COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
98 North Washington Street, Boston, Massachusetts 02114 617-727-7060

September 24, 2008

In the Matter of	Docket No. 2003-018 File No. 007475
Town of Rockport Department of Public Works	Docket No. DEP-05-307 File No. 62-308 Rockport

RECOMMENDED FINAL DECISION

Jedediah Mannis, Esq., Harvard, for the petitioners.

John W. Giorgio, Esq. and Robert H. McKertich, Esq. (Kopelman and Paige, P.C.), Boston, for the applicant, Rockport Department of Public Works and for the Rockport Conservation Commission in Docket No. DEP-05-307.

Elizabeth Kimball, Esq., Boston, for the Department of Environmental Protection.

Bonney Cashin, Administrative Magistrate.

INTRODUCTION

These appeals concern a proposal by the Town of Rockport Department of Public Works to construct a dam and associated structures at Flat Ledge Quarry, a reservoir that is part of the town's public water supply. The Department of Environmental Protection issued a water quality certificate to the Rockport DPW pursuant to M.G. L. c. 21, §§ 26-53, the Massachusetts Clean Waters Act. The DEP also issued the Rockport DPW a wetlands permit pursuant to M.G.L. c. 131, § 40, the Wetlands Protection Act. A group of Rockport residents appealed the DEP's decisions.

I previously issued a decision that addressed several of the issues identified for adjudication in these appeals. *Matter of Rockport Dept. of Public Works*, Docket Nos. 2003-018, DEP-05-307, Remand Decision, 14 DEPR 157 (July 17, 2007). In the portion of that decision concerning the water quality certification appeal, I ruled that the flooding of a vernal pool did not constitute the discharge of dredged or fill material. *Rockport DPW*, 14 DEPR at 159, 160. I remanded the matter to the DEP in order for it to determine whether the project could be otherwise certified under the water quality certification regulations, because it is not up to me to make that determination in the first instance. *Rockport DPW*, 14 DEPR at 160.

I also remanded the wetlands permit appeal to the DEP in order for it to determine the agency's view of whether the stormwater discharge from Quarry Road complied with the DEP's stormwater policy and whether the location, design, and construction of the dam's spillway and stilling basin complied with the Wetlands Protection Act. Again, the remand was necessary because the DEP did not determine whether these aspects of the project complied with the regulations during its review.

In addition, I ordered the parties to file additional testimony regarding the project's compliance with the limited project criteria at 310 CMR 10.53 (3)(l). To the extent necessary, the Remand Decision is incorporated herein because I made a recommended final determination in it on several issues.

Following the remand, the DEP filed additional testimony and exhibits to clarify its position regarding the discharge of dredged or fill material. According to the DEP's analyst assigned to the project, Philip DiPietro, who relied on additional information submitted to the DEP by the Rockport DPW, the vernal pool will be filled as well as flooded. DiPietro Aff. at 2.[1] Consequently, all parties now agree on this point. *See* Rimmer Add. Supp. Test.

[1] Mr. DiPietro's affidavit was filed with the DEP's response to an order in the Remand Decision dated January 16, 2008.

One consequence of my ruling in the water quality certification appeal is that several issues originally identified for adjudication did not need to be decided. *Rockport DPW*, 14 DEPR at 161. In light of the DEP's clarification of its testimony, these issues now need to be decided.

I conclude that the water quality certificate cannot be issued without a variance because of the prohibitions at 314 CMR 9.06 (4) and 9.06 (5). I nonetheless address additional remaining issues in the water quality certification appeal, in particular, the project's compliance with 314 CMR 9.05 (1), and 314 CMR 9.06 (1), (2) and (6). I further conclude that the project revisions and the additional evidence submitted following the Remand Decision demonstrates that the dam project satisfies the limited project criteria at 310 CMR 10.53 (3)(l), that the Quarry Road outfall complies with the DEP's stormwater policy, and that the spillway and stilling basin design conforms to regulatory requirements. Consequently, the dam project may receive a final wetlands permit.

DISCUSSION

A. Background

The following project description and other background information are taken from *Rockport DPW*, 14 DEPR at 158-159. I repeat them here for the reader's convenience, with some modifications based on the Rockport DPW's 2007 plan revisions following the remand. Much of this information is taken from the permit application[2] filed by the Rockport DPW and is undisputed.

Flat Ledge Quarry is located about one-half mile north of the center of Rockport, Massachusetts. It currently captures rainfall and surface runoff from the quarry's own watershed and some overflow from nearby Carlson's Quarry. The Rockport DPW proposes to construct a 150 foot dam at the southeastern edge of Flat Ledge Quarry that would raise the water elevation

[2] The Rockport DPW filed a joint application in 1999 for a federal wetlands permit, a state water quality certification, a state wetlands permit, and a local wetlands permit under Rockport's wetlands bylaw.

by 35 feet, to 55 feet mean sea level (MSL), thereby increasing the quarry's capacity. The expanded quarry would fill gradually over 2-3 years after the dam is constructed. Rockport historically has had problems with water shortages; the dam is one of several options to be implemented or that are under exploration to increase its water supply and keep up with projected growth.[3]

Residential properties abut Flat Ledge Quarry to the north. To the east lies Granite Street (Route 127). An intermittent stream at the southern edge of the Quarry flows easterly to the ocean under the Granite Street Bridge at Granite Street. Carlson's Quarry is southwest of Flat Ledge Quarry. A graded dirt road runs south of Flat Ledge Quarry to Carlson's Quarry. Another access road runs roughly in the same direction and ends approximately 100 feet from Carlson's Quarry.

According to the permit application filed by the Rockport DPW, including the 2007 plan revisions, its proposal would result in the filling or flooding of 818 square feet of bordering vegetated wetland and 260 linear feet of bank[4] along an intermittent stream, including a 6 square foot certified vernal pool[5] that lies within the stream.

Raising the water level would also flood approximately 2300 linear feet of bank around the Flat Ledge Quarry, but 3640 linear feet of bank would eventually be created at the higher water elevation. The open water area of the quarry would increase from approximately 173,200 square feet to 427,600 square feet. Part of the increase would result from converting three isolated pools to contiguous open water. An additional 254,400 square feet of land under water bodies and water ways (land under water) would be created by the increase in water elevation from elevation 20 MSL to elevation 55 MSL.

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[3] Rockport evaluated three different on-site dam alternatives, based on a 1999 feasibility study prepared by GEI Consultants, Inc.

[4] I take the parties' references to linear feet of bank to mean linear feet of stream with associated bank.

In addition to the wetlands permit and the water quality certification that are the subjects of these appeals, the dam proposal needed a water management permit from the DEP. As part of its water management permit application, the Rockport DPW proposed to divert three streams into Flat Ledge Quarry. The stream diversions were not proposed in the wetlands permit or water quality certification joint application. The Rockport DPW generally described them in its application as components of its long-term plan to meet the town's water needs. The Rockport DPW considers the diversions to be a separate project that is not necessary to meet the town's immediate water shortage. According to the Rockport DPW, hydrologic calculations demonstrate that the quarry would fill without the stream diversions. The size of the dam, however, will provide the capacity to store water from the stream diversions.

The Rockport DPW revised its dam proposal several times during its review by local, state, and federal agencies. During meetings held in 2001, the DEP informed the town that variances from the wetlands regulations and the water quality certification regulations were needed because the project could not meet all the applicable standards. Specifically, the DEP determined that the prohibition at 314 CMR 9.06 (4) against the filling of a vernal pool applied to the project in spite of the exemption at 314 CMR 9.06 (3) (a) for water supply projects. The DEP also determined that the project constituted a water dependent use under the wetlands regulations and, accordingly, could be reviewed under the "limited project" provisions at 310 CMR 10.53 (3) (l). In March, 2001, after it filed its permit application, the Rockport DPW submitted a vernal pool mitigation plan to the Rockport Conservation Commission. It withdrew its plan to upgrade the access road that leads to nearby Carlson's Quarry during the public hearing before the Conservation Commission. In order to accommodate a wetlands replication area that the DEP determined was required, the Rockport DPW needed to reconfigure the

[5] Some documents in the record also refer to "six square feet of vernal pool habitat." According to the Vernal Pool Observation Form prepared by Bryan Windmiller, the pool itself is six square feet in size. *See* Rimmer Dir. Test. Exhibit 4, App. A.

original location of the dam's spillway and stilling basin. The Rockport Conservation Commission conditioned the project to allow the Rockport DPW to submit plans for the reconfiguration after the permit was issued.[6] Additional revisions were made after the Remand Decision issued on July 17, 2007.

DEP issued its water quality certificate on March 15, 2003. I held a prehearing conference on November 6, 2003, at which the parties reported that the state and local wetlands permit application was still under consideration by the Rockport Conservation Commission. Since it appeared likely that the petitioners would ultimately appeal those decisions, the parties agreed that further action on the water quality certification appeal should await the DEP's decision on the wetlands permit. The petitioners appealed the DEP's wetlands permit decision on March 29, 2005. I allowed several requests by the parties to reschedule the prehearing conference in the wetlands matter, which was held on March 7, 2006. The two appeals were subsequently consolidated for hearing.

The Rockport DPW and the DEP filed motions to dismiss for failure to sustain a case after the petitioners filed their testimony. I denied the motions as to all claims except an identical claim raised in each appeal, which concerned whether the Rockport DPW was required to file a new application.[7]

The parties requested that the appeals be decided based on the record rather than after a live hearing. 310 CMR 1.01 (13) (g). Consequently, the Remand Decision was not based on live testimony, nor is this Recommended Final Decision.

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[6] In the Remand Decision I ruled that the reconfiguration must be reviewed before a final order of conditions may issue.

[7] The Rockport DPW and the DEP argued in their closing briefs that the petitioners did not meet their burden of going forward with respect to several of the issued raised in these appeals. To the extent they sought to reargue my denial of their motions, their request is denied. My decision here is based upon the entire record.

B. Further Proceedings

After I issued the Remand Decision, the parties exchanged information and filed additional evidence. I held a status conference on March 31, 2008 and established a schedule for further proceedings. The Rockport DPW filed supplemental testimony concerning the wetlands appeal. It described a stormwater management plan for the Quarry Road stormwater outfall and addressed impacts associated with the location, design, and construction of the dam's spillway and stilling basin. *See generally* Doyle-Breen Supp. Dir. Test.; Langforth Supp. Dir. Test. The revised plans eliminate impacts to the 280 square feet of a certified vernal pool within an isolated wetland depression east of the Granite Street Bridge and avoid the intermittent stream east of the bridge.[8] Doyle-Breen Supp. Dir. Test. Exh. B. In addition to its response regarding the discharge of dredged or fill material referenced at 2, *infra,* the DEP filed supplemental testimony concerning the wetlands permit issues addressed by the Rockport DPW. It also filed a proposed final order of conditions and proposed final water quality certificate. DiPietro 2008 Dir. Test. Finally, the petitioners filed additional supplemental testimony concerning the water quality certification appeal. Rimmer Add. Supp. Test.; Kastrinos Add. Supp. Test.

C. Regulatory Framework

The DEP administers section 401 of the federal Clean Water Act, 33 USC § 1251 *et seq*., which regulates the discharge of dredged or fill material to waters of the United States within Massachusetts. 314 CMR 9.01 (1). When an activity requiring a federal permit involves such a discharge, the DEP must certify that the discharge will comply with state water quality standards, set forth at 314 CMR 4.00, and other appropriate requirements of state law. 33 USC § 1341.

For most activities requiring certification, the DEP's water quality certification regulations at 314 CMR 9.00 provide that the activities are regulated through the United States

[8] The isolated depression is not subject to the DEP's jurisdiction under the Wetlands Act; a portion of it is, however, subject to federal wetlands law.

Army Corps of Engineers' Programmatic General Permit for the state.[9] *See* 314 CMR 9.03 (1). Activities involving large amounts of fill or discharges into more sensitive areas, including discharges to "outstanding resource waters," require an individual application for certification. *See* 314 CMR 9.04. An outstanding resource water is a surface water of the Commonwealth designated in accordance with the Massachusetts Surface Water Quality Standards for their "outstanding socio-economic, recreational, ecological and/or aesthetic values." 314 CMR 9.02, 314 CMR 4.04 (3). Public water supplies and vernal pools are outstanding resource waters. 314 CMR 4.06 (1) (d) (1) and 4.06 (1) (d) (11).

314 CMR 9.06 sets out the criteria for the evaluation of applications for the discharge of dredged or fill material. As a general matter, "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge that would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 314 CMR 9.06 (1). In addition, "[n]o discharge of dredged or fill material shall be permitted unless … steps have been taken which will minimize potential adverse impacts to the bordering or isolated vegetated wetlands or land under water …." 314 CMR 9.06 (2).

However, "[n]o discharge of dredged or fill material shall be permitted to Outstanding Resource Waters except for [certain] activities …, which remain subject to an alternatives analysis and other requirements of 314 CMR 9.06…." 314 CMR 9.06 (3). Activities that may be permitted under this standard include projects conducted or approved by public or private water suppliers when protecting the quality of water in the watershed, or projects to maintain, operate, and improve the waterworks system. 314 CMR 9.06 (3) (a). The discharge of dredged or fill material to "an Outstanding Resource Water specifically identified in 314 CMR 4.06 (1) (d) (*e.g.*, vernal pools, within 400 feet of a water supply reservoir and any other areas so

[9] The DEP has promulgated revisions to 314 CMR 9.00. The version of the regulations that applies to this water

designated) is prohibited as provided therein unless a variance is obtained under 314 CMR 9.08." 314 CMR 9.06 (4). "No discharge of dredged or fill material is permitted for the impoundment or detention of stormwater in Outstanding Resource Waters for any purpose." 314 CMR 9.06 (5).

The DEP also administers the Wetlands Protection Act. The wetlands regulations, at 310 CMR 10.00, establish performance standards for work that will alter wetland resource areas, including land under water, *see* 310 CMR 10.56, as well as stream banks and bordering vegetated wetlands and their 100–foot buffer zones. *See* 310 CMR 10.54 and 10.55, respectively. The wetlands regulations also authorize the DEP to waive the performance standards for "limited projects," including water dependent uses. *See* 310 CMR 10.53 (3) (l).

D. Water Quality Certification Claims

1. Grounds for Denial

I have determined that the Rockport DPW's project will fill an outstanding resource water, and thus conclude it cannot be certified under 314 CMR 9.06 (4) absent a variance. I also have determined that the Rockport DPW's project will fill an outstanding resource water for the impoundment or detention of stormwater, and thus conclude that it cannot be certified under 314 CMR 9.06 (5) absent a variance. I discuss these regulatory provisions first.

a. 314 CMR 9.06 (4)

The DEP and the Rockport DPW argue that, as a public water supplier, the Rockport DPW may fill a certified vernal pool, an outstanding resource water. The petitioners do not dispute that the Rockport DPW is a public water supplier. Rather, they argue that, 314 CMR 9.06 (3) (a) notwithstanding, the prohibition against filling a certified vernal pool at 314 CMR 9.06 (4) applies here and prevents the DEP from approving the project without a variance. The

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quality certification appeal is that in effect in 1999 when the Rockport DPW filed its application.

plain language of the regulation as well as fundamental principles of statutory construction demonstrate that the petitioners are correct.

First, it is well established that courts interpret regulations in the same manner as statutes and according to traditional rules of construction. *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762, 769, 407 N.E. 2d 297, 302 (1980). Under traditional rules of construction, a regulation "should be read as a whole to produce an internal consistency." *Telesetsky v. Wight*, 395 Mass. 868, 873, 482 N.E. 2d 818, 821 (1985). "General statutory language must yield to that which is more specific" in order to arrive at that internal consistency. *Risk Mgmt. Foundation of the Harvard Medical Insts. v. Commissioner of Ins*., 407 Mass. 498, 505, 554 N.E. 2d 843, 847 (1990). Furthermore, "it is a common tenet of statutory construction that, whenever possible, no provision of a legislative enactment should be treated as superfluous." *Casa Loma, Inc. v. Alcoholic Beverages Control Commission*, 377 Mass. 231, 234, 385 N.E. 2d 976, 978 (1979).

With these principles in mind I turn to the relationship between 314 CMR 9.06 (3) and (4). The general rule under 314 CMR 9.06 (3) is that no discharge of dredged or fill material is allowed to an outstanding resource water. The DEP identified exceptions to this general rule, including certain activities of public water suppliers described at 314 CMR 9.06 (3) (a). This project will improve a waterworks system, hence it is potentially approvable under 314 CMR 9.06 (3) (a).

This does not, however, excuse the project from complying with the separate standard set out at 314 CMR 9.06 (4). This section requires a further step for approval for specific subcategories of waters or uses, that is, those identified in the water quality standards at 314 CMR 4.06 (1) (d). Discharges of dredged or fill material to these waters is prohibited as provided therein without a variance. 314 CMR 9.06 (4).

The general language of 314 CMR 9.06 (3) must yield to the more specific language of 314 CMR 9.06 (4). *Risk Mgmt. Foundation of the Harvard Medical Insts.,* 554 N.E. 2d at 847. If the exceptions for certain filling of outstanding resource waters conducted by public water suppliers at 314 CMR 9.06 (3) (a) were intended to apply to discharges to a certified vernal pool, then logically that provision would so state. If I were to adopt the position of the DEP and the Rockport DPW, 314 CMR 9.06 (4), which limits discharges to certified vernal pools, would be mere surplusage. *Casa Loma,* 385 N.E. 2d at 978.

Discharges of dredged or fill material to certified vernal pools and other specific outstanding resource waters identified at 314 CMR 9.06 (4) are not allowed without a variance. An examination of 314 CMR 4.06 (1) (d) (1) - 4.06 (1) (d) (11) reinforces the conclusion that the restrictions in 314 CMR 9.06 (4) operate as a limitation on the more general language of 314 CMR 9.06 (3). In particular, 314 CMR 4.06 (1) (d) (1) authorizes work by public water suppliers within 400 feet of a public water supply, but in a different manner than under 314 CMR 9.06 (3), which refers to all outstanding resource waters. With respect to vernal pools, 314 CMR 4.06 (1) (d) (11) unequivocally provides that "[n]o discharge of dredged or fill material shall be allowed to a vernal pool certified by the Massachusetts Division of Fisheries and Wildlife, unless a variance is granted under 314 CMR 9.08."

This interpretation is reinforced by the DEP's *Preface to the 1995 401 Water Quality Certification Regulations* and the *Preface to the 1995 Revisions of 314 CMR 4.00*. The *Preface to the 1995 401 Water Quality Certification Regulations* states that the DEP decided that a total prohibition against discharges of dredged or fill material was not warranted, and thus the regulation allows activities in outstanding resource waters for certain projects, after an alternatives analysis and the minimization and mitigation of any adverse impacts. The *Preface* continues: "Discharges of dredged or fill material in specifically restricted areas (e.g., certified vernal pools and within 400 feet of a public water supply reservoir) are prohibited without a

variance." The *Preface* notes that additional protection for the most sensitive areas of its outstanding resource waters will be provided within the Surface Water Quality Standards, 314 CMR 4.00. The discharge of dredged or fill material within 400 feet of reservoirs is prohibited without a variance except for the maintenance of existing roads and activities of the water supplier.

The *Preface to the 1995 Revisions of 314 CMR 4.00* notes that the purpose of the revisions is to clarify the relationship between the antidegradation provisions of the water quality standards and the water quality certification regulations for the discharge of dredged or fill material. It reiterates that discharges of fill are prohibited to certain limited outstanding resource waters without a variance. "The initial areas designated for this protection are certified vernal pools … and within 400 feet of a water supply reservoir." *Preface to the 1995 Revisions of 314 CMR 4.00.* None of these provisions refer to 314 CMR 9.06 (3) as offering general permission for activities of a water supplier within a certified vernal pool or within 400 feet of a water supply reservoir.

Consequently, I conclude that 314 CMR 9.06 (4) prohibits the Rockport DPW from discharging dredged or fill material to the certified vernal pool within the intermittent stream without a variance. The Rockport DPW submitted a variance application to the DEP after the agency determined that 314 CMR 9.06 (4) prohibits the discharge of dredged or fill material to the vernal pool without a variance. Doyle-Breen Dir. Test. Exh. D and I.[10] While the Rockport DPW and the DEP urge me to decide that the project qualifies for a variance, I cannot do so. *Rockport DPW*, 14 DEPR at 161 fn. 10. No variance appeal is before me. Accordingly, no water quality certificate can issue as a result of this proceeding.

b. 314 CMR 9.06 (5)

314 CMR 9.06 (5) prohibits the discharge of dredged or fill material for the impoundment or detention of stormwater for the purpose of controlling sedimentation or other pollutant attenuation. 314 CMR 9.06 (5) imposes conditions on the discharge of dredged or fill material for the impoundment or detention of stormwater for flood control purposes. 314 CMR 9.06 (5) also prohibits the discharge of dredged or fill material for the impoundment or detention of stormwater in outstanding resource waters for any purpose.

The Rockport DPW does not propose to construct a stormwater detention facility. Rather, it is making use of the natural impounding of runoff and rainfall that the quarry provides. It proposes to increase the storage capacity of the quarry by constructing a dam. The additional capacity to impound water is not for the purposes of controlling sedimentation or other pollutant attenuation or for flood control.

The last sentence of 314 CMR 9.06 (5), however, prohibits the discharge of dredged or fill material for the impoundment or detention of stormwater in outstanding resource waters *for any purpose*. *Emphasis added.* By the Rockport DPW's own admission, the proposed project will discharge fill into an outstanding resource water, *i.e.*, a vernal pool in order to "capture and store stormwater runoff." Rimmer Dir. Test. Exh. 1, Att. F. While the quarry is not a typical stormwater detention facility, it nonetheless falls within the plain meaning of the regulatory language. Impound means "to collect and confine (water) in or as if in a reservoir." Merriam-Webster Online Dictionary, 2008. Merriam-Webster Online. 25 June 2008, http://www.merriam-webster.com/dictionary/impound. Detention means "the act or fact of detaining or holding back." Merriam-Webster Online Dictionary, 2008. Merriam-Webster Online. 25 June 2008, http://www.merriam-webster.com/dictionary/detention. The purpose of the impoundment or detention is irrelevant. The proposed project, therefore, does not comply

[10] Nothing in the record explains the reasons for the DEP's changed opinion.

with 314 CMR 9.06 (6) and cannot be constructed without a variance. Again, as no variance appeal is before me, no water quality certificate may issue in this proceeding.

2. Other Water Quality Certification Issues

My decision regarding 314 CMR 9.06 (4) and (5) is dispositive of the water quality certification appeal. The dam project cannot proceed without a variance. Nonetheless, I briefly discuss the remaining outstanding issues because the parties consider them to be significant and the discussion may be useful to them subsequently.

a. 314 CMR 9.05 (1)

The petitioners maintain that the Rockport DPW failed to submit sufficient information in its water quality certification application to satisfy the requirements at 314 CMR 9.05 (1). I addressed the petitioners' claim that the Rockport DPW had "segmented" the project in the Remand Decision. *Rockport DPW*, 14 DEPR at 160-161. The petitioners also argue that the application contained insufficient information regarding practicable alternatives, particularly about groundwater resources. The petitioners' quarrel is less with the procedural requirements at 314 CMR 9.05 (1) regarding an application's contents and more with the substantive requirements in the water quality regulations concerning the scope of the town's project. The application contained sufficient information so that the DEP could render a decision. To the extent the petitioners have raised a separate claim under 314 CMR 9.05 (1), they have failed to show that critical information was missing. *See Matter of North Washington Wharf, LLC and Beverly Wharf, LLC (Wharf Project)*, Docket No. DEP-07-477, Recommended Final Decision, 15 DEPR 36, 41 (March 24, 2008), *adopted by Final Decision,* 15 DEPR 35 (April 18, 2008). Their claim regarding the scope of practicable alternatives is discussed in the following section.

b. 314 CMR 9.06 (1)

The water quality certification regulations provide that:

> No discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.
> 314 CMR 9.06 (1).

An alternative is practicable "if it is available and capable of being done after taking into consideration costs, existing technology, and logistics in light of overall project purposes." 314 CMR 9.06 (1) (a). "The scope of alternatives to be considered shall be commensurate with the scale and purpose of the proposed activity, the impacts of the proposed activity, and the classification, designation and existing uses of the affected wetlands and waters in the Surface Water Quality Standards at 314 CMR 4.00." 314 CMR 9.06 (1) (c). The use of the practicable alternatives analysis is consistent with the approach used under federal wetlands law.

The Rockport DPW and the DEP maintain that the project satisfies the practicable alternatives analysis required at 314 CMR 9.06 (1). In their view, the applicant only needed to examine alternative dam configurations---another size, or a different location or construction method. They emphasize that different alternatives were examined during the water management permitting process and during the project's review under M.G.L. c. 30, §§ 62-62H, the Massachusetts Environmental Policy Act (MEPA). The Rockport DPW argues that its evaluation of its water supply needs cannot be examined in this proceeding. It contends that once the DEP's water management division agreed with the applicant's decision to improve its surface water storage capacity and approved the dam alternative, the DEP's water quality certification staff was limited to looking only at alternative configurations for the dam. The DEP concurs with this view. DiPietro Dir. Test. ¶¶15-16.

The petitioners press for a more expansive consideration of practicable alternatives. In their view, project alternatives are to be examined in light of overall project purposes, not in light of the means the town has selected to achieve a particular purpose. The Rockport DPW hence

should be looking at alternate ways of increasing its water supply. In particular, the petitioners urge that the Rockport DPW should have considered in more detail expanding an existing wellfield and using deep bedrock wells. Recent well test results are quite favorable, they report. Kastrinos Dir. Test. ¶¶ 9, 10, 12, Kastrinos Add. Supp. Test. *generally*.

When a project is not "water dependent," practicable alternatives that do not involve the discharge of dredged or fill material are presumed to be available, unless clearly demonstrated otherwise. 314 CMR 9.06 (1) (b). The definition of "water dependent" in the water quality certification regulations is virtually identical to the term's definition in the wetlands regulations. I previously concluded that the proposed project is water dependent within the meaning of the wetlands regulations, specifically at 310 CMR 10.04. *Rockport DPW*, 14 DEPR at 161, 162. *See also James City County, Virginia v. EPA*, 955 F.2d 254, 260 (4th Cir. 1992) (in an appeal of a federal wetlands permit decision, court found that dam construction for a proposed reservoir is a water dependent project for purposes of the practicable alternatives analysis). I conclude that the project is water dependent as defined at 314 CMR 9.02. Consequently, there is no presumption that practicable alternatives that do not involve the discharge of dredged or fill material exist. 314 CMR 9.06 (1) (b).

The Rockport DPW and the DEP define the scope of alternatives too narrowly. The Rockport DPW's Supplemental Environmental Impact Report (SEIR), submitted under MEPA in 1997 and included as part of its permit application, described the project as "water supply development." See Notice of Intent Att. H.[11] The alternatives examined for purposes of MEPA review included the development of deep bedrock wells and desalination. *Id.* at 2-7; DiPietro Dir. Test. ¶ 16. In its permit application, however, the Rockport DPW referred to the project's purpose as increasing the town's water supply and storage. Notice of Intent Att. A. In its testimony the Rockport DPW refers to the project's objective as increasing surface water storage

capacity. Tomasz Dir.Test. ¶¶ 6, 13; *see also* Motion of the Town of Rockport Department of Public Works to Dismiss for Failure to Sustain a Direct Case, August 21, 2006.

To the extent the project purpose is only to increase water storage, an alternative that expands groundwater supplies does not fulfill this purpose. One cannot increase the capacity of the ground to store water; one can only tap into what water is there. If the project is defined more broadly to encompass increasing available water supplies, however, then the availability of groundwater resources may properly be included.

Throughout the history of the project, until after the appeals were filed, the Rockport DPW has referred to the project primarily as one that would increase its water supply. Moreover, the purpose of storing water is to augment the available supply for use in times of drought. In this respect any water storage method would increase the amount of water available to the water supply's users. Rockport DPW's recent refocus of its project purpose appears intended to eliminate the petitioners' preferred bedrock well alternative. *See Greater Yellowstone Coalition v. Flowers*, 359 F. 3d 1257, 1270 (10th Cir. 2004) (in applying the practicable alternatives analysis when issuing a federal wetlands permit, the Corps must take into account the legitimate objectives of the applicant's project, but should not allow developers to artificially constrain the analysis by defining the project's purpose too narrowly).

I further consider that 314 CMR 9.06 (1) (c) provides that the scope of alternatives should take into account the class, designation, and expected uses of the affected wetlands and waters under the surface water quality standards. When a proposed discharge is to an outstanding resource water, the analysis thus should be especially rigorous because these areas are considered of critical importance under the water quality standards.

I conclude that the purpose of the Rockport DPW's project is to increase the available water supply. The use of deep bedrock wells, thus, is an alternative to the proposed project that

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[11] Several copies of the town's joint permit application are in the record, although not all are complete. Attachment

fulfills the basic project purpose. Indeed, it is an alternative that the Rockport DPW considered in the past under MEPA. The petitioners identified the alternative early in the proceeding. Accordingly, the petitioners' testimony regarding the bedrock well alternative should be considered.

In another DEP water quality certification appeal that involved a discharge to an outstanding resource water, the DEP Acting Commissioner determined that the applicant should examine the availability of practicable alternatives over the time period beginning when the applicant started planning its project up to the time of the DEP's final decision. *Matter of D. and T. Giombetti, Trustees, Giombetti Realty Trust*, Docket Nos. 97-169 and 97-185, Commissioner's Decision to Remand, 6 DEPR 114, 115 (May 14, 1999). I adopt that approach here. Consequently, the petitioners' additional supplemental testimony about the April 2008 well test results should be considered as well. As *Giombetti* makes clear, the examination of practicable alternatives is not static. Although the SEIR completed in 1997 considered expanding an existing well field and developing bedrock wells, the Rockport DPW may re-examine the bedrock well alternative now based on more recent information.

Furthermore, nothing in the water quality certification regulations indicates that the practicable alternatives analysis is constrained by the outcome of an examination of alternatives required by another law, as the DEP and the Rockport DPW suggest.[12] An applicant may make use of the same underlying information for the different examination of alternatives, to the extent it is relevant and meets applicable regulatory requirements. In an appeal such as this, however, a party choosing to rely on another alternatives analysis must do more than show that it was performed. That party must explain, by competent evidence, why the prior analysis satisfies the specific requirements of the water quality certification regulations. Similarly, nothing suggests

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H may be found as part of the DEP's filing of April 3, 2003.

that the DEP wetlands personnel are restricted in any way when implementing the water quality certification program by decisions made by other regulatory programs with different missions and different regulatory requirements.

The petitioners' testimony about the bedrock well alternative relies on information provided to Rockport DPW by its consultants. It is sufficient to show that the alternative is sufficiently viable so that it should be considered. In light of my conclusion that the water quality certification should be denied, though, I do not decide now whether it is an alternative that would have less adverse effect on the aquatic ecosystem. Indeed, such a conclusion is premature.

c. 314 CMR 9.06 (2)

314 CMR 9.06 (2) prohibits the discharge of dredged or fill material unless appropriate and practicable steps have been taken to minimize adverse impacts to the wetlands or land under water associated with the selected alternative. 314 CMR 9.06 (2) further provides that the ability to minimize and mitigate impacts may be a factor in the evaluation of alternatives.

The dam occupies the smallest footprint of the various dam design options considered. Additional vernal pool habitat is protected. Wetlands replication is provided. The recent redesign of the spillway and stilling basin eliminates impacts to the vernal pool east of the Granite Street Bridge and to a portion of the intermittent stream. Accordingly, to the extent the dam project is considered to be the practicable alternative selected, the Rockport DPW has satisfied this provision. If additional analysis of alternatives is undertaken, as discussed above, then such a conclusion is premature.

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[12] *Compare Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 1447-1448 (1st Cir. 1992) (Federal wetlands regulations allow Corps to consider the evaluation of alternatives discussed in NEPA documents, but require supplementation when necessary to meet federal wetlands requirements).

d. 314 CMR 9.06 (6)

314 CMR 9.06 (6) provides that stormwater discharges shall be provided with best management practices to attenuate pollutants and to provide a setback from the receiving water or wetlands. It further provides that stormwater discharges to outstanding resource waters shall be removed or set back from the receiving water or wetland, and shall provide the highest and best practical method of treatment.

The Rockport DPW proposes to redirect stormwater from the Quarry Road outfall, which now discharges into the existing wetland that will be flooded, to the replicated wetland. The Rockport DPW now proposes to treat the stormwater, relocate the discharge point, and provide for velocity dissipation. Doyle-Breen Supp. Dir. Test.; DiPietro Supp. Dir. Test. Accordingly, the project complies with 314 CMR 9.06 (6). They also testify that the project complies with the DEP's stormwater policy, which implements 314 CMR 9.06 (6). The petitioners do not claim otherwise.

E. Wetlands Permit Claims

In light of my decision in the water quality certification appeal, the Rockport DPW's attempts to secure a wetlands permit may be viewed as futile. Were that the case, the permit would be vacated, and the appeal dismissed as moot. The remaining issues in the wetlands appeal are limited, however, and the parties have filed their supplemental testimony concerning them. Consequently, I decide the remaining issues concerning the project's compliance with the limited project criteria for water dependent uses and the DEP's stormwater policy, and whether the spillway and stilling basin complies with regulatory requirements.

I concluded in the Remand Decision that I did not have sufficient evidence from which to determine the dam project's compliance with the limited project criteria at 310 CMR 10.53 (3) (l). Consequently, the parties submitted supplemental testimony concerning whether the project would impair the physical stability or water carrying capacity of the banks of the intermittent

stream and Flat Ledge Quarry, and whether it would impair the water carrying capacity of the land under water associated with the stream and the quarry.

I consider the quarry and the stream separately because Ms. Rimmer and Ms. Doyle-Breen did so in their supplemental testimony. In addition, the impacts to the stream differ west of the dam, where construction will fill a portion of the stream and the rising waters in the quarry will flood it. East of the dam, some flows that now reach the stream will be redirected.

1. Flat Ledge Quarry

Both Ms. Doyle-Breen and Mr. DiPietro testified that the bank and land under water associated with Flat Ledge Quarry would be increased as a result of the rising water within the quarry. Doyle-Breen Supp. Dir. Test.; DiPietro Supp. Dir. Test. Ms. Rimmer agrees.[13] Consequently, the water carrying capacity of the bank and land under water will be augmented, not impaired.

Ms. Doyle-Breen testified that the project would not affect the physical stability of the quarry walls. She added that, in her view, the physical stability and the water carrying capacity of a waterbody's banks are important characteristics that limit the spread of flood waters. In this way, she explained, the performance standards maintain the resource area's ability to serve the wetlands interests of flood control and storm damage prevention. Doyle-Breen Supp. Dir. Test. Ms. Rimmer does not refute the testimony of Ms. Doyle-Breen and Mr. DiPietro that the physical stability of the quarry's granite walls will not be affected by the project.

Accordingly, I conclude that the physical stability and the water carrying capacity of the quarry banks and the water carrying capacity of the quarry's land under water will not be impaired by the project.

[13] It is undisputed that the water level in the quarry will rise. Ms. Rimmer questioned the extent of the increase in bank. Ms. Doyle-Breen and Mr. DiPietro assume that the quarry will fill to its maximum elevation, which would

2. Intermittent Stream

According to Mr. DiPietro, west of the dam a portion of the stream will be filled and flooded. DiPietro Supp. Dir. Test. According to Ms. Rimmer, the physical stability and the water carrying capacity of the stream banks in this area will be eliminated because the bank and channel will be under water. In her view, although the granite bank will remain, it will cease to function as a bank once the quarry fills with water. Rimmer Supp. Dir. Test.

In her additional supplemental testimony, Ms. Doyle-Breen testified about the impacts associated with the project's redesign of the spillway and stilling basin. She concluded that "the construction and operation of the dam are anticipated to have no effect on the physical stability of the intermittent stream remaining east of the dam." Doyle-Breen Add. Supp. Dir. Test. Exh. B. Ms. Rimmer testified about impacts she predicted before the design was finalized. She did not file additional testimony about the project's compliance with the wetlands regulations after the redesign.

Ms. Doyle-Breen and Mr. DiPietro tended to look at the stream as a whole. They each opined that the existing flow regime would remain unchanged. They reasoned that flows overtopping the spillway would occur infrequently and would be of low velocity, thus mimicking current conditions. Mr. DiPietro added that, west of the dam, the banks of the stream would essentially be replicated by the quarry walls, which would continue to channel water downstream. DiPietro Supp. Dir. Test. Also, stormwater flows from the south that are now directed toward the outfall pipe on Quarry Road will continue to discharge to the stream, although the discharge point will be relocated downstream, i.e., further east to where the replicated wetlands are proposed. Consequently, in Ms. Doyle-Breen's view, the stream will continue to serve its function of directing stormwater flows to Rockport Harbor. Overall, thus, the water carrying capacity of the stream would not be impaired.

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result in an increase of 1340 linear feet of bank. However, there is no evidence on when or how often the quarry will fill to that elevation, particularly given the expected water withdrawals.

West of the dam, the stream, once submerged, would no longer retain its identity as what one customarily thinks of as a stream. Yet I am convinced that in spite of the changes wrought by the project, the stream nonetheless would retain its essential characteristics, as Ms. Doyle-Breen suggests. A segment of the stream will be lost, but given the nature of the project, the larger water body of which the stream segment is now a part will continue to carry flows downstream in a similar fashion to existing conditions.

Although the physical stability of the bank west of the dam is not altered, the bank will no longer confine flows. That will no longer be necessary, however, because the water ultimately remains confined by the quarry walls.

As discussed in Ms. Doyle-Breen's and Mr. DiPietro's testimony, the Rockport DPW has developed a stormwater management plan and the discharge from the Quarry Road outfall will be treated by a Stormcepter before it is discharged to the replicated wetland. Doyle-Breen Add. Supp. Test. Exh. B; DiPietro 2008 Dir. Test. ¶ 2. Ms. Rimmer did not file additional supplemental testimony on wetlands permit issues. Based on the testimony of Ms. Doyle-Breen and Mr. DiPietro, I conclude that the dam project satisfies the DEP's stormwater policy.

Finally, the Rockport DPW has filed final plans for the spillway and stilling basin. Based on the testimony of Ms. Doyle-Breen and Mr. DiPietro, these structures reduce impacts to state and federal wetlands. Doyle-Breen Add. Supp. Test. Exh. B; DiPietro 2008 Dir. Test. ¶ 3. Mr. DePietro testified that the work is in the buffer zone of the intermittent stream bank. *Id*. Ms. Rimmer does not dispute their testimony. Accordingly, I conclude that the design for the spillway and stilling basin conforms to the wetlands regulations.

CONCLUSION

I conclude that a water quality certification for the dam project cannot be issued without a variance because of the prohibitions at 314 CMR 9.06 (4) and 9.06 (5). I further conclude that the project revisions and the additional evidence submitted following the Remand Decision

demonstrates that the dam project satisfies the limited project criteria at 310 CMR 10.53 (3)(l), the Quarry Road outfall complies with the DEP's stormwater policy, and the spillway and stilling basin design conforms to regulatory requirements. Consequently, the dam project may receive a final order of conditions.

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.