

**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**

June 30, 2015

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In the Matter of

Lowell C. Spring, LLC

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Docket No. WET-2014-019

Superseding Determination of Applicability  
Plymouth

**RECOMMENDED FINAL DECISION**

This appeal challenges a Superseding Determination of Applicability (“SDA”) issued by the Massachusetts Department of Environmental Protection (“Department”) pursuant to the Massachusetts Wetlands Protection Act and the Wetlands Regulations related to the status of a drainage channel. M. G.L. c. 131, § 40; 310 CMR 10.00. The property (“Lot 4-6”) is owned by Lowell C. Spring, LLC (the “LLC”), which is controlled by Kathleen Mann, who owns the downgradient property (“Lot 5” or “Mann bog”).<sup>1</sup> The appeal was filed by Denise M. Beaton Luke (“Petitioner”), who is the owner of property (“Lot 6” or “Luke bog”) upgradient of and abutting Lot 4-6. The dispute arises within the context of a family relationship, in that the Petitioner, Ms. Luke, is the daughter of Kathleen Mann. Both Lot 5 and Lot 6 contain cranberry bogs. Lot 4-6 contains a drainage channel that runs between these two cranberry bogs. In 2010 and 2011, Ms. Mann ordered the placement of fill in the drainage channel to block the flow of water to Lot 4-6 from the Luke bog. Ms. Luke claimed that fill in the drainage channel caused

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<sup>1</sup> As the parties noted, Lot 5 and the LLC as the owner of Lot 4-6 are both controlled entirely by Ms. Mann. The street address of the property is 1229 State Road in Plymouth.

flooding in the Luke bog, in violation of the Act and Wetlands Regulations. Ms. Mann claimed that the filling of the drainage channel was necessary for controlling water flow into her cranberry bog and was an activity that qualifies for an exemption as normal maintenance of land in agricultural use under the Act and Wetlands Regulations.

After the Department declined to take enforcement, Ms. Luke filed a Request for Determination of Applicability to obtain a formal ruling as to whether the Act and Wetlands Regulations apply to the filling of the drainage channel on Lot 4-6, and whether Ms. Mann must file an after-the-fact Notice of Intent for the filling of the drainage channel. Ms. Luke seeks the removal of the fill from the drainage channel so that she can allow flow from her bog on Lot 6 through the drainage channel on Lot 4-6. The Plymouth Conservation Commission determined that the activity of placing the fill was not exempt as an agricultural activity as defined in the Wetlands Regulations. The Department found that the activity was exempt and therefore not subject to jurisdiction under the Act and Wetlands Regulations. Ms. Luke filed this appeal of the Department's SDA. Thus, the dispute centers on the nature of the work, conducted several years ago, and the exemption for normal maintenance of land in agricultural use in the Act and Wetlands Regulations.

While natural streams often flow through cranberry bogs and provide a source of water, the drainage channel on Lot 4-6 was dug specifically to connect two bogs that are no longer in separate ownership. Essentially, both Ms. Mann and Ms. Luke seek to control the flow of water through the drainage channel on Lot 4-6, as part of managing water for their respective cranberry operations. All parties agree that the control of water is necessary to cranberry production. The Wetlands Regulations do not address the question of who should control the flow of water in the drainage channel, but do assume that activities will be undertaken by or on behalf of the owner

of the property. A dispute over rights to water or drainage must be resolved by the courts, as the Department lacks jurisdiction over common law riparian rights or nuisance claims. The adjudication here is limited to the Act and Wetlands Regulations, and focuses on the exemption for normal maintenance of land in agricultural use on Ms. Mann's property. After consideration of the arguments and evidence, I conclude that the filling of the drainage channel is an exempt activity under the Act and Wetlands Regulations and does not require the filing of a Notice of Intent. Consequently, I recommend that the Department's Commissioner issue a Final Decision which sustains the Department's SDA.

### **STATUTORY AND REGULATORY FRAMEWORK**

The Wetlands Protection Act explicitly states that its provisions do not apply "to maintenance of drainage and flooding systems of cranberry bogs" and "to work performed for normal maintenance or improvement of land in agricultural use." M.G.L. c. 131, s. 40. The Act further required the Department to define "normal maintenance or improvement of land in agricultural use" for agricultural commodities with the assistance of a farmland advisory board with experience in agriculture. *Id.* The application of the exemption invites a two-part inquiry: 1) whether the site where the activity takes place is "land in agricultural use" and 2) whether the activity is "normal maintenance." Land in agricultural use is defined as land presently and primarily used in producing agricultural commodities for commercial purposes, as well as land used in a manner related to, and customarily and necessarily used in, producing the commodities. 310 CMR 10.04 Agriculture (a). Only the land where the activity occurs must be land in agricultural use, not the entire property. *Id.* Water management projects, specifically including channels, are identified as examples of land used in a manner customarily and necessarily used in producing commodities and thus qualify as land in agricultural use. *Id.*

Such land may be inactive for five years, after which it will not qualify unless subject to a Farm Plan under the auspices of the United States Department of Agriculture (USDA). Id.

The Department's regulatory definition of "Agriculture" is detailed, and includes three provisions identified by the parties as potentially applicable to the activity of the placement of fill in the drainage channel on Lot 4-6 between the two cranberry bogs:

(b) Normal Maintenance of Land in Agricultural Use, which in all cases does not include placing substantial amounts of fill in Bordering Land Subject to Flooding or filling or dredging a Salt Marsh, means the following activities, without enlargement as to geographical extent, that are occurring on land in agricultural use, when directly related to production or raising of the agricultural commodities referenced in 310 CMR 10.04: Agriculture(a), when undertaken in such a manner as to prevent erosion and siltation of adjacent water bodies and wetlands, and when conducted in accordance with federal and state laws . . .

7. the cleaning, clearing, grading, repairing, dredging, or restoring of existing man-made or natural water management systems such as reservoirs, farm ponds, irrigation systems, field ditches, cross ditches, canals/channels, grass waterways, dikes, sub-surface drainage systems, watering facilities, water transport systems, vents, and water storage systems, all in order to provide drainage, prevent erosion, provide more effective use of water, or provide for efficient use of equipment, and all for the purpose of maintaining favorable conditions for ongoing growing or raising of agricultural commodities;

...

13. the cultivation of cranberries, including the following practices:

a. the activities described in 310 CMR 10.04: Agriculture(b)1. through 11.;

...

d. the regrading, including modification of drainage, and replanting of existing cranberry bogs;

310 CMR 10.04 Agriculture (b). Thus, qualifying for the agricultural exemption may require meeting certain conditions.

Exempt agricultural activities taking place on land in agricultural use may occur in various jurisdictional wetlands areas. A drainage channel with a control structure that shuts off flow is typically an intermittent stream, which includes the resource areas Land Under Water and Bank when without water. 310 CMR 10.54 and 310 CMR 10.56. A cranberry bog is typically

Bordering Vegetated Wetland. 310 CMR 10.55. Bordering Land Subject to Flooding, a wetlands resource area referenced in the regulatory exemption, extends from water bodies to the extent of the 100-year floodplain. 310 CMR 10.57(2)(a)3. The performance standards for alteration of resource areas are not applied where a farmer meets the exemption for normal maintenance and improvement of land in agricultural use.<sup>2</sup> In addition to the regulations, the Department prepared a guidance document to provide an explanation of the exemption in practice. See Farming in Wetland Resource Areas: A Guide to Agriculture and the Massachusetts Wetlands Protection Act (rev'd January 1996)(available at the Department's website). Where an activity conforms to the exemption, work may take place even if it may have a negative effect on wetlands resource areas. Where work does not conform to the exemption, it must be conducted according to the applicable wetlands regulatory procedures and performance standards.

### **FACTUAL BACKGROUND**

The dispute involves primarily three lots formerly owned by Lowell C. Spring, a cranberry farmer who died in 2007. Ms. Mann purchased Lot 5 from Mr. Spring in 2001, and the 36 acre parcel contains cranberry bogs and her primary residence. She manages the bogs on Lot 5 as Lowell C. Spring LLC. The LLC owns Lot 4-6, which is situated between Lot 5 and Lot 6 and is undeveloped land containing the drainage channel. Lot 6 is a 90 acre parcel containing cranberry bogs which was conveyed by the LLC to Ms. Luke in 2007 and now contains her residence. Mann PFDT, paras. 1-8, Luke PFDT, para. 5. In 1964 when the lots were all owned by Mr. Spring, Ms. Mann and Mr. Spring dug the drainage channel on Lot 4-6

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<sup>2</sup> Special regulatory provisions govern work to begin using land for agricultural use and to begin using land to raise cranberries. 310 CMR 10.53(3)(a) and (b). The Department also has regulations governing the renovation of abandoned cranberry bogs. 310 CMR 23.00.

between the bogs on Lot 6 and Lot 5. A concrete sluice box with a valve was installed at the edge of Lot 6 at the point where water could flow through a culvert under the road between the two lots.<sup>3</sup> Mann PFDT, para. 17 and Luke PFDT, para. 8. This drainage channel on Lot 4-6 is the locus of the present dispute. Although Mr. Spring had cultivated Lot 6 as a cranberry bog, according to Ms. Mann he had abandoned cultivation and flooded the bog, which destroyed the vines and allowed the bog to become fallow prior to its conveyance in 2007. Mann PFDT, para. 20. According to Ms. Luke, Lot 6 contains an active cranberry bog that Ms. Luke has hand-picked beginning three years prior to her purchase and continuing at a lesser rate due to phragmites in the bog. Luke PFDT, paras. 21 and 25. A portion of the bog on Lot 6 has been abandoned. Bracken Reb. Testimony, para. 17.

While Ms. Mann was out of town in April 2010, she was notified by a neighbor that water was flowing from the culvert into the drainage channel on Lot 4-6 from Lot 6 toward her bogs on Lot 5. Mann PFDT, para. 22. Ms. Mann was not in the U.S. at the time, as she spends the winter in a warmer climate. Mann Oral Testimony. She instructed the neighbor to place fill in the channel to interrupt the flow. Mann PFDT, para. 23. The flow of water in the drainage channel occurred because Erik Luke, Ms. Luke's husband, opened the gate valve to reduce the amount of water in the bog on Lot 6. Mr. Luke stated that he had entered Ms. Mann's property to remove the fill after it had been placed in the channel and opened the sluicibox on Lot 5 to discharge any additional water from Ms. Mann's downgradient bog. These events were repeated

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<sup>3</sup> Although the parties sometimes used other terms, I have consistently used "drainage channel" to refer to the channel on Lot 4-6 between Lot 6 and Lot 5. The parties referred in various ways to the mechanisms used to control flow from the bogs on Lot 6 and Lot 5. The mechanism on Lot 6 has a valve that is called a valve or gate valve to open what is sometimes called a sluicibox. The mechanism on Lot 5 is called a sluicibox with the opening controlled by the removal or replacement of boards. I preserved terms used by the witnesses, but for consistency I refer to the mechanism on Lot 6 as the gate valve and on Lot 5 as the sluice gate, as both served as gates that could be opened or closed to release or retain water. The common feature of these two structures that is important is the presence of a mechanism to release or retain water; the distinctions between these two structures did not appear material to the parties.

in early 2011, with the opening of the gate valve by Mr. Luke, placement of fill upon the instruction of Ms. Mann and the removal of the fill by Mr. Luke. Although there was some discrepancy regarding the dates, in March 2011, Mr. Luke again opened the gate valve and Ms. Mann ordered the placement of a larger amount of fill that extended over the drainage channel and obstructed the flow. Mr. Luke testified that when he opened the gate valve on Lot 6, he also opened the sluiceway on Lot 5 to allow the discharge of additional water.<sup>4</sup> E. Luke PFDT, paras 18-23. Mr. Luke did not have the permission of Ms. Mann to enter her property for purposes of his actions on Lot 4-6 or Lot 5.

Apparently Ms. Luke or a representative contacted the Department alleging a violation of the Act related to the placement of fill on Lot 4-6. The Department conducted an investigation, including a site visit on January 30, 2013. The Department responded to the complaint on May 2, 2013 in correspondence to Donald Bracken, a representative of Ms. Luke, stating its view that the activity was exempt as normal maintenance of land in agricultural use. The letter further stated that Mr. Bracken could file a Request for Determination of Applicability for a formal response. Gilmore Ex. 1. Mr. Bracken filed the Request on behalf of Ms. Luke, asserting that the activity on Lot 4-6 was not exempt and requires an “after the fact” Notice of Intent. Petitioner’s Ex. 1. In a Narrative, Mr. Bracken stated that a Notice of Intent should be required because the fill was placed in Bordering Land Subject to Flooding in contravention of the regulations, the work had altered wetlands resource areas and caused the Luke bog to become fallow from an infestation of phragmites.

The Plymouth Conservation Commission determined that the site was land in agricultural use but that the placement of fill required a Notice of Intent. The Commission’s Determination

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<sup>4</sup> In addition to Mr. Luke’s actions in removing the fill from the channel on Lot 4-6, opening the sluice box on Lot 5 was also undertaken without the permission of Ms. Mann.

was based on findings that the fill caused loss of flood control capacity in the upgradient Luke bog and that the filling of drainage ditches for agriculture was not specifically permitted under the Wetlands Regulations. Petitioner's Ex. 2. The LLC, through Ms. Mann, requested the Department issue an SDA. The Department's SDA determined that the channel was "necessary and related land" to the cranberry operation of Ms. Mann, and that the placement of fill was equivalent to adjusting the grade within the channel to maintain favorable growing conditions and was therefore exempt so that no Notice of Intent would be required. Ms. Luke filed this appeal, claiming that the fill was not undertaken to support Ms. Mann's cranberry production but "to 'spite' her estranged daughter," caused siltation in Ms. Luke's bog, and intentionally interfered with Ms. Luke's cultivation of her bog. Notice of Claim, pp. 5-6.

#### **ISSUES FOR ADJUDICATION**

1. Whether the activity of placing fill in the Landowner's drainage channel related to the cranberry bog is exempt under M.G.L. c. 131, s. 40 or requires the filing of an after-the-fact Notice of Intent?
2. Whether the activity of placing fill in the Landowner's drainage channel related to the cranberry bog is exempt under 310 CMR 10.04(b), introductory paragraph, or requires the filing of an after-the-fact Notice of Intent?
3. Whether the activity of placing fill in the Landowner's drainage channel related to the cranberry bog is exempt under 310 CMR 10.04(b)(7), or requires the filing of an after-the-fact Notice of Intent?
4. Whether the activity of placing fill in the Landowner's drainage channel related to the cranberry bog is exempt under 310 CMR 10.04(b)(13)(d), or requires the filing of an after-the-fact Notice of Intent?

The parties initially agreed that the drainage channel was "Land in Agricultural Use," so that the issues for adjudication were focused on the activity of placing the fill. The Petitioner later challenged the status of the land in a Motion for Summary Decision after Ms. Mann



referred to it as inactive conservation use. The motion was denied because “Land in Agricultural Use” may refer to only a portion of a Landowner’s property. See Ruling on Motions (December 15, 2014).

Although the activity is described as “placing fill” in the drainage channel, the Department declined to take enforcement related to the complaint filed by Ms. Luke. Enforcement discretion resides with the Department, and cannot be challenged in an administrative hearing. Further, the parties focused on the effects of the fill because it blocked the flow from the bog on Lot 6 rather than on any impacts on the drainage channel itself. For these reasons, as well as the unusual nature of the circumstances in which this dispute has arisen, the activity of placing fill should be viewed within the context of this appeal and the agricultural exemption. The placement of fill in wetlands resource areas in other contexts without a permit is typically a violation of the Act and Wetlands Regulations.

### **TESTIMONY OF THE PARTIES**

I conducted an evidentiary hearing to resolve the issues for adjudication. Ms. Luke filed testimony from four individuals: herself, her husband Erik Luke, Donald Bracken, and Walter Hartley. In her testimony, Ms. Luke described her recollection of Mr. Spring using the drainage channel on Lot 4-6 to control the water level of the bog on Lot 6 and her disappointment that she had been unable to fully harvest the Lot 6 bog for the past four years. D. Luke PFDT, paras. 13 and 24. She testified that she had hand-picked cranberries from her bog every year since 2007 and that she was obligated by a contractual agreement with Ms. Mann to maintain Lot 6 in agricultural use. D. Luke Reb. Testimony, paras. 3, 4, and 7. She stated that Ms. Mann had filled the drainage channel in 2010 and again in 2011. Her husband, Mr. Luke, removed the fill on each occasion, until in March 2011, Ms. Mann completely blocked the drainage channel with

approximately 80 feet of fill. D. Luke PFDT, paras. 14-16. She claimed that the filling of the drainage channel was inconsistent with prior practice because the channel had carried flows between the bogs for the past 45 years. D. Luke PFDT, para. 26.

Mr. Luke testified that he had removed a small amount of fill placed in the drainage channel on Lot 4-6 to block the culvert opening in 2010 and removed a larger amount, approximately 6 feet, in 2011. He testified that the fill blocked the flow of water that he wanted to release from Lot 6. E. Luke PFDT, paras. 18-23. He stated that he had attempted the alternative method of pumping to control the water level in the bog on Lot 6, but had been unsuccessful. He stated that the gate valve regulating the flow from Lot 6 toward the drainage channel on Lot 4-6 remains functional, so in his view the flow of water from Lot 6 through Lot 4-6 to Lot 5 can be controlled from Lot 6. E. Luke PFDT, paras. 36-43. He emphasized that the flow of water through the drainage channel on Lot 4-6 and through Lot 5 was the only means of controlling the water level of the bog on Lot 6. E. Luke Reb. Testimony, para. 6-7.

Donald Bracken is a registered Professional Engineer with his own consulting company, and was retained by Ms. Luke to assist her with this dispute. Bracken PFDT, paras. 1 and 9-13. Mr. Bracken testified that the flow of water from Lot 6 into the drainage channel had not caused any erosion in the bog on Lot 5 but had interfered with the hydrology of Lot 6 because the water level can no longer be regulated. Bracken PFDT, paras. 64-68. He stated that filling to obstruct the drainage channel was inconsistent with Department Guidance, which specified that open channels require maintenance to keep them free of obstruction and maintain their carrying capacity. Guidance, p. 4-7. Mr. Bracken stated that cranberry farmers would not eliminate a controllable source of water. Bracken PFDT, para. 85. He stated that the water entering the channel was not uncontrolled, but instead was controlled through the gate on Lot 6 that limited

flows to 20 cubic feet per second. He stated that Ms. Mann can control the water level in her bog through the sluice gate on Lot 5. Bracken Reb. Testimony, paras. 2-8. Mr. Bracken stated that the sluicebox on Lot 5 was historically the means of controlling the water level of the bog on Lot 5, and Ms. Mann can lower the water level by removing wooden boards from the sluicebox if the Lukes release water from Lot 6 in the same way that she releases water after flooding her bog over the winter. Bracken Reb. Testimony, paras. 14 and 16.

Mr. Bracken testified that the filling of the drainage channel did not constitute normal agricultural maintenance related to the bog on Lot 5, but instead was the “total destruction of the drainage and flooding system which functioned properly and served as a vital means of controlling the water levels in both bogs for over 45 years.” Bracken PFDT, para. 86. He stated that water could flow from Lot 6 to the bog on Lot 5 without any damage to the Lot 5 bog, and the drainage channel was not necessary to prevent erosion. Bracken PFDT, paras. 87 and 89. Mr. Bracken testified that he had studied alternatives to the release through the drainage channel on Lot 4-6. He concluded that due to elevations of topography and groundwater, there were no feasible options for controlling the water level in the bog on Lot 6. Bracken Reb. Testimony, para. 21.

Mr. Bracken testified that the drainage channel was within Bordering Land Subject to Flooding, and therefore the placement of fill in the channel was specifically excluded from “normal maintenance” pursuant to the introductory language at 310 CMR 10.04 Agriculture (b). He stated that because the bog on Lot 6 is identified on the flood map and the drainage channel floods from the rise in the water level of the bog, the drainage channel itself is Bordering Land Subject to Flooding. Bracken Reb. Testimony, para. 9. He explained that the fill in the drainage channel eliminated flood storage volume in the bog on Lot 6 by impounding water there, and

thus constitutes a loss of flood control capacity. Bracken Reb. Testimony, para. 10. He further stated that the flood storage capacity of the bog on Lot 6 was reduced by the filling of the drainage channel on Lot 4-6. Bracken PFDT, para. 96. He testified that the placement of fill in the drainage channel was done “with the purposeful intent of causing damage to the Luke’s bog” or “with no consideration of the potential issues the Luke’s bog would suffer from being inundated” due to the fill. Bracken PFDT, para. 102.

Mr. Bracken further testified that the Wetlands Regulations do not contemplate “filling” as an activity meriting an exemption because the regulations do not use that term. Bracken PFDT, para. 107. He stated that the amount of fill was substantial, covering an area 80 feet long, 8 to 10 feet wide and 2 to 3 feet deep. Bracken Reb. Testimony, para 1. Citing to regulatory provisions that the exemption was contingent on having the purpose of maintaining favorable farming conditions, he stated that the filling was not done to maintain favorable conditions, but instead that leaving the hydraulic system intact would maintain favorable conditions because it could be adjusted to control water elevations. Mr. Bracken testified that “grading” means “re-shaping the topography, or creating a specified slope, such as for surface drainage” and that the filling of the drainage channel was not grading because it created a level surface with no other change in topography. Bracken PFDT, paras. 115-116. He stated that “regrading” means reshaping an area with existing material, while filling means that outside material is imported to a site. Bracken PFDT, para. 122. Mr. Bracken concluded that the filling of the drainage channel was not “normal maintenance of land in agricultural use.” Bracken PFDT, para. 123.

Walter Hartley is President of Hartley-Rhodes, Inc., a cranberry and agricultural construction company where he manages 11.3 acres of cranberry bogs. Hartley PFDT, paras. 1-3. He is also a part-time land surveyor for Bracken Engineering. Hartley PFDT, Addendum A.

He testified that water is the most important resource in cranberry cultivation and that a “cranberry grower’s ability to access water and control water levels is imperative to successful growing and harvesting of cranberries.” Hartley PFDT, para. 17 and 19. He stated that he was “not aware of any instance where a cranberry grower has blocked a release of water from an adjacent bog and taken away a controllable source of water.” Hartley PFDT, para. 21. In Mr. Hartley’s view, the filling of the drainage channel by Ms. Mann “serves no farming purpose and certainly is not related to the maintenance of her bog.” He described cranberry growers as a “close-knit and cooperative group” who work together to control the flow of water between their bogs. Hartley PFDT, para. 37. He testified that considering only the impacts on Ms. Mann’s bog was inconsistent with the regulations, which consider off-site impacts under 310 CMR 10.04 (Agriculture) (b), and it is undisputed that the bog on Lot 6 has been negatively impacted by the growth of phragmites. Hartley Reb. Testimony, para. 6 and 9.

Mr. Hartley testified that if he owned both bogs, he would not have filled the drainage channel and cut off a potential source of water to a downgradient bog. He emphasized that Ms. Mann was able to control the water level in the bog on Lot 5 through the sluiceway there, and any water entering her bog through the drainage channel on Lot 4-6 would not flood her bog unless she failed to remove some boards to lower the water level. Hartley Reb. Testimony, para. 2. He stated that Ms. Mann could regulate the flow into the drainage channel toward her bog “by working with the Lukes in a fashion typical of the industry,” presumably by being prepared to open her sluiceway on Lot 5 when Ms. Luke opened the valve on Lot 6. Hartley Reb. Testimony, para.3. Mr. Hartley stated that the filled drainage channel had interfered with the Luke’s bog, prevented traditional methods of cranberry growing, and caused an invasion of phragmites from the elevated water table. Hartley PFDT, para 40-42. He stated that the purpose

of the exemption was to encourage farming, but the filling of the drainage channel had served no farming purpose and had prevented the Lukes from farming their bog. Hartley Reb. Testimony, para. 9.

Ms. Mann testified that she is the owner of Lot 5, which contains cranberry bogs, and the manager of Lowell Spring, LLC, which owns Lot 4-6. Mann PFDT, para. 1, 2, and 4. Prior to Mr. Spring's death in 2007, Lot 4-6 was owned by Ms. Mann and Mr. Spring as 50/50 partners. Mann Oral Testimony. Her bogs on Lot 5 are currently under a five year plan with the USDA to implement best management practices. Mann PFDT, para. 3. Her primary residence, constructed in 2004, is located on Lot 5. Id. She described Lot 4-6 as "vacant land in active conservation use." Mann PFDT, para. 5. Ms. Mann explained that the Spring Reservoir, which had supplied water for Mr. Spring's bogs, was discontinued as a source of water when another grower "closed the brook" that provided the reservoir with water. Without the Reservoir, Mr. Spring dug ten wells, including five on Lot 6, to supply his bogs with water. Mann PFDT, para. 12. She testified that she used the wells on Lot 5 for water for her bog. Mann Oral Testimony.

Ms. Mann testified that she began working for Mr. Spring on a variety of cranberry cultivation tasks beginning in 1957 when she was ten years old. Mann PFDT, para. 11. She described helping Mr. Spring hand-dig the drainage channel between Lots 5 and 6 and the installation of a gate valve to control the flow of water. Mann PFDT, para. 17. She stated that Mr. Spring had abandoned the bog on Lot 6, removing it from cultivation. When she conveyed Lot 6 to her daughter in 2007, she testified that the bog on Lot 6 was fallow because of the flooding and had been fallow for more than five years. Mann PFDT, para. 20. She stated that the deed for Lot 6 did not convey any water, drainage, or flowage rights. Mann PFDT, para. 21.

Ms. Mann testified that in April 2010, she received a “frantic telephone call” while out of town from her neighbor, Ms. Bostek, who was watching the property. Mann PFDT, para. 22.<sup>5</sup> Stating that she had been concerned about damage to her bog and surrounding property, Ms. Mann asked her neighbor to place fill in the ditch and re-grade the area to stop the flow of water into her bog. Mann PFDT, para. 23. She testified that Mr. Luke admitted to opening the gate valve allowing the water to flow and to removing the fill placed in the drainage channel. Mann PFDT, paras. 24-26. She stated that these events occurred again, with flow released by Mr. Luke from Lot 6 to the drainage channel and the placement of fill to protect the downgradient bog on Lot 5. Mann PFDT, para. 26. Ms. Mann explained that she floods her bogs every year to a depth of 4 inches above the vines to protect them over the winter, and leaves the boards in the sluiceway at the outlet of the bog on Lot 5 at the correct height to maintain this level. Mann Oral testimony. She testified that in 2011, the water in her bog was much higher than she preferred because water that is too deep can reduce oxygen and damage vines, and flow can harm ditches and access roads. Mann Oral Testimony.

Ms. Mann asserted that Ms. Luke has other means of draining the bog on Lot 6 to allow its cultivation, specifically by draining water into the portion of the bog that was abandoned by Mr. Spring. Mann PFDT, para. 29. She concluded her testimony by stating that cultivation of cranberries requires the ability to control water, and the filling of the channel was “to prevent an

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<sup>5</sup> The Petitioner filed a Motion to Strike certain testimony and the exhibits of Ms. Mann, which was denied with one exception. The Department’s hearing rules allow the exclusion of unduly repetitious or irrelevant testimony. 310 CMR 1.01(13)(h)1. Ms. Mann provided an explanation of the photographs at the hearing and the record did not suggest that they depict anything other than what they were purported to depict. The photographs and related testimony were relevant because they explain the basis for the action she took in ordering the fill to be placed in the drainage channel while she was out of town. Hearsay is allowed in administrative hearings provided it has sufficient indicia of reliability. The photographs could be accorded varying weight based on their quality. I allowed the affidavit of Ms. Bostek to the extent it identified herself as the person who took photographs of the site, but did not consider her statement of her observations of events or her opinion because she was not available as a witness. To the extent Ms. Bostek’s observations or opinions, along with the photographs, were conveyed by telephone to Ms. Mann, Ms. Mann was a witness.

unauthorized and unimpeded flow of water” to her property and her bogs. Mann PFDT, para. 30. The agricultural purpose was water management and the protection of the bogs. Mann Oral Testimony. She stated that the filling of the drainage channel was the fastest way to prevent water from flowing into the bog on Lot 5 while she was out of town. Id.

Dan Gilmore testified for the Department as the staff who prepared the SDA. In addition to many years of experience at the Department, Mr. Gilmore served as Conservation Officer and Director of Natural Resources for the Town of Wareham, where he often interacted with cranberry growers. Gilmore PFDT, para. 2. Mr. Gilmore visited the site both to conduct a complaint investigation in 2013 and as part of the SDA process in 2014. Gilmore PFDT, paras. 4-6. He emphasized throughout his testimony that with the change in ownership of Lot 6, Ms. Mann no longer could control the flow of water entering Lot 4-6. In response to Mr. Luke’s assertions that the gate valve controlling the flow from Lot 6 was operable, Mr. Gilmore testified that whether or not the valve worked was not relevant because Ms. Mann and/or Spring LLC did not own or control the gate valve and had no right to make any adjustments to the volume or timing of the flow from Lot 6 to Lot 4-6. Gilmore Reb. Testimony, para. 17 and para. 28 (rebuttal to Hartley PFDT, para. 36). Mr. Luke had released water without her knowledge or consent, and Ms. Mann had stated that she placed the fill to protect her roadway from erosion and her bog from receiving unwanted flows of water. Id.

Mr. Gilmore stated that the placement of fill in the drainage channel was an activity with an agricultural purpose. Gilmore Reb. Testimony, para. 19. In response to testimony from Mr. Bracken and Mr. Hartley that a cranberry grower would not cut off a source of water, Mr. Gilmore stated that the fill was not necessarily permanent. He noted that Mr. Luke had removed the fill twice and the fill material could be removed at any time if Ms. Mann wanted to



reestablish flows within the drainage channel. Gilmore Reb. Testimony, para. 23. He offered his opinion that the removal of the drainage channel as a source of water would qualify under the agricultural exemption. He emphasized that the timing of flows into a bog is critical for a number of reasons and the entry of water at the wrong time, such as during pollination, could damage the crop. Id.

Mr. Gilmore testified that it is “normal for cranberry growers to regularly open and close water control structures, reroute water through different channels or by-pass canals, and otherwise flood bogs and release water.” Gilmore PFDT, para. 9 and Exh. 3 (citing to Guidance, p. 4-11). He stated that Ms. Mann no longer controls the outlet from Lot 6 and Mr. Luke had released water to Lot 4-6, resulting in unwanted water entering and flooding the Mann bog. Gilmore PFDT, para. 9. He viewed the fill as “minimal” and as an adjustment in “the grade of the channel bottom” to prevent damage from unwanted flooding of her bog. Id. He described the placement of fill by Ms. Mann as “an inexpensive, expedient and reversible method of maintaining the desired flooding and drainage system for her bog.” Id. He believed that the fill allowed Ms. Mann to improve her ability to regulate the water within her bog and maintain the integrity of the dike and road that were potentially compromised by the “uncontrolled and unregulated flow of water off the Luke bog resulting in unwanted and unnecessary water flowing into her cranberry bogs.” Gilmore PFDT, para. 10. For these reasons, he concluded that the activity of filling the drainage channel was exempt under the statutory provision for “maintenance of drainage and flooding systems of cranberry bogs” and “work performed for normal maintenance or improvement of land in agricultural use.” Gilmore PFDT, paras. 9 and 10.

Mr. Gilmore testified that the fill was not placed in Bordering Land Subject to Flooding as claimed by Mr. Bracken. Gilmore PFDT, para. 11. He explained that the fill had been placed within the Banks of the drainage channel, thus altering the resource areas Land Under Water and inland Bank. Bordering Land Subject to Flooding extends landward from these resource areas, and therefore was not altered by the fill. Id. Mr. Gilmore further stated that during his site visit, he had observed no evidence that fill had been transported out of the drainage channel, and thus, there had been no erosion or sedimentation of adjacent water bodies or wetlands. Id. He countered Mr. Bracken's testimony that the fill was not undertaken to prevent erosion and sedimentation into the bog on Lot 5 by stating that the exemption does not require an analysis of "all off site ramifications of the exempt activity." Gilmore Reb. Testimony, para. 22.

In response to Mr. Hartley's opinion that Ms. Mann had alternatives to avoid erosion in her bogs, Mr. Gilmore noted that the regulations do not contain a provision allowing the Department to dictate a method for effective use of water by a grower. Gilmore Reb. Testimony, para. 27. He stated that whether Lot 6 now has an overgrowth of phragmites is not relevant to the question of whether the exemption should have applied in 2010 when the fill occurred. Id. Mr. Gilmore generally described the placement of fill as providing more effective use of water on Lot 5. Id. For these reasons, Mr. Gilmore concluded that the activity met the introductory paragraph of the normal maintenance exemption that does not allow the placement of substantial amounts of fill in Bordering Land Subject to Flooding and that the work be undertaken in a manner to prevent erosion and sedimentation of adjacent water bodies and wetlands. Id.

Mr. Gilmore testified that the placement of fill was necessary to adjust the grade within the drainage channel to control the flow of water and prevent unwanted water from entering the bog on Lot 5 without Ms. Mann's knowledge or consent. Gilmore PFDT, para. 12. He

emphasized that Ms. Mann no longer controlled the flow of water from Lot 6, due to the change in ownership of Lot 6 that resulted in the need for Ms. Mann to modify her operation to maintain favorable growing conditions. Id.; Gilmore Reb. Testimony, para.14. In Mr. Gilmore's professional opinion, the placement of the fill was consistent with the intent of the exemption, describing the activity as the "grading of the existing man-made channel . . . with the intent of preventing erosion, providing more effective use of water for the purpose of maintaining favorable growing conditions for ongoing growing of agricultural commodities." Gilmore PFDT, para. 12. Finally, Mr. Gilmore testified that he initially viewed the activity as qualifying as exempt under the provision for drainage of existing cranberry bogs but after reconsideration and consultation with other Department staff concluded that this section of the regulations was intended to apply to the footprint of the cranberry bog as opposed to connecting channels such as the channel on Lot 4-6. Gilmore PFDT, para. 13; See 310 CMR 10.04 Agriculture (b)(13)d.

The Department also filed testimony of Gary Makuch, who has served in the Department's Wetlands program since 1986 and has had primary responsibility for agricultural and cranberry matters for the last eight years. Makuch PFDT, paras. 1 and 2. He had visited the site and observed "shallow layers of fill" within the drainage channel on Lot 4-6 that connects the bogs on Lots 5 and 6. He testified that the placement of fill in an existing cranberry bog ditch is exempt if it meets the conditions of 310 CMR 10.04(b)(7) related to grading of existing man-made or natural water management systems such as channels for the purpose of maintaining favorable growing conditions for an agricultural commodity. Makuch PFDT, para. 5. He stated his opinion that Ms. Mann did not have the ability to control the flow because the gate valve was not located on her property and the control of the flow on her own property was related to her ongoing cranberry production. Id. Thus, in his view, the work on Lot 4-6 was exempt.

## **DISCUSSION**

In this appeal, the work that Ms. Luke contends violates the Act and Wetlands Regulations is the placement of fill by Ms. Mann in a portion of the drainage channel on Lot 4-6. The issues for adjudication are focused on the narrow question of whether this activity constitutes normal maintenance of land in agricultural use and complies with conditions identified in the Regulations. Much of the dispute, however, centers on the control of the discharge of water to and from the drainage channel on Lot 4-6 rather than the activity of placing the fill. Ms. Luke seeks the use of the drainage channel on Lot 4-6 as a means to control the water level of her upgradient bog on Lot 6. Ms. Luke claims she will be unable to cultivate the bog on Lot 6 without the ability to release water through the drainage channel on Lot 4-6 to the bog on Lot 5, both owned by Ms. Mann. Mr. Luke twice removed fill placed by Ms. Mann, allowing the discharge of flows from the Luke bog over Ms. Mann's property, and released flow by opening the sluice gate on Ms. Mann's bog on Lot 5, activities undertaken on Ms. Mann's property apparently without her knowledge or consent. The parties agree that controlling water is critical to cranberry cultivation; the underlying question here seems to be whether Ms. Luke or Ms. Mann may control the water and the effect of the release or retention of water for cranberry cultivation.

The Act and Wetlands Regulations, by extending an exemption for normal maintenance of land in agricultural use, do not require a farmer to actually maintain land for agricultural use, to conduct agricultural activities, or to support agricultural use by others.<sup>6</sup> Instead, the Act and

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<sup>6</sup> Ms. Luke could not file a Notice of Intent for work on the drainage channel without the permission of Ms. Mann because Ms. Luke does not own or have ownership rights in the land. It is not clear whether the activities on Lot 6 qualify for the exemption. Although Ms. Luke states that she has picked cranberries from her bog, it is not clear whether it is a commercial enterprise based on the references in the record to the bog on Lot 6 as fallow and the limited hand-picking of cranberries by Ms. Luke.

Wetlands Regulations protect wetlands interests, which include flood control which in turn is intertwined with the operation of a cranberry bog where periodic flooding and release are essential to cultivation. Because the parties were focused on their agricultural operations, some of the testimony is not relevant to the wetlands regulatory provisions identified for adjudication. I address first the distinction between agricultural interests and the interests of the Act and Wetlands Regulations. A second threshold question is whether the exemption claimed by Ms. Mann is contingent on maintaining or promoting the agricultural use of Ms. Luke's property. I then evaluate the activity of placing fill in the drainage channel within the confines of wetlands interests and Ms. Mann's agricultural operation, beginning with the claim related to Bordering Land Subject to Flooding and flood control impacts to Lot 6.

The fundamental relationship between benefits from or for agricultural activities that involve wetlands and the protection of wetlands interests of the Act has been addressed in a prior appeal involving a cranberry operation and the construction of Route 25 in Plymouth. Matter of Route 25: Massachusetts Department of Public Works, Docket No. 84-71, Final Decision (September 17, 1986), 4 MELR 1235.<sup>7</sup> The Final Decision recognized that cranberry cultivation is highly dependent on sufficient water and the ability to control water. It distinguishes, however, the protection and promotion of agricultural interests from the wetlands interests that are protected by the Act. Where a grower claimed that a highway project would cause a change in groundwater, which is a protected interest under the Act, and would reduce his flexibility in managing available water for cranberry cultivation, the Department's Commissioner characterized the harm as "an injury to a strictly private property interest outside the scope of the Act," and therefore not redressable under the Act. Id. The Commissioner stated the basis for this

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<sup>7</sup> The parties did not discuss this case. Although the Final Decision was issued prior to the revisions related to agriculture as well as other important regulatory provisions and some aspects may be dated, I believe the sections I have cited have continuing relevance. The Final Decision may be found online at the Social Law Library website.

conclusion, “that it is the ability of the land to perform certain functions which is protected under the Act, not the right of particular individuals to derive benefit from these functions in precisely the manner they may desire.” *Id.* Consistent with this precedent, claims related to the use or inability to use water for cranberry operations by either Ms. Luke or Ms. Mann are not protectable as wetlands interests. The inquiry is properly limited to the functions of wetlands as wetlands resource areas to protect wetlands interests.

While agricultural interests are not cognizable as interests under the Act, the conduct of agricultural activities is central to the exemption from the otherwise applicable requirements of the Act and thus to the resolution of this appeal. Nothing in the language related to the exemption in the statute or regulations, however, suggests that the effect of the activity on another agricultural operation has any relevance to whether the activity claimed as exempt qualifies for an exemption. The exemption simply is not contingent upon maintaining favorable conditions for another agricultural operation. In my prior ruling denying Ms. Mann’s Motion for Summary Decision or Directed Decision because there were disputed issues of fact, I addressed the question of whether the exemption for agriculture extended to impacts on other agricultural operations. I concluded that the exemption for normal maintenance of land in agricultural use does not require activities that will benefit or enable the production of agricultural commodities by another agricultural landowner, or that will maintain favorable conditions for another agricultural landowner. 310 CMR 10.04 Agriculture (b) and (b)(7). An interpretation of the regulation that would require conservation commissions or the Department to evaluate other nearby agricultural operations would be administratively infeasible and could represent an unwanted intrusion for some farmers.

Water rights may establish the flow of water independent of the application of an exemption to an activity under the Act and Wetlands Regulations. Lot 6 was conveyed to Ms. Luke without any water rights or agreement regarding the use of the drainage channel on Lot 4-6 by Ms. Luke. Lot 4-6 is managed by Ms. Mann. Common law principles may apply. For purposes of the Act and Wetlands Regulations, however, Ms. Mann may maintain the land in agricultural use and undertake actions within the scope of the exemption or allow the exemption to lapse. Clearly the division of ownership and the changed circumstances in control of water between Ms. Luke's Lot 6 and Ms. Mann's Lots 4-6 and 5 affect their agricultural interests, but the control of water is beyond the purview of the Act and regulations.

The change in circumstances with the division of ownership also seems to have injected into this appeal the question of whether the exemption extends beyond the owner of the land in agricultural use to the Lukes and their abutting bog on Lot 6. The SDA concerns only the activity on Lot 4-6 and does not address other activities or extend to Lot 6. Certainly nothing in agriculture exemption of the Wetlands Act or regulations suggests that a person, regardless of familial relationship, may enter land in agricultural use without permission, regardless of whether the exemption applies or a benefit is claimed, as may have occurred when Mr. Luke opened the sluiceway on Lot 5. Lot 4-6 is managed by Ms. Mann, and, for purposes of the Act and Wetlands Regulations, an exemption would apply to her activities on her land.

The agricultural status of the bog on Lot 6 was not included in Ms. Luke's RDA, but its status has an effect on Lot 4-6. Unquestionably, the bog on Lot 6 was an active cranberry bog when it was owned by Mr. Spring. Ms. Mann testified that that Mr. Spring's sole source of income was derived from the cultivation of cranberries. Mann PFDT, para. 10. She testified that Mr. Spring abandoned the bog on Lot 6 and removed it from cultivation because he did not want

to continue to grow cranberries there. He flooded the bog to eliminate any growth. Mann PFDT, para. 18. The date when this occurred is not apparent from the record, but it was prior to Mr. Spring's death in 2007 and the conveyance of the land to Ms. Luke, also in 2007. Ms. Luke testified that when she acquired Lot 6 in 2007, there was still cranberry vine and she continued to handpick cranberries every year since 2007. Mann Rebuttal Testimony, para. 2-3. She stated that she had handpicked cranberries for three years prior to acquiring the land in 2007. Thus, she states that the bog on Lot 6 has never been fallow. Mann Rebuttal Testimony, para. 3. According to the Guidance, [o]ften fallow is often used to mean "inactive," implying that a field is planted . . . but not managed for production. Guidance 4-3. This is consistent with Ms. Luke's testimony that she has been engaged in some cultivation of the bog on Lot 6. She testified that for four years, 2010 to 2014, she had hand-picked a limited amount of cranberries from the bog on Lot 6.

According to the regulations, land that is "presently and primarily" in agricultural use may be inactive for up to 5 consecutive years. 310 CMR 10.04 Agriculture (a). It is not clear from the record how long the Lot 6 bog was inactive prior to the cessation of Mr. Spring's cultivation of the bog, so it is not clear whether Lot 6 remained in agricultural use when Ms. Luke's activities began. Further, to qualify as land in agricultural use, the commodity, in this case cranberries, must be produced for commercial purposes. *Id.* Ms. Luke has the goal of producing cranberries on the bog Lot 6. However, even assuming the bog has been picked continuously to some extent, Ms. Luke has not asserted, nor is there evidence to support a finding, that the hand-picking was sufficient to meet the test for commercial production, that she was engaged in the commercial enterprise of selling the cranberries. Thus, for purposes of this



wetlands appeal, it has not been established that the bog on Lot 6 is land in agricultural use as that term is defined in the Wetlands Regulations.<sup>8</sup>

The status of the bog on Lot 6 as Bordering Vegetated Wetland was not disputed by any party. The gate valve and associated structure on Lot 6 that controls any flow to Lot 4-6 would be considered land in agricultural use, even if the bog on Lot 6 is not, to the extent it is “presently and primarily used in a manner related to, and customarily and necessarily used in, producing” cranberries on the Mann bog.<sup>9</sup> 310 CMR 10.04 Agriculture (a). In other words, the gate valve on Lot 6 has the same characteristics, from a regulatory perspective under the definition, as the drainage channel on Lot 4-6. From a regulatory perspective, it appears that the gate valve on Lot 6 and the drainage channel on Lot 4-6 may lapse from land in agricultural use in March 2016, five years from the last flow in 2011.<sup>10</sup>

It is not clear from the record what arrangement was made, if any, as to the use of the drainage channel on Lot 4-6 in 2007. It is clear that in 2010, Ms. Mann sought to cease use of the drainage channel because she could instead use wells as a source of water supply for her bog on Lot 5, a source of water within her control, and could not control the gate valve on Lot 6. From Ms. Luke’s perspective, the fill in the drainage channel had the effect of maintaining an excessive water level in the bog on Lot 6. From a wetlands perspective, her inability to use the valve and channel to periodically drain excess water had the effect of maintaining the Bordering Vegetated Wetland in a constant state. Gilmore PFDT, para. 22.

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<sup>8</sup> Ms. Luke notes that she is required by an Agreement executed at the time of conveyance to maintain the land in agricultural use. D. Luke Rebuttal Testimony, para. 7 and Ex. A. The Agreement, however, does not refer to the Act but to M.G.L. c. 61A related to taxation of agricultural land.

<sup>9</sup> No party disputed that Ms. Mann’s bog on Lot 5 was land in agricultural use, and nothing in the record suggests it was not in commercial production.

<sup>10</sup> Land that has lapsed from agricultural use may, of course, be returned to land in agricultural use but requires a permit.

Another determinative area of dispute involved flooding in the Luke bog, the flood control interest of the Act, and the applicability of the resource area Bordering Land Subject to Flooding to the site. Under the regulations, normal maintenance excludes the placement of substantial amounts of fill in Bordering Land Subject to Flooding. 310 CMR 10.04 Agriculture (b) and (b)(7). Bordering Land Subject to Flooding extends landward from the Bank of a waterbody to the lateral extent of flooding from the 100-year storm event. 310 CMR 10.57(2)(a)1. and 3. Specifically, to be ineligible for the exemption, substantial fill must have been placed on the land of that landowner between a Bank (or a Bordering Vegetated Wetland) and the boundary estimated according to the provisions of 310 CMR 10.57(2).

Ms. Mann ordered the placement of fill in the drainage channel. The drainage channel is two jurisdictional wetlands resource areas: 1) an intermittent stream or Land Under Water (when water is present); 2) within Banks, which confine the stream up to the first observable break in slope or the mean annual flood level. See 310 CMR 10.04(Stream); 310 CMR 10.54(2). The drainage channel does not include the resource area Bordering Land Subject to Flooding. The evidence supports a finding that the fill was placed inside the Banks, consistent with the testimony of Ms. Mann that the fill was placed in the channel, and there is no evidence that fill was placed beyond the Banks. The regulations refer to fill placed on Bordering Land Subject to Flooding, not to whether Bordering Land Subject to Flooding in another location is affected by the placement of fill. The placement of substantial amounts of fill in Bordering Land Subject to Flooding refers to that activity on the land of the landowner asserting the exemption. 310 CMR 10.04 Agriculture (b). Therefore, the placement of fill in the drainage channel meets the condition that substantial amounts of fill not be placed in Bordering Land Subject to Flooding.

Ms. Luke, however, asserts that additional water in her bog on Lot 6 is reducing flood storage capacity and thus adversely affecting Bordering Land Subject to Flooding because the Flood Map shows the bog as flood plain, or Bordering Land Subject to Flooding. The bog itself appears to be Bordering Vegetated Wetland, and any Bordering Land Subject to Flooding would extend beyond that resource area. I address the flood capacity issue in spite of considerable ambiguity as to the identity of the resource areas.

The Final Decision for Route 25 is relevant to the issue of the flood control function of Ms. Luke's bog on Lot 6 and the assertion that the fill placed in the drainage channel on Lot 4-6 reduces its flood storage capacity. Matter of Route 25: Massachusetts Department of Public Works, Docket No. 84-71, Final Decision (September 17, 1986), 4 MELR 1235. In evaluating the flood storage capacity of a bog, the Final Decision states that "labeling as a flood storage area any land with a capacity to hold water is not only a departure from the Department's past interpretation of the flood control interest, but also represents a wholly unworkable standard. This is because "flood storage" as commonly understood and as consistently employed by the department . . . refers to the confinement of water which has reached a certain location as the result of a "flood," that is, a meteorologically-induced event." Id. The Final Decision further explains that, where part of the stored volume is simply held prior to a storm event as occurs in the bog on Lot 6, "any topographic basin or other area lower than the surrounding terrain could be designated an area subject to flooding up to its "rim," even if the volume of water required to fill it was many times greater than the volume of a hundred-year storm. Flood storage volume in this sense would be limited only by the size of the "container." Id. On the other hand, the Department's [regulations] using a hundred-year storm or a hundred year flood as the outer limit of land subject to flooding establishes a level of protection based in reality." Id. See 310 CMR

10.57(2) (a)1. and 3. Thus, to the extent a cranberry bog is a container for non-flood waters, the extra “volume has no meaning with regard to flood storage protectable by the Act.” Id.

Although this Final Decision was issued almost thirty years ago, the regulations currently in effect show that the Bordering Land Subject to Flooding is the maximum lateral extent of the 100-year storm event, and may be determined by a Flood Map. The Flood Map filed by Ms. Luke appears to show a lateral boundary around the bog, but this does not mean that the flood control interest is necessarily protected to the height of the bog. Ms. Luke did not provide calculations to show the extent of the 100 year storm as measured vertically, and thus there is no evidence to support the claim that the extra volume from the lack of ability to release water from the bog has any relevance to Bordering Land Subject to Flooding.

I turn to other conditions for the agricultural exemption in the regulations. I find that the flow of water from Lot 6 entering the channel on Lot 4-6 is controlled by Ms. Luke through the valve on Lot 6, absent the installation of a control structure on land owned or managed by Ms. Mann. Consistent with the testimony of all witnesses, I further find that the control of water is an essential part of cranberry farming, and the ability to control water is essential to a cranberry operation. Hartley PFDT para. 19, Gilmore PFDT, Reb. Testimony, para. 25. By all accounts, the drainage channel on Lot 4-6 was constructed as a water management system and flows were controlled by the gate valve. Maintaining the drainage channel includes maintaining its capacity to carry flow and to regulate the flow, including shutting off the flow. The construction of a new water management system on land in agricultural use is identified as an activity within the scope of normal improvement of land in agricultural use, undertaken in a manner to prevent erosion and siltation of adjacent water bodies and wetlands. 310 CMR 10.04Agriculture(c)(1)g.

Because the drainage channel as a water management system already exists, the narrow question is whether the filling qualifies as “normal maintenance.”

Normal maintenance must occur on land in agricultural use. Lot 4-6 is “land in agricultural use” because water management channels for bogs are customarily and necessarily used in cranberry operations. Ms. Mann’s bogs on Lot 5 qualify as land in production because the bogs produce cranberries, an agricultural commodity for commercial purposes, as shown by the USDA farm plan. The history of the drainage channel demonstrates that it has been a customary and necessary component of the cranberry operation. There was little testimony related to the means, the placement of fill near the culvert outlet, by which Ms. Mann sought to block the channel; instead the testimony focused on the ends, the effects of the blockage itself. Presumably, the effect would be the same as if the gate valve were inoperable in a closed position or she had used concrete to block the culvert. The testimony related to the effects of the flow or lack of flow. There was no testimony that the fill itself caused sedimentation or had any deleterious effect on the downgradient portion of the drainage channel, on Ms. Mann’s bog, or on any wetland resource area downgradient of Ms. Mann’s bog. It appears that the “intermittent stream” characteristic of the drainage channel was in response to the opening and closing of the gate valve on Lot 6. It further appears that, but for the opened gate valve on Lot 6, the drainage channel on Lot 4-6 would not have flowing water. Because the parties focused on the blockage of the channel rather than the effects of the fill itself, the references to the activity as placement of fill connote the blockage of the channel.<sup>11</sup> If Ms. Mann owned Lot 6 she could stop opening the gate valve and block any flow to Lot 4-6 as normal maintenance because she did not need the

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<sup>11</sup> The analysis is limited to the facts presented, which are highly unusual. Cranberry cultivation and other agricultural activities often involve natural streams or man-made channels where there is not a control mechanism or where the placement of fill would cause erosion and sedimentation and would clearly not meet the regulatory requirements.

water, without running afoul of the Wetlands Regulations. The placement of fill on Lot 4-6 accomplished the same result of blocking the flow, an action she could take on her own property in response to actions by Ms. Luke. Although there was no longer intermittent flow in the drainage channel to Lot 5, there was also no longer periodic drainage of the Bordering Vegetated Wetland on Lot 6.

Normal maintenance must be undertaken in a manner to prevent erosion and siltation to adjacent water bodies and wetlands. The placement of fill in a channel could lead to erosion of the material if overwhelmed by flow, transporting the fill material downstream and leading to sedimentation of downgradient water bodies. There is no evidence, however, supporting a conclusion in this case that the placement of fill material did cause erosion or sedimentation to the downstream channel or the bog on Lot 5. From the photograph of the site of the fill taken in January 2013 by Mr. Gilmore, the area is fully vegetated and there is no sign of erosion or sedimentation of the fill material that was placed in 2010 and 2011. Gilmore PFDT, Ex.4 (photograph of drainage channel). Ms. Luke claims that the placement of the fill causes sedimentation in the upgradient bog on Lot 6, as evidenced by the phragmites growth. Sedimentation refers to material deposited by water that sinks to the bottom. Phragmites is an invasive plant, not sediment. There is no evidence that the fill material was deposited in the bog on Lot 6. The placement of fill caused the bog on Lot 6 to remain in a more flooded condition than if the Lukes could release water to the drainage channel on Lot 4-6, which affects their agricultural interests. But the flooded condition of the Luke bog is not inconsistent with wetlands interests.

The parties disagree on whether the placement of fill is “grading” of the channel. In the definition provided by Mr. Braken, “grading” means “re-shaping the topography, or creating a

specified slope, such as for surface drainage.” Bracken PFDT, para. 115. Mr. Bracken distinguished “grading” and “filling,” stating that the channel was filled and leveled with no other alteration of the topography. Bracken PFDT, para. 116. “To grade” is also defined as “to level or smooth to a desired or horizontal gradient.” American Heritage Dictionary, Houghton Mifflin Company (1985). The placement of fill in the channel did reshape the topography by filling in the channel and making the area level or horizontal. The fact that the work was limited to the drainage channel and did not change the surrounding topography is not relevant; all the terms refer to work in jurisdictional wetland areas and land in agricultural use, not to surrounding areas. The placement of fill falls within the scope of “grading” of a water management system.

The activity must “provide drainage, prevent erosion, provide more effective use of water, or provide for more efficient use of equipment.” 310 CMR 10.04 Agriculture(b)(7). The placement of fill, with its effect of cutting off a flow of water which was not needed for Ms. Mann’s cranberry operation, met two of these criteria: 1) the use of water was more effective because there was no added flow that subsequently required release, and 2) it allowed more efficient use of equipment because it was unnecessary to open the sluiceway for the bog on Lot 5. The activity did not allow more effective use of water or more efficient use of equipment for Ms. Luke, but the regulations do not extend beyond the person seeking the agricultural exemption.

Finally, the work meeting these conditions must be “all for the purpose of maintaining favorable conditions for ongoing growing or raising of agricultural commodities.” *Id.* As part of cultivating her cranberry bog, Ms. Mann seeks to protect the vines during the dormant period over the winter months by keeping the vines covered by four inches of water, thus providing the proper temperature and oxygen levels. Mann Oral Testimony. Ms. Mann does not remain on

site during the dormant period. Id. When additional flows were released from Lot 6, by the opening of the gate valve on property she no longer owns, she had the flow stopped by placing fill in the downgradient drainage channel on Lot 4-6 which she did own. The placement of the fill served the purpose of maintaining favorable growing conditions in her bog. Although she could have maintained the four inches of water above the vines by allowing the flow from Lot 6 through the drainage channel and opening the sluice gate of her bog on Lot 5 to release water, the regulations do not require the consideration of alternatives to achieve favorable growing conditions. The regulations do not require favorable growing conditions for another grower. Although she potentially could have controlled the flow into Lot 4-6 by installing a gate valve at the opening of the culvert at its downgradient end on her property, the regulations also do not require consideration of alternatives for maintaining water management systems to provide more effective use of water.

As described above, ensuring a water level of four inches above the cranberry vines during the dormant winter months is a critical component of maintaining favorable conditions for the cultivation of cranberries. More generally, the control of water is essential to favorable conditions for a cranberry operator. From the perspective of Ms. Mann, it was important to establish a means to block unnecessary and potentially detrimental flows into the bog on Lot 5 after the former means of control, the gate valve on Lot 6, was no longer available. From the perspective of the Lukes, the growing conditions on Lot 6 became less favorable. It may be true that in a cooperative context, these abutting growers could have reached an amicable arrangement to the benefit of both, but the regulations do not require that result. It may be quite true, as Mr. Hartley emphasizes, that cranberry growers typically cooperate but neither the statute nor the regulations suggest that cooperation is a norm that stands as a prerequisite to the



exemption. The regulatory language applies to the land in agricultural use and the activity of the landowner asserting the exemption. As the Guidance notes, a “farm is both a business and a complex unit in which all components relate to one another.” Guidance, p. 1-9. The Department properly respects farms as entities making business decisions and responding to changing circumstances. Gilmore PFDT, para. 35.

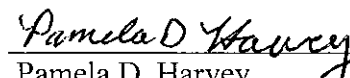
Although it may be normal for abutters cultivating cranberries to cooperate in their use of water, it is clear that these abutters are, unfortunately, not able to cooperate. In light of the constant adjustment of water required for successful cranberry cultivation and the history here of a failure to cooperate, Ms. Mann’s resolve to control of her water supply independently of Ms. Luke appears to be necessary. The parties focused on two incidents where Mr. Luke opened the sluice gate on Lot 5, and Ms. Luke’s urging that Ms. Mann can easily remedy the excess water on lot 6 whenever the Lukes choose to open their gate valve by opening her sluice gate. As a routine matter, Ms. Mann may not want to operate her bogs to release water at the same time that Ms. Luke wants to open the valve on lot 6. In the context of cranberry cultivation, normal maintenance may include flooding and release of flood water from bogs, but it does not require a cranberry grower to synchronize her activities with an abutter, particularly to her detriment.

I conclude that the activity also appears to conform to the statutory exemption for “maintenance of drainage and flooding systems of cranberry bogs.” M.G.L. c. 131, s. 40. The department asserted that the placement of fill in the drainage channel fell within this statutory exemption, but not the more specific regulatory exemption for cranberry operations. 310 CMR 10.04Agriculture (b) (13). See Gilmore PFDT, para. 13. Because the activity also meets the specific regulatory requirements for the statutory exemption for normal maintenance of land in agricultural use, I need not reach the question of whether the Department intended for the

regulatory provisions specific to cranberry cultivation to capture the entirety of the statutory exemption related to cranberry bogs.

### **CONCLUSION**

I recommend that the Department's Commissioner issue a Final Decision which sustains the SDA finding that the placement of fill in the drainage channel on Lot 4-6 was exempt from the Act and Wetlands Regulations as normal maintenance of land in agricultural use.

  
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)(e), 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.

## SERVICE LIST

In The Matter Of: Lowell C. Spring, LLC

Docket No. WET-2014-019 File No. SDA  
Manomet

Representative

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