On September 17, 2025, I granted the extension and scheduled the Pre-Hearing Conference for November 6, 2024. Following the Pre-Hearing Conference, I issued a Pre-Hearing Conference Report and Order in which I framed the Issues for Adjudication based upon the discussion at the Conference.⁵ I allowed the Parties to comment on the Issues for Adjudication, which were amended thereafter based on the Parties' comments.⁶

On January 21, 2025, I allowed the Applicant's Motion to replace one witness, to add a new witness and to request that it be allowed a week extension to file its Pre-Filed Testimony and memorandum of law.⁷ The Applicant's proposed new witness, Guy Dalton, LSP, was proposed as a rebuttal witness to Petitioner's witness, Luke Fabbri, SLP. I allowed the Applicant's late request to add Mr. Dalton as a rebuttal witness over the Petitioner's objection in an abundance of caution to ensure a complete record for this appeal proceeding.⁸

⁵ The Parties filed separate issues for adjudication which were discussed at the Pre-Hearing Conference. See Email Order, September 17, 2025.

⁶ The Applicant and MassDEP responded with similar revisions to Issue 1, contending that the Petitioner does not challenge the wetland delineation itself. At the Pre-Hearing Conference, when I asked the Petitioner if he intended to challenge the wetland delineation, he responded yes, and I framed the issue accordingly. However, after reviewing the Issues as framed in the Pre-Hearing Conference Report and Order, the Petitioner agreed with the Applicant's framing of Issue 1 which challenges only the reliance on the 2011 delineation without flagging. See Amended Issues for Adjudication, November 13, 2024.

⁷ The Applicant requested replacement of witness Daniel Nitzsche, wetlands scientist, with witness Joseph Rogers, also a wetlands scientist, indicating that Mr. Nitzsche no longer works for GZA, the Applicant's consultant. Neither the Department nor the Petitioner objected to this replacement. See Ruling and Order, January 21, 2025.

⁸ See Ruling and Order, January 21, 2025.

Three days before the Hearing, on March 25, 2024, the Applicant filed a Motion to Strike the Petitioner’s Rebuttal Exhibits A,⁹ B,¹⁰ and E;¹¹ paragraphs 15, 16, 90(a), and 91 of the Pre-Filed Rebuttal Testimony (“PFR”) of Anthony Capachietti; and paragraph 48 of the PFR of Luke Fabbri. The Petitioner opposed the Motion on March 27, 2024, and included affidavits with their opposition intending to authenticate the new rebuttal exhibits. Later the same day, MassDEP filed an email opposing the inclusion of the affidavits and exhibits included in the Petitioner’s opposition. At the start of the Hearing, I allowed the Parties to argue their positions on the Motions, which is discussed below. The Hearing was conducted on March 28, 2025, and the Parties filed their closing briefs on May 5, 2025.

ISSUES FOR ADJUDICATION

Based on the Parties’ respective positions in the appeal regarding approval of the proposed Project, the Issues for Adjudication in the appeal were established as follows:

Issue 1: Whether the Department correctly issued the SOC in accordance with the wetlands regulations at 310 CMR 10.55(2)(c)1-3, as informed by the Handbook, where the 2011 wetland delineation for the Property was not flagged during the proceedings?

Issue 2: Whether the Department correctly determined that the Property qualifies as “Redevelopment” as set forth in 310 CMR 10.04?

- a. If yes, is the Property subject to the requirements for a redevelopment project at 310 CMR 10.05(6)(k)7.
- b. If yes, does the SOC satisfy the requirements at 310 CMR 10.05(6)(k)7.

Issue 3: Whether the SOC includes appropriate conditions for erosion control measures necessary to avoid alteration of the BVW consistent with 310 CMR 10.53(1), specifically

⁹ Aerial photograph dated June 2010, referenced in Capachietti PFR, ¶ 15.

¹⁰ Aerial photograph dated June 2010, referenced in Capachietti PFT, ¶ 16.

¹¹ City of Peabody Fire Department Overdue Invoice dated September 16, 2010 for fire services at Farm Avenue, Peabody, MA on June 20, 2010.

- a. does the SOC include appropriate conditions for mulch in areas adjacent to the resource area; and
- b. does the SOC include appropriate conditions for managing excavation necessary to construct the proposed stormwater basins including relocation of the basins if necessary to do undetermined fill and management on-site of such materials.

Issue 4: Whether the Department correctly determined that the project complies with 310 CMR 10.05(6)(k)5, and Standard 5 as stated in Volume I, Chapter 1 of the Department’s Stormwater Handbook.

Issue 5: Whether the Department erred in not requiring evaluation of the unknown fill materials at the Property where the Property is not listed waste site.

- a. If yes, is a mounding analysis necessary pursuant to Volume 3, Chapter 1 of the Stormwater Handbook.

Issue 6: Whether the Department erred in issuing the SOC the where Executive Office of Energy and Environmental Affairs did not review pursuant to the Massachusetts Environmental Policy Act, G.L. c. 30, §§ 61 to 62H (“MEPA”), as implemented through the regulations at 310 CMR 11.00.

STATUTORY & REGULATORY FRAMEWORK

The Massachusetts Wetlands Protection Act and the Wetlands Regulations have as their purpose the protection of wetlands and the regulation of activities affecting wetlands areas in a manner that promotes the following interests: (1) protection of public and private water supply; (2) protection of ground water supply; (3) flood control; (4) storm damage prevention; (5) prevention of pollution; (6) protection of land containing shellfish; (7) protection of fisheries; and (8) protection of wildlife habitat. G.L. c. 131, § 40; 310 CMR 10.01(2); see In the Matter of Kristen Kazokas, OADR Docket No. WET-2017-022, Recommended Final Decision (August 29, 2018), 2018 WL 9847851, *3, adopted by Final Decision (September 18, 2019), 2019 WL 5209254, citing Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 224 (2010).

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

APPEAL ADJUDICATION PROCEDURE

I. PETITIONER’S BURDEN OF PROOF

In addition to the Adjudicatory Proceeding Rules at 310 CMR 1.01, the Wetlands Permit Appeal Regulations at 310 CMR 10.05(7)(j), and the requirements of the MWPA and the Wetlands Regulations govern resolution of the Petitioner’s appeal of the SOC. Under 310 CMR 10.05(7)(j), the Petitioner has the burden of proof on all Issues for Adjudication in the Appeal. See 310 CMR 10.03(2); 310 CMR 10.05(7)(j)2.b.iii; 310 CMR 10.05(7)(j)2.b.v; 310 CMR 10.05(7)(j)3.a; 310 CMR 10.05(7)(j)3.b.

¹² See 310 CMR 10.02(2)(a); 310 CMR 10.02(2)(b)3; 310 CMR 10.03(1)(a).

To prove his contention that the Department erred in issuing the SOC, the Petitioner was required to “produce [at the Hearing] at least some credible evidence from a competent source in support of [their] position[.]” See 310 CMR 10.03(2); 310 CMR 10.05(7)(j)2.b.iv; 310 CMR 10.05(7)(j)2.b.v; 310 CMR 10.05(7)(j)3.a; 310 CMR 10.05(7)(j)3.b. The Petitioner had to present “credible evidence from a competent source in support of each claim of factual error [made against the Department], including any relevant expert report(s), plan(s), or photograph(s).” 310 CMR 10.05(7)(j)3.c. “A ‘competent source’ is a witness who has sufficient expertise to render testimony on the technical issues on appeal.” In the Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 WL 3427461, *11, adopted by Final Decision (August 19, 2010), 2010 WL 3427460. Whether the witness has such expertise depends “[on] whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony.” Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted); see, e.g., In the Matter of Carl Carulli, Docket No. 2005-214, Recommended Final Decision (August 10, 2006), 2006 WL 4211673, adopted by Final Decision (October 25, 2006) (dismissing claims regarding flood control, wetlands replication, and vernal pools for failure to provide supporting evidence from competent source); In the Matter of Indian Summer Trust, Docket No. 2001-142, Recommended Final Decision (May 4, 2004), 2004 WL 3973695, adopted by Final Decision (June 23, 2004) (insufficient evidence from competent source showing that interests under MWPA were not protected); In the Matter of Robert Siegrist, Docket No. 2002-132, Recommended Final Decision (April 30, 2003), 2003 WL 21202599, adopted by Final Decision (May 9, 2003) (insufficient evidence from competent source to show wetlands delineation was incorrect and work was not properly conditioned).

II. STANDARD OF REVIEW

My review of the evidence presented by the Parties at the Hearing was *de novo*, meaning that my review was anew, irrespective of any prior determination of the Department in issuing the SOC. In the Matter of Brian Corey, OADR Docket No. WET 2016-023, Recommended Final Decision (February 28, 2018), 2018 WL 2002973, *19, adopted as Final Decision (March 15, 2018), 2018 WL 2002972 (“Brian Corey”). Additionally, because the proceedings before me in this appeal are *de novo*, the Department “is authorized to, and should change its position” on any Issue for Adjudication it had taken previously in issuing the Draft License approving the proposed Project “if during the pendency of [the] appeal, ‘[it] becomes convinced’ based on [1] a different legal interpretation of applicable regulatory standards, [2] new evidence, [and/or] [3] error in its prior determination,” that a change in position is warranted. See Brian Corey, *19; In the Matter of Michael Gaspard, DEP Docket No. 2006-155, Final Decision (November 7, 2008), 2008 WL 5740294; In the Matter of Kristen Kazokas, OADR Docket No. WET 2017-022, Recommended Final Decision (August 29, 2018), 2018 WL 9847851, adopted as Final Decision, (September 18, 2019), 2019 WL 5209254.

The relevancy, admissibility, and weight of evidence that all parties sought to introduce at the Hearing was governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h). 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 . . . rest[ed] within the discretion of the Presiding Officer.” Speculative evidence was accorded no weight given its lack of probative value in resolving the issues in the case. In the Matter of Sawmill

Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), 2015 WL 5758252, *29, adopted as Final Decision (July 7, 2015), 2015 WL 5758285 (petitioners' expert testimony "that pharmaceuticals, toxins, and other potentially hazardous material would be discharged from effluent generated by . . . proposed [privately owned wastewater treatment facility] . . . was speculative in nature and not reliable").

DISCUSSION

1. Motion to Strike

"A party may move to strike, or the Presiding Officer may strike from a pleading any insufficient allegation or defense or any redundant, irrelevant, immaterial, impertinent or scandalous matter; and from any testimony material which is unduly repetitious, irrelevant or otherwise inadmissible pursuant to 310 CMR 1.01(13)(h)." 310 CMR 1.01(11)(c). 310 CMR 1.01(13)(h)1 states, "Unless otherwise provided by any law, the Presiding Officer 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. The weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. Unduly repetitious or irrelevant evidence may be excluded."

At the start of the Hearing, I allowed the Parties to argue their positions on the Motions, after which I allowed the Petitioner's Rebuttal exhibits and testimony to remain in the record, but excluded the additional affidavits offered in the Petitioner's Opposition to the Motion to Strike..

a. Exhibit A; Exhibit B; Capachietti PFR, ¶¶ 15-16

Exhibit A contains an aerial photograph of the Property purported to have been taken in June 2010, while Exhibit B contains an aerial photograph of the Property purported to have be

taken in April 2022.¹³ Capachietti PFR, ¶¶ 15-16. The Applicant argues that Exhibit A and Exhibit B should be stricken because they are not properly authenticated specifically with respect to the date the photographs were taken. Mass G. Evid. § 901(a) states, “To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Subsection (a) of the Editors’ Notes for § 901 further states, “Photographs are usually authenticated by competent testimony that the photograph fairly and accurately depicts something the witness actually saw, or by circumstantial evidence to support a finding that the matter in question is what its proponent claims.” See also Commonwealth v. Figueroa, 56 Mass. App. Ct. 641, 646 (2002) (“Photographs usually are authenticated directly through competent testimony that the scene they show is a fair and accurate representation of something the witness actually saw. . . . But authenticity also can be established circumstantially by ‘evidence sufficient to support a finding that the matter in question is what its proponent claims.’”).

Here, Mr. Capachietti has testified under oath that Exhibit A was taken in June 2010 and Exhibit B was taken in April 2022. While he has not testified that he personally observed the Property at those times, his testimony is still evidence. When asked at the Hearing, no Party questioned Mr. Capachietti’s veracity, and I am disinclined to believe that Mr. Capachietti has lied under oath without at least some evidence from the Applicant demonstrating that his statements are false. While Mr. Capachietti may not have fully satisfied Mass. G. Evid. § 901, I am not bound by the Rules of Evidence in these proceedings. The Applicant had the opportunity to cross-examine Mr. Capachietti about how he knows the date these photographs were taken, and I may choose to reduce the weight given to the photographs or discount the photographs

¹³ Both Exhibit A and Exhibit B contain a caption reading “Aerial Photograph June 2010.” However, Mr. Capachietti claims in his Pre-Filed Rebuttal Testimony that Exhibit B was taken in April 2022. Capachietti PFR, ¶ 16. I assume that the caption on Exhibit B is erroneous.

entirely if I am not convinced that Mr. Capachietti's claims are accurate. At the Hearing, I exercised my discretion and declined to strike the exhibits. Accordingly, the Applicant's motion to strike Exhibit A, Exhibit B, and paragraphs 15 and 16 of Mr. Capachietti's PFR **is denied**. I have given these exhibits due weight during the course of my review of the evidence presented by the Parties in this appeal.

b. Exhibit E; Fabbri PFR, ¶ 48; Capachietti PFR, ¶¶ 90(a) & 91

Exhibit E contains a series of documents and invoices related to a request for payment by the Peabody Fire Department to the Applicant for the cost of fighting a fire on the Applicant's property on June 20, 2010. The invoice, dated July 21, 2010, lists 550 gallons of "3%-6% AR-AFFF Foam" as one of the items for which the Peabody Fire Department was requesting payment. The revised invoice dated March 5, 2012, does not mention AR-AFFF foam. Mr. Fabbri's PFR claims that 3%-6% AR-AFFF contains PFAS, to which Mr. Capachietti's PFR also refers. Fabbri PFR, ¶ 48; Capachietti PFR, ¶¶ 90(a), 91. The Applicant argues that Exhibit E should be stricken as hearsay; that Exhibit E is not reliable for purposes of identifying what materials were used at the Property because it was sent for purposes of financial collection; that Mr. Fabbri is not qualified to testify as to the chemical makeup of firefighting foam; and that 3%-6% AR-AFFF foam was not actually used because the revised invoice omitted it.

Regarding the Applicant's claim of hearsay, Mass G. Evid. § 803(6)(A) provides, "A business record shall not be inadmissible because it is hearsay or self-serving if the court finds that (i) the entry, writing, or record was made in good faith; (ii) it was made in the regular course of business; (iii) it was made before the beginning of the civil or criminal proceeding in which it is offered; and (iv) it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter." The invoices for the cost of fighting the fire on the Applicant's property in 2010

would appear to meet all the requirements for the hearsay exception for business records. Therefore, even if the invoices are hearsay, they are nonetheless admissible evidence. It is unnecessary for me to analyze the factors for admission of hearsay evidence because the evidence already satisfies one of the exceptions.

Regarding the reliability of the invoices, I see no reason why the purpose of financial collection would make the invoices unreliable for the materials used. If anything, the motive of financial collection would make the invoices more reliable, as the Peabody Fire Department would want to ensure it was compensated for every expense incurred. Presumably the firefighters knew what materials they were using. As for Mr. Fabbri's qualifications, he is an expert in hazardous waste and environmental site assessments. See Fabbri PFT, ¶¶ 1-4; Fabbri Ex. A. I am unconvinced that someone with his qualifications would not be qualified to testify to chemical pollutants and the materials that contain them.

Finally, regarding the discrepancy between the July 21, 2010 invoice and the March 5, 2012 invoice, this discrepancy may raise a dispute about whether 3%-6% AR-AFFF foam was used at the Property, and the Parties may argue about the significance of this discrepancy. However, it does not justify striking the entire exhibit. Motions to strike are for "any insufficient allegation or defense or any redundant, irrelevant, immaterial, impertinent or scandalous matter; and from any testimony material which is unduly repetitious, irrelevant or otherwise inadmissible pursuant to 310 CMR 1.01(13)(h)." There is no suggestion that the invoices meet any of the conditions for being stricken. Accordingly, the Applicant's motion to strike Exhibit E, paragraph 48 of Mr. Fabbri's PFR, and paragraphs 90(a) and 91 of Mr. Capachietti's PFR **is denied.**

c. Petitioner's Opposition Exhibits

In his opposition, the Petitioner included an additional affidavit from Mr. Capachietti to which the Applicant and MassDEP objected. At the Hearing, I stated that I agreed that the late Affidavit of Mr. Capachietti would be excluded and that the Parties could cross-examine him related to the exhibits he sought to support with the late filed affidavit. Hearing, 16:17-22. As to the second affidavit, it is from Amato Bocchino, not a witness to these proceedings and not available for cross-examination and is excluded from the record. Hearing, 16:23-17:2. The Petitioner noted his objection for the record. Hearing, 17:10-11.

2. Basin #2

Vegetated wetlands that do not border certain waterbodies are not regulated under the MWPA and the Wetlands Regulations unless they qualify as Isolated Land Subject to Flooding. See Matter of Linda-Ann Cintron, Trustee, Bucko Family Realty Trust, OADR Docket No. 2004-530, Recommended Final Decision (November 10, 2005), 2005 WL 4124542, adopted by Final Decision (December 27, 2005) (isolated wetlands are not regulated under the MWPA, unless they qualify as Isolated Land Subject to Flooding). Under the Wetlands Regulations “bordering” means “touching.”¹⁴

MassDEP contends that previously, IVWs were regulated by the Department through the Water Quality Certification Program implemented pursuant to Section 401 of the federal Clean Water Act. The U.S. Supreme Court decision in Sackett v. U.S. Environmental Protection Agency,¹⁵ however, concluded that for wetlands to qualify as “waters of the United States” subject to the federal Clean Water Act they must be an indistinguishable part of a body of water. Thereafter, the United States Environmental Protection Agency and United States Army Corps

¹⁴ 310 CMR 10.04: Bordering (“[b]ordering means touching”).

¹⁵ Sackett v. Environmental Protection Agency, 598 U.S. 651 (2023).

of Engineers issued a final rule consistent with the Sackett ruling and revised the definition of waters of the United States which excludes IVWs.¹⁶

On behalf of the Department, Mr. DiPietro testified regarding a correction to the delineation as approved in the SOC. DiPietro PFT, ¶ 9. The SOC states that the proposed Project entails the construction of two (2) stormwater management basins located in Buffer Zone to BVW. SOC cover letter, p. 1. With respect to Basin #2, the SOC cover letter describes its location as “[o]nly a small portion of the northern berm of basin #2 (the southerly lying basin) is located in the buffer zone to a wetland replication area constructed on the adjacent site located to the west.” Id.

Mr. DiPietro testified that there was an error in the approved Plans, specifically Sheets EX-1, C-1 and C-2, related to the identification of “the buffer zone to wetland replication area” associated with Basin #2. DiPietro PFT, ¶¶ 9-10. He testified that the replicated wetlands areas located on the abutting Weiss property are IVWs and are not regulated under the MWPA or the Wetlands Regulations.¹⁷ As such, the Plan identification of a “100’ wetland buffer to offsite wetland replication area” is in error because the offsite wetland replication area, an IVW, does not have a regulated Buffer Zone. As a result, Mr. DiPietro testified that Basin #2 is not within MWPA jurisdiction and therefore is not subject to the stormwater standards. DiPietro PFT, ¶ 11. Mr. DiPietro’s testimony, therefore, addressed only Basin #1. DiPietro PFT, ¶ 12, 18, 23. Mr. DiPietro was not cross-examined on his conclusion regarding Basin #2.

On behalf of the Petitioner, Mr. Capachietti testified that Mr. DiPietro’s conclusion is incorrect. Capachietti PFR, ¶ 87. He testified that because an NOI was required for the proposed

¹⁶ See <https://www.epa.gov/wotus/amendments-2023-rule>.

¹⁷ Mr. DiPietro testified that this replication was permitted under a local bylaw and by MassDEP under a Water Quality Certification #X274980, and that due to changes in federal law discussed above, IVWs are now eliminated from MassDEP’s 401 WQC Program. DiPietro PFT, ¶ 9.

Project, “the location of the treatment practice has no bearing on jurisdiction provided the stormwater runoff is associated with a project within an area of projection or within the buffer zone. The jurisdiction of the Department extend [sic] to all components of the required treatment system for work requiring the filing of a Notice of Intent.” Id. However, Mr. Capachietti does not cite to any authority for expanding MWPA jurisdiction in this manner. Nor did the Petitioner (or Applicant) address this conclusion in their memoranda of law.

However, the Stormwater Handbook acknowledges that an issuing authority cannot regulate a structure located outside of a wetland Resource Area and outside of the Buffer Zone. The Stormwater Handbook provides that conditions may be imposed on the quality and quantity of the discharge from such structures into jurisdictional areas, to ensure the discharges satisfy the stormwater standards. Therefore, issuing authorities may make inquiries regarding the design of such structures during the permitting process. See Stormwater Handbook, Vol. 1, Ch. 2, p. 4.¹⁸ During the pendency of an administrative adjudicatory appeal it is appropriate for MassDEP to change its position in the course of its defense of the interests of the MWPA as Mr. DiPietro has done in this case. Because Basin #2 is an infiltration basin identified as being located outside of MWPA jurisdiction, and there is no testimony indicating that it will discharge into a Resource Area or Buffer Zone subject to MWPA jurisdiction, Basin #2 is not appropriately included in the SOC.

Issue 1: Whether the Department correctly issued the SOC in accordance with the wetlands regulations at 310 CMR 10.55(2)(c)1-3, as informed by the Handbook, where the 2011 wetland delineation for the Property was not flagged during the proceedings.

Under the Wetlands Regulations, the boundary of BVW is determined by the line where 50% or more of the vegetational community consists of wetlands indicator plant species and the

¹⁸ The example discussed in the Stormwater Handbook is a discharge basin located outside of jurisdiction that will discharge into jurisdiction. As such, the issuing authority may inquire regarding the design of the structure to ensure that the quantity and quality of the discharge will comply.

presence of saturated or inundated conditions. 310 CMR 10.55(2)(c)1. The presence of 50% or more of wetlands plant species is presumed to indicate saturated or inundated conditions and serves as the boundary where there is a distinct slope between upland and certain indicator status of wetland plants, where the work is clearly limited to the buffer zone, or where the issuing authority determines that sole reliance on wetlands indicator species will yield an accurate delineation. Id.

In other circumstances or to rebut the presumption, credible evidence from a competent source may be offered as to whether the 50% wetlands species line is correct or indicators of saturated or inundated conditions must be used to determine the boundary by also evaluating and finding groundwater within the root zone, observation of flooding or standing water, or hydric soils. 310 CMR 10.55(2)(c)2.

Wetlands resource area¹⁹ delineations are only effective for a period of three (3) years unless extended.²⁰ The three (3) year expiration period is bounded in well-established wetlands delineation principles that wetlands can change over time as a result of conditions in the environment. In the Matter of Elite Home Builders, LLC, OADR Docket No. WET-2015-010, Recommended Final Decision on Reconsideration (June 30, 2016), 2016 WL 4083861, *3, adopted as Final Decision on Reconsideration (July 14, 2016), 2016 WL 4083863 (an expired wetlands permit cannot be revived or reinstated), citing In the Matter of David H. Barrett and Kevin Cunniff, Docket No. 2001-178, Recommended Final Decision (June 11, 2002), 2002 WL 1574701, *2, adopted as Final Decision (July 1, 2002), 2002 WL 1898910; In the Matter of Martha's Vineyard Land Bank, OADR Docket No. WET 2013-029, Recommended Final

¹⁹ The term "Resource Area" is used synonymously with Areas Subject to Protection under the MWPA and Wetlands Regulations. See 310 CMR 10.04: Resource Areas.

²⁰ 310 CMR 10.05(6)(a)3 (Orders of Resource Area Delineation); 310 CMR 10.05(6) (Orders of Conditions); 310 CMR 10.05(8) (extensions).

Decision (June 20, 2014), 2014 WL 2996116, *8, adopted as Final Decision (June 26, 2014), 2014 WL 2996123 (time limitation on wetlands boundary is 3 years).

Such boundaries are typically delineated by the applicant and are reviewed by the Commission, or by the Department for an SOC. Either the Commission or the Department may require supporting plans or materials prepared by professional engineers, wetlands scientists, or other professionals when warranted by the complexity of the project or site. 301 CMR 10.05(4)(h).

The Department published a Delineation Handbook that describes in detail recommendations for how wetlands are to be delineated under the Wetlands Regulations.²¹ The use of sequentially numbered flags and GPS points are included in the recommended procedures for marking a delineated boundary. Delineation Handbook, 5.5.1 Delineation Procedures, p. 58. For review of boundary delineations, the Handbook anticipates that the issuing authority is responsible for reviewing the accuracy of an applicant's flagged boundary and for ensuring that boundaries are accurately represented on the maps/plans. *Id.*, 5.5.2 Reviewing Boundary Delineations, p. 59. In evaluating a boundary delineation, the reviewing agency is to consider vegetation, soils and other indicators of hydrology when submitted and recommends that the applicant attend the site visit to answer questions. Further, the Delineation Handbook acknowledges that wetland boundary delineations often involve much interpretation and judgment and that experienced professionals may have differing opinions on precisely where they put the line but that such differences should not be large. *Id.*

In appeals, typically a Petitioner will challenge a delineation by having its expert delineate an alternate boundary in the field at the property under review. Under the Department's

²¹ Massachusetts Handbook for Delineation of Bordering Vegetated Wetlands, Second Edition (September 2022) ("Delineation Handbook"), <https://www.mass.gov/doc/massachusetts-handbook-for-delineation-of-bordering-vegetated-wetlands/download>.

appeal regulations, a person filing an appeal has the right to access a site for purposes related to their appeal. 310 CMR 10.05(7)(j)2.e. The Petitioner here chose to pursue his appeal only by reference to documents and did not conduct a separate wetlands delineation.

It is undisputed that the wetlands delineation relied upon in the NOI filing was first prepared in 2011 and submitted to the Department in the context of the 2013 ACOP. DiPietro PFT, ¶ 8; DiPietro, 121:7-9; Capachietti PFT, ¶ 6; Rogers PFT, ¶ 10. The Applicant's expert, Mr. Rogers, testified that the 2011 delineation was confirmed prior to filing the NOI. Rogers PFT, ¶¶ 11-12. Mr. Rogers further testified that the Commission's peer reviewers visited the site and confirmed existing site conditions on July 11, 2022. Rogers PFT, ¶ 13; Applicant Ex. A, HWG Peer Review of NOI, July 13, 2022, p. 2. Mr. DiPietro testified that he is familiar with the Property and the wetlands boundary, through his involvement in reviewing the Property in 2011 and 2012 and also through his more recent site visits on December 20, 2018, December 28, 2022, and September 7, 2023, as well as his review of the file for the proposed Project. DiPietro PFT, ¶¶ 2, 9.²²

MassDEP and the Applicant contend that neither the regulations nor the Handbook require flagging when an NOI is filed or before issuance of an SOC. DiPietro PFT, ¶ 7; Rogers PFT, ¶ 11. They contend that it is not necessary to flag the delineation before filing the NOI because the SOC includes a standard general condition that requires flagging before work is conducted. DiPietro PFT, ¶¶ 8-9; Rogers PFT, ¶ 11; see SOC Condition 17.²³ The Applicant contends that it is enough that the delineation was submitted by a competent source and contends

²² Mr. Rogers testified that Mr. DiPietro was the analyst who confirmed the wetlands delineation in 2011 and 2013. Rogers PFT, ¶ 10.

²³ SOC General Condition 17 provides "Prior to the start of work, and if the project involves work adjacent to a Bordering Vegetated Wetland, the boundary of the wetland in the vicinity of the proposed work area shall be marked by wooden stakes or flagging. Once in place, the wetland boundary markers shall be maintained until a Certificate of Compliance has been issued by the Department."

that the 2011 delineation was confirmed through the 2022 NOI submission and the Commission's review, which included the Commission's peer reviewers who visited the site and confirmed existing site conditions on July 11, 2022, prior to issuance of the OOC. Rogers PFT, ¶¶ 11-13.

Petitioner's burden to show that the wetlands delineation is not correct requires credible evidence in support of that position, based on the methodology used by the Department to establish wetlands boundaries. In his testimony, the Petitioner's expert, Mr. Capachietti, questioned reliance on the 2011 wetlands delineation in the absence of flagging, contending that it is too old to be valid. Capachietti PFT, ¶ 9. Mr. Capachietti testified that "at a minimum, the reestablishment of wetlands flags in the field is necessary to inform proper confirmation of the line." Capachietti PFT, ¶ 9. Mr. Capachietti testified that there have been significant hydraulic and hydrologic changes within the watershed since the 2011 wetlands delineation.²⁴ Mr. Capachietti identified paving, building and clearing on the Property, including significant tree clearing and expansion of the business within Buffer Zone. Capachietti PFR, ¶ 17.²⁵

Mr. Capachietti contends that the Applicant has not demonstrated the boundary location by other credible evidence, as allowed by the regulations, because the Applicant submitted only field data sheets from the 2011 delineation. Capachietti PFR, ¶¶ 34-36, citing NOI, Section 2.1, p. 1 and Appendix C, 2011 Narrative from LEC. Mr. Capachietti also contends that the Commission's peer reviewer was not retained to review the wetlands delineation. Capachietti

²⁴ Capachietti PFT, ¶ 10 ("[t]he Applicant's activities at the Site comprise systematic, unpermitted, incremental and unabated increases to impervious surfaces on Site occurring over a 10-year period (adding a total of approximately 5 acres in impervious surface during that time) in violation of the WPA"); Capachietti PFR, ¶ 14 ("the relied upon delineation is over 13 years old and there have been significant hydraulic and hydrologic changes within the watershed since it was originally established").

²⁵ This paragraph of Mr. Capachietti's PFR includes his descriptions of the changes he identified between Rebuttal Ex. A, a 2010 aerial photograph before the 2011 wetlands delineation, and Rebuttal Ex. B, an aerial photograph dated April 2022, the year the NOI was filed with the Commission.

PFR, ¶¶ 38-40; Capachietti, 29:14-30:7.²⁶ However, the Petitioner does not present his own delineation, asserting only that the Applicant did not provide enough data, which does not satisfy his burden.²⁷

Here, the SOC does not rely solely on the 2011 wetlands delineation to determine the current wetlands boundary. The Applicant's expert testified that prior to filing the NOI in 2022, a wetlands scientist from GZA conducted an in-the-field delineation and determined that the 2011 delineations were accurate. Rogers PFT, ¶ 12.²⁸ Mr. Rogers also testified that the Commission's peer reviewer also visited the site in 2022 and confirmed the resource area delineation. Rogers PFT, ¶ 13.²⁹

Further, Mr. DiPietro testified persuasively regarding his long familiarity with particular Property, concluding that the wetlands delineation is accurate is based on the 2022 NOI plan, with the correction to it regarding the buffer zone labeled as associated with the replicated IVW on the abutting property, his familiarity with the site in 2011 and 2012 and his more recent review of the Property in 2018, 2021 and 2023. DiPietro PFT, ¶¶ 2, 9. Mr. DiPietro is an Environmental Engineer with more than 40 years' experience reviewing proposals subject to the MWPA and Wetlands Regulations. His experience includes site inspections and preparation of

²⁶ Mr. Capachietti contends that the Commission's peer review was for the limited purpose of stormwater management design. Capachietti PFR, ¶¶ 38-39. However, the summary he references from the peer reviewer's site visit summary appears broader: "confirming the existing site conditions and to verify field assumptions . . . reviewed resource areas on the abutting property . . . and a chain link fence has recently been installed around the mulch operation. HW recommends that the fence be added to the site plans."

²⁷ See In the Matter of Diamond Development Realty Trust, OADR Docket No. WET-2018-016, Recommended Final Decision (April 2, 2019), 2019 WL 4735457, *6, adopted as Final Decision (April 8, 2019), 2019 WL 4735456 (stating that claiming the data are insufficient to support the BVW delineation without providing data or testimony to support a different delineation does not meet the petitioners' burden of going forward).

²⁸ Mr. Rogers testified that this was the conclusion of Daniel M. Nitzsche, Senior Wetland Scientist for GZA at the time, who filed the NOI on behalf of the Applicant. Rogers PFT, ¶ 13. Mr. Nitzsche was not a witness in these proceedings.

²⁹ Mr. Rogers testified that the Commission retained Janet Carter Bernardo of Horsley Witten Group as its peer reviewer. Rogers PFT, ¶ 13. See also n.25.

enforcement documents and permitting documents on a range of projects. Mr. DiPietro has served as the Department's lead staff member on significant projects, training and regulatory promulgation. His long familiarity with this Property is also not in question. I found Mr. DiPietro to be a credible witness based on his extensive experience implementing the MWPA and his experience with this Property. He persuasively testified regarding his determination that the wetlands delineation is accurate is based on the 2022 NOI plan, with the correction to it regarding the labeled IVW buffer zone, his familiarity with the site in 2011 and 2012 and his more recent review of the property in 2018, 2021 and 2023. DiPietro PFT, ¶¶ 2, 9.

The Department and the Applicant are correct that neither the MWPA nor the Wetlands Regulations expressly require flagging prior to filing an NOI or issuance of an SOC. The Delineation Handbook recommends flagging as a good practice to mark a delineated wetlands boundary prior to filing an NOI for the benefit of those reviewing the delineation. In absence of flagging, reviewers in the field must exercise their professional judgment without the benefit of the common reference point of placed flags. Mr. DiPietro testified that he confirmed the Applicant's delineation and that General Condition 17 is intended to confirm delineation in advance of any work being conducted. To effectively challenge the determination that the wetland boundary is correctly delineated, the Petitioner would have had to provide his own delineation, with a demonstration of competent sources or flagging to demonstrate the alleged errors, but he has not done that here.

In sum, the Petitioner has failed to demonstrate by a preponderance of the evidence that the wetlands delineation relied upon in the SOC is inaccurate. It is reasonable to rely on MassDEP's expert's opinion that the wetlands boundary is accurately identified on the SOC plans, as corrected, even if not flagged in the field. Nor has the Petitioner demonstrated that it is unreasonable to rely on SOC General Condition 17 to ensure that the boundary delineation is

flagged and staked prior to any work being conducted.

Issue 2: Whether the Department correctly determined that the Property qualifies as “Redevelopment” as set forth in 310 CMR 10.04.

- a. If yes, is the Property subject to the requirements for a redevelopment project at 310 CMR 10.05(6)(k)7.
- b. If yes, does the SOC satisfy the requirements at 310 CMR 10.05(6)(k)7.

Redevelopment is defined in the Wetlands Regulations as follows:

“Redevelopment means replacement, rehabilitation, or expansion of existing structures, improvement of existing roads or reuse of degraded or previously developed areas for purposes of 310 CMR 10.58, governing work in the riverfront area. For purpose of the Stormwater Management Standards as provided in 310 CMR 10.05(6)(k) through (q), redevelopment is defined to include the following projects:

(a) maintenance and improvement of existing roadways including widening less than a single lane, adding shoulders, correcting substandard intersections, improving existing drainage systems and repaving;

(b) development, rehabilitation, expansion and phased projects on previously developed sites provided the redevelopment results in no net increase in impervious area; and

(c) remedial projects specifically designed to provide improved stormwater management such as projects to separate storm drains and sanitary sewers and stormwater retrofit projects.” 310 CMR 10.04.

Stormwater Standard 7 provides that a redevelopment project is required to meet the following Stormwater Management Standards only to the maximum extent practical: Standard 2, Standard 3, and the pretreatment and structural stormwater best management practice requirements of Standards 4, 5, and 6. A redevelopment project shall also comply with all other requirements of the Stormwater Management Standards and improve existing conditions.

Stormwater Handbook, Vol. 1, Ch. 1, p. 20.

The Handbook provides the meaning of maximum extent practical for purposes of Standard 7 as follows:

- (1) Proponents of redevelopment projects have made all reasonable efforts to meet the applicable Standard;
- (2) They have made a complete evaluation of possible stormwater management measures including environmentally sensitive site design that minimizes land disturbance and impervious surfaces, low impact development techniques, and stormwater BMPs; and,
- (3) If not in full compliance with the applicable Standard, they are implementing the highest practicable level of stormwater management.

In issuing the SOC the Department determined that the proposed Project is redevelopment and that the design of the stormwater management systems should be based on the current extent of impervious surfaces at the Property contributing to them. SOC cover letter, p. 3. MassDEP determined that the proposed Project will not increase impervious surfaces and considered the proposed Project to be “a remedial project specifically designed to improve stormwater management on the project site.” DiPietro PFT, ¶ 14.

Mr. DiPietro testified on behalf of the Department as to Basin #1,³⁰ that the current extent of the impervious surfaces at the Property should be the basis for the stormwater structure design and that 100% of the Applicant’s mulch operation was included in the stormwater calculations as being impervious. DiPietro PFT, ¶ 15. Mr. DiPietro testified that the SOC satisfies the requirements of Stormwater Standard 7 because the proposed Project improves existing conditions, meets Standard 1, and meets Standards 2 and 3 to the maximum extent practicable and meets the pretreatment and structural stormwater best management practice requirements of Standards 4 and 5. DiPietro PFT, ¶ 16.

The Applicant also contends that the proposed Project is a redevelopment project, which will not increase impervious area, and that the stormwater calculations accounted for 100% of the mulch operation as impervious area and will ensure that no new stormwater outfalls

³⁰ DiPietro PFT, ¶ 12.

discharge untreated stormwater directly to wetlands or cause erosion to wetlands. D’Ambrosio PFT, ¶¶ 12-15.

The Petitioner contends that over the past 10 years the Applicant expanded the impervious surfaces without permission and in violation of the MWPA. Capachietti PFT, ¶¶ 10-14. The Petitioner contends that treating the proposed Project as redevelopment would reward the Applicant’s unlawful and unpermitted activities and that the NOI is an “after the fact” filing resulting from the unpermitted increase in impervious surface. Capachietti PFT, ¶¶ 10-11, 15. However, on cross examination Mr. Capachietti did agree that the proposal addressed in the SOC did not include an increase in impervious surface. Capachietti, 53:24-54:13. In his memorandum of law, the Petitioner contends that the work proposed here is “phased” development and that the project should therefore consider the past allegedly unpermitted work on the Property. Post-Hearing Br., p. 8. The Department does not address this argument directly, but Mr. DiPietro testified that the project would be considered a remedial project and therefore qualifies as a redevelopment project.³¹ DiPietro PFT, ¶ 14.

The SOC addresses only the proposed stormwater management systems relative to existing conditions. Whether noncompliant activities occurred at the Property is not the subject of this SOC appeal. It is well settled that the exercise of enforcement discretion resides with the Department and cannot be achieved through permit adjudication.³² Neither the Wetlands

³¹ See 310 CMR 10.04: Redevelopment(c) (“For purpose of the Stormwater Management Standards as provided in 310 CMR 10.05(6)(k) through (q), redevelopment is defined to include the following projects . . . remedial projects specifically designed to provide improved stormwater management such as projects to separate storm drains and sanitary sewers and stormwater retrofit projects.”).

³² See In the Matter of Mike Facchini, Bridgestone Development, Inc., OADR Docket No. WET 2022-027, Recommended Final Decision (December 9, 2024), 2024 WL 6068036, *15, adopted as Final Decision (June 13, 2025), 2025 WL 1859173; In the Matter of Bourne Community Boating, Inc., OADR Docket No. WET-2009-031, Recommended Final Decision (November 19, 2009), 2009 WL 5698017, *17, adopted by Final Decision (December 18, 2009); In the Matter of Town of Swansea, OADR Docket No. WET-2014-020, Recommended Final Decision (March 27, 2015), 2015 WL 9998844, *5, adopted by Final Decision (June 1, 2015), 2015 WL 9999165.

Regulations nor the Stormwater Handbook consider whether existing impervious surfaces were created in noncompliance, focusing instead on not increasing impervious surface and improving stormwater management.

After reviewing all witness testimony, the preponderance of the evidence demonstrates that the Petitioner failed to provide relevant evidence to support his allegations that the Property is not a previously developed site; there is no dispute among the Parties that the Property is developed. Regardless of how the Property was developed, the Department's and the Applicant's experts testified convincingly that the proposed Project is a remedial project designed to improve the stormwater management on the Property consistent with 310 CMR 10.05(6)(k)7. In sum, the evidence demonstrates that the SOC satisfies the requirements of Stormwater Standard 7 because the project improves existing conditions, meets Standard 1, and meets Standards 2 and 3 to the maximum extent practicable and meets the pretreatment and structural stormwater best management practice requirements of Standards 4 and 5.

Issue 3: Whether the SOC includes appropriate conditions for erosion control measures necessary to avoid alteration of the BVW consistent with 310 CMR 10.53(1), specifically.

- a. does the SOC include appropriate conditions for mulch in areas adjacent to the resource area; and
- b. does the SOC include appropriate conditions for managing excavation necessary to construct the proposed stormwater basins including relocation of the basins if necessary to do undetermined fill and management on-site of such materials.

The Wetlands Regulations at 310 CMR 10.53(1) govern the conditioning of Buffer Zone work to avoid Resource Area alterations that will adversely affect the ability of the areas to contribute to the protection of one or more of the interests of the Act. The regulation, in pertinent part, provides the following:

For work in the Buffer Zone subject to review under 310 CMR 10.02(2)(b)3., the Issuing Authority shall impose conditions to protect the interests of the Act identified for the adjacent Resource Area. The potential for adverse impacts to Resource Areas from work in the Buffer Zone may increase with the extent of the work and the proximity to the Resource Area. The issuing authority may consider the characteristics of the Buffer Zone, such as the presence of steep slopes, that may increase the potential for adverse impacts on Resource Areas. Conditions may include limitations on the scope and location of work in the Buffer Zone as necessary to avoid alteration of Resource Areas. The Issuing Authority may require erosion and sedimentation controls during construction, a clear limit of work, and the preservation of natural vegetation adjacent to the Resource Area and/or other measures commensurate with the scope and location of the work within the Buffer Zone to protect the interests of [the Act].

The SOC includes General and Special Conditions 1-51, several of which address construction period erosion and sediment control and include a Stormwater Pollution Prevention Plan (“SWPPP”), erosion control barriers, monitoring, and reporting. See SOC Special Conditions 28-30, 35, 37-39, 41. Excavation of undetermined on-site fill material is subject to Special Condition 43 requiring disposal of any excavated materials beneath the proposed infiltration basins at a properly licensed facility, with notification to the Commission and MassDEP. Additional SOC conditions address the Property post-construction and include a vegetative screen, a concrete block wall, incorporation of the operation and maintenance plan and inspection protocols (Special Conditions 20, 44, 46), immediate removal of any visible mulch fibers within wetlands without disturbance (Special Condition 46), maintenance of berms and vegetative cover to prevent erosion or sedimentation into wetland resource areas (Special Condition 45), and prohibition of stockpiling within 100 feet of any resource area (Special Condition 47).

Mr. Capachietti's testimony on behalf of the Petitioner identified only the erosion controls practices required in SOC Special Condition 30³³ and Special Condition 47.³⁴ Capachietti PFT, ¶ 17. The Petitioner contends that the SOC does not address fine particulate matter that is airborne due to grinding and storing of processed mulch into piles. Mr. Capachietti testified that airborne migration from the mulch operation into adjacent areas currently exists and that the SOC does not address the problem of this airborne erosion. Capachietti PFT, ¶¶ 22-23, 25; Capachietti PFR ¶¶ 56, 58; Capachietti, 35:22-36:3. On behalf of the Petitioner, Mr. Capachietti testified that mulch particles travel on to the Petitioner's abutting property and flow into the Petitioner's stormwater management areas and wetlands protection areas resulting in additional maintenance impacts to the Petitioner. Capachietti PFR, ¶ 57. Mr. Capachietti testified that the wetlands regulations reference guidance which addresses dust control that should be utilized in review of NOIs.³⁵ By way of specific example, Mr. Capachietti testified that the proposed planting of 21 Colorado Blue Spruce, which will be 5-6 feet tall at planting, is not conditioned appropriately to provide a buffer or screen from airborne particulate erosion from the mulch piles which exceed 60-feet in areas. Capachietti PFR ¶ 57.³⁶ However, on cross-examination Mr. Capachietti conceded that the proposed tree planting, additional setbacks, and requirements for inspection and removal do address airborne dust into the wetlands better than

³³ Special Condition 30 addresses erosion controls to prevent erosion and sedimentation from disturbed areas from entering BVW and intermittent stream.

³⁴ Special Condition 47 prohibits stockpiling of soil or other materials within 100 feet of any resource area, with erosion controls placed around stockpiled material. Mr. Capachietti testified that Condition 47 is contrary to allowing the Applicant to move stockpiles 7 and 8 which he testified are located within the jurisdictional Buffer Zone of BVW. Capachietti PFT, ¶ 24.

³⁵ Referencing 310 CMR 10.00 and "Massachusetts Erosion and Sedimentation Control Guidelines for Urban and Suburban Areas." Capachietti PFT, ¶ 19.

³⁶ Proposed vegetative screening to which the Petitioner objects include planting Colorado Blue Spruce (or equal) near Basin 1 and a proposed concrete block wall with approximately 12" reveal installed along the edge of a portion of the site's active use area. Capachietti PFT, ¶ 56; D'Ambrosio PFT, ¶ 17, DiPietro PFT, ¶ 18.

current conditions. Capachietti, 38:4-11. The Petitioner in his closing brief acknowledges that the planting of the 33 trees will provide some mitigation but contends that it is not enough. Pet. Post-Hearing Br., p. 13.

The Petitioner also contends that the excavation of fill material on site in the area of the proposed basins is not appropriately conditioned because the fill material is a “Recognized Environmental Condition”³⁷ (“REC”) and therefore has the potential to contain regulated concentrations of oil and/or hazardous materials. Capachietti PFT, ¶ 26; Fabbri PFT, ¶ 33. (Special Condition 47).³⁸ Mr. Capachietti testified that there is not a sufficient area identified on the plans for the continued storage of mulch along with the need to store excavated materials from below the proposed basins. Capachietti PFT, ¶ 26; Capachietti PFR, ¶¶ 59-62. Mr. Capachietti contends that the insufficient description of how these excavated materials will be stored will result in adverse impacts from erosion to adjacent resource areas. Capachietti PFR, ¶ 63.

The Applicant and MassDEP contend that the SOC includes several construction period erosion control practices and monitoring requirements to ensure that construction period erosion or sedimentation does not alter any resource areas. DiPietro PFT, ¶ 17;³⁹ D’Ambrosio PFT, ¶ 17. Mr. D’Ambrosio testified that the guidelines cited by Petitioner include trees, fences and mulch

³⁷ REC is defined by ASTM International to mean (1) the presence of hazardous substances or petroleum products in, on, or at the subject property due to a release to the environment; (2) the likely presence of hazardous substances or petroleum products in, on, or at the subject property due to a release or likely release to the environment; or (3) the presence of hazardous substances or petroleum products in, or at the subject property under conditions that pose a material threat of a future release to the environment. Fabbri PFT, ¶ 11. ASTM International is an organization that develops technical standards used internationally for testing methods, specifications, classification, guides and practices. <https://www.astm.org/about/detailed-overview>.

³⁸ Mr. Capachietti testified that Special Condition 47 is contrary to allowing the Applicant to move stockpiles 7 and 8, which are located within the jurisdictional buffer zone of BVW. Capachietti PFT, ¶ 24.

³⁹ Regarding erosion control during construction, Mr. DiPietro references Special Conditions 28-35, 37, 38, 39, and 41.

as dust control. D'Ambrosio PFT, ¶¶ 20-21. Mr. DiPietro also testified that the SOC includes conditions to manage and control the spread of mulch located on the site including vegetative screening, concrete block wall and plantings, the Operation and Maintenance Plan and maintenance requirements. DiPietro PFT, ¶ 18.⁴⁰ On cross-examination Mr. DiPietro testified that the trees with other aspects of the proposal will address erosion and that the height of the trees should be measured against the trajectory of any airborne mulch. DiPietro, 141:3-142:8. Mr. DiPietro also testified on cross-examination that he did not know the growth rate of the proposed Colorado Blue Spruce trees and acknowledged that the mulch piles are taller than the proposed trees.⁴¹

Regarding the undetermined fill on site, the Applicant and MassDEP contend that the SOC includes appropriate conditions to manage the fill to be excavated, including the filing of a SWPPP (Special Condition 41), management and disposal of the fill material (Special Condition 43), monitoring (Special Condition 29), and notification (Special Condition 42). D'Ambrosio PFT, ¶ 22-23; DiPietro PFT, ¶¶ 20-22. Further, they contend that the minimum 25-foot buffer from wetland resource areas required in the 2013 ACOP was included in the approved plan. D'Ambrosio PFT, ¶¶ 18-19; DiPietro PFT, ¶ 18. As such, the Applicant and the Department contend that the SOC includes appropriate conditions for managing the necessary excavation in

⁴⁰ Mr. DiPietro references: Special Condition 20. All work shall conform to the Notice of Intent and attachments, plans, reports and special conditions:

Special Condition 44. All inspection protocols specified in the referenced Operations and Maintenance Plan are hereby [sic] incorporated into this Order.

Special Condition 45. All elements of the storm water management system on site, including berms and vegetative cover, shall be maintained in a condition to prevent filling or alteration of wetland resource areas by erosion and sedimentation, or flooding of adjacent properties. If the system proposed under this SOC causes erosion and sedimentation or other alteration of wetland resource areas, it shall be modified by the owner under the direction of MassDEP.

⁴¹ The Plans require trees to be 5-6 feet tall at planting. See Pet. Ex. 13, Revised Plans (April 11, 2023), Sheet C-2.

accordance with applicable laws. D'Ambrosio PFT, ¶ 24; DiPietro PFT, ¶ 21. MassDEP and the Applicant contend that the SOC includes appropriate conditions for erosion control necessary to avoid impact to the BVW. D'Ambrosio PFT, ¶ 21; DiPietro PFT, ¶¶ 17-19.

The SOC includes General and Special Conditions 1-51, several of which address construction period erosion and sediment control and include a Stormwater Pollution Prevention Plan ("SWPPP"), erosion control barriers, monitoring, and reporting. See SOC Special Conditions 28-30, 35, 37-39, 41. Excavation of undetermined on-site fill material is subject to Special Condition 43 requiring disposal of any excavated materials beneath the proposed infiltration basins at a properly licensed facility, with notification to the Commission and MassDEP. Additional SOC conditions address the Property post-construction and include a vegetative screen, a concrete block wall, incorporation of the operation and maintenance plan and inspection protocols (Special Conditions 20, 44, 46), immediate removal of any visible mulch fibers within wetlands without disturbance (Special Condition 46), maintenance of berms and vegetative cover to prevent erosion or sedimentation into wetland resource areas (Special Condition 45), and prohibition of stockpiling within 100 feet of any resource area (Special Condition 47). Based upon my review of the expert testimony, I find that the SOC includes adequate erosion control measures and conditions to protect the wetlands resources.

Issue 4: Whether the Department correctly determined that the project complies with 310 CMR 10.05(6)(k)5, and Standard 5 as stated in Volume I, Chapter 1 of the Department's Stormwater Handbook.

Stormwater Management Standard 5 at 310 CMR 10.05(6)(k)5 provides in relevant part that:

[f]or land uses with higher potential pollutant loads, source control and pollution prevention shall be implemented in accordance with the Massachusetts Stormwater Handbook to eliminate or reduce the discharge of stormwater runoff from such land uses to the maximum extent practicable.

The Stormwater Handbook includes log storage and sorting yards in the category of “land use with higher potential pollutant loads” or “LUHPPL.” Stormwater Handbook, Vol. 1, Ch. 1, p. 14; DiPietro PFT, ¶ 24. In addition to the use of a treatment train that provides 80% TSS removal prior to discharge, a treatment train for a LUHPPL must “provide for at least 44% TSS removal prior to discharge to the infiltration BMP and shall also be designed to treat 1.0 inch of runoff times the total impervious area at the post-development site.” Stormwater Handbook, Vol. 1, Ch. 1, p. 13. Source control and pollution prevention measures are also required to eliminate or reduce the discharge of stormwater runoff to the maximum extent possible. Id.

The SOC concludes that the two stormwater infiltration basins meet the requirements for Standard 5 because they are designed to treat the theoretical one-inch water quality volume generated at the property during rain events or snow melt. SOC cover letter, p. 3. The sediment forebays associated with the two basins include proprietary hydrodynamic separators to treat stormwater runoff for hydrocarbons and provide additional TSS removed prior to discharging to the respective infiltration basins. Id. The SOC cover letter also states that both basins are located within Buffer Zone, although Mr. DiPietro testified regarding a correction, stating that Basin #2 is not within Buffer Zone.⁴² No fill has been or will be discharged to wetlands in conjunction with the proposed work. Id. The SOC approved the design based on the current extent of impervious surfaces at the site. Id.

The Petitioner agrees that the property is a LUHPPL but contends that the Applicant fails to meet the standard because it did nothing to eliminate or reduce the discharge of stormwater runoff from the Property using steps such as storing product under cover (tarpaulins, membrane huts or other means) to limit the exposure of products to precipitation. Capachietti PFT, ¶ 29. The Petitioner objects to the Applicant’s use of a sediment forebay and proprietary separator as

⁴² DiPietro PFT, ¶ 23. See discussion *supra*, at pp. 18-21.

equivalent BMPs to those listed in the Handbook. Capachietti PFT, ¶ 30, citing Stormwater Handbook, Vol. 1, Ch. 1 p. 14.

The Applicant and MassDEP contend that Standard 5 is satisfied to the maximum extent practicable. DiPietro PFT, ¶ 26; D’Ambrosio PFT, ¶ 27. The Applicant and MassDEP contend that the approved pretreatment methods satisfy Standard 5 because the use of the hydrodynamic separators in combination with the sediment forebay achieves the 44% TSS removal rate required for the type of project. D’Ambrosio PFT, ¶¶ 30-31; DiPietro PFT, ¶ 24. The combination provides an equivalent method. DiPietro PFT, ¶ 27. Mr. DiPietro also addressed Mr. Capachietti’s assertion that the systems will discharge a water level below that in the forebay during large storm events, stating that the standards do not prohibit that outcome. DiPietro PFT, ¶ 28, citing Capachietti PFT, ¶¶ 31-34. Mr. DiPietro testified that the design storm event is the 1-inch theoretical storm during which the water levels in the forebays would be lower than those listed for the larger theoretical storms. DiPietro PFT, ¶ 28. Mr. DiPietro further testified that the relevant requirement is that the basin is designed to completely drain within 72 hours after a one-inch event. *Id.* Combined with the infiltration systems the pretreatment meets the 80% TSS removal requirement. DiPietro PFT, ¶ 24. Mr. DiPietro testified on behalf of the Department that the system is “equivalent” and satisfies the regulatory requirements. DiPietro PFT, ¶ 27; DiPietro, 162:5-9.

Based upon my review of the expert testimony, the Petitioner has not demonstrated by a preponderance of the evidence that the SOC fails to meet Standard 5.

Issue 5: Whether the Department erred in not requiring evaluation of the unknown fill materials at the Property where the Property is not listed waste site.

- a) If yes, is a mounding analysis necessary pursuant to Volume 3, Chapter 1 of the Stormwater Handbook.

The Handbook requires a mounding analysis:

when recharge is proposed at or adjacent to a site classified as contaminated, was capped in place, or has an Activity and Use Limitation (AUL) that precludes inducing runoff to the groundwater, pursuant to MGL Chapter 21E and the Massachusetts Contingency Plan 310 CMR 40.0000; or is a solid waste landfill pursuant to 310 CMR 19.000; or groundwater from the recharge location flows directly toward a solid waste landfill or 21E site. Handbook, Vol. 3, Ch. 1, p. 29.

There is no evidence in the record that the Property is a site classified as contaminated pursuant to G.L. c. 21E and its implementing regulations, the Massachusetts Contingency Plan, 310 CMR 40.0000, nor that it has contaminants capped in place or an AUL. Nor is there evidence in the record that the Property is a solid waste landfill or that groundwater from the recharge location flows directly toward a solid waste landfill or 21E site.

The SOC cover letter indicates that the party requesting the SOC had asserted that the test holes in the areas of the proposed infiltration basins indicate the presence of solid waste. SOC cover letter, p. 3. The SOC cover letter states that the approved plans indicate that infiltration basin areas will be over-excavated a minimum of two (2) feet below the proposed basin bottom and that the soil is to be replaced with clean material having an infiltration rate of 1.02 inches per hour or more.⁴³ The excavated material is to be disposed of in accordance with applicable laws. SOC cover letter, p. 3; SOC Special Condition 43.⁴⁴

The Petitioner contends that unknown fill in the proposed infiltration basin areas includes solid waste or historic fill and is an REC that could impact the abutting property. Fabbri PFT, ¶¶ 2, 17. Mr. Fabbri further testified that the material in question is “historic fill”⁴⁵ defined by the

⁴³ See SOC, A. General Information, 8., Condition 20, Plan set “Stormwater Management Improvements,” for 25 Farm Avenue & 0 Forest Street in Peabody, MA, prepared by GZA GeoEnvironmental, Inc. for J.D. Raymond Transport, Inc., dated April 14, 2022, and revised April 11, 2023; Sheet C-3, Infiltration Basin Cross Section KC-3.

⁴⁴ SOC Special Condition 43 provides, “Any excavated material beneath the proposed infiltration basins found to be fill and/or solid waste shall be disposed of at a properly licensed facility in accordance with applicable state laws and notification provided to MassDEP as to materials found and copies of disposal records. Notification shall also be provided to the PCC.”

⁴⁵ Citing 310 CMR 40.0006, Mr. Fabbri summarized “Historic Fill” as, “among other things, contaminated fill

MCP as contaminated and requiring evaluation by an LSP or other competent person to determine the contaminant concentrations. Fabbri PFT, ¶ 17. However, on cross-examination Mr. Fabbri acknowledged that the Applicant's consultant had not identified the material as coal ash, had not identified the material as an REC, and had not recommended further soil analysis. Fabbri, 60:18-61:8. On cross examination Mr. Fabbri also testified that "site classified as contaminated" is not a defined term and that he did not know what it means, although he also testified that the MCP does classify sites. Fabbri, 62:10-63:3, 76:23-77:3.

The Applicant and MassDEP contend that the proposed Project does not meet criteria requiring a mounding analysis because it is not a landfill, a classified site or a classified site subject to an AUL. D'Ambrosio PFT, ¶ 14; Dalton PFT, ¶¶ 9, 15; Dalton, 97:16-19; DiPietro PFT, ¶¶ 29, 32. Further, Mr. DiPietro testified that the prior peer review recommendation to over excavate the basin areas is included in the approved plans. DiPietro PFT, ¶ 31.

The Petitioner has not demonstrated that a mounding analysis is required and the record demonstrates that the Property does not satisfy the pre-conditions that would require a mounding analysis. Additionally, the SOC requires that the excavated material "be disposed of at a properly licensed facility in accordance with applicable state laws." Special Condition 43. This requirement necessitates appropriate evaluation which must be conducted in order to dispose of the materials. Special Condition 43 also requires that notification and documentation be provided to the Department, which implicitly must be done in accordance with applicable laws. As such, the SOC is adequately conditioned to ensure that any excavated materials are appropriately managed in a manner that is protective of the interests of the MWPA.

emplaced before January 1, 1983, does not contain disposed waste material, and may contain, but is not primarily composed of, construction and demolition debris, reworked soils, dredge spoils, coal ash, wood ash or other solid waste material." Fabbri PFT, ¶ 26.

Issue 6: Whether the Department erred in issuing the SOC where the Executive Office of Energy and Environmental Affairs did not review pursuant to the Massachusetts Environmental Policy Act, G.L. c. 30, §§ 61 to 62H (“MEPA”), as implemented through the regulations at 310 CMR 11.00.

“[MEPA] requires . . . state agencies [to] study the environmental consequences of their actions, including permitting and financial assistance.”⁴⁶ “It also requires them to . . . ‘use all practicable means and measures to minimize damage to the environment,’ by studying alternatives to the proposed project, and developing enforceable mitigation commitments, which will become conditions for the project if and when they are permitted.” *Id.* “MEPA [only] applies to projects that exceed MEPA review thresholds and that require a state agency action, specifically that they are either proposed by a state agency or are proposed by municipal, nonprofit or private parties and require a permit, financial assistance, or land transfer from state agencies.” *Id.* A stay in an administrative adjudicatory proceeding is appropriate where a MEPA threshold has been triggered and review has not yet occurred because MassDEP cannot reach final agency action prior to MEPA compliance.⁴⁷

In issuing the SOC, MassDEP determined that the proposed Project does not trigger the thresholds for work in wetlands under 301 CMR 11.03(3). SOC cover letter, p. 4. The Petitioner contends that this conclusion is in error because the Applicant’s 3.5 acres of impervious area addressed under the 2013 ACOP and the 5 acres of impervious area created since then are

⁴⁶ <https://www.mass.gov/eea/agencies/mepa/about-mepa>.

⁴⁷ See *In the Matter of Terry Milligan and Sea Pines Condominium* OADR Docket No. WET 2009-004, Recommended Final Decision (June 11, 2010), 2010 WL 2641751, *1, adopted as Final Decision (June 22, 2010) (stay lifted after applicant received notification that it was not required to file an EIR and had completed MEPA review); see also *In the Matter of Philip Capolupo*, Docket No. 2000-097, Partial Decision and Stay (March 5, 2003), 2003 WL 1875446 (proceedings stayed after finding that the site is eagle habitat triggering a MEPA review threshold of projects that “take” rare species).

sufficient to trigger the MEPA review thresholds under 301 CMR 11.03(1)(b)²⁴⁸ and 301 CMR 11.01(2)(c).⁴⁹ Capachietti PFT, ¶ 40. Mr. Capachietti contends that the Department cannot avoid MEPA review through bifurcation of the enforcement matters and permitting. *Id.* At a minimum, the Petitioners contend that this appeal should be stayed so that MEPA review can take place because the proposed Project involves the creation of more than 5 acres of impervious area. *Id.*

The Applicant and MassDEP contend that no MEPA threshold has been triggered by this SOC approval. Rogers PFT, ¶ 16; DiPietro PFT, ¶ 34. Specifically, Mr. DiPietro testified that the proposed Project does not trigger MEPA review because it does not propose to create new impervious area and the SOC does not authorize the creation of new impervious surface. DiPietro PFT, ¶ 34. Mr. DiPietro also testified that the past wetlands filling was addressed under the 2013 ACOP.

A stay is not appropriate in the present case because the proposed Project authorized by the SOC does not trigger a MEPA threshold. The SOC approves stormwater management of existing impervious surfaces but does not approve the creation of impervious surface as the Petitioner contends.⁵⁰ Nor do MEPA review thresholds reach back to the wetlands filling

⁴⁸ 301 CMR 11.03(1)(b)2, “review thresholds identify categories of Projects or aspects thereof of a nature, size or location that are likely, directly or indirectly, to cause Damage to the Environment.” The referenced subsection addresses an “ENF and other MEPA review if the Secretary So Requires” for a project with “creation of five or more acres of impervious area.”

⁴⁹ 301 CMR 11.01(2)(c), Segmentation provides in relevant part, “In determining whether a Project is subject to MEPA jurisdiction or meets or exceeds any review thresholds, and during MEPA review, the Proponent, any Participating Agency, and the Secretary shall consider the entirety of the Project, including any likely future Expansion, and not separate phases or segments thereof. The Proponent may not phase or segment a Project to evade, defer or curtail MEPA review. The Proponent, any Participating Agency, and the Secretary shall consider all circumstances as to whether various work or activities constitute one Project including, but not limited to, whether the work or activities, taken together, comprise a common plan or independent undertakings, regardless of whether there is more than one Proponent; any time interval between the work or activities; and whether the environmental impacts caused by the work or activities are separable or cumulative.”

⁵⁰ As discussed above, at p. 28, a permit appeal cannot be used to force MassDEP to take enforcement action regarding the alleged unpermitted creation of impervious surfaces at the Property.

addressed in the 2013 ACOP which is expressly excluded from such review.⁵¹ Because the SOC does not trigger a MEPA review threshold the Petitioner's request for a stay **is denied**.

CONCLUSION

The Petitioner has not demonstrated that the wetlands delineation is incorrect or that the MWPA and Wetlands Regulations, or the Handbook, require that flagging of a wetlands delineation occur prior to filing an NOI or issuance of a SOC. I find that the Department has correctly determined that the Property satisfies the requirements for redevelopment and satisfies Stormwater Standard 7 to the maximum extent practicable because it improves existing conditions, meets Standard 1, meets Standards 2 and 3 to the maximum extent practicable and meets the pretreatment standard for stormwater best management practice requirements of Standards 4 and 5. As a matter of law, to the extent applicable, Stormwater Standards 6, 8, 9, and 10 are met because these standards were not challenged by the Petitioners.

Because the record shows that Basin #2 is not within MWPA and Wetlands Regulation jurisdiction, it is not subject to the Stormwater Standards or requirements of the Stormwater Handbook. I recommend that the Commissioner issue a Final Decision affirming the SOC as to Basin #1, directing the Department to draft a Final Order of Conditions reflecting this change based on the evidence presented at the Hearing, including a revised Plan of Record.

Date: November 26, 2025



Margaret R. Stolfa
Presiding Officer

⁵¹ 301 CMR 11.02, Definitions, Permit, (d)1 excludes from review thresholds “a consent order or agreement to the extent it addresses noncompliance with applicable statutes and regulations and does not allow or approve a New Project or an Expansion of a Project.”

NOTICE - RECOMMENDED FINAL DECISION

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

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

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