

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
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May 20, 2008

In the Matter of

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

Docket No. DEP-07-560
File No. 006-1097
Boston

RECOMMENDED FINAL DECISION

SUMMARY

In this wetlands permit appeal, the petitioners have failed to raise a material factual dispute regarding their claims of information insufficiency, noncompliance with standards for work in a coastal bank and its buffer zone, alteration of land subject to coastal storm flowage, performance standards for work within land under the ocean and fish run, protection of groundwater supply, and compliance with the DEP's standards for managing stormwater.

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C. Dylan Sanders, Esq. (DLA Piper US LLP) Boston, for the project proponents.
Samuel Bennett, Esq. Boston, for the Department of Environmental Protection.
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 redevelop a waterfront site in Boston known as Lovejoy Wharf. The DEP issued a wetlands permit under M.G.L. c. 131, §40, the Wetlands Protection Act, allowing the project. A group of residents who own condominium units in a building on adjacent property oppose the project and filed a request for an adjudicatory appeal.

Following a prehearing conference, the project proponents move for summary decision on all issues identified for adjudication. The petitioners oppose the motion. The DEP did not respond to it. The project 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. The site is occupied by two buildings at 160 North Washington Street and at 131 Beverly Street, and an approximately 36,600 square foot wharf that extends over a portion of Boston's Inner Harbor. The Beverly Street building and the wharf are dilapidated and in disrepair.

The project proponents propose to demolish the Beverly Street building and replace it with a new structure that will provide residential and commercial space and a parking garage. The Washington Street building will be rehabilitated. In addition, the project proponents intend to construct a pavilion on the wharf and a floating dock adjacent to it. I will refer to this work collectively as "the Redevelopment Project."

Under an earlier-filed wetlands permit application, the project proponents sought permission to replace the existing Lovejoy Wharf with a new structure, to repair an existing timber bulkhead under the wharf, and 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 will connect to an existing section of it under Washington Street. I will refer to this work collectively as the "Wharf Project." The DEP allowed this work under a separate wetlands permit, which the petitioners here also appealed.¹ The Wharf Project is not the subject of this appeal. Nonetheless, many of the petitioners' claims relate to the relationship between the Wharf Project and the

¹ Matter of North Washington Wharf LLC and Beverly Wharf LLC, (Wharf Project), Docket No. DEP-477, Recommended Final Decision (March 24, 2008), *adopted by Final Decision* (April 18, 2008).

Redevelopment Project and the extent to which the work proposed as a part of each project is or is not conditioned by the DEP's wetlands permits.

The parties agree that the wetland resource areas known as land under the ocean and land under the ocean that underlies an anadromous/catadromous fish run are affected by the Redevelopment Project. *See generally* 310 CMR 10.25 and 310 CMR 10.35. The parties further agree that the existing wharf and proposed dock are within land subject to coastal storm flowage, the existing timber bulkhead is a coastal bank, and the existing buildings are within the coastal bank's 100-foot buffer zone. *See generally* 310 CMR 10.30.²

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 the presence of a material factual dispute. *The Gallagher Group, Inc.*, 12 DEPR at 64. An opinion without factual support also is insufficient to establish the presence of a material factual dispute. *See Matter of Pacheco*, Docket No. 98-072, Ruling on Applicant's Motion for Summary Decision; Issues List, 6 DEPR

² Although land subject to coastal storm flowage is defined at 310 CMR 10.04, it is not addressed in a separate section of the wetlands regulations.

84 (April 14, 1999); *Cf. Matter of Haddad*, Docket No. 98-028, Ruling on Motion for Directed Decision and Motion to Dismiss, 6 DEPR 13, 14 (January 9, 1999) (expert’s opinion “worth nothing” without testimony demonstrating the basis for it).

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 November 21, 2007. Their motion refers to the affidavits of Julie A. Vondrak, a wetland scientist, and David Porter, P.E.³ As an initial matter, I find Vondrak competent to testify to the facts and opinions set forth in her affidavit. I further find, with respect to each issue, that the project 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. They offer the affidavit of Michael F. Clark, P.E. Based on Clark’s qualifications as set forth in his affidavit, I find he is competent to express the opinions therein.⁴

C. Issues Identified For Adjudication

1. and 2. Adequacy of permit application and the DEP’s wetlands permit.

The petitioners contend that various deficiencies in the project proponents’ permit application and in the DEP’s permit render both incomplete and inadequate. They are incorrect on all counts. The proposed work is described in sufficient detail so that the DEP could condition it in accordance with the regulatory requirements. The petitioners present no evidence to the contrary.

³ The project proponents resubmitted the same affidavit Porter prepared for the Wharf Project appeal, noting that it was supplied insofar as groundwater supply was at issue in this appeal. His opinion is based on the work proposed as part of the Wharf Project. Accordingly, I do not consider his affidavit applicable to the effects of the work proposed as part of the Redevelopment Project to the groundwater supply interest.

⁴ Clark did not append a resume to his affidavit.

a. Use of reconstructed wharf as staging area.

According to the project proponents, the reconstructed wharf is outside the limits of land subject to coastal storm flowage. Vondrak Aff. ¶ 13.

The petitioners complain that the project proponents have not described in sufficient detail how the reconstructed wharf will be used as a staging area during construction of the Redevelopment Project. They argue that the use of the reconstructed wharf as a staging area means that work will take place within the resource area known as land subject to coastal storm flowage. Clark avers that “items” below the dock are within a “resource area.” Clark Aff. ¶¶ 2, 10.⁵ He further avers that “structures” are below the 100 year flood elevation, which defines the limit of the resource area.⁶ Clark Aff. ¶ 9. Clark finally states that the area that will be used for two years of uncontrolled staging and construction is “literally right over Boston Harbor and in the resource area.” Clark Aff. ¶ 2.

Clark’s averments are vague and thus inadequate. While it is likely that the resource area to which he is referring to land subject to coastal storm flowage, he does not identify it as such. Nor does he identify the structures to which he refers. He does not specify which performance standards would be violated or explain how an interest of the Act would not be protected. His testimony is thus wholly insufficient to establish the presence of a material factual dispute. *Matter of Pacheco*, 6 DEPR at 84. According to the project plans as well as Vondrak’s affidavit at ¶ 13, the reconstructed wharf will be outside the limits of land subject to coastal storm flowage. Clark does not show otherwise.

⁵ The affiants’ affidavits are cited as “Aff. ¶ __.” Exhibits attached to an affidavit are cited as “Exh. __.”

⁶ Clark may be raising the same argument that he raised unsuccessfully in the Wharf Project appeal. *See North Washington Wharf LLC and Beverly Wharf LLC, (Wharf Project)*, Recommended Final Decision at 7-8. If so, his claim would fail here for the same reasons, in addition to its vagueness.

b. Stormwater management.

The petitioners complain that the stormwater management report submitted to the DEP under the Wharf Project filing and incorporated into conditions in the DEP's permit for that project is inadequate. In addition, they complain that the actions outlined in the report do not apply to the Redevelopment Project because the report's actions are not made enforceable by a condition of the permit under appeal here.

Clark implicitly concedes nonetheless that he had enough information to review the merits of the Redevelopment Project's compliance with the DEP's stormwater management standards. See discussion at 17-21 *infra*. Hence his objections here are not material. 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 cannot develop conditions that meet the performance standards and contribute to the protection of the interests of the Act. *Id.* The petitioners have not met that heavy burden here.

c. Use of floating dock.

The petitioners assert that, according to the project proponents' waterways licensing application, they propose to relocate an MBTA water shuttle service to the floating dock. The petitioners maintain that this level of use for the dock was not described as part of the Redevelopment Project wetlands permit application and thus was not addressed in the permit conditions. Clark Aff. ¶ 2. According to Clark, the water by the dock is not deep enough, particularly during low tide. Clark Aff. ¶ 4. The vessels will cause propeller backwash or "prop

wash” and thereby disturb sediments and alter water circulation. *Id.* This problem would, in Clark’s view, occur in any event but would be exacerbated by the level of use associated with the MBTA water shuttle service.

The petitioners are correct that the MBTA’s use of the dock was not described in the wetlands application and permit. The DEP’s wetlands permit was issued on April 18, 2007; the waterways license application apparently was submitted on October 23, 2007. Nothing in the record addresses whether the DEP was aware of the MBTA water shuttle service relocation when it issued its wetlands permit. The relocation was not addressed in proponents’ motion.

Certainly the better practice on the project proponents’ part would have been to base their motion on the project as proposed at the time they filed their motion. For the purposes of deciding whether their motion is made and supported as required, however, I cannot say, based on the permit application as submitted and the permit conditions, that the motion is inadequately supported.

More significantly, Clark incorrectly concludes that the DEP’s permit does not condition vessels’ use of the dock. Special Condition No. 59 of the DEP’s permit provides for at least 2.5 feet of clearance and prohibits vessels from grounding with the tide. According to Clark, a minimum of 2 feet of clearance is required. Clark Aff. ¶ 12. The permit condition, thus, is more protective than his recommendation.

Clark also takes the position that the DEP’s permit, particularly Special Condition No. 60, allows dredging. Clark Aff. ¶¶ 12, 35. He opines that dredging is certain to occur from the heavy construction and use of the dock area by vessels. Clark Aff. ¶¶ 3, 35. Clark simply misreads Special Condition No. 60; it does not permit dredging. Clark never identifies the heavy construction to which he refers as a cause of dredging. Dredging from prop wash will not occur

when the DEP's permit requires a minimum clearance in excess of what Clark considers necessary. Consequently, the petitioners fail to raise a material factual dispute regarding the need for additional permit conditions.

d. Use of public pavilion.

According to Vondrak, the public pavilion is not within land subject to coastal storm flowage. Vondrak Aff. ¶¶ 13, 44. The pavilion will be located over the newly constructed wharf. Vondrak Aff. ¶ 23.

Clark maintains nonetheless that extensive use of the public pavilion on the wharf with its “attendant stormwater and trash issues” is not conditioned in the DEP's permit. Clark Aff. ¶¶ 2-4.

Clark, however, does not disagree with Vondrak's opinion that the limit of the resource area is at elevation 10. He does not specifically dispute Vondrak's opinion that the pavilion is outside the limits of the resource area. The DEP may not regulate work that occurs outside of a resource area or its buffer zone unless and until it alters the area. 310 CMR 10.02 (2) (c). The petitioners have not raised a material factual dispute concerning whether the pavilion lies within the resource area; and their claim that activities upon it should be conditioned cannot prevail.

e. Erosion and sedimentation plan.

The petitioners argue that the permit application refers to a section on erosion and sedimentation controls that does not exist. In their view the application is, thus, incomplete; and the DEP could not properly condition the work. Clark Aff. ¶ 2.

The petitioners further complain that the DEP inappropriately attempted to address the deficiency by requiring the project proponents to submit a plan after the permit became final. In

the petitioners' view, the plan should have been submitted as part of the application so that the information was available to the public for review and comment.⁷

The permit application includes proposed erosion and sedimentation controls. Notice of Intent, Att. A at 12.⁸ The project proponents submitted sufficient information about their plans to control erosion and sedimentation so that the DEP was able to affirm a condition that set out specific elements of an erosion and sedimentation control plan. *See Norton Youth Soccer* at 3 DEPR 102. DEP had sufficient information about the erosion and sedimentation control measures, particularly as they concerned the stormwater management plan. *Vondrak Aff.* ¶¶ 54, 67, and 68. Moreover, according to *Vondrak*, the Boston Conservation Commission routinely requires such a plan to be filed shortly before construction after construction activities are sufficiently finalized. *Vondrak Aff.* ¶ 68. The petitioners failed to raise a material factual dispute sufficient to show that the level of information was so inadequate the DEP could not craft enforceable permit conditions.

3. Coastal bank as a sediment source

The project proponents aver that no work on the coastal bank is proposed as part of the Redevelopment Project. *Vondrak Aff.* ¶ 15. Compliance with the performance standards for work on a coastal bank that is a sediment source is, thus, irrelevant. *Id.*

The petitioners argue that the coastal bank--that is, the timber bulkhead--must meet the performance standards at 310 CMR 10.30 (3) – (5) because it supplies sediment to the coastal beach on the project site in addition to acting as a vertical barrier to stormwaters.⁹ The

⁷ The petitioners raise a similar argument concerning the future submission of plans for the maintenance of and signage for the Harborwalk. The Harborwalk is not part of the work proposed for the Redevelopment Project; hence, I do not address this argument.

⁸ A copy of the Notice of Intent Att. A is part of the DEP's submission dated December 18, 2007. The Notice of Intent submitted with the *Vondrak* Affidavit is for the Wharf Project.

⁹ *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.

petitioners pursued the same argument in the Wharf Project appeal. They maintain that the deteriorating timber wall allows the sediment behind it to erode. The petitioners argue that the steel sheeting the proponents intend to install in order to reinforce the bulkhead will impede this movement of sediment.

Clark's affidavit does not contradict Vondrak's. To the extent he describes work proposed on the coastal bank, it is proposed under the Wharf Project. Clark Aff. ¶¶ 5 and 6. Accordingly, he fails to raise a material factual dispute regarding the work that is proposed in the Redevelopment Project.¹⁰

4. Work in coastal bank buffer zone

According to Vondrak, work in the coastal bank buffer zone is limited to building rehabilitation, construction, and parking. Vondrak ¶ 24. The building foundations are 3-10 feet from the top of the bank. Vondrak ¶ 19. The Redevelopment Project will not impact the coastal bank. Vondrak ¶ 15. Additionally, the proponents maintain that no work is proposed in the coastal bank buffer zone as part of file no. 1076, the Wharf Project.¹¹ No wharf reconstruction work, thus, will occur in the coastal bank buffer zone. Vondrak Aff. ¶ 20.

The petitioners argue that the DEP's wetlands permit does not condition work in the coastal bank's buffer zone. They assert that the wharf is within 100 feet of a resource area; presumably, they refer to the coastal bank. As they did in the Wharf Project appeal, they rely on Clark's opinion that the removal of asphalt from the existing wharf will occur from the land. The petitioners further argue that use of the reconstructed wharf as a staging area is not conditioned in the permit.

¹⁰ On this issue, the petitioners further argue that the floating dock will have impacts not examined or conditioned in the DEP's wetlands permit. They fail to identify what these impacts are or how they might affect the coastal bank. Clark's affidavit does not provide any insight into what these impacts might be.

¹¹ I suspect that the proponents refer to file number 1076 because I did so when drafting the issues to be decided. I referred incorrectly to the file number for the Wharf Project, not the Redevelopment Project.

No wharf reconstruction is proposed under the Redevelopment Project. To the extent the petitioners argue that the wharf reconstruction will alter the coastal bank's buffer zone, they raise a claim that cannot be adjudicated in this appeal. They cannot, thus, prevail as a matter of law. To the extent they argue that use of the reconstructed wharf as a staging area for the Redevelopment Project will alter the coastal bank's buffer zone, they are mistaken about the buffer zone's location. By definition it is landward of the coastal bank, *i.e.*, the bulkhead. *See* 310 CMR 10.30 (6). The wharf is seaward of the bulkhead. Consequently, as a matter of law, the wharf cannot lie within the buffer zone of the coastal bank.

5. 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 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. *Eg., Matter of Longo*, Docket No. 91-001, Final Decision, 3 DEPR 24, 27 (February 7, 1996). The parties do not dispute that the land subject to coastal storm flowage on this site is significant to these two wetlands interests.

According to the project proponents, the floating dock is the only portion of the Redevelopment Project within land subject to coastal storm flowage because it is below the 100-year flood elevation of 10 feet NGVD. *Vondrak Aff.* ¶¶ 13, 44. The dock will rise and fall with the tide; and the pilings are spaced and sized to allow wave energy and water to pass relatively unimpeded through them. *Vondrak Aff.* ¶ 44.

The petitioners note that the project proponents concede that the floating dock is within land subject to coastal storm flowage. They further contend, however, that the proponents intend to relocate the MBTA water transit terminal to the floating dock and, thus, within land subject to coastal storm flowage. They claim the project proponents have not examined the impacts associated with this use. Clark Aff. ¶ 9. Clark also contends that “structures” penetrate the dock and are within land subject to coastal storm flowage. Clark Aff. ¶¶ 9, 10. Finally, the petitioners aver that the nine piles on which the dock will rest will alter sediment movement, water speed, and turbidity. Clark Aff. ¶ 11.¹²

The petitioners’ arguments fail on all counts. First, Clark refers to the Landscape Plan for the project¹³ as showing structures within land subject to coastal storm flowage, but he fails to identify precisely what the structures are or describe how they will impair the ability of the resource area to serve the interests of storm damage prevention and flood control. Furthermore, the Landscape Plan is conceptual and does not have the limits of land subject to coastal storm flowage shown on it.

Second, Clark fails to identify impacts to land subject to coastal storm flowage resulting from the relocation of the MBTA water transit terminal. He fails to show how the wetland interests served by the resource area are affected by the use of the dock and any changes resulting from the MBTA’s use of it. Clark assumes that the dock’s use will be more intensive, but he does not quantify the increased activity in any way, nor does he explain why the

¹² The petitioners also argue that the project proponents have not shown that the structures within land subject to coastal storm flowage will not be damaged by flooding. The petitioners assert that such a showing is required by “the Act under 310 CMR 10.04.” I assume that the petitioners are referring to the definition of land subject to coastal storm flowage at 310 CMR 10.04. I do not read that definition as requiring the project proponents to show no damage by flooding.

¹³ The Landscape Plan is Figure 6-1 of Attachment H to the permit application, that is, the Notice of Intent.

conditions in the DEP's permit are now insufficient. Increased use of the dock does not necessarily require a conclusion that the wetlands permit is insufficiently protective.

Finally, Clark fails to support his conclusion that the nine pilings will affect sediment movement, water speed, and turbidity within land subject to coastal storm flowage so that its ability to serve the wetlands interest of storm damage prevention and flood control will be impaired. Particularly where performance standards are not set out in the wetlands regulations, it is necessary for the petitioners to have alleged sufficient facts to raise a material factual dispute about whether the proposed work would alter the resource area and harm its ability to serve the wetlands interests connected with it. In all respects, therefore, Clark's testimony lacks an adequate factual basis. *See Pacheco*, 6 DEPR at 84. With respect to his statements about the use of the dock, his testimony is speculative as well. *Gallagher Group*, 12 DEPR at 64.

6. Land under ocean/fish run

The wharf and the proposed floating dock are within the resource area known as land under the ocean. The project proponents maintain that the Redevelopment Project complies with the performance standards at 310 CMR 10.25 (5) and (6) for work in land under the ocean. *Vondrak Aff.* ¶¶ 33, 34. Because this area of the Boston Inner Harbor has been designated by the Department of Marine Fisheries as a fish run, the Redevelopment Project also must satisfy the performance standards at 310 CMR 10.35 (3) and (4). The project proponents submit that the Redevelopment Project complies with these standards as well.

According to the project proponents, the installation of the nine pilings to support the floating dock will not alter the bottom topography so as to increase storm damage or the erosion of coastal resource areas. *Vondrak Aff.* ¶ 33. Turbidity will be controlled by a silt curtain. *Id.* *Vondrak* also explains why the floating dock construction will not alter water circulation, or

change water quality, Vondrak Aff. ¶ 35, and explains why 310 CMR 10.25 (3) (4), and (7) do not apply to the proposed work. Vondrak Aff. ¶¶ 32 and 36.

According to Vondrak, the performance standards for projects within a fish run are also satisfied. Installation of the nine pilings will not impede or obstruct fish migration or change the flow or volume of water. Vondrak Aff. ¶ 39. The species that are present in the fish run do not use the project site for spawning or nursery habitat. *Id.* 310 CMR 10.35 (3) (c), therefore, does not apply. *Id.* Finally, no dredging, disposal of dredged material, or filling is authorized in the fish run. Vondrak Aff. ¶ 41. The DEP's permit also contains a condition that prohibits work that will disturb bottom sediments within the fish run between February 15 and July 15 in any year. *See* Special Condition No. 70. The project proponents will consult with the Division of Marine Fisheries regarding the timing of the work. Vondrak Aff. ¶ 41. 310 CMR 10.35 (4), thus, is satisfied. *Id.* 310 CMR 10.35 (5) does not apply. Vondrak Aff. ¶ 42.

The petitioners counter that the project proponents have not demonstrated that the Redevelopment Project meets the applicable performance standards, particularly as to the distribution of sediment grain size and impacts to water quality. Clark maintains that dredging will be required because a portion of the floating dock is in very shallow water and without dredging, the minimum two feet of clearance needed to avoid impacts at low tide from prop wash cannot be maintained. Clark Aff. ¶¶ 11-13.

Clark further maintains that the bottom topography will be affected. Clark Aff. ¶ 16. In his opinion, the pilings will continually disturb the sediments by altering water circulation around them. Clark Aff. ¶ 14.

Clark fails to raise a material factual dispute. As discussed previously at 7, his opinion regarding dredging is incorrect. In all other respects his opinion lacks a factual basis and is, thus, inadequately supported. *See Pacheco*, 6 DEPR at 84.

7. Protection of groundwater supply.

The petitioners maintain that the installation of a parking garage in the 131 Beverly Street building and 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. The Act protects groundwater, they contend, and the proposed work will alter it. Yet, in their view, the DEP's wetlands permit fails to address this alteration.

Under the wetlands regulatory scheme, the various resource areas are presumed significant to one or more of the eight wetlands interests set forth in the Act, one of which is the protection of groundwater supply. 310 CMR 10.01 (2). The DEP also may determine on a case-by-case basis that a resource area is significant to a particular interest for which no presumption is established. 310 CMR 10.24 (1). When the DEP has not done so, in the context of a hearing, a petitioner must come forward with evidence that would support a finding that the resource area serves a wetland interest for which no regulatory presumption exists. *Matter of Longo*, Docket No. 91-001, Decision on Motion for Reconsideration (June 5, 1996) citing *Matter of LaFrance*, Docket No. 84-036, Final Decision (May 24, 1993.) *See also Matter of Anderson*, Docket No. 95-085, Final Decision - Order of Dismissal, 4 DEPR 56, 57 (April 8, 1997) (discussing whether land subject to coastal storm flowage is significant to the wetlands interests of public or private water supply or prevention of pollution).

A coastal bank is presumed significant to storm damage prevention and flood control. 310 CMR 10.30 (1). On this site, the parties agree that the timber bulkhead functions as a coastal bank. Under the application at issue here, however, no work will take place on the coastal bank. The installation of the steel sheet piling behind the bulkhead is proposed under the Wharf Project. Hence, the impacts that the petitioners claim are associated with the installation of the steel sheet piling are not at issue in this appeal.

The existing buildings at Washington Street and 131 Beverly Street are within the 100 foot buffer zone of the coastal bank. According to 310 CMR 10.24 (1), work in the buffer zone of a coastal bank must be conditioned to protect the wetlands interests identified for the bank. These interests would include storm damage prevention and flood control to which the coastal bank is presumed to be significant as well as any additional interests to which the coastal bank is determined to be significant, as outlined above.

Accordingly, whether work is proposed in the buffer zone or in the resource area, in order to defeat the project proponent's motion the petitioners would first need to come forward with sufficient evidence to raise a material factual dispute regarding whether the coastal bank serves the groundwater supply interest. The petitioners have failed to do so.

Clark avers simply: "The area in which the proposed work is to be done is significant to the groundwater supply." Clark Aff. ¶ 17. He fails to provide any factual support for his opinion. Consequently, he fails to establish the existence of a material factual dispute. *Cf. Haddad*, 6 DEPR at 14.

The petitioners' failure is not surprising, because their theory is flawed. 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 work in the coastal bank's buffer zone will prevent the bank from serving the groundwater supply interest. *See, Matter of Longo*, Docket No. 91-001, Decision on Motion for Reconsideration, 3 DEPR 139, 140 (June 5, 1996).

The petitioners had an affirmative obligation to support their opposition with facts that show the presence of a genuine factual dispute concerning whether the coastal bank protects groundwater and, if so, explain how the project interferes with that function. Clark failed to do so; consequently, the petitioners' claim fails.

8. 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 Nos. 3, 4, 7, 8, and 9 are at issue in this appeal. The project proponents maintain that the Redevelopment Project satisfies all five of these standards. As explained below, the petitioners fail to raise a material factual dispute regarding compliance with any of the five standards at issue, primarily because Clark's opinions lack a factual basis. *See Pacheco*, 6 DEPR at 84.

Standard No. 3 requires that loss of recharge to groundwater be minimized through the use of infiltration measures. The intent of the standard is to encourage the maintenance of groundwater recharge rates under post-development conditions. *Stormwater Management Volume One: Stormwater Policy Handbook* at 1-17.

According to Vondrak, the existing site is largely impervious, with paved surfaces and buildings occupying the lot. Vondrak Aff. ¶¶ 59, 60, 64. Consequently, there is no infiltration occurring now; and once the Redevelopment Project is constructed the site will remain similarly

impervious. Vondrak Aff. ¶ 64. Furthermore, she avers, the groundwater levels are heavily influenced by the tides. *Id.* Little potential exists, therefore, to infiltrate stormwater runoff from the proposed buildings' rooftops. *Id.*

Clark does not mention Standard No. 3 in his affidavit. Nor does he dispute Vondrak's description of pre- and post-development site characteristics. Accordingly, he fails to raise a material factual dispute regarding compliance with Standard No. 3.

In an apparent response to Vondrak's affidavit at ¶ 64, however, the petitioners renew an argument they made in the Wharf Project appeal. They maintain that the steel sheeting behind the bulkhead will block the movement of water and result in a lowering of the groundwater table. Clark Aff. ¶ 34. The installation of the steel sheeting, however, is not a part of the Redevelopment Project. The petitioners' argument, therefore, is not relevant to this appeal.

Standard No. 4 requires the removal of at least 80% of the average annual load of total suspended solids (TSS). According to Vondrak, the project will achieve the 80% removal rate through the installation of a properly-sized stormceptor unit, deep sump catch basins, and street sweeping activities. Vondrak Aff. ¶ 65 and Exh. B.

According to Clark, the project proponents have not documented the effectiveness of the stormceptor unit or provided design calculations and a model number for it; thus it may not function as well as the manufacturer claims it will. Clark Aff. ¶¶ 19, 31. Clark maintains that run-off from the wharf is subject to Standard No. 4, yet it is not being treated. Clark Aff. ¶¶ 29, 32. Clark also avers that the proponents have not provided maintenance schedules for the deep sump catch basins and street sweeping activities on which Vondrak relies for her conclusion that Standard No. 4 is met. Clark Aff. ¶¶ 26, 28.

Clark's testimony on Standard No. 4 is insufficient to defeat the project proponent's motion. He needed to explain why the stormceptor unit would not function as intended at this location and show that the reduced function, in combination with street sweeping and installation of catch basins, would not meet the 80% removal rate. Furthermore, he needed to explain why runoff from the wharf is subject to this standard and provide the basis for his opinion that the runoff is not being collected and treated. Finally, Clark's claim that the project lacks maintenance schedules for the deep sump catch basins and street sweeping activities is incorrect. Special Condition No. 48 sets forth the frequency of catch basin cleaning, sweeping, and maintenance of the stormceptor unit that must be incorporated into the project's operation and maintenance plan (O&M Plan). Accordingly, Clark fails to provide an adequate basis for his opinion, or he is simply mistaken.

Standard No. 7 provides that the redevelopment of previously developed sites must meet the stormwater standards to the maximum extent practicable; if it is not practical to meet all standards, then the new or retrofitted stormwater management system must improve existing conditions. In other words, the project need not strictly adhere to the remaining eight stormwater standards. Redevelopment projects, however, do not include projects that would result in a net increase in impervious areas on the site. According to Vondrak, the Redevelopment Project qualifies as the redevelopment of a previously developed site. Vondrak Aff. ¶ 66. Nonetheless, it will meet all applicable stormwater standards as well as will improve overall drainage over existing conditions by installing a new drainage system. *Id.*

According to Clark, the project proponents should have considered additional best management practices, or BMPs, in order to comply with the standard to the maximum extent practicable. Clark Aff. ¶ 20. Clark, however, does not explain why he thinks the project does

not qualify as a redevelopment project; instead he suggests that the project proponents' selection of BMPs is inadequate. It appears, thus, that the relevant question is whether the project complies with all applicable stormwater standards and not whether it complies with them to the maximum extent practicable. As discussed in this section, Clark has not demonstrated that there is a material factual dispute about the Redevelopment Project's compliance with the stormwater standards.

Standard No. 8 requires that erosion and sedimentation controls be implemented during construction or land disturbance activities. Vondrak explains that this standard is satisfied because siltation barriers will mark the limit of work, upland catch basins that drain toward the harbor will be protected, work areas will be swept regularly, a silt boom and curtain will be installed in the harbor, and any debris in the harbor will be removed. Vondrak Aff. ¶ 67. Before construction begins, a sedimentation and erosion control plan will be submitted that outlines specific BMPs, based on the construction techniques to be used.

The petitioners argue that this standard is not met because the DEP's permit authorizes the project proponents to develop and submit an erosion and sedimentation control plan after the permit was issued. *See* Special Condition No. 33. The petitioners maintain that the DEP's permit does not require the project proponents to implement the measures outlined by Vondrak in her affidavit and that the specific BMPs utilized cannot be analyzed in advance. *See* Clark Aff. ¶¶ 22, 33.

The petitioners' claim must fail. Special Condition No. 33 requires more than the submission of a plan before work commences. It identifies what the plan must contain and imposes additional substantive requirements. Standard No. 8 requires the implementation of erosion and sedimentation control measures; it does not require the development of a plan as part

of a permit application. The project proponents provided sufficient information in the permit application at sections 7.3-7.5 and in the revised stormwater management plan at 6 for the project to be appropriately conditioned. It was so conditioned by Special Condition No. 33. Accordingly, the petitioners failed to raise a material factual dispute regarding compliance with Standard No. 8.

Standard No. 9 requires all stormwater management systems to have an O&M plan. The project proponent has filed an O&M plan with the DEP. Vondrak Aff. ¶¶ 62, 69, and Exh. B. A Construction Management Plan, including mitigation measures, will be submitted once the construction schedule is fixed. Vondrak Aff. ¶ 57, Notice of Intent, Att. A. The site owners will maintain any portion of the new drainage system beneath Lovejoy Place, a private way. Vondrak Aff. ¶ 69; Notice of Intent, Att. A. The City of Boston will maintain the new catch basin pipe system directed to an existing system beneath Beverly Street. *Id.*

In Clark's view, the O&M Plan is an inadequate summary rather than a specific outline of planned actions. Clark Aff. ¶¶ 21, 25. He identifies a number of ways in which the plan could be different. *Id.*

The O&M Plan is brief. Nonetheless, it contains the basic, minimum information required by Standard No. 9. Clark also does not acknowledge that much of what he states should be in the O&M Plan is required by a permit condition. For example, he states that dust control measures are not identified, yet the permit imposes such measures at Special Condition Nos. 30, 31, and 37. A separate O&M Plan is required for the stormwater management system under Special Conditions Nos. 48 and 49. The petitioners, therefore, have failed to raise a real dispute about whether the Redevelopment Project complies with Standard No. 9.

DISPOSITION

The project proponents' motion for summary decision is granted in its entirety. The appeal is dismissed. The DEP's wetlands permit is made final.

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.