

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

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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

December 9, 2024

**In the Matter of
Mike Facchini, Bridgestone
Development, Inc.**

**OADR Docket No. WET 2022-027
DEP File No. SE 126-0646
Carver, MA**

RECOMMENDED FINAL DECISION

INTRODUCTION

On November 23, 2022, the Massachusetts Department of Environmental Protection's ("MassDEP" or "the Department") Office of Appeals and Dispute Resolution ("OADR") received this appeal of a Superseding Order of Conditions ("SOC") issued by the Department's Southeast Regional Office on November 14, 2022. The SOC affirmed the Order of Conditions ("OOC") issued by the Carver Conservation Commission ("CCC") to Mike Facchini, Bridgestone Development, Inc. ("Applicants") approving the Applicants' project on property known as Lot 3 located in the Ricketts Pond Business Park (the "Property") owned by RPBP, LLC ("Intervenor").¹ The project consists of the construction of two commercial buildings with associated driveways, parking areas, drainage and septic systems, grading, landscaping and utility connections, with stormwater conveyed to a stormwater infiltration basin originally planned to accommodate runoff from the eastern portion of the Rickett's Pond Business Park Subdivision ("proposed Project"). The

¹ See Order Granting Motion to Intervene, December 28, 2022.

Notice of Claim (“Appeal Notice”) was filed by a group of ten (10) residents and Save the Pine Barrens, Inc. – Community Land and Water Coalition (collectively “the Petitioners”).

After thoroughly reviewing the administrative record, I recommend that the Department’s Commissioner issue a Final Decision affirming the SOC.

WITNESSES²

The evidence in the administrative record includes the Department’s basic records and the pre-filed, sworn written testimony and exhibits submitted by witnesses on behalf of the Parties. The witnesses below submitted pre-filed direct testimony.

For the Petitioners:

1. **Stephen Borgatti**: Mr. Borgatti is a Senior Project Engineer with BETA Group, Inc. (“BETA”), an engineering firm. He received a bachelor’s degree in Civil and Environmental Engineering from the University of Massachusetts Dartmouth and a master’s degree from the University of Connecticut. He is a Registered Professional Engineer in Massachusetts and has worked with BETA since 2016. His experience at BETA includes site/civil design, stormwater management, project plan development, preparation of double cost estimates, construction project oversight, environmental reporting, and field inspections. Mr. Borgatti is qualified as an expert witness.
2. **Rachel Atkins**: Ms. Atkins is a founder of Save the Pine Barrens (“STPB”) and currently serves as director and treasurer of STPB. She received a Bachelor of Arts in Education from the University of Vermont and a master’s degree in Public Health from Boston University. Her family has lived in the Plymouth area for six generations and she is knowledgeable of the

² Throughout this Recommended Final Decision, the witnesses’ Pre-Filed Direct Testimony is 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.”

environmental and cultural history of the Plymouth area. Her role with STPB involves organizing, communications, outreach, and education.

For the Applicants:

1. Brad Holmes: Mr. Holmes is a Manager of Environmental Consulting & Restoration, LLC (“ECR”), a Massachusetts consulting firm specializing in wetland and coastal project permitting. He received a Bachelor of Science in Wildlife Biology and Environmental Sciences from the University of Massachusetts Amherst and a degree in Environmental Engineering from Northeastern University. He has more than 20 years of experience in wetland science, arboriculture, natural resource management, land use permitting, and restoration, with a focus on wetland resource area delineations and buffer zone restoration/replication. He is also a certified Professional Wetland Scientist. Mr. Holmes is qualified as an expert witness.
2. Bradley McKenzie: Mr. McKenzie is the founder and President of McKenzie Engineering Group, Inc. (“McKenzie Engineering”), a Massachusetts land planning, design, surveying, and construction services administration firm. He received a Bachelor of Science in Civil Engineering from the University of New Hampshire and a master’s degree in Business Administration from New Hampshire College. He has over 39 years of experience in the design, permitting, and construction management of civil infrastructure, stormwater management, utilities, roadways, water distribution systems, and wastewater collection and treatment systems. He is a Registered Professional Engineer in Massachusetts. Mr. McKenzie is qualified as an expert witness.
3. Erik Schoumaker: Mr. Schoumaker is a Project Engineer with McKenzie Engineering. He received a Bachelor of Science in Civil and Environmental Engineering from the University of Massachusetts Amherst. He has worked for McKenzie Engineering since 2017 and has

experience with the preparation of comprehensive civil site development plans and the design of stormwater management systems and the preparation of drainage calculations and stormwater management reports. He is a Registered Professional Engineer in Massachusetts. Mr. Schoumaker is qualified as an expert witness.

4. Michael Facchini: Mr. Facchini is the President of Bridgestone Development, Inc., the corporate Applicant in this case. He has personally participated in and is intimately familiar with the proposed Project and the events leading up to these proceedings.
5. Peter Opachinski: Mr. Opachinski is a member and manager of the Intervenor and the President and Secretary of SLT Construction Corporation (“SLT”), an excavation contractor. He has personally participated in and is intimately familiar with the proposed Project and the events leading up to these proceedings.

For the Department:

1. Maissoun Reda: Ms. Reda is a Section Chief with the Wetlands Program in MassDEP’s Southeast Regional Office. She received a Bachelor of Science in Biology from the Lebanese American University and a Master of Science in Soil Science from the University of Massachusetts Amherst. In her current role, she is responsible for supervising MassDEP staff in carrying out permitting, compliance, enforcement activities, and appeals in accordance with the Wetlands Protection Act. She is required to review Notices of Intent, site plans, and wetland resource area delineations, and is responsible for reviewing and approving SOC’s. She was previously employed by BSC Group, Inc., as an environmental scientist, in which role she was responsible for conducting wetland delineations, permitting, and project site inspections. Ms. Reda is qualified as an expert witness.

BACKGROUND

The Property

The proposed Project will be located on a parcel of land referred to as “Lot 3” which abuts Ricketts Pond. Facchini PFT, ¶ 7. Lot 3 is part of a larger swath of land located off of Spring Street in Carver on the Carver-Plympton border (the “Spring Street Property”). Opachinski PFT, ¶ 7. The Spring Street Property was deeded to the Intervenor by the Massachusetts Department of Transportation in 2018. Opachinski PFT, ¶ 7. The Spring Street Property was mostly wooded at the time the Intervenor purchased it, but some areas, including areas on Lot 3, had already been cleared. Opachinski PFT, ¶ 7. To prepare the Spring Street Property for development, SLT obtained an earth removal permit in 2018, which was not appealed. Opachinski PFT, ¶ 8(a). The Intervenor also contracted with ECR to prepare a wetlands delineation and file an Abbreviated Notice of Resource Area Delineation (“ANRAD”) and with McKenzie Engineering to submit a Notice of Intent (“NOI”) for the construction of a subdivision roadway, utilities, and stormwater measures. Holmes PFT, ¶ 7; Opachinski PFT, ¶ 8(c). The CCC issued an Order of Resource Area Delineation (“ORAD”) certifying the ANRAD as accurate on August 8, 2018, and issued an OOC approving the NOI on May 29, 2019 (“the 2019 OOC”). Holmes PFT, ¶ 7; Opachinski PFT, ¶ 8(c). Neither the ORAD nor the 2019 OOC was appealed and the components of the 2019 OOC have already been constructed. Opachinski PFT, ¶¶ 8(c), 9; Reda PFT, ¶ 17. One of these components, an infiltration basin referred to as “Infiltration Basin 1,” is located on Lot 3. McKenzie PFT, ¶ 30; Borgatti PFT, ¶ 10. Additionally, land clearing and grading are taking place on abutting parcels, such as the Marob Trust Property to the northeast; these other parcels are not subject to the SOC and are not at issue in these proceedings. McKenzie PFT, ¶ 23; Borgatti PFT, ¶¶ 15-16. In January 2022, the Intervenor and Bridgestone reached an agreement for the sale of Lot 3 in which the Intervenor would remain the

record owner of Lot 3 and would remain involved regarding permitting and approvals. Facchini PFT, ¶ 7.

Proposed Project

The proposed Project involves the construction of two commercial buildings with associated bituminous concrete driveways, parking areas, closed drainage system, septic system, grading, landscaping, and utility connections. SOC cover letter, p. 1. Stormwater runoff will be conveyed to the already-constructed Infiltration Basin 1 via the closed drainage system, which consists of a series of catch basins and drainage manholes. SOC cover letter, p. 1; McKenzie PFT, ¶ 20; Borgatti PFT, ¶ 10. The proposed Project is partially located in the 100-foot Buffer Zone to the Bordering Vegetated Wetlands (“BVW”) associated with Ricketts Pond. SOC cover letter, p. 1; Reda PFT, ¶ 8; McKenzie PFT, ¶ 12. Approximately 18% of the Buffer Zone located on Lot 3 will be disturbed by the proposed Project. McKenzie PFT, ¶ 10.

Procedural Background

On May 2, 2022, McKenzie Engineering submitted, on behalf of the Applicants, an NOI for the proposed Project to the CCC. Opachinski PFT, ¶ 12; Facchini PFT, ¶ 9; McKenzie PFT, ¶ 10. On June 21, 2022, the CCC issued an OOC approving the proposed Project. Opachinski PFT, ¶ 14; Facchini PFT, ¶ 11. On July 6, 2022, the Petitioners filed a request for an SOC to MassDEP. Opachinski PFT, ¶ 15; Facchini PFT, ¶ 12. On November 14, 2022, MassDEP issued an SOC upholding the OOC and approving the proposed Project (“2022 SOC”). SOC cover letter, p. 1; Reda PFT, ¶ 9; Opachinski PFT, ¶ 18; Facchini PFT, ¶ 14; Borgatti PFT, ¶ 8.

On November 23, 2022, the Petitioners filed a Notice of Claim (“NOC”) appealing the SOC. On December 14, 2022, the Intervenor filed a motion to intervene. I granted that Motion on December 28, 2022, as the Intervenor would be substantially affected by these proceedings as the record owner of Lot 3. I stayed these proceedings on January 31, 2023, pending other ongoing

litigation. In their August 24, 2023 Status Report, the Applicants indicated that the other ongoing litigation was resolved because the court had vacated and annulled the Planning Board's denial and that the Applicants' amended permit application had been approved which relied on a revised plan. The Applicant requested that the appeal be dismissed and the Petitioners requested an opportunity to respond. On October 5, 2023, I issued an order lifting the stay and scheduled a status conference on October 24, 2023.

A Pre-Hearing Conference took place on November 13, 2023. Following the status conference the Department reviewed the revised plan and determined that the changes were insubstantial under the plan change policy. The Petitioner disagreed and requested that the matter be remanded to the regional office for further review, but I agreed with the Department because the changes do not alter the project configuration and reduce wetlands impacts. Because the appeal had been stayed, I directed the Parties to discuss settlement, and if they could not resolve the matter to submit a Joint Status Report with a Joint Statement of Issues by December 1, 2024. After the Parties failed to comply with my Order, I issued an Order establishing the Issues for Adjudication and Schedule for Adjudication.³

On January 10, 2024, the Applicants filed a motion to dismiss for lack of standing, arguing that STPB had not demonstrated aggrievement either to itself or its members and there was not sufficient evidence that the members of the Ten Resident Group authorized the appeal. The Petitioners filed an Opposition on January 26, 2024, and MassDEP filed a Reply also on January 26, 2024, supporting the Motion with respect to STPB and opposing it with respect to the Ten Resident Group. On February 6, 2024, the Petitioners moved to substitute in a new member of the Ten Resident Group to replace a member who had recently died. On February 9, 2024, I denied the

³ On December 4, 2023, I ordered the Parties to comply with my prior orders and file a Joint Statement of Issues by December 18, 2023. In response, the Parties jointly filed a Joint Statement of Issues which also failed to comply with my orders.

Motion to Dismiss, ruling that there was sufficient evidence that the members of the Ten Resident Group authorized the appeal and that STPB had shown aggrievement sufficient to survive a Motion to Dismiss when taking its factual allegations as true. I also granted the Petitioners' Motion to Substitute a new member of the Ten Resident Group.

On February 20, 2024, the Petitioners filed a Motion to Substitute their previously disclosed expert witness, Scott Horsley, with a different expert witness, Gary James, to which the Applicants and MassDEP assented. The Petitioners also filed a Motion that same day to add Margaret Sheehan, the Petitioners' lawyer, as a witness to testify to the Petitioners' standing, which the Applicants and MassDEP opposed. On February 21, 2024, I granted the Petitioners' Motion to Substitute Mr. Horsley with Mr. James, and on February 26, 2024, I denied the Petitioners' Motion to add Ms. Sheehan as a witness, ruling that Rule 3.7 of the Rules of Professional Conduct prohibited her from acting as both a lawyer and a witness in the same proceeding.

On February 26, 2024, the Petitioners filed their Pre-Hearing Memorandum of Law, in which they stated that "[t]he Petitioners submit no testimony on Issue 4 for adjudication." The Petitioners filed the Pre-Filed Direct Testimony ("PFT") of Gary James that same day, and on March 1, 2024, the Petitioners filed the PFT of Rachel Atkins. On March 6, 2024, the Applicants moved to strike Exhibit 2 to the Ms. Atkins PFT, a report put together by Mr. Horsley ("the Horsley Report"), arguing that as Mr. Horsley was no longer acting as a witness in the case, the Horsley Report constituted hearsay. The Petitioners filed an Opposition to the Motion to Strike on March 15, 2024. On March 18, 2024, the Applicants filed four Motions for Summary Decision, pertaining to Infiltration Basins 1 and 2; Catch Basin 17; total suspended solids; and all issues for adjudication. MassDEP filed a brief in support of the Motion to Strike the Horsley Report on March 19, 2024.

On April 19, 2024, the Petitioners moved to enlarge the time to file their Rebuttal PFT and reply memorandum, contending that they had discovered new evidence of flooding which resulted in

an alteration of the wetlands delineation. On April 23, 2024, I ruled that the Horsley Report was hearsay that did not contain sufficient indicia of reliability and so was stricken as evidence of the truth of the matters asserted but was admissible to show that the Petitioners had expended resources to protect the land in question as evidence of standing. The Applicants, Intervenor and MassDEP filed timely Oppositions to the Petitioners' Motion to Enlarge Time. I denied the Petitioners' Motion, ruling that the Petitioners had not shown that the evidence of flooding was related to any of the issues for adjudication besides Issue 4, which the Petitioners had waived. On May 2, 2024, the Petitioners filed the Rebuttal Testimony of Mr. James and an opposition to the Applicants' Motions for Summary Decision. On May 3, 2024, MassDEP filed a Reply opposing the Applicants' Motion for Summary Decision with respect to all issues for adjudication but supporting the Motions for Summary Decision with respect to Infiltration Basins 1 and 2, Catch Basin 17, and Total Suspended Solids.

On May 15, 2024, MassDEP notified me that the Petitioners' witness, Mr. James, had had his license to practice engineering suspended on April 1, 2024, and had not disclosed this fact in his rebuttal testimony. On May 20, 2024, the Applicants filed a Motion to Strike Mr. James' testimony, and on May 23, 2024, filed a Motion for Summary Decision. The Petitioners filed an Opposition to the Motion to Strike on May 31, 2024, in which they also stated that they were withdrawing Issue 2 for adjudication, and MassDEP filed a Reply in support of the Motion to Strike on the same day. On May 31, 2024, I granted the Motion to Strike due to Mr. James's lack of candor and ordered the Petitioner counsel to file an affidavit informing me of when and how she discovered that Mr. James's license had been suspended.⁴ The Petitioners filed said affidavit on June 4, 2024, along with a Motion to Substitute in a new witness.

⁴ See Order and Ruling on Applicants' Motion to Strike the Testimony of Gary James (May 31, 2024).

On June 5, 2024, the Petitioners filed their Opposition to Summary Decision. On June 10, 2024, MassDEP filed a brief opposing the Petitioners' Motion to Substitute and supporting the Applicants' and Intervenor's Motion for Summary Decision, and the Applicants and Intervenor filed an Opposition to the Motion to Substitute that same day. On June 13, 2024, I issued an Order denying the Applicants' May 23, 2024 Motion for Summary Decision and granting the Petitioners' Motion to Substitute because the Petitioners' counsel affidavit stated that she did not know about Mr. James' suspended license until the day before MassDEP brought it to my attention. The Order specified that the substitute witness's testimony was to be "limited to the scope of testimony provided by Mr. James relative to Issue 1."⁵

The Order additionally ruled on the Applicants' March 18, 2024 Motions for Summary Decision. I granted summary decision on Infiltration Basins 1 and 2 and Catch Basin 17 because they were approved by the 2019 OOC and were therefore outside the scope of these proceedings; deferred ruling on the issue of Total Suspended Solids; granted summary decision with respect to Issues 2 and 4 for adjudication because the Petitioners had waived them; and denied summary decision on Issues 1 and 3 because the Petitioners were entitled to rely on the evidence already in the record to support their position.

On June 24, 2024, the Petitioners moved for reconsideration of my granting of summary decision with respect to Infiltration Basins 1 and 2 and Catch Basin 17. On July 1, 2024, MassDEP and the Applicants opposed the Motion for Reconsideration. On July 2, 2024, I denied the Motion for Reconsideration, for the reasons discussed herein.

⁵ See Order and Rulings on: (1) Petitioners' Motion to Substitute Witness; (2) Applicants' and Intervenor's May 23, 2024 Motion for Summary Decision; (3) Applicants' and Intervenor's Motion to Supplement Pre-Filed Testimony; and (4) Applicants' and Intervenor's March 18, 2024 Motions for Summary Decision (June 13, 2024).

On July 12, 2024, the Petitioners filed the PFT of Stephen Borgatti, their substitute witness, along with an additional memorandum of law. On July 16, 2024, the Applicants filed a Motion to Strike the additional memorandum of law, arguing that the Petitioners did not have permission to file a second memorandum of law, and that Mr. Borgatti's testimony primarily addressed topics outside the scope of Mr. James's testimony or topics on which I had already granted summary decision such as Infiltration Basin 1. The Petitioners filed an Opposition to the Applicants' Motions on July 24, 2024, and MassDEP filed a brief in support of the Motion to Strike Mr. Borgatti's testimony on July 25, 2024.

On August 1, 2024, I granted the Motion to Strike with respect to the majority of Mr. Borgatti's testimony for addressing issues outside the scope of Mr. James's testimony or issues on which I had already granted summary decision. I also ordered the Petitioners to show cause why the appeal should not be dismissed considering their lack of testimony.⁶ The Petitioners responded to the Order to Show Cause on August 15, 2024, contending that Infiltration Basin 1 was still relevant to these proceedings. On August 30, 2024, I informed the Parties that I would issue a Recommended Final Decision dismissing the appeal because the Petitioners had failed to demonstrate that they could succeed on the merits.

ISSUES FOR ADJUDICATION

Based on the Parties' respective positions in the appeal regarding approval of the proposed Project, the Issues for Adjudication in the appeal were established as follows:

1. Whether the proposed project complies with the Stormwater Management Standards pursuant to 310 CMR 10.05(6)(k) through (q).
2. Whether the proposed project complies with the standards concerning projects within the buffer zone to a jurisdictional wetland pursuant to 310 CMR 10.02(2)(b).
3. Whether the Petitioners have demonstrated standing to bring this appeal.

⁶ I deferred ruling on these motions until issuance of a Recommended Final Decision. See Ruling and Order, 8-1-24. **In the Matter of Mike Facchini, Bridgestone Development, Inc., OADR Docket No. WET 2022-027**
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4. Are the wetland delineations in the August 8, 2018 Order of Resource Area Delineation (“ORAD”) binding where the Notice of Intent (“NOI”) based on the ORAD was submitted to the Carver Conversation Commission on March 7, 2022, and the Parties agree that the ORAD was still in effect at that time?
 - a. If the ORAD was not in effect, are the wetland resource areas correctly delineated on the Plans?
 - b. If the ORAD was not in effect and the wetland resource areas are not correctly delineated on the Plan, what effect does this have on the proposed Project?

STATUTORY & REGULATORY FRAMEWORK

The Massachusetts Wetlands Protection Act and the Wetlands Regulations have as their purpose the protection of wetlands and the regulation of activities affecting wetlands areas in a manner that promotes the following 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); See In the Matter of Kristen Kazokas, OADR Docket No. WET-2017-022, Recommended Final Decision (August 29, 2018), 2018 WL 9847851, *3, adopted by Final Decision (September 18, 2019), 2019 WL 5209254, citing Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 224 (2010).

APPEAL ADJUDICATION PROCEDURE

I. PETITIONERS’ BURDEN OF PROOF

In addition to the Adjudicatory Proceeding Rules at 310 CMR 1.01, the Wetlands Permit Appeal Regulations at 310 CMR 10.05(7)(j), and the requirements of the MWPA and the Wetlands Regulations govern resolution of the Petitioners’ appeal of the SOC. Under 310 CMR 10.05(7)(j), the Petitioners have the burden of proof on all Issues for Adjudication in the Appeal. See 310 CMR 10.03(2); 310 CMR 10.05(7)(j)2.b.iii; 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.

To prove their contention that the Department erred in issuing the SOC, the Petitioners were required to “produce [at the Hearing] at least some credible evidence from a competent source in support of [their] position[.]” 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. The Petitioners had 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 ‘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 WL 3427461, *11, adopted by Final Decision (August 19, 2010), 2010 WL 3427460. 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 Carl Carulli, Docket No. 2005-214, Recommended Final Decision (August 10, 2006), 2006 WL 4211673 (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), 2004 WL 3973695 (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), 2003 WL 21202599, adopted by Final Decision (May 9, 2003) (insufficient evidence from competent source to show wetlands delineation was incorrect and work was not properly conditioned).

II. STANDARD OF REVIEW

My review of the evidence presented by the Parties at the Hearing was *de novo*, meaning that my review was anew, irrespective of any prior determination of the Department in issuing the SOC.

In the Matter of Brian Corey, OADR Docket No. WET 2016-023, Recommended Final Decision (February 28, 2018), 2018 WL 2002973, *19, adopted as Final Decision (March 15, 2018), 2018 WL 2002972.

The relevancy, admissibility, and weight of evidence that all parties sought to introduce at the Hearing was governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h). 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 . . . rest[ed] within the discretion of the Presiding Officer.” Speculative evidence was accorded no weight given its lack of probative value in resolving the issues in the case. In the Matter of Sawmill Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), 2015 WL 5758252, *29, adopted as Final Decision (July 7, 2015), 2015 WL 5758285 (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

I. Petitioners had standing to initiate the appeal⁷

I previously denied the Applicant's Motion to Dismiss concluding that the 10 Resident Group and the STPB have standing.⁸ This finding was that the 10 Resident Group and STPB have standing based on the lower evidentiary threshold that only required that they put forth a minimum quantum of credible evidence in support of their claims. It still remained for them to support their claims by preponderance of the evidence. My rulings on standing are summarized below.

a. The Jurisdictional Nature of Standing

"Standing 'is not simply a procedural technicality.' . . . Rather, it 'is a jurisdictional prerequisite to being allowed to press the merits of any legal claim.'" In the Matter of Brian Corey, OADR Docket No. WET 2016-023, Recommended Final Decision (February 28, 2018), 2018 WL 2002973, *9, adopted as Final Decision (March 15, 2018), 2018 WL 2002972 (Buzzards Bay Coalition had standing to challenge the SOC as an aggrieved Person who previously participated in the permit proceedings), citing Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975).

The provisions of 310 CMR 10.05(7)(j)2.a state:

"Any applicant, landowner, aggrieved person if previously a participant in the permit proceedings, conservation commission, or any ten residents of the city or town where the land is located, if at least one resident was previously a participant in the permit proceeding may request review of a Reviewable Decision by filing an Appeal Notice no later than ten business days after the issuance of the Reviewable Decision. Previously participating in the permit proceeding means the submission of written information to the conservation commission prior to close of the public hearing, requesting an action by the Department that would result in a Reviewable Decision, or providing written information to the Department prior to issuance of a Reviewable Decision."

⁷ Standing was identified as Issue 3: Whether the Petitioners have demonstrated standing to bring this appeal.

⁸ Ruling and Order, February 9, 2024.

“To show standing, [however,] a party need not prove by a preponderance of the evidence [at the evidentiary Adjudicatory Hearing in the appeal] that his or her claim of particularized injury is true.” Brian Corey, *10.

As the Massachusetts Appeals Court explained in Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005):

[t]he “findings of fact” a judge is required to make when standing is at issue . . . differ from the “findings of fact” the judge must make in connection with a trial on the merits. Standing is the gateway through which one must pass en route to an inquiry on the merits. When the factual inquiry focuses on standing, therefore, a plaintiff is not required to prove by a preponderance of the evidence that his or her claims of particularized or special injury are true. “Rather, the plaintiff must put forth credible evidence to substantiate his allegations. [It is i]n this context [that] standing [is] essentially a question of fact for the trial judge.”

“Under 310 CMR 1.01(11)(d)(1), a party may move to dismiss an administrative appeal for lack of jurisdiction ‘In deciding [either] motion, the Presiding Officer shall assume all the facts alleged in the [appellant’s Appeal Notice] to be true,’ but ‘[the] assumption shall not apply to any conclusions of law’ alleged in the Appeal Notice. . . . This standard mirrors the standard applied by Massachusetts courts in civil cases when reviewing challenges to court pleadings based upon the court’s lack of subject matter jurisdiction under Mass. R. Civ. P. 12(b)(1)” In the Matter of Brice Estates, Inc., OADR Docket No. WET-2016-024, Recommended Final Decision (April 21, 2017), 2017 WL 2843027, *4, adopted as Final Decision (June 16, 2017), 2017 WL 2843023 (10 Resident Group with one member does not have standing, and that member was not a person aggrieved). “‘To show standing, a party need not prove by a preponderance of the evidence that his or her claim of particularized injury is true.’ . . . ‘Rather, the plaintiff must put forth credible evidence to substantiate his allegations.’” In the Matter of Webster Ventures, LLC, OADR Docket No. WET-2014-016, Recommended Final Decision (February 27, 2015), 2015 WL 5758253, *6, adopted as Final Decision (March 26, 2015), 2015 WL 2381916.

b. The Ten Resident Group Had Standing to Appeal

The standing requirements for a group of ten residents to appeal a Superseding Order of Conditions are that all members be “residents of the city or town where the land is located” and that “at least one resident was previously a participant in the permit proceeding.” 310 CMR 10.05(7)(j)2.a. Previously participating includes “requesting an action by the Department that would result in a Reviewable Decision.” 310 CMR 10.05(7)(j)2.a. The Appeal Notice filed by the Ten Resident Group lists ten individuals and represents that they are residents of Carver, providing their addresses.⁹ Furthermore, two of the members, Dorothy Pollitt and Tom Pollitt, are among the individuals who previously participated in the permit proceeding by requesting the SOC that is being reviewed in this appeal. Thus, the Ten Resident Group has satisfied all the requirements for standing.

The Applicant avers that the ten listed individuals did not actually approve being listed as members of the Ten Resident Group in this proceeding. “Where ten residents are identified in a notice of claim, with an authorized representative, generally the Department will accept the appeal. Where standing is challenged, however, the Department has asked the authorized representative to verify that group members indeed intended to participate in the appeal, at the time the appeal was filed, and to be represented by the authorized representative.” In the Matter of Michael Noonan, OADR Docket No. WET-2010-017, Recommended Final Decision (June 16, 2010), 2010 WL 2641744, *2, adopted as Final Decision (June 22, 2010), 2010 WL 2641743.

In response to the Applicant’s allegation, the Ten Resident Group submitted affidavits from nine of the listed individuals in which they state that they are participating in this proceeding, as well

⁹ The Ten Resident Group members identified in the Appeal Notice include: Dorothy Pollitt, Timothy Pollitt, Mary Dormer, James Gaskey, Nancy Ryan, Elizabeth Sullivan, Shawn Keith, Jonathan Cooney, Patty Cooney, William Duggan. Notice of Appeal, Footnote 1; Petitioner’s Opposition, Ex. 1, Ex. 2.

as an affidavit from Attorney Sheehan representing that Dorothy Pollitt, who is now deceased, authorized her to act as her representative in this proceeding. Petitioners' Opposition Ex. 1, Ex. 2.¹⁰ The Applicant argues that some of the affidavits reference only an "administrative appeal" without specifying this particular proceeding, but it is apparent from the context that the administrative appeal being referred to in the affidavits is this one. The affidavits suffice to demonstrate that the ten individuals did approve their participation in this administrative appeal.

The Applicants and Intervenors raised a number of other arguments as to why the Ten Resident Group does not have standing, including: the ten residents did not sign the Appeal Notice, there is no evidence that the ten residents received copies of the SOC request or the Appeal Notice, Attorney Sheehan has not represented that she is an aggrieved person herself, and one of the ten residents would not oppose the project following revisions to address her concerns. None of these arguments address the statutory or regulatory requirements for Ten Resident Group standing.

The Applicants and Intervenor also assert that the Ten Resident Group has not proven that there were ten individuals with standing to request the SOC in the first place. It is unnecessary for the Ten Resident Group to make that showing. The regulations require that at least one member of a Ten Resident Group participate in the prior proceedings. See 310 CMR 10.05(7)(a)4. The record shows that Dorothy Pollitt and Thomas Pollitt requested the SOC and that they are abutters and as such had standing to request the SOC. 310 CMR 10.05(7)(a)4. As a consequence, the Ten Resident Group satisfies the requirement that at least one member have participated in the prior proceedings. 310 CMR 10.05(7)(j)2.a. The Applicants and Intervenor also incorrectly compared the present case to Brice Estates. In Brice Estates, the Ten Resident Group had only one member who sought the administrative appeal, and that resident did not demonstrate that she was an aggrieved party. Brice

¹⁰ The Ten Resident Group brought a proper motion to substitute another Carver resident for the late Ms. Pollitt.

Estates, *6-9. By contrast, here the Notice of Claim lists ten individual residents who initiated the administrative appeal. The Petitioners have supported that list by providing affidavits confirming each member resident's intent to participate in the administrative appeal. See Petitioners' Opposition, Ex. 1, Ex. 2.

c. STPB had Standing to Initiate this Appeal

The Parties do not dispute that STPB is a legal entity. As such, STPB is a person under the regulations. 310 CMR 10.01(1)(c). The regulations define an aggrieved person as "any person who, because of an act or failure to act by the issuing authority, may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in M.G.L. c. 131, § 40." 310 CMR 10.04: Person Aggrieved.

"A 'person aggrieved' as that term is used in the MWPA must assert 'a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest. . . . Of particular importance, the right or interest asserted must be one that the statute . . . intends to protect.'" Brian Corey, *10.

A corporate entity has aggrieved status and standing if it can "establish some harm to a corporate legal right." Id.¹¹ "A mere statement of corporate purpose which expresses a general civic interest in the enforcement of [environmental] laws, or in the preservation of [natural resources], is not enough to confer standing" upon the corporate entity. Id.

However, "where the core public mission of a non-profit corporate organization is to protect, preserve and advocate on behalf of one or more interests enumerated in the MWPA and the Wetlands Regulations, decisions involving proposed projects that are issued by the local permitting entity (the

¹¹ Citing Harvard Square Defense Fund, Inc. v. Planning Board of Cambridge, 27 Mass. App. Ct. 491, 496 (1989); In the Matter of Entergy Nuclear Operations, Inc. and Entergy Nuclear Generation Co., OADR Docket No. 2015-009, Recommended Final Decision (February 5, 2016), 2016 WL 921973, *9, adopted as Final Decision (February 25, 2016), 2016 WL 903463.

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local conservation commission) and/or the Department can have a disproportionate impact upon that entity's core public mission, and may or does constitute a harm that is distinctly greater in kind and magnitude from the harm to the interests to the general public.” Brian Corey, *13.

The Applicants and Intervenor contend that STPB's corporate purpose is merely a general statement of civic interest, insufficient to make STPB a person aggrieved by the SOC. MassDEP agreed, contending that STPB cannot be an aggrieved person because it is an organization run by attorney Margaret Sheehan located in Plymouth MA, not Carver MA where the project Property is located.

STPB contends that it has standing as an aggrieved person. STPB asserts in its Notice of Claim that it is a non-profit corporation “established for the charitable and educational purposes of protecting, preserving and restoring the land and waters of Southeastern Massachusetts, including the federally designated Plymouth Carver Aquifer. Notice of Claim, p. 3. STPB's Notice of Claim further contends that “STPB is a Massachusetts non-profit corporation organized for charitable and educational purposes including but not limited to ‘research, outreach and dissemination of information about preserving, protecting and stewarding land and water resources in Massachusetts including but not limited to the pine barrens ecosystem and its species, and the region's sole source aquifer.’” Notice of Claim, p. 3.¹² STPB contends that it previously participated in the permit proceedings by submitting written information to the Department prior to issuance of the SOC.¹³ Additionally, STPB's membership includes residents of Carver who own property or live on property abutting the proposed Project.

¹² See also the webpage provided in Applicant's Motion to Dismiss, <https://communitylandandwater.org/join/>.

¹³ In Exhibit 3 attached to its Opposition to the Applicant's Motion to Dismiss and to demonstrate standing to bring its appeal, STPB relies on a previous ruling of the Commonwealth's Energy Facilities Siting Board (“EFSB”) allowing STPB to intervene in a proceeding about the construction of a battery energy storage system in Carver, Massachusetts. In that matter, the EFSB determined that STPB could be “substantially and specifically affected” by the EFSB proceeding and as such allowed STPB to intervene in the proceeding.

Based on the facts that STPB alleged in its Notice of Claim and the deferential standard of 310 CMR 1.01(11)(d)(1) discussed above requiring me, as the Presiding Officer in this appeal, to assume the facts to be true in response to the Applicant's motion to dismiss, I conclude that STPB's purpose is more than a "general statement of civic interest in the enforcement of [environmental] laws, or in the preservation of [natural resources]." Its mission is particularly targeted to the Plymouth Carver Aquifer and "the pine barrens ecosystem and its species, and the region's sole source aquifer." As a consequence, its core public mission is to "protect, preserve and advocate on behalf of one or more interests enumerated in the MWPA and the Wetlands Regulations." This appeal involves decisions of the Department that could "have a disproportionate impact upon" STPB's core public mission, and "may or does constitute a harm that is distinctly greater in kind and magnitude from the harm to the interests to the general public. Brian Corey, *13. Further, that its address is located in Plymouth is irrelevant as STPB's mission extends regionally to include at least the several municipalities under which the Plymouth Carver Aquifer lies.¹⁴ In sum, STPB has demonstrated the necessary corporate relevance and the SOC authorizes a proposed Project that STPB has alleged will impact the interests it seeks to protect sufficient to pass through the standing gateway. The proposed Project directly impacts STPB's core public mission, and so constitutes an injury that is different in kind and magnitude from that suffered by the general public.

My finding that the 10 Resident Group and STPB have standing to challenge the SOC does not mean that they prevail on the merits of their substantive claims challenging the SOC authorizing the proposed Project. My finding only means that they have standing based on the much lower evidentiary threshold that only required them to put forth a minimum quantum of credible evidence in support of their claims.

¹⁴ Sole Source Aquifer Designation for the Plymouth-Carver Aquifer, Massachusetts Federal Register, Vol. 55, No. 152, August 7, 2009.

II. Scope of this appeal

Petitioners contend that testimony should be included regarding Infiltration Basin 1 and contend that MassDEP should take enforcement action relative to Infiltration Basin 1. The Stormwater runoff from the proposed Project will be conveyed, through a series of proposed catch basins and drainage manholes to the existing, previously authorized infiltration basin. SOC cover letter, p. 1.¹⁵

First, as noted above, I ruled that Infiltration Basin 1 is not within the scope of the SOC on appeal and was constructed pursuant to the 2019 OOC. Petitioners contend that because the 2019 OOC expired, Infiltration Basin 1 should be considered in the context of the 2022 SOC appeal that is the subject of this proceeding. However, whether the 2019 OOC expired is not relevant to this proceeding; Infiltration Basin 1 itself is not within the scope of the 2022 SOC and therefore is not a part of this appeal of the 2022 SOC.

Second, there is sufficient evidence in the record to rule as a matter of law that Infiltration Basin 1 and the other existing components were not part of the SOC on appeal.¹⁶ After Mr. James's testimony was stricken, the substitute witness's testimony was to be limited to the scope of Mr. James's testimony. This limit was imposed to allow the Petitioners an opportunity to cure the lack of testimony in the record, given the timing of their knowledge regarding his disqualification, without

¹⁵ See Ruling and Order, June 13, 2024; See also In the Matter of Northern Provinces, Inc., Docket Nos. 91-067, 91-073, 91-165, 93-086, Tentative Final Decision (November 15, 1995), 1995 WL 805805, *8 ("Because the subdivision's drainage system was approved by the Rehoboth Conservation Commission in 1988 and the Order of Conditions approving it has long since become unappealable, I may not now consider attacks on the drainage system itself, but only issues raised as to any changes in drainage that will be brought about by construction of the proposed projects. . . . What Petitioners had to show was that construction of the proposed houses will increase runoff from the lots into Bordering Vegetated Wetland above and beyond any increase permitted by the 1988 Order of Conditions and that this increased runoff will alter the wetland and impair its function.").

¹⁶ Those portions of the project that are proposed within the Buffer Zone to BVW include: portions of a bituminous concrete pavement; two concrete dumpster pads; two propane tanks with associated bollards and gas service connection; a potable well and its associated water service connection; catch basins, drainpipes and drain manholes; four conservation posts; a wood chipped maintenance path; and grading and landscaping. SOC cover letter, p. 1.

expanding the scope of the position they had offered with Mr. James' testimony. Mr. Borgatti offered testimony beyond that scope which was, accordingly, stricken. Reviewing his remaining testimony, I was able to determine that the Petitioners did not submit any evidence that would change this conclusion.

III. Petitioners' Second Pre-Hearing Brief

Petitioners filed a Second Pre-Hearing Memorandum on July 12, 2024, which the Applicants and Intervenor moved to strike. On July 25, 2024, the Petitioners filed a Motion for Permission to file their Second Pre-Hearing Brief nunc pro tunc.¹⁷ In my August 1, 2024 Ruling and Order, I deferred a ruling on these motions until after the Petitioners filed a response to the Order to Show Cause. On August 2, 2024, the Applicants and Intervenor opposed the Petitioners' Second Pre-Hearing Brief nunc pro tunc, moved to strike it, and in the alternative filed a motion for leave for their own Second Pre-Hearing Memorandum with additional testimony. MassDEP did not make any additional filing. Following my review of the Petitioners' Response to the Order to Show Cause, I ruled on August 30, 2024, that the Petitioners failed to demonstrate that they could succeed on the merits of this appeal.

The Petitioners' rationale for filing a second pre-hearing brief is that the first brief addressed Mr. James's testimony, which was stricken from the record, and that a second brief was necessary to address Mr. Borgatti's substitute testimony. However, Mr. Borgatti's testimony was largely stricken because it was beyond the scope of Mr. James's testimony and addressed matters outside the scope of this appeal, specifically Infiltration Basin 1 which was the subject of the 2019 OOC. The intent in allowing the Petitioners to file testimony from a substitute witness was not to give them a second chance to make new arguments but was to give them a second chance to support the positions

¹⁷ The doctrine of relation back, nunc pro tunc, is a doctrine that an act done at a later time is, under certain circumstances, treated as though it occurred at an earlier time. Black Law Dictionary, 12th ed. 2024.

already taken in their pre-hearing memorandum, which relied on Mr. James's testimony. Where Mr. Borgatti's testimony was largely stricken because it did not address the same issues as Mr. James's testimony, a Second Pre-Hearing Memorandum does not serve to support the Petitioners' position asserted in their original filings. The Petitioners' Second Pre-Hearing Memorandum is not made a part of the record. Nor is the Applicants' and Intervenor's Second Pre-Hearing Memorandum and additional testimony from its witnesses.

In this Adjudicatory Proceeding, the Petitioners had the burden of proof on all Issues for Adjudication in the Appeal.¹⁸ To prove their contention that the Department erred in issuing the SOC, the Petitioners were required to produce at least some credible evidence from a competent source in support of their position. Id.¹⁹

The SOC on appeal, the 2022 SOC, describes the proposed Project as follows: "This proposed project consists of the construction of two commercial buildings with associated bituminous concrete driveways, parking areas, closed drainage system, septic system, grading, landscaping, and utility connections. Stormwater runoff from the proposed development of the subject lot, through a series of proposed catch basins and drainage manholes (the closed drainage system referenced above), will be conveyed to a stormwater infiltration basin originally planned to accommodate runoff from the eastern portion of the Rickett's Pond Business Park Subdivision." SOC cover letter, p. 1. The stormwater infiltration basin referred to is Infiltration Basin 1, which was approved by the 2019 OOC. The 2019 OOC reads: "This Order of Conditions is for the construction of the subdivision roadway, utilities and stormwater measures (catch basins, stormwater

¹⁸ See 310 CMR 10.03(2); 310 CMR 10.05(7)(j)2.b.iii; 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.

¹⁹ See In the Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 WL 3427461, *11, adopted by Final Decision (August 19, 2010), 2010 WL 3427460 ("A 'competent source' is a witness who has sufficient expertise to render testimony on the technical issues on appeal.").

infiltration basins) designed to support/mitigate the future development of a 7-Lot, 19-building business park on the 42-acre parcel in Carver and Plympton.” Catch Basin 17 and Infiltration Basins 1 and 2 were approved by the 2019 OOC. McKenzie PFT, ¶¶ 30, 36. The 2019 OOC was not appealed, and Infiltration Basin 1 has already been constructed. The Petitioners presented no evidence suggesting that Catch Basin 17 or Infiltration Basins 1 and 2 are governed by the 2022 SOC. Thus, I concluded that the Petitioners’ arguments related to Catch Basin 17 and Infiltration Basins 1 and 2 were an impermissible collateral attack on the unappealed 2019 OOC. See Ruling and Order, 6-13-24.

The Petitioners’ substitute witness, Mr. Borgatti, is an expert with substantial relevant experience.²⁰ However, as discussed in detail in a prior Order, his testimony addressed matters outside the scope of the 2022 SOC, specifically the previously approved infiltration basin.²¹ To the extent that the Petitioners assert that the infiltration basin is not in compliance with the MWPA and the Wetlands Regulations, that issue is not the subject of this appeal. The implication is that MassDEP should take enforcement action against the Applicants. These are assertions that go to the heart of MassDEP’s enforcement discretion regarding alleged prior noncompliance with the MWPA and Wetlands Regulations, not to what is authorized by the 2022 SOC. It is well settled that the exercise of enforcement discretion resides with the Department and cannot be achieved through permit adjudication. See In the Matter of Bourne Community Boating, Inc., OADR Docket No. WET-2009-031, Recommended Final Decision (November 19, 2009), 2009 WL 5698017, *17, adopted by Final Decision (December 18, 2009); In the Matter of Town of Swansea, OADR Docket

²⁰ Mr. Borgatti was allowed as the Petitioners’ substitute witness solely for the purpose of replacing the testimony of Mr. James. The purpose was not to give the Petitioners an additional opportunity to offer testimony on issues not addressed by Mr. James. See Ruling and Order 6-13-2024; Ruling and Order, 8-1-2024.

²¹ Ruling and Order, 8-1-2024.

No. WET-2014-020, Recommended Final Decision (March 27, 2015), 2015 WL 9998844, *5, adopted by Final Decision (June 1, 2015), 2015 WL 9999165.

Mr. Borgatti's remaining testimony addressed land clearing and soil removal to the north of the limit of analysis. Borgatti PFT, ¶¶ 15, 35. He also testified that the post-development watershed plan depicts grading along the northeast property and conflicts with existing topography at the limit of work, and he contends that if additional grading is required, it would result in changes to hydrology that have not been accounted for in the drainage analysis. Borgatti PFT, ¶ 16. However, this testimony is insufficient to support the Petitioners position that the SOC fails to comply with the Stormwater Standards.

IV. The Petitioners failed to demonstrate that the proposed Project does not comply with the Stormwater Management Standards pursuant to 310 CMR 10.05(6)(k) through (q).

The Applicants and Intervenor moved for summary decision regarding Total Suspended Solids; the Stormwater Standards provide that “[s]tormwater management systems shall be designed to remove 80% of the average annual post-construction load of Total Suspended Solids (“TSS”).” 310 CMR 10.05(6)(k)4. The Applicants, Intervenor and MassDEP contend that the Petitioners have presented no evidence suggesting that the stormwater management system will remove less than 80% of TSS. However, because the Petitioners’ expert, Mr. James, submitted testimony on TSS which was stricken, and the Petitioners’ motion for substitute expert was granted, I deferred a ruling on this motion until all testimony was filed.

Mr. Borgatti's testimony did not address Total Suspended Solid requirements or the remaining stormwater standards. After reviewing all witness testimony, the preponderance of the evidence demonstrates that the Petitioners failed to provide relevant evidence to support their allegations that the proposed Project fails to comply with the Stormwater Management Standards pursuant to 310 CMR 10.05(6)(k) through (q).

V. Petitioners withdrew Issue 2²²

In their Opposition to the Motion to Strike Mr. Jame’s Testimony, filed on May 31, 2024, the Petitioners stated that they were withdrawing Issue 2 for adjudication. Accordingly, this issue was dismissed.²³

VI. Petitioners withdrew Issue 4²⁴

In their May 31, 2024 Opposition to the Motion to Strike Gary James Testimony, the Petitioners wrote that they are “withdrawing subsidiary Issues 2 and 3.” However, because Issue 3 is about whether the Petitioners have standing, they could not simply withdraw this issue, as this proceeding could not go forward if the Petitioners lacked standing. I noted this discrepancy in the June 13, 2024 Ruling and Order in this matter, concluding that Petitioners meant to write that they are withdrawing Issues 2 and 4. The Petitioners filed nothing to the contrary.

In their June 24, 2024 Motion for Reconsideration of my June 13, 2024 Ruling and Order on summary decision the Petitioners indicated that they would move to introduce testimony on Issue 4 if I did not reconsider my June 13, 2024 ruling. I denied Petitioner’s motion for reconsideration on July 2, 2024; no subsequent filing was made by the Petitioners to introduce testimony on Issue 4.

²² Issue 2: Whether the proposed project complies with the standards concerning projects within the buffer zone to a jurisdictional wetland pursuant to 310 CMR 10.02(2)(b).

²³ See Ruling and Order, June 13, 2024. Also, the Applicants’ and Intervenor’s March 18, 2024 Motion for Summary Decision moved to dismiss Issue 2 on grounds that the Petitioners’ had not included exhibits in their PFT. However, I ruled that those exhibits were in the record and that the Petitioners were entitled to refer to them in testimony and their later clarification of which documents they were citing cured any harm.

²⁴ Issue 4: Are the wetland delineations in the August 8, 2018 Order of Resource Area Delineation (“ORAD”) binding where the Notice of Intent (“NOI”) based on the ORAD was submitted to the Carver Conversation Commission on March 7, 2022, and the Parties agree that the ORAD was still in effect at that time?

- a. If the ORAD was not in effect, are the wetland resource areas correctly delineated on the Plans?
- b. If the ORAD was not in effect and the wetland resource areas are not correctly delineated on the Plan, what effect does this have on the proposed Project?

CONCLUSION

In sum, the Petitioners, the 10 Resident Group and STPB had standing to challenge the SOC. However, they then failed to demonstrate by a preponderance of the evidence that the Department erred in issuing the SOC approving the proposed Project. Accordingly, I recommend that the Department's Commissioner issue a Final Decision affirming the SOC.



Date: December 9, 2024

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 her sole discretion, directs otherwise.

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