

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**

100 CAMBRIDGE STREET, BOSTON, MA 02114 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

**May 4, 2023**

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In the Matter of  
Michael Carrigan,  
Carrigan Development, LLC

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OADR Docket No. WET-2021-027  
DEP File No. 028-2602  
Gloucester, MA

**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

Carrie Fryklund and a Ten Residents Group (“collectively Petitioners”) filed this appeal to challenge a Superseding Order of Conditions (“SOC”) that the Massachusetts Department of Environmental Protection’s Northeast Regional Office (“MassDEP” or the “Department”) issued to the Applicant, Michael Carrigan, Carrigan Development, LLC (“the Applicant”), for the construction of a 12 residential unit cluster development (“the proposed Project”) in Gloucester, Massachusetts. The SOC was issued pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131 §40 (“MWPA”), and the Wetlands Regulations, 310 CMR 10.00.

The Petitioners allege that the SOC incorrectly identified wetlands resource areas including a stream, would result in adverse impacts to the wildlife habitat of a certified vernal pool and failed to meet local permitting requirements. MassDEP issued the SOC after determining that the stream is intermittent, that consideration of the vernal pool was unnecessary because it was not

certified when the Applicant filed the Notice of Intent (“NOI”) with the Gloucester Conservation Commission (“GCC”), and that local permitting requirements were appropriately addressed. After this appeal ensued, the Department changed its position regarding the vernal pool which resulted in the Applicant submitting revised plans to meet the setback requirements for stormwater discharges near or to a certified vernal pool.

After thoroughly reviewing the administrative record, including the recorded Evidentiary Adjudicatory Hearing (“Hearing”) conducted by the prior Presiding Officer,<sup>1</sup> I recommend that the Department’s Commissioner issue a Final Decision (1) affirming the SOC; (2) issuing a Final Order of Conditions approving the proposed Project; and (3) replacing the SOC Plan with Alternative Plan 2, as recommended by MassDEP; and (4) revising Special Condition 20(a) of the SOC by adding, “with Sheet 5 of 1 (‘Proposed Conditions 1 to 3, VP Alternative 2’) further revised on September 9, 2021.”

### **WITNESSES<sup>2</sup>**

The evidence in the administrative record consists of pre-filed, sworn written testimony and exhibits (“PFT”) submitted by the Parties’ respective witnesses for the Hearing. These witnesses, who were available for cross-examination on their PFT at the Hearing, were as follows.<sup>3</sup>

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<sup>1</sup> The prior Presiding Officer who conducted the Hearing is no longer available. Accordingly, pursuant to 310 CMR 1.01(14)(c), I was assigned to be the substitute Presiding Officer in this appeal to review the administrative record and to draft a Tentative Decision, which I issued on April 18, 2023 for the Parties’ comment pursuant to 310 CMR 1.01(14)(a), which informed the Parties that they had seven business days to file with OADR objections to or supporting arguments in favor of the Tentative Decision. The Parties filed their respective comments to the Tentative Decision in due course, which I reviewed. The Department and the Applicant supported my issuance of a Recommended Final Decision adopting the Tentative Decision with the Department recommending updating the reference to Alternative Plan 2. The Petitioners objected to the Tentative Decision by re-arguing their previous positions which I rejected in the Tentative Decision.

<sup>2</sup> Throughout this Recommended Final Decision, the witnesses’ Pre-Filed Direct Testimony will be referred to as “[Witness] PFT, ¶ X” and Pre-Filed Rebuttal Testimony will be referred to as “[Witness] PFR, ¶ X.” Exhibits to testimony are referred to as “[Witness] Ex. X”.

<sup>3</sup> The Hearing was recorded on the Zoom Internet Platform and shared with all Parties. Throughout this Recommended Final Decision, the witnesses’ Cross-Examination and Redirect Testimony are referred to as “[Witness], time of recording.”

For the Petitioners:<sup>4</sup>

1. Michael Igo, PE, LEED AP, D.WRE. Mr. Igo's specialty is in water resources engineering with a focus in irrigation, rainwater harvesting, soil-water-plant analysis, climate studies and original computer modeling architecture, stormwater, civil engineering, and environmental monitoring. Mr. Igo has a BS in Aerospace Engineering and an MS in Civil Engineering. He is qualified as an expert witness.
2. Patrick C. Garner. Mr. Garner is a wetlands scientist, professional land surveyor, certified soil evaluator and hydrologist with more than 30 years of experience in these fields. Mr. Garner has been a member of MassDEP technical advisory committees including the stormwater advisory group. He is qualified as an expert witness.
3. Carrie Fryklund. Ms. Fryklund is a resident of 250 Concord Street, Petitioner and the Representative of Petitioner, Ten Resident Group.<sup>5</sup>
4. Rick Roth, Director of the Cape Ann Vernal Pond Team. Mr. Roth has been the Director of the Cape Ann Vernal Pond Team ("CAVPT"), a Section 501(c)(3) organization, for 25 years, a member of CAVPT for 31 years, and is a former member of the board of directors of the New England Herpetological Society. He has training through workshops conducted by the Vernal Pool Association, UMass Amherst, and the Massachusetts Audubon Society in obligate species identification, related habitat matters and vernal pool documentation and certification. He is qualified as an expert witness.

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<sup>4</sup> The Petitioners also filed PFT for Joseph Skolnik, but he did not attend the Hearing and therefore was not available for cross-examination by opposing Parties. As a result of Mr. Skolink's failure to attend the Hearing, the Applicant moved to strike his PFT and the Petitioners had no objection. In response, the prior Presiding Officer struck his PFT from the record, consistent with 310 CMR 1.01(13)(h)3. Prior Presiding Officer, 00:10.00.

<sup>5</sup> Ms. Fryklund's PFT did not include a resume or other description of expertise, nor did it offer facts, opinion, or analysis, and consisted solely of documents submitted as exhibits.

For the Applicant:

1. Michael Carrigan. Mr. Carrigan is the Principal of Carrigan Development, LLC, the Applicant. Mr. Carrigan has been developing real estate in Gloucester since 1996 and has a working knowledge of local wetlands, building and zoning regulations.
2. Michael Seekamp. Mr. Seekamp is Principal of Seekamp Environmental Consulting, Inc. Mr. Seekamp is a wetlands scientist with over 25 years of experience in delineating Massachusetts wetlands under federal, state, and local criteria. Mr. Seekamp was formerly a Conservation Agent for the Town of Ipswich Massachusetts and the Chair of the Ethics Commission for the Association of Massachusetts Wetlands Scientists, and former President. He is qualified as an expert witness.
3. Peter J. Ogren, PE, PLS. Mr. Ogren is President of Hayes Engineering, Inc. Mr. Ogren has more than 50 years civil engineering and land and survey experience, including design involving water and sewer pump stations, hydraulic analysis, environmental impact reports, site designs and experience with MPA proceedings, including appeals. He is qualified as an expert witness.
4. Anthony M. Capachietti, EIT. Mr. Capachietti is an Engineer with over 25 years of civil engineering and land surveying experience, designing and permitting residential and commercial developments of difference sizes in the Commonwealth, including the design of subsurface sanitary disposal systems compliant with Title 5. Mr. Capachietti has been involved with wetlands permitting, stormwater, SSDA and ledge removal and serves as a Commissioner on the Town of North Andover Conservation Commission. He is qualified as an expert witness.
5. Deborah Eliason: Ms. Eliason is an attorney and has been practicing law for more than 30 years. She is the founding principal of Eliason Law Office, LLC, with a general

practice focusing on real estate transactions, including examination and assessment of title reports, and state and local permitting. She is qualified as an expert witness.

For the Department:

1. Gary Bogue. Mr. Bogue has worked for MassDEP since 1985 in several different programs and has been a Wetlands Analyst with MassDEP's Wetlands Program since 2006. Mr. Bogue is responsible for drafting Superseding Orders of Conditions, conducting wetlands site visits, reviewing delineations and soil data, reviewing hydrologic calculations and construction plans and applying the MWWA, the Wetlands Regulations, and MassDEP's Stormwater Policy. In addition to multiple wetlands specific trainings, he has a BA and MS in Biology. He is qualified as an expert witness.

**BACKGROUND**

**The Property**

The proposed Project is to be constructed on approximately 21.5 acres located at 186 Concord Street in Gloucester with frontage on both Bray Street and Concord Street ("the Property"). The Property has a varied topography with wooded areas, ledge outcrops and gravel haul roads. Capachietta PFT at ¶¶ 2-3. The Property also includes wetlands resource areas subject to protection by the MWWA and the Wetlands Regulations, including Bordering Vegetated Wetlands ("BVW") and Bank associated with a stream. SOC cover letter, page 2. In 2008, the Applicant delineated the wetlands boundaries and these were confirmed in 2018. Seekamp PFT, ¶¶ 5a-b. The wetlands delineation is shown on the plans approved by the GCC and MassDEP made no changes to the wetlands boundaries when it issued the SOC at issue in this appeal. Seekamp PFT, ¶ 5a. The stream and BVW are designated Outstanding Resource Waters

(“ORWs”) associated with the Great Marsh Area of Critical Environmental Concern (“Great Marsh ACEC”). SOC cover letter, page 2; Capachietti PFT, ¶ 12.a.

### **The Proposed Project**

The proposed Project is for the construction of 12 single-family homes, clustered on a single looped driveway, on 4.9 acres of the Property, preserving approximately 78% of the Property for open space and passive recreation, subject to a conservation restriction. Capachietti, PFT ¶¶ 3-4. The portions of the proposed Project located within jurisdiction of the MWPA and the Wetlands Regulations are the stormwater management systems, grading associated with the proposed riprap slope, and a small area of grading for the Title 5 sewage disposal system. SOC cover letter, page 2.

The proposed Title 5 sewage disposal system is not located within a wetlands resource area but has a small area of grading in the Buffer Zone to BVW.<sup>6</sup> The associated soil absorption system is set back at least 50 feet horizontally from the boundary of a wetlands resource area. SOC cover letter, page 2; Ogren PFR, ¶ 4. Capachietti PFT, ¶ 33.

The SOC approved two stormwater discharge points.<sup>7</sup> Bogue PFT, ¶ 33. The second stormwater treatment train, the one at issue in this proceeding, as proposed consists of two catch basins that discharge to a Stormreceptor Unit which then discharges to a 10-foot-wide-level spreader. Bogue PFT, ¶ 34. Under the SOC Plan, the pipe outlet discharging into the level spreader was located approximately 20 feet from the edge of BVW where the vernal pool is located, and therefore in the Buffer Zone to the vernal pool in the BVW. Id.

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<sup>6</sup> The SOC Plan shows that only a small section of grading for the proposed subsurface sewage disposal system is located within the Buffer Zone, approximately 95 feet away from the BVW boundary. SOC cover letter, page 2. The proposed Title 5 sewage disposal system is the same on all plans discussed in this Recommended Final Decision and the small area of grading in the Buffer Zone related to it is not identified as an issue for adjudication.

<sup>7</sup> The first is an infiltration basin for treating most of the stormwater runoff from the proposed Project, does not discharge near or to the certified vernal pool, and is not identified as an issue for adjudication.

At the time the NOI was filed, the vernal pool was identified as a Potential Vernal Pool by the Natural Heritage and Endangered Species Program (“NHESP”) and was known to the Applicant. Capachietti PFT, ¶ 59. It is located within the BVW on the abutting property approximately 63 feet back from Bray Street on the City of Gloucester (“the City” or “Gloucester”) property at 88 Bray Street, 137 feet southwest and perpendicular to the City’s property line. Capachietti PFT ¶¶ 61-62; Capachietti Ex. 15. The SOC Plan created a separation of greater than 100 feet between the limit of work and the *estimated* location of the vernal pool, a single point on the NHESP map. Id. Later calculation and observation of the vernal pool boundary reduced this separation to less than 100 feet and MassDEP directed the Applicant to prepare new plans. Bogue PFT, ¶ 34; Capachietti PFT, ¶ 86.

As a result, during these proceedings, the Applicant prepared two alternative plans which relocated the second stormwater treatment train. Alternative Plan 1 relocates the stormwater treatment train so that it is 109 feet from the calculated boundary of the newly certified vernal pool. Capachietti PFT, 87; Capachietti Ex. 22. Alternative Plan 2 relocates the stormwater treatment train so that it is 114 feet from the observed edge of water as the boundary of the certified vernal pool. Capachietti PFT, 88; Capachietti Ex. 23.

### **Procedural Background**

The Applicant filed its NOI with the GCC on or about July 3, 2018. Capachietti PFT, ¶ 7. The GCC issued an Order of Conditions (“OOC”) on September 20, 2018 approving the proposed Project and thereafter, on October 3, 2018, the Petitioners requested that MassDEP issue an SOC overturning the OOC and rejecting the proposed Project. Capachietti PFT, ¶¶ 8-9. MassDEP dismissed the Petitioners’ SOC request on the grounds that the Petitioners had failed to send a timely photocopy of the SOC Request to the Applicant. The Petitioners appealed the dismissal to OADR which resulted in a Remand Order from MassDEP’s Commissioner directing MassDEP to

review the Petitioners' SOC request and to issue an SOC in accordance with the MWPA and the Wetlands Regulations.<sup>8</sup>

Following the Remand Order, MassDEP held a site visit on June 5, 2019 attended by Petitioner Fryklund, other Gloucester residents, the Applicant, and the Applicant's representatives. Capachietti PFT, ¶ 11. On August 30, 2019 MassDEP informed the Applicant's representatives that it had determined that the intermittent stream and BVW on the Property were designated as ORW associated with the Great Marsh ACEC. SOC cover letter, page 2. As a result, MassDEP requested that the Applicant revise its stormwater plans to comply with wetlands regulatory requirements for discharges near or to critical areas. Id. Thereafter, the Applicant revised its plans to include sub-surface infiltration in place of the previously proposed extended dry-detention basin. Capachietti PFT, ¶ 12.a. Over the next several months, MassDEP made requests for additional information related to the stormwater system to which the Applicant responded. SOC Cover Letter, page 3; Capachietti PFT, ¶ 12b-e.<sup>9</sup>

The vernal pool was approved for certification by NHESP on December 23, 2020 and assigned #8177 ("CVP #8177"). Fryklund Ex. 4-B. The record shows that Mr. Bogue was informed of the certification on that date. Fryklund Ex. 4-C; See also Capachietti PFT, ¶ 7. However, MassDEP did not consider it to be vernal pool habitat because it was certified after the filing of the NOI and issued the SOC on May 5, 2021 approving the proposed Project. Bogue PFT, ¶ 3; See also SOC cover letter, page 3.

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<sup>8</sup> See In the Matter of Michael Carrigan, Carrigan Development, LLC, Docket 2018-017, Recommended Remand Decision, 2019 MA ENV LEXIS 44, OADR Docket No. WET-2018-017 (March 28, 2019), adopted by Final Decision, (May 13, 2019), 2019 MA ENV LEXIS.

<sup>9</sup> Mr. Capachietti's testimony acknowledged that during this time-period the Commonwealth issued a state of emergency regarding the COVID-19 virus resulting in the closure of MassDEP's offices. Capachietti PFT, ¶12.c.



The Petitioners appealed to OADR on May 19, 2021 seeking a Final Decision overturning the SOC and denying approval for the proposed Project. In their appeal, the Petitioners claimed that the Project would adversely impact multiple resource areas, including BVW and CVP #8177 within the BVW and a perennial stream that are designated as ORWs associated with the Great Marsh ACEC. The prior Presiding Officer conducted a Pre-Hearing Conference on June 15, 2021 to establish the issues for adjudication in the appeal and the Hearing schedule. On August 16, 2021, the prior Presiding Officer granted the Parties' Joint Motion to Amend the Schedule to accommodate MassDEP's reconsideration of its position relative to CVP #8177 (See Issue No. 4). Capachietti PFT, ¶ 80.

On August 25, 2021 the Parties participated in a site view at the reported location of CVP #8177. Capachietti PFT, ¶ 81. Thereafter, on September 9, 2021 the Applicant submitted Alternative Plan 1 and Alternative Plan 2, both of which relocate the limit of work more than 100 feet from CVP #8177. Bogue PFT, ¶ 32. The prior Presiding Officer conducted a Hearing on December 9, 2021. The Parties' post-hearing briefing was completed on March 11, 2022 with the filing of Petitioner's Reply Brief.

### **ISSUES FOR ADJUDICATION**

The issues for adjudication were established by the prior Presiding Officer in consultation with the Parties during and after the Pre-Hearing Conference.<sup>10</sup> The issues on which the witnesses presented testimony are:

1. Whether MassDEP complied with the Plan Change Policy 91-1 when it approved the Applicant's plan changes during its SOC review?

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<sup>10</sup>On June 16, 2021 the prior Presiding Office issued a Pre-Hearing Conference Report and Order ("PHC Report and Order") identifying the issues for adjudication. Following his review of the Parties comments on the PHC Report and Order, the prior Presiding Officer revised Issues 4 and 5 in an Amended Pre-Hearing Conference Report and Order issued on June 28, 2021 ("Amended PHC Report and Order"). He subsequently made further revisions to Issue 4 after review of additional Party comments and issued a Second Amended Issue Statement for the Pre-Hearing Conference Report and Order on June 29, 2021 ("Second Amended Issue Statement").

- a. If not, what impact, if any, does that have on whether the Project should be approved under the Wetlands Regulations and the Wetlands Act?
2. Whether the Applicant complied with the requirement to obtain or apply for all obtainable permits, variances, and approvals pursuant to 310 CMR 10.05(4)I and (4)(f)?
  - a. If not, what impact, if any, does that have on whether the Project should be approved under the Wetlands Regulations and the Wetlands Act?
3. To what extent, if any, is there a perennial stream and associated Riverfront Area on the Property pursuant to 310 CMR 10.58?
  - a. If there is a perennial stream on the Property, what impact, if any, does that have on whether the Project should be approved under the Wetlands Regulations and the Wetlands Act?
4. Does 310 CMR 10.57(2)(a)5 bar MassDEP from requiring the Applicant to comply with applicable regulatory, policy, or guidance requirements for the certified vernal pool<sup>4</sup> because the vernal pool was not certified before the Notice of Intent was filed?
  - a. If not, to what extent, if any, should the certified vernal pool impact the project plans?
5. Does the project comply with the stormwater standards provision at 310 CMR 10.05(6)(k)<sup>6</sup> that requires: “stormwater discharges near or to any other critical area” use “specific source control and pollution prevention measures and specific structural stormwater best management practices determined by the Department to be suitable for managing discharges to such area as provided in the Massachusetts Stormwater Handbook”?
6. Does the Applicant possess sufficient real property interests for all aspects of the project?
  - a. If not, what impact, if any, does that have on the project.

## **STATUTORY & REGULATORY FRAMEWORK**

The MWPA and the Wetlands Regulations "do not prohibit development in wetlands areas[,], [but rather,] “create[e] a procedure requiring the [D]epartment to condition activities in certain [wetlands] areas so as to protect [the MWPA's] statutory mandate." In the Matter of

Kristen Kazokas, OADR Docket No. WET-2017-022, Recommended Final Decision (August 29, 2018), 2018 MA ENV LEXIS 67, \*9 adopted by Final Decision (September 18, 2019), 2019 MA ENV LEXIS 93, citing Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 224 (2010). The purpose of the MWPA and the Wetlands Regulations is to protect wetlands and to regulate activities affecting wetlands areas in a manner that promotes the following eight statutory interests:

- (1) protection of public and private water supply;
- (2) protection of ground water supply;
- (3) flood control;
- (4) storm damage prevention;
- (5) prevention of pollution;
- (6) protection of land containing shellfish;
- (7) protection of fisheries; and
- (8) protection of wildlife habitat.

G.L. c. 131, § 40; 310 CMR 10.01(2); Kristen Kazokas, \*9, citing New England Wind, 457 Mass. At 224, n.6.

#### **PETITIONER'S BURDEN OF PROOF AT THE HEARING**

As the party challenging the Department's issuance of the SOC, the Petitioners had the burden of proof in this *de novo* appeal, to produce credible evidence from a competent source to support its positions.<sup>11</sup> Specifically, the Petitioners were required to present "credible evidence from a competent source in support of each claim of factual error [made against the Department], including any relevant expert report(s), plan(s), or photograph(s)." 310 CMR 10.05(7)(j)3.c. "A

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<sup>11</sup> See 310 CMR 10.03(2); 310 CMR 10.05(7)(j)2.b.iv; 310 CMR 10.05(7)(j)2.b.v; 310 CMR 10.05(7)(j)3.a; 310 CMR 10.05(7)(j)3.b.

‘competent source’ is a witness who has sufficient expertise to render testimony on the technical issues on appeal.” In the Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 MA ENV LEXIS 89, at 36-37, adopted by Final Decision (August 19, 2010), 2010 MA ENV LEXIS 31. Whether the witness has such expertise depends “[on] whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony.” Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted). see e.g. In the Matter of Carulli, Docket No. 2005-214, Recommended Final Decision (August 10, 2006)(dismissing claims regarding flood control, wetlands replication, and vernal pools for failure to provide supporting evidence from competent source), adopted by Final Decision (October 25, 2006); In the Matter of Indian Summer Trust, Docket No. 2001-142, Recommended Final Decision (May 4, 2004) (insufficient evidence from competent source showing that interests under MWPA were not protected), adopted by Final Decision (June 23, 2004); In the Matter of Robert Siegrist, Docket No. 2002-132, Recommended Final Decision (April 30, 2003) (insufficient evidence from competent source to show wetlands delineation was incorrect and work was not properly conditioned), adopted by Final Decision (May 9, 2003).

### **STANDARD OF REVIEW**

My review of the evidence is *de novo*, meaning that my review is anew, irrespective of any prior determination of the Department in issuing the SOC. See Kazokas, \*9. “Hence, if during the pendency of an administrative appeal, '[the Department] becomes convinced' based on a different legal interpretation of applicable regulatory standards, new evidence, or error in its prior determination, 'that the interests of [MWPA] require it to take a different position from one that it had adopted previously [in issuing the SOC],' the Department is authorized to, and should change its position.” In the Matter of Algonquin Gas Transmission, LLC, OADR Docket No. WET-2016-

025, Recommended Final Decision (October 16, 2019), 2019 MA ENV LEXIS 106, \*15, adopted by Final Decision, (October 24, 2019), 2019 MA ENV LEXIS 104. Additionally, "[t]he Presiding Officer [responsible for adjudicating the administrative appeal] is not bound by MassDEP's prior orders or statements [in the case], and instead is responsible ... for independently adjudicating [the] appeal[1] and [issuing a Recommended Final Decision] to MassDEP's Commissioner that is consistent with and in the best interest of the [MWPA, the Wetlands] Regulations, and MassDEP's policies and practices." In the Matter of Francis P. and Debra A. Zarette, Trustees of Farm View Realty Trust, OADR Docket No. WET 2016-030, Recommended Final Decision (February 20, 2018), 2018 MA ENV LEXIS 7 \*16, adopted by Final Decision (March 1, 2018), 2018 MA ENV LEXIS 6.

The relevancy, admissibility, and weight of the evidence presented at the Hearing 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 . . . rests within the sound discretion of the Presiding Officer. . . ." See, In the Matter of Sawmill Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), 2015 MA ENV LEXIS 63, at 84, adopted as Final Decision (July 7, 2015), 2015 MA ENV LEXIS 62 (petitioners' expert testimony "that pharmaceuticals, toxins, and other potentially hazardous material would be discharged from effluent generated by . . . proposed [privately owned wastewater treatment facility] . . . was speculative in nature and not reliable").

## **DISCUSSION**

### **1. MassDEP complied with the Plan Change Policy 91-1 when it approved the Applicant's plan changes during its SOC review.**

Regarding Issue 1 for adjudication, the Petitioners withdrew their claim that MassDEP did not comply with the Plan Change Policy. See Petitioners' Memorandum of Law, page 6 and Supplemental Memorandum of Law, page 2. The Applicant's experts offered no testimony on this issue and the Applicant requested the prior Presiding Officer issue a Recommended Final Decision reflecting the Petitioners' waiver of this issue. See the Applicant's Memorandum of Law, page 7; Capachietti PFT, Page 7, footnote 1. Nonetheless, on behalf of MassDEP, Mr. Bogue testified that the plan as approved by the GCC did not meet the Stormwater performance standards, and as such MassDEP may accept substantial changes where the GCC does not object. Bogue PFT, ¶17. Mr. Bogue further testified that MassDEP contacted the GCC through its conservation agent, Adrienne Lennon, and that the GCC did not have any issues with the proposed plan changes. Id. Additionally, the plan changes required before the SOC was issued did not significantly modify the proposed Project configuration and did not result in any increased impacts to wetlands resources. Bogue PFT, ¶16. Mr. Bogue further testified that Alternative Plans 1 and 2, which relocate the southern stormwater treatment train to reflect the delineation of CVP #8177, are not substantial plan changes, do not significantly modify the proposed Project configuration and do not result in increased impacts to wetlands resource areas. This result is because neither alternative changes the design approved in the SOC, and only move the discharge points farther away from CVP #8177 and the BVW. Bogue PFT, ¶¶ 15-19; See also Capachietti, PFT, ¶ 89. Mr. Bogue's testimony is uncontested. See also MassDEP's Memorandum of Law, page 2. I find by a preponderance of the evidence that the Department has complied with the Plan Change Policy 91-1.

**2. The Applicant complied with requirements regarding local permits pursuant to 310 CMR 10.05(4)(e) and (4)(f) and MassDEP appropriately relied on the Gloucester Conservation Commission’s decision to accept the Notice of Intent as complete for review.**

Issue 2 for adjudication relates to whether the subsurface sanitary disposal system (“SSDS”) septic permit that is required for the proposed Project is a local permit rather than a State permit, and if it is a local permit, whether the Applicant was required to apply or obtain it before filing the NOI. Undisputedly, the septic permit would be issued by the Gloucester Board of Health (“Gloucester BOH”) pursuant to the State Environmental Code, G.L. c. 21A, § 13 and its implementing regulation, 310 CMR 15.00 (“Title V”) and the ordinance and regulations implemented by the Gloucester BOH, which include more stringent requirements.

The Petitioners contend that this permit is a local permit pursuant to the Wetlands Regulations at 310 CMR 10.05(4)(e) and (4)(f), that it was feasible for the Applicant to obtain prior to filing the NOI and that the GCC was required to reject the NOI because the Applicant had not applied for the septic permit. MassDEP and the Applicant contend that the septic permit is a State permit, not a local permit and not subject to 310 CMR 10.05(4)(e) and (4)(f). 310 CMR 10.05(4)(e) provides that:

The requirement under M.G.L. c. 131, § 40 to obtain or apply for all obtainable permits, variances and approvals required by local by-law with respect to the proposed activity shall mean only those which are feasible to obtain at the time the Notice of Intent [NOI] is filed. Permits, variances, and approvals required by local by-law may include, among others, zoning variances, permits from boards of appeals, permits required under floodplain or wetland zoning by-laws and gravel removal permits. They do not include, among others, building permits under the State Building Code, M.G.L. c. 23B, § 16, or subdivision control approvals under the State Subdivision Control Law, M.G.L. c. 41, §§ 81K through 81GG, which are issued by local authorities. (emphasis supplied)

310 CMR 10.05(4)(e) identifies two categories of permits. The first, are those “required by local bylaw,” and excluded from the first are those which are “issued by local authorities.” The regulation provides two examples of permits “issued by local authorities” that are required by state law, with

specific state-wide requirements, that are implemented locally. I agree with the Applicant and MassDEP that the septic permit is more akin to the second category because like permits issued under the State Building Code or State Subdivision Control Law, the septic permit is issued based upon statewide requirements that are implemented at the local level. See the Applicant's Supplemental Memorandum of Law, pages 5-7; MassDEP's Memorandum of Law, page 3. While local boards of health may impose more stringent requirements on septic permits, such boards must implement the statewide minimum which is part of a comprehensive statutory and regulatory scheme. MassDEP's and the Applicant's argument, that because of this statewide permitting scheme, this category of permit is excluded from the list of those "required by local bylaw" is persuasive. The Petitioners' argument that the additional requirements that the Gloucester Board of Health has added to the septic permit converts it to a permit "required by local bylaw" would eliminate the distinction the regulation makes between permit "required by local bylaw" and those "issued by local authorities." If the Wetlands Regulations did not intend to include other statewide programs "issued locally" it would not have included the words "among others." See Maters v Nixon, 15 LCR 541, \*543 (October 2017) (basic tenant of construction to give effect to all the provision so that no part will be inoperative or superfluous).

Additionally, recent cases have consistently placed the responsibility to accept or reject a NOI based upon obtaining other local approvals squarely upon the local conservation commission, to which MassDEP will defer. See In the Matter of Terrill, Docket No. 05-523, Final Decision, 2011 MA ENV LEXIS 13, 4 (January 7, 2011)(MassDEP deferred to Commission, which treated lack of local permit as insufficient information), citing 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); Matter of Stephen Bankert, Docket No. 2003-027, Final Decision (December 3, 2004).



Mr. Capachietti's testimony on behalf of the Applicant demonstrated that the GCC specifically considered the status of the septic permit and discussed the issue in public hearing. Capachietti PFT, ¶ 28.<sup>12</sup> The proposed Title 5 sewage disposal system, as proposed on all the plans, is depicted outside of regulated wetlands resource areas and their buffer zones. Capachietti PFT 18; Igo Hearing 2:50:58-2:53:43.<sup>13</sup> The GCC acknowledged the lack of a septic permit by conditioning the OOC on the approval of the sewage disposal system by the Gloucester BOH. Capachietti PFT, ¶¶ 29-30; Bogue PFT, ¶ 5; OOC, General Condition 3 and Special Condition 5. In reliance on that GCC decision, the SOC maintains the same conditions. Capachietti PFT, ¶ 31; SOC, General Condition 3 and Special Condition 22.<sup>14</sup>

In their closing brief, the Petitioners raised a new argument, asserting that because the SOC is conditioned on the Applicant's obtaining a septic permit that the SOC is "invalid and has no legal effect" and that therefore any decision from OADR is merely an "advisory opinion." In pointing out that the Petitioners do not cite any legal authority for this assertion, MassDEP contends that there are any number of possible conservation commission outcomes that are

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<sup>12</sup> The Applicant and his experts testified that it was not feasible to apply for and obtain the septic permit prior to filing the NOI, citing the iterative nature of project planning at that early stage, including that planning decisions could not be made until the outcome of the NOI proceedings was known. Capachietti PFT, ¶¶ 22-25; Carrigan PFT, ¶¶ 5-6. Mr. Ogren also testified that in his experience the GCC had never required submission of the septic permit prior to filing an NOI, particularly where the septic system is proposed outside of jurisdictional areas. Ogren PFT, ¶¶ 7-8. See also Capachietti, PFT, ¶ 17.

<sup>13</sup> See also 310 CMR 10.02(2)(d) which provides: "Any activity proposed or undertaken outside the areas specified in 310 CMR 10.02(1) and outside the Buffer Zone is not subject to regulation under M.G.L. c. 131, section 40 and does not require the filing of Notice of Intent unless and until that activity actually alters an Area Subject to Protection under M.G.L. c. 131, § 40."

<sup>14</sup> Potential harms from activities outside jurisdictional wetlands areas is not subject to regulation under the MWPA or the Wetlands Regulations, unless and until that activity alters an area subject to protection under the MWPA. See 310 CMR 10.02(2)(d). As shown on all plans, no component of the SSDS is proposed to be located within jurisdictional areas under the MPWA and the soil absorption system is set back at least 50 feet horizontally from the resource area. Ogren PFR, ¶ 4; Capachietti PFT, ¶¶ 18, 33; Capachietti, Ex. 23; Capachietti PFR, ¶¶ 2, 5. As such, the septic permit is presumed to protect the interests of MWPA because none of its components is proposed within wetlands resource areas, and the soil absorption system is set back at least 50 feet horizontally from the resource area. See 310 CMR 10.03(3). Whether the Applicant will obtain a septic permit under Title 5, 310 CMR 15.000 (and the Gloucester local bylaw) is a decision for the Gloucester BOH.

appealable to MassDEP without the commission having issued a document with “present legal effect.” In addition to a failure to act, these outcomes include the issuance of a decision “allowing, conditioning or prohibiting work.” G.L. c. 131, § 40.; 310 CMR 10.05(7)(b)3. It is well established that local conservation commission actions and inactions, conditioned or not, are reviewable by MassDEP, and the Petitioners have presented no facts or legal argument to the contrary. See Zarette, \*13, citing Healer v. Dept. of Envir. Prot., 73 Mass. App. Ct. 714-719 (2009) (MassDEP assumes primary review of the proposed work or review on appeal from a local conservation commission decision.)

Based on the foregoing, I find that a preponderance of the evidence supports a conclusion that the Title 5 septic permit is a state permit issued by a local authority and it was reasonable for MassDEP to rely on the GCC’s decision to accept the NOI and include among the conditions, that the Applicant obtain the appropriate septic permit. As such, the Department’s issuance of the SOC complies with 310 CMR 10.05(4)(e) and (4)(f).

**3. The Stream On the Property Is Intermittent pursuant to 310 CMR 10.58, And Therefore Does Not Have Associated Riverfront Area.**

Issue 3 for adjudication addresses whether the stream that passes through the Property is intermittent or perennial, as marked at flags C48 and H20 to C40 and H14 where it crosses the Property.<sup>15</sup> Seekamp PFT, ¶ 4. The Petitioners contend that the stream is perennial and the Applicant and MassDEP contend that it is intermittent. Whether a stream is intermittent or perennial is important because a perennial stream is a River that has regulated bordering land area known as the Riverfront Area. The Riverfront Area is: "that area of land situated between a river's

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<sup>15</sup> The stream is not otherwise shown on the SOC Plan, Alternative Plan 1 or Alternative Plan 2.

mean annual high-water line and a parallel line located two hundred feet away, measured outward horizontally from the river's mean annual high-water line." G.L. c. 131, § 40; 310 CMR 10.58(2)(a); 310 CMR 10.58(2)(c).<sup>16</sup>

The MWPA and Wetlands Regulations define a River as a natural flowing body of water that empties to any ocean, lake, or other river and which flows throughout the year. See G.L. c. 131, § 40; 310 CMR 10.04; 310 CMR 10.58(2)(a)1. Rivers include perennial streams because surface water flows within them throughout the year. See 310 CMR 10.04 ("Stream"). A stream that does not flow throughout the year is intermittent. Id. A determination that a stream is perennial or intermittent shall only be made pursuant to 310 CMR 10.58(2)(a)1. Id.

The Wetlands Regulations set out four different tests for determining whether a stream is perennial or intermittent. 310 CMR 10.58(2)(a)1.a-c. provides:

[a] river or stream [is] shown as perennial on the current United States Geological Survey ("USGS") or [on a] more recent map provided by the Department . . . ;

[b] river or stream [is] shown as intermittent or not shown on the current USGS map or [on a] more recent map provided by the Department, [but] has a watershed size greater than or equal to one square mile . . .

[c] stream [is] shown as intermittent or not shown on the current USGS map or [on a] more recent map provided by the Department, that has a watershed size less than one square mile, but has a watershed size of at least one-half (0.50) square mile and has a predicted flow rate greater than or equal to 0.01 cubic feet per second at the 99% flow duration using the USGS Stream Stats method . . . ; or [w]hen the USGS StreamStats method cannot be used because the stream does not have a mapped and digitized centerline[,] . . . and the stream has a watershed size of at least one-half (0.50) square mile, and the surficial geology of the contributing drainage area to the stream at the project site contains 75% or more stratified drift[:] . . . sand and gravel deposits that have been layered and sorted by glacial meltwater streams. . . .

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<sup>16</sup> "The boundary of the Riverfront Area is a line parallel to the mean annual high-water line, located at the outside edge of the riverfront area. At the point where a stream becomes perennial, the riverfront area begins at a line drawn as a semicircle with a 200-foot (25-foot in densely developed areas; 100-foot for new agriculture) radius around the point and connects to the parallel line perpendicular to the mean annual high water line which forms the outer boundary."

If a stream is determined, or presumed, to be perennial according to any one of the above methodologies, the Wetlands Regulations provide a means to rebut that presumption. 310 CMR 10.58(2)(a)1.d provides in relevant part the following:

the issuing authority shall find that any stream is intermittent based upon a documented field observation that the stream is not flowing. A documented field observation shall be made by a competent source and shall be based upon an observation made at least once per day, over four days in any consecutive 12 month period, during a non-drought period on a stream not significantly affected by drawdown from withdrawals of water supply wells, direct withdrawals, impoundments, or other human-made flow reductions or diversions. Field observations made after December 20, 2002 shall be documented by field notes and by dated photographs or video. Field observations made prior to December 20, 2002 shall be documented by credible evidence. All field observations shall be submitted to the issuing authority with a statement signed under the penalties of perjury attesting to the authenticity and veracity of the field notes, photographs or video and other credible evidence. Department staff, conservation commissioners, and conservation commission staff are competent sources; issuing authorities may consider evidence from other sources that are determined to be competent. (emphasis supplied).

As discussed below, the Petitioners have failed to demonstrate that the stream on the Property is perennial under the first three tests, and the results of the fourth test would not alter that outcome.

a. 310 CMR 10.58(2)(a)1.a:

310 CMR 10.58(2)(a)1.a. provides that a “stream shown as perennial on the current United States Geological Survey (“USGS”) map or more recent map provided by the Department” is perennial. (emphasis supplied). The Parties disagree on the interpretation and application of this regulation. The Petitioners contend that only the paper version of the USGS map can be used and that changes in the fonts used on the map support their argument that the stream is perennial. The Applicant and MassDEP contend that the current USGS map controls, and that map is the digital version and shows the stream as intermittent.

Although raised anew by the Petitioners in this proceeding, confusion regarding the font on the 2018 USGS map was resolved during the GCC public hearing in a letter from the GCC peer reviewer, Wetlands Preservation Inc. (“WPI”). In the letter WPI confirmed with USGS that the

relevant portion of the stream is intermittent, notwithstanding unclear depiction of the uppermost reach of the stream related to font size. See Fryklund Ex. 3-A; Capachietti Ex. 13; Capachietti PFR, 12.

As between the paper map and the digital map, the digital map is the current map because it is based on data as of October 2021, whereas the paper version is based on 2019 data. Capachietti PFR, 10-11<sup>17</sup> Ultimately the Parties' experts agreed that the current, digital USGS quadrangle topographic map for Gloucester OE N 2021 shows the stream on the Property as intermittent.<sup>18</sup> Bogue PFT, ¶¶ 22-23, 27; Bogue PFR, page 1; Capacheitti PFT, ¶ 46; Capacheitti Ex. 12; Seekamp PFT, ¶ 15, 16; Seekamp PFR, ¶ 3. Igo 2:08:20-2:11:29.

Mr. Igo's conflicting testimony on behalf of the Petitioners, that Gloucester's map should be used, contending that it is a map issued by MassDEP, carries no weight. Igo PFT, ¶ 13.g.-k. Mr. Bogue testified that MassDEP has not issued a map and that therefore the Gloucester map is not "a more recent map provided by the Department," which is the only map that would supersede the current USGS map. See 310 CMR 10.58(2)(a)(1); Bogue PFT, ¶ 27; Bogue PFR, page 1. See also Capachietti PFT, ¶ 48-49.<sup>19</sup>

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<sup>17</sup> The Petitioners object to Mr. Capachietti's reference to the "National USGS Map." Mr. Capachietti testified that he has been relying on the digital versions of the maps since early the 2000's and that "National Map" and "USGS Map" mean the same thing. Capachietti, 04:41:08.

<sup>18</sup> Consistent with reliance on the current USGS map, the Applicant's expert witnesses Mr. Ogren and Mr. Capacheitti asserted that the USGS maps referenced in the Wetlands Regulations are treated as the industry standard for evaluating the status of a stream under 310 CMR 10.58(2)(a)1.a. See Ogren PFT, ¶ 6; Capacheitti RFT, ¶ 10. The Petitioners sought to use this testimony to undercut the validity of reliance on the USGS map, but in fact it supports that the regulatory test is not an outlier but is in line with industry standards and is therefore likely to be understood and correctly applied.

<sup>19</sup> Also, Mr. Igo's testimony included as an exhibit his email inquiry to MassGIS wherein he acknowledges that the USGS map shows the stream as intermittent and that the MassGIS shows the stream as perennial, in an apparent effort to support his argument that Gloucester's map should control. Igo Exhibit F. However, further supporting that the stream is intermittent, is Mr. Bogue's rebuttal testimony stating that MassGIS' new on-line tool, that replaced the MassGIS Oliver mapping tool, shows the stream as intermittent. Bogue PFR, page 1; Bogue, PRF Exhibit 2.

Finally, Ms. Fryklund's exhibits, without any testimony to explain them, depict different USGS maps each with the following text, "depicting a segment of the stream on the Property as perennial." Which segment this statement is intended to address is unknown as the Property is not identified on either map. Fryklund PFR Ex. 3A (2021 USGS Map) and 3D (2018 USGS Map). See also Capachietti PFR, ¶ 14. As such the Petitioners failed to meet their burden of proof on this issue.

Given that the regulations rely in the first instance on the current USGS map, unless MassDEP has provided a more recent map, and Mr. Bogue, MassDEP's wetlands expert, testified that MassDEP has not provided a substitute map, I find by a preponderance of the evidence, that the current digital USGS quadrangle topographic map for Gloucester OE N 2021 is the current and correct map for use in determining whether the stream is perennial or intermittent. That map shows the stream segment at issue as intermittent.

b. 310 CMR 10.58.(2)(a)1.b.:

The next inquiry is to determine whether the stream "has a watershed size greater than or equal to one square mile," which would make the stream perennial. See 310 CMR 10.58.(2)(a)1.b. All Parties used StreamStats to determine watershed size, consistent with the Wetlands Regulations, with slight differences in selecting the point at which they considered the stream to be perennial, which resulted in slightly different sizes for the watershed. Nonetheless, all Parties agree that the stream's watershed is less than one square mile; ranging from the Applicant's 0.0697 square miles to MassDEP's 0.09 square miles, to the 0.22 square miles as calculated by Mr. Igo in his PFT, or the 0.0364 square miles included in his PFR. See Seekamp PFT, ¶ 19; Capachietti PFT I, ¶ 51-54; Bogue PFT, ¶ 24-26; Igo PFT, ¶ 13.d; Igo PFR, ¶ 3(a)(i)(e). As a result, the stream is intermittent under this analysis.

c. 310 CMR 10.58(a)1.c.:

The Wetlands Regulations at 310 CMR 10.58(a)(1)(c) provide a third test for demonstrating that an intermittent stream is in fact perennial, allowing a demonstration that an intermittent stream is perennial if its watershed is “at least a ½ (0.05) square mile and has a predicted flow rate greater than or equal to 0.01 cubic feet per second at the 99% flow duration using the USGS StreamStats method . . . .” The Applicant and MassDEP used StreamStats to calculate predicted flow rate and concluded that the flow rate would not change their conclusion that the stream is intermittent. Seekamp PFT, ¶ 19; Bogue PFT, ¶¶ 24-25. The Petitioners offered no testimony calculating a flow rate. As a result, the stream is intermittent under this analysis.

d. 310 CMR 10.58(2)(a)1.d:

Finally, under the Wetlands Regulations, at 310 CMR 10.58(2)(a)1.d. a stream must be considered intermittent, “if documented field observations by a competent source show that it is not flowing based upon observations at least once per day over at least four days in any consecutive 12-month period, during a non-drought period on a stream not significantly affected by withdrawals or other man-made flow reductions.”

The Regulations require that all “[f]ield observations . . . [to] be documented by field notes and by dated photographs or video,” and “submitted to the issuing authority with a statement signed under the penalties of perjury attesting to the authenticity and veracity of the field notes, photographs or video and other credible evidence. . . .” Id. Such documentation must be provided by competent sources which includes, “[d]epartment staff, conservation commissioners, and conservation commission staff.” Id. The Regulations also allow issuing authorities to consider evidence from other sources that are determined to be competent. Id.

The Applicant, Mr. Carrigan’s testimony on this issue is inadequate to make the necessary demonstration. First, Mr. Carrigan’s general conclusory statements regarding his experience as a

developer, and in that context, with the MWP&A and Wetlands Regulations, are insufficient to demonstrate that he is a competent source.<sup>20</sup> None of the wetlands experts, including those testifying for the Applicant, asserted that Mr. Carrigan is a competent source. Even if Mr. Carrigan had sufficiently demonstrated relevant training and experience, his vested interest and bias would result in my according his testimony little or no weight.<sup>21</sup>

Second, Mr. Carrigan's documentation lacked detailed and clear field notes or logs describing what is shown in photographs, how he proceeded to ensure that he was "in the general area of Flag C41," and to identify features of rocks or trees to confirm the asserted location. Carrigan PFT, ¶ 4.<sup>22</sup> Assuming for the sake of argument, that the videos made available through a link maintained by the Applicant's legal counsel at Beverage & Diamond were properly submitted into evidence at the Hearing, they raised more questions than provided answers and did not cure the documentary deficiencies. Carrigan PFR, ¶ 6.<sup>23</sup> As a result, my assessment of the credibility,

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<sup>20</sup>See In the Matter of Jodi Dupras, 2013 MA ENV LEXIS 40, Recommended Final Decision, (July 3, 2013) adopted by Final Decision (July 11, 2013), 2013 MA ENV LEXIS 41 (Petitioner not a qualified expert where her interpretation of other expert's document was made without any testimony that demonstrated education, training, or experience, or familiarity with the technical subject matter); See also, In the Matter of John Soursourian, 2014 MA ENV LEXIS 49, Recommended Final Decision (June 13, 2014), adopted by Final Decision (June 19, 2014), 2014 MA ENV LEXIS 47 (civil engineer not deemed competent to assess whether stream is perennial where he provided no detailed information concerning his knowledge and experience relative to the MWP&A, the regulations, wetlands in general, or river evaluation and hydrogeology and testimony was conclusory and ambiguous.)

<sup>21</sup>See Carvalho v. Tripp, 16 LCR 407, 408, n2. (June 26, 2008)(plaintiff has sufficient training and experience to testify; the defendants' challenges to his training, experience and self-interest/bias go to the credibility and weight of his testimony, not its admissibility.)

<sup>22</sup>At the Hearing, the Applicant's witnesses, Mr. Seekamp and Mr. Capachietti, unsuccessfully attempted to cure Mr. Carrigan's lack of supporting documentation. Specifically, Mr. Seekamp testified in summary fashion that he reviewed Mr. Carrigan's photographs and that they "show the Stream between flags C41 and H14." Seekamp PFT, ¶ 20. Mr. Capachietti testified that based on his "personal knowledge of the locus, those photographs accurately depict the area at flag C41." Capachietti PFT, ¶ 56. Neither Mr. Seekamp's nor Mr. Capachietti's testimony sufficed to cure Mr. Carrigan's lack of adequate field documentation but did demonstrate that Mr. Carrigan's field documentation was lacking.

<sup>23</sup>Mr. Carrigan also provided two letters from MassDEP with identical language, in which MassDEP accepted his photographs at other properties as accurate following site visits which purported to confirm the locations of the photographs presumably to cure the lack of due diligence required by 310 CMR 10.58(2)d. Carrigan PFT, Exhibits A&B. The merits of these letters are not at issue in this appeal.



weight and inferences to be drawn from Mr. Carrigan's testimony, leads me to conclude that he is not a competent source, and his documentation lacks probative value, and as a result, would carry no weight if it was necessary to apply this fourth test.

Nonetheless, because the stream is intermittent under the first three tests, application of this fourth test does not change the status of the stream because its purpose is to demonstrate that a stream considered perennial pursuant to subsections (a)-(c) is, in fact, intermittent. Therefore, I find that a preponderance of the evidence supports a conclusion that the stream is intermittent at the location of the proposed Project. As a result, there is no Riverfront Area associated with the SOC.

**4. 310 CMR 10.57(2)(a)5 does not bar MassDEP from requiring the Applicant to comply with all applicable requirements regarding the vernal pool that was certified after the NOI was filed.**

Vernal pools are not a separate resource area protected under the Wetlands Regulations but are instead a type of wetlands wildlife habitat area protected when located within a wetlands resource area. CVP #8177 is located within a BVW, and therefore is protected wildlife habitat. The Wetlands Regulations define BVW as:

freshwater wetlands which border on creeks, rivers, streams, ponds and lakes. The types of freshwater wetlands are wet meadows, marshes, swamps and bogs. [BVW] are areas where the soils are saturated and/or inundated such that they support a predominance of wetland indicator plants. The ground and surface water regime and the vegetational community which occur in each type of freshwater wetland are specified in [the MWPA]. See 310 CMR 10.55(2)(a).

Bordering Vegetated Wetlands are likely to be significant to public or private water supply, to ground water supply, to flood control, to storm damage prevention, to prevention of pollution, to the protection of fisheries and to wildlife habitat. " 310 CMR 10.55(1); In the Matter of Brian Corey, OADR Docket No. WET 2016-023, Recommended Final Decision (February 28, 2018), 2018 MA ENV LEXIS 10, \*17, adopted by Final Decision (March 15, 2018), 2018 MA ENV LEXIS. "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 Wetlands Regulations at 310 CMR 10.04 define vernal pool habitat as follows:

“Vernal pool habitat means confined basin depressions which, at least in most years, hold water for a minimum of two continuous months during the spring and/or summer, and which are free of adult fish populations, as well as the area within 100 feet of the mean annual boundaries of such depressions, to the extent that such habitat is within an Area Subject to Protection Under M.G.L. c. 131, § 40 as specified in 310 CMR 10.02(1). These areas are essential breeding habitat, and provide other extremely important wildlife habitat functions during non-breeding season as well, for a variety of amphibian species such as wood frog (*Rana sylvatica*) and the spotted salamander (*Ambystoma maculatum*), and are important habitat for other wildlife species.” (emphasis supplied).

MassDEP wildlife habitat guidance states that, “whether certified or “documented” during the application review process, vernal pool habitat is protected as long as it occurs within resource areas.”<sup>24</sup>

The Wetlands Regulations presume the existence of a vernal pool that has been certified before an NOI is filed but allows the existence of a vernal pool to be demonstrated by other means. Specifically, 310 CMR 10.57(2)(a)5. provides:

The only portions of this resource area which shall be presumed to be vernal pool habitat are those that have been certified as such by the Massachusetts Division of Fisheries and Wildlife, where said Division has forwarded maps and other information needed to identify the location of such habitat to the Conservation Commission and DEP prior to the filing of each Notice of Intent or Abbreviated Notice of Intent regarding that portion. Such presumption is rebuttable, and may be overcome upon a clear showing to the contrary. . . . (emphasis supplied).<sup>25</sup>

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<sup>24</sup> See, 2006 Massachusetts Wildlife Habitat Protection Guidance for Inland Wetlands, at page 7-8.  
<https://www.mass.gov/doc/massachusetts-wildlife-habitat-protection-guidance-for-inland-wetlands/download>

<sup>25</sup> See, In the Matter of Horacio’s Welding and Sheet Metal, Inc., DALA Docket No. DEP-04-301, Ruling on Summary Decision, 2004 MA ENV LEXIS 13, \*3 (September 30, 2004)(the regulations presume the existence of a vernal pool that has been certified, but allow the existence of a vernal pool to be demonstrated by other means.).

In its SOC review, MassDEP did not consider CVP #8177 to be protected wildlife habitat because it was certified after the NOI was filed. During these proceedings, however, MassDEP reconsidered its interpretation of 310 CMR 10.57(2)(a)5 and determined that the Regulation does not bar it from treating CVP #8177 as protected vernal pool habitat, and hence required the Applicant to comply with the applicable regulatory requirements for certified vernal pools. The Petitioners agree with MassDEP's new position while the Applicant argues that MassDEP was correct to not require compliance because the vernal pool was certified after the NOI was filed. I agree with the Petitioners and MassDEP that the regulation does not bar MassDEP from protecting a vernal pool certified after an NOI is filed. Certification of a vernal pool, whenever it occurs, is documentation of a clear showing of vernal pool habitat.

Specifically, Mr. Bogue testified that, "[i]n this de novo proceeding, MassDEP has decided that [310 CMR] 10.57(2)(a)5 does not bar MassDEP from requiring the [A]pplicant to comply with the applicable regulatory requirement for the certified vernal pool and that the [A]pplicant must meet the stormwater regulation pertaining to this certified vernal pool pursuant to Standard 6, Table CA 2 of the MA Stormwater Handbook. (Vol. 1, Ch 1, pg 18)" Bogue PFT, ¶ 31.<sup>26</sup> Mr. Bogue's testimony is consistent with the well-established principle I stated earlier, that if, during this de novo proceeding, MassDEP becomes convinced of a different legal interpretation the interests of the MWPA require it to take a different position than the one previously adopted. Algonquin \*15. Additionally, I am not bound by MassDEP prior orders or statements and instead my review must independently adjudicate the issues identified for appeal and issue a Recommended Final Decision for the Commissioner's review that is consistent with and in the

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<sup>26</sup> See also In the Matter of David A. Bosworth Co., Inc., OADR Docket WET-2015-015, Recommended Final Decision, (February 17, 2016), 2016 MA ENV LEXIS 12, \*64, adopted by Final Decision, (March 14, 2016), 2016 MA ENV LEXIS 10 ("Bosworth") (stormwater controls required for project work near vernal pools certified after NOI was filed.)

best interests of the MHPA, Wetlands Regulations and MassDEP's policies and practices. Zarette

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The facts are that prior to the filing of the NOI, CVP #8177 was on the NHESP map as a Potential Vernal Pool.<sup>27</sup> Capachietti PFT, ¶¶ 59-62. The Applicant's witness, Mr. Capachietti, testified that in preparing the NOI for the proposed Project, he provided separation of approximately 140 feet from that single coordinate point representing the Potential Vernal Pool to the edge of grading for the Project. Id. Mr. Capachietti testified that Mr. Carrigan had been informed of the efforts to certify the vernal pool as early as October 19, 2020, and two more times after that, but stated that Mr. Carrigan was not provided with any of the supporting documentation under review by NHESP. Capachietti PFT, ¶ 69.<sup>28</sup> While the Applicant argues that Ms. Fryklund was late and secretive in her vernal pool certification efforts, the testimony shows that the Applicant was well aware of the vernal pool's existence before filing the NOI, and of efforts to certify the area as a Vernal Pool after the NOI was filed. Yet there is no evidence that Mr. Carrigan or his experts made efforts to obtain the supporting documentation after receiving notice of the submittal to NHESP.

The vernal pool was certified after the NOI was filed but before the SOC was issued. See SOC Cover Letter, page 3; Bogue PFT, ¶ 31.<sup>29</sup> See also, Fryklund Exhibit 4-C (email exchange between Ms. Fryklund and Mr. Bogue, informing MassDEP of the certification on December 23,

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<sup>27</sup> The Applicant's legal memoranda refer to the fact that CVP #8177 is located on the abutting property, but this fact is not relevant to whether it is protected under the MHPA and Wetlands Regulations as a critical area within a BVW.

<sup>28</sup> Mr. Capachietti references three (3) letters on which Mr. Carrigan or his counsel was copied, from Ms. Fryklund to Mr. Bogue.

<sup>29</sup> Specifically, the SOC provides, "...The discharge from the level spreader directs flows into an area of the BVW that has recently been certified as vernal pool habitat. It is MassDEP's understanding, however, that the vernal pool was not certified at the time of the filing of the NOI. Pursuant to 310 CMR 10.57(2)(a)5, certification of vernal pool habitat must occur prior to the filing of a NOI to be considered vernal pool habitat." SOC Cover Letter, page 3.

2020, almost five (5) months before MassDEP issued the SOC); See Capachietti PFT, ¶ 7.<sup>30</sup>

Giving no weight to the certification, in support of his argument that there has been no “clear showing” of vernal pool habitat, the Applicant cites In the Matter of Old Barn, LLC, OADR Docket No. WET-2010-013, Recommended Final Decision (October 20, 2010), 2010 MA ENV LEXIS 223, adopted by Final Decision (November 16, 2010), 2010 MA ENV LEXIS 224 (“Old Barn”). However, Old Barn did not address “clear showing” of a vernal pool, before or after an NOI filing. Old Barn concluded that the NOI filed within 3 years of an Order of Resource Area Delineation (“ORAD”)<sup>31</sup> was entitled to rely on the ORAD, which contained no reference to a vernal pool because a vernal pool is not a resource area required to be identified in an ORAD. The relevant comparison with Old Barn is that the applicant had no prior notice of a vernal pool, unlike the present case,<sup>32</sup> and that the potential existence of a vernal pool was raised only late in the proceedings, well after the Pre-Hearing Conference, unlike here where the vernal pool was specifically identified as an issue for resolution in these proceedings.

In its Post-Hearing Brief, the Applicant contends that NHESP’s Guidance supports his position that certification after the SOC is too late to be a “clear showing” of vernal pool habitat. However, the referenced NHESP Guidance does not override MassDEP’s Wetlands Regulations and also does not contradict MassDEP’s position and encourages the incorporation of protective conditions to prevent impairment of vernal pool habitat during an appeal, whether certified or

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<sup>30</sup> Mr. Bogue’s conflicting testimony, that the Potential Vernal Pool was certified on June 2, 2021, appears to refer to the date the NHESP completed processing. Bogue PFT, ¶ 31; See also, Fryklund Ex.4-B 7 (email from NHESP explaining that the certification was approved on December 23, 2020 and that processing and number assignment was completed on June 2, 2021.)

<sup>31</sup> An ORAD is a determination that a BVW or other resource area is subject to MWPA jurisdiction and is effective for 3 years, unless extended for up to 3 additional years upon confirmation by a professional with relevant expertise that the resource area delineations remain accurate. 310 CMR 10.05(6)(a)3; 310 CMR 10.05(6)(d).

<sup>32</sup> See also Bosworth, \*8 (Regulatory requirements applied to vernal pool certified after NOI was filed; Applicant was aware of the Potential Vernal Pool when it filed the NOI).

not.<sup>33</sup> Generally, the Applicant's argument misconstrues the applicable regulation, 310 CMR 10.57(2)(a)5, as applied to these facts.

In sum, I conclude that 310 CMR 10.57(2)(a)5 does not bar MassDEP from requiring the Applicant to comply with applicable regulatory, policy or guidance requirements for CVP #8177 where it was certified after the NOI was filed. The issue was raised early in these proceedings and was not a surprise to the Applicant. Certification of a vernal pool, whenever it occurs, is documentation of a clear showing of vernal pool habitat.

**“Observed edge of water” boundary is protective of CVP #8177**

The next issue to address is to what extent, if any should CVP #8177 impact the Project plans. The Wetlands Regulations provide that “the area within 100 feet of the mean annual boundaries” of a vernal pool, to the extent that such vernal pool is within an area subject to the MWPA, is also protected. 310 CMR 10.04; 310 CMR 10.02(2)(b).<sup>34</sup> Therefore, to make this determination it was necessary to delineate the boundary of the CVP. Bogue PFT, ¶ 32. The Wetlands Regulations at 310 CMR 10.57(2)(a)6 provide a method for calculating the boundaries of the vernal pool which the Applicant utilized to prepare a topographic plan showing the calculated boundaries of CVP #8177 (“Alternative Plan 1”). Capachietti PFT, ¶¶ 84-85; Capachietti Ex. 22.<sup>35</sup> The Petitioners’ expert testimony did not include any calculation of the

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<sup>33</sup> “Vernal pools that are not certified may also be protected by local conservation commissions or the DEP if credible scientific evidence is presented prior to the end of the appeal period for a superseding order of conditions (OOC) [sic] issued by the DEP. A conservation commission, or the DEP on appeal, can incorporate protective conditions into an OOC that would prevent the impairment of the wildlife habitat value of the pool and its 100 feet “Vernal Pool Habitat” if the pool is not certified.” *Guidelines for the Certification of Vernal Pool Habitat*, March 2009, page 4.

<sup>34</sup> The Petitioners’ expert, Mr. Garner, testified that the wildlife habitat of a vernal pool extends beyond 100 feet. Garner PFT, page 10. While acknowledging studies indicating that wildlife habitat can extend beyond 100 feet, Mr. Bogue testified that the Wetlands Regulations require a setback of 100 feet. Bogue PFR, page 2.

<sup>35</sup> Mr. Garner testified on behalf of the Petitioners that only NHESP can certify the boundary and that therefore the Applicant’s boundary delineation cannot be used. See Garner PFT, page 13-14. This interpretation is incorrect. NHESP does not establish the physical, on-the-ground vernal pool boundary during the certification process. See Guideline to Vernal Pool Certification, March 2009, page 4. The Wetlands Regulations provide “ . . . In the event of a

probable extent of the vernal pool in accordance with the regulation.<sup>36</sup> They contend nonetheless that the Applicant's calculation is in error. The Applicant and MassDEP both contend that regardless of whether the Applicant's calculation is accurate, adoption of Alternative Plan 2, which is based not on the calculated boundary but on the "observed edge of water," eliminates the need to utilize the Applicant's calculated boundary. I agree.

Alternative Plan 2 measures the vernal pool boundary from the observed edge of water, as viewed during an August 25, 2021 site visit, attended by all the Parties' experts for the purpose of viewing CVP #8177. ("Alternative Plan 2") Capachietti PFT, ¶¶ 81-82.<sup>37</sup> The testimony indicates that due to wet weather CVP #8177's boundary was likely submerged and is actually smaller than what was observed. Seekamp PFT, ¶ 9; Capachietti PFT, ¶ 83; Garner PFT, page 14.<sup>38</sup> The Applicant's experts, Mr. Seekamp and Mr. Capachietti, also based this conclusion on the observance of healthy, green Cinnamon and Sensitive Ferns submerged, approximately 10 feet inside the observed edge of water, which would not be typical of a vernal pool. Seekamp PFT, ¶ 9; Capachietti PFT, ¶ 82.

MassDEP's expert, Mr. Bogue, testified that the boundary based on observed edge of water, rather than the boundary based on the engineering calculation is the appropriate boundary.

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conflict of opinion, or the lack of a clear boundary delineation certified by the Division of Fisheries and Wildlife, the applicant may submit an opinion certified by a registered professional engineer, supported by engineering calculations, as to the probable extent of said habitat. . . ." 310 CMR 10.57(a)6. (emphasis supplied)

<sup>36</sup>Mr. Igo's testimony on behalf of the Petitioners included a calculation that did not utilize 310 CMR 10.57(2)(a)(6). Igo, 2:20:20-2:21:12; (Capachietti II, pars. 21-22.) On cross-examination, Mr. Garner testified that the Petitioners did not calculate the vernal pool boundary based on the wetlands regulations. Garner, 49:13-49:22; Capachietti II, par. 25.

<sup>37</sup> Mr. Capachietti's PFT did not identify the Parties' experts by name, but no Party disputed attendance.

<sup>38</sup> Without calculation or analysis, Mr. Garner concluded that the boundary, "parallels BVW points D1-D6 and D15-D19" and "lies west of said BVW line by a distance of no more than four to 12 feet."

Bogue PFT, ¶ 32, 35.<sup>39</sup> This observed vernal pool boundary as marked on Alternative Plan 2 is at or just inside the BVW line at flags D1-D6. Capachietti PFT, ¶¶ 81-82. Accordingly, Mr. Garner's estimated boundary is inside or within the "observed edge of water," meaning that his estimate of the boundary represents a smaller vernal pool.<sup>40</sup> As a result, the observed edge of water of CVP #8177 as shown on Alternative Plan 2 is measured from wetlands flags D-1 to D-6 and D-15 to D-19. This boundary is more conservative, and therefore more protective, than Mr. Garner's estimate.<sup>41</sup>

MassDEP's determination to recommend adoption of the observed edge of water as the boundary for CVP # 8177 and Alternative Plan 2 is well supported by the evidence. In sum, together these facts present a rational basis for MassDEP to have determined that the observed edge of water depicted on Alternative Plan 2 is the appropriate vernal pool boundary to use to determine whether the stormwater BMP is set back more than 100 feet from CVP #8177, a critical area, and therefore whether it complied with Standard 6 of the Stormwater Regulations.

**The Proposed Project does not Alter and Adversely Affect the Ability of CVP #8177 to function.**

Finally, the Petitioners contend that the proposed Project will alter and have adverse impacts on the BVW and the wildlife habitat of the BVW because it will significantly alter the

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<sup>39</sup> This position is consistent with the Vernal Pool Certification Handbook which provides, "[w]hen there is no distinct and clear topographic break at the edge of a pool, the maximum observed or recorded extent of flooding represents the ecological boundary of the vernal pool." Guidelines for the Certification of Vernal Pool Habitat, March 2009, page 4.

<sup>40</sup> The Petitioners' expert testimony offered three different opinions regarding boundaries and as result lacks credibility. Specifically, Mr. Garner and Mr. Igo each depicted a different estimated boundary in their testimony. Garner PFT, Ex 2; Igo PFT Fig 6. Mr. Roth testified that the vernal pool "size is significantly greater than most vernal pools on Cape Ann." Roth PFT, ¶ 6. He acknowledged, however, that he did not delineate the boundary and instead provided only a vague description of a boundary testifying that he "observed the pool as extending significantly further to the east in the direction of the Carrigan property" than the calculated boundary. Roth PFR, ¶ 2. His testimony referenced GPS coordinates but he did not include them in his testimony. *Id.*

<sup>41</sup> This boundary is the same as the BVW boundary from D-1 to D-6 and D-15- to D-19. The BVW boundary from D-6 to D-15 extends beyond the CVP #8177 boundary. See Capachietti Ex. 23.



vernal pool water budget. Garner PFT, page 15; Petitioners' Post-Hearing Memorandum of Law, page 30. The Applicant and MassDEP contend that that proposed Project will neither alter nor impact CVP #8177. Capachietti PFR, ¶ 30; Seekamp PRF, ¶¶ 11-12; Bogue PFR, page 2-3; Applicant's Post-Hearing Memorandum of Law, page 34; MassDEP's Closing Brief, page 9-10. I agree with MassDEP and the Applicant that the alterations to the vernal pool water budget are insignificant and will not alter the CVP #8177 and as a result will not result in adverse impacts.

The Petitioners' wetlands expert, Mr. Garner, testified that the proposed Project will have significant impacts on the vernal pool's water budget, negatively impacting CVP #8177. Garner PFT, page 14-15. However, Mr. Garner's testimony is of limited probative value because his evaluation of the alleged impacts is based on the SOC Plan, which placed the stormwater treatment train within 100 feet of CVP # 8177, and not Alternative Plan 1 or Alternative Plan 2, which relocate the stormwater treatment train to more than 100 feet from CVP #8177.<sup>42</sup> Also, in his testimony regarding the vernal pool water budget, Mr. Garner mixed conclusions about the vernal pool watershed on the Project site, and the entire vernal pool watershed resulting in errors in his calculations that do not support his conclusion that the vernal pool watershed budget will be altered in violation of the regulations.

Mr. Garner testified that for the CVP #8177 to continue to function post-development, its water budget must be maintained. Garner PFT, page 3. He testified that vernal pools with a significantly disturbed watershed generally have higher pH,<sup>43</sup> more mineral substrate, and more algae, which in similar cases project applicants have performed detailed assessments to determine how work in the buffer zone will impact the vernal pool habitat, particularly its water budget. Id.

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<sup>42</sup> The Petitioners contend, incorrectly, that Alternative Plan 1 and 2 were not available for Mr. Garner's review. The record shows that Mr. Capachietti submitted his PFT including exhibits related to these Alternatives on September 17, 2021, more than a month before Mr. Garner submitted his PFT on October 29, 2021.

<sup>43</sup> "pH is a measure of how acidic/basic water is." <https://www.usgs.gov/media/images/ph-scale-0>.

He then testified that, based on the SOC Plan, the proposed Project will impact the vernal pool habitat because it will significantly alter the water budget of CVP #8177 in violation of the Wetlands regulatory performance standards. Garner PFT, pages 12-15.<sup>44</sup>

Mr. Garner estimated the CVP #8177 watershed area to be 26 acres.<sup>45</sup> He then calculated the pre-development Project-related watershed area to be 1.98 acres and the post-development watershed area as being 1.185 acres, a reduction of .79 acres and concluded that the proposed Project would decrease the CVP #8177 water budget by 39%. Garner PFT, page 4. This percentage is clearly in error. By his own testimony the watershed area impacted by the proposed Project is .79 acres,<sup>46</sup> which is less than 3% (not 39%) of the total vernal pool watershed area which he estimated at 26 acres. Bogue, PFR, page 2; Capachietti PFR, ¶ 31; Seekamp PFR, ¶¶ 11-13. On cross-examination, Mr. Garner opined that a 7% change in the water budget would be significant. Garner, 1:00:00-1:01:03. These inconsistencies undermine his water budget conclusions.

MassDEP's and the Applicant's experts testified that the Petitioners' calculations were in error. Mr. Bogue testified that using Mr. Garner's water budget formula, the post-development run-off will increase the volume of stormwater run-off by 0.001 acre foot or 326 gallons, which he concluded was insignificant. Bogue PFR, page 3. Mr. Capachietti testified that this impact is de minimis and equates this volume to a "water surface rise equivalent to 0.0003 feet, or four one-

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<sup>44</sup> Because the Applicant and MassDEP testified that the plan changes are insignificant and did not change the area impacted by the proposed Project represented on the SOC Plan, I have considered Mr. Garner's testimony relative to the vernal pool water budget, recognizing that it is not accurate as to the relocated stormwater structures. Bogue PFT, ¶ 16; and Capachietti PFT, ¶ 89.

<sup>45</sup> Garner PFT, page 14; Garner Ex. 2. Note also, however, that Mr. Garner's PFT indicates that he and Mr. Igo collaborated on their analysis, yet their depictions of the vernal pool watershed do not align. See Garner PFT, Fig. 1; Garner Ex 2; Igo PFR, Fig. 6.

<sup>46</sup> 1.98 acres pre-development – 1.185 post-development equals a change of .79 acres, about 3% of the total CVP watershed area. See also, Bogue PFR, page 2.

thousandths of an inch” the thickness of a piece of paper. Capachietti PFR, ¶ 31, 32.c. Mr.

Seekamp agreed that less than 3% is alteration or disturbance is insignificant.<sup>47</sup> I find compelling the expert testimony of MassDEP’s and the Applicant’s witnesses that the Project impact to the vernal pool water budget of less than 3% is not a significant disturbance and that this amount of loss of watershed area is not a significant change and will not have any significant adverse impact on the vernal pool water budget. Id.

**5. The Proposed Project does have a Stormwater Discharge and does comply with the requirements for stormwater discharges near or to critical areas applicable pursuant to 310 CMR 10.05(6)(k)(6)**

Issue 5 for adjudication addresses the requirements for stormwater discharges near or to certified vernal pools.<sup>48</sup> The Petitioners and MassDEP contend that the Applicant’s assertion that the Project does not have a stormwater discharge as identified in 310 CMR 10.05(6)(k)6 is without merit. I agree.

Flood control and storm damage prevention are two of the eight statutory interests the MWPA and the Wetlands Regulations are intended to advance. "Stormwater runoff from rainfall and snow melt ‘represents the single largest source responsible for water quality impairments in the Commonwealth's rivers, lakes, ponds, and marine waters.'" In the Matter of Francis P. and Debra A. Zarette, Trustees of Farm View Realty Trust, OADR Docket No. WET 2016-030, Recommended Final Decision (February 20, 2018), 2018 MA ENV LEXIS 7 \*42, adopted by Final Decision (March 1, 2018), 2018 MA ENV LEXIS 6, citing In the Matter of Sunset City, Inc., OADR Docket WET-2016-016, Recommended Final Decision, (March 31, 2017), 2017 MA ENV LEXIS 35, \*22-24 adopted by Final Decision, (April 21, 2017), 2017 MA ENV LEXIS 33,

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<sup>47</sup> Mr. Seekamp testified that the number is closer to 2.846% reduction in the overall watershed area of CVP #8177 and that this alteration or disturbance is insignificant. See Seekamp PFR, ¶ 11-13.

<sup>48</sup> See 310 CMR 10.04, “Critical Area” means ORW as designated in 314 CMR 4.00 which includes certified vernal pools. See 314 CMR 4.06(1)(d)(12) and 314 CMR 4.06(2).

citing the Stormwater Handbook, V. 1, ch. 1, p. 1. "New and existing development typically adds impervious surfaces and, if not properly managed, may alter natural drainage features, increase peak discharge rates and volumes, reduce recharge to wetlands and streams, and increase the discharge of pollutants to wetlands and water bodies." Id. The stormwater standards "promote increased stormwater recharge, the treatment of more runoff from polluting land uses, low impact development (LID) techniques, pollution prevention, the removal of illicit discharges to stormwater management systems, and improved operation and maintenance of stormwater best management practices (BMPs). Stormwater Handbook (2008), Vol. I, ch. 1, p. 1.

MassDEP's stormwater regulations at 310 CMR 10.05(6)(k)-(q) "address water quality (pollutants) and water quantity (flooding, low base flow and recharge) by establishing standards that require the implementation of a wide variety of storm water management strategies[,] ... includ[ing] environmentally sensitive site design and low impact development [("LID")] techniques to minimize impervious surface and land disturbance, source control and pollution prevention, structural [stormwater Best Management Practices ("BMPs")], construction period erosion and sedimentation control, and the long-term operation and maintenance of storm water management systems." Stormwater Handbook, Vol. 1, ch. 1, p. 1.

The Wetlands Regulations at 310 CMR 10.05(6)(k) provide in pertinent part that:

[e]xcept as expressly provided, stormwater runoff from all industrial, commercial, institutional, office, residential and transportation projects that are subject to regulation under [the MWPA] including site preparation, construction, and redevelopment and all point source stormwater discharges from said projects within [a wetlands] Area Subject to Protection under [the MWPA] or within the Buffer Zone shall be provided with stormwater [BMPs] to attenuate pollutants and to provide a setback from the receiving waters and wetlands in accordance with the [10] Storm water Management Standards as [set forth in 310 CMR 10.05(6)(k)1-(k)10 and] further defined and specified in the Massachusetts Stormwater Handbook. . .

These stormwater standards include Standard Number 6, 310 CMR 10.05(6)(k)(6), which provides:

Stormwater discharges within the Zone II or Interim Wellhead Protection Area of a public water supply and stormwater discharges near or to any other critical area require structural stormwater best management practices determined by the Department to be suitable for managing discharges to such area as provided in the Massachusetts Stormwater Handbook. A discharge is near a critical area, if there is a strong likelihood of a significant impact occurring to said area, taking into account site-specific factors. Stormwater discharges to Outstanding Resource Waters and Special Resource Waters shall be removed and set back from the receiving water or wetland and receive the highest and best practical method of treatment. A “storm water discharge” as defined in 314 CMR 3.04(2)(a) or (b) to an Outstanding Resource Water or Special Resource Water shall comply with 314 CMR 3.00: Surface Water Discharge Permit Program and 314 CMR 4.00: Massachusetts Surface Water Quality Standards. (emphasis supplied)

The Applicant references only the last subpart of 310 CMR 10.05(6)(k)6 to assert that stormwater requirements do not apply:

A “storm water discharge” as defined in 314 CMR 3.04(2)(a) or (b) to an Outstanding Resource Water or Special Resource Water shall comply with 314 CMR 3.00: Surface Water Discharge Permit Program and 314 CMR 4.00: Massachusetts Surface Water Quality Standards.

314 CMR 3.04(2)(a) addresses discharges from municipal storm drain systems, and 314 CMR 3.04(2)(b) addresses stormwater discharges specially designated by the Department. The proposed Project’s stormwater discharges fall in neither of those two categories; therefore, its stormwater discharges are not covered by the provision of 310 CMR 10.05(6)(k)6 that incorporates 314 CMR 4.00. Mr. Capachietti’s interpretation that as a result the subpart excludes all other stormwater discharges is incorrect. Capachietti PFT, ¶¶ 90-96. See also Bogue PFT, ¶¶ 33-36. The remaining requirements set forth in 310 CMR 10.05(6)(k)6, are applicable to the proposed Project’s stormwater discharges near or to critical areas.

In short, the proposed Project does have a Stormwater Discharge as identified in 310 CMR 10.05(6)(k)(6), and therefore must satisfy Stormwater Standard No. 6.<sup>49</sup> As a result, the proposed Project must incorporate Best Management Practices, or BMPs, for stormwater discharges near or to ORWs as detailed in the Stormwater Handbook, Table CA 2: Standard 6. Stormwater Handbook, Table CA 2: Standard 6, Stormwater Discharges Near or To Outstanding Resource Waters Including Vernal Pools and Surface Water Sources for Public Water Systems; see also Stormwater Handbook, Vol. 1. ch. 1, page 15.

The SOC Plan shows the second discharge point that is relevant in relation to CVP #8177 near Wetlands Flag 9. Bogue PFT, ¶ 34. Mr. Bogue testified that the SOC Plan shows this BMP located within 100 feet of the newly certified vernal pool. Id.<sup>50</sup> The two alternative plans submitted by the Applicant during these proceedings relocate the discharge point to more than 100 feet from CVP #8177. Capachietti PFT, ¶¶87-88; Bogue PFT ¶ 35.

Alternative Plan 2, as recommended by MassDEP, satisfies the setback requirements for stormwater discharges near or to critical areas that include an ORW. As discussed above, Alternative Plan 2 adopts the observed edge of water as the boundary of CVP #8177. Alternative Plan 2 relocates the treatment train 114 feet from the CVP #8177 boundary. Capachietti PFT, ¶ 88. Mr. Capachietti testified that the closest work to the wetlands resource area under Alternative Plan 2, is that the level spreader is located within 19 feet of the BVW, near flag D10. Id. Mr. Bogue testified that Alternative Plan 2 complies with the requirements of Standard 6. Bogue PFT,

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<sup>49</sup> The Petitioners' witness, Mr. Igo, provided testimony on the other stormwater standards as they apply to locations depicted on the SOC Plan (not on Alternative Plan 1 or Alternative Plan 2). Igo PFT, ¶ 12. The Applicant's witnesses, Mr. Seekamp, and Mr. Capachietti, provided rebuttal testimony. However, only Standard 6 was identified as an issue for adjudication in this proceeding. Capachietti PFT, ¶¶ 104-138; Seekamp PFR, ¶17.

<sup>50</sup> Mr. Capachietti testified that the SOC Plan satisfies the requirement measured from the one coordinate point for the PVP but acknowledged that if the certification of the vernal pool was accepted then the SOC Plan would put "project activity" within 51.6 feet of CVP #8177 boundary. Capachietti PFT, ¶¶ 97, 101.

¶ 35. Also, while more protective of the certified vernal pool, Alternative Plan 2 represents insignificant changes to the proposed Project. Capachietti PFT, ¶ 89; Bogue PFT, ¶¶ 15-19.

### **A Wildlife Habitat Evaluation is Not Required**

Finally, Standard 6 of the Stormwater Handbook also requires compliance with 310 CMR 10.60, wildlife habitat. 310 CMR 10.60(1)(a) requires that:

To the extent that a proposed project on inland Banks Land Under Water, Riverfront Area, or Land Subject to Flooding will alter vernal pool habitat or will alter other wildlife habitat beyond the thresholds permitted under 310 CMR 10.54(4)(a)5., 10.56(4)(a)4., 10.57(4)(a)3 and 10.58(4)(d)1, such alterations may be permitted only if they will have no adverse effects on wildlife habitat.

The boundary of the vernal pool habitat shown on Alternative Plan 2, is the observed edge of water. See Bogue PFR, page 3. As discussed above, the stage storage of the proposed infiltration basin is adjusted so that it is set back 129 feet from CVP #8177's boundary. Capachietti PFT, ¶ 88. The Wetlands Regulations define vernal pool habitat as the area within 100 feet of CVP boundary to the extent that habitat is within a wetlands resource area. See 310 CMR 10.04; Bogue PFR, page 2-3; Seekamp PFR, ¶ 14; Capachietti PFR, ¶ 100. As a result, as shown on Alternative Plan 2, no activity is planned within the vernal pool habitat.

The testimony of the Applicant's and MassDEP's respective witnesses conclusively support the conclusion that because there is no planned activity within the vernal pool habitat, and because the change in the vernal pool watershed budget is insignificant, there will be no direct alteration of the vernal pool habitat within the BVW and therefore no wildlife habitat evaluation is required. Seekamp PFR, ¶¶ 14-15; Bogue PFR, page 3; Capachietti PFR, ¶ 32. In sum, Petitioners have not met their burden which is to demonstrate that the stormwater treatment train, located more than 100 feet from CVP #8177, outside the vernal pool set back of 100 feet, will alter the Resource Area (i.e. CVP #8177, located within the BVW) or adversely affect the ability of CVP #8177 to contribute to the protection of wildlife habitat.

**6. The Applicant Possesses Sufficient Colorable Interest in the Property to Merit the Issuance of the Superseding Order of Conditions**

The bar for showing sufficient real property interests in a particular parcel of land for issuance of an SOC authorizing proposed activities in wetlands areas located in that parcel, is low, requiring only that an applicant “has demonstrated a colorable claim of title to the real property that the party claims to own.” In the Matter of Michael Gleason, 2019 MA ENV LEXIS 151, OADR WET 2017-019, Recommended Final Decision (December 4, 2019), 2019 MA ENV LEXIS 151, at \*11, adopted as Final Decision (January 7, 2020), 202 MA ENV LEXIS 65, citing In the Matter of Town of Brewster, OADR Docket No. WET-2012-006, Recommended Final Decision (August 10, 2012), 2012 MA ENV LEXIS 97, at 31, n. 20, adopted as Final Decision (August 16, 2012), 2012 MA ENV LEXIS 99, citing, Tindley v. Department of Environmental Protection, 10 Mass. App. Ct. 623, 626-27 (1980); In the Matter of John Schindler, OADR Docket Nos. WET-2011-024 and 026, Recommended Final Decision (December 5, 2011), 2011 MA ENV LEXIS, at 7, 13, 37-38, adopted as Final Decision (December 27, 2011).

The Petitioners argue the Applicant does not have a colorable interest in the Property because Bray Street in Gloucester is a public way. The Petitioners assert that the City owns an easement in Bray Street whether it has recorded an interest or not, and that such easement either extinguishes the fee or requires that the Applicant obtain an easement from the City to install the SSDS system in Bray Street. Petitioners Memorandum of Law, pages 29-34. The Petitioners also argue that the Derelict Fee Statute G.L. c. 183, § 58 cited by the Applicant’s expert witness, Ms. Eliason, does not grant Mr. Carrigan a fee interest to the middle of Bray Street. However, the Petitioners offer no testimony, expert or otherwise, to support their arguments on this issue.

On the other hand, Ms. Eliason, a highly qualified real estate attorney with more than 30 years of experience in real estate transaction and state and local permitting, including the examination and assessment of title reports, provided persuasive testimony demonstrating that the



Applicant has a colorable claim of title in the Property. Eliason PFT, ¶ 1; Eliason Ex. A. Ms. Eliason testified that she was engaged to examine title to the Property to determine whether the City of Gloucester held any interest, in fee or easement, in Bray Street. Eliason PFT, ¶ 2; Eliason Ex. B. Ms. Eliason testified that she reviewed the Plan (See Eliason Ex. E), Title Report (See Eliason Ex. C) and Title Report 2021 Update (See Eliason Ex. D) and performed her own title research including review of the title material supporting the Title Reports she reviewed. Eliason PFT, ¶ 5. Specifically, she testified that she evaluated the ownership history of the portion of Bray Street, shown on the Plan as abutting the Property, where the SSDS will be constructed and installed within the portion of Bray Street shown on the Plan that abuts Property. Eliason PFT, ¶ 4. Ms. Eliason testified that she reviewed records back to 1640 and found no evidence that the City owns, or owned in the past, either the fee in or an easement in, Bray Street. Eliason PFT, ¶ 6. She also testified that while the Title Examiner found recorded plans that referred to Bray Street as a public way, there was no recorded acquisition by the City of the fee or an easement. Id. Further, she testified that the Title Examiner also reviewed the plan index going back to 1741, and again, did not find any record of City ownership, in fee or easement, in Bray Street. Id.

Ms. Eliason testified that her professional opinion is that, as an abutter to Bray Street, the Applicant owns the fee to the middle of Bray Street along the portion that abuts the Property. Eliason PFT, ¶ 7.<sup>51</sup> In her opinion, the Applicant holds much more than “colorable claim of title” as that term is described in the wetlands administrative case law. Eliason PFT, ¶ 8.<sup>52</sup> Further Ms. Eliason’s testimony acknowledges that the Applicant must obtain a street opening permit from the

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<sup>51</sup> Ms. Eliason cited to G.L. c. 183, § 58, the so-called “Derelict Fee Statute” which provides that “every instrument passing title to real estate abutting a way public or private . . . shall be construed to include any fee interested of the grantor in such way . . . .” ... Eliason PFT, ¶ 8.

<sup>52</sup> Ms. Eliason also testified that the Petitioners incorrectly concluded that the installation of the SSDS is a major repair to a public way. Eliason PFT, ¶ 9.

Gloucester Department of Public Works which she concludes is a non-discretionary, administrative permit. Eliason PFT, ¶ 10.<sup>53</sup>

Mr. Bogue testified that he reviewed Ms. Eliason's testimony and concluded that it provides sufficient evidence of the Applicant's property interest in Bray Street to support issuance of the SOC. Bogue PFT, ¶ 37. Mr. Bogue does not purport to be an expert in real estate interests. Nonetheless, I give his opinion some weight as a professional experienced in reviewing property interests to the level of "colorable claim" for purposes of issuing the SOC. I find that Ms. Eliason's testimony, uncontradicted by expert testimony on behalf of the Petitioners, and with support from MassDEP, adequately demonstrates that the Applicant has colorable title sufficient for issuance of the SOC.

Finally, The Petitioners attempted through their briefs and experts' testimony to mount a challenge to the Wetlands Regulations generally. That claim was not raised in the appeal notice, or identified as an issue before, during or after the Pre-Hearing Conference and is not properly before OADR.<sup>54</sup>

### **CONCLUSION**

A preponderance of the evidence presented at the Hearing shows that: (1) MassDEP followed the Plan Change Policy 91-1; (2) MassDEP reasonably relied upon the GCC's determination regarding local permits and the SOC is appropriately conditioned to require that the Applicant obtain all such permits; (3) the stream in the area of the proposed Project is intermittent under the relevant regulatory criteria; (4) MassDEP's consideration of the certified vernal pool, where certification occurred after the NOI was filed, is appropriate and MassDEP's

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<sup>53</sup> See also SOC General Condition 3, "This Order does not relieve the permittee or any other person of the necessity of complying with all other applicable federal, state or local statutes, ordinances, bylaws or regulations."

<sup>54</sup> See 310 CMR 10.05(a)15.c. and PHC Report and Order, Amended PHC Report and Order and Second Amended Issue Statement.

recommendation to approve the observed edge of water as the vernal pool boundary of the shown on Alternative Plan 2 and is a rational exercise of MassDEP's discretion; (5) the stormwater treatment plan as depicted on Alternative Plan 2 complies with the applicable stormwater standards; and (6) the Applicant has demonstrated that it has a colorable claim of title sufficient for issuance of the SOC. In sum, I recommend that the Department's Commissioner issue a Final Decision affirming the SOC, issuing a Final Order of Conditions approving the proposed Project, that adopts Alternative Plan 2 in place of the SOC Plan, as recommended by MassDEP.

**Date:** May 4, 2023



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Margaret R. Stolfa  
Presiding Officer

### **NOTICE- RECOMMENDED FINAL DECISION**

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her 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.

## SERVICE LIST

**In the Matter of:**

**Michael Carrigan, Carrigan  
Development, LLC**

**Docket No. WET-2021-027**

**File No. 028-2602  
Gloucester, MA**

Representative

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DEPARTMENT

**In the Matter of Michael Carrigan, OADR Docket No. WET-2021-027**

Recommended Final Decision

Page 45 of 45