COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS

# DEPARTMENT OF ENVIRONMENTAL PROTECTION

ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

 March 28, 2013

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In the Matter of Docket Nos. WET-2012-024

 File No. SE 250-882

Kenneth Leavitt/Pheeny’s Island

 Norton

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RECOMMENDED FINAL DECISION

This appeal filed by a Ten Residents Group (the “Petitioner”) concerns a ropes course on Pheeny’s Island in the Norton Reservoir proposed by Kenneth Leavitt (the “Applicant”). The Petitioner challenges a Superseding Order of Conditions (“SOC”) that the Massachusetts Department of Environmental Protection’s Southeast Regional Office (the “Department”) issued to the Applicant under the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 and the Wetlands Regulations, 310 CMR 10.00. The Department affirmed an approval of the project by the Norton Conservation Commission (“Commission”), but declined to adopt several of the Commission’s conditions. After the Pre-Hearing Conference, the Department, the Applicant, and the Commission filed a settlement agreement with a Proposed Order pursuant to 310 CMR 1.01(8)(c), which requires the Petitioner to bear the burden of going forward as to why the agreement is inconsistent with law. After the Petitioner filed direct testimony of its expert witness, the Department and Applicant filed a motion to dismiss for failure of the Petitioner to sustain its direct case. The Petitioner filed an Opposition with a supporting affidavit of its expert witness. The Department and the Applicant filed a response and a motion to strike the affidavit on the grounds that there is no provision for the filing of such an affidavit. The Petitioner opposed the motion to strike and the Department and Applicant’s response on the grounds that there is no provision for the filing of a response. I have relied primarily on the Petitioner’s Prefiled Direct Testimony of its expert witness, consistent with the emphasis on the Petitioner’s direct case in the regulations, but also took the affidavit into account, consistent with ruling on a motion to dismiss. 310 CMR 10.05(7)j.3.[[1]](#footnote-1) I conclude that the Petitioner has failed to sustain its direct case, on grounds specific to each issue and recommend that the Department’s Commissioner issue a Final Decision sustaining the Proposed Order filed by the Department, the Applicant, and the Commission.

The Wetlands Regulations require that a Petitioner’s direct case establish the legal and factual basis for its position on each issue. 310 CMR 10.05(7)j.3.c. The Petitioner must provide “credible evidence from a competent source in support of each claim of factual error.” See also 310 CMR 10.03(2). The focus on errors in the Department’s SOC follows the requirement for the notice of claim, which must include a clear and concise statement of alleged errors and how each alleged error is inconsistent with 310 CMR 10.00 with references to regulatory provisions alleged to have been violated. The Applicant, the Department, and the Commission have agreed to a settlement of this matter, with a Proposed Order which has been substituted for the SOC for purposes of this appeal. Under the provision at 310 CMR 1.01(8)(c), the Petitioner has the burden of going forward, with credible evidence from a competent source, to establish why the agreement, in this case the Proposed Order, is inconsistent with law. See Matter of Old Barn, LLC, Docket No. WET 2010-013, Recommended Final Decision (October 20, 2010), adopted by Final Decision (November 16, 2010). I considered the Petitioner’s testimony through that lens, focusing on factual support for assertions that the proposed Order is unlawful, not on assertions that the information in insufficient or the project could be improved.

The Petitioner’s expert witness, Ingeborg Hegemann, questioned the information in the project description, and whether it is sufficient to support a conclusion on the issues for adjudication. Although a Commission or the Department may deny a project for lack of sufficient information, after an appeal is filed, the burden shifts to the Petitioner to prove that proposed work violates regulatory performance standards. There is no question that Ms. Hegemann is fully competent and qualified as an expert witness. The failure of the Petitioner’s direct case stems instead from lack of factual support for actual errors in the Proposed Order and from arguments that do not support a conclusion that the Proposed Order is inconsistent with law.

ISSUES FOR ADJUDICATION

1. Whether the proposed work meets the requirements of 310 CMR 10.55(4)(a), so that the work may be performed without replication because it will not destroy or otherwise impair, or result in the loss, of bordering vegetated wetlands?

1. Whether the proposed work will have no adverse effect on wildlife habitat in bordering vegetated wetlands, as specified in the Department’s Wildlife Habitat Protection Guidance (March 2006) and 310 CMR 10.55?
2. Whether the proposed work, specifically related to the floats and Condition 35, meets the requirements of 310 CMR 10.56(4), as it has been interpreted in the Department’s Guide to Permitting Small, Pile-Supported Docks and Piers (Small Dock and Pier Guidance, 2003)?
3. Whether the Department may require activities identified in Conditions 12, 34, and 45 to be performed subsequent to the issuance of an Order, or must they be performed as part of the review prior to issuance of an Order? (see below)
4. Whether a condition should be included requiring the seasonal storage of floats in upland areas? (see below)

As to issue 4, the Proposed Order filed with the Settlement Agreement revised the SOC’s Condition 12 related to activities prior to commencement of work, renumbered the SOC’s Condition 34 related to freshwater mussels as Condition 32, and renumbered the SOC’s Condition 45 related to marking of trees preferred by Bald Eagles as Condition 42. As to Issue 5, the Proposed Order filed with the Settlement Agreement included a condition requiring winter storage of the dock in an upland location. See Condition 37. The Petitioner challenged the adequacy of the added condition requiring upland storage.

**STANDARD OF REVIEW**

A directed decision, referred to as “dismissal for failure to sustain case” in the hearing rules, may be grounded upon facts or the law. 310 CMR 1.01(11)(e). The burden of going forward in a wetlands case, credible evidence from a competent source in support of the position taken, is placed upon the person contesting the Department’s position. 310 CMR 10.03(2). The submission of a petitioner’s direct case allows an opportunity to assess whether the arguments and evidence aresufficient to demonstrate that the position is correct, as to the facts or the law, even assuming it is correct about alleged shortcomings in the Department’s position. See Matter of Walden Woods, LLC, Docket Nos. DEP-04-363 and DEP 04-364, Recommended Final Decision (September 6, 2006), Final Decision (December 8, 2006); 310 CMR 1.01(12)(f). Where a direct case is insufficient to prevail, dismissal is appropriate. See Matter of Oxford Housing Authority , Docket Nos. 92-026, 93-008, Final Decision, January 21, 1994, Reconsideration denied February 22, 1994, aff’d in part (as to availability of a directed decision and dismissal for failure to sustain the direct case) sub nominee Widen v. Oxford Housing Authority, Civ. No. WOCV94-004130, Memorandum and Order on Defendant’s Motions to Dismiss (Worcester Super. Ct., October 20, 1994).

As prior decisions have explained, dismissal for failure to sustain a case does not deprive a petitioner of its “day in court.” See, e.g., Matter of Lawrence Borins, Trustee, Noon Hill Realty Trust, Docket No. 98-140, Final Decision, July 22, 1999 and Decision on Motion for Reconsideration, August 19, 1999. The petitioner’s direct case must provide credible evidence relevant to the governing legal standard. See Matter of the Meadows at Marina Bay, Docket No. 98-006, Final Decision (February 18, 1999), Reconsideration Denied (March 23, 1999), aff’d sub nominee Neponset River Watershed Association v. The Meadows at Marina Bay, LLC, Civ. No. 99-642, Memorandum of Decision and Order on Cross Motions for Judgment on the Pleadings (Norfolk Super. Ct., December 23, 1999), aff’d pursuant to Rule 1:28 (Mass. App. Ct., November 6, 2000). A decision may include conclusions of law which reject the position taken by a party, with the result that the evidence it has provided is insufficient or irrelevant as a consequence of how it has elected to frame its position. Id.; Matter of City of Cambridge DPW, Docket No. 2005-088, Decision on Motion for Reconsideration (October 16, 2007).

**BACKGROUND**

 The site is Pheeny’s Island, a 7.4 acre, currently undeveloped island within the Norton Reservoir, which has a developed shoreline. The project is the construction of a ropes course, including zip lines where a participant aerially glides along a cable high off the ground between platforms on existing trees. Participants will travel to the site on low draft boats to a dock proposed for the west side of the site. The dock is over the resource area identified as land under water and a zip line approximately 90 feet long will extend over the resource area identified as bordering vegetated wetlands (“BVW”) on the east side of the Island, requiring the pruning of four trees to a height of 20 feet. A main lodge building with a Clivus Multrum (i.e. composting) sewage system will be located outside resource areas. The Commission approved the project with extensive conditions. The Petitioner requested the SOC as well as filing this appeal, urging that the project be denied due to its alleged impacts on resource areas.

**ISSUE 1: LOSS OR IMPAIRMENT OF BVW**

 The Petitioner asserted that the BVW will be altered by the project and that impacts could have been reduced or eliminated by an alternatives analysis as to the location of the zip line. The Petitioner argued that the Department was required to conduct a sequential “avoid, minimize, mitigate analysis” pursuant to 310 CMR 10.55(4)(b). The Petitioner also argued that the Applicant has not overcome the regulatory presumption of significance, and the removal of vegetation in the BVW for the zip line specifically implicates the interests of the Wetlands Protection Act related to BVW. Ms. Hegemann testified that construction, operation and maintenance activities were not clear and could have an impact. Hegemann PFT, paras. 10 and 12; Hegemann Affidavit, paras. 4 and 5. She testified that removal of vegetation will affect the hydroperiod of the wetland and wildlife habitat, the Applicant had not overcome the presumption of significance as to these interests, and therefore either the impacts must be avoided or the performance standards must be met. Hegemann PFT, para. 13 and 15. Ms. Hegemann also noted that landward access to the site had not been identified, with uncertainty over whether the performance standards for any such work in BVW could be met. Hegemann PFT, para. 14; Hegemann Affidavit, para. 6. The Department and the Applicant argued that Ms. Hegemann’s testimony contained general methods to reduce or eliminate impacts, but did not show that trimming the tops of four trees constitutes, or could lead to, a loss of BVW. The Department and the Applicant viewed concerns about impacts from long-term maintenance and landward access as speculative.

 First, there is no dispute as to jurisdiction. The activity of cutting or trimming trees in BVW is an alteration, as the destruction of vegetation under the definition of “alter,” and thus requires the filing of a Notice of Intent. 310 CMR 10.02(2)(a); 310 CMR 10.04. The Applicant filed a Notice of Intent. The Applicant’s plan shows the delineated BVW and the alteration within the BVW, the four trees “to be trimmed or cut to 20 ft. snag.” Plan of Trees to be Removed with Course Overlay, Dated March 27, 2012, Revision date 5/24/2012 (also in insert, Trees #36, #37, #38 and #39). The Commission’s Order, the Department’s SOC, and the Proposed Order with the Settlement Agreement identified the alteration of 748 sq. ft. of BVW.

Second, the Applicant proposed, and the Commission and the Department approved, the project under 310 CMR 10.55(4)(a), on the grounds that the reduction in height of four trees to 20 ft. would not “destroy or otherwise impair” the BVW. The Petitioner focused on other regulatory provisions, the presumptions of significance at 310 CMR 10.03(5) and the performance standard for BVW at 310 CMR 10.55(4)(b) that would allow loss or impairment only after consideration of alternatives and with replication. Hegemann PFT, paras. 11,13, 15. Ms. Hegemann testified that removal of vegetation will affect the hydroperiod of the wetland and will affect wildlife habitat, citing to the regulatory language stating generally that various characteristics of BVW provide important food, shelter, migratory and overwintering, and breeding areas for wildlife. Hegemann, PFT, para. 13.

The Petitioner’s direct case fell short for several reasons. First, the Petitioner cannot simply show that the work will alter, i.e., “change the condition,” of the BVW, the Petitioner must show that the work will actually “destroy or otherwise impair” the BVW. Compare 310 CMR 10.04 (Alter) and 310 CMR 10.55(4)(a). To impair means to have an adverse effect, a term defined in the coastal regulations to mean “a greater than negligible change in the resource area or one of its characteristics or factors that diminishes the value of the resource area to one or more [interests of the Act]. ‘Negligible’ means small enough to be disregarded.” 310 CMR 10.23 (Adverse effect). A direct case may not rely on hypothetical effects described in the regulations, but instead must refer to effects of the proposed work on the resource area at the site. The amount of alteration of BVW is identified as 748 sq. ft. in the Proposed Order, consistent with the Order and SOC. Ms. Hegemann has not testified that this area will be destroyed, impaired, or “lost” as BVW, nor has she provided any specific testimony as to what amount of BVW would be affected by the trimming of the four trees or how the affected area of BVW would degrade the capacity of the BVW to protect specific interests of the Act. Referring to regulatory language without pointing to characteristics present at the site of the proposed work is not sufficient to sustain a direct case.

To the extent Ms. Hegemann raises questions about impacts from work not actually proposed, the testimony is speculative and cannot support a position that actually proposed work will impair BVW. She questions what impacts may arise from the use of swamp mats during construction and maintenance, but does not show that swamp mats are proposed for use and their use would destroy or impair the BVW. Hegemann PFT, para. 12. She does not show that any provision related to maintenance, or the omission of a maintenance provision, in the proposed Order is inconsistent with law.[[2]](#footnote-2) Hegemann Affidavit, para. 5. The Department may impose conditions on work actually proposed, but may not impose conditions on work that is speculative, i.e., could occur but has not been proposed. See Matter of Philip Capolupo, Docket No. 2000-097, Partial Decision and Stay (March 5, 2003).

Ms. Hegemann did not view the interior of the site. Hegemann PFT, para. 16;

 Hegemann Affidavit, para. 8. She stated that the Applicant denied access to the Petitioner during the site visit conducted by the Department prior to its issuance of the SOC. She stated that the Applicant denied access to the Petitioner during the site visit conducted by the Department at the time it issued its SOC. Id. The wetlands regulations were revised in 2007 to include a provision allowing access to a site by a Petitioner after filing an appeal. 310 CMR 10.05(7)(j)2.e. A Petitioner must file a written request with the Applicant, and although the Applicant may impose reasonable conditions, access to the site may not be denied. The Petitioner did not request access under this provision, and thus Ms. Hegemann did not directly observe and evaluate the resource areas on Pheeny’s Island. The lack of a site visit typically undermines the ability of an expert witness to marshal facts to support opinions; such was the case here.

The Petitioner argued and Ms. Hegemann testified that the Applicant must include information about landward access to the site and future maintenance activities at the site prior to approval of construction. Hegemann PFT, para. 14. Such an approach may well be preferable for purposes of comprehensive environmental review, but it is not required under the Wetlands Protection Act. In contrast to the 401 Water Quality Certification Regulations, which include a provision for a “single and complete project,” an applicant may file a Notice of Intent for any proposed work under the Wetlands Protection Act. The adverse consequence to an applicant of doing so, of course, is that further work will require a new Notice of Intent or an Amended Order of Conditions, such work may not be approved, and any decision would be subject to appeal. But the Department cannot deny a project, other than within the context of a denial for insufficient information, on the grounds that it wants to review a related activity not proposed in the Notice of Intent where not specifically authorized by the regulations.

In this matter, the Applicant has not proposed landward access to the site through BVW as suggested by the Petitioner and no such work is allowed under the Proposed Order. Approval of the proposed work cannot be denied on the theory that work related to landward access might impact resource areas adjacent to Norton Reservoir. The Proposed Order does not violate the performance standards as to work for landward access that has not been proposed. The Petitioner has not met its burden under 310 CMR 1.01(8)(c) by showing that the project is inconsistent with 310 CMR 10.55(4)(a). Approval of a project which would alter BVW under this provision is allowed only where an issuing authority finds that the work will not destroy or otherwise impair the BVW. Such circumstances arise rarely, and appear to be limited to proposed work involving selective lowering of tree canopy.[[3]](#footnote-3) I concur with the Commission and the Department that this finding is warranted on the facts of this case. Accordingly, this claim is properly dismissed.

**ISSUE 2: WILDLIFE HABITAT IN BVW**

 The protection of wildlife habitat has arisen in this appeal within the context of the Bald Eagle, our national symbol since 1782 and a threatened species within the Commonwealth.[[4]](#footnote-4) Bald Eagles have been observed at the site. The wetlands regulations provide for the protection of wildlife habitat generally and for the protection of rare species habitat under separate procedures and standards. Habitat of rare species is identified through coordination with the Natural Heritage and Endangered Species Program (“NHESP”) when a project is located within estimated habitat shown on maps. 310 CMR 10.59. The maps are based on the estimated geographical extent of state-listed rare species “for which a reported occurrence within the last 25 years has been accepted by [NHESP] and incorporated into its official database.” Id. If a project is not located within estimated habitat, the site is presumed not to be within the rare species actual habitat, a presumption that may be rebutted by a clear showing to the contrary. Id. NHESP is responsible for determining whether the site continues to be within actual habitat and for providing information to the issuing authority so that it can ensure that the project will not have any long or short-term adverse effects on the habitat of the local population of that species. Id. If a project is not located within estimated habitat, the site is presumed not to be within the rare species actual habitat, a presumption that may be rebutted by a clear showing to the contrary. Id. Pheeny’s Island is not identified as estimated habitat of Bald Eagle, nor has any party attempted to rebut the presumption to show that Pheeny’s Island is, in fact, actual Bald Eagle habitat.

The issue identified for adjudication focuses on wildlife habitat of species other than rare species, where NHESP is not involved. 310 CMR 10.60. Alteration of wildlife habitat in resource areas, in some cases exceeding certain thresholds, may be allowed only where there will be no adverse effects, defined as a substantial reduction in its capacity to provide important wildlife functions of food, shelter, and migratory, breeding, or overwintering areas. 310 CMR 10.60. The regulations, however, specifically state that this performance standard “shall not apply to the habitat of rare species.” Id. While the NHESP program does consider occurrences of rare species, the Wetlands Protection Act focuses on presence of significant habitat features.[[5]](#footnote-5) See Preface to Wetlands Protection Regulations Relative to Protection of Wildlife Habitat, 1987 Regulatory Revisions (legislation preamble). While an issuing authority may differ with NHESP as to whether a site serves as habitat for a particular rare species, it must base its determination on evidence of the presence of habitat features within wetlands resource areas that are proposed to be altered rather than observation of species.

 The Petitioner asserts that the project will affect wildlife habitat in BVW, by the removal of trees. Hegemann PFT, para. 16. Ms. Hegemann acknowledges that the Applicant’s consultant completed an Appendix A Simplified Wildlife Habitat Evaluation and found no important habitat features within the BVW, and therefore there would be no significant adverse impacts to important wildlife habitat from the project. Hegemann PFT, para. 17; See Wildlife Habitat Protection Guidance for Inland Wetlands (March 2006), p. 4. Ms. Hegemann did not disagree with the finding of no important wildlife habitat features. Instead, she asserted that, although the work will not result in the direct loss of habitat, the disturbance of habitat through the use of the zip lines would cause a significant adverse effect on wildlife habitat in the BVW and buffer zone. Hegemann PFT, para. 17. Ms. Hegemann testified that a forest management plan was necessary to ensure that trees of various ages continued to thrive on the island site. She noted the presence of tall white pines preferred by Bald Eagles and that some white pines will be removed. Hegemann PFT, paras. 16, 18. The Department and the Applicant correctly argued that wildlife habitat is protected only in resource areas, not within the buffer zone. They pointed to the Wildlife Habitat Guidance as setting forth criteria only for physical characteristics of land, and argued that use of land, with associated disturbance from noise or human presence, is not subject to the Department’s regulatory authority. See Matter of Town of Milton, Docket No. WET 2011-030, Recommended Final Decision, March 29, 2012, adopted by Final Decision (April 6, 2012).

 BVW is presumed significant to the protection of wildlife habitat, and also undisputed is that there is no threshold for BVW as to the size of the alteration to trigger an evaluation under the regulations and the Guidance. The Petitioner’s position falls short for two reasons. First, as stated in the Guidance, “the presumption [of significance] is predicated on a statutory definition that requires the presence of characteristics providing important wildlife habitat functions such as food, shelter, migratory and over-wintering areas.” Wildlife Habitat Guidance, p. 4. For alterations below 5000 sq. ft., as is the case here, an applicant must complete Appendix A to identify (and avoid) important habitat features in the altered area. Wildlife Habitat Guidance, p. 5. Here, the Applicant completed Appendix A and found no important habitat features. The Petitioner has not provided evidence to support a position that there are important habitat features at the project site or that the Applicant failed to comply with the Guidance. The Petitioner’s argument however, is more nuanced, alleging that the presence of white pine at the site and the impacts from human use will adversely affect wildlife habitat more generally. The Petitioner’s position falls short due to jurisdictional limitation as to the location of the white pines outside resource areas and the activity the Petitioner seeks to address which is not within the scope of regulatory authority.

 The term “work,” as used in 310 CMR 10.05(4)(a), is defined in 310 CMR 10.04 as meaning the same as “activity.” “Activity” is defined in that section as

any form of draining, dumping, dredging, damming, discharging, excavating, filling or grading; the erection, reconstruction or expansion of any buildings or structures; the driving of pilings; the construction or improvement of roads and other ways; the changing of run-off characteristics; the intercepting or diverging of ground or surface water; the installation of drainage, sewage and water systems; the discharging of pollutants; the destruction of plant life; and any other changing of the physical characteristics of land.

310 CMR 10.04. This definition provides the scope of jurisdiction under the wetlands regulations. The specified forms of activity do not include human presence, and the general activity concluding the definition refers to “changing the physical characteristics of land.” 310 CMR 10.04. Thus, human use of land, without change in the physical characteristics of land, is not subject to jurisdiction. The Petitioner has not provided factual support for a claim that the human presence will change the physical characteristics of the BVW. See Matter of Town of Milton, Docket No. WET 2011-030, Recommended Final Decision (March 29, 2012), adopted by Final Decision (April 6, 2012) (no jurisdiction over sound and vibration).

The regulations cite to the statutory definition of “wildlife habitat” as areas “which, due to their plant community, composition and structure, hydrologic regime or other characteristics, provide important food, shelter, migratory or overwintering areas, or breeding areas for wildlife.” M.G.L. c. 131, s. 40, para. 19. Only wildlife habitat within resource areas is subject to jurisdiction, not within the buffer zone.[[6]](#footnote-6) The four trees to be trimmed in BVW are not white pines, and the Petitioner has not identified any white pines that will be removed that are also within resource areas. Thus, the Petitioner has not provided factual support for the claim that any work involving white pine will occur within wildlife habitat. White pines outside resource areas are not subject to jurisdiction of the Wetlands Protection Act.

For insight into the scope of the Department’s authority, I look to what constitutes an adverse effect on wildlife habitat. Generally, alterations may be permitted if there will be no adverse effect, which means “the alteration of any habitat characteristic listed in 310 CMR 10.60(2), insofar as such alteration will, following two growing seasons of project completion and thereafter . . . substantially reduce its capacity to provide the important habitat functions listed in 310 CMR 10.60(2).” 310 CMR 10.60(1). Because BVW does not have thresholds for the protection of wildlife habitat and thus is not specifically included in 310 CMR 10.60(2), I turn to the preamble related to BVW and wildlife habitat:

Bordering vegetated wetlands are probably the Commonwealth's most important inland

habitat for wildlife. The hydrologic regime, plant community composition and structure, soil composition and structure, topography, and water chemistry of bordering vegetated wetlands provide important food, shelter, migratory and overwintering areas, and breeding areas for many birds, mammals, amphibians and reptiles. A wide variety of vegetated wetland plants, the nature of which are determined in large part by the depth and duration of water, as well as soil and water composition, are utilized by varied species as important areas for mating, nesting, brood rearing, shelter and food (directly and indirectly). The diversity and interspersion of the vegetative structure is also important in determining the nature of its wildlife habitat. Different habitat characteristics are used by different wildlife species during summer, winter and migratory seasons.

310 CMR 10.55(1). It appears from this text that the Department and the Applicant are correct that the focus is on the protection of physical characteristics that BVW offers. See Wildlife Habitat Protection Guidance for Inland Wetlands (March 2006), p. 13. I note that the area of BVW subject to the Department’s jurisdiction where the presence of wildlife could be reduced even while the physical habitat features remain intact is limited to the area under the four trees where trimming is proposed and the project’s effect on the habitat is the reduction in canopy of four deciduous trees.[[7]](#footnote-7) Although the physical presence of humans may discourage wildlife from visiting the site, the Petitioner has not shown that the physical characteristics of the habitat will be degraded by the use of the zip line 30 feet above the BVW.

Finally, I return to the question of the effect of the Proposed Order on the Bald Eagle. Rare species are protected under a specific provision in the wetlands regulations, based on Estimated Habitat Maps published by NHESP. 310 CMR 10.59. At this site, there is no evidence to support a claim that there is mapped Bald Eagle habitat. Further, the reference to communication with staff at NHESP indicates that NHESP was aware of the project, even if there was some error as to mapping. Despite references to observations of Bald Eagle at the site, there is no support for a conclusion that the regulatory provisions related to rare species habitat should be imposed at this site. Although white pines outside resource areas are not subject to jurisdiction of the Wetlands Protection Act, the Proposed Order nonetheless contains several provisions related to the actual or potential presence of Bald Eagle at the site.

The Proposed Order contains a “Findings” section, which notes that there have been documented observations of Bald Eagle perching and hunting at this site. The Migratory Bird Act and Bald Eagle Protection Act may result in additional requirements, including a setback with no disturbance, in the event nesting occurs even after the project is completed. Proposed Order at n. 1. The findings of the proposed Order also note that the trees proposed for removal will not reduce canopy cover to less than 50%, retains at least 50% overstory trees within 50 ft. of the shoreline, retains a minimum of two nest or perch trees for each linear 330 ft. of shoreline, and “do not appear to significantly decrease opportunity to provide perch, roost or hunting opportunity provided certain precautions are taken to maintain available trees,” with the citation to communication with staff at the NHESP. Further, a condition requires the Applicant to install permanent markers on trees identified as potential perch/nest trees for Bald Eagle on the eastern shore within 65 feet of the BVW with certain characteristics. Conditions 41 and 42. Other conditions require the Applicant to notify the Commission and NHESP of any Bald Eagle nesting activity in any trees on the Island and prohibit the removal of any nest materials. Conditions 43 and 44. These conditions are not fully required by the performance standards, as they apply outside the geographic jurisdiction of the Act. Similarly, even if the use of the zip line were subject to jurisdiction, the omission of a condition requiring a forest management plan to maintain a diversity of age in white pines urged by the Petitioner is not inconsistent with law; the Petitioner has not pointed to any requirement for a forest management plan in the regulations or the Guidance in the circumstances presented here. Nothing in the Proposed Order indicates a lack of protection for Bald Eagles, to the contrary, the Proposed Order goes beyond the regulatory requirements to protect the habitat in the event Bald Eagles visit the site.

**ISSUE 3: DOCK AND FLOATS**

The Petitioner argued that the float proposed as part of the dock does not meet the

 requirements of 310 CMR 10.56(4) and the Department’s Guide to Permitting Small, Pile-Supported Docks and Piers (Small Dock and Pier Guidance, 2003), primarily based on Ms. Hegemann’s view that the Applicant has not finalized plans for the dock. Ms. Hegemann testified that the Applicant had not provided plans with dimensions for the dock, and that its size appeared to be inadequate for the number of passengers expected to arrive at the site. Hegemann PFT, paras. 20 and 22; Hegemann Affidavit, para. 9. The Petitioner asserted that the failure to specify how the dock will be removed for the winter without affecting resource areas was a violation of the performance standards. The Petitioner also noted that the dock may not be permissible under the Americans with Disabilities Act. Id. The Petitioner argued that the omission of a condition included in the Commission’s Order to require spacing to allow light penetration was contrary to the Department’s Small Dock and Pier Guidance and therefore violated the performance standards for land under water. The Applicant and the Department argued that the plans show the dimensions of the proposed dock. They also argued that the Petitioner’s views on whether it can accommodate the expected use or whether it meets the requirements of the ADA are irrelevant; the Applicant is seeking approval of the proposed plans and any revisions to the size or design of the dock would require the filing of a new Notice of Intent.

 The dock design is shown on the plan entitled “Detail Sheet,” March 27, 2012 (Rev. 5/24/2012). The “Plan View” detail shows that the dock will consist of four 6 foot by 10.5 foot floats in a “U” shape, with a gangway extending over the shoreline to a timber landing structure. This plan adequately depicts the dimensions and design of the proposed dock. From the “Profile View of Proposed Dock,” together with the “Plan of Proposed Recreational Day Camp” dated January 5, 2012 (Rev. 5/24/2012)(showing wetlands boundaries), it is clear that there is no BVW at this location and neither the gangway, the floats, or the landing will affect the bank. No alteration of bank for installation or for seasonal removal is proposed by the Applicant, and none is allowed under the Proposed Order. The Profile View of the dock includes a notation that “Docks to be polyethylene with ultra violet light penetrating surface. Ramps to be aluminum with “flow thru” surface and allowing 60% light penetration.” Detail Sheet,” March 27, 2012 (Rev. 5/24/2012).

The Petitioner argued that Condition 35 of the Commission’s Order, which was deleted from the SOC, should be included in any approval of the dock. Condition 35 provides that “[t]he dock and gangway shall be constructed of polyethylene or other material that allows greater than 60% light penetration as proposed or contains a minimum of 1-inch gaps between the docking boards to allow for light penetration.” Condition 33 of the Proposed Order provides that “[t]he dock and gangway shall be constructed of polyethylene or other material consistent with the specifications for the EZ-Dock, including the “Flow-thru” material for the ramp, as set forth in the NOI.” As to this revised Special Condition, Ms. Hegemann stated that the Applicant should be required to document how the EZ-Dock system complies with the Department’s Small Dock and Pier Guidance.

The Petitioner has not sustained its case on the issue of whether the proposed project related to the dock complies with the requirements of 310 CMR 10.56(4). The Petitioner has not identified any provision of 310 CMR 10.56(4) which would be violated by the proposed design. The Applicant has stated that “the sandy bottom of the Reservoir is largely without vegetation,” and for that reason, no loss of vegetation from shading is expected. Yarmouth Engineering Letter (May 27, 2012) (discussion of Land Under Waterbody). The Small Dock and Pier Guidance discusses light penetration through pier structures in terms of avoiding adverse effects on plant productivity. Small Dock and Pier Guidance, p. 15. Further, the Guidance distinguishes between inland and coastal docks and piers, and refers to spacing between planking of the pier and walkways rather than floats, at least in inland locations. Id. at 15-16. The Petitioner has offered no evidence that there is vegetation on land under water where the dock is proposed.

Instead, the Petitioner asserted that the Commission’s condition must be included. The condition, however, references the same language that appears on the plans as to the materials and 60% light penetration. The plans are specifically referenced in the SOC, and the Applicant must conform to them. Further, the language is specifically included in the Proposed Order filed with the Settlement Agreement. As to the additional information urged by the Petitioner to be submitted for review, including management of visitors and transport of the floats for storage, such information is not required for issuance of an Order. The Proposed Order allows only specified activities, and the Applicant will need to file another Notice of Intent if the dock needs to be expanded to accommodate visitors to the site, comply with the ADA, or will alter resource areas during transport for storage.

**ISSUE 5: ACTIVITIES TO BE PERFORMED SUBSEQUENT TO ORDER (CONDITIONS 12, 34, and 45)**

(Condition 12 related to activities prior to commencement of work was revised; Condition 34 related to freshwater mussels was renumbered as Condition 32; Condition 45 related to marking of trees for Bald Eagles was renumbered as Condition 42).

The Petitioner objected generally to activities required to be conducted after, rather than prior to, the issuance of the Order on the grounds that discussion of the activity should occur in a public forum. There are several instances in the Petitioner’s testimony and argument which suggest that an aspect of the project would benefit from, or must be provided, discussion at a public hearing. Following a request for action, however, the Department does not hold a public hearing and may request additional information from an Applicant that is not subject to local review. Wolbach v. Beckett, 20 Mass. App. Ct. 302 (1985) (initial review of an application to bring local knowledge to bear on local conditions, but not prerequisite to state action to protect statewide interests). The Wetlands Protection Act provides that the Department may request supplemental information if the application “is not in proper form or is lacking information or documentation necessary to make the determination.” Id., quoting M.G.L. 131, s. 40, para. 13. Thus, the statute, as interpreted by case law, establishes no barrier to an independent review of an NOI submittal by the Department.

As to Condition 45, renumbered to Condition 42, the Petitioner argued that the marking of trees with potential for offering perching or nesting sites for Bald Eagles must be completed prior to the issuance of an Order so that this information will inform the issuing authority. Hegemann PFT, para. 28. Ms. Hegemann testified that Pheeny’s Island has many mature white pines that are preferred by Bald Eagles. Hegemann PFT, para. 18. The trees proposed to be trimmed in the BVW for the zip line have been specifically identified, however, and are not white pines. Ms. Hegemann’s testimony does not provide factual support for a conclusion that these four trees provide important wildlife habitat. There is no requirement in the Department’s regulations or the Wildlife Habitat Guidance for the marking of trees that might be used for perching or nesting even where located in resource areas, which is not the case here. Although the condition would appear to offer a mechanism for Commission oversight of potential sites desired by Bald Eagles, as the Department suggests, it appears to extend beyond the limits of the Department’s jurisdiction of alterations to wetlands resource areas. Indeed, it is the type of condition that appears in Orders which has general environmental protection merit and may remain absent opposition from the applicant. But where such conditions lack a regulatory basis, a Petitioner may not argue that they should be further strengthened.

As to Condition 34 related to freshwater mussels renumbered as Condition 32, the Petitioner argued that this activity should be conducted prior to issuance of the Order. Ms. Hegemann testified that without an understanding of the capacity of land under water to provide breeding habitat near the proposed dock, the issuing authority cannot assess any impacts or appropriately condition the dock. She stated that the information provided by the freshwater mussel survey will contribute to the protection of the interests of the Act. Hegemann PFT, para. 27. The performance standards for land under water provide that work may not impair the capacity of the land to provide breeding habitat. 310 CMR 10.56(4)(a)3. The regulations do not require the removal of shellfish prior to the placement of floats in inland areas, although the condition in the proposed order is consistent with a sample condition in the Small Dock and Pier Guidance for work in coastal land containing shellfish designated as significant pursuant to 310 CMR 10.34(6). See Small Dock and Pier Guidance, p. 21.

As to operation and maintenance, the Petitioner argued and Ms. Hegemann testified that boat and pedestrian access, fueling and maintenance, and seasonal operations may affect land under water and bank, and long term operation and maintenance may have impacts on resource areas over time. Hegemann PFT, para. 26. The Applicant and the Department argue that boat operations are not within the jurisdiction of the Act. The Department has viewed vessel use as navigation, which is not an interest under the Wetlands Protection Act and generally is addressed by the Department through its Chapter 91 authority. As a practical matter, conditions relating to dock use can be difficult to enforce and for that reason are wisely imposed sparingly. The Small Docks and Piers Guidance suggests that certain explicit conditions related to motorized vessels may be acceptable. See Small Docks and Piers Guidance, p. 21 (references to use of motorized vessels in sample conditions, such as “Motorized vessels shall be moored stern seaward at the float or end of the pier to prevent ‘propeller dredging’ and turbidity.” See Matter of Community Boating Center, Inc., Docket No. WET-2011-005 and 006, Recommended Final Decision (November 18, 2011), adopted by Final Decision (February 2, 2012). The Petitioner has offered no argument or evidence, however, to support a conclusion that the conditions identified in Issue 5 must be completed prior to issuance of the Order.

**ISSUE 6: SEASONAL STORAGE OF FLOATS**

The Petitioner initially challenged the lack of a condition related to the seasonal storage of the dock. The Proposed Order filed with the Settlement Agreement included a condition requiring winter storage of the dock in an upland location. See Special Condition 37. Although agreeing with the requirement for upland storage, the Petitioner nonetheless challenged the adequacy of the condition. Specifically, Ms. Hegemann testified that there should be a provision for transporting boats from the water to the upland location, and asked whether there will be a maintained access route or impact to bank. Hegemann PFT, para. 36. The Applicant has not proposed to maintain an access route to provide for winter storage, and none is allowed by the Proposed Order. Impacts to bank from moving boats or the floats to an upland location is also not proposed or permitted in the Order. The condition included in the Proposed Order is the same as the sample condition on this topic provided in the Small Dock and Pier Guidance: both require seasonal storage in a “suitable upland location.” Small Dock and Pier Guidance, p. 21. The Department’s Guidance does not specify that the movement of boats and floats must also be governed by conditions in an Order. Although Ms. Hegemann suggested the potential for impacts to sandy or vegetated banks, there is no basis for a conclusion that such impacts will actually occur. I conclude that the Petitioner has not sustained its direct case that the condition related to seasonal storage in an upland location is inconsistent with law.

**CONCLUSION**

 I conclude that the Petitioner, for the reasons stated, has not sustained its direct case and this appeal should therefore be dismissed. Accordingly, I recommend that the Department’s Commissioner issue a Final Decision sustaining the Proposed Order filed by the Department, the Applicant, and the Commission.

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 Pamela D. Harvey

 Presiding Officer

##  NOTICE- RECOMMENDED FINAL DECISION

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

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

1. I also requested the submission of a document referenced in the Proposed Order, a letter from Yarmouth Engineering dated May 27, 2012 and a document referenced in that letter, entitled “Operations & Maintenance Plan for Pheeny’s Island” dated June 2, 2012. The Department also filed another letter dated June 2, 2012 discussing alternatives to the course design. [↑](#footnote-ref-1)
2. The record includes an “Operations & Management Plan For Pheeny’s Island” dated June 2, 2012. It states that the Commission should allow routine maintenance tasks in its Order. There is only one reference to a relevant maintenance task: The larger trees used for the ropes course will be inspected as needed, and any damaged trees may need to be cut. No cutting of trees within wetland jurisdictional areas will be done without first contacting the Conservation Commission.” The Proposed Order allows the pruning of the four trees in the BVW as specifically identified on the plans. [↑](#footnote-ref-2)
3. I note that the Applicant submitted an alternative analysis as would be required under 310 CMR 10.55(4)(b), but the Petitioner did not address its adequacy as a basis for project approval. [↑](#footnote-ref-3)
4. Rare Species in the Commonwealth may be listed as endangered, threatened, or of special concern. 310 CMR 10.04. After recovery from serious population declines caused by hunting, habitat loss, and pesticides, the Bald Eagle was removed from the federal list in 2007 but remains on the state list. See [www.nhesp.org](http://www.nhesp.org) for a fact sheet on the Bald Eagle in Massachusetts. [↑](#footnote-ref-4)
5. Although the Department and NHESP have similar definitions of habitat, compare 321 CMR 10.02 and M.G.L. c. 131, s. 40, the NHESP delineation of habitat is based on records of occurrences of a species. [↑](#footnote-ref-5)
6. The resource areas identified in the issues for adjudication in this appeal were limited to BVW and land under water, and thus, I have not addressed any other resource areas that may be present at the site. [↑](#footnote-ref-6)
7. The trees appear to be identified as three Red Maples and a Hickory on the plan, but are referred to as four Red Maple in the Applicant’s documents. Nonetheless, it is clear the trees to be pruned in BVW are not White Pine. [↑](#footnote-ref-7)