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DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

August 29, 2018

In the Matter of
Kristen Kazokas

OADR Docket No. WET-2017-022
DEP File No. 204-0855
Littleton, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

In this appeal, Jodi and Kenneth MacDonald (“the Petitioners”) challenge a Superseding Order of Conditions (“SOC”) that the Central Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to Kristen Kazokas (“the Applicant”) on October 3, 2017, pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 (“MWPA”), and the Wetlands Regulations, 310 CMR 10.00 et seq. (“the Wetlands Regulations”). The SOC approved the Applicant’s proposed Project at her real property at 6 Cottage Way in Littleton, Massachusetts (“the Property”), which is located on Fort Pond in Littleton. Specifically, the SOC approved the Applicant’s installation of a sewage disposal system and well to support the renovation of an existing cabin at the Property, as well as improving an existing access way. The Littleton Conservation Commission (“the LCC”) had



previously approved the proposed Project pursuant to the MWPA and the Wetlands Regulations, and the Town of Littleton's Wetlands Protection By-law.¹

The Petitioners request that the SOC be vacated because the Department purportedly issued the SOC in violation of the MWPA and the Wetlands Regulations. Petitioners' Appeal Notice; Petitioners' Pre-Hearing Statement. In response, the Applicant, the LCC, and the Department dispute the Petitioners' claims and request that the SOC be affirmed, contending that: (1) the Petitioners lack standing to challenge the SOC; and (2) the Department properly issued the SOC pursuant to the MWPA and the Wetlands Regulations. Applicant's Pre-Hearing Statement, at pp. 1-5; LCC's Pre-Hearing Statement, at pp. 1-2; Department's Pre-Hearing Statement, at pp. 1-2.

I conducted an Adjudicatory Hearing ("Hearing") to resolve the Petitioners' Appeal of the SOC. The Issues for Resolution in the Appeal, as established with the parties' assent at the Pre-Hearing Conference that I conducted with the parties well in advance of the Hearing,² were as follows:

- (1) Whether the Petitioners have standing to challenge the SOC as "[an] aggrieved person [who] previously [participated] in the permit

¹ In issuing its SOC, the Department only affirmed that aspect of the LCC's approval of the proposed Project under the MWPA and the Wetlands Regulations because the Department lacks jurisdiction to review decisions of local conservation commissions under local Wetlands Protection Bylaws and Regulations. Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich, 449 Mass. 859, 866-67 (2007); Healer v. Department of Environmental Protection, 73 Mass. App. 714, 716 (2009); In the Matter of John Walsh and Walsh Brothers Building Co., Inc., Memorandum and Order Denying Petitioners' and Harwich Conservation Commission's Joint Motion to Proceed (September 10, 2013), 2013 MA ENV LEXIS 92, at 10; Order Granting Petitioners' Renewed Motion to Proceed (September 18, 2014); Recommended Remand Decision (April 23, 2015), 2015 MA ENV LEXIS 35; Decision Adopting Recommended Remand Decision (June 2, 2015), 2015 MA ENV LEXIS 34. Decisions of local conservation commissions approving or rejecting proposed activities in protected wetlands areas pursuant to local wetlands protection bylaws are generally appealable to the Superior Court pursuant to the Certiorari Statute, G.L. c. 249, § 4. Id. Here, the Petitioners appealed to Middlesex Superior Court, the LCC's approval of the proposed Project under the Littleton Wetlands Protection By-law. MacDonald v. Kazokas, Docket No. 1781CV02814 and their appeal remains pending before the Court.

² The Pre-Hearing Conference is discussed in detail below, at pp. 16-19.

proceedings” within the meaning of 310 CMR 10.04 and 10.05(7)(j)2(a)?

- (a) Are the Petitioners “person[s] aggrieved” by the SOC, specifically could or will the proposed Project cause the Petitioners to suffer an injury in fact, which will be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interests protected by the MWPA and the Wetlands Regulations?
- (2) If the Petitioners have standing, whether the proposed work authorized by the SOC has been conditioned to meet the requirements of 310 CMR 10.53(1) for activities in Buffer Zone to the protected wetlands areas of Bank, Bordering Vegetated Wetlands, and Land Under Water?

Per the standard practice of the Office of Appeals and Dispute Resolution (“OADR”)³ the Hearing was digitally recorded.⁴ At the Hearing, the parties were represented by legal counsel, and with the exception of the LCC, presented witnesses and documentary evidence in support of

³ OADR is a quasi-judicial office within the Department, which is responsible for advising the Department’s Commissioner in resolving all administrative appeals of Department Permit decisions and enforcement orders in a neutral, fair, timely, and sound manner based on the governing law and the facts of the case. In the Matter of Tennessee Gas Pipeline Company, LLC, OADR Docket No. 2016-020 (“TGP”), Recommended Final Decision (March 22, 2017), 2017 MA ENV LEXIS 34, at 9, adopted as Final Decision (March 27, 2017), 2017 MA ENV LEXIS 38, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7). The Department’s Commissioner is the final agency decision-maker in these appeals. TGP, 2017 MA ENV LEXIS 34, at 9, citing, 310 CMR 1.01(14)(b). To ensure its objective review of Department Permit decisions and enforcement orders, OADR reports directly to the Department’s Commissioner and is separate and independent of the Department’s program offices, Regional Offices, and Office of General Counsel (“OGC”). TGP, 2017 MA ENV LEXIS 34, at 9. OADR staff who advise the Department’s Commissioner in resolving administrative appeals are Presiding Officers such as myself. Id. Presiding Officers are senior environmental attorneys at the Department appointed by the Department’s Commissioner to serve as neutral hearing officers in administrative appeals. Id. Presiding Officers are responsible for fostering settlement discussions between the parties in administrative appeals, and to resolve appeals by conducting pre-hearing conferences with the parties and evidentiary Adjudicatory Hearings and issuing Recommended Final Decisions on appeals to the Commissioner. TGP, 2017 MA ENV LEXIS 34, at 9-10, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7). The Department’s Commissioner, as the agency’s final decision-maker, may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision issued by a Presiding Officer in an appeal. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(b). Unless there is a statutory directive to the contrary, the Commissioner’s Final Decision can be appealed to Massachusetts Superior Court pursuant to G.L. c. 30A, § 14. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(f).

⁴ Following the Hearing, OADR’s Case Administrator made the digital recording available to the parties for downloading from the internet, which they relied on in drafting and filing their respective Closing Briefs in the case.

their respective positions in the case.⁵ Among the exhibits introduced in evidence at the Hearing was an updated plan by the Applicant, entitled “Scope of Work, MA DEP 204-855”, originally dated February 14, 2014, and revised on November 7, 2018, that was submitted in order to become the “Plan of Record” for the proposed Project’s work activities. Digital Recording of Hearing, at 54:00. In addition to the new Plan of Record, the Applicant submitted an updated “Interim as built plan,” dated October 13, 2018, to present an updated demarcation of the septic system components in relation to the protected wetlands resource areas and Buffer Zone to these areas at the Property.

A total of seven witnesses filed sworn Pre-filed Testimony (“PFT”), Rebuttal Pre-Filed Testimony (“RPFT”), and/or Supplemental Pre-Filed Testimony (“SPFT”), prior to the Hearing in support the parties’ respective positions in the case. The witnesses were as follows.

The Petitioners called two witnesses:

- (1) the Petitioner Kenneth MacDonald (July 13, 2018 PFT; September 17, 2018 RPFT); and
- (2) Michael J. Marcus, Professional Wetlands Scientist (“PWS”), of SWCA Environmental Consultants, Amherst, Massachusetts (July 13, 2018 PFT; September 17, 2018 RPFT; October 26, 2018 SPFT).

The Applicant called four witnesses:

- (1) David J. Cowell, PWS, Certified Wildlife Biologist (“CWB”), and Certified Erosion, Sediment, and Storm Water Inspector (“CESSWI”), of Hancock Associates, Marlborough, Massachusetts (August 16, 2018 PFT; November 2, 2018 RPFT).
- (2) Scott Goddard, PWS, Goddard Consulting, LLC, of Northborough, Massachusetts (August 17, 2018 PFT);

⁵ Although the LLC did not present any witnesses for the Hearing, it was represented by counsel at the Hearing, and continued to support the SOC’s affirmance. See LCC’s Pre-Hearing Statement, at pp. 1-2.

- (3) the Applicant Kristen Kazokas (August 17, 2018 PFT; November 2, 2018 RPFT); and
- (4) Joseph D. Peznola, Professional Engineer (“P.E.”), of Hancock Associates, Marlborough, Massachusetts (August 16, 2018 PFT).

The Department called one witness: Meghan E. Selby, an Environmental Analyst in the Wetlands Program of the Department’s Central Regional Office (August 29, 2018 PFT; November 2, 2018 SPFT).

As discussed in detail below, based upon a preponderance of the testimonial and documentary evidence presented at the Hearing and the governing statutory and regulatory wetlands requirements, I find that:

- (1) the Petitioners have standing to challenge the SOC as “aggrieved Person[s] [who] previously [participated] in the permit proceedings” within the meaning of 310 CMR 10.04 and 10.05(7)(j)2(a); and
- (2) the Department properly issued the SOC approving the proposed Project pursuant to the MWPA and the Wetlands Regulations.

I also find that the updated plans, including the Plan-Of-Record submitted at the Hearing, present a more accurate depiction of the proposed Project’s scope of work and a more accurate delineation of the wetland flagging adjacent to the Fort Pond, including but not limited to the so-called “BVW Fringe” on the Property. Lastly, I also find that the Applicant has not performed any unauthorized work at the Property during the pendency of this appeal in violation of the SOC, the MWPA, and the Wetlands Regulations.

Accordingly, I recommend that the Department’s Commissioner issue: (1) a Final Decision affirming the Department’s SOC approving the proposed Project; and (2) a Final Order of Conditions (“FOC”) as proposed by the Department approving the proposed Project, which includes and appropriately references the updated 11/7/18 Plan-Of-Record as well as any other

updated plans as specified by the Department, but retains the current SOC conditions issued by the Department, which are already sufficiently protective of the wetlands resource areas that are at issue in this appeal.

STATUTORY AND REGULATORY FRAMEWORK

I. THE PERMITTING REQUIREMENTS OF THE MWPA AND THE WETLANDS REGULATIONS

The MWPA and the Wetlands Regulations “do not prohibit development in wetlands areas[,] [but rather,] “creat[e] a procedure requiring the [D]epartment to condition activities in certain [wetlands] areas so as to protect [the MWPA’s] statutory mandate.” Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 224 (2010). The MWPA’s statutory mandate is to protect wetlands areas and to regulate activities affecting those areas in a manner that promotes the following eight 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); New England Wind, 457 Mass. at 224, n.6; In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 6-7, adopted as Final Decision (September 23, 2014),

2014 MA ENV LEXIS 77; In the Matter of Webster Ventures, LLC, OADR Docket No. WET-2014-016 (“Webster Ventures I”), Recommended Final Decision (February 27, 2015), 2015 MA ENV LEXIS 14, at 10-11, adopted as Final Decision (March 26, 2015), 2015 MA ENV LEXIS 10; In the Matter of Elite Home Builders, LLC, OADR Docket No. WET-2015-010, Recommended Final Decision (November 25, 2015), adopted as Final Decision (December 17, 2015), 22 DEPR 202, 204 (2015); In the Matter of Sunset City, Inc., OADR Docket No. WET-2016-016, Recommended Final Decision (March 31, 2017), 2017 MA ENV LEXIS 35, at 9-10, adopted as Final Decision (April 21, 2017, 2017 MA ENV LEXIS 33.

The MWPA and the Wetlands Regulations provide that “[n]o person shall remove, fill, dredge[,], or alter⁶ any [wetlands] area subject to protection under [the MWPA and Wetlands Regulations] without the required authorization, or cause, suffer or allow such activity” G.L. c. 131 § 40, ¶ 32; 310 CMR 10.02(2)(a); Vecchione, 2014 MA ENV LEXIS 76, at 7; Webster Ventures I, 2015 MA ENV LEXIS 14, at 11-12; Elite Home Builders, 22 DEPR at 204; Sunset City, 2017 MA ENV LEXIS 35, at 10. “Any activity proposed or undertaken within [a protected wetlands] area[,], . . . which will remove, dredge or alter that area, is subject to

⁶ The Wetlands Regulations at 310 CMR 10.04 define “alter” as “chang[ing] the condition” of any wetlands area subject to protection under the MWPA and the Wetlands Regulations. Examples of alterations include, but are not limited to, the following:

- (a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas;
- (b) the lowering of the water level or water table;
- (c) the destruction of vegetation;(d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water.

310 CMR 10.04. “Dredge” is defined as “deepen[ing], widen[ing], or excavat[ing], either temporarily or permanently” a protected wetlands area, and “[f]ill means to deposit any material [in a protected wetlands area] so as to raise an elevation, either temporarily or permanently.” Id.

Regulation under [the MWPA and the Wetlands Regulations] and requires the filing of a Notice of Intent (“NOI”)” with the permit issuing authority. 310 CMR 10.02(2)(a). A party must also file an NOI for “[a]ny activity . . . proposed or undertaken within 100 feet of [any protected wetlands]” described as “the Buffer Zone” by the Regulations, “which, in the judgment of the [permit] issuing authority, will alter [any protected wetlands].” 310 CMR 10.02(2)(b).

The “[permit] issuing authority” is either the local Conservation Commission when initially reviewing the applicant’s proposed work in a wetlands resource area protected by the MWPA and the Wetlands Regulations, or the Department when it assumes primary review of the proposed work or review on appeal from a local Conservation Commission decision. Healer v. Department of Environmental Protection, 73 Mass. App. Ct. 714, 717-19 (2009). Under the MWPA, a local Conservation Commission may issue an Order of Conditions authorizing or precluding proposed activities in protected wetlands areas and “[is] allowed to ‘impose such conditions as will contribute to the protection of the interests described [in the MWPA and the Wetlands Regulations]’” and to require that “‘all work shall be done in accordance’ with the conditions they might impose. . . .” Id.

Orders of Conditions, including any findings and wetlands delineations forming the basis of the Orders, are valid for three years from the date of the Orders’ issuance. 310 CMR 10.05(6)(d). However, any “order [by the Department] shall supersede the prior order of the conservation commission [issued pursuant to the MWPA and the Wetlands Regulations] . . . and all work shall be done in accordance with the [Department’s] order,” Id., unless the Commission has properly denied the proposed project pursuant to a local Wetlands Protection Bylaw that is more protective than the MWPA. Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich, 449 Mass. 859, 866 (2007). This is the case because the MWPA “establishes

Statewide minimum wetlands protection standards, [but] local communities are free to impose more stringent requirements” by enacting local Wetlands Protection Bylaws. Oyster Creek, 449 Mass. at 866; Healer, 73 Mass. App. At 716. As a result, a Superseding Order of Conditions issued by the Department under the MWPA approving proposed work in protected wetlands areas cannot preempt a timely decision of a local conservation commission denying approval of the proposed work based “on provisions of a local bylaw that are more protective than the [MWPA].” Oyster Creek, 449 Mass. at 866. However, this issue is not present in this case, because both the LCC and the Department approved the proposed Project pursuant to the MWPA and the Wetlands Regulations. The LCC also approved the proposed Project pursuant to Littleton’s Wetlands Protection By-law and the Petitioners’ appeal of that approval is pending in Superior Court. See above, at p. 2, n. 1.

“[W]hen it receives an SOC request, ‘[t]he Department [conducts] a de novo review of [the proposed] Project [at issue],’ meaning that the review of the Project starts anew, and that the Department makes a determination independent of any local conservation commission determination regarding whether the Project should be authorized pursuant to the MWPA and the Wetlands Regulations.” In the Matters of Richard Cuda and Town of Orleans Board of Selectmen, OADR Docket Nos. WET-2015-012 and WET-2016-014 (“Cuda”), Recommended Final Decision (December 13, 2017), at 40, adopted as Final Decision (January 8, 2018); In the Matter of Francis P. and Debra A. Zarette, Trustees of Farm View Realty Trust, OADR Docket No. WET-2016-030, Recommended Final Decision (February 20, 2018), 2018 MA ENV LEXIS 7, at 15-16, adopted as Final Decision (March 1, 2018), 2018 MA ENV LEXIS 6. “Indeed, in issuing an SOC affirming a local conservation commission’s approval of a proposed Project, the Department is not required by either the MWPA or the Wetlands Regulations “[to] adopt

conditions identical to those adopted by [the] conservation commission.” Id. “[T]he Department’s de novo review authority [also] carries over to an administrative appeal of an SOC filed with OADR. During the pendency of the administrative appeal before OADR, the Department ‘is [not] precluded from changing its position [on the SOC because] . . . its [primary] obligation [is] to defend the interests of the [MWPA].’” In the Matter of John Soursourian, OADR Docket No. WET-2013-028, Recommended Final Decision (2014), 2014 MA ENV LEXIS 49, at 34-36, adopted as Final Decision, 2014 MA ENV LEXIS 47 (2014); Cuda, at 40-41; Zarette, 2018 MA ENV LEXIS 7, at 15-16. “Hence, if during the pendency of an administrative appeal, ‘[the Department] becomes convinced’ based on a different legal interpretation of applicable regulatory standards, new evidence, or error in its prior determination, ‘that the interests of [MWPA] require it to take a different position from one that it had adopted previously [in issuing the SOC],’ the Department is authorized to, and should change its position.” Id.

The level of scrutiny that proposed activities in protected wetlands areas receive from the local Conservation Commission in its initial review of the proposed activities and by the Department on an SOC review “depends on the [wetlands] area in which the activit[ies] will occur.” New England Wind, 457 Mass. at 224. “For activity in a [specific wetlands] resource area, the applicant must comply with certain ‘performance standards’ for that particular resource area” Id., at 224-25. “Performance Standards” are “th[e] requirements established by [the Wetlands Regulations] for activities in or affecting [specific wetlands areas protected by MWPA].” 310 CMR 10.04. For activity in a Buffer Zone, i.e. within 100 feet of any specific wetlands area “that [the local Conservation Commission or the Department] determines will ‘alter’ [that] area, the applicant has a lighter burden and need demonstrate only that the work

‘will contribute to the protection of the interests identified in [the MWPA] as determined by the [local Conservation Commission or the Department]. New England Wind, 457 Mass. at 225.

II. THE NATURE OF THE WETLANDS AREAS OF BANK, BORDERING VEGETATED WETLANDS, LAND UNDER WATER, AND THE BUFFER_ZONE TO THESE AREAS

The proposed Project consists solely of proposed work activities in the Buffer Zone to the wetlands areas of Bank, Bordering Vegetated Wetlands (“BVW”), and Land Under Water (“LUW”), which are present on the Property. The nature of these wetlands areas are as follows.

A. Bank

Bank is “the portion of the land surface which normally abuts and confines a water body,” and it “may be partially or totally vegetated, or . . . comprised of exposed soil, gravel or stone.” 310 CMR 10.54(2)(a). Bank “[is] likely to be significant” to the advancement of all eight MWPA interests listed above. 310 CMR 10.54(1); In the Matter Robert J. Cote, OADR Docket No. WET-2017-014, Recommended Final Decision (August 9, 2018), 2018 MA ENV LEXIS 47, at 13, adopted as Final Decision (August 28, 2018), 2018 MA ENV LEXIS 46. As a result, there is a presumption under the Wetlands Regulations that “[when] a proposed activity involves the removing, filling, dredging[,], or altering of a Bank, the [local conservation commission and the Department must] presume that [the] area is significant to the [advancement of these MWPA] interests” 310 CMR 10.54(3); Cote, 2018 MA ENV LEXIS 47, at 13-14. However, “[t]he presumption is rebuttable and may be overcome upon a clear showing [by the project proponent] that the Bank does not play a role in the protection of [these MWPA]

interests.” Id.

B. BVW

BVW are:

freshwater wetlands which border on creeks, rivers, streams, ponds and lakes. The types of freshwater wetlands are wet meadows, marshes, swamps and bogs. [BVW] are areas where the soils are saturated and/or inundated such that they support a predominance of wetland indicator plants. The ground and surface water regime and the vegetational community which occur in each type of freshwater wetland are specified in [the MWPA].

310 CMR 10.55(2)(a); In the Matter of Town of Hopkinton, OADR Docket No. WET-2007-010, Recommended Final Decision, 15 DEPR 203, 205 (May 1, 2008), adopted as Final Decision (May 30, 2008), affirmed, Morrison v. Massachusetts Department of Environmental Protection, Middlesex Superior Court, C.A. MICV2008-02876 (October 16, 2009); In the Matter of Ronald and Lois Enos, OADR Docket No. WET-2012-019, Recommended Final Decision (February 22, 2013), 2013 MA ENV LEXIS 21, at 19-20, adopted as Final Decision (March 22, 2013), 2013 MA ENV LEXIS 20; In the Matter of Brian Corey, OADR Docket No. WET-2016-023, Recommended Final Decision (February 28, 2018), 2018 MA ENV LEXIS 10, at 16-17, adopted as Final Decision (March 15, 2018), 2018 MA ENV LEXIS 9. BVW are likely to be significant to the MWPA interests of protection of public and private water supply, protection of ground water supply, flood control, storm damage prevention, prevention of pollution, and protection of fisheries and to wildlife habitat. 310 CMR 10.55(1); Hopkinton, 15 DEPR at 205; Enos, 2013 MA ENV LEXIS 21, at 20; Corey, 2018 MA ENV LEXIS 10, at 17-18. “The plants and soils of [BVW] remove or detain sediments, nutrients (such as nitrogen and phosphorous) and toxic

substances (such as heavy metal compounds) that occur in run off and flood waters.” Id.

C. LUW

LUW is “the bottom of, or land under, the surface of the ocean or any estuary, creek, river, stream, *pond*, or lake. . . .” 310 CMR 10.04 (Definitions); 310 CMR 10.56(2)(a) (emphasis supplied). “[This] land may be composed of organic muck or peat, fine sediments, rocks, or bedrock.” 310 CMR 10.56(2)(a).

LUW under a pond is likely to be significant to the MWPA statutory interests of protection of public and private water supply, protection of ground water supply, flood control, storm damage prevention, prevention of pollution, and protection of fisheries and wildlife habitat. 310 CMR 10.56(1). “The physical nature of [LUW] is highly variable, ranging from deep organic and fine sedimentary deposits to rocks and bedrock.” Id. “The organic soils and sediments play an important role in the process of detaining and removing dissolved and particulate nutrients (such as nitrogen and phosphorous) from the surface water above.” Id. “They also serve as traps for toxic substances (such as heavy metal compounds).” Id.

“[LUW] in conjunction with [B]anks, serves to confine floodwater within a definite channel during the most frequent storms. Filling within this channel blocks flows which in turn causes backwater and overbank flooding during such storms. An alteration of [LUW] that causes water to frequently spread out over a larger area at a lower depth increases the amount of property which is routinely flooded. Additionally, it results in an elevation of water temperature and a decrease in habitat in the main channel, both of which are detrimental to fisheries, particularly during periods of warm weather and low flows.” Id.

“[LUW in] ponds and lakes is vital to a large assortment of warm water fish during spawning periods.” Id. Additionally, “[t]he plant community composition and structure,

hydrologic regime, topography, soil composition and water quality of [LUW] provide important food, shelter, migratory[,] and overwintering areas, and breeding areas for wildlife. Certain submerged, rooted vegetation is eaten by water fowl and some mammals. Some amphibians (as well as some invertebrate species eaten by vertebrate wildlife) attach their eggs to such vegetation. Some aquatic vegetation protruding out of the water is also used for nesting, and many species use dead vegetation resting on land under water but protruding above the surface for feeding and basking. Soil composition is also important for hibernation and for animals which begin to burrow their tunnels under water. Hydrologic regime, topography, and water quality not only affect vegetation, but also determine which species feed in an area.” Id.

D. Buffer Zone

As discussed above, pursuant to 310 CMR 10.53(1), for work that is to be performed in the Buffer Zone to a specific wetlands area, the local Conservation Commission and the Department in reviewing the proposed work “shall impose conditions to protect the interests of the [MWPA] identified for the adjacent [wetlands area].” These “[c]onditions may include limitations on the scope and location of work in the Buffer Zone as necessary to avoid alteration of [the wetlands area]” and “requir[ing] erosion and sedimentation controls during construction, a clear limit of work, and the preservation of natural vegetation adjacent to [a specific wetlands area] and/or other measures commensurate with the scope and location of the work within the Buffer Zone to protect the interests of [the MWPA].” 310 CMR 10.53(1). However, as also previously discussed above, the proponent of the proposed work in the Buffer Zone of a specific wetlands area is not required to demonstrate that the proposed work will satisfy the Performance Standards applicable to the wetlands area at issue. New England Wind, 457 Mass. at 224-25. Instead, the proponent “has a lighter burden and need demonstrate only that the work ‘will

contribute to the protection of the interests identified in [the MWPA] as determined by the [local Conservation Commission or the Department].” Id.

PRIOR PROCEEDINGS IN APPEAL

Although the Petitioners’ appeal of the SOC involves relatively straightforward legal and factual issues regarding whether the Petitioners have standing to challenge the SOC as “aggrieved persons,” and if so, whether the Department properly issued the SOC, it is necessary to set forth the prior proceedings in the appeal, in particular the Petitioners’ actions, which unduly delayed final resolution of this appeal.

As discussed above, the LCC initially approved the proposed Project pursuant to both the MWPA and Littleton’s Wetlands Protection By-law. The Petitioners then filed two appeals of the LCC’s approval of the proposed Project: (1) an appeal with the Superior Court seeking to overturn the LCC’s approval of the Project pursuant to Littleton’s Wetlands Protection By-law; and (2) an appeal with Department seeking an SOC to overturn the LCC’s approval of the Project pursuant to the MWPA and the Wetlands Regulations. After the Department issued the SOC affirming the LCC’s approval of the proposed Project pursuant to the MWPA and the Wetlands Regulations, the Petitioners appealed the SOC to OADR.

The Petitioners filed their appeal with OADR on October 16, 2017. Approximately three days later, on October 19, 2017, the Department’s Central Regional Office received information from the Petitioners contending that the Applicant had performed tree cutting work at the Property while this appeal was pending in violation of the SOC, the MWPA, and the Wetlands Regulations. Mr. MacDonald’s July 13, 2018 PFT, ¶¶ 2-3 and Exhibit A to the PFT (email

communications with the Department).⁷ However, upon inspection of the Property, Ms. Selby, the Department's wetlands expert witness at the Hearing, determined that the Applicant's tree cutting did not include stumping of trees, and, more importantly, no impacts to wetlands areas were identified that would necessitate the initiation of enforcement proceedings by the Department against the Applicant. Digital Recording of Hearing, after 2:32. When the Petitioners raised similar allegations later in this appeal that the Applicant had performed unauthorized activities at the Property during the pendency of this appeal in violation of the SOC, the MWPA, and the Wetlands Regulations, the Department determined again that the Applicant had not committed such violations, and did not initiate any enforcement activities against the Applicant. Digital Recording of Hearing, at 2:36:20; Applicant's February 11, 2019 Closing Brief, at pp. 24-27.

On January 26, 2018, I conducted a Pre-Hearing Conference with the parties and their respective legal counsel in accordance with 310 CMR 1.01(5)(a)15, 310 CMR 10.05(7)(j)7, and a Scheduling Order that I issued in the case on December 5, 2017.⁸ The purpose of the Pre-Hearing Conference was to establish: (1) the Issues for Resolution in the Appeal in the event that the appeal was not settled by written agreement of the parties, (2) the date of Hearing to resolve the Issues,⁹ and (3) the schedule for the parties to file the PFT of witnesses and memoranda of

⁷ As discussed below at pp. 40-42, a project proponent's performance of work authorized by an SOC during the pendency of an administrative appeal of the SOC is a serious infraction that can result in a Final Decision in the appeal against the proponent vacating the SOC.

⁸ The Conference was originally scheduled for December 22, 2017, but re-scheduled to January 26, 2018 by agreement of the parties to accommodate their schedules.

⁹ The original Hearing date as set forth in my December 5, 2017 Scheduling Order was March 16, 2018, but was re-scheduled to April 27, 2018 as a result of the Conference having been re-scheduled from December 22, 2017 to January 26, 2018 (see n. 8 above). As discussed above in the text, at pp. 16-21, the Hearing was further delayed to November 2018, principally because of the Petitioners' actions.

law in support their positions on the Issues prior to the Hearing. Scheduling Order, ¶ 3; Pre-Screening Conference Report and Order, January 29, 2018 (“Pre-Hearing Conf. Rept. & Order”), at pp. 3-15. Prior to the Pre-Hearing Conference, the Petitioners, without justification, initially refused to file their Pre-Hearing Statement for the Conference setting forth their positions in the case and the names of their witnesses for the Hearing, including their expert witnesses. See January 17, 2018 Electronic Mail (“E-mail”) Orders to Petitioners. The Petitioners were required to file their Pre-Hearing Statement prior to the Conference by my December 5, 2017 Scheduling Order and December 17, 2017 Order re-scheduling the Conference from December 22, 2017 to January 26, 2018. Id. The provisions of 310 CMR 10.05(7)(j)7.g also required the Petitioners to file their Pre-Hearing Statement prior to the Pre-Hearing Conference because this regulation requires “[a]ll parties [to] attend [the Conference] and be prepared to discuss settlement *and the narrowing of [the] [I]ssues [for Resolution in the Appeal].*” (emphasis supplied).

Facing the specter of dismissal of their appeal of the SOC, the Petitioners filed their Pre-Hearing Statement prior to the Pre-Hearing Conference only after I ordered them to do so. See January 17, 2018 E-mail Orders to Petitioners. Their Pre-Hearing Statement, just as their October 2017 Appeal Notice challenging the SOC, did not assert that the Applicant had failed to properly delineate the wetlands areas at the Property for the proposed Project. The Petitioners also did not assert that they needed discovery from the Applicant to prosecute their appeal of the SOC. As discussed below, the Petitioners first made these claims after the Pre-Hearing Conference and two weeks before the PFT of their witnesses for the Hearing was due.

At the Pre-Hearing Conference, I conferred with the parties regarding establishment of the Issues for Resolution in the Appeal. As a result of my review of the Petitioners’ Appeal

Notice challenging the SOC, the parties' respective Pre-Hearing Statements summarizing their positions in the appeal, and with the parties' assent, I informed the parties at the Conference that the Issues for Resolution in the Appeal were the Issues as I previously set forth above, at pp. 2-3: whether the Petitioners had standing to challenge the SOC as "aggrieved persons," and if so, whether the Department properly issued the SOC. Pre-Hearing Conf. Rept. & Order, at pp. 3-4. The Petitioners did not request at the Pre-Hearing Conference that the propriety of the Applicant's wetlands delineations at the Property for the proposed Project be made an additional Issue for Resolution in the Appeal. As a result, they waived the issue. Zarette, 2018 MA ENV LEXIS 7, at 71-73 (appellants new pollution claim was not considered at evidentiary adjudicatory hearing for adjudication because "the claim was not an Issue for Resolution . . . established at the Pre-Hearing Conference"). The Petitioners also did not claim a need for discovery from the Applicant.

At the Pre-Hearing Conference, with the Petitioners' assent, I established a deadline of February 23, 2018 for the Petitioners to file the PFT of their witnesses, including the PFT of their wetlands expert. On February 9, 2018, two weeks before the PFT of their witnesses was due and four months after initiating this appeal of the SOC, the Petitioners for the first time in this appeal challenged the Applicant's wetlands delineations for the proposed Project and claimed that they needed to conduct discovery of the Applicant in order to file the PFT of their wetlands expert witness, Mr. Marcus for the Hearing. The Petitioners made these assertions in their February 9, 2018 Motion seeking to substitute Mr. Marcus in place of another individual as their wetlands expert witness at the Hearing. In their Motion, the Petitioners stated that they "ha[d] been in contact with the Applicant . . . to seek permission to conduct a site visit and testing of the . . .

[P]roperty” on some unspecified date after the end of the Winter season¹⁰ and that they wanted their expert, Mr. Marcus, “[to] conduct [this] testing . . . and include his results as part of his [PFT]” [Petitioners’] Motion to Modify Witness List (February 9, 2018), at p. 1. In support of their purported need for discovery from the Applicant, the Petitioners submitted an Affidavit from Mr. Marcus. In his Affidavit, Mr. Marcus represented that “[he sought] to conduct testing on the . . . [P]roperty” (for reasons he did not explain) and that “[he would] not be able to accurately perform the analysis” by the February 23, 2018 due date for his PFT “because of the winter conditions which [in his view] diminish the accuracy of wetland determinations when the soils are frozen, and herbaceous vegetation is dead.” See June 8, 2018 Revised Adjudication Schedule and Rulings and Orders on: (1) Applicant’s Motion to Add Expert Witness; (2) Petitioners’ Motion to Substitute Expert Witness; (3) Petitioners’ Motion For Extension of Time to File Pre-Filed Testimony of Witnesses; and (4) Petitioners’ Motion to Compel Discovery From Applicant (“June 8, 2018 Ruling”), pp. 9-10.

Both the Department and the Applicant strenuously objected to the Petitioners’ Motions, arguing that the Petitioners’ request for discovery regarding the wetlands delineation was not relevant to the previously-identified Issues for Resolution in the Appeal. I agreed with the Department and the Applicant, and issued a ruling on June 8, 2018 rejecting the Petitioners’ discovery request as being untimely and brought for the purpose of delay, and because “the accuracy of the wetlands delineation for the proposed Project [was] not one of the Issues for Resolution in the Appeal.” June 8, 2018 Ruling, pp. 6-10. However, due to the extensive briefing required by the parties in conjunction with addressing Petitioners’ various Motions, I

¹⁰ The Winter season officially ended on March 20, 2018, the first day of Spring. The first day of Spring was more than three weeks after the February 23, 2018 filing deadline for the PFT of the Petitioners’ witnesses and Memorandum of Law on the Issues for Resolution in the Appeal.

also agreed to a revised PFT filing deadline schedule, and extended the Hearing date to September 25, 2018. June 8, 2018 Ruling, pp. 11-14.

On July 13, 2018, Mr. MacDonald and Mr. Marcus filed PFT in support of the Petitioners' claims in the appeal. In his PFT, Mr. Marcus, among other things, again raised the issue of whether the Applicant had properly delineated the wetlands areas at Property for the proposed Project, in particular BVW, notwithstanding my prior June 8, 2018 Ruling that wetlands delineation was not an Issue for adjudication in the appeal. See Mr. Marcus' July 13, 2018 PFT, ¶¶ 3-8. In response, Mr. Cowell, one of the Applicant's expert witnesses, presented through his PFT an updated delineation of the BVW areas that included, but were not limited to, defining a certain BVW "fringe" area and a "seep" area at the northeast corner of the Property, in order to refute Mr. Marcus' assertions that the Applicant had not properly delineated the BVW at the Property for the proposed Project. Mr. Cowell's August 16, 2018 PFT, ¶¶ 14-15 and Exhibit 2 to the PFT.

In response to Mr. Cowell's updated delineation plan, on August 29, 2018, the Department, while re-asserting that BVW delineation was not an issue for adjudication in the appeal, requested that I allow the Department to verify this updated delineation by conducting a site visit at the Property to determine whether the plan set forth in Exhibit 2 of Mr. Cowell's August 16, 2018 PFT should become the new plan of record for the proposed Project. Department's Memorandum of Law and Request for Submission of New Plan of Record, pp. 3-5. After obtaining the Petitioners' and Applicant's respective views regarding the Department's request (through extensive briefing), I issued an Order on October 1, 2018: (1) authorizing the Department's site visit at the Property to review the updated delineation, (2) establishing

additional deadlines for the parties to submit additional and/or rebuttal PFT prior to the Hearing, and (3) scheduling the new Hearing date of November 7, 2018.

In response to my October 1, 2018 Order, the Petitioners and the Applicant submitted additional, and voluminous, pre-filed testimony and exhibits in support of their respective positions in the appeal. Among the Petitioners' submissions was a November 2, 2018 Supplement to their Memorandum of Law Regarding Issues for Resolution, which attached, as Exhibit A, a copy of the Superior Court's October 18, 2018 Order and Ruling denying the Applicant's and the LCC's Joint Motion to Dismiss, for lack of standing, the Petitioners' appeal of the LCC's approval of the proposed Project pursuant to Littleton's Wetlands Protection By-law. The Superior Court's ruling is discussed below, at pp. 28-29, in connection with my finding that the Petitioners have standing to challenge the SOC as "aggrieved persons" in this appeal.

FINDINGS

I. BURDEN OF PROOF AND STANDARD OF REVIEW

A. Burden Of Proof

At the Hearing the Petitioners had the burden of proof on all of the Issues for Resolution in the Appeal. 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. Specifically, they had the burden of presenting competent and persuasive evidence through their witnesses demonstrating they had standing to challenge the SOC as "aggrieved persons" and that the Department erred in issuing the SOC. Id. It is well settled that "[a] competent source' [of evidence includes] 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 MA ENV LEXIS 89, at 36-37, adopted as Final Decision

(August 19, 2010), 2010 MA ENV LEXIS 31. 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 Carulli, Docket No. 2005-214, Recommended Final Decision (August 10, 2006)(dismissing claims regarding flood control, wetlands replication, and vernal pools for failure to provide supporting evidence from competent source), adopted as Final Decision (October 25, 2006); In the Matter of Indian Summer Trust, Docket No. 2001-142, Recommended Final Decision (May 4, 2004) (insufficient evidence from competent source showing that interests under MWPA were not protected), adopted as Final Decision (June 23, 2004); In the Matter of Robert Siegrist, Docket No. 2002-132, Recommended Final Decision (April 30, 2003) (insufficient evidence from competent source to show wetlands delineation was incorrect and work was not properly conditioned), adopted as Final Decision (May 9, 2003); Pittsfield Airport Commission, supra, 2010 MA ENV LEXIS 89, at 36-39 (petitioner’s failure to submit expert testimony in appeal challenging Department’s Commissioner’s issuance of 401 Water Quality Certification Variance to Pittsfield Airport Commission fatal to petitioner’s claims in appeal because Variance was “detailed and technical . . . requiring expert testimony on issues . . . implicated by the Variance,” including . . . (1) wetland replication, restoration, and enhancement, (2) mitigation of environmental impacts to streams, and (3) stormwater discharge and treatment[,] [and (4)] . . . runway safety and design”).

B. Standard Of Review

My review of the evidence that was presented at the Hearing was de novo, meaning that my review was anew, irrespective of any prior determination of the Department in issuing the SOC. Soursourian, 2014 MA ENV LEXIS 49, at 34-36; Zarette, 2018 MA ENV LEXIS 7, at 16-

17; In the Matter of Brian Corey, OADR Docket No. WET-2016-023, Recommended Final Decision (February 28, 2018), 2018 MA ENV LEXIS 10, at 58, adopted as Final Decision (March 15, 2018), 2018 MA ENV LEXIS 9; In the Matter of Christopher N. Colby, OADR Docket No. WET-2016-012, Recommended Remand Decision (October 12, 2018), 2018 MA ENV LEXIS 63, at 26-27, adopted as Remand Decision (October 26, 2018), 2018 MA ENV LEXIS 62. Put another way, as the Presiding Officer responsible for adjudicating the appeal, “[I am] not bound by MassDEP’s prior orders or statements [in the case], [but] instead [am] responsible . . . for independently adjudicating [the] appeal[I] and making a recommendation to MassDEP’s Commissioner that is consistent with and in the best interest of the [MWPA] and . . . [the Wetlands] Regulations” Id.

As for the relevancy, admissibility, and weight of evidence that was presented at the Hearing, this was governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):

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

Under 310 CMR 1.01(13)(h), “[t]he weight to be attached to any evidence in the record . . . rest[ed] within the sound discretion of the Presiding Officer. . . .” Speculative evidence was accorded no weight given its lack of probative value in resolving the Issues for Resolution in the Appeal. In the Matter of Sawmill Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), 2015 MA ENV LEXIS 63, at 84, adopted as Final Decision (July 7, 2015), 2015 MA ENV LEXIS 62 (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”).¹¹

II. THE PETITIONERS DEMONSTRATED THAT THEY HAVE STANDING TO CHALLENGE THE SOC AS “PERSON[S] AGGRIEVED” BY THE SOC PURSUANT TO 310 CMR 10.04

A. The Jurisdictional Nature Of Standing

Standing “is not simply a procedural technicality.” Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975); In the Matter of Webster Ventures, LLC, OADR Docket No. 2015-014 (“Webster Ventures II”), Recommended Final Decision (June 3, 2016), 2016 MA ENV LEXIS 27, at 19-20, adopted as Final Decision (June 15, 2016), 2016 MA ENV LEXIS 32; In the Matter of Thomas Vacirca, Jr., OADR Docket No. WET-2016-017, Recommended Final Decision (April 11, 2017), 2017 MA ENV LEXIS 22, at 18-19, adopted as Final Decision (April 18, 2017), 2017 MA ENV LEXIS 28. Rather, it “is a jurisdictional prerequisite to being allowed to press the merits of any legal claim.” R.J.A. v. K.A.V., 34 Mass. App. Ct. 369, 373 n.8 (1993); Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998) (“[w]e treat standing as an issue of subject matter jurisdiction [and] . . . of critical significance”); see also United States v. Hays, 515 U.S. 737, 115 S.Ct.2431, 2435 (1995) (“[s]tanding is perhaps the most important of the jurisdictional doctrines”); Webster Ventures II, 2016 MA ENV LEXIS 27, at 19.

Under 310 CMR 10.05(7)(j)2(a), certain individuals or entities may, within 10 business

¹¹ To the extent that there are any outstanding Motions of the parties seeking to strike some, or all portions, of the PFT of a particular witness, see, e.g., the Applicant’s Closing Brief, p. 7, n. 8, noting that I had not ruled on her August 17, 2018 Partial Motion to Strike Mr. Marcus’s PFT, all such motions are denied. As noted in 310 CMR 1.01(13)(h), as Presiding Officer, I have discretion with respect to the weight to be accorded to the evidence presented by the parties at the Hearing, and through issuance of this Recommended Final Decision, I have evaluated and addressed these evidentiary issues.

days after an SOC's issuance, file an appeal with OADR challenging the SOC, including "[an] aggrieved person [who] previously [participated] in the permit proceedings." Under the regulation, "[p]reviously participating in the permit proceeding" means:

- (1) the submission of written information to the conservation commission prior to the close of the [commission's] public hearing;
- (2) requesting an action by the Department that would result in [the SOC]; or
- (3) providing written information to the Department prior to issuance of [the SOC].

See also 310 CMR 10.04 (definition of "person aggrieved").

Here, the parties do not dispute that the Petitioners previously participated in permit proceedings by submitting comments to the LCC when it initially reviewed the proposed Project, and then to the Department by requesting an SOC overturning the LCC's Order of Conditions approving the Project. Thus, the only issue regarding the Petitioners' standing is whether the Petitioners are "person[s] aggrieved" by the SOC within the meaning of 310 CMR 10.04 and 10.05(7)(j)2(a).

The Wetlands Regulations at 310 CMR 10.04 define a "person aggrieved" as:

any person who because of an act or failure to act by the issuing authority may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in [MWPA]. . . .

"A 'person aggrieved' as that term is used in the MWPA must assert 'a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest. . . . Of particular importance, the right or interest asserted must be one that the statute . . . intends to protect.'" Webster Ventures I, 2015 MA ENV LEXIS 14, at 15; Vacirca, 2017 MA ENV LEXIS

22, at 28-29; In the Matter of Ronald and Lois Enos, OADR Docket No. WET -2012-019, 2013 MA ENV LEXIS 21, at 16-17, adopted as Final Decision, 2013 MA ENV LEXIS 20; .
In the Matter of Norman Rankow, OADR Docket No. WET -2012-029, Recommended Final Decision (August 6, 2013), 2013 MA ENV LEXIS 45, at 26-27, adopted as Final Decision (August 12, 2013), 2013 MA ENV LEXIS 79; In the Matter of Town of Southbridge Department of Public Works, OADR Docket No. WET-2009-022, Recommended Final Decision, at p. 4 (September 18, 2009), adopted as Final Decision (October 14, 2009); In the Matter of Onset Bay Marina, OADR Docket No. 2007-074, Recommended Final Decision (January 30, 2009), 16 DEPR 48, 50 (2009), adopted as Final Decision (April 1, 2009); Compare, Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20, 27-28 (2006) (definition of “person aggrieved” under G.L. c. 40B).

“To show standing, [however,] a party need not prove by a preponderance of the evidence [at the evidentiary Adjudicatory Hearing in the appeal] that his or her claim of particularized injury is true.” Webster Ventures I, 2015 MA ENV LEXIS 14, at 16; Vacirca, 2017 MA ENV LEXIS 22, at 29-30; In the Matter of Edward C. Gordon and 129 Racing Beach Trust, OADR Docket No. WET-2009-048, Recommended Final Decision (March 3, 2010), 2010 MA ENV LEXIS 114, at 10, adopted as Final Decision (March 5, 2010), 2010 MA ENV LEXIS 13, citing, Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005); Enos, 2013 MA ENV LEXIS 21, at 16-17; Rankow, 2013 MA ENV LEXIS 45, at 27-28. As the Massachusetts Appeals Court explained in Butler:

[t]he “findings of fact” a judge is required to make when standing is at issue . . . differ from the “findings of fact” the judge must make in connection with a trial on the merits. Standing is the gateway through which one must pass en route to an inquiry on the merits. When the factual inquiry focuses on standing, therefore, a plaintiff is not required to prove by a preponderance of the evidence that his or

her claims of particularized or special injury are true. “Rather, the plaintiff must put forth **credible evidence** to substantiate his allegations. [It is i]n this context [that] standing [is] essentially a question of fact for the trial judge.”

63 Mass. App. Ct. at 441 (emphasis supplied); Webster Ventures I, 2015 MA ENV LEXIS 14, at 16-17; Vacirca, 2017 MA ENV LEXIS 22, at 30-31; Enos, 2013 MA ENV LEXIS 21, at 17-18; Rankow, 2013 MA ENV LEXIS 45, at 28-29. This “credible evidence” standard to demonstrate standing “has both a quantitative and a qualitative component.” Butler, 63 Mass. App. Ct. at 441. Specifically:

[q]uantitatively, the evidence must provide specific factual support for each of the claims of particularized injury the [party seeking to establish standing] has made[,] . . . [and] *[q]ualitatively*, the evidence must be of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the [challenged governmental] action. Conjecture, personal opinion, and hypothesis are therefore insufficient [to establish standing] . . . [If] the judge determines that the evidence is both quantitatively and qualitatively sufficient . . . [to] establis[h] standing, the inquiry [regarding whether the party has standing] stops [and the party is not] required to persuade the judge that [the party’s] claims of particularized injury are, more likely than not, true.

Id., at 441-42 (emphasis supplied).

To summarize, in order to demonstrate that they were “person[s] aggrieved” by the SOC, the Petitioners were required to put forth at the Hearing a minimum quantum of specific factual evidence that qualitatively a reasonable person could rely upon to conclude that the proposed Project will or might cause the Petitioners to suffer an injury in fact, which will be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interest protected by the MWPA and the Wetlands Regulations. Butler, 63 Mass. App. Ct. at 441-42; 310 CMR 10.04; See also Webster Ventures I, 2015 MA ENV LEXIS 14, at 17-18; Vacirca, 2017 MA ENV LEXIS 22, at 31-32; Gordon, 2010 MA ENV LEXIS 114, at 11 and cases cited; Enos, 2013 MA ENV LEXIS 21, at 17-18; Rankow,

2013 MA ENV LEXIS 45, at 29. If the Petitioners met that threshold, their appeal of the SOC would proceed “to [the] inquiry on the merits” regarding whether the Department properly issued the SOC. Butler, 63 Mass. App. Ct. at 441-42.

B. The Petitioners’ Evidence Demonstrating Standing To Appeal The SOC

At the Hearing, the Petitioners put forth a minimum quantum of specific factual evidence that qualitatively a reasonable person could rely upon to conclude that they have standing to challenge the SOC as “aggrieved persons” for the following reasons.

First, the Petitioners’ wetlands expert, Mr. Marcus, testified that “[t]he secondary driveway [at the Property called for by the proposed Project] directly abuts the [Petitioners’] property, and will have direct negative impact on the trees, drainage and soil erosion on their property.” Mr. Marcus’s July 13, 2018 PFT, ¶ 10; Mr. Marcus’s September 17, 2018 RPFT, ¶ 4(f). He also testified that the increase of phosphorus and nitrogen from the proposed septic system at the Property will contribute to nutrient loading, thereby causing algae blooms to an area of Fort Pond, Mr. Marcus’s July 13, 2018 PFT, ¶ 14, which the Petitioners contend they actually own because, Fort Pond is a Massachusetts Great Pond, and as such, their legal title extends to the low water mark. See Petitioners’ September 17, 2018 Supplemental Memorandum of Law Addressing Matters Asserted in Applicant’s and MassDEP’s Pre-Filed Testimony, pp. 3-4.

In response, the Applicant and the Department asserted that Mr. Marcus’s testimony regarding the Petitioners’ standing was too generalized or not specific enough to establish the Petitioners’ standing. Applicant’s Closing Brief, at pp. 12-18; Department’s Closing Brief, at pp. 3-5. However, Mr. Marcus’s testimony is virtually the same testimony that he provided in an Affidavit that he submitted on behalf of the Petitioners to establish their standing in the Superior

Court appeal they filed challenging the LCC's approval of the proposed Project pursuant to Littleton's Wetlands Protection By-law. Based on Mr. Marcus's Affidavit, the Superior Court denied the Applicant's and LCC's Motion to Dismiss that appeal for lack of standing. In denying the Motion, the Court ruled that, while the factual evidence in Mr. Marcus's Affidavit to establish the Petitioners' standing was "[a]lbeit thin," it was nevertheless "sufficient [evidence] to confer standing upon the [the Petitioners] to challenge the [LCC's local wetlands by-law] Order of Conditions" approving the proposed Project. Superior Court's October 18, 2018 Order, pp. 2-3.

In sum, I find that the Petitioners demonstrated, albeit barely, that they have standing as "persons aggrieved" to challenge the Department's issuance of the SOC.¹²

III. THE DEPARTMENT PROPERLY ISSUED THE SOC

My finding that the Petitioners have standing to challenge the SOC does not mean that they prevail on the merits of their substantive claims challenging the Department's SOC authorizing the proposed Project. My finding only means that the Petitioners have standing based on the much lower evidentiary threshold discussed above that did not require them to prove for standing purposes that their "claims of particularized injury [resulting from the Department's issuance of the SOC] are, more likely than not, true." Butler, 63 Mass. App. Ct. at 441-42. To successfully challenge the SOC on the merits, the Petitioners had the higher burden of proving by a preponderance of credible evidence through the sworn testimonial and

¹² In light my ruling that the Petitioners have standing to challenge the SOC as "aggrieved persons" it is unnecessary for me to make a finding on the Petitioners' claim asserted for the first time in the appeal after the Hearing in their Closing Brief, at pp. 4-7, that they also have standing to challenge the SOC as a "landowner" pursuant to 310 CMR 10.05(7)(j)2a. Indeed, the claim is barred because the Petitioners waived the claim by failing to raise it at the Pre-Hearing Conference, and as such, the claim was not an Issue for Resolution in the Appeal that I established at the Pre-Hearing Conference. Zarette, 2018 MA ENV LEXIS 7, at 71-73 (appellants waived new pollution claim by failing to raise it at Pre-Hearing Conference).

documentary evidence of their witnesses that the Department erred in issuing the SOC approving the proposed Project. Id.; Webster Ventures I, 2015 MA ENV LEXIS 14, at 13-14, 31-37. As explained below, the Petitioners failed to meet their burden because based upon a preponderance of the evidence presented at the Hearing and the governing statutory and regulatory wetlands requirements: (1) the Department's SOC approving the proposed Project was sufficiently conditioned to address the work activities within the Buffer Zone to the wetlands areas of Bank, BVW, and LUW; (2) the recommended inclusion of the Applicant's updated 11/7/18 Plan of Record in an FOC at the Department's request in order to more accurately depict the Property's wetlands resources in no way negated the Department's SOC conditions, which are already sufficiently protective for the proposed Project; and (3) the Applicant did not perform any work activities in violation of the SOC, the MWPA, and the Wetlands Regulations while this appeal was pending that would in any way impact or change my findings or Recommended Final Decision in this matter.

A. The SOC Contains Conditions That Satisfy The Requirements Of 310 CMR 10.53(1) For Activities In The Buffer Zone To The Wetlands Areas Of Bank, BVW, And LUW

As discussed previously, the proposed Project consists of the installation of a sewage disposal system and well to support the renovation of an existing cabin at the Property, as well as improving a pre-existing access way. Located on Fort Pond in Littleton, the Property's wetlands resources include Bank, BVW, and LUW in the vicinity of an intermittent stream and the Pond. However, it is undisputed that all work activities associated with the proposed Project will take place solely in the Buffer Zone to these wetlands areas.

As also discussed previously, where proposed project activities occur in the Buffer Zone

to a specific wetlands area, 310 CMR 10.53(1) requires the local Conservation Commission (or the Department on appeal) to condition the work activities in order to protect the MWPA interests in the adjacent protected wetlands areas. These conditions may require, among other things, “limitations on the scope and location of the work in the Buffer Zone . . . to avoid alteration of [the protected MWPA resource]” and the requirement of “erosion and sedimentation controls during construction [and] a clear limit of work” At the Hearing, the Department’s and the Applicant’s respective witnesses provided persuasive testimony that the SOC provides multiple conditions regarding the performance of the Buffer Zone work at the Property that are fully protective of the wetlands resources of Bank, BVW, and LUW in accordance with the requirements of 310 CMR 10.53(1).

Ms. Selby testified on behalf of the Department that after the Petitioners filed their SOC request with the Department, she performed a site visit of the Property to familiarize herself with the proposed Project and the wetlands resource areas at the Property. Ms. Selby’s August 29, 2018 PFT, ¶¶ 7-12. As a result of her site visit of the Property, Ms. Selby determined that the proposed Project’s work associated with the eastern driveway improvements and new septic system installation would take place within the 100-foot Buffer Zone to the BVW along an intermittent stream, and that the proposed Project’s work associated with the western driveway improvements and cottage renovation would take place within the 100-foot Buffer Zone to the BVW along Fort Pond. *Id.*, ¶ 11. She testified that the largest potential wetlands impacts posed by these Buffer Zone work activities would be siltation and erosion into the intermittent stream or Fort Pond during construction, and as a result, the SOC included multiple conditions specific to these activities in accordance with the requirements of 310 CMR 10.53(1). *Id.*, ¶ 12. These SOC conditions include General Condition 18, and Special Conditions 21 and 23-30, which

address the prevention of erosion and sedimentation by requiring the Applicant to take certain measures during the construction activities, including the following:

- (1) notifying the LCC and the Department in writing, not less than 72 hours prior to the start of the work, to ensure that the proper installation of the erosion and sedimentation controls can be verified (SOC, Special Conditions 21 and 22);
- (2) maintaining all sedimentation barriers in good repair until all disturbed areas have been fully stabilized with vegetation or other means (SOC, General Condition 18; SOC, Special Condition 22);
- (3) inspecting the erosion controls on a daily basis and removing accumulated sediments as needed to ensure that no sediments are deposited in a wetlands or water body (SOC, General Condition 18; SOC, Special Condition 26);
- (4) immediately controlling any erosion problems at the Property and immediately notifying the Department of those problems, which has the authority to require the Applicant to deploy additional erosion and/or damage prevention controls the Department deems necessary (SOC, General Condition 18; SOC, Special Condition 29);
- (5) not limiting the Applicant to only use those erosion and sedimentation controls that are shown on the proposed Project plan to prevent unauthorized discharges of fill material in wetlands resource areas, but directing the Applicant to utilize Best Management Practices during construction to prevent such discharges (SOC, Special Conditions 24 and 25);
- (6) inspecting all erosion and sedimentation controls at the end of each construction day and maintaining, reinforcing, and/or repairing these controls as necessary (SOC, Special Condition 26);
- (7) stockpiling all debris, construction material fill, and excavated material as far away from designated wetlands resource areas as practicable and at a location to prevent any impact to wetlands resource areas (SOC, Special Condition 30); and
- (8) surrounding all soil stockpiled within the Buffer Zone areas with appropriate sediment control measures and covering such soil daily in

order to prevent impacts to wetlands resource areas (SOC, Special Condition 30).

Ms. Selby also testified that SOC Special Conditions 31 and 36 further ensure that the Buffer Zone work is protective of Bank, BVW, and LUW by “requiring the Site be stabilized as soon as work is complete and requiring the applicant to keep adequate erosion and sedimentation controls in place until the site is fully stabilized.” Ms. Selby’s August 29, 2018 PFT, ¶ 13.

Ms. Selby’s opinion regarding the protective nature of the SOC’s General Condition 18, and Special Conditions 21, 23-30, 31, and 36, remained the same after she performed an additional site visit of the Property on October 4, 2018, to verify the updated BVW delineation and updated plan that Mr. Cowell, one of the Applicant’s expert witnesses, submitted in response to the delineation issues raised by the Petitioners’ expert, Mr. Marcus. Specifically, Ms. Selby, in her Supplemental pre-filed testimony, confirmed the updated delineation and revised plan of record from the Applicant and testified that this additional information did not change her opinion that the proposed Buffer Zone work, as already conditioned in the SOC, adequately protects the resource areas (including the BVW fringe along the Fort Pond area) in accordance with the requirements of 310 CMR 10.53(1). Ms. Selby’s November 18, 2018 SPFT, ¶¶ 2-3, 5-7.¹³

Ms. Selby’s opinion that the SOC is adequately conditioned to address the Buffer Zone activities to protect the Property’s wetland resources is further supported by Mr. Cowell’s and Mr. Goddard’s testimony on behalf of the Applicant. Mr. Cowell testified that, even with the newly-delineated BVW areas, all proposed work activities were occurring in the Buffer Zone locations, and “were appropriately conditioned [by the SOC] through mandating in-construction

¹³ The full discussion of the Applicant’s updated BVW delineation and the revised Plan of Record are set forth above, at pp. 19-21, and below, at pp. 37-39.

Best Management Practices for erosion and sediment control to protect downgradient resource areas.” Mr. Cowell’s August 16, 2018 PFT, ¶ 15. Mr. Goddard testified that the SOC’s General Condition 18 requires all sediment barriers be properly maintained and opined that the SOC conditioned the proposed Project to protect resources and interests of MWPA. Mr. Goddard’s August 16, 2018 PFT, ¶¶ 22-23.

In response, the Petitioners, through their wetlands expert, Mr. Marcus, failed to effectively refute Ms. Selby’s, Mr. Cowell’s, and Mr. Goddard’s testimony that the SOC is sufficiently conditioned to address the proposed Project’s Buffer Zone activities to protect the wetlands resources of Bank, BVW, and LUW. In his testimony, Mr. Marcus made only generalized statements regarding the proposed Project’s purported negative impacts, without evaluating and refuting the adequacy of the SOC’s Buffer Zone protections for the proposed Project’s work activities. The deficiencies in Mr. Marcus’ testimony included the following.

In his initial July 13, 2018 PFT, Mr. Marcus summarized the Applicant’s plans for the proposed Project, contending that there are “no grading plan[s]” for various components, and “insufficient sediment and erosion controls,” but he made these contentions without making any reference or connection to any purported deficiencies in the SOC conditions for Buffer Zone work activities due to these plan omissions. Mr. Marcus’s July 13, 2018 PFT, ¶ 11. He also asserted that “[t]he construction of a new driveway to the property of Shagbark Drive will result in significant new work in the Buffer Zone to [LUW], Bank, and BVW,” but he provided no specific testimony to indicate that the SOC conditions are inadequate regarding this work. *Id.*, ¶ 9. He also asserted that the proposed Project has “[in]adequate sediment and erosion controls [that] . . . may directly alter [a certifiable] vernal pool habitat . . . and will have a direct negative impact on the trees, drainage, and soil erosion on [the Petitioners’] property,” without providing

any specifics as to this actual damage, and also claimed, without any detailed support, that the Project Plans and the SOC “have not initiated a plan to avoid alteration of [Wetlands] Resource Areas.” Id., ¶¶ 10 and 12.

Mr. Marcus also testified in his July 13, 2018 PFT that the septic system’s current location at the Property may result in a “significant . . . risk of failure,” that would expose the stream and Fort Pond to “effluent,” and that the proposed Project’s new septic system “will contribute to increased algae populations” in Fort Pond. Id., ¶¶ 13 and 14. He made these assertions notwithstanding that: (1) “[under] 310 CMR 10.03(3), a septic system designed and constructed in compliance with Title 5 [of the State Sanitary] [C]ode (310 CMR 15.000) is presumed to protect the eight interests of the [MWPA]”; and (2) the proposed Project’s new septic system is entitled to that presumption because the system was approved by the Nashoba Associated Boards of Health (“NABH”) on September 16, 2014 pursuant to Title 5¹⁴ and the NABH’s approval was included with the Applicant’s NOI for the proposed Project. Ms. Selby’s August 29, 2018 PFT, ¶ 20. Additionally, two of the Applicant’s expert witnesses, Mr. Goddard and Mr. Peznola, confirmed in their testimony that the proposed Project’s new septic system complies with Title 5. Mr. Goddard’s August 17, 2018 PFT, ¶ 21; Mr. Peznola’s August 16, 2018 PFT, ¶ 15.

With respect to his September 17, 2018 RPFT, Mr. Marcus asserted that, while the SOC’s “General Condition 18 and Special Conditions 21 and 23-30 address the prevention of erosion and sedimentation,” the Applicant failed to adhere to “ANY of these conditions when she began unauthorized work on the proposed project in the buffer zone while this SOC [was] under

¹⁴ “The [NABH’s] Environmental Division . . . handles the daily public health work for the fifteen member communities” comprising the NABH, including the Town of Littleton. <http://www.nashoba.org/environmental>. The NABH’s Environmental Division enforces Title 5 (310 CMR 15.00) on behalf of its member communities. Id.

appeal.” Mr. Marcus’s September 17, 2018 RPFT ¶4(d). This testimony was of no assistance to the Petitioners because as explained in detail below, at pp. 40-42, the Applicant, contrary to Mr. Marcus’s assertions, did not perform any unauthorized work at the Property during the pendency of this appeal in violation of the SOC, the MWPA, and the Wetlands Regulations. Also, assuming for the sake of argument that the Applicant performed such “unauthorized work,” Mr. Marcus essentially admitted in his testimony that, had the Applicant performed such work with the erosion and sedimentation control measures ordered by the SOC’s General Condition 18 and Special Conditions 21 and 23-30 in place, these measures would have been sufficiently protective of the wetlands impacted by the Buffer Zone activities.

In his September 17, 2018 RPFT, Mr. Marcus also disputed generally the Department’s description of the location of certain proposed Project components in relation to the wetlands resource areas, and included testimony regarding the 50 foot “No Disturb Area” requirement of Littleton’s Wetlands Protection By-law as evidence of the alleged insufficiency of the SOC sedimentation and erosion controls for Buffer Zone activities, contending generally that various work components will “introduce disruption and sediment close to the resource area,” or “will impact the tree roots and grading” or “will have the potential to impact the vernal pool habitat.” Mr. Marcus’s September 18, 2018 RPFT ¶4(e)-(h). However, Mr. Marcus failed to provide any specificity or reference as to how the SOC conditions fail to address these issues. Moreover, the 50 foot “No Disturb Area” requirement of Littleton’s Wetlands Protection By-law has no relevance in this appeal because this appeal concerns the requirements of the MWPA and the Wetlands Regulations, and not the requirements of Littleton’s Wetlands Protection By-law, which are the subject of the Petitioners’ pending appeal in Superior Court of the LCC’s approval

of the proposed Project pursuant to the By-law.

Lastly, in his October 26, 2018 SPFT, Mr. Marcus confirmed that, as a result of his October 4, 2018 site visit of the Property, the Applicant had accurately delineated the previously-undocumented BVW areas along Fort Pond. Mr. Marcus's October 26, 2018 SPFT, ¶¶ 9, 10.¹⁵ However, Mr. Marcus never addressed how this updated delineation impacted the adequacy (or inadequacy) of the Department's specific SOC conditions for the proposed Project's Buffer Zone work activities. Id. Instead, Mr. Marcus continued to question: (1) the accuracy and legitimacy of certain proposed Project plans (Id., SPFT, ¶¶1-4); (2) the location of certain proposed Project components, including but not limited to Project location impacts upon the 50 foot "No Disturb Area" under Littleton's Wetlands Protection By-law (Id., ¶¶6-7), which as discussed above has no relevance in this appeal; (3) other aspects of the proposed Project due to the Petitioners' purported inability to gain access to verify other BVW or soils on the property (Id., ¶¶9, 11, 13); and (4) why the Applicant had to utilize the cart road location to access her Property at all. (Id., ¶12).

In sum, based on a preponderance of the evidence presented at the Hearing and the governing statutory and regulatory wetlands requirements, the Department properly issued the SOC with conditions that meet the requirements of 310 CMR 10.53(1) for activities in the Buffer

¹⁵ As noted above, at pp. 20-21, and below, at pp. 38-40, the Department requested the opportunity to confirm the updated delineation on a plan that was offered through the testimony of Applicant's expert, Mr. Cowell in response to this issue being raised by Mr. Marcus in his July 13, 2018 PFT.

Zone to the wetlands areas of Bank, BVW, and LUW.

B. Inclusion Of The Applicant's Updated 11/7/18 Plan Of Record In A Final Order Of Conditions In Order To More Accurately Depict The Property's Wetlands Resources In No Way Negates The Department's SOC Conditions, Which Are Already Sufficiently Protective Regarding The Buffer Zone Activities

As discussed previously above, at pp. 16-21, whether the Applicant properly delineated the wetlands areas at the Property for the proposed Project was not an issue for adjudication in this appeal. Nevertheless, the Petitioners, through their wetlands expert, Mr. Marcus, repeatedly tried to make wetlands delineation an issue in the appeal, in particular, the Applicant's delineation of BVW at the Property. See generally, Mr. Marcus's July 13, 2018 PFT, ¶¶ 3-8. In response, the Applicant, through one of her expert witnesses, Mr. Cowell, persuasively addressed Mr. Marcus's contentions by presenting through his PFT an updated delineation of the BVW areas that included, but were not limited to, defining a certain BVW "fringe" area and a "seep" area at the northeast corner of the Property. Mr. Cowell's August 16, 2018 PFT, ¶¶ 14-15 and Exhibit 2 to Mr. Cowell's PFT. Ms. Selby, on behalf of the Department, concurred with Mr. Cowell's position after conducting a Site visit of the Property on October 4, 2018 and confirming the updated BVW delineation. Consequently, among the exhibits entered in evidence at the Hearing was the Applicant's updated plan, entitled "Scope of Work, MA DEP 204-855", originally dated 2/4/14, and most recently revised on 11/7/18, that was submitted in order to become the "Plan of Record" for the proposed project's work activities.

In its Closing Brief, the Department requested that an FOC be issued in conjunction with the Commissioner's Final Decision in this matter affirming the SOC. With its Closing Brief, the Department submitted a proposed FOC, which "includes reference to the new plans of record submitted during the Hearing, based on the delineated 100 and 200 wetland flag series by the

[Fort] [P]ond . . . [but also] includes the identical conditions [that were set forth] in the SOC.” DEP Closing Brief, at p. 7. In making this request, the Department maintained, based upon Ms. Selby’s unrefuted testimony, that even with the Applicant’s delineation of the new BVW areas on the Property as reflected in the updated Plan of Record, the original SOC conditions are sufficiently protective of the Buffer Zone activities to prevent adverse erosion or sedimentation impacts to the wetlands resource areas in accordance with the requirements of 310 CMR 10.53(1). Id.

I find that the Department’s request for the issuance of the FOC that incorporates the updated Plan of Record as part of the Commissioner’s Final Decision will further enhance and protect the wetlands resources for the proposed Project. I also find that the SOC conditions, as originally issued, are already sufficiently protective of the Buffer Zone work activities, based upon Ms. Selby’s unrefuted testimony. Finally, I note that the Department’s request for issuance of this FOC is fully within its purview and authority as part of its ability to conduct a further review of the proposed Project during the pendency of this appeal, which allows the Department to change its position or the basis for its decision approving or rejecting a proposed activity, in response to its receipt of additional information. See discussion at pp. 9-10 above regarding the Department’s de novo review authority; see also, Cote, 2018 MA ENV LEXIS 47, at 33-43 (addition of two SOC conditions to original SOC conditions proper because they further enhanced and protected wetlands resources, although SOC as issued already met required

regulatory requirements).

C. The Applicant Did Not Perform Any Work Activities At The Property In Violation Of The SOC, The MWPA, And The Wetlands Regulations During The Pendency Of This Appeal

As noted previously, the Petitioners have repeatedly asserted in this appeal, both through pre-filed testimony and at the Hearing, that the Applicant has performed unauthorized work activities at the Property during the pendency of this appeal in violation of the SOC, the MWPA, and the Wetlands Regulations. See e.g., Mr. MacDonald's July 13, 2018 PFT, ¶¶ 2-3 and Exhibit A to the PFT (email communications with the Department); Mr. MacDonald's Sept. 17, 2018 RPFT, ¶ 2, with reference to Exhibit 2 to the RPFT (email communications with the Department); the Petitioners' Closing Brief at pp. 24-28. The Petitioners further assert that the Applicant's alleged illegal actions are so egregious that the SOC should be vacated as a result. Petitioners' Closing Brief at p. 24. Given the serious nature of these assertions and the potential negative impact upon the Applicant in this appeal if the assertions were true, I allowed extensive testimony on this issue at the Hearing and further requested that the parties address this issue in their Closing Briefs.

The Wetlands Permit Appeal Regulations at 310 CMR 10.05(7)(j)2g, provide that "[n]o work [authorized by an SOC] shall be undertaken until all administrative appeal periods [for the SOC] have elapsed, or if such an appeal has been taken, until all procedures before the Department have been completed." Zarette, 2018 MA ENV LEXIS 7, at 103. The same directive appears in Section C, ¶ 8 of the SOC that the Petitioners challenge in this case. A violation of this directive by the project proponent during the pendency of an administrative appeal of an SOC can result in the imposition of sanctions against the project proponent pursuant

to 310 CMR 1.01(10). Zarette, 2018 MA ENV LEXIS 7, at 103-04. “Possible sanctions under 310 CMR 1.01(10) include, without limitation:

- (1) taking designated facts or issues as established against the project proponent in the appeal of the SOC;
- (2) prohibiting the project proponent from supporting or opposing designated claims or defenses in the appeal, or introducing designated matters into evidence in the appeal; and/or
- (3) issuing a Final Decision against the project proponent in the appeal vacating an SOC approving a proposed project.

Id.

Based on a preponderance of the evidence presented at the Hearing and the governing statutory and regulatory wetlands requirements, I find that the Applicant did not perform any unauthorized work at the Property during the pendency of this appeal in violation of the SOC, the MWPA, and the Wetlands Regulations for the following reasons.

First, I credit Ms. Selby’s testimony at the Hearing on behalf of the Department that, when notified of potential unauthorized tree cutting activities in October 2017 at the Property, she inspected the Property and determined that work did not include stumping of trees, and, more importantly, no impacts to wetlands were identified that would necessitate the initiation of enforcement proceedings against the Applicant. Digital Recording of Hearing, after 2:32. Ms. Selby further testified at the Hearing that, in her opinion, the Applicant’s activities on the Property could be properly done without a wetlands permit. Applicant’s Closing Brief at p. 27; Digital Recording of Hearing at 2:36:20. Ms. Selby’s testimony was consistent with the view of her supervisor at the Department, Denise Child, the Section Chief of the Wetlands Program in the Department’s Central Regional Office, who stated (in response to Petitioners’ email) that the alleged actions “could be a “minor activity” in the buffer zone which could be done without a

permit per 310 CMR 10.02(2)b.2.p.” See Mr. MacDonald’s Sept. 17, 2018 RPFT, ¶ 2 and Exhibit 2 to the RPFT (email communications containing Ms. Child’s statements).

I also credit the Hearing testimony of the Applicant who testified that she regularly communicated with the Department and the LCC about any work she performed on the Property, including activities that were completely outside the Buffer Zone. Digital Recording of Hearing, at 1:20:30, as set forth in Applicant’s Closing Brief, at p. 26. The Applicant further testified that both the LCC and the Department regularly inspected the Property with respect to these activities. Id.

Lastly, it is undisputed that neither the LCC nor the Department initiated any enforcement action against the Applicant with respect to these work activities while this appeal has been pending. See Applicant’s Closing Brief at p. 26, with references to the Digital Recording of the Hearing at 2:45:10; 2:41.10. This is in stark contrast to the situation in Zarette, where the project proponent in that case had performed unauthorized work that exceeded the scope of a limited emergency permit issued by the local conservation commission during the pendency of an appeal of an SOC before me approving the project proponent’s proposed work, and was therefore required to obtain after-the-fact-permitting authorization from the local conservation commission for the unauthorized work. Id.; Digital Recording of Hearing at 2:36:20.

CONCLUSION

For all the reasons discussed above, I recommend that the Commissioner issue: (1) a Final Decision affirming the Department’s SOC approving the Proposed Project and (2) issuing an FOC as proposed by the Department, which includes and appropriately references the updated 11/7/18 Plan-Of-Record as well as any other updated plans as specified by the Department, but

retains the current SOC conditions issued by the Department, which are already sufficiently protective of the wetlands areas of Bank, BVW, and LUW.

Date: 10/3/2019



Salvatore M. Giorlandino
Chief Presiding Officer

NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Chief 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/or 14(e), and may not be appealed to Superior Court pursuant to 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 and no other person directly or indirectly involved in this administrative appeal shall neither (1) file a motion to renew or reargue this Recommended Final Decision or any part of it, nor (2) communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

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