

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
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March 24, 2008

In the Matter of

North Washington Wharf LLC and
Beverly Wharf LLC
(Wharf Project)

Docket No. DEP-07-477
File No. 006-1076
Boston

RECOMMENDED FINAL DECISION

SUMMARY

The project proponents' motion for summary decision is granted in this wetlands permit appeal. The petitioners have failed to raise a material factual dispute regarding their claims of coastal wetland alteration and compliance with relevant performance standards, significance of the coastal bank to the protection of groundwater supply, compliance with Standard No. 1 of the DEP's Stormwater Policy, and the adequacy of the permit application.

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Christopher Busch, Boston, for the Boston Conservation Commission.*

Bonney Cashin, Administrative Magistrate.

INTRODUCTION

In this wetlands permit appeal, the project proponents, North Washington Wharf LLC and Beverly Wharf LLC, propose to replace a dilapidated wharf in Boston's Inner Harbor with a new structure and to extend the existing Harborwalk along the edge of the new wharf. The project is opposed by a group of residents who own condominium units in a building on adjacent property.

The project proponents have moved for summary decision on all issues identified for adjudication. The petitioners oppose the motion and the DEP supports it. The proponents' motion is granted for the reasons set forth below.

DISCUSSION

A. Background

The 2.1 acre project site is owned by North Washington Wharf LLC and Beverly Wharf LLC. They propose to replace the existing Lovejoy Wharf with a new structure and to repair an existing timber bulkhead under the wharf. They also propose to construct a section of Boston's Harborwalk along the northern edge of the wharf. The Harborwalk will run from open space at Beverly Street and connect to an existing section under Washington Street. I will refer to this work collectively as the "Wharf Project."

The Wharf Project is proposed over Boston's Inner Harbor. The following wetland resource areas are on or near the project site: coastal beach, land subject to tidal action, land under the ocean, and land under the ocean that underlies an anadromous/catadromous fish run. *Vondrak Aff.* ¶ 20.¹ Additionally, the existing wharf is within land subject to coastal storm flowage and the existing timber bulkhead is a coastal bank. *Id.*

The project proponents plan to demolish one of the existing buildings on the site and to rehabilitate a second building. In addition, they intend to construct a pavilion on the reconstructed wharf and to construct a floating dock adjacent to and below the Harborwalk. All of this additional work is proposed under a separate wetlands permit filing, which is at issue in a separate appeal.

B. Standard for Summary Decision

A party moving for summary decision must show that there is no genuine issue as to any material fact and that it is entitled to a decision in its favor as a matter of law. *Matter of The*

Gallagher Group, Inc., Docket No. 2003-019, Recommended Final Decision, 12 DEPR 63, 64 (May 2, 2005), *adopted by Final Decision* (July 8, 2005). The motion shall be based on supporting affidavits, if any, the pleadings, depositions, answers to interrogatories, and admissions on file. *Id.* Once a motion for summary decision is made and supported, a party opposing the motion must come forward with competent evidence showing there is a genuine issue of material fact in dispute. *Matter of Palmer*, Docket No. DEP-05-072, Recommended Final Decision, 12 DEPR 161, 162 (September 16, 2005), *adopted by Final Decision* (November 10, 2005). Speculation and conjecture are insufficient to establish a material factual dispute. *The Gallagher Group, Inc.*, 12 DEPR at 64.

The project proponents move for summary decision on all of the issues identified for adjudication as set forth in the order attached to the prehearing conference report issued on December 13, 2007. In support of their motion, they rely on the affidavits of Julie A. Vondrak, a wetland scientist, and David Porter, P.E. As an initial matter, I find Vondrak and Porter competent to testify to the facts and opinions set forth in their affidavits. I further find, with respect to each issue, that the proponents have come forward with sufficient evidence to support their motion. It was, thus, the petitioners' responsibility to come forward with competent evidence showing there is a genuine issue of material fact in dispute.

C. Issues Identified For Adjudication

1. Protection of groundwater supply

The petitioners maintain that the installation of steel sheeting behind the existing timber bulkhead will result in the lowering of groundwater levels beneath their condominium building and expose the building's pilings, thus destabilizing it. They argue that M.G.L. c. 131, §40, the Wetlands Protection Act, protects groundwater, and that the area where the work will occur is

¹ The affiants' affidavits are cited as "Aff. ¶ __." Exhibits attached to an affidavit are cited as "Exh. __."

significant to groundwater supply. They contend that the DEP's wetlands permit is deficient because it fails to address this alleged groundwater alteration.

Under the wetlands regulatory scheme, the various wetland resource areas are presumed to be significant to one or more of eight wetlands interests, one of which is the protection of groundwater supply. 310 CMR 10.01 (2). The DEP may also determine that a resource area is significant to a particular interest for which no presumption is established. 310 CMR 10.24 (1). Absent such a determination by the DEP, a petitioner must come forward with sufficient evidence to support a finding that the resource area serves a wetland interest for which no presumption exists. *Matter of Blake Anderson*, Docket No. 95-085, Final Decision - Order of Dismissal, 4 DEPR 56, 57 (April 8, 1997). The petitioners must make this showing if they are to prevail on their groundwater alteration claim.

The parties agree that the timber bulkhead functions as a coastal bank, which is presumed significant to storm damage prevention and flood control. 310 CMR 10.30 (1). The petitioners have failed to come forward with any evidence that would support a finding that the coastal bank on the site is also significant to the protection of groundwater supply. The petitioners offer the affidavit of Michael F. Clark, P.E. Clark also is a Certified Professional in Erosion and Sedimentation Control®. He avers only that “[t]he area in which the proposed work is to be done is significant to the groundwater supply.” Clark Aff. ¶ 28. He offers no factual support for his opinion, however. It is, thus, insufficient to meet his responsibility to come forward with sufficient evidence to support a finding that the coastal bank on the site is significant to the protection of groundwater supply. *Matter of Cohen*, Docket No. 99-206, Final Decision, 8 DEPR 99, 104 (May 3, 2001). Consequently, Clark's testimony does not establish the existence of a material factual dispute.

This is not surprising, because the petitioners' basic theory misses the mark. The Act does not protect groundwater *per se*, rather it protects the ability of a resource area to serve the

groundwater supply interest. Even were I to assume that the coastal bank is significant to the groundwater supply interest, the petitioners have failed to show how the coastal bank would be altered so that it would no longer protect that interest. *See, Matter of Longo*, Docket No. 91-001, Decision on Motion for Reconsideration, 3 DEPR 139, 140 (June 5, 1996). Clark theorizes that the placement of the steel sheeting behind the bulkhead will result in lowering of the groundwater table and exposure of the pilings on which the petitioners' building rests. His opinion is not adequately supported. More significantly, it is, in essence, an attempt to prevent the alteration of groundwater directly in order to prevent property damage. Even were I to accept Clark's theory, there is no evidence that the project will alter the coastal bank so as to impair its ability to protect groundwater supply.

Clark also faults the project proponents for failing to provide information on soil conditions and groundwater pathways; however, this was not their responsibility when filing a motion for summary decision here. All the project proponents had to do in order to adequately support their motion was to point out that under the wetlands regulations a coastal bank is not presumed to protect groundwater.

The petitioners had an affirmative obligation to support their opposition with facts showing a genuine factual dispute: (1) about the alleged function of the coastal bank in protecting groundwater; and (2) how the project would interfere with that function. Clark fails to offer any facts to support his theory on impacts to groundwater, such as the permeability of the existing bulkhead, the existing groundwater levels and pathways beneath the building, or other existing conditions; or why water from other locations, including the Inner Harbor, would not equalize any lowering of the water table that might occur. Consequently, the petitioners' claim fails.

2. Coastal bank as a sediment source

The project proponents and the DEP agree that the coastal bank acts as a vertical barrier to stormwaters.² The petitioners argue that the coastal bank--that is, the bulkhead--must meet the performance standards at 310 CMR 10.30 (3) – (5) because it also supplies sediment to the coastal beach on the project site. According to the petitioners, the deteriorating timber wall allows the sediment behind it to erode, and the installation of the steel sheeting to reinforce the bulkhead will impede this movement of sediment.

Clark refers to statements made by Vondrak and Porter and concludes that they contradict one another regarding whether soil is eroding from behind the bulkhead. Clark Aff. ¶¶ 11 and 27. Clark misconstrues the statements made by Vondrak and Porter, however. Both agree that the purpose of the sheet piling is to stabilize the deteriorating wall and protect the building foundations behind it. Vondrak ¶ 24; Porter ¶ 17. Neither avers that the bank is eroding and supplying sediment to a coastal beach. *Id.*

Clark relies on Porter's statements that the existing bulkhead is degraded and that the sheet piling may prevent some water flow through the bulkhead in order to conclude that the existing bulkhead is permeable and that the sheet piling will prevent the movement of sediment from the coastal bank to the coastal beach and land subject to tidal action. Clark Aff. ¶ 27.

Clark's theory fails for lack of evidence that there is sediment movement to the coastal beach.

The timber bulkhead was intended to prevent erosion of the fill material behind it and thereby protect the building foundation. Porter ¶ 18. The fact that the bulkhead has not been maintained does not convert it into a sediment source. Once the bulkhead is reinforced with the sheet piling, it should continue to serve its intended purpose of protecting the building foundation.

² Vondrak also referred to a second area of coastal bank armored by granite block and riprap to the northwest of the property boundary, parallel with Beverly Street. Vondrak Aff. ¶23. This area is not at issue.

The petitioners have failed to show the presence of a material factual dispute on this issue as well.

3. Work in coastal bank buffer zone

The petitioners argue that the wharf reconstruction will take place in the buffer zone of the coastal bank. The proponents counter that all activities will be conducted from the water or the wharf as it is built out. Porter Aff. ¶ 10, Vondrak Aff. ¶ 20 and Exh. A. No work, thus, will occur in the buffer zone (Vondrak Aff. ¶ 20), which by definition is landward of the coastal bank. *See* 310 CMR 10.30 (6).

According to Clark, “it is likely” that the removal of asphalt from the existing wharf will take place from the land rather than the water. Clark Aff. ¶ 9. He bases his conclusion on his view that the proponents have not described this aspect of the Wharf Project in their permit application. Clark’s statement is pure speculation. In response to the project proponents’ clear statements that they intend to work from the water or from the wharf as it is constructed, Clark needed to explain why it would be necessary to conduct this activity from the land rather than from the water. Here again, the petitioners have failed to establish the existence of a genuine factual dispute about whether there will be work in the coastal bank buffer zone.

4. Alteration of land subject to coastal storm flowage

Land subject to coastal storm flowage is defined as “land subject to any inundation caused by coastal storms up to and including that caused by the 100-year storm, surge of record or storm of record, whichever is greater.” 310 CMR 10.04. The parties agree that the existing wharf is within land subject to coastal storm flowage. The wetlands regulations do not set out presumptions of significance or performance standards for this resource area. Prior decisions, however, have held that land subject to coastal storm flowage on particular sites is significant to the interests of storm damage prevention and flood control. *Matter of Longo*, Docket No. 91-001, Final Decision, 3 DEPR 24, 27 (February 7, 1996).

According to the proponents, the Harborwalk and reconstructed wharf will be built above the 100-year flood elevation, which is at 10 feet NGVD. Vondrak Aff. ¶¶ 21, 22. The steel sheeting will be installed on the seaward side of the bulkhead. Vondrak Aff. ¶ 22. The reinforced bulkhead will provide more storm damage prevention and flood control than the existing dilapidated structure. *Id.*

The petitioners contend that the proponents' plan shows work within land subject to coastal storm flowage. Clark states that Plan S-002, which uses a different datum than that used by Vondrak, shows work at elevation 109.0 feet. Clark Aff. ¶ 10. After making an adjustment for the different datum, he avers that, according to the plan, the steel pile cap and the concrete pile caps will be below 10 feet NGVD, "resulting in permanent impacts in the [land subject to coastal storm flowage]." *Id.*

The petitioners have found a factual dispute; however, they have failed to show that it is material. Clark fails to explain how, if at all, the presence of the pile caps within land subject to coastal storm flowage will interfere with the resource area's ability to serve the interests of storm damage prevention and flood control.

5. Alteration of coastal beach/land subject to tidal action

A land area within the project site is bounded by the bulkhead and extends for a short distance underneath the existing wharf to the mean low water line. Vondrak Aff. ¶ 30. The project proponents initially identified this area as land subject to tidal action. The DEP characterized it as coastal beach. *Id.* Vondrak states that the area can be characterized as either land subject to tidal action or coastal beach. *Id.*

The DEP's analyst, Rachel Freed, explains in her affidavit that the term "land subject to tidal action" is used in the definition of a coastal beach at 310 CMR 10.27 (2) and is also defined at 310 CMR 10.04. Freed Aff. ¶ 3. She states that land subject to tidal action has the same

performance standards as coastal beach. *Id.* The petitioners agree with the DEP's classification of the area as a coastal beach. Clark Aff. ¶ 13.

A coastal beach and land subject to tidal action are separate resource areas. *Compare* 310 CMR 10.02 (1) (a) and 310 CMR 10.02 (1) (c). A coastal beach is defined as:

unconsolidated sediment subject to wave, tidal and coastal storm action which forms the gently sloping shore of a body of salt water and includes tidal flats. Coastal beaches extend from the mean low water line landward to the dune line, coastal bankline or the seaward edge of existing man-made structures, when these structures replace one of the above lines, whichever is closest to the ocean.
310 CMR 10.27 (2).

Land subject to tidal action is "land subject to the periodic rise and fall of a coastal water body, including spring tides." 310 CMR 10.04. The wetland regulations do not set out presumptions of significance or performance standards for work in this resource area. On a given site, the two resource areas may be coextensive.

Neither Freed, Vondrak, or Clark describe the physical characteristics of the area in any detail, perhaps because there is no real dispute among them for the purposes of the motion for summary decision. Based on the undisputed facts, it would appear that the timber bulkhead is the landward limit on this site of each of these resource areas. In any case, Vondrak explains how the proposed work within the area complies with the performance standards for work on a coastal beach. Vondrak Aff. ¶33. As described by Vondrak, the work includes cutting some existing piles at the mudline, removing other piles, installing new piles, and clearing debris. Vondrak Aff. ¶ 31. She also explains how this work will contribute to the protection of the interests of the Act to the extent it is within land subject to tidal action. Vondrak Aff. ¶ 32.

The petitioners have not provided sufficient evidence regarding their opposing view that the work does not comply with the coastal beach performance standards. Clark suggests that soil eroding from behind the timber bulkhead supplies sediment to the coastal beach on the site. Clark Aff. ¶ 27. He fails to discuss, however, the relevant performance standards for coastal

beach set forth at 310 CMR 10.27 (3) and (6). He also fails to identify the wetlands interests served by land subject to tidal action at the site and explain how the project would interfere with such functions. The petitioners, consequently, have failed to show the existence of a material factual dispute.

6. Stormwater management standards

310 CMR 10.05 (6) (b) provides that “stormwater shall be managed according to the standards established by the Department in its Stormwater Policy.” The Policy, published in 1996, sets forth nine stormwater standards. Standard No. 1, at issue in this appeal, provides that “[n]o new stormwater conveyances (e.g., outfalls) may discharge untreated stormwater directly to or cause erosion in wetlands or waters of the Commonwealth.”

The project proponents’ position is two-fold. Vondrak avers that the runoff generated as a result of the Wharf Project will be rainfall sheeting from the concrete and timber decks into the ocean, which will be uncontaminated, Vondrak Aff. ¶ 34, and, therefore, complies with Standard No. 1. Vondrak Aff. ¶ 35. The proponents argue that this runoff is like roof runoff, which, according to the Stormwater Policy, generally should be considered as uncontaminated and need not be treated.

The project proponents also argue that a stormwater management plan has been developed to address the temporary use of the wharf as a staging area for the redevelopment proposal that is proposed under a separate wetlands permit application. Stormwater management associated with the use of the wharf as a staging area, therefore, is not a part of the Wharf Project. Nevertheless, the proponents note, under the plan, runoff that occurs when the wharf is used as a staging area will be directed from the deck surface to the storm drain system beneath Beverly Street. Consequently, they submit, Standard No. 1 will be met in this circumstance as well.

The petitioners argue that the proponents' affiants contradict themselves and, thus, a material factual dispute exists. Clark avers that while Vondrak states that the runoff will come from clean surfaces and thus be uncontaminated, Vondrak and Porter state that construction activities will take place on the wharf as it is built out. Clark Aff. ¶ 22. Clark sees these statements as contradictory. *Id.* He concludes that the wharf "will be subjected to significant non-point source pollution during its use while [it] is being built out." Clark Aff. ¶ 17.

The petitioners also argue that the stormwater management plan proposed for the redevelopment project is likely to be inadequate because, according to Clark, the wharf is "likely to be subject to deposition of materials from temporary parking, and storage of materials." Clark Aff. ¶ 24.

Clark fails to provide any support for his opinion that untreated or insufficiently treated runoff will be generated by construction activities while the wharf is constructed. He relies on the statements of Vondrak and Porter, who, while they do not detail the construction activities they refer to, nonetheless maintain that the runoff will be uncontaminated. Similarly, Clark fails to support his opinion that, when the completed wharf is used as a temporary staging area for the redevelopment project, runoff will be inadequately treated under the proposed stormwater management plan. In any event, that use of the wharf and the plan to control stormwater runoff associated with it is proposed under another wetlands permit, not the one at issue here. Consequently, Clark's objections are outside the subject matter of this appeal and, thus, immaterial.

In addition, the petitioners contend that the Wharf Project does not qualify as a "redevelopment project" under the Stormwater Policy's Standard No. 7.³ This provision provides that the redevelopment of previously developed sites must meet the stormwater standards to the maximum extent practicable. Redevelopment projects are defined to exclude

those that result in a net increase in impervious areas. According to Clark, the Wharf Project will create 20,000 square feet of impermeable surface. Clark Aff. ¶ 17.

The project proponents did not seek summary decision on this basis, however, because they contend the standard is irrelevant since the project complies fully with the relevant stormwater standards. Accordingly, it is not material whether a given standard is met “to the extent practicable” when the relevant question is whether the standard is fully satisfied.

Clark further avers that Standards No. 2 (TSS removal) and No. 9 (O&M Plan) are not met. Clark Aff. ¶¶ 18 and 19. Compliance with these standards was not raised by the petitioners or identified at the prehearing conference as an issue to be decided, however.

7. Land under ocean/ fish run

The existing wharf is within a resource area known as land under the ocean. The project proponents maintain that the Wharf Project complies with the performance standards at 310 CMR 10.25 (5) for work in this resource area. The project proponents explain how the removal and installation of pilings and the removal of debris will not alter the bottom topography or increase storm damage or erosion of coastal resource areas. Vondrak Aff. ¶ 29(a). Turbidity will be controlled by a silt curtain. *Id.* Furthermore, the project will improve bottom conditions by reducing the number of pilings and removing debris. *Id.* Vondrak also explains why the wharf construction will not alter water circulation, or change water quality. Vondrak Aff. ¶ 29(b). She also explains why 310 CMR 10.25 (6) (b), (c), and (e) do not apply to the proposed work. *Id.*

Since this area of the Boston Inner Harbor has been designated by the Department of Marine Fisheries as a fish run, the Wharf Project also must satisfy the performance standards at 310 CMR 10.35 (3) and (4). The project proponents submit that the Wharf Project complies with these standards as well. According to Vondrak, the performance standards for projects within a

³ Compliance with Standard No. 7 was not identified as an issue to be decided at the prehearing conference. I

fish run are also satisfied. The repairs and improvements to the coastal bank and the replacement of existing timber piles with fewer steel piles will not impede or obstruct fish migration or change the flow or volume of water. Vondrak Aff. ¶29 (c). The species that are present in the fish run do not use the project site for spawning or nursery habitat. *Id.* Therefore, 310 CMR 10.35 (3) (c) does not apply. *Id.* Finally, the DEP's permit contains a condition prohibiting work that will disturb bottom sediments within the fish run between February 15 and June 15 in any year. Vondrak Aff. ¶ 29 (d). Thus, 310 CMR 10.35 (4) is satisfied. *Id.*

The petitioners counter that the project proponents have not demonstrated that the Wharf Project meets the applicable performance standards. According to Clark, a plan of the existing topography, a description of the type and quantity of debris and of the debris removal method is necessary to determine if 310 CMR 10.25 (5) is satisfied. Clark Aff. ¶ 34.

In addition, regarding 310 CMR 10.25 (6), Clark avers that the decrease in pile density and the removal of debris will change water circulation under the wharf. Clark Aff. ¶ 35. He further states that the decrease in pile density and the removal of debris will likely result in an increase in current and wave energy at the site with an increase in erosive force leading to a change in the distribution of sediment grain size. *Id.* Finally, he maintains that the discharge of untreated stormwater would change water quality. *Id.*

Clark fails to show that the project proponents' proposal does not comply with 310 CMR 10.25 (5). Assuming, at best, that Clark's testimony shows that there is a factual dispute regarding the changes in topography resulting from the removal of debris, his testimony does not go far enough. The regulation prohibits adverse effects caused not simply by changes in bottom topography, but changes that will increase storm damage or the erosion of certain coastal resource areas. Clark fails to address why the information he asserts the proponents failed to provide is necessary in order to prevent changes in bottom topography that will increase storm

damage or the erosion of coastal resource areas. Consequently, any factual dispute he may have shown is not material.

Clark fails to show that a decrease in pile density and removal of debris from the ocean floor would lead to a violation of 310 CMR 10.25 (6). He fails to explain how and to what degree the impacts he alleges would occur. As discussed in the previous section, Clark has not shown that stormwater would be inadequately treated. Consequently, he fails to establish that water quality would be adversely affected. The petitioners thus fail to show the presence of a material factual dispute on this issue as well.

8. Adequacy of permit application

The petitioners contend that the project proponents have not described in sufficient detail (i) how the reconstructed wharf will be used as a staging area during construction of the redevelopment project, (ii) the portion of the Harborwalk on the site, and (iii) the Harborwalk's connections to adjacent parcels. The project proponents disagree. They maintain that the use of the reconstructed wharf as a staging area for the redevelopment project is a part of that work and, thus, properly described in that project's permit application. The wharf will not be used as a staging area unless and until the redevelopment project goes forward.

The petitioners raise stormwater management as a principal concern, yet, as previously discussed, a stormwater management plan was submitted to the DEP as part of the redevelopment project's permit application. The only issue involving work on the present project concerns the proposed Harborwalk extension.

The project proponents note that Special Condition No. 53 of the DEP's permit states that it applies to the construction of a Harborwalk. The portion of the Harborwalk on the site, including connections to existing portions of it, is shown on the project plans and discussed in the application. Vondrak Aff. ¶¶ 9, 15, 16; Exh. A and F.

Clark states that it is unclear whether the Harborwalk is permitted under the Wharf Project. Clark Aff. ¶ 25. The petitioners' chief concern appears to be the extent to which the Harborwalk will be used by the public. Clark Aff. ¶ 21. The petitioners argue that the wharf may be used as a staging area for a minimum of two years and may not be accessible to the public during that time.

The petitioners appear to have ignored the numerous references to the Harborwalk in the project proponents' application materials. The location, dimensions, materials, and general construction methodology are all provided by the proponents, as well as the locations where the Harborwalk on the site will connect to existing portions of it. The construction of the Harborwalk is clearly authorized by the DEP's permit. The use of the Harborwalk as a pedestrian walkway, as well as the use of the wharf for its usual purpose, are implicitly authorized by the permit. Safety concerns may limit those uses during the time when the wharf is used as a staging area. None of this, however, creates any ambiguity about the work allowed under the permit.

I also note that the petitioners fail to raise a wetlands concern related to the use of the wharf and Harborwalk. They fail to show how any wetlands interest is adversely affected by the asserted deficiencies in the permit application.

A petitioner who challenges the sufficiency of information that the DEP had before it when making its permitting decision bears a heavy burden. *Matter of Norton Youth Soccer League, Inc.*, Docket No. 95-035, Final Decision, 3 DEPR 100, 101 (May 22, 1996). A petitioner must show that the missing information was so critical to the DEP's review that it was unable to assess the impact of the work on the wetlands and could not have developed conditions that satisfy the regulatory performance standards and protect the interests of the Act. *Id.* The petitioners have not met their burden here. The use of the wharf as a staging area for the redevelopment project is not a part of the work proposed here. The Harborwalk is described

sufficiently so that it may be conditioned in accordance with the wetlands regulations. The petitioners have failed to raise a material factual dispute on this issue.

DISPOSITION

The project proponents' motion for summary decision is granted in its entirety. The appeal is dismissed. The DEP shall issue a final order of conditions that identifies the correct site owners, in accordance with the parties' agreement at the prehearing conference.

Bonney Cashin
Administrative Magistrate

NOTICE

This decision is a recommended final decision of the Administrative Magistrate. It has been transmitted to the Commissioner of the Department of Environmental Protection for her final decision in this matter. This decision is therefore not a final decision subject to reconsideration and may not be appealed to the Superior Court pursuant to M.G.L. c. 30A, §14(1). 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 portion of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.