

COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS

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In the Matter of:

James M. Knott, Sr.,  
Requester and Owner

Docket No. DEP-07-561  
Superseding Determination of  
Applicability  
Natick

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RECOMMENDED FINAL DECISION

The Department of Environmental Protection determined that a channel on land adjacent to the Charles River in Natick contains an intermittent stream and, therefore, the wetlands protection regulations, 310 CMR 10.00, apply to a portion of the site.

James M. Knott, Sr., the owner of the land, appealed. After a hearing, I conclude that the channel does not contain an intermittent stream, and order DEP to issue a final determination of applicability consistent with my conclusion.

BACKGROUND

On January 2, 2007, the Natick conservation agent, Robert Bois, issued Knott an enforcement order concerning tree cutting on a portion of his land that the Natick Conservation Commission considered either wetland or the buffer zone to a wetland. The order directed Knott to stop work until he obtained commission approval to continue.

Subsequently, Bois requested a determination of applicability from the commission, which held a public hearing on January 18, 2007 and four days later issued its determination. The commission decided that Knott's land contains resources protected

by the wetlands regulations.<sup>1</sup>

On January 30, 2007, Knott asked DEP to review the commission's determination. In a superseding determination issued on April 22, 2007, DEP decided that the channel on the site contains an intermittent stream, with banks. On May 9, 2007, Knot requested a hearing on that determination. After "prescreening" Knott's appeal, DEP transferred it to DALA on July 19, 2007.

DALA ordered the parties to appear on September 21, 2007 for a prehearing conference and subsequently granted a DEP motion to reschedule the conference to November 7, 2007. On that day, Administrative Magistrate Bonney Cashin conducted the conference and subsequently issued an order identifying five issues and establishing a schedule including a hearing on January 31, 2008. On January 7, 2008, I rescheduled the hearing to February 12, 2008 in response to Knott's assented-to motion for an extension.

Meanwhile, on January 4, 2008, I summarily decided two of the five issues identified at the prehearing conference. I held that if Knott's land is the site of an historic mill complex, it is exempt only from the riverfront portion of DEP's wetlands regulation (issue 4). Additionally, I found that the facility on site has not generated electricity for at least 27 years and, consequently, it is not entitled to the exception for electrical generating facilities (issue 5).

### HEARING

Three witnesses appeared at the hearing and adopted the written direct testimony that they had previously filed.

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<sup>1</sup> The commission also determined that the land contained resources protected by the local wetlands bylaw. Neither the commission's local bylaw determination nor its enforcement order is under review in this proceeding.

After Knott adopted his written testimony, which supports his contention that the channel does not contain a stream, DEP and the commission declined to cross-examine him. After Nancy White (the DEP employee responsible for its determination) adopted her testimony, Knott cross-examined her. Finally, Jason Makofsky, a member of the commission, adopted his testimony and Knott cross-examined him.

During the hearing, I ruled that Makofsky's testimony was of no probative value because it consisted of conclusions without supporting information.<sup>2</sup> Thus, White, the DEP's sole witness, was the only person to provide testimony supporting the assertion that the channel contains a stream.

In her written direct testimony, White devotes only four paragraphs (#9-#12) to this salient issue. In paragraph #9, she says that she visited the site on March 15, 2007 and observed the channel and other structures (her observations are consistent with the below findings). In paragraph #10, she sets out the regulatory definition of stream.

White begins paragraph #11 "It is my professional opinion that the waterbody ... is an intermittent stream". She is not, however, referring to a body of water. Rather, throughout her testimony, she calls the channel a waterbody. Next, she describes the site (her description is consistent with the below findings). The paragraph ends without providing support for the opinion stated in the first sentence, instead she returns to that opinion at the end of the following paragraph.

Paragraph #12 begins "it is my professional opinion that because the waterbody [channel] is hydrologically connected to the Charles River, it meets the definition of stream under the regulations and that it [has] the jurisdictional resource area bank..." It

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<sup>2</sup>Makofsky says that the things he saw while visiting the site convinced him that the channel contains a stream, however, he never says what he saw.

continues, “the bank also contains a 100 foot buffer zone as defined in the regulations...”. This paragraph ends:

Because the flow of the water entering the waterbody [channel] is controlled by placement of wooden gates [logs] in the control structure, it is also my professional opinion that the waterbody [channel] meets the category of an intermittent stream. During my inspection of the site, I observed the wooden gates [logs] to be in place, and down gradient of the control structure, I observed very little water within the waterbody [channel].

### FINDINGS

Based on uncontradicted evidence in the record, including Knott’s testimony, I make the following findings.

1. The Charles River flows north passing the west side of the site. It then turns south and flows by the east side of the site.
2. The channel was dug in the late 1850s to divert water from the Charles River to a hydropower facility at 22 Pleasant Street.
3. At the channel’s west end where it meets the Charles River, there is a stop log structure.
4. When the logs are in place, water flowing in the river does not enter the channel.
5. The channel runs east for about 200 feet and ends at a concrete headwall that contains a 24 inch pipe designed to carry water east to the building at 22 Pleasant Street.
6. The building contains equipment designed to utilize hydropower.
7. The building also includes structures to carry water passing through it further east where it reenters the Charles River through an outfall pipe.
8. The facility has served as a mill and for some part of the twentieth century as a

hydroelectric generating facility.

9. The facility has not operated for over 27 years.
10. Knott leaves the stop logs in place.
11. On December 15, 1980, the Natick Conservation Commission determined that the site was not subject to the Wetlands Protection Act.
12. On January 22, 2007, the Natick Conservation Commission decided that Knott's land contained protected wetlands.
13. On March 15, 2007, the day of DEP's site visit, the channel contained very little water and no running water.
14. The record contains no evidence of any observations of water flowing in the channel, only historical evidence of water running there.
15. On April 22, 2007, DEP determined that the channel contains an intermittent stream with associated banks and a hundred-foot buffer zone.

### CONCLUSIONS

A stream is a body of running water.<sup>3</sup> DEP's witness, however, did not testify that she saw water running in the channel. Additionally, she provided no observations of scouring or other indicators that water flows in the channel. DEP's position seems to

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<sup>3</sup> The Wetlands Protection Regulations contain this definition of stream:

Stream means a body of running water, including brooks and creeks, which moves in a definite channel in the ground due to hydraulic gradient, and which flows within, into or out of an area [protected by the Wetlands Protection Act]. A portion of a stream may flow through a culvert or beneath a bridge. 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. (310 CMR 10.04)

be<sup>4</sup> that such evidence was unnecessary because the channel contains an intermittent stream, which “does not flow throughout the year”. While a body of water need not flow throughout the year to meet the definition of intermittent stream, it must flow at some time. There is no evidence that it does. Rather, the evidence is that the channel is a manmade ditch or a canal through which water runs only when needed to produce power, something that has not happened for over 27 years.

Here, DEP appears to assume that because water would flow in the channel if the stop logs were removed, the channel contains an intermittent stream. Following this analysis, the channel could be regulated as a river because the stop logs could not only be removed but discarded. A stream is a body of running water, not a channel that does not, but, could, contain running water.

#### HOLDING

The channel on Knott’s land does not contain an intermittent stream and the sides of the channel are not regulated banks.

This holding renders moot the remaining issues: whether DEP is obligated to delineate resource areas on the site<sup>5</sup> and whether tree cutting activities on the site are entitled to the agricultural exemption.<sup>6</sup>

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<sup>4</sup> DEP and the other parties chose not to make closing arguments.

<sup>5</sup> Issue 2 in the prehearing conference report is: Whether the DEP’s determination should delineate or otherwise identify the location(s) of the resource area(s) associated with the intermittent stream, if any?

<sup>6</sup> Issue 3 in the prehearing conference report is: Whether any portion of the 22 Pleasant Street, Natick site is land in agricultural use?

ORDER

DEP must issue a final determination of applicability consistent with this decision.

DATED:

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Francis X. Nee  
Administrative Magistrate

NOTICE

This is a recommended final decision. This office has transmitted it to the Commissioner of the Department of Environmental Protection for her final decision. It is not subject to reconsideration at the Division of Administrative Law Appeals, and may not be appealed to the Superior Court pursuant to G.L. c. 30A. The Commissioner's final decision is subject to these rights 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 portion of it and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.