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DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

January 27, 2022

In the Matter of John
Hasenjaeger

Docket No. WET-2021-024
Walpole

RECOMMENDED FINAL DECISION

INTRODUCTION

John Hasenjaeger (“Petitioner”) brought this appeal to challenge the Superseding Order of Resource Area Delineation (“SORAD”) issued by the Massachusetts Department of Environmental Protection’s Southeast Regional Office for 3.63 acres of property owned by the Petitioner at Pinnacle Drive, Walpole, Massachusetts (Assessor’s Map 18, Lot 183) (the “Property”). The SORAD was issued pursuant to the Wetlands Protection Act, G.L. c. 131 § 40, and the Wetlands Regulations, 310 CMR 10.00.

The Property borders a waterbody known as Bird Pond. The Petitioner asserts the SORAD incorrectly identifies Bird Pond as part of the Neponset River (“the Neponset”), instead of a separate waterbody identified as a pond. His assertion is primarily based upon the alleged absence of riverine characteristics in Bird Pond and Bird Pond’s: difference in surface elevation from upstream and downstream flows; its larger width than the Neponset; and its identification on the United States Geological Survey (“USGS”) map as a pond. Consequently, the Petitioner contends that because Bird Pond is a pond and not part of the Neponset, it does not have the

protective wetlands resource area known as a Riverfront Area. See 310 CMR 10.58 (defining Riverfront Area).

MassDEP contends that Bird Pond is part of the Neponset, and thus has a Riverfront Area that borders it. See id. MassDEP relies upon the status of the Neponset’s designation as a “major river” in the Wetlands Regulations to conclude that Bird Pond is part of the Neponset. Id. Under those regulations, major rivers are deemed to be rivers for their “*entire length and width*” up to the mean annual high-water line. (emphasis added) This is distinguished, for example, from other rivers that may have segments along their course that are intermittent, and not perennially flowing rivers. Given this, prior MassDEP adjudicatory decisions have held that major rivers remain rivers for their entire length regardless of whether there are segments that may not have riverine flow or lack other indicia of rivers, as long as there is a sufficient hydraulic connection to determine that such segments are part of the major river and not “physically separate.”

The underlying material facts are not genuinely disputed, and consequently MassDEP filed a Motion for Summary Decision and a supporting affidavit pursuant to 310 CMR 1.01(11)(f) (“Motion”). The Petitioner filed an Opposition to the Motion for Summary Decision with supporting affidavits (“Opposition”). MassDEP’s Motion is persuasive and based upon undisputed material facts.¹

In sum, the undisputed material facts demonstrate that Bird Pond is an impoundment in the middle of three consecutive impoundments on the Neponset. It is undisputed that the Neponset’s waters are not diverted around the impoundments, and instead flow through them, from one impoundment to the next, until they exit the last impoundment, returning to the riverine flow in the Neponset. Dams built at the bottom of each impoundment alter the water surface elevation and surface area of the impoundments, but it is abundantly clear that the

¹ This appeal was ripe for Summary Decision as of July 1, 2021. It was transferred to me on December 6, 2021, from Presiding Officer Rothchild.

impoundments, particularly Bird Pond, are all part of the hydrologic and riverine system of the Neponset, and not physically separate. Consequently, Bird Pond is part of the Neponset, and because it is a major river it is deemed to be a river for its entire length and width, despite the impoundments' alteration of the predominant riverine flow. Bird Pond therefore has a Riverfront Area associated with it.

For all the above reasons, I recommend that MassDEP's Commissioner issue a Final Decision allowing the Motion and affirming the SORAD.

REGULATORY FRAMEWORK

SORAD Process. This appeal is rooted in the Petitioner's request for an order of resource area delineation filed with the Walpole Conservation Commission pursuant to 310 CMR 10.05 (6)(a)3. That provision provides a mechanism to request a determination whether wetland resource areas are subject to jurisdiction and have been identified and delineated according to the definitions in 310 CMR 10.00. The Conservation Commission then issues an Order of Resource Area Delineation ("ORAD") that is binding as to the location of resource areas identified by the proponent for a period of three years. 310 CMR 10.05(6)(a)3; Matter of Boston Properties, LP, Docket No. WET 2004-012, Recommended Final Decision (May 4, 2012), adopted by Final Decision (May 11, 2012). Here, the Commission issued an ORAD determining that Bird Pond was part of the Neponset and had a Riverfront Area.

When a party appeals the ORAD to MassDEP, which was the case here, MassDEP issues a Superseding Order of Resource Area Delineation (SORAD), rendering its own de novo determination whether the Wetlands Act and Wetlands Regulations apply to the identified areas. The regulations are clear: "when requested to issue a [SORAD], the Department shall limit its review to the resource area delineations. The Department shall consider the objections to the resource area delineations stated in the request." 310 CMR 10.05(7)(g). In this case, MassDEP

issued the SORAD, which the Petitioner appealed here to the Office of Appeals and Dispute Resolution (“OADR”).

Rivers, Streams, and Major Rivers. The Wetlands Regulations define a River as "any natural flowing body of water that empties to any ocean, lake, pond, or other river and which flows throughout the year."² 310 CMR 10.58(2)(a)1. Directly relevant here is the specific regulatory designation that: "Rivers include the entire length and width to the mean annual high-water line of [] *major rivers*" as defined by the Wetlands Regulations at 310 CMR 10.58(2)(a)1.e. (emphasis supplied). This Regulation lists several major rivers, including the Neponset.

Rivers include perennial streams because surface water flows within them throughout the year. Id.; 310 CMR 10.04 (definition of stream); G.L. c. 131 § 40 ("River"); see Matter of Robert Zeraschi, Docket No. 2006-115, Final Decision (December 8, 2008).

Streams are defined as "a body of running water, including brooks and creeks, which moves in a definite channel in the ground due to a hydraulic gradient, and which flows within, into or out of an Area Subject to Protection under M.G.L. c. 131 § 40. . . . Such a body of running water which does not flow throughout the year (i.e., which is intermittent) is a stream except for that portion upgradient of all bogs, swamps, wet meadows, and marshes." 310 CMR 10.04 (Stream). "Intermittent streams are not rivers . . . because surface water does not flow within them throughout the year." 310 CMR 10.58(2)(a)1.

A stream may vary from being perennial to intermittent and vice versa along its entire course. See Matter of Martha Jean Eakin, Docket No. 2002-013, Recommended Final Decision, (April 12, 2005), adopted by Final Decision (June 8, 2005); Matter of Robert Winter, Docket No. 2002-010, Recommended Final Decision, (May 15, 2003) (analyzing in detail how and why

² Matter of Martha Jean Eakin, Docket No. 2002-013, Recommended Final Decision, (April 12, 2005), adopted by Final Decision (June 8, 2005) (“empties” refers to the type of waterbody into which a river ultimately discharges, not to changes in the nature of the stream during the course of its run).

rivers may vary along their course from perennial to intermittent and vice versa), adopted by Final Decision (August 11, 2003).

Whether a stream is intermittent or perennial has important regulatory consequences. If a waterbody is perennial, under the Wetlands Regulations and Wetlands Act it has a regulated bordering land area known as the Riverfront Area. The Riverfront Area is: "that area of land situated between a river's mean annual high-water line and a parallel line located two hundred feet away, measured outward horizontally from the river's mean annual high-water line." G.L. c. 131 § 40; 310 CMR 10.58(2)(a); 310 CMR 10.58(2)(c) ("The boundary of the Riverfront Area is a line parallel to the mean annual high water line, located at the outside edge of the riverfront area. At the point where a stream becomes perennial, the riverfront area begins at a line drawn as a semicircle with a 200 foot (25 foot in densely developed areas; 100 foot for new agriculture) radius around the point and connects to the parallel line perpendicular to the mean annual high water line which forms the outer boundary."); Matter of Skeffington, Docket No. WET 2009-049, Recommended Final Decision (March 30, 2010), adopted by Final Decision (April 9, 2010).

Riverfront Areas generally receive heightened protection which limits development under the Wetlands Act and the Regulations because of the environmental benefits they provide, including: protection of the water supply (including groundwater), flood control, storm damage prevention, protection of wildlife habitat (including fisheries and habitat within the Riverfront Area), and maintenance of water temperatures. They are critical to preventing water pollution by filtering contaminants before they reach the river and groundwater. See generally 310 CMR 10.58(1) (discussing in detail environmental benefits of the Riverfront Area).

Standard for Summary Decision. The Adjudicatory Rules, 310 CMR 1.01(11)(f), provide for the issuance of summary decision where the pleadings together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law. See e.g. Matter of Papp, Docket No. DEP-05-066,

Recommended Final Decision, (November 8, 2005), adopted by Final Decision (December 27, 2005); Matter of Lowes Home Centers Inc., Docket No. WET-09-013, Recommended Final Decision (January 23, 2009), adopted by Final Decision (February 18, 2009). A motion for summary decision in an administrative appeal is similar to a motion for summary judgment in a civil lawsuit. See Matter of Lowe's Home Centers, Inc., *supra* (citing Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, 9 Mass. App. Ct. 775, 785-86 (1980)).

DISCUSSION

It is undisputed that along its course in the vicinity of the Property the Neponset was impounded many years ago for industrial purposes into three consecutive impoundments as part of a mill complex owned by the Bird Corporation. Notice of Claim, p. 1; Hasenjaeger Affidavit, ¶¶ 10-13. The parties' expert witnesses agree that the waters of the Neponset flow into the first impoundment, known as Plimpton Pond; from there, they flow through or over a dam and discharge channel into the second impoundment, known as Bird Pond; from there they flow through a dam and discharge channel into the third unnamed impoundment; and from there the waters resume their natural flowing, un-impounded character, from which the Neponset continues until it reaches the Atlantic Ocean, just east of Dorchester, Massachusetts. Affidavit of Maissoun Reda at ¶7; Gluck Affidavit at ¶15b; McManus Affidavit, ¶ 4. The Petitioner's Notice of Claim describes Bird Pond as "an impoundment *of the* Neponset River." Notice of Claim, p. 4 (emphasis added).

The SORAD determined that the plans submitted with the Petitioner's Abbreviated Notice of Resource Area Delineation were inaccurate because they omitted Riverfront Area. SORAD, p. 2. The Petitioner omitted the Riverfront Area because he believes that Bird Pond is a pond, not a river, and thus it does not have a Riverfront Area. He acknowledges that the Neponset is designated as a major river by 310 CMR 10.58(2)(a)1.e., but he asserts that the controlling regulation is 310 CMR 10.58(2)(a)1.h, which provides:

Where rivers flow through lakes or ponds, the Riverfront Area stops at the inlet and begins again at the outlet. A water body identified as a lake, pond, or reservoir on the current USGS map or more recent map provided by the Department, is a lake or pond, unless the issuing authority determines that the water body has primarily riverine characteristics. When a water body is not identified as a lake, pond, or reservoir on the current USGS map or more recent map provided by the Department, the water body is a river if it has primarily riverine characteristics. Riverine characteristics may include, but are not limited to, unidirectional flow that can be visually observed or measured in the field. In addition, rivers are characterized by horizontal zonation as opposed to the vertical stratification that is typically associated with lakes and ponds (emphasis added)

Focusing on the preceding provision, the Petitioner asserts that Bird Pond is identified as a “pond” on the current USGS map and, he asserts, there is no evidence of “primarily riverine characteristics.” In fact, the Petitioner’s expert witnesses did not observe the type of unidirectional flow one would generally find in a river during any of their three visits. Therefore, the Petitioner argues, under 310 CMR 10.58(2)(a)1.h, Bird Pond must be considered a pond rather than a river, and thus it does not have associated Riverfront Area.

While the Petitioner’s application of 310 CMR 10.58(2)(a)1.h appears at first glance to have merit, it is undermined by prior MassDEP adjudicatory decisions and principles of regulatory construction.

In 2001, MassDEP’s then Commissioner issued a Final Decision in Matter of Annese, Docket No. 99-083 (August 27, 2001), that reversed the administrative law judge’s (“ALJ”) conclusion that a “waterbody projecting” from the Concord River, which is a major river, was “not part of the Concord River.” Indeed, *contrary* to the Petitioner’s assertions in this appeal, the Commissioner explained that portions of major rivers may *not* have riverine characteristics and may exhibit *characteristics of a lake or pond*, such as standing open water, stating:

In the case of major rivers, jurisdiction extends "the entire length of the river." 310 CMR 10.58(2)(a)1.b. Since the river at issue in this appeal - the Concord River - is a "major river," the "waterbody" need not necessarily exhibit riverine characteristics in order to be considered part of the Concord River.

A "river" is defined as "any natural flowing body of water that empties to any ocean, lake, pond, or other river and which flows throughout the year." 310 CMR 10.04. The Concord River, as a major river, is a river for its entire length and its length ends where it empties into another river, the Merrimack River. . . . As a major river, its classification as a river continues even if it ceases to exhibit riverine characteristics before it finally empties into the Merrimack. A major river may exhibit the characteristics of a lake or pond, standing open water, within its length.³

Thus, all segments of each major river, from its source to its mouth, are considered part of the "river" for their entire length and width. Id. The Commissioner elaborated upon the above, concluding that only those waterbodies that are "physically separate" from a major river are to be excluded from a major river for Riverfront Area jurisdictional purposes.⁴ Id.

To determine whether the waterbody in Annese was physically separate the Commissioner analyzed the extent of a hydrologic connection between the Concord River and the unnamed waterbody. While the ALJ did not find that the waterbody was physically separate from the Concord River, there was also no evidence of surficial hydrologic flow from the waterbody into the Concord River, or vice versa; nor was there evidence that the waterbody was an impoundment of the Concord River. Nevertheless, the Commissioner found that there was a sufficient hydrologic connection between the waterbody and the Concord River to include it as part of the river based upon the undisputed facts that the water surface elevations of the Concord River and the waterbody were equal and they had equal mean annual high water marks. The Commissioner therefore determined that this was sufficient to "support a conclusion that these are not two separate waterbodies, either emptying into the other, but the same waterbody, the Concord River." Id. The Commissioner noted the absence of hydrologic gradient and that

³ When the Annese decision was issued the regulatory provision quoted by the Commissioner (at that time it was 310 CMR 10.58(2)(a)1.b.) referenced only the "entire length" of major rivers. The "major river" provision (now found at 310 CMR 10.58(2)(a)1.e) has since been revised to more clearly and comprehensively reference "the entire length and width to the mean annual high-water line of the major rivers." 310 CMR 10.58(2)(a)1.e.

⁴ Annese, supra ("Although part of the Concord River may still be considered a river even where it does not exhibit riverine characteristics, the question remains whether the "waterbody" at issue here is a separate waterbody from the Concord River.").

neither waterbody emptied to the other to refute the applicant's contention that the waterbody was a separate tributary or a pond that emptied to the Concord River.

This regulatory interpretation in Annese was recently applied in Matter of Colby, Docket No. WET 2016-12, Recommended Remand Decision (October 12, 2018), affirmed by Decision Adopting Recommended Remand Decision (October 26, 2018). In that SDA appeal the applicant argued that a waterbody in Attleboro known as Mechanics Pond was not part of the Ten Mile River, a designated major river. The applicant asserted that position with various USGS maps, a Massachusetts GIS map, and a National Wetlands Inventory Map prepared by the U.S. Fish and Wildlife Service. The Presiding Officer held that “[t]hese maps do not govern whether Mechanics Pond is a branch of the Ten Mile River because, as discussed above, the regulatory definition of a River as set forth in 310 CMR 10.58(2)(a) i.e. of the Wetlands Regulations governs the determination.” Matter of Colby, *supra*.⁵

The undisputed material facts in this appeal more persuasively lead to the conclusion that Bird Pond is a part of the Neponset than the facts in Annese and Colby led to the conclusions that the waterbodies there were part of the Concord and Ten Mile rivers, respectively. Indeed, in those appeals there were more substantial indicia of *physical separateness* from the major rivers than here. In Annese, at issue was a “waterbody projecting” from the major river (the Concord); and in Colby the waterbody was determined to be a branch of the major river (the Ten Mile River), with water flowing through the waterbody from the river, and then back into the river. Given the degree of physical separateness in each of those appeals it was necessary to look for other hydrologic indicia that the waterbody was not physically separate, including whether: the waterbody was within the mean annual high waterline of the major river; the water surface elevations were equal for the river and the waterbody; the extent to which water flowed to and from the river and the waterbody; and whether the waterbody was within the river's flood plain.

⁵ This matter was ultimately rendered moot after the applicant obtained approval of his proposed project as a Limited Project. Matter of Colby, Docket No. WET-2016-012, Final Decision (June 18, 2019).

In stark contrast, in this appeal it is undisputed that Bird Pond is an impoundment of the Neponset through which all the Neponset's waters flow. They are not physically separate waterbodies, aside from the artificial concrete dams, and they maintain an undisputed hydrologic connection. That the surface elevations among the three impoundments are different, is not an indicator in this appeal that Bird Pond is physically separate from the Neponset. Instead, the differential elevations relate to the means and degree of impoundment, i.e., dams that hold back the Neponset's waters until they flow over or through the dam for the historic industrial purposes to the downgradient impoundment, and ultimately back to natural riverine flow. Hasenjaeger Affidavit, ¶¶ 10-13 (Petitioner's affidavit discussing historical development of the impoundments to generate power).

Despite the above, the Petitioner contends that 310 CMR 10.58(2)(a)1.h preempts application of the major river regulation, 310 CMR 10.58(2)(a)1.e. The Petitioner concludes that because there is allegedly no riverine flow in Bird Pond and it is identified on the USGS map as a pond it must be a pond.⁶ See Gluck Affidavit at ¶16; McManus Affidavit at ¶5. That interpretation is wrong as a matter of law.

Annese and Colby concluded that an alleged absence of riverine characteristics and a USGS pond designation are immaterial to determining the status of a waterbody if it is shown that the waterbody is part of, and not physically separate from, a major river. That interpretation gives meaning, as it must, to the major river designation that such rivers remain rivers for their entire length and width. The failure to do that would carve out a regulatory exception to the major river designation even though when it drafted 310 CMR 10.58(2)(a)1.e MassDEP did not do that.⁷ See Beverly Port Marina, Inc. v. Commissioner of Department of Environmental

⁶ For purposes of summary decision only, it is assumed that there is no riverine flow through Bird Pond because, as discussed in Annese, riverine flow is immaterial under 310 CMR 10.58(2)(a)1.e. Nevertheless, the undisputed fact that the Neponset's waters flow from impoundment to impoundment undermines the assertion that there is no riverine flow. Indeed, there may be subsurface riverine flow that was not observable from the water surface.

⁷ To reconcile conflicting and ambiguous considerations I look to principles of interpretation. An agency regulation or policy must be interpreted in the same manner as a statute, and according to traditional rules of construction.

Protection, 84 Mass. App. Ct. 612, 620 (2013) (regulatory interpretation must follow plain meaning for all terms); accord Water Department of Fairhaven v. Department of Environmental Protection, 455 Mass. 740, 749-50 (2010) (must follow plain meaning of regulations). Perhaps more compelling is that when MassDEP drafted 310 CMR 10.58(2)(a)1.h it only specified “rivers,” leaving out the more specific category here—“major rivers.” See Plainville Asphalt Corp. v. Town of Plainville, 83 Mass. App. Ct. 710, 713, 989 N.E.2d 526 (2013). (the more specific regulatory provision is controlling over the more general).⁸ Accordingly, the exclusion of major rivers from 310 CMR 10.58(2)(a)1.h compels the conclusion that it applies to all rivers except major rivers.

For all the above reasons, I recommend that MassDEP’s Commissioner issue a Final Decision allowing MassDEP’s Motion for Summary Decision and affirming the SORAD.

Warcewicz v. Department of Environmental Protection, 410 Mass. 548, 574 N.E.2d 364 (1991). Thus, the words of the regulation or policy are accorded their usual and ordinary meaning. An agency's interpretation of its own regulation in a final decision or other formal agency authority is generally afforded considerable deference. “However, this principle is deference, not abdication, and courts will not hesitate to overrule agency interpretations when those interpretations are arbitrary, unreasonable, or inconsistent with the plain terms of the regulation itself.” Id. When a regulation is ambiguous, rules of construction generally require deference to a reasonable agency interpretation that coincides with the regulation’s purpose and intent. Springfield Pres. Trust, Inc. v. Springfield Library & Museums Ass’n, 447 Mass. 408 (2006).

⁸ The assertion that Mr. Hasenjaeger made in ¶ 7 of his affidavit that the Walpole Conservation Commission had previously “concluded that Bird Pond was, in fact, a pond and not a river” suffers from a number of defects, including the following: First, it does not comply with the summary decision standard because it does not constitute “[evidence that] would be admissible . . . in Massachusetts courts” because, among other reasons, Mr. Hasenjaeger attached no supporting documentation and provided no other supporting factual or evidentiary bases for those conclusory assertions. 310 CMR 1.01(11)(f) (affidavits “[s]upporting and opposing [a motion for summary decision] shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence in Massachusetts courts, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit”). In contrast, in its Order of Resource Area Delineation, the Commission specifically referenced (on page 3) two previous decisions in which it had determined that Bird Pond had a Riverfront Area. Second, Mr. Hasenjaeger failed to establish a foundation to show the relevancy of historical, isolated decisions by a conservation commission to the application and interpretation of MassDEP’s Wetlands Regulations. Indeed, there is no evidence those alleged Commission decisions considered the issues addressed in this decision. There is therefore an insufficient showing that the alleged instances are sufficiently similar and material and considered the issues addressed in this decision. Third, Figure 2 attached to the Petitioner’s Notice of Appeal shows that the property that is the subject of this appeal lies between the previously permitted houses on Pinnacle Drive (referenced by Mr. Hasenjaeger in his Affidavit) and Bird Pond. It appears that at least some of those houses may simply lie outside of the 200-foot Riverfront Area. Last, Mr. Hasenjaeger’s allegations appear to pertain to Commission ORAD decisions from *over twenty years ago*, but ORAD decisions are only valid for a period of three years. 310 CMR 10.05(6)(a)3; Matter of Boston Properties, LP, Docket No. WET 2004-012, Recommended Final Decision (May 4, 2012), adopted by Final Decision (May 11, 2012).

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: January 27, 2022



Timothy M. Jones
Presiding Officer

SERVICE LIST

In the Matter of:

John Hassenjaeger

Docket No. WET-2021-024

**File No. SE 315-1217
Walpole, MA**

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