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|  | COMMONWEALTH OF MASSACHUSETTS  EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  **DEPARTMENT OF ENVIRONMENTAL PROTECTION**  ONE WINTER STREET, BOSTON, MA 02108 |
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**OFFICE OF APPEALS AND DISPUTE RESOLUTION**

July 25, 2013

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# In the Matter of Docket No. WET-2011-016

# Karen McNiff, Trustee File No. 021-0581

# Chocoura Realty Trust

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**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

The Petitioners, Lenard B. Zide, Trustee of JJML Realty Trust, and Arthur Hodges and Eloise Hodges (collectively “the Petitioners”) challenge the Superseding Order of Conditions (“SOC”) that the Department of Environmental Protection’s Northeast Regional Office (“MassDEP”) issued under the Wetlands Protection Act, G.L. c. 131 § 40, and the Wetlands Regulations, 310 CMR 10.00. The SOC approved the construction of a three bedroom house at Lot 4A, a 1.23 acre lot near 90 Apple Street, Essex, MA (“the Property”). The Property is owned by the Applicant, the Chocorua Realty Trust, Karen McNiff, Trustee. The Hodges own two parcels of property at issue here—one is downgradient and directly abutting McNiff’s Property and the other is located across Apple Street from the McNiff Property. The JJML Realty Trust holds title to a parcel of property across Apple Street from the McNiff Property.

Significantly, all work on the McNiff project will occur well outside Resource Areas regulated under the Act and Regulations; here, those Resource Areas are Bordering Vegetated Wetland (“BVW”) and Bank to an Intermittent Stream. See 310 CMR 10.02 and 10.04. Indeed, the Buffer Zone encroachment will be relatively minimal and the vast majority of it will occur in the outer 50 feet of the Buffer Zone. That said, the project does present some challenges because the work will occur on a relatively steep slope that is upgradient of the BVW and Bank. In response, MassDEP and the Essex Conservation Commission imposed strict conditions (some of which are rare in a single residence building project) that are intended to prevent adverse impacts to the Resource Areas. As a consequence, to successfully challenge the project, the Petitioners must present factually based evidence showing that despite the conditions, there will be alterations to the Resource Areas and those alterations will adversely impact the ability of the Resource Areas to protect the interests served by those areas under the Act. I find below on summary decision that the Petitioners’ case is fatally devoid of such evidence.

Although the Petitioners lodged a commendably strenuous fact-based challenge to several aspects of the project, that challenge comes up short because the final crucial element to their case is missing—in sum, there is no genuine issue of material fact that the project will alter the Resource Areas and such alteration will adversely impact the ability of the areas to protect the interests of the Act. To be clear, the Petitioners’ challenge to aspects of the project design is factually based, but their leap to conclude that this will alter and adversely impact the Resource Areas is based upon conclusory statements, unsupported by facts. See Matter of Kornblith, Docket No, 2010-016, Recommended Final Decision (October 8, 2010), adopted by Final Decision (November 16, 2010) (expert testimony provided fact-based evidence and a model showing how pollutants would travel from Buffer Zone to Resource Areas in sufficient concentrations to alter and adversely affect those areas); Matter of Palmer Energy, LLC, OADR Docket No. 2011-021 & -022, Recommended Final Decision After Remand (July 9, 2012), adopted on the merits by Final Decision (September 11, 2012) (although facility would emit pollutants into the air, there was insufficient evidence they would be emitted at sufficient levels to cause harm). This omission is akin to the failure to present evidence of damages in a tort action.

As a consequence, I resolved this appeal without an adjudicatory hearing when I allowed MassDEP’s and the McNiff’s motions for summary decision. I recommend that MassDEP’s Commissioner adopt this outcome and this Recommended Final Decision to issue a Final Order of Conditions that incorporates the SOC terms and conditions, references the updated amended plans, and includes the additional special conditions identified at the end of section I.B below. The special conditions are recommended simply to clarify how the project should proceed, and thus to help ensure compliance with the Regulations and the Act.

With respect to each of the issues raised by the Petitioners, I find that the Hodges have standing but Petitioner Zide has not shown standing because he has not shown a possibility that the JJML trust property could be harmed. In contrast, the Hodges have shown that under the Act and Regulations their downgradient property could possibly be harmed by the project. Nevertheless, summary decision should be allowed for MassDEP and McNiff. They submitted undisputed material facts demonstrating that: (1) the project will not adversely impact the Resource Areas’ ability to protect the interests of the Act, (2) the septic system located approximately 70 feet from the Resource Areas will not adversely impact their ability to protect the interests of the Act, and (3) McNiff has complied with the Essex Conservation Commission practice for obtaining local permits and approvals. Conversely, although the Petitioners take issue with facets of the project design, they failed to raise a genuine issue of material fact that those asserted design inadequacies will somehow alter the Resource Areas and that alteration will adversely impact their ability to serve or protect the interest of the Act.

REGULATORY FRAMEWORK

All work in this case will occur in the Buffer Zone, and almost all of it in the outer 50 feet of the Buffer Zone. No work will occur in wetland Resource Areas. The Buffer Zone is that area of land extending 100 feet horizontally outward from the boundary of any Resource Areas specified in 310 CMR 10.02(1)(a). 310 CMR 10.04 (defining Buffer Zone). Here, the Buffer Zone to the Resource Areas of BVW and Bank is at issue. See 310 CMR 10.02 and 10.04 (defining Resource Areas).

For work in the Buffer Zone there are a number of regulatory provisions and decisions dictating that the work is subject to less scrutiny than work which takes place in the Resource Areas themselves. First, Buffer Zone work is not per se regulated under the Act or the Regulations. See 310 CMR 10.02(2)(b). Instead, only that work “which, in the judgment of the issuing authority, will alter [a Resource Area] is subject to regulation under M.G.L. c. 131, § 40 and requires the filing of a Notice of Intent.” Id. Thus, the Buffer Zone may generally be altered if it will not alter a Resource Area, as determined by the issuing authority. In contrast, any alteration of a Resource Area is generally subject to jurisdiction under the Act and Regulations. See 310 CMR 10.02(2)(a). “Alter means to change the condition of any Area Subject to Protection Under M.G.L. c. 131, § 40. Examples of alterations include, but are not limited to, the following: . . .(c) the destruction of vegetation; (d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water. . . .” 310 CMR 10.04 (“Alter”).

When reviewing Buffer Zone work for compliance with the Act and Regulations, the ultimate issue is whether the work will alter the Resource Area *and* whether the alteration will adversely affect the ability of the Resource Area to contribute to the protection of one or more of the interests of the Act. 310 CMR 10.53(1); Matter of Kornblith, supra.; Matter of Trammell Crow Residential, Docket No. WET 2010-037, Recommended Final Decision (April 1, 2011), adopted by Final Decision (April 21, 2011); Matter of Nielsen, Docket No. WET 2008-046, Recommended Final Decision (April 12, 2010), adopted by Final Decision (May 11, 2010);  Matter of Princeton Development, Inc., Docket No. 2006-157, Final Decision (February 5, 2009).

Here, the Resource Areas of BVW and Bank are significant to the Act’s interests of protecting or providing public or private water supply, ground water supply, flood control, storm damage prevention, prevention of pollution, and fisheries and wildlife habitat. 310 CMR 10.54(1), 10.55(1). “Prevention of Pollution means the prevention or reduction of contamination of surface or ground water.” 310 CMR 10.04 (“Prevention of Pollution”). “Significant means plays a role. A resource area is significant to an interest identified in M.G.L. c. 131, § 40 when it plays a role in the provision or protection, as appropriate, of that interest. . . .” 310 CMR 10.04 (“Significant”).

The provision at 310 CMR 10.53(1) governs the conditioning of Buffer Zone work to avoid Resource Area alterations that will adversely affect the ability of the areas to contribute to the protection of one or more of the interests of the Act. It provides, in pertinent part, the following:

For work in the buffer zone subject to review under 310 CMR 10.02(2)(b)3., [which is the case here,] the issuing authority shall impose conditions to protect the interests of the Act identified for the adjacent resource area. The potential for adverse impacts to resource areas from work in the buffer zone may increase with the extent of the work and the proximity to the resource area. The issuing authority may consider the characteristics of the buffer zone, such as the presence of steep slopes, that may increase the potential for adverse impacts on resource areas. Conditions may include limitations on the scope and location of work in the buffer zone as necessary to avoid alteration of resource areas. The issuing authority may require erosion and sedimentation controls during construction, a clear limit of work, and the preservation of natural vegetation adjacent to the resource area and/or other measures commensurate with the scope and location of the work within the buffer zone to protect the interests of the Act. . . .

310 CMR 10.53(1); see Matter of Travis Snell, Docket No. 2005-226, Final Decision (May 1, 2007).

In addition to the above, MassDEP regulates certain other work that occurs in the Buffer Zone, under the Regulations’ Stormwater Standards.[[1]](#footnote-1) 310 CMR 10.05(6)(k). Those standards, however, do not apply here because the McNiff project is expressly exempt as a single family residence. 310 CMR 10.05(6)(l)1.

BACKGROUND

McNiff seeks to construct a single family residence on the Property, including related infrastructure: a gravel driveway, attached garage, Title 5 septic system, and drinking water well. The project falls under the Act and Regulations because approximately one-half of the house and garage (roughly 1,000 square feet), one-half of the leach field to the septic system, a retaining wall associated with the leach field, a small corner of the driveway (approximately 200 sq. ft.), and infiltration structures for the roof and driveway are located within the outermost portion of the Buffer Zone to the BVW and Bank of an Intermittent Stream (collectively “Resource Areas”), which lie on the Hodges’ property. Bogue Aff., ¶ 7; see 310 CMR 10.02, 10.04, 10.54, 10.55.

The Essex Conservation Commission issued an Order of Conditions approving McNiff’s Notice of Intent to build the project. See 310 CMR 10.02. The Petitioners appealed that to MassDEP. MassDEP issued an SOC approving the project, after receiving input from the Petitioners’ engineering expert and including additional significant plan changes and conditions intended to protect the Resource Areas during and after construction. The plan changes were made and the conditions imposed because MassDEP recognized that the project would be located on a “steeply sloping forested hillside. . . .” In MassDEP’s view: “It was apparent that the site will present erosion control challenges due to the steep slopes. Maintaining adequate erosion control throughout the project until the site is stabilized will be extremely important.” SOC Cover letter (May 24, 2011); accord Bogue Aff., ¶ 8.

The Petitioners appealed the SOC to the Office of Appeals and Dispute Resolution. They claim that the downgradient Resource Areas will be adversely impacted by pre- and post-construction erosion and sedimentation and pollutants from the septic system. They also claim that McNiff has not obtained all necessary local permits, contrary to the Act and the Regulations.

MassDEP and McNiff dispute the Petitioners’ claims, asserting that they do not have standing and that there is no genuine issue of material fact that the SOC is sufficiently conditioned to prevent adverse impacts to the Resource Areas and they satisfied their obligation to obtain all necessary local permits. I partially agree with MassDEP and McNiff with respect to standing—I find the Hodges have standing but Zide does not. On the merits, I agree with MassDEP and McNiff, and recommend inclusion of additional special conditions to clarify how the project should proceed, and thus to help ensure compliance with the Regulations and the Act.

***Affiants.*** The Petitioners submitted affidavits from the following individuals:

1. Leah D. Basbanes. Basbanes holds a BA degree in biology and an MA degree in energy and environmental studies. She is the principal of Basbanes Wetland Consulting, which provides wetlands consulting services.
2. Philip G. Christiansen. Christiansen is a licensed soil evaluator and he has been a licensed professional civil engineer in Massachusetts since 1977. He is a partner of the engineering and land surveying firm Christiansen and Sergi. He holds a BCS in civil engineering and an MS in environmental engineering.

McNiff submitted affidavits from the following individuals:

1. Daniel Ottenheimer. Ottenheimer is the sole principal of Mill River Consulting, Inc. He holds a BS in environmental engineering and an MS in environmental science and forestry, specializing in watershed hydrology. He was previously employed as a public health director for Gloucester for 9 years and as an environmental engineer for MassDEP for 3 years. He is licensed in Massachusetts as a sanitarian, soil evaluator, and septic system inspector.
2. Mark S. Bartlett. Bartlett has been licensed as a professional engineer in Massachusetts since 1981. He is a certified professional in erosion and sediment control and soil evaluator. He is president of Norfolk Ram Group, LLC, an engineering firm. He holds a BS in civil engineering, an MS in environmental engineering, and an MBA in finance.
3. Mary Rimmer. Rimmer is a wetlands consultant and scientist with Rimmer Environmental Consulting. She has approximately 25 years of experience in wetlands permitting. She holds a BS in environmental conservation and an MA in energy and environmental studies.

MassDEP submitted affidavits from:

1. Gary Bogue. Bogue has worked in the wetlands program of the Department's Northeast Regional Office for 12 years, handling matters with wetlands permitting and enforcement. He has worked for MassDEP in other positions from 1985 until 1998. He holds a BA and MS in biology.
2. Madelyn Morris. Ms. Morris submitted an affidavit to authenticate a letter received into the record.

***Plan Changes.*** In the course of this appeal, McNiff submitted plan changes that are relatively minor in nature. They include: relocating a driveway infiltration trench so that it is at least 25 feet from the septic system; incorporating a 6 inch wide concrete weir along the proposed driveway infiltration trench; including a linear drainage grate along the driveway at the wall with vertical piping and distribution header to distribute the runoff to the trench; using a different dry well configuration; and using various erosion control practices on soils and slopes that will be disturbed during the construction period. Maguire Aff., ¶ 8; Bogue Aff. for Plan Changes, ¶ 1; Bartlett Aff., ¶¶ 24-29. The amended plans are identified as: “Supplemental Grading Plan for McNiff, 90 Apple Street, Essex, MA,” revision date of May 17, 2013. MassDEP and McNiff moved that the amended plans be substituted for the preceding plans. Those motions are allowed under “Wetlands Program Policy 91-1: Plan Changes” because the amendments are insubstantial changes that reduce potential environmental impacts. See Matter of Robert Rinaldi, Docket No. 2008-058, Recommended Final Decision (February 18, 2009), adopted by Final Decision (March 12, 2009) (discussing acceptance of plan changes at late stages in an appeal, including "at any time prior to a Final Decision"). Because the plans were submitted near the end of the briefing periods, I allowed the Petitioners’ expert additional time to review and provide rebuttal evidence regarding the amended plans.

***Motions to Strike.*** The Petitioners moved to strike portions of affidavits from Daniel Ottenheimer and Gary Bogue on the grounds that they are not competent to testify whether the stormwater infiltration and drywell structures are sufficiently designed. I need not resolve this issue and find that it is moot based upon the subsequent affidavit from Mark Bartlett, a licensed professional engineer who is undoubtedly qualified to testify on the issue. In the interest of justice and furthering the interests of the Act, I exercised my discretion and allowed Bartlett’s affidavit into the record in rebuttal to Petitioners’ affidavits. I cured any potential prejudice by giving the Petitioners and their experts an opportunity to respond to Bartlett’s affidavit and the amended plans. I therefore denied the motion to strike Bartlett’s affidavit. See May 24, 2013 Ruling and Order. Given Bartlett’s affidavit, I did not rely upon any affidavit testimony from Ottenheimer or Bogue regarding design of the stormwater structures; quite simply, it became unnecessary once Bartlett’s testimony was accepted into the record. Ottenheimer and Bogue are competent to testify to all other matters set forth in their affidavits. See Matter of Pittsfield Airport Commission, Docket No. 2010-041, Recommended Final Decision (August 11, 2010), adopted by Final Decision (August 19, 2010) (describing what constitutes evidence from a competent source).

**BURDENS OF PROOF AND STANDARD OF REVIEW**

As the party challenging MassDEP’s issuance of a permit, the Petitioners have the burden of going forward by producing credible evidence in support of their position. Matter of Town of Freetown, Docket No. 91-103, Recommended Final Decision (February 14, 2001), adopted by Final Decision (February 26, 2001) ("the Department has consistently placed the burden of going forward in permit appeals on the parties opposing the Department's position."). So long as the initial burden of production or going forward is met, the ultimate resolution of factual disputes depends on where the preponderance of the evidence lies. Matter of Town of Hamilton, DEP Docket Nos. 2003-065 and 068, Recommended Final Decision (January 19, 2006), adopted by Final Decision (March 27, 2006).

“A party in a civil case having the burden of proving a particular fact [by a preponderance of the evidence] does not have to establish the existence of that fact as an absolute certainty. . . . [I]t is sufficient if the party having the burden of proving a particular fact establishes the existence of that fact as the greater likelihood, the greater probability.” Massachusetts Jury Instructions, Civil, 1.14(d).

The relevancy, admissibility, and weight of evidence that the parties seek to introduce are governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):

[u]nless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

Under 310 CMR 1.01(13)(h), “[t]he weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. . . .”

***Standard for Summary Decision.*** The Adjudicatory Rules, [310 CMR 1.01](http://web2.westlaw.com/find/default.wl?tc=-1&docname=310MADC1.01&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=1012167&tf=-1&findtype=L&fn=_top&mt=208&vr=2.0&pbc=8DB11364&ordoc=0362730218)(11)(f), provide for the issuance of summary decision where the pleadings together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law. See e.g. Matter of Papp, Docket No. DEP-05-066, Recommended Final Decision, (November 8, 2005), adopted by Final Decision (December 27, 2005); Matter of Lowes Home Centers Inc. Docket No. WET-09-013, Recommended Final Decision (January 23, 2009), adopted by Final Decision (February 18, 2009). A motion for summary decision in an administrative appeal is similar to a motion for summary judgment in a civil lawsuit. See Matter of Lowe’s Home Centers, Inc., supra. (citing Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, [9 Mass. App. Ct. 775](http://socialaw.gvpi.net/sll/lpext.dll/sll/sjcapp/sjcapp-2323990#sjcapp-9-32-mass-46--32-app-46--32-ct-46--32-775), 785-86 (1980)).

**DISCUSSION**

I. The Hodges Have Standing But They Failed To Raise A Genuine Issue of Material Fact Whether The Project Will Cause Adverse Impacts.

A. The Hodges Have Standing But Petitioner Zide Does Not.

McNiff and MassDEP argue the Petitioners do not have standing because they have not sufficiently shown they are aggrieved. I agree that the Petitioner Zide lacks standing, but disagree regarding the Hodges. To have standing as an aggrieved party, one must be:

any person who, because of an act or failure to act by the issuing authority, may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in M.G.L. c. 131, § 40.

310 CMR 10.05(7)(j)2.b.iii.; 310 CMR 10.04. For standing, it is not necessary to prove the claim of particularized injury by a preponderance of the evidence. Matter of Gordon, Docket WET No. 2009-048, Recommended Final Decision, (March 3, 2010), adopted by Final Decision (March 5, 2010). "Rather, the plaintiff must put forth credible evidence to substantiate his allegations. In this context, standing becomes, then, essentially a question of fact for the trial judge." [Marashlian v. Zoning Bd. Of Appeals of Newburyport, 421 Mass. 719, 721, 660 N.E.2d 369 (1996)](http://www.lexis.com/research/buttonTFLink?_m=46fea1ae8b8a2e879efa3b20b33aec51&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b453%20Mass.%20517%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=104&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b421%20Mass.%20719%2c%20721%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVlz-zSkAB&_md5=43cda21abd2c10ec04bcb666dbc872e2). Of importance here, is that one must only set forth evidence demonstrating a *possibility* that the injury alleged could result from the allowed activity. Matter of Gordon, supra.; see also Matter of Town of Hull, Docket No. 88-022, Decision on Motion for Reconsideration of Dismissal (July 19, 1988); compare Standerwick v. Zoning Board of Appeals of Andover, [447 Mass. 20](http://socialaw.gvpi.net/sll/lpext.dll/sll/sjcapp/sjcapp-0057048#sjcapp-447-32-mass-46--32-20), 37 (2006) (plaintiff's case appealing zoning decision cannot consist of "unfounded speculation to support their claims of injury").

Here, for purposes of standing the Petitioners must demonstrate that: (a) the work in the Buffer Zone could possibly adversely impact the interests of the Act for the Resource Areas under 310 CMR 10.53(1); and (b) the adverse impacts would *or* could possibly generate identifiable impacts on their properties. See Matter of Andover, WET 2011-036 &-037, Recommended Final Decision (January 10, 2012), adopted by Final Decision (January 19, 2012); Matter of Lepore, Recommended Final Decision (September 2, 2004), adopted by Final Decision (December 3, 2004); Matter of Whoulev, Docket No. 99-087, Final Decision (May 16, 2000). "[A]n allegation of abstract, conjectural or hypothetical injury is insufficient to show aggrievement."   Matter of Doe, Doe Family Trust, Docket No. 97-097, Final Decision (April 15, 1998); see also Ginther v. Commissioner of Insurance, 427 Mass. 319 (1998); Group Insurance Commission v. Labor Relations Commission, 381 Mass. 199 (1980); Duato v. Commissioner of Pub. Welfare, 359 Mass. 635 (1971).

Here, the Hodges have two parcels of property at issue. First, they own Lot 2A, which is approximately 12 acres that lie to the north, downgradient from and bordering the Property. The BVW and Bank are located in this area directly adjacent to McNiff’s upgradient Property. Ottenheimer Aff., ¶¶ 33-38, 42. Focusing solely on the Hodges’ supporting expert testimony, it includes sworn opinions that it would be *possible* for the project, either during or after construction, to adversely impact the interests of the Act for the Resource Areas on their property. In sum, the Hodges claim it is possible that the downgradient BVW could be adversely impacted by pre- and post-construction erosion and sedimentation and pollutants from the septic system and that the SOC conditions are insufficient. This is enough to show standing derived from Lot 2A. See Matter of Gordon, supra.

The Hodges second parcel of property, however, lies across Apple Street from and upgradient of the Property. It is adjacent to the other property at issue, that of the JJML Trust (trustee, Petitioner Zide), which also lies significantly upgradient and across the street from the Property. Bogue Aff., ¶ 16; Ottenheimer Aff., ¶¶ 30-33. Given the upgradient nature of these properties, Ottenheimer testified that it is not physically possible for the proposed work to harm them. Neither Zide nor the Hodges have offered any argument or evidence to the contrary. I therefore find that there is no standing for Zide or the Hodges based upon these property interests, which is consistent with prior decisions. See Matter of Andover, WET 2011-036 &-037, Recommended Final Decision (January 10, 2012), adopted by Final Decision (January 19, 2012) (no standing where upgradient property could not possibly be harmed).

**B. There Is No Genuine Issue Of Material Fact Whether The Project, Properly Conditioned, Will Adversely Impact The Resource Areas**

The Petitioners assert that the Project will adversely impact the Resource Areas during and after construction. They generally contend that construction will expose soils during and after construction because they will not sufficiently re-vegetate, and sediment will travel downgradient into the Resource Areas. I find there is no genuine issue of material fact whether the project will be sufficiently conditioned to avoid the alleged adverse impacts. Simply put, although the Petitioners critiqued aspects of the project design, there was no fact-based evidence showing how the alleged pollutants would reach the resource areas and how they would reach those areas in sufficient volume or concentration to alter the areas and adversely affect their ability to serve or protect the interests of the Act.

The SOC includes a number of special conditions not ordinarily associated with the construction of a single family residence, but which are intended to address the potential risks from the steep upgradient slopes, including: (1) a preconstruction meeting for MassDEP and the Commission to inspect erosion controls and review construction sequencing; (2) retention of an Environmental Monitor who will be on site daily to oversee erosion controls and “all work” in the Buffer Zone; (3) seeding or mulching of stockpiled soils and exposed areas where construction activity ceases for at least 14 days; and (4) special procedures for dewatering to occur only in upland area. See SOC, Special Conditions; Bogue Aff., ¶ 8-10; Bogue Reply Aff., ¶ 3, 11. Further, the erosion and sedimentation barriers, which are designed to stop any sedimentation of Resource Areas, must be maintained in good condition and inspected on a daily basis until the site is stabilized. MassDEP must be notified of any erosion problems and MassDEP reserves the right to require additional measures if necessary. General Condition 17. The Environmental Monitor is required to immediately notify the Commission and MassDEP if the erosion controls fail. Bogue Aff., ¶ 10.

*Moving Erosion Control Barrier and Limit of Work.* Responding to MassDEP’s interest in further protecting the BVW, McNiff also agreed during the SOC review to move the erosion control barrier, which is also the limit of work, further upgradient and closer to the house to leave more of the natural vegetated buffer undisturbed, and thus reduce potential adverse impacts. Bogue Aff., ¶ 9. This was a condition of the SOC. Almost all of the first fifty feet of the Buffer Zone will be undisturbed and remain in its presently forested and densely vegetated state. Ottenheimer Aff., ¶ 38. The only work in the first fifty feet of the Buffer Zone includes a retaining wall for the leach field, erosion controls, and some grading for the leaching field. Bogue Aff., ¶ 7. The retaining wall is set back 42 feet from the BVW. Id. The wall is designed to assist in preventing erosion of fill for the leaching field. Bogue Aff., ¶ 9.

*Adding Infiltration Structures.* During the SOC review, McNiff also agreed to mitigate stormwater runoff from the house roof and any runoff from the gravel driveway by using two infiltration trenches and a dry well. Bogue Aff., ¶ 13; Bogue Reply Aff., ¶ 6. These measures are intended to significantly reduce runoff from the impervious or less pervious surfaces and allow any runoff that is not infiltrated back into the ground to travel slowly as sheet flow through the vegetated areas (the grass lawn and densely vegetated buffer) and eventually down to the BVW. Bogue Reply Aff., ¶ 6; Bartlett Aff., ¶¶ 17-18.

The two infiltration trenches are shallow excavated areas that are filled with stone. See MassDEP Stormwater Handbook, V. 2, p. 94. One is located in the Buffer Zone 80 feet from the BVW and is designed to receive runoff from the north facing roof. Bogue Aff., ¶ 13. The other infiltration trench is located at the bottom of the driveway in the Buffer Zone 85 feet from the BVW and is designed to mitigate stormwater runoff that does not infiltrate the gravel driveway. Bogue Aff., ¶ 13. A drywell located outside of the Buffer Zone is intended to capture runoff from the south facing roof. Bogue Aff., ¶ 13; Ottenheimer Aff., ¶ 88-89. The structures are designed to handle a 2-year frequency rainfall event, which is 3.1 inches of rain for a 24 hour duration storm. Bartlett Aff., ¶ 20. This is the correct measure for compliance with Stormwater Standard 1, even though as a single residence this project is expressly exempt from the Stormwater Standards. Bartlett Aff., ¶ 28; 310 CMR 10.05(6)(l)1. The structures were modified slightly while the appeal was pending to address minor discrepancies, as provided in the amended plans and Bartlett’s affidavits. Bartlett Supplemental Aff., ¶ 4. And grading plans were clarified, but the general amount of grading and the resulting gradient remained significantly unchanged. Bartlett Supplemental Aff., ¶ 5.

Importantly, Bartlett, one of McNiff’s experts, calculated that any water that is not immediately infiltrated back into the ground via the infiltration structures will have a very low maximum velocity as sheet flow, significantly less than permissible velocities under the Stormwater Standards, even assuming they applied. For example, according to the Standards, excessive velocities of 2 to 5 feet per second, depending upon vegetation, will cause soil erosion. Here, the potential velocities are “far less” than permissible velocities, and thus will not cause erosion in the vegetated lawn areas to which they will discharge. The maximum velocity sheet flows were calculated to be .09 feet per second and .21 feet per second for the driveway trench and trench along the house, respectively. Bartlett Aff., ¶ 29.

*The Hodges’ Critique of Infiltration is Deficient.* The Hodges take issue with the design of the infiltration structures. They concede that the project is exempt from the Stormwater Standards, but nevertheless insist that the structures should meet the same level of design and performance as required by the Standards. Petitioners’ Response to McNiff’ and MassDEP’s Replies, p. 4. The Hodges argue that there is a genuine issue of material fact whether the stormwater infiltration structures are adequately designed under the Standards. Opposition to Summary Decision, p. 12. That position is misplaced, as evidenced by the exemption from the Standards. Here, the applicable regulatory standard is 310 CMR 10.53(1). Thus, the appropriate inquiry is whether the infiltration is sufficient to aid in avoiding alterations and adverse impacts to the BVW and Bank. On that point, the Hodges have not rebutted Bartlett’s calculations showing that not only will any water that is not infiltrated be dispersed as slow moving sheet flow, it will travel at a maximum velocity that is substantially below that necessary to lead to erosion. Moreover, even assuming the sheet flow approached the threshold maximum velocity of 2 to 5 feet per second, to cause sedimentation of the Resource Areas the sediment would have to travel another 50 feet through thickly vegetated buffer before reaching the BVW.

The Hodges have not presented any evidence regarding velocity of the sheet flow or how such sheet flow, even assuming it approached maximum velocity, would still somehow cause erosion and sedimentation after flowing through the thickly vegetated fifty-foot natural buffer. That is the fatal crux of their case. Although it is true that the Hodges’ expert, Christiansen, asserted what he perceived as design inadequacies with the proposed infiltration, his testimony falls short of the mark.[[2]](#footnote-2) He performed no calculations or analysis showing how the asserted inadequacies would lead to alteration of the Resource Areas sufficient to adversely impact the Areas’ ability to protect the interest of the Act. So, even assuming his points are correct, the record is devoid of any factual evidence and analysis showing that the mistakes he asserts will lead to adverse impact to the Resource Areas. Instead, he reached the unsupported conclusory statement that the asserted errors will lead to erosion and sedimentation of the adjacent wetlands, without even mentioning how the erosion and sedimentation will travel unimpeded through the lawn and then the 50 feet of thickly vegetated natural buffer that lies between the lawn and the Resource Areas with enough of an impact to alter and adversely affect the Resource Areas. Christiansen Supplemental Aff. The outcome might be difference if the Stormwater Standards applied to this project instead of simply 310 CMR 10.53(1). However, because the latter is solely applicable, Christiansen was obligated to demonstrate how the asserted stormwater design problems will lead to adverse impacts on the ability of the Resource Areas to protect the interests of the Act. He failed to do that. Cf. Matter of Kornblith, supra. (expert testimony provided fact based evidence and model showing that pollutants would travel from Buffer Zone to Resource Areas in sufficient concentrations to alter and adversely affect those areas).

*Soil Stabilization During and Immediately After Construction.* On behalf of McNiff, Bartlett and Rimmer, the wetlands expert, testified in their affidavits to specific measures the Environmental Monitor should require to prevent erosion as the project evolves, before, during, and after construction. Presently, the SOC requires the monitor to oversee erosions controls but does not specify what those controls shall be, with the exception of: plans specifying the location of the erosion control barrier, conditions requiring the seeding or mulching of stockpiled soils and exposed areas where construction activity ceases for at least 14 days, and special procedures for dewatering to occur only in upland area. See SOC, Special Conditions; Bogue Aff., ¶ 8-10; Bogue Reply Aff., ¶ 3, 11. Bartlett and Rimmer testified that during the construction and early post construction stabilization periods, the Environmental Monitor should require, as necessary, erosion controls such as mulch, geo-textile netting, jute netting or other biodegradable netting (affixed with soil staples), sod, or other erosion control products. Bartlett Aff., ¶ 30; Bogue Reply Aff., ¶¶ 3-4; Rimmer Rebuttal Aff., ¶¶ 7.

Rimmer also testified that it is “reasonable that the site contractor should take care during construction to minimize the amount of soil exposed on the site and to strip and stockpile the top 5 inches of loamy surface soil for replacement at the surface upon completion of excavation or, alternatively to replace this with similar loamy material to be imported to the site.” In addition, areas that are to be cleared and graded should have loam installed. This measure “will insure that finer grained material present in some locations below the surface is not placed at the surface during backfilling and final grading activities . . . support rapid re-establishment of vegetative cover.” Further, shade tolerant grass seed disbursed via hydro-seeding will lead to faster germination. Rimmer Rebuttal Aff., ¶¶ 5-6. Rimmer testified that if the Environmental Monitor and applicant’s contractors properly employ some or all of the above measures, including the proper installation, inspection and maintenance of the erosion control barriers, no sediment is expected to migrate into wetlands. Rimmer Rebuttal Aff., ¶ 8. A second row of erosion control measures should be considered by the Environmental Monitor as a reinforcement in the event that the first row fails. Of course, this may prove to be redundant and unnecessary, but redundancies are often built into systems to minimize risk. Rimmer also recommended that the site should be inspected before and during or immediately following rainfall events to determine whether any adjustments are necessary in the erosion control measures. Id. McNiff expressed a willingness to undertake the above precautionary measures. McNiff Reply Brief, n. 11. MassDEP also supports, as necessary, the additional measures, such as mulch netting on disturbed unvegetated soils.[[3]](#footnote-3) MassDEP Reply Brief, p. 10.

The Hodges claim that the above measures will be insufficient to comply with 310 CMR 10.53(1) and avoid adverse impacts to the Resource Areas. But their position is lacking in factual support. Their experts instead make broad conclusory statements that the above measures will be insufficient. Petitioners’ Response to MassDEP and McNiff Replies, p. 5; Basbanes Aff.; Christensen Aff., ¶¶ 5-11, 13. Their conclusions are based upon the assumption that the erosion controls will fail and the result will undoubtedly be an adverse impact to the ability of the Resource Areas to protect the interests of the Act. But an unsupported assumption of failure is not enough. Moreover, even if the erosion controls fail, to adversely impact the Resource Areas, they would have to fail to such a degree that the densely vegetated 50 feet of natural buffer is also unable to impede erosion and sedimentation and protect the Resource Areas. This is a prescription for disaster for which the Hodges have provided no factual basis, only conclusory statements. Petitioners’ Response to MassDEP and McNiff Replies, pp. 5-6 (arguing the “discharge of uncontrolled sediments into wetlands . . . causes adverse impacts”). These broad, conclusory statements are insufficient to survive summary decision. Matter of Pioneer Valley Energy Center, LLC, Docket No. 2011-002, Recommended Final Decision (July 6, 2011), adopted by Final Decision (July 28, 2011).

To clarify the Environmental Monitor’s authority and to help prevent adverse impacts to the Resource Areas, McNiff and MassDEP should be required to submit a Final Order of Conditions that references and incorporates the amended plans and includes the following additional special conditions: Before, during, and after construction, until the site is sufficiently re-vegetated to prevent erosion, the Environmental Monitor shall, at a minimum: (a) inspect the site before and during or immediately following significant rainfall events for erosive conditions; and (b) employ all reasonable and necessary measures to avoid adverse impacts to the ability of the downgradient Resource Areas to protect the interests of the Act, including but not limited to: (i) employing two rows of erosion control barriers, (ii) minimizing exposure of finer grained material and reserving and stockpiling existing loamy surface soil or importing loamy surface soil to encourage rapid re-vegetation and discourage erosion of finer grain sub-surface soils, (iii) using erosion control products such as mulch, geo-textile netting, jute netting or other biodegradable netting (affixed with soil staples), and (iv) employing measures for rapid re-vegetation of soils, such as using existing or importing loamy surface soils, disbursing shade tolerant seed via hydro seeding, and laying sod.

**C. There Is No Genuine Issue of Material Fact That the Septic System Will Adversely Impact The Resource Areas.**

The Hodges also contend that the septic system will adversely impact the BVW by leaching pollutants that will travel downgradient into the BVW. This claim is without merit for several reasons. First, the project was previously approved by the Essex Board of Health and determined to be in compliance with Title 5, 310 CMR 15.000, and the more stringent local bylaws. See 310 CMR 15.000; Ottenheimer Aff., ¶¶ 46, 69-75. The leaching field will be at least 70 feet from the BVW, exceeding the 50 foot minimum under 310 CMR 15.211 and 310 CMR 10.03(3). Bogue Aff., ¶ 7. This undermines the Hodges’ claim of harm to the BVW because when a compliant Title 5 system meets the minimum setback it is presumed to protect the interests served by the BVW under the Act. 310 CMR 10.03(3). In particular, the Regulations provide:

A subsurface sewage disposal system that is to be constructed in compliance with the requirements of 310 CMR 15.000 Subsurface Disposal of Sanitary Sewage (Title 5), or more stringent local board of health requirements, shall be presumed to protect the eight interests identified in M.G.L. c. 131, § 40, but only if none of the components of said system is located within the following resource areas . . . . and only if the soil absorption system of said system is set back at least 50 feet horizontally from the boundary of said areas, as required by 310 CMR 15.211 (Title 5), or a greater distance as may be required by more stringent local ordinance, by-law or regulation. . . . This presumption may be overcome only by credible evidence from a competent source that compliance with 310 CMR 15.000: Subsurface Disposal of Sanitary Sewage (Title 5) or more stringent local requirements will not protect the interests identified in M.G.L. c. 131, § 40.

310 CMR 10.03(3).

The Hodges’ attempt to overcome this presumption fails for a number of reasons. First, they argue that even though the system was previously approved by the Board of Health, the system design has since changed in a number of ways that are not compliant with Title 5. This alleged noncompliance, the Hodges argue, means the system is no longer entitled to the presumption. This argument fails to raise a genuine issue of material fact because the assertions are stated in a conclusory manner, unsupported by a specific factual basis.[[4]](#footnote-4) Christiansen Aff., ¶¶ 15-16; cf. Ottenheimer Aff., ¶¶ 47, 69, 81 (“The septic system components have not changed in location or elevation from those shown on the approved plan.”). Further, Christiansen’s conclusory list of alleged noncompliant areas or changes is not based upon the amended plans, which altered the alleged deficiencies pertaining to the infiltration structures and dry well. Moreover, even if the conclusory list were sufficient, it is not enough simply to identify areas of noncompliance. Rather, there must be sufficient factually based evidence showing that the alleged noncompliance will adversely impact the resource area and its ability to protect the interests under the Act. [[5]](#footnote-5) See 310 CMR 10.53(1). Indeed, as held in a prior Title 5 case, the petitioner must “introduce credible, competent evidence that the septic system will interfere with the functioning of a wetlands resource area. It is not enough to claim that the system will cause pollution, nor is it sufficient to state that the system does not meet the requirements of Title 5 of the State Environmental Code.” Matter of Indian Summer Trust, Docket No. 2001-142, Recommended Final Decision (May 4, 2004), adopted by Final Decision (June 23, 2004) (motion for directed decision allowed when expert testimony was conclusory and not based upon specific factual evidence concerning how and the mechanism by which the alleged pollutants would impair the functioning of the wetland); accord Matter of Kornblith, supra. (expert testimony provided fact based evidence and model showing that pollutants would travel from Buffer Zone to Resource Areas in sufficient concentrations to alter and adversely affect those areas).

Likewise, the Hodges’ claim that the system will adversely impact the BVW even if it is compliant and meets the setback requirements is based upon conclusory statements, unsupported by a specific factual foundation that raises a genuine issue of material fact that the system will “interfere with the functioning of a wetlands resource area” and its ability to protect the interest of the Act. [[6]](#footnote-6) Matter of Indian Summer Trust, supra. (motion for directed decision allowed when expert testimony was conclusory and not based upon specific factual evidence concerning how and the mechanism by which the alleged pollutants would impair the functioning of the wetland); see also Matter of Palmer, Docket No. 2005-072, Recommended Final Decision (September 16, 2005), adopted by Final Decision (November 10, 2005) (summary decision granted when no evidence to rebut presumption); Matter of Farber and Waage, Docket No. 201-126, Recommended Final Decision (May 31, 2002), adopted by Final Decision (August 3, 2002) (directed decision when no evidence that compliance with Title 5 and setback would be insufficient); Matter of Anderson, Docket No. 96-085, Final Decision (April 8, 1997) (dismissing appeal for failure to sustain case when insufficient evidence to show septic system impaired ability of resource area to protect interests under the Act).

**II. McNiff Complied With Local Practice Regarding Permits**

The Hodges also claim that McNiff has not applied for all local permits as required by G.L. c. 131 § 40 and 310 CMR 10.05(4)(e). The statute specifies that a notice of intent shall not be submitted "before all permits, variances, and approvals required by local by-law with respect to the proposed activity, which are obtainable at the time of such notice, have been obtained, except that such notice may be sent, at the option of the applicant, after the filing of an application or applications for said permits, variances, and approvals." M.G.L. c. 131, § 40, ¶ 1. Under CMR 10.05(4)(e), an applicant must obtain or apply for all obtainable permits, variances, or approvals required by local bylaw that are feasible to obtain at the time a wetlands permit application is filed.

“Recent cases have placed the responsibility to accept or reject a notice of intent based upon obtaining other local approvals squarely upon the local conservation commission, to which the Department will defer.”[[7]](#footnote-7) Matter of Terrill, Docket No. 05-523, Final Decision (January 7, 2011). Under the Regulations, a ruling by the municipal agency within whose jurisdiction the issuance of the permit, variance or approval lies, or by the town counsel or city solicitor, concerning the applicability or obtainability of such permit, variance or approval shall be accepted by the issuing authority. In the absence of such a ruling, other evidence may be accepted. 310 CMR 10.05(4)(f).

Here, a threshold issue is whether the approval at issue is one that must be obtained under G.L. c. 131 § 40 and 310 CMR 10.05(4)(e). The Hodges argue that a scenic road permit is required from the Planning Board under G.L. c. 40 § 15C because Apple Street is a scenic road. Under G.L. c. 40 § 15C, Planning Board Approval is required for specified changes to a scenic road. But McNiff and MassDEP contend that this is not a necessary local approval because it is based on a state statute, and thus is a state not a local requirement, and the statutorily specified changes will not be made to the local scenic road, McNiff will only be obtaining access to it.

I need not resolve these threshold issues, even assuming it is appropriate for me to do so. MassDEP proffered a letter from the Chairman of the Essex Conservation Commission stating that scenic road permits are administered by the Essex Department of Public Works and are usually sought at the time the building permit application is filed, which is after any wetlands permitting under the Act is finalized. See Morris Aff., July 19, 2011 letter from Wallace Bruce. The letter was authenticated by an affidavit from Attorney Morris, MassDEP counsel in this case, who received the letter from the Chairman via email on July 28, 2011.[[8]](#footnote-8) The letter appears to have official letterhead of the Essex Conservation Commission and identifies MassDEP as requesting the letter. This is sufficiently reliable and competent evidence to demonstrate that McNiff has complied with local Commission practice, to which I must generally defer. 310 CMR 10.05(4)(f); Matter of Terrill, supra.; Matter of Enos, Docket No. 2012-019, Recommended Final Decision (February 22, 2013), adopted by Final Decision (March 22, 2013); 310 CMR 10.05(4)(f).

**CONCLUSION**

I recommend that MassDEP’s Commissioner adopt this Recommended Final Decision to issue a Final Order of Conditions that incorporates the SOC, references the updated amended plans, and includes the additional special conditions identified at the end of section I.B above, to help ensure compliance with the Regulations and the Act. In sum, summary decision should be allowed for MassDEP and McNiff. They submitted undisputed material facts demonstrating that: (1) the project will not adversely impact the Resource Areas’ ability to protect the interests of the Act, (2) the septic system located approximately 70 feet from the Resource Areas will not adversely impact their ability to protect the interests of the Act, and (3) McNiff has complied with the Essex Conservation Commission practice for obtaining local permits and approvals. Conversely, although the Petitioners take issue with facets of the project design, they failed to raise a genuine issue of material fact that those asserted design inadequacies will somehow alter the Resource Areas and adversely impact their ability to serve or protect the interest of the act. [[9]](#footnote-9)

## NOTICE- RECOMMENDED FINAL DECISION

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

subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a

motion to renew or reargue this Recommended Final Decision or any part of it, and no party

shall communicate with the Commissioner’s office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

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Timothy M. Jones

Presiding Officer

**SERVICE LIST**

In The Matter Of: Karen McNiff, Trustee of Chocorua Realty Trust

Docket No. WET-2011-016 File No. 021-0581

Essex

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| --- | --- |
| Representative | Party |
| Albert Farrah, Esq.  One Washington Mall  Boston, MA 02108  [alf@corwinlaw.com](mailto:alf@corwinlaw.com) | APPLICANT  Karen L. McNiff, Trustee |
|  |  |
| Lenard B. Zide, Esq.  Butters Brazilian LLP  One Exeter Plaza, 12th Floor  Boston, MA 02116  [zide@buttersbrazilian.com](mailto:zide@buttersbrazilian.com)  Matthew Watsky, Esq.  30 Eastbrook Road, Suite 301  Dedham, MA 02026  [matt@watskylaw.com](mailto:matt@watskylaw.com) | PETITIONER/ABUTTER  JJML Realty Trust, Trustee & Arthur & Eloise Hodges |
| Madelyn Morris, Esq.  Mass DEP Office of General Counsel  One Winter Street  Boston, MA 02108  [Madelyn.morris@state.ma.us](mailto:Madelyn.morris@state.ma.us) | DEPARTMENT |
| Cc:  Gary Bogue  MassDEP – Northeast Regional Office  205B Lowell Street  Wilmington, Ma 01887  [Gary.bogue@state.ma.us](mailto:Gary.bogue@state.ma.us) | DEPARTMENT |
| Essex Conservation Commission  Essex Town Hall  30 Martin Street  Essex, MA 01929  [conservation@essexma.org](mailto:conservation@essexma.org) | CONCOM |

1. “Except as expressly provided, stormwater runoff from all industrial, commercial, institutional, office, residential and transportation projects that are subject to regulation under M.G.L.c. 131, § 40 including site preparation, construction, and redevelopment and all point source stormwater discharges from said projects within an Area Subject to Protection under M.G.L.c. 131, § 40 or within the Buffer Zone shall be

   provided with stormwater best management practices to attenuate pollutants and to provide a setback from the receiving waters and wetlands in accordance with the following Stormwater Management Standards as further defined and specified in the Massachusetts Stormwater Handbook.” 310 CMR 10.05(6)(k) (emphasis added).

   [↑](#footnote-ref-1)
2. For the alleged design inadequacies, he asserted that: (1) the soil characterization is insufficiently conservative regarding infiltration rates; (2) Bartlett’s estimation of site alteration is inaccurate; (3) the gravel driveway, most of which lies outside the Buffer Zone, was assigned too much permeability by Bartlett and an insufficient rate of runoff; (4) there are inadequately designed concrete berms for infiltration trenches that could “present a greater threat” of erosion; and (5) there is an insufficiently designed dry well and infiltration trench. [↑](#footnote-ref-2)
3. The OOC required that all “disturbed or exposed soils surfaces designated on the plan shall be kept temporarily stabilized DAILY with hay, straw, [or] mulch. Jute netting or other protective covering and/or method approved by the U.S. Dept. of Agriculture Soil Conservation Service shall be installed if stabilization is not obtained using hay, straw, or mulch.” OOC, Special Condition # 8. That condition does not appear in the SOC, apparently leaving the issue to the discretion of the Environmental Monitor. [↑](#footnote-ref-3)
4. Matter of Pioneer Valley Energy Center, LLC, Docket No. 2011-002, Recommended Final Decision (July 6, 2011), adopted by Final Decision (July 28, 2011) (conclusory testimony is insufficient); Matter of Jody Reale, Docket No. 2010-012, Recommended Final Decision (July 8, 2010), adopted by Final Decision (July 13, 2010) (unsupported expert testimony does not sustain the burden of going forward); Matter of Town of Falmouth Dept. of Public Works, Docket No. 93-032, Decision and Order on Motion to Dismiss (September 2, 1994) (if wetland impacts are so abstract, speculative or conjectural, dismissal is appropriate). See also Wetlands Program Policy 86-1: Presumptions for Subsurface Sewage Disposal Systems That Meet Title 5 or More Stringent Local Board of Health Requirements. [↑](#footnote-ref-4)
5. The Petitioners reliance on 310 CMR 15.020 is misplaced. That provision applies after system installation commences and it is discovered that the site conditions where the system will be installed are different than represented in the plan.

   [↑](#footnote-ref-5)
6. Although not necessary, the Final Order of Conditions should also include a provision specifying that the system retaining wall must be designed and approved by a Massachusetts Registered Professional Engineer and comply with 310 CMR 15.255(2). 310 CMR 15.255(2)(f).

   [↑](#footnote-ref-6)
7. It was previously held that "whether an applicant has applied for all obtainable local permits is a threshold issue to be resolved by the conservation commission. Determining what local permits are necessary and obtainable is uniquely within the expertise of conservation commissions and the

   Department need not revisit a local decision properly made at the time a Notice of Intent is filed." Matter of Indian Summer Trust, Docket No. 2001-142, Ruling on Summary Decision and Order Regarding Witnesses and Schedule (May 16, 2003), adopted by Final Decision (June 23, 2004). [↑](#footnote-ref-7)
8. The Petitioners’ motion to strike the letter and the Morris affidavit is denied. I find that as authenticated through the affidavit of Attorney Morris it is sufficient for purposes of summary decision. G.L. c. 30A, § 11(2); 310 CMR 1.01 (11)(f) and (13)(h)(1); See generally Matter of Franklin Office Park Realty Corp., Docket No. 2010-016, Recommended Final Decision (February 24, 2011), adopted by Final Decision (March 9, 2011) (discussing hearsay standard, appeal pending on other grounds). [↑](#footnote-ref-8)
9. At one point in this appeal, the Hodges had maintained that the BVW delineation was inaccurate. They have since not pressed that issue and have apparently abandoned it. But even if they had not abandoned it, I find that there is no genuine issue of material fact that the present delineation is inaccurate. The Hodges proposed delineation does not comply with MassDEP protocol and is conclusory in nature, providing no field data. Bogue Aff., ¶¶ 11-12; Bogue Reply Aff., ¶ 10; see Matter of Gordon supra. Moreover, even if their delineation were accepted, it would be immaterial to the project because it would only mean that the leach field was 70 feet instead of 78 feet from the BVW at the northwest corner. Thus, it would still be in compliance with the Title 5 setback requirement. Bogue Aff., ¶¶ 11-12. [↑](#footnote-ref-9)