COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS

DEPARTMENT OF ENVIRONMENTAL PROTECTION

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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

February 14, 2024

In the Matter of
Peter & Betsy Wild/Idlewild Acres, LLC

OADR Docket Nos. WET-2019-019, 020
DEP File No. SE 7-2096
Sandwich, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

In these consolidated appeals, the Petitioners – a Ten Residents Group and two individuals - challenge a Superseding Determination of Applicability ("SDA") issued by the Southeast Regional Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") to Peter and Betsy Wild, Idlewild Acres, LLC ("the Applicant") on May 29, 2019 pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 ("MWPA"), and the Wetlands Regulations, 310 CMR 10.00 et seq. ("the Wetlands Regulations") relative to property located at 46 Roos Road in Sandwich, Massachusetts, owned by Idlewild Acres, LLC. ("the Property"). The appeals require me to determine whether some or all of a group of twelve farm fields are subject to regulation under the MWPA and the Wetlands Regulations because they are not Land in Agricultural Use ("LIAU") as defined in 310 CMR 10.04 Agriculture, and whether the work or activities proposed by the Applicant in 2018 in their Request for Determination of Applicability ("RDA") is "normal maintenance" or "normal

improvement" of LIAU. The Department determined that certain farm fields identified on a Natural Resources Conservation Service ("NRCS")[1] Conservation Farm Plan qualified as existing LIAU ("the Negative Determination"), while other areas on the Applicant's property did not qualify as LIAU ("the Positive Determination"). The SDA partly reversed a decision of the Sandwich Conservation Commission ("the SCC"), which had issued a Positive Determination for the entirety of the work depicted on the plans submitted by the Applicant with the RDA. Neither the Applicant nor the Commission appealed the SDA to the Office of Appeals and Dispute Resolution ("OADR"), apparently content to let the SDA stand, notwithstanding the fact that of the 18 fields at issue in the SDA, one-third of them would now be regulated under the MWPA and the Wetlands Regulations (or only one-third from the Commission's perspective).

However, a Ten Residents Group and two individuals residing at the same address (collectively "the Petitioners") did appeal the SDA to OADR, citing as error the Department's determination that any of the fields were exempt from regulation. I consolidated the appeals pursuant to 310 CMR 1.01(6)(g) because they involve common issues of law and fact. The Ten Residents Group members each claims to be an abutter to the subject property and each member of the group claims prior participation in the proceedings. These Petitioners allege that activities on the Applicant's property have resulted in pollution of the Cow River and Long River; have polluted resident Peter Hanlon's cranberry bogs; and have adversely and directly affected the MWPA's interests of flood control and storm damage prevention by displacing flood waters onto their properties. The Petitioners in WET-2019-020 are Michael Karl and Cathy Walter. They claim to be aggrieved and assert that they are abutters to the subject property. They allege that

[1] The NRCS is part of the United States Department of Agriculture. Its purpose is to provide farmers, ranchers and forest managers with technical assistance and advice for their land. https://www.nrcs.usda.gov/about

flood waters from the Applicant's property have impacted their property, and adversely and directly affected the MWPA's interests of flood control and storm damage prevention, to their detriment. The Commission participated in the appeals, filing testimony and memoranda of law, being deemed a "party" pursuant to 310 CMR 10.05(7)(j)2.f.[2]

After a pre-hearing conference at which the issues to be adjudicated were determined, the matter proceeded to an evidentiary adjudicatory hearing ("Hearing"). Prior to the hearing, the parties submitted the written direct testimony of their witnesses, rebuttal testimony as allowed, and memoranda of law on the issues for adjudication. I conducted the Hearing on December 18, 2019 at which the witnesses who had filed testimony in advance of the Hearing were cross-examined under oath. The Hearing was stenographically recorded, and a printed transcript is part of the record. After the Hearing, the parties submitted closing briefs and except for the Department, proposed findings of fact and rulings of law. To the extent the proposed findings are consistent with my evaluation of the witnesses and analysis of the evidence presented, I have incorporated them into this Recommended Final Decision. I conducted a site view pursuant to 310 CMR 1.01(13)(j)[3] on February 5, 2020, with representatives of each party.

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[2] As noted, the Commission did not appeal the SDA. Instead, after the appeal period ran the Commission sent correspondence to the Southeast Regional Office in which it asserted that it intended to actively participate in the appeals. The Applicant filed a Motion to Strike/Motion in Limine directed at this correspondence; neither the Commission nor the Petitioners opposed it. I denied the Motion to Strike because the correspondence had not been filed with OADR and was not a part of the OADR record. The Motion in Limine requested that the Commission be limited to introducing evidence and testimony which was not contradictory to the SDA. I granted the Motion in Limine because while 310 CMR 10.05(7)(j)2.f. affords a local conservation commission party status in an appeal of an SDA, that status is limited, and does not include the right to collaterally attack the SDA through the appeals of the Petitioners, where the Commission itself failed to appeal the SDA. The Commission is bound by the SDA it failed to appeal. See Matter of Thomas Vacirca, Jr., OADR Docket No. WET-2016-017, Recommended Final Decision (April 11, 2017), 2017 MA ENV LEXIS 22, adopted by Final Decision (April 18, 2017), 2017 MA ENV LEXIS 28. I allowed the Commission to file factual testimony consistent with this ruling, and I did not preclude the Commission from filing a memorandum of law which articulates its position in the appeals.

[3] 310 CMR 1.02(13)(j) provides that:

After reviewing the administrative record and considering all the evidence presented and the applicable law and regulations, I recommend that the Department's Commissioner issue a Final Decision reversing the negative SDA regarding all farm fields except farm field F2. A preponderance of the evidence supports a finding that the farm fields at issue are not LIAU because they are not presently and primarily being used to raise agricultural commodities for a commercial purpose. If they were considered LIAU, then the activities proposed by the Applicant constitute normal maintenance and normal improvement of LIAU.

WITNESSES[4]

Written pre-filed Testimony was presented by the following witnesses:

For the Petitioner:

Peter Hanlon, Sr. Mr. Hanlon, Sr. is the owner of P.J. Cranberries and is a direct abutter to the Property. He has been farming his land adjacent to the property since 1990 and was familiar with the farming practices of the prior owner of the Property (Thomas Gelsthorpe) from before 1990 until the property was sold to Idlewild Acres, LLC. Hanlon retired in 2009 as a Captain in the Massachusetts Environmental Police and has extensive experience enforcing laws and regulations to protect natural resources. He was an associate member of the SCC from 1990-

> "The parties may request and the Presiding Officer may order that a view be taken of a site, property or other places and things that are relevant to an appeal to promote understanding of the evidence that has been or will be presented. Notice and a reasonable opportunity to be present shall be given to all parties. Parties shall not present evidence during the view, but may point out objects or features that may assist the Presiding Officer in understanding evidence. The Presiding Officer may rely on the Presiding Officer's observations during a view as evidence to the same extent permissible as if observed in the hearing room."

[4] Throughout this Recommended Final Decision, the witnesses' Pre-Filed Direct Testimony is referred to as "[Witness] PFT at ¶" and Pre-Filed Rebuttal Testimony is referred to as "[Witness] PFRT at ¶." Exhibits to testimony are referred to as "[witness] Ex. X" or as Petitioners' Rebuttal Exhibits or Applicant's Record Appendix. References to the written transcript are referred to a Tr. at page:line(s).

1994. He holds a Bachelor of Arts degree in Law Enforcement and attended the Massachusetts Police Academy and the Command Performance School at Babson College.

Peter Hanlon, Jr. Mr. Hanlon, Jr. has been working on his father's farm since 2004. He also worked at E&T Farms in West Barnstable and for Mr. Wild beginning in the summer of 2008, continuing summers in high school and through college. After graduating college in 2016, he worked at least 40 hours per week for Mr. Wild, until May of 2018. He holds a Bachelor of Science degree in Sustainable Food and Agriculture.

Edward Liberacki. Mr. Liberacki lives across the street from the Property, on property his family has owned for nearly 40 years. He is familiar with the uses of the Property during the time it was owned by Mr. Gelsthorpe and since Idlewild acquired it in 2004.

Michael Karl. Mr. Karl and his wife have owned property abutting the Property since 2008, adjacent to Field F5.

C. Diane Boretos, PWS. Ms. Boretos is a Certified Professional Wetlands Scientist and is the principal wetlands biologist for Call of the Wild Consulting and Environmental Services of Sangerville, Maine (formerly of West Falmouth, Massachusetts). She has been active in the field of wetlands biology since 1981. She has served as a conservation commission member and was employed by the Department's Southeast Regional Office as an Environmental Analyst for six years in the Wetlands and Waterways Division. She has experience as the Conservation Administrator for the towns of Barnstable and Mashpee and as a regional ecologist for the Trustees of Reservations. She has authored articles on wetlands ecology and wildlife habitat for MassDEP publications, the Massachusetts Association of Conservation Commissions, and the Trustees of Reservations. She holds a Bachelor of Science degree.

For the Applicant

Peter Wild. Mr. Wild is the managing member of Idlewild Acres, LLC. He is also the owner of Boston Tree Preservation, a company he started in 1977 as Winchester Tree Service. He and his wife have started and pioneered multiple companies dedicated to an organic approach to the environment. He holds an Associates degree in Arborculture and Park Management, and is a Massachusetts Certified Arborist.

Matthew Schweisberg, PWS. Mr. Schweisberg is a Wetlands Ecologist, Wildlife Biologist and Professional Wetlands Scientist. He was employed by the United States Environmental Protection Agency ("USEPA") from 1979 to 1985 in Washington, D.C. and from 1985 to 2012 in the New England Regional Office. He served as the Senior Wetland Ecologist for 27 years, including 10 years as manager of the Wetlands Enforcement Program and eight years as manager of the Wetlands Protection Program. Since 2012 he has been the principal of Wetland Strategies and Solutions, LLC, a consulting firm. He has served as a member of the boards of directors for several organizations, including the Massachusetts Association of Conservation Commissions and the Association of State Wetland Managers. He holds a Bachelor of Science degree in Wildlife Management.

David C. Thulin. Mr. Thulin is a Registered Professional Engineer and a Registered Professional Land Surveyor in Massachusetts. He is also licensed by the Commonwealth as a Soil Evaluator and Septic and Septic System Inspector. He has been engaged in the practice of Civil Engineering since 1974 in various capacities in the public and private sectors. He holds a Bachelor of Science degree in civil engineering.

Robert M. Gray. Mr. Gray is a Professional Wetlands Scientist with extensive experience as a professional wetland biologist and project manager. He is Principal of Sabatia, Inc., which has

provided wetland consulting services to clients throughout eastern Massachusetts, including Cape Cod and the Islands, since 1983. He is a member of the Society of Wetland Scientists and the New England Chapter of Wetland Scientists. He has served on the Bourne Conservation Commission since 1978. He holds a Bachelor of Science degree in Biological Sciences and a M. Ed. Degree in Education.

Matthew Arsenault. Mr. Arsenault is a Certified Ecologist (Ecological Society of America) and a Certified Wetland Scientist (New Hampshire). He has been employed by Stantec Consulting Services, Inc. since 2005. His professional focus is terrestrial and palustrine (marshy) ecosystems of New England, with an emphasis on rare, threatened and endangered species identification and habitat assessments; wetland and watercourse delineations; ecological monitoring; impact assessments and mitigation; and Clean Water Act (Section 401/404) permitting. He holds a Bachelor of Science degree in Botany.

For the Department

Gary Makuch. Mr. Makuch was employed by the Department in the Division of Wetlands and Waterways from 1986 to 2022. His responsibilities included: reviewing Notices of Intent ("NOI"); technical review of RDAs and NOIs, including analysis of engineering plans, drainage calculations and supporting information; issuing Superseding Ordering of Condition ("SOC"), SDAs and Superseding Orders of Resource Area Delineations ("SORAD"); enforcement, including calculation and assessment of penalties; technical assistance and training to conservation commissions and other municipal officials, to other state agencies, to the regulated community and to the general public; and reviewing and commenting on projects under the Massachusetts Environmental Policy Act ("MEPA"). Beginning in 2009, he was the Southeast Region's wetlands analyst with primary responsibility for agricultural and cranberry matters. He

holds a Bachelor of Science degree in Environmental Science and a Masters degree in Environmental Pollution Control.

For the Commission

Joshua K. Wrigley. Mr. Wrigley is the Assistant Director of Natural Resources and Conservation Agent for the Town of Sandwich, a position he has held since 2017. He holds a Bachelor of Science degree and a Masters degree in History, and has taken certification courses with the Massachusetts Association of Conservation Commissions.

BACKGROUND

The Property and Conversion from Cranberry Farming to Horticulture

The property consists of approximately 35 acres located at 46 Roos Road in Sandwich, Massachusetts. For many years the property was a cranberry growing operation. See Conservation Farm Plan for Peter Wild, Idlewild Acres, LLC, 11/12/2018, prepared by Christine Worthington-Berndt, Ph.D., CCA, Applicant's Record Appendix at p. 59 ("hereafter 2018 Conservation Farm Plan"); see also Wetland Evaluation Report: A Comparative Function Value Assessment of Pre- and Post-Alteration Conditions at the Peter Wild Property, Sandwich, MA, November 2012, prepared by Stantec Consulting (hereafter "the Stantec Evaluation Report"). See also PFT of Peter Hanlon, Sr. and Edward Liberacki. In 2004 when the Applicant purchased the Property, there were nine cranberry beds totaling approximately 15 acres, each constructed and farmed by former owners of the property. Id. At that time the Wilds intended to convert most of the cranberry bogs to lands suitable for an organic tree and shrub nursery.

On December 10, 2007, the Applicant submitted an RDA to the SCC for the conversion of the site from cranberry culture to a tree and shrub nursery operation. See Petitioners' Rebuttal Exhibits, Ex. 8. The RDA stated that the "applicant plans to convert several cranberry bogs

currently classified as [LIAU]…to a nursery for trees, shrubs, composting activities and related agricultural uses." To implement the plan to convert the cranberry bogs to land suitable for an organic tree and shrub nursery, the Applicant developed a horticultural plan, working with the NRCS and the SCC to implement the agricultural change of commodity. Petitioners' Rebuttal Exhibits, Ex. 8. (2007 RDA). The Horticultural Plan, both as proposed by the Applicant and as approved by the SCC are shown on Hearing Exhibit No. P-1; see also Petitioners' Rebuttal Ex. 2, pp. 1 & 2. The approved Horticultural Plan differed from what was proposed. Composting was not permitted as proposed for Field F4, but instead an "Organic Material Stockpile Area" was approved along Roos Road adjacent to the Homestead parcel, outside of any wetlands or buffer zone. Field F7 was to remain in cranberry culture. The NRCS Conservation Plan signed by Mr. Wild and the NRCS District Conservationist noted that "[f]or all planned practices, all local, state and federal regulations must be adhered to." Petitioners' Rebuttal Exhibits, Ex. 9.

The Commission approved the plan and issued a negative determination of applicability, finding the work was exempt from regulation as Land in Agricultural Use. Petitioners' Rebuttal Exhibits, Ex. 9. The Horticultural Plan as approved provided for the creation of two ponds: the first in the center of Field F9, and the second in the center of Field F3. Appellant's Record Appendix, p. 20. The two ponds would be connected by a culvert between them. Id. HQ would remain a farmstead. Id. Field F2 and parts of Field F3 would be used for farm staging. Id. Field F7 would be used for cranberry production. Id. Field F3 would be used for the storage of organic material and as a stockpile area. Id. F8 would be used as a tree staging area. Id.

Work began on the Property in 2008 but did not proceed according to the 2008 Determination of Applicability, including the Horticulture Plan. The Applicant created four ponds, rather that the two approved, and the configuration of the ponds was different than the

configuration approved by the Conservation Commission. The Applicant filled in all cranberry bogs (except for Field F2) and did not retain Field F7 in cranberry culture. Tr. at p. 97:6-20 (Gray Cross-examination). According to the Stantec Evaluation Report, the locations and shapes of the ponds had to be modified to accommodate pre-existing underground utilities, but the surface area of the combined ponds matched the approved plan. Stantec Evaluation Report at p. 1. The Applicant also stockpiled fill in Field F4. The SCC had not approved stockpiling or composting in that location, instead requiring in the approved plan that fill be stockpiled along Roos Road. See 2008 Determination; see also Tr. at pp. 99-101 (Gray cross-examination). Conditions contained in the Determination required that any modifications or revisions to the site plan(s) or project had to be submitted in writing to the Commission with supporting documentation for review, and that the approved project had to comply with all local, state and federal laws. The Applicant did not submit any proposed modifications to the plans or project to the SCC for review.

Ultimately, in implementing the conversion of cranberry bogs to a horticulture farm, the Applicant dredged and filled 14.7 acres of wetlands. Among the areas that were converted to upland were F3, F4, F6, F7, and F9. Petitioners' Rebuttal Ex. 13 (attachment to Consent Decree depicting 14.7 acre violation area). Much of that work was completed by 2010. Petitioners' Rebuttal Exhibits, Ex. 10, p. 1.[5]

[5] Stantec noted in its Evaluation Report that Mr. Hanlon "has a long history working this site and was able to describe the former conditions of the Wild property bogs as to their bed elevations and flume drainage directions. Mr. Hanlon is also a keen observer of wildlife at the site and was able to provide a list of animal species he has observed using the Wild property at various times of the year. Some of the information provided by Mr. Hanlon proved useful in completing the NH Method functional evaluation, under pre- and post- alteration conditions." Stantec Evaluation Report at p. 3.

The USACOE/USEPA Enforcement Action.

In response to a complaint, in 2010, the U.S. Army Corps of Engineers ("ACOE") notified Mr. Wild that it was aware that he had performed work within wetlands at the Property "that may [have] involve[d] activities that require[d] a permit from the [ACOE]." ACOE correspondence dated April 16, 2010. The ACOE inspected the property and determined that the ACOE had not issued a federal Clean Water Act Section 404 permit[6] to the Applicants for the dredging and filling activities in the bogs. Petitioners' Rebuttal Exhibits, Ex. 14, p. 1. The 14.7 acres of cranberry bogs were considered jurisdictional wetlands under the federal Clean Water Act. Id.; see also Tr. at pp.123-24 (Cross-examination of Matthew Arsenault). To fill any portion of them a Section 404 permit was required. Tr. at pp.123-24 (Cross-examination of Matthew Arsenault). The United States Environmental Protection Agency ("USEPA") filed suit against Mr. Wild and Idlewild Acres, LLC in federal court in 2016 for alleged violations of the Clean Water Act. See Petitioners' Rebuttal Exhibits, Ex. 11 (Complaint in United States v. Idlewild Acres, LLC, United States District Court for the District of Massachusetts, Docket No. 1:16-cv-11967-WGY).

The result of the enforcement action was a Consent Decree between USEPA and Idlewild and Mr. Wild. Petitioners' Rebuttal Exhibits, Ex. 12; Wild PFRT, Ex. 12, p. 1. ("Consent Decree"). In the Consent Decree, Mr. Wild agreed to perform wetland restoration to "restore wetlands and replace the ecological functions of the filled and disturbed wetlands…." Six areas were identified for remediation work in F3 (labeled as areas 1, 2, and 3); F7 (area 4); and F9

[6] "Section 404 of the Clean Water Act (CWA) establishes a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands…Section 404 requires a permit before dredged or fill material may be discharged into waters of the United States, unless the activity is exempt from Section 404 regulation (e.g., certain farming and forestry activities)." Permit Program under CWA Section 404 | US EPA

(areas 5 and 6). As part of the restoration process, Mr. Wild agreed to "submit periodic reports to EPA documenting the progress of the development and implementation" of the work. The Consent Decree did not "affect[] or relieve[] [the Applicants] of their responsibility to comply with any applicable federal, state, or local law, regulation or permit." Consent Decree at p. 5.

The remediation work to be performed was set forth in “Scope of Work for Wetland Restoration” attached to the Consent Decree. USEPA agreed that Mr. Wild could retain two acres of the 14.7 filled acres as upland. Consent Decree, Attachment 2 at p. 26 of 52. (Petitioners’ Rebuttal Ex. 12). He was required to "restore to wetland, through the removal and associated re-grading of fill, and the placement and re-grading of suitable topsoils, the remaining areas of the [Property] that, based on the results of pre-restoration hydrology monitoring, [were] neither permanently ponded nor vegetated wetland." Id. Once the restoration work was complete, “Defendants [could] continue to undertake agricultural or horticultural activities at the Site” as detailed in the Consent Decree. See Consent Decree at ¶ 20.

Stantec prepared a plan depicting and describing the proposed wetland restoration areas. See Proposed Conceptual Restoration Plan at p. 37 of 52 of Consent Decree. (Petitioners’ Rebuttal Exhibits, Ex. 12); see also Final Wetland Restoration Work Plan, Idlewild Acres”, dated May 10, 2017, prepared by Stantec (hereafter “Stantec Restoration Plan”), Petitioners’ Rebuttal Exhibits, Ex. 14. The restoration areas included F7 and parts of F3 and F9. Id. The Applicants proposed to retain portions of F3, F4, F5, and F9 as upland. Id. The Stantec Restoration Plan was developed to comply with federal requirements, not the requirements of the MWPA. Tr. at p. 136:15-19 (Cross-examination of Matthew Arsenault).

Correspondence from USEPA to the SCC dated February 14, 2019, stated that “[a]ll restoration construction work required under the [Consent Decree] was completed in July 2018.”

Applicant's Record Appendix, Part 1 of 3, pp. 15-16. This correspondence further stated that "EPA remain[ed] very involved in ensuring this wetlands restoration [would] be successful" and further noted that as of the date of the letter Mr. Wild had not recorded the Conservation Restriction ("CR") required by the Consent Decree. Id.[7] Despite the alleged violations and the USEPA enforcement action, after a site visit in January 2011 the NRCS concluded that the change in agricultural use had been well-executed and followed the approved plan closely. See Stantec Evaluation Report at p. 1.

Other Relevant Enforcement Action or Litigation

SCC Enforcement. On January 31, 2011, the SCC issued an Enforcement Order ("EO") to the Applicant. Petitioners' Rebuttal Exhibits, Ex. 9. The EO found that the Applicant had violated the MWPA by:

> filling resource areas (cranberry bogs) and bordering vegetated wetlands. Failure to comply with NRCS Plan dated April 8, 2008. Failure to follow best management practices with erosion/sediment control. Failure to comply with all local, state and federal laws permits and regulations as required by the Determination of Applicability SCC2007D-14 and conditions #6, 7, and 8.

The EO required the Applicant to "immediately cease and desist from any activity affecting the buffer zone and/or resource areas." The Applicant effectively stopped farming activity in all areas within the footprint of the former cranberry bogs from the date of issuance of the EO. Tr. at pp. 196-197 (cross-examination of Peter Wild); see also Petitioners' Rebuttal Ex. 6. At a meeting of the SCC on August 16, 2017, the SCC declared the Enforcement Order satisfied after it voted

[7] A recent review of the Barnstable County records for Recorded and Registered Land found no evidence of a CR on the Property.

to approve the Restoration Plan approved by USEPA and the Department. Petitioners' Rebuttal Exhibits, Ex. 15.[8]

Private Party Litigation. In 2018, Peter Hanlon and Janet Hanlon sued Peter Wild and Idlewild Acres, LLC in Barnstable Superior Court, Peter J. Hanlon Trustee of the Peter J. Hanlon Living Trust, et al. v. Wild, Docket Number 1872CV000325 ("Superior Court Action"). The Complaint alleged claims for trespass, nuisance, violation of civil rights and declaratory relief. This civil suit remains pending. As part of discovery in that case, Mr. Wild was deposed on October 2, 2019 and the deposition is part of the record in this appeal. Petitioners' Rebuttal Exhibits, Ex. 5.[9] Requests for Production of Documents were also promulgated in the case seeking, among other requests, any documents "that constitute[] evidence of any sale of agricultural product [sic] by the Defendants that was produced by land owned by Defendant Idlewild Acres, LLC." Petitioners' Rebuttal Exhibits, Ex. 6, p. 1.

Procedural Background

In 2018 the Applicant submitted an RDA to the Commission seeking a determination as to whether the work depicted on referenced plans and described in the RDA was subject to the MWPA and the Wetlands Regulations. The Work was described as follows:

> Idlewild grows trees and shrubs for commercial sale and use for its associated landscaping business. In addition, the Wilds grow food crops (e.g. fruits and vegetables) for their own use as well as for sale and donation. Plants and crops grown at this agricultural/horticultural operation are grown and harvested in an organic and sustainable manner, and cover crops are often incorporated into soils for temporary stabilization. In addition, there may be selective *de minimis* removing of brush, pruning and cutting to prevent, control or remove hazards, disease,

[8] The SCC issued two other EOs in 2018 for work at the Property; they are the subject of ongoing litigation between the SCC and the Applicant in Barnstable Superior Court. See Idlewild Acres, LLC v. Sandwich Conservation Commission, C.A. 1872CV00514.

[9] The Petitioners' Rebuttal Exhibit contained only portions of the deposition, with highlights. A full copy of the deposition with no text highlighted was entered into the record at the Adjudicatory Hearing.

> insect or fire damage, or to preserve the present condition of the property, including woods roads, fence lines, trails and meadows. The activities conducted at the Idlewild farm constitute exempted activities under Normal Maintenance of Land in Agricultural Use, explained in 310 CMR 10.04.

2018 RDA, Department's Basic Documents. The 2018 RDA noted that in 2008 the SCC had issued a Determination that confirmed Resource Area Boundaries and confirmed that the work was exempt from regulation as Land in Agricultural Use. Id. The SCC issued a Positive Determination, making nine separate Findings. 2018 DOA, Department's Basic Documents. These included, *inter alia*, that only a portion of the property was in agricultural use prior to its purchase by Idlewild Acres, LLC; that the work undertaken and proposed exceeded the extent of lands in prior agricultural use; that the 2008 RDA delineation boundary had expired in 2011; that the USDA maps provided with the RDA had no dates, no titles and were based on aerial photography that was not current and did not show existing ponds but showed the old cranberry bog layout and were not reflective of current conditions; that the buildings requested and proposed could not be approved under an RDA and would not constitute normal maintenance or improvement "even for a property that is considered to be land in agricultural use, which the applicant's property is not"; and it was not sufficiently demonstrated that the entire property met the definition of land in agricultural use.

The Applicant requested an SDA from the Department, responding to each of the findings of the SCC and identifying what it considered other errors by the SCC. The Department conducted an in-depth review of the information submitted and conducted a site visit, after which it issued an SDA that was negative for twelve of the fields and positive for another six. The Department based its negative determination on its site

inspection, review of aerial photographs, MassGIS information, wetlands and soil mapping, the NRCS Conservation Farm Plan and the information submitted by the Applicant, finding that these 12 fields qualified as existing Land in Agricultural Use. As to the six fields for which the Department issued a positive determination, the Department stated that "[t]here is no information on record that demonstrates that said land is being maintained in accordance with 310 CMR 10.04(b)…or 310 CMR 10.04(c). SDA, Department's Basic Documents. As noted above, these appeals followed, claiming error with the negative determinations in the SDA.

ISSUES FOR ADJUDICATION

The issues for adjudication were determined in consultation with the parties during the pre-hearing conference conducted shortly after the appeal was filed. The issues on which the witnesses presented testimony are:

1. Whether Farm Fields HQ, F2, F3, F4, F5, F6, F7, F8, F9, F13, F14 and F16, shown by the Water Protection Areas Map, Conservation Plan by Natural Resources Conservation Service ("NRCS") qualify as "Land in Agricultural Use" as defined in 310 CMR 10.04, Agriculture, and are therefore exempt from regulation under the MWPA and the wetlands regulations?[10]

2. Whether the Farm Fields HQ, F2, F3, F4, F5, F6, F7, F8, F9, F13, F14 and F16, are presently and primarily Land in Agricultural Use as defined in 310 CMR 10.04?

3. Whether the Applicant's activities since 2008 on Farm Fields HQ, F2, F3, F4, F5, F6, F7, F8, F9, F13, F14 and F16 constitute normal maintenance and improvement of Land in Agricultural Use as defined in 310 CMR 10.04?

[10] All the farm fields are shown in Hearing Ex. A-1 and in the Applicant's Record Appendix at p. 76. The subject farm fields, i.e. those that were determined by MassDEP to be positive and negative, are shown in Hearing Ex. A-2 and in Arsenault PFT Ex. B.

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.

M.G.L. c. 131, § 40; 310 CMR 10.01(2).

The so-called "agricultural exemption" at issue in these appeals has its roots in the MWPA. M.G. L. c. 131, § 40 provides that "[t]he provisions of this section shall not apply to … maintenance of drainage and flooding systems of cranberry bogs, to work performed for normal maintenance or improvement of land in agricultural use or in aquacultural use…." The statute further directs the Department to promulgate rules and regulations "which shall establish definitions for the term 'normal maintenance or improvement of land in agricultural, or in aquacultural use.'" In commenting on the agricultural exemption, the Supreme Judicial Court, quoting from the MWPA's legislative history stated:

> The exemption was necessary to balance the need to protect wetlands and other fragile habitats with the "future economic viability of . . . farms [in the Commonwealth]. " St. 1991, c. 141, § 1. Those farmers, however, "are faced with a growing morass of regulation and restriction which is

> increasing the cost of farming." *Id*. Although the Act had exempted "'work performed for normal maintenance or improvement of land in agricultural use[,'] many routine and long standing farm operations [were] being challenged by local and state agencies, creating confusion, frustration and . . . costly delays." *Id*. In order to correct this problem, the Legislature directed that "a uniform definition" be established "to assist the agricultural community in complying with the [Act] and reducing the current uncertainty that exists." *Id*.

Commonwealth v. Clemmey, 447 Mass. 121, 849 N.E.2d 844, 2006 Mass. LEXIS 439. Pp 7-9.

The court in Clemmey noted that in the Acts 1991, c. 141, § 1 the Legislature stated:

> Farmers across the state are faced with the growing morass of regulations and restrictions which is increasing the cost of farming and jeopardizing the future economic viability of our farms . . . although the Wetland Protection Act exempts 'work performed for normal maintenance or improvement of land in agricultural use' many routine and long-standing farm operations are being challenged by local and state agencies, creating confusion, frustration and in some cases costly delays. The intent of this act is to establish a uniform definition to assist the agricultural community in complying with the Wetland Protection Act and reducing the current uncertainty that exists.

Id. p. 848-849. The issues in this appeal concern the application of the definitions in 310 CMR 10.04 Agriculture of "Land in Agricultural Use", "Normal Maintenance of Land in Agricultural Use" and "Normal Improvement of Land in Agricultural Use."

THE PETITIONERS' BURDEN OF PROOF AT THE HEARING

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 SDA. 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. My review of the matter is *de novo*.

To prove their contention that the Department erred in issuing the SDA, 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 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).

So long as the initial burden of production or going forward is met, the ultimate resolution of factual disputes depends on where the preponderance of the evidence lies. Matter of Town of Hamilton, DEP Docket Nos. 2003-065 and 068, Recommended Final Decision (January 19, 2006), adopted by Final Decision (March 27, 2006). "A party in a civil case having the burden of proving a particular fact [by a preponderance of the evidence] does not have to establish the existence of that fact as an absolute certainty. . . . [I]t is sufficient if the party having the burden of proving a particular fact establishes the existence of that fact as the greater likelihood, the greater probability." Massachusetts Jury Instructions, Civil, 1.14(d).

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

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

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

DISCUSSION

I. Farm Fields HQ, F3, F4, F5, F6, F7, F8, F9, F13, F14 and F16 Do Not Qualify as Land in Agricultural Use Because They Are Not Presently and Primarily Used By the Applicant in Producing or Raising Commodities for a Commercial Purpose.[11]

[11] The Petitioners have conceded that Farm Field F2 qualifies for the agricultural exemption as LIAU. They agree that Farm Field F2 is land in agricultural use because Peter Hanlon farmed it with a profit motive between 2012 and 2015, leaving no five-year gap between 2008 and 2019 during which it was not presently and primarily used in producing or raising an agricultural commodity for commercial purposes.

The Wetland Regulations define land in agricultural use ("LIAU") to mean "land presently and primarily used in producing or raising one of more of the [listed][12] commodities for commercial purposes." 310 CMR 10.04 Agriculture (a). This case presents a novel situation regarding application of the phrase "commercial purpose" as used in the definition of LIAU. The agricultural exemption from the permitting requirements of the MWPA may apply to certain work at LIAU.

The Petitioners contend that the agricultural exemption does not apply in this case because the land is not presently and primarily being used to produce agricultural commodities for a commercial purpose. They contend that the Applicant has not sold any agricultural products since it has owned the Property, and that there was a greater than five-year gap in farming at the Property between 2011 and 2017, which nullifies the agricultural exemption.

The Applicant disagrees, arguing that the Applicant has a commercial intent to sell what is produced on the Property to Mr. Wild's other company (Boston Tree Preservation) for direct sales to customers by Boston Tree Preservation. The Applicant contends that his intent is to farm the Property for profit in two ways: by providing cranberries for vermicomposting[13] and by converting the Property into a tree farm. The Applicant further argues that "sellable goods have been exchanged" between the two companies. Applicant's Memorandum of Law at p. 17. The Department asserts that the Agricultural Exemption does not require a showing of a profit and "minimal documentation of transactions may be enough to show a commercial purpose." Department's Closing Brief at p. 13.

[12]Those commodities include fruits, vegetables, berries, nuts, maple sap, and other foods for human consumption, and feed, seed, forage, tobacco, flowers, sod, nursery or greenhouse products, and ornamental plants or shrubs. See 310 CMR 10.04 Agriculture (a) 1. and (a) 2.

[13] "Vermicomposting" is also known as "worm composting." It utilizes earthworm digestion to produce an organic soil amendment containing a diversity of plant nutrients and beneficial microorganisms.

As discussed in detail below, while the disputed farm fields may be "presently and primarily used for raising agricultural commodities", a preponderance of the evidence supports a finding that the commodities are not being raised for "commercial purposes" as that phrase has been defined in Department Guidance and interpreted and applied in prior Final Decisions in administrative appeals of Department wetlands determinations, and therefore the land is not LIAU. After the Petitioners presented and elicited credible evidence that the Applicant was not engaged in the commercial production of agricultural commodities, it was for the Applicant to persuade me otherwise by presenting persuasive evidence supporting his position. Neither Mr. Wild nor his experts were able persuasively to establish that the Applicant has sold or attempted to sell any commodities from the farm, or that Idlewild Acres, LLC has an intent to make a profit, the two essential elements of a "commercial purpose."

The Department has promulgated a guidance document that affirms the necessity of active agricultural use to maintain the agricultural exemption. See Farming in Wetland Resource Areas: A Guide to Agriculture and the Massachusetts Wetlands Protection Act (the "Guidance"). The Guidance explains that the exemption applies to the work or activity, not the land. Guidance at Chapter 2. A piece of land may be in agricultural use but a particular activity may not qualify for the exemption. Id. For an activity to claim the agricultural use exemption, it must satisfy two requirements: it must take place on "land in agricultural use" and it must be "normal maintenance or improvement of land in agricultural use." Additionally, "land within resource areas or the Buffer Zone presently and primarily used in a manner related to, and customarily and necessarily used in, producing or raising such commodities" also qualifies as

land in agricultural use. 310 CMR 10.04.[14] Land "may lie inactive for up to five consecutive years" without losing its status as land in agricultural use, with some exceptions that do not presently apply. Id. "Land under the jurisdiction of the Wetlands Protection Act that has been out of production for longer than five years (without being under USDA contract) is considered new land. Farming activities proposed for such areas are not exempt and therefore require a permit (an Order of Conditions) under the Wetlands Protection Act." Guidance, at page 2-3.

There must be a "commercial purpose" for land to qualify as land in agricultural use. The term "commercial purpose" is not defined in the Regulations, but the Guidance identifies two elements that need to be established to prove commercial purpose: (1) the agricultural commodities must be offered for sale; with (2) the "goal" of making a profit. See, Guidance at 2-3 to 2-4. "A farmer is not required to actually make a profit from the sale of his goods; all that is necessary is that profit is the goal of the farming operation. . . The Guidance notes that a determination of the presence or absence of a commercial purpose, as so defined, is a fact-specific inquiry. One must divine the nature of the individual farmer's business and determine not only whether goods are sold but additionally whether the farmer's intent is to profit by their sale." In the Matter of Judith Comley, Trustee, Docket Nos. DEP-04-1129 & 1130, Partial Summary Judgment, 14 DEPR 47, 48 (March 29, 2007), 2007 MA ENV LEXIS 21, *6. The Department's interpretation of the term "commercial purpose" has been affirmed as "grounded on the logic of traditional rules of statutory and regulatory construction in which undefined terms will be given their usual and ordinary meaning". Matter of Nancy and Walter Thompson, Docket

[14] These uses include but are not limited to: existing access roads and livestock crossings; windbreaks; hedgerows; field edges; bee yards; sand pits; landings for forest products; fence lines; water management projects such as reservoirs, farm ponds, irrigation systems, field ditches, cross ditches, canals/channels, grass waterways, dikes, sub-surface drainage systems, watering facilities, water transport systems, and water storage systems; agricultural composting sites; agricultural storage and work areas; and land under farm structures.

No. WET-2008-017, Recommend Final Decision (July 22, 2008), adopted by Final Decision (August 18, 2008); See, Matter of Judith Comley, Trustee, Docket Nos. DEP-04-1299 &1130, Partial Summary Judgment, 14 DEPR, 47, 48 (March 29, 2007).

The Petitioners' witnesses testified as follows. Peter Hanlon, Jr. testified that he had been working on his father's Cranberry Farm adjacent to Mr. Wild's land for 15 years. Hanlon Jr. PFT at ¶ 2. He worked for Mr. Wild beginning in the summer of 2008, continuing summers in High School and through college. After college graduation he worked at least 40 hours per week until May 2018, when he quit after believing that Mr. Wild was polluting his father's irrigation water. Hanlon Jr. PFT at ¶ 2. He testified that in May 2018, Mr. Wild stockpiled manure adjacent to his Pond No.1. Hanlon Jr. PFT at ¶ 3. When Mr. Wild purchased his land it was largely cranberry bogs. The bogs had not been maintained for several years and had last been harvested the year before Mr. Wild bought the land, in 2003. Hanlon Jr. PFT at ¶ 7. During the entire time that he was employed by Mr. Wild he never saw him harvest a single plant from his land, or any cranberries, with the exception of a single tree that he donated. Hanlon Jr. PFT at ¶ 8. According to Mr. Hanlon's testimony, there has been no commercial agricultural activity on the Idlewild land since Mr. Gelsthorpe, the prior owner, last harvested in 2003 (except for the work Mr. Hanlon's father did). Hanlon Jr. PFT at ¶ 8. Mr. Wild's dredging and filling activities began in the late Fall 2008, when he dredged out ponds 1 and 2. Hanlon Jr. PFT at ¶ 9. In 2009, Mr. Wild dredged out the large oval pond, and filled in the bogs adjacent to North Shore Boulevard Extension. Hanlon Jr. PFT at ¶10. In the Winter of 2017-2018, Mr. Wild instructed Mr. Hanlon and a co-worker to place fill along North Shore Boulevard Extension for the purpose of raising the grade of his land in that area. Mr. Wild had experienced flooding, and he told Mr. Hanlon that he wanted to raise the grade in that area to keep floodwater from getting onto his land.

Hanlon Jr. PFT at ¶ 12. Mr. Wild liked to swim in the pond in front of his house. Hanlon Jr. PFT at ¶ 14.

Edward Liberacki, an abutter to the Property, also testified on behalf of the Petitioners. He was personally familiar with the uses of the Idlewild Acres LLC land during the time that it was owned by Thomas Gelsthorpe, and since Idlewild Acres LLC acquired it in 2004. Liberacki PFT at ¶ 2. He did not recall that Mr. Wild harvested any cranberries before Mr. Wild began filling in the bogs. Liberacki PFT ¶ 5. He has never seen Mr. Wild harvest anything on the property or do anything that constitutes farming. Liberacki PFT ¶ 5.

Peter Hanlon, Sr. also testified on behalf of the Petitioners. He is the owner of P.J. Cranberries, which directly abuts the property. He has access to his land across an easement over the Property and has driven across the Property on a nearly daily basis since 1990. He knew the prior owner well and was familiar with the prior owner's farming practices from before 1990 to the time the property was sold to the Applicant. He has personal familiarity with the prior owner's agricultural practices from 1990 to 2004 and with the Applicant's land use practices from 2004 to the present, daily. Hanlon Sr. PFT at ¶ 1. Mr. Hanlon, Sr. has a background in environmental law enforcement, having served in the Massachusetts Environmental Police from 1976, when he joined as a Natural Resources Officer, until 1990 when he retired as a Captain. His specific experience included enforcing laws and regulations enacted to protect natural resources. Hanlon Sr. PFT at ¶¶ 3, 5. He was a member of the Sandwich Conservation Commission from 1990 to 1994 and is familiar with the MWPA, especially as it relates to agriculture. He has been engaged in cranberry farming since 1990. Hanlon Sr. PFT at ¶ 9. Based on his experience, I find Mr. Hanlon, Sr. qualified as an expert.

Mr. Hanlon Sr. testified that from the 1960s until 2003 Mr. Gelsthorpe and his family operated an active cranberry farm at the Property. The last time Mr. Gelsthorpe harvested his bogs was in 2003. Mr. Hanlon was present and helped Mr. Gelsthorpe harvest that year. Hanlon Sr. PFT at ¶ 13. The cranberry bogs on the Property were directly connected to each other by culverts and water control structures for the purpose of flooding the bogs and for drainage. Bogs 1-4 and 5-9 were connected in this manner. Hanlon Sr. PFT at ¶ 14. All the bogs were configured so that when it was necessary to drain them, water flowed through the ditches, into and through the culverts, and to the flumes where, depending on conditions, it was allowed to drain into the streams that lead into Long River and the Cow River. These conditions existed prior to the time Mr. Wild filled any of the bogs. Id,

Mr. Hanlon testified that he has never seen Mr. Wild harvest any cranberries from the Property. In 2006 Mr. Hanlon saw a good crop of berries on one portion of the Property and asked Mr. Wild if he could harvest it. Mr. Wild agreed and Mr. Hanlon harvested approximately 1,300 pounds of berries from Field F3. Hanlon Sr. PFT at ¶ 18. In 2009 Mr. Wild sold to Mr. Hanlon his Ocean Spray Cranberry rights to the bogs he, Mr. Wild, had by that time filled. Hanlon attempted to bring Field F2 into cultivation and was able to harvest small quantities of berries from Field F2 from 2012-2015. Hanlon Sr. PFT at ¶ 19. Aside from these two harvests by Mr. Hanlon, to his personal knowledge there has been no commercial harvest of cranberries or any other commercial agricultural products from the Property from 2003 to present. Hanlon further testified that until the summer of 2018 there was no planting of agricultural crops at any time. Hanlon Sr. PFT at ¶ 20. Between 2008 and 2010, Mr. Wild filled in all the farm fields other than Field F2. Hanlon Sr. PFT at ¶ 22. Mr. Wild filled in the bogs and converted wetland to

upland, while the plan approved by the SCC in 2008 only permitted conversion of crops from cranberries to horticulture. Hanlon Sr. PFT at ¶ 23.

Peter Hanlon, Sr. further testified that in his over 30 years of full-time cranberry farming he is completely familiar with the types of records that are kept in the course of business in the operation of a commercial farm. Hanlon Sr. PFRT at ¶¶ 22-23. Relevant here, he testified that "[w]ith respect to sales of agricultural commodities, I give my customers an invoice on each purchase…[a]ll berries, sold or gifted to a worthy cause, are recorded. These are necessary to prove you are a farm if questioned, and for the annual 61A filing necessary to the Town of Sandwich." Id. at ¶ 25. To Mr. Hanlon it is inconceivable that the Applicant would not have any records evidencing sales or donations or other business records if he were, in fact, engaged in the production and sale of agricultural commodities. Id. at ¶ 26. Petitioners' Rebuttal Ex. 6 included the Applicant's response to a Request for Production of Documents promulgated in the lawsuit by Mr. Hanlon against the Applicant, in which the Applicant stated in response to Request #3 that he had no documents "that constitute evidence of any sale of agricultural product by the [Applicant] that was produced by land owned by Idlewild Acres LLC." Applicant further responded that he had no payroll records for the months of May, June and July 2018 nor records of payments to independent contractors during that period. Petitioners' Rebuttal Ex. 6.

C. Diane Boretos testified on behalf of the Petitioners as an expert witness. In preparation for her testimony she reviewed the Department's Basic Documents and documents related to the USEPA's enforcement action against the Petitioner, including the Stantec "Wetland Evaluation Report" dated November 2012. Boretos PFT at ¶¶ 11-14. She visited the site in October 2019 and made observations and took photographs of site conditions at that time, but was prohibited from accessing the Applicant's property due to orders entered in the Superior Court litigation

between the Hanlons and the Applicant. She interviewed petitioners Peter Hanlon, Sr. and Cathy Walters, and observed surrounding conditions, including barrier beaches, upgradient marshes, the Long River and the Cow River. Boretos PFT at ¶ 15. Based on her observations of the site conditions, which are detailed in her PFT at paragraphs 39-47 (including numerous photographs) and which include a critique of the restoration of wetlands required by the Consent Decree, it is her opinion that the Property is not LIAU as defined in 310 CMR 10.04 because there is no evidence of cranberry culture taking place on the site, or other products for human consumption. Boretos PFT at ¶¶ 57-59. She did observe evidence of ornamental shrubs planted on the Property beginning in 2018, but based on images from Google Earth she opined that this is not the primary use of the site or the fields in which the shrubs were placed. Boretos PFT at ¶ 61. According to her observations, the new plantings are limited to a small sliver of the westerly side of Field F3 and the southeasterly quadrant of Field F7. In her opinion, only Field F13 appears to be presently and primarily devoted to shrub production, but that area was always upland or buffer zone and agricultural use did not begin in these areas until 2018. Id. Ms. Boretos testified that the Applicant's activities from 2008 to 2010 do not qualify as LIAU because there were no commodities being raised during this period. Boretos PFT at ¶ 67. In her opinion, the agricultural exemption for the Applicant ended in the Fall of 2008, five years after the last commercial harvest of cranberries. Boretos PFRT at ¶ 5.

Joshua Wrigley testified for the SCC. As noted above at footnote 2, the SCC was precluded from collaterally attacking the SDA because the SCC did not appeal it. Mr. Wrigley's testimony was focused on providing context for why the SCC issued a Positive Determination as to all of the farm fields. Wrigley PFT at ¶ 3. The SCC made its determination for two reasons. First, it concluded that the Applicant failed to meet its burden of proving the Property was

exempted LIAU. Second, it concluded that Idlewild did not meet its burden of proving that all of the proposed activities and installation of structures shown on the plans submitted to the SCC constituted normal maintenance or improvement of LIAU. Id. Mr. Wrigley testified that the plans submitted by the Applicant show currently undisturbed areas being proposed to be converted into active agricultural use, but pursuant to the Guidance, such lands are not exempt as LIAU, and therefore the SCC issued its Positive Determination. Wrigley PFT at ¶ 11.

The SCC concluded that Idlewild did not provide satisfactory evidence that it was currently and presently producing agricultural commodities on the Property or that all of the lands included with the Property were "in agricultural use" as defined under 310 CMR 10.04. Wrigley PFT at ¶ 13. The SCC noted that the only evidence submitted to show that the Applicant was producing agricultural commodities was a letter claiming that the Applicant sold trees to Boston Tree Preservation, LLC and the SCC concluded that the Applicant stating that it transferred plants to a sister entity did not prove that the Applicant had produced any agricultural commodities with the intent of making a profit. There were no receipts confirming the alleged transfers nor was there any information provided about where the plants were produced on the Property. Id. On cross-examination by Department counsel at the Hearing, Mr. Wrigley admitted that there was no prohibition in the regulations against one company selling to a sister company, but he stated his opinion that absent documented receipt of sales of agricultural commodities, the agricultural exemption does not apply. Tr. at pp. 80-81.

The Applicant presented testimony of Mr. Wild and several expert witnesses. Mr. Wild testified that "there hasn't been one farm field identified in the farm plans that hasn't been

renovated, restored, mowed, managed, or accessed by the owners of this farm annually since 2008 to present." Wild PFT, ¶ 22.[15], [16]

Mr. Wild testified in his written prefiled testimony that for the first two years after purchasing the Property in 2004, he educated himself as to the process of cross commoditizing the cranberry acreage in accordance with federal, state and local laws. Wild PFT at ¶ 10. By 2008 he had received a NRCS Farm Plan, Town Conservation Commission, Negative Determination of Applicability, and acceptance by the Department. Wild PFT at ¶ 11. His work to implement the farm plan began in fall of 2008. Wild PFT at ¶ 11. He testified that he has continuously propagated plant materials in the upland and wetland areas of the existing farm plan. He has grown fruits and vegetables and harvested beach plums, cranberries, and blueberries from his permaculture crops. He testified that he has planted cover crops for soil regeneration every year and planted and propagated thousands of trees and shrubs (seedlings, cuttings and lining out stock). He further testified that he has amended soil with regenerative practices in all fields and has managed invasive weeds in all fields. Wild PFT at ¶ 13. Mr. Wild provided a list of the plantings for each field. See Wild PFT, Ex. 3, p. 4, and Applicant's Record Appendix, Volume 1 at pp. 21-31. He explained that soil rejuvenation takes 3 years and propagation from seedling to harvest 7-12 years. He testified that as soil and trees have developed, he has donated, sold and transferred stock to interested parties through his associated company, Boston Tree

[15] Mr. Wild presented two schedules of the year by year and field by field work he has done on the Property during that time: one in the Record Appendix at pages 21-31, which is part of the administrative record in this appeal, and one as Exhibit 3 to his PFT, Ex. 3, pp. 1-3.

[16] As noted above, Field F2 is not in dispute and the Petitioners concede it is LIAU. Regarding F2, Mr. Wild testified that it has been consistently used for growing cranberries. Wild PFT, Ex. 3, pp. 1-3. Starting in 2013, F2 was also used to grow garlic, poplar, and red maple. Id., Ex. 3, p. 2. The Petitioner's expert witness, Ms. Boretos, agrees with the negative determination of F2. Boretos PFT, ¶ 2.

Preservation. Wild PFT at ¶ 14. At the Hearing, Mr. Wild confirmed on cross-examination that the agricultural commodities that in ¶ 14 he says he sold were not produced on Farm Fields F3, F4, F6, F7 and F9 (the former cranberry bogs). Tr. at pp. 195:19-24 and 196:1-19.

Mr. Wild employed Peter Hanlon Jr. for several years and testified that Mr. Hanlon "performed all aspects of farms services at Idlewild Acres" from 2009 to 2018, including mowing, brush cutting, pruning and removal of trees, brush and invasive weds, equipment operation, planting, propagation of seedlings, planting of feed crops, insect and disease management, wind screen installations, and equipment repair and maintenance. Wild PFT at ¶ 15; Wild Ex. 1 (Letter of Reference for Peter Hanlon for Nauset Garden Club Scholarship).[17]

Mr. Wild further testified that "[t]he commercial intent of Idlewild Acres was to provide organic plant material including a healthy soil growing medium through the Boston Tree Preservation Company." Wild PFT, ¶ 18. He continued:

> Idlewild Acres has been able to satisfy cranberry demand for Boston Tree Preservation annually since 2004. This product is utilized as a food source for Vermicomposting where the worm farms at Boston Tree Preservation are selling Liquid Biological Extraction from the castings to its clients for a profit by enhancing and amending plants and soil health.

Id. at ¶ 19. Further, "the cranberries are still intended to be used as a food source for Vermicomposting production and profits by Boston Tree Preservation…. Enhanced soil blends are being amended and fortified for delivery to Boston Tree Preservation for its worm farming and vermicomposting." Id. at ¶ 20. Mr. Wild testified that, with respect to the tree production, "mature stock is still in the production phase," Id. at ¶ 19, and "[l]arger plant materials to be sold such as the poplar trees are maturing and overwintering till spring of 2020. Blue Point Juniper

[17] Mr. Hanlon, Jr. disputes that the photographs of himself attached to Mr. Wild's PFT depict him engaged in activities related to the propagation of farm products and stated that in some instances the photographs do not relate to Mr. Hanlon's activities for the Applicant, but for a company called Cape Tree Preservation. See Hanlon Jr. PFRT.

and Arborvitae [are] potential products for spring sales." Id. at ¶ 20. His testimony makes clear that it is Boston Tree Preservation that is selling product and intending to make a profit. See Wild PFT at ¶¶ 19-21 ("At present the cranberries are still intended to be used as food source for Vermicomposting production and profits by Boston Tree Preservation" and "Current sales and profits for 2020 of Boston Tree Preservation are being contracted.")

On cross-examination at the Hearing, Mr. Wild admitted that he has never harvested cranberries on a commercial scale, but only for personal use and to give as gifts. Tr. at 181:19-24; 183:18-184:1. He testified to a "stream of commerce" between Idlewild Acres and Boston Tree Preservation and stated that "the cranberries that were determined as sold was a value placed on that stream of commerce because the cranberries are used for food for vermicomposting, and the vermicompost is turned into liquid biological extraction which is sold to a customer base." Tr. at p. 183:11-17. When asked by Petitioners' counsel about these cranberries placed into the stream of commerce, he acknowledged that in his PFT he did not testify that the cranberries he harvested were for anything other than personal use or to give as gifts. Tr. at 183:8-24, 184:1. Importantly, at the Hearing Mr. Wild testified that he has no records of donations, sales or transfers of any commodities, Tr. at p. 187:6-14, nor any records of sales of commodities. Tr. at p. 190:19-23, 191:21-23; see also Tr. at pp. 190-193 (Wild admitting that he does not have records of sales of agricultural products from the Property). When asked on cross-examination whether the activities he described in paragraphs 18 and 20 of his PFT, i.e. to provide organic plant material, cranberries as a food source for vermicomposting, and larger plant materials (e.g. trees and shrubs) through Boston Tree Preservation for sales by Boston Tree Preservation within 60 miles of Woburn, had already occurred or were prospective, he admitted that these were future activities, i.e. not presently occurring, and that all sales of these products

were being contracted by Boston Tree Preservation, not Idlewild Acres. Tr. at pp. 198-200. He testified that Boston Tree Preservation does not own the property but leases it, however, there is no record of such a lease in the record. Tr. at pp. 199:21-24, 200:1-3. Mr. Wild did not think it was important for a witness other than himself to provide evidence of sales to prove agricultural use. Tr. at p. 201:13-19. Of importance, Boston Tree Preservation was not the Applicant for the RDA or SDA, nor was it involved in the USEPA enforcement action.

In response to a Request for Production of Documents in the Superior Court Action, seeking, among other requests, any documents "that constitute[] evidence of any sale of agricultural product [sic] by the Defendants that was produced by land owned by Defendant Idlewild Acres, LLC.", the Applicants responded that no such documents existed. Id. The Applicants also had no "invoices or other records relating to delivery of composting material… in 2017, 2018, and 2019"; "records relating to composting material… received by the Defendants from the Town of Barnstable in 2017, 2018, and 2019"; or "payroll records maintained by the defendants for the months of May, June, and July 2018." Petitioner's Rebuttal Exhibits, Ex. 6. Mr. Wild confirmed in his testimony that he had no such records. Tr. at pp. 187:6-14, 190:19-23, 191:21-23.

Mr. Schweisberg also testified for the Applicant. He was involved at the Property as a subcontractor to Stantec during the USEPA enforcement action against Idlewild Acres and Peter Wild. Schweisberg PFT at ¶¶ 1, 10. He subsequently worked directly for Mr. Wild beginning in 2015 or 2016. Tr. at p. 155:11-12, 22-24. He visited the property eight times between 2013 and 2019 and reviewed historic imagery of the property from 1991 to 2018. In his opinion, the Property has been in relatively continuous agricultural use since at least the 1990s, primarily producing cranberries. Schweisberg PFT at ¶¶ 12, 14, 15. Mr. Schweisberg testified that he

never saw a period of five years when no agriculture occurred on the Property. Schweisberg PFT at ¶ 16.

Mr. Gray provided additional expert testimony for the Applicant. As noted earlier, he has extensive experience as a professional wetland biologist and has served since 1978 on the Bourne Conservation Commission. Gray PFT at ¶¶ 1-2. According to Mr. Gray, Mr. Wild has practiced farming and prepared and continues to prepare the land for his Tree Farming operation since 2008. He has continued to prepare the soil and has planted many trees and shrubs throughout the areas described in the original Horticultural & Conservation Plan. Gray PFT at ¶ 12. Mr. Gray admitted on cross-examination at the Hearing that there was no cranberry production on the Property in 2010 and there is none today. Tr. at p. 99:15-20. He also admitted that he had no personal knowledge of what cranberry harvesting may have occurred prior to the bogs being filled and has no knowledge of sales of commodities prior to 2010. Tr. at p. 106:6-9, 15-18.

Mr. Makuch testified on behalf that the Department issued the SDA at issue in this appeal after he reviewed on-site conditions and all available information and concluded that Farm Fields HQ, F2, F3, F4, F5, F6, F7, F8, F9, F13, F14 and F15 were considered LIAU and that as such, certain work qualified for the agricultural exemption. Makuch PFT at ¶ 10. Prior to the on-site meeting Mr. Makuch reviewed MassGIS[18] mapping of the subject site, including MassDEP wetland delineation overlay, soils mapping, hydrology, flood plain overlays, abandoned cranberry bog overlay and various other maps and information. Makuch PFT at ¶ 11. He testified that the USGS topographic overlay, wetland and hydrology overlays and MassGIS

[18] MassGIS is the acronym for the Massachusetts Bureau of Geographic Information. It is the Commonwealth's "one-stop-shop" for interactive maps and related descriptive information. MassGIS coordinates GIS activities in state and local government and sets GIS data standards. MassGIS (Bureau of Geographic Information) | Mass.gov

orthophotography of various dates show the presence of cranberry bogs at the subject site until approximately 2008, when conversion from cranberry bogs to horticulture commenced. Makuch PFT at ¶ 11. Mr. Makuch reviewed the MassGIS wetchange[19] polygons, Makuch Exhibit 3, for the subject site. The MassGIS wetchange maps are based upon the time period of alteration, and are color coded showing the approximate range in years of the identified alteration. In his review, there are no wetchange polygons on the Applicant's property. This indicates that between 2001 and 2012, based upon the wetland change polygons, that no wetlands alterations have occurred on site. Makuch PFT at ¶ 12. The alterations that were seen were not on the Property and occurred in 2001-2003. Id. At the time of his on-site inspection of April 3, 2019, he did not observe any activity that would change his opinion concerning the accuracy of the MassGIS wetland overlays, including the wetland delineation and surface hydrology as shown by MassGIS. Makuch PFT at ¶ 13. Based on his April 3, 2019 observations, it is his opinion that the extent of land in agricultural use is consistent with the Farm Plan designations, aerial photographs, USGS maps and MassGIS mapping. Makuch PFT at ¶ 13. Mr. Makuch noted the two Farm or Conservation Plans prepared for Peter Wild and considered both of them as good evidence of continuing farming practice at the Property. Makuch PFT at ¶ 16.[20] On cross-examination at the Hearing, Mr. Makuch clarified that his testimony regarding the wetchange polygons referred only to the polygons, and he was not stating that there had been no wetland alterations at the site between 2001 and 2012. Tr. at p. 204:2-17.

[19] The wetlands change (wetchange) polygons were developed as part of a project launched in 2002 to evaluate the Department's wetlands protection efforts over the previous decade using remote sensors. The wetchange data layer in MassGIS is based on the interpretation of aerial photographs and digital aerial imagery. The changes represented on the maps do not represent wetlands delineations under the MWPA and should not be used as such. Details about the project can be found at MassGIS Data: MassDEP Wetlands (1:12,000) Change | Mass.gov.

[20] 310 CMR 10.04 provides that '[t]he issuing authority may require appropriate documentation, such as a USDA Farm Plan or aerial photography, to demonstrate agricultural use."

Mr. Makuch also reviewed aerial photographs provided by MassGIS from 1996 through 2017. Makuch PFT at ¶ 17. The earliest MassGIS orthophotographs show the existence of cranberry bogs from the years 1996 through 2008, with a change from cranberry cultivation to horticulture commencing in 2008. Id. Examples of the change from cranberry bog to horticulture include the construction of farm ponds with associated grading work around each pond, with the planting of trees and shrubs in the areas surrounding the farm ponds. The orthophotographs dated prior to 2008 show perimeter ditches of the cranberry bog that appear to be maintained, and cranberry vine with little to no weed infestation. He also reviewed the abandoned cranberry bog layer while using MassGIS. MassGIS does not identify any of the cranberry bogs on the subject property to be abandoned prior to 2008. Based upon his review of these aerial photographs and the information submitted with the Applicant's request for the SDA, in Mr. Makuch's opinion, these cranberry bogs appear to be actively managed and maintained. Id.

Additionally, he viewed MassGIS orthophotographs dated post-2008, including the years 2011/2012 and 2014. They show the ponded areas and grading work surrounding the ponds. Makuch PFT at ¶ 18. Makuch Ex. 4 and 5 photos show the completion of cranberry bog conversion to ponded areas with surrounding rows of planted trees. He testified that the planting of trees and shrubs for horticultural purposes is consistent with the goals and objectives stated in the 2018 NRCS Farm Plan. Id. Mr. Makuch observed these rows of trees and shrubs at various locations around the ponds during his field inspection of April 3, 2019. Id. Cranberry bogs are shown on USGS maps since at least 1938 at the subject property, and the configuration has been the same since 1972. Makuch PFT at ¶ 22. In his opinion, the Applicant has demonstrated that the Property has been continually active LIAU in accordance with the regulations, based on the

Applicant's submittals of Farm Plans, information submitted with the RDA and the SDA. Makuch PFT at ¶ 23.

A preponderance of the credible evidence in the record of this appeal supports a finding that the Property is not LIAU because the land is not presently and primarily used in producing one or more designated agricultural commodities for commercial purposes. It is important to note that the record of this appeal is more fully developed than the record on which the Department based its SDA and includes the Applicant's sworn testimony at a deposition, and in response to discovery requests, that occurred in the Superior Court Action and at the Hearing in this appeal, as well as testimony from Mr. Hanlon, Sr. in this appeal regarding how a farmer documents his commercial purpose. While Boston Tree Preservation provided MassDEP with a letter from its Controller stating that "Idlewild Acres LLC has supplied plant materials and cranberries for landscape operations and client relations of Boston Tree Preservation, Inc….since 2004", other than his statement that certain dollar amounts had been "spent", that certain purchases had been made, he specifies neither the buyer nor the seller for cranberries, seedlings and other materials, not does he provide any documentation to support the statement in his letter, for instance copies of receipts or any financial records. See Record Appendix, Part 2 of 3, Tab 4 to January 16, 2019 Presentation, Letter from John F. Manganiello, Controller, dated December 18, 2018. And the contents of this letter are partially contradicted by Mr. Wild's admission at the Hearing that he has never harvested cranberries on a commercial scale, but only for personal use and to give as gifts. Tr. at 181:19-24; 183:18-184:1.

During the Hearing, Mr. Wild, on cross-examination, admitted that he had no documentation to support his claim of sales from Idlewild Acres, LLC to Boston Tree Preservation or anyone else. There was no testimony or other credible evidence submitted by the

Applicant that the activities conducted by Mr. Wild resulted in or were intended to result in a profit by Idlewild Acres LLC. The Department's argument that "minimal documentation of transactions may be enough to show a commercial purpose" would be a reasonable one had the Applicant shown minimal documentation of transactions that I could find credible. A single letter from the controller of a sister company, who did not testify at the Hearing, is not, in my judgment, sufficient to demonstrate a commercial purpose, particularly when it is contradicted by the Applicant's own testimony that he never sold cranberries. There is no evidence of "the activity of selling" and there is no evidence that Idlewild has a goal of making a profit. Boston Tree Preservation may satisfy those two prongs of the definition as explained in the Guidance, but Boston Tree Preservation doesn't own or operate the property, and it is not the Applicant.

As noted above, the Guidance explains that for an activity to have a commercial purpose two elements are required: a sale and an intent to make a profit. The Guidance cites to the American Heritage Dictionary (Second College Edition, 1985) to define "commercial purpose" as "1.a. Of or pertaining to commerce." ["Commerce," in turn, is defined as "The buying and selling of goods."] 3. Having profit as a chief aim." The Merriam-Webster Dictionary defines "sale" as "the act of selling, specifically the transfer of ownership of and title to property from one person to another for a price." Black's Law Dictionary defines a "sale" as "a contract between two parties, called, respectively, the 'seller' (or vendor) and the 'buyer,' (or purchaser) by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and the possession of an object of property." Black's Law Dictionary, Sixth Edition. In this case, Mr. Wild admitted he did not sell anything. While he may have transferred nursery stock to his other company (and there is no credible documentary evidence that he did), there is no evidence that it was in consideration of any payment or promise

of payment of a certain price in money. Additionally, there is no evidence that Idlewild Acres, the owner of the Property, has a profit motive. The weight of the evidence supports this finding.

The Department argues that "there is nothing in the record to show the various transactions between Mr. Wild's two companies to be fraudulent, or anything else other that at [SIC] start up farming operation engaging in commercial activity with an ongoing nursery business." Department's Closing Brief at p. 13. The Department argues that these transactions are valid commercial transactions and not personal use transactions, and the "commercial purpose" is present in the transactions. Id. The Department emphasizes that the two entities are separate and distinct legal corporations. The Applicant, on the other hand, argues that I should consider the two companies as one and attribute Boston Tree Preservation's profit motive to Idlewild because both companies are owned by the same person.[21] Applicant's Closing Memorandum at p. 5. The Applicant cites to no court or Final Decision in an administrative appeal of a Department wetlands determination decision supporting this position in the context of the agricultural exemption in the wetlands regulations, and my legal research has found none. I decline to adopt this argument because the approach presents opportunities for abuse. The Applicant also argues that I should look to the Uniform Commercial Code for what constitutes a "sale", but again, the Applicant cites no relevant case law to support this argument. Id. at p. 4. The Guidance clearly sets forth the Department's interpretation of the phrase "commercial purpose", relying on a simple dictionary definition and providing examples of what does and does not constitute a sale for a commercial purpose. See Guidance at 2-3 to 2-4.

[21] The SCC aptly notes in its Closing Brief at p. 9: "Even assuming *arguendo* that Idlewild had produced credible documentary evidence showing a transfer of agricultural commodities to Boston Tree Preservation, Idlewild then would need to produce profit statements from Boston Tree Preservation proving that the products transferred to Boston Tree from Idlewild were eventually sold for a profit" and no such documents have been produced. I agree with this argument, though as noted, it is the *intent* to make a profit from sales that is relevant; actual profit is not required to be shown.

No one has alleged that any activity is fraudulent. But allowing one legal entity to claim the sales and profit motive of a separate and distinct legal another would open the door for parties to assert entitlement to the agricultural use exemption despite not qualifying for it. Here, Idlewild Acres, LLC, not Boston Tree Preservation, is responsible for farming the property. What matters is whether Idlewild sold any agricultural products and had a profit motive. I find by a preponderance of the evidence that Idlewild is not engaged in the activity of selling and has not demonstrated a profit motive. Therefore, the land is not in agricultural use as defined in the 310 CMR 10.04 Agriculture.

Notwithstanding this finding, the evidence does not support the Petitioners' claim that all the Farm Fields for which the Department issued a negative SDA have been inactive for more than five years. The evidence provided by Mr. Wild, in the Applicant's Record Appendix, Volume 1 at pp. 21-31 shows continuous agricultural or agriculturally related activity at the Property even during the time when the USEPA enforcement action was ongoing. That these activities have occurred is supported by the testimony of Mr. Gray and Mr. Schweisberg, as discussed in more detail in the next section. However, there is also evidence directly from Mr. Wild that for a period of more than five years he did not farm any areas that were within the footprint of the former cranberry bogs, that is, between the time that the SCC issued its January 31, 2011, EO and time the SCC vacated the EO on August 16, 2017. Tr. at pp. 196-197. Mr. Wild confirmed at the Hearing that the fields he did farm during this time are those he circled on Exhibit 5A to his deposition testimony in the Hanlon matter, contained in Petitioners' Rebuttal Exhibit 6, p. 2. The fields he admitted he did not farm are Fields F3, F4, F6, F7 and F9. Those fields were thus inactive for more than five years. As such, those fields cannot be considered LIAU, as defined in 310 CMR 10.04 Agriculture, for the additional reason that they were

inactive for more than five years. Therefore, even if the Commissioner were to disagree with my finding that there is no "commercial purpose", the evidence supports a finding that those five farm fields would still not be considered LIAU because they were not "presently and primarily used in producing or raising…agricultural commodities for commercial purposes.". However, Farm Fields HQ, F5, F8, F13, F14 and F16 were not inactive for more than five years and would be considered LIAU if the "commercial purpose" requirement of the regulations was satisfied.

In sum, based on a preponderance of the evidence presented at the Hearing, I find that the Applicant's production of agricultural commodities is not for commercial purposes because there is no credible evidence of sales by, or intent to make a profit by, the Applicant. Accordingly, the Applicant cannot claim the agricultural use exemption with respect to any work or activities on the property aside from Field F2 because the land is not LIAU as defined in the wetlands regulations.

II. The Applicant's Activities since 2008 (except for 2008-2011) on Farm Fields HQ, F3, F4, F5, F6, F7, F8, F9, F13, F14 and F16 Constitute Normal Maintenance and Improvement of Land in Agricultural Use

In the 2018 RDA, the Applicant describes the proposed activities as follows:

> Idlewild grows trees and shrubs for commercial sale and use for its associated landscaping business. In addition, the Wilds grow food crops (e.g., fruits and vegetables) for their own use as well as for sale and donation. Plants and crops grown at this agricultural/horticultural operation are grown and harvested in an organic and sustainable manner, and cover crops are often incorporated into soils for temporary stabilization. In addition, there may be selective *de minimis* removing of brush, pruning and cutting to prevent, control or remove hazards, disease, insect or fire damage, or to preserve the present condition of the property, including woods roads, fence lines, trails and meadows. The activities conducted at the Idlewild farm constitute exempted activities under Normal Maintenance of Land in Agricultural Use, explained in 310 CMR 10.04.

Request for Determination at Attachment 1, Department's Basic Documents. See also Applicant's Record Appendix at pp. 41-88. This describes normal crop management practices and maintenance practices as described in 310 CMR 10.04(b). Attachment 1 to the RDA included in the Area Description the following statement: "Originally a cranberry farm, the Wilds converted the cranberry beds and adjacent supporting land into a horticultural farm (i.e. an organic nursery…." Clearly, the 2018 RDA considers the work done between 2008 (when the SCC issued the DOA finding the land was LIAU and approving the conversion or the farm from cranberries to horticulture) and 2018 to be in the past and not the subject before the reviewing authorities. The Notification to Abutters described the project as "maintenance and operation of an established organic farm, including a commercial tree and shrub nursery, and growing of fruit and vegetables." Applicant's Record Appendix at p. 55. In the Conservation Farm Plan prepared by Dr. Worthington-Berndt in 2018 for the current RDA application, the objectives were described as

> to improve and maintain the ecological value of the property by rejuvenating and remediating the soils within and around the areas of the former cranberry bogs by various natural means…transforming low value, highly manipulated cranberry bogs into varied and more natural habitats. The conversion of the old cranberry bogs have provided the opportunity for the Wild's [sic] to cross commoditize into alternative agricultural production practices, including commercial horticultural nursery, native and ornamental varieties of trees, shrub, grasses and herbaceous plants.

Applicant's Record Appendix, Vol. 1 at p. 59 (Conservation Farm Plan at p. 3). This Plan described wetland mitigation at the Property and the Applicant's future plans and practices for nutrient and soil management, planting practices, compost, and pond and pond margin management. Id. at pp. 60-67 (Conservation Farm Plan at pp. 4-11). The Conservation Farm Plan included the USDA/NRCS Tree/Shrub Establishment, Massachusetts Specifications/Job Sheet describing what and how the horticultural items would be plants throughout the Property. Id. at

pp. 68-88. The statement of objectives presumes that the work done in the past pursuant to (and in violation of) the 2008 DOA to fill the cranberry bogs, which work resulted in enforcement actions by both USEPA and the SCC, is in the past, and not relevant to a determination on the 2018 RDA.

The Applicant and the Department assert the activities proposed in the RDA are "normal" and that the USEPA enforcement action has no bearing on this permitting process; the Petitioners and the SCC dispute this assertion, arguing that the Applicant's activities subsequent to the SCC's 2008 negative determination were done in violation of state and federal law; damaged the wetland resource areas at the Property; resulted in the USEPA enforcement action and multiple Enforcement Orders issued by the SCC; and therefore the activities being proposed are disqualified from claiming any exemption per the plain language of the regulations requiring that work be done in accordance with law and prohibiting filling of BVW when there is a change in commodity, citing Section (C)1.f. of 310 CMR 10.04 Agriculture.

Based on the findings in the previous section, the Applicant cannot claim the agricultural use exemption. Nonetheless, the case presents the question of whether the Applicant's activities since 2008 following a negative determination can be considered "normal maintenance" and/or "normal improvement" of LIAU as defined in 310 CMR 10.04 if the Property were LIAU, and what bearing that has on the SDA resulting from the later-filed RDA. The Petitioners assert that the Applicant lost its exemption because the activity did not comply with the SCC's 2008 Negative Determination and the Applicant's work at the Property after 2008 was not normal maintenance or improvement but rather a massive wetlands violation and a violation of federal law. Petitioners' Preliminary Memorandum of Law at pp. 3-4. The Applicant contends that all the activities to convert the farm from cranberry production to horticulture are among those

detailed in Section (b) and (c) in the definition of Agriculture. Applicant's Memorandum of Law at p. 27. The MassDEP concurs with the Applicant and asserts that both the 2008 and 2018 Farm Plans confirm that the Applicant's activities since 2008 constitute normal maintenance or improvement of LIAU. Department's Memorandum of Law at p. 3. The SCC argues that the Department ignored the "dispositive fact" that in converting the cranberry bogs to ponded areas surrounded by trees the Applicant filled 4.7 acres of Bordering Vegetated Wetlands ("BVW")[22] in violation of the Clean Water Act and the MWPA. Cranberry bogs are BVW. SCC Closing Memorandum at pp. 4-5.

Based on a preponderance of the evidence presented at the Hearing and as described below, I find that the activities identified in the 2018 RDA at issue in this appeal are normal maintenance or improvement activities. The activities at the Property between 2008 and 2011 did not constitute normal maintenance or improvement activities due to the violations of the Clean Water Act, because the explicit language in the regulation requires that activities purporting to be normal maintenance or improvement activities be conducted in accordance with federal and state laws. However, neither the Petitioners nor the SCC cite to any authority for the proposition that the agricultural exemption is lost for all time under the circumstances presented here. Specifically, the SCC approved the Applicant's proposal in 2008, while modifying the Horticultural Plan and imposing certain conditions. In implementing the Plan, the Applicant failed to obtain a permit from the ACOE for dredging and filling the cranberry bogs (which filling, with two exceptions, was proposed to, and approved by, the SCC in, 2008.) The Applicant resolved the alleged violations in a Consent Decree requiring it to pay a fine and

[22] 310 CMR 10.04(Agriculture)(c)1.f. allows for changing commodities as an exempt normal improvement practice but it does not include filling of BVW.

restore all but two acres of wetlands that had been altered. The SCC voted to approve the restoration plan. That restoration is ongoing. Having resolved the problems arising during the conversion of crop from cranberry to horticulture, the Applicant gets a fresh start in permitting review for its existing and ongoing farming operations.

"Normal maintenance of land in agricultural use" is defined as:

> the following activities, without enlargement as to geographical extent, that are occurring on land in agricultural use, when directly related to production or raising of the agricultural commodities referenced in 310 CMR 10.04: Agriculture(a), when undertaken in such a manner as to prevent erosion and siltation of adjacent water bodies and wetlands, and when conducted in accordance with federal and state laws: 1. all crop management practices, not to include drainage in a Bordering Vegetated Wetland, customarily employed to enhance existing growing conditions, including but not limited to: tillage, trellising, pruning, mulching, shading, and irrigating; and all customary harvesting practices such as digging, picking, combining, threshing, windrowing, baling, curing, and drying . . . .

310 CMR 10.04: Agriculture(b) (emphasis added). Additionally, normal maintenance "in all cases does not include placing substantial amounts of fill in Bordering Land Subject to Flooding or filling or dredging a Salt Marsh." Id. "Normal improvement of land in agricultural use" includes but is not limited to:

> the following activities when they occur on land in agricultural use or when they occur within the Buffer Zone or Bordering Land Subject to Flooding that is not land in agricultural use, when they are directly related to production or raising of the agricultural commodities referenced in 310 CMR 10.04: Agriculture(a), and when they are undertaken in such a manner as to prevent erosion and siltation of adjacent water bodies and wetlands and the activity is conducted in accordance with federal and state laws: . . . f. a change in commodity other than from maple sap production or forest products to any other commodity, provided that there is no filling of Bordering Vegetated Wetland and drainage ditches or the subsurface drainage system are not increased or enlarged . . . .

310 CMR 10.04: Agriculture(c).(Emphasis added). Normal improvement "in all cases does not include filling or dredging a Salt Marsh." Id. "Maintenance activities involve practices that keep existing operations in good working order" and "improvement activities involve change", including a change from one crop to another. See Guidance at 2-2; 310 CMR 10.04 Agriculture at section (c)1.f.

The Guidance provides further explanation as to whether an activity is "normal": "[a] 'normal' practice may not always be considered a 'best practice'"; "[n]ormal practices don't necessarily look nice"; "[a] normal practice may cause impacts to resource areas"; "[t]o be normal, a practice must fit the scale and the scope of an operation"; and "[w]hat is normal may involve change." Guidance, page 2-1. A conversion may be unsightly and it may result in violations if not done in accordance with the law and any approvals, but that does not mean it is not "normal improvement" as defined in 310 CMR 10.04: Agriculture, Section (c)1.f.

Notwithstanding the assertions by the Petitioners and the SCC, and the fact that there really is no credible dispute that violations of the Clean Water Act occurred at the Property subsequent to the SCC's 2008 Negative Determination, I agree with the Department that "[l]ooking into the past to see if the Applicant may have violated law would be appropriate only if the activities of the past are currently taking place at the Site and are in violation of law." Department's Closing Brief at p. 17. Any violations were resolved in the Consent Decree, which the SCC in essence assented to by vacating its EO in 2017 so that the restoration work could proceed. Allowing fill to remain in place, as was done at the Property, is within the discretion of both USEPA and MassDEP, see DiCicco v. MassDEP, 64 Mass. App. Ct. 423, 833 N.E. 2nd 654 (2005), 2005 Mass App Lexis 830; this is not the first or only instance when the resolution of alleged wetlands violations involved allowing fill to remain in place. If there are violations of the

Consent Decree, as Petitioners assert regarding stockpiling of manure by the Applicant, then that issue should be reported to USEPA for investigation. This is a permitting appeal and the Applicant's activities between 2008 and 2011 are not relevant to the question of whether the activities proposed in the 2018 RDA constitute normal maintenance or normal improvement of LIAU if the land where the activities are proposed is LIAU. That is the only question.

The Petitioners' focus their argument and evidence on the Applicant's failures to comply with the approval given by the SCC in 2008 and his violations that resulted in the USEPA enforcement action, and what they consider the present state of the Property and the restoration. The focus is understandable, given the significant changes at the property as it has been converted from a cranberry farm to a horticultural operation. See Hearing Exhibit P-2 (side-by-side aerial photographs depicting the property in July 2008 and May 2010); see also Petitioners' Rebuttal Ex. 4 at pp. 5 & 10.[23]

On behalf of the Petitioners, Ms. Boretos opined that the conduct engaged in by Mr. Wild since 2008 was not normal maintenance of LIAU. Boretos PFT at ¶ 68. In her opinion, the violations of federal law preclude the Department from determining that the conduct constituted normal maintenance of LIAU. Boretos PFT at ¶ 70. She also believes that the Applicant's violation of the 2008 DOA violated state law. Boretos PFT at ¶ 72. In her opinion, normal maintenance and improvement LIAU must first comply with State and Federal Law, and because in her opinion this work did not, the work done in violation was per-se not normal maintenance and improvement as defined in the Regulation. Boretos PFT at ¶ 73. She cites the following activities in support of her opinion: (1) placement of substantial fill in Bordering Land Subject to

[23] As is evidenced by the ongoing Superior Court litigation between the Hanlons and the Applicant and some of the assertions made by witnesses in their PFT, there is much animosity among these parties. This animosity carried over to the beginning of the Hearing which resulted in my reminding the parties of the rules of decorum that govern these proceedings and requested them to be respectful of one another. Tr. at 21:23-24-22:1-8.

Flooding ("BLSF"); (2) the change in commodity was not normal because the Applicant filled BVW, contrary to the language of 310 CMR 10.04: Agriculture, Section (c)(1)(f); (3) there was a net loss of flood storage capacity; and (4) the alteration of BVW exceeded 10,000 sq. ft. Boretos PFT at ¶¶ 77-82. Her determination that there was BLSF at the Property into which fill was placed was based on her review of FEMA maps and information given to her by Mr. Hanlon, Sr., and not on her own observations, evaluations, or calculations. See Boretos PFT at ¶ 29; Tr. at pp. 29:10-24: 30:1. She does not agree that the former wetlands at the site have been restored, except in two areas as described in her PFT at ¶¶ 44-45 (the easterly side of the elongated pond shows a small fringe of herbaceous BVW; and on the southeast side of the large oval pond – which is supposed to be a restored wetland according to the 2017 Stantec plan – there is a roughly 20-foot fringe around the southeastern margin of the pond). In her opinion, what she observed at the Property in October 2018 was a site being managed for upland culture, with composting and filling occurring on an ongoing basis. The activities that she observed in this regard "are antithetical to the goal of restoring the former wetlands on site, but consistent with the continued conversion of former wetlands to upland." Boretos PFRT at ¶ 26.

Mr. Hanlon, Sr. testified that the 2008 DOA-approved plan did not permit the filling of any cranberry bogs and did not permit the conversion of any portion of the site from wetland to upland, it only permitted the conversion of crops from cranberry to tree horticulture. Hanlon, Sr. PFT at ¶ 23. He further testified that when Mr. Wild began the restoration work, Mr. Hanlon observed that he was stockpiling "enormous quantities" of manure on a portion of the Property that was allowed to remain as upland under the Consent Decree. Hanlon, Sr. PFT at ¶ 45. In early 2018 Mr. Hanlon observed Mr. Wild spreading the manure on Fields F7 and F9, which are hydraulically connected through culverts, and drain through the water control structure now

located in Pond 2 in the Stantec Restoration Plan into the stream where Mr. Gelsthorpe had his flume, and into the Cow River. Hanlon, Sr. PFT at ¶ 46. Mr. Hanlon complained to the SCC and the local Board of Health, and to USEPA about the stockpiling and spreading of manure. USEPA conducted a site inspection and Mr. Wild agreed that manure, composted or not, was not to be used in any wetland area. Hanlon, Sr. PFT at ¶¶ 48-49. In Mr. Hanlon's opinion, what the Applicant did at the Property was not "normal maintenance" of LIAU. Mr. Wild received permission to convert his crop from cranberry to tree horticulture and to create two ponds. But he "utterly violated" the SCC's 2008 approval and engaged in "an environmental outrage and an outrageous violation of law." Hanlon, Sr. PFT at ¶¶ 60-61. On cross-examination at the Hearing, Mr. Hanlon stated that he has no experience changing commodities in his fields from one crop to another. Tr. at 25:24-26:2.

As detailed above in Section I., Mr. Wild testified that he has continuously propagated plant materials in the upland and wetland areas of the existing farm plan. He has grown fruits and vegetables and harvested beach plums, cranberries, and blueberries from his permaculture crops. He testified that he has planted cover crops for soil regeneration every year and planted and propagated thousands of trees and shrubs (seedlings, cuttings and lining out stock). He further testified that he has amended soil with regenerative practices in all fields and has managed invasive weeds in all fields. Wild PFT at ¶ 13. Mr. Wild provided a list of the plantings for each field. See Wild PFT, Ex. 3, p. 4, and Applicant's Record Appendix, Volume 1 at pp. 21-31.

The only witness for the Applicant whom I consider qualified to testify as to whether the activities at the Property constituted "normal maintenance" or "normal improvement of LIAU is Mr. Gray, based on his many years of experience as a conservation commissioner in the town of Bourne. The other witnesses for the Applicant provided testimony regarding site conditions pre-

and post-restoration, and rebuttal testimony to Petitioners' experts, discussed below, but their experience is not in implementing the MWPA and its regulations concerning the agricultural exemption.

Mr. Gray testified that he has personal experience and knowledge of what constitutes LIAU and "normal maintenance and improvement" of LIAU through the Bourne Conservation Commission's oversight of the cranberry industry in Bourne. Gray PFT at ¶¶ 1-2. He personally witnessed the many activities at the Property (past and ongoing) that would constitute "Normal Maintenance and Improvement of Land in Agricultural Use" within "Land in Agricultural Use". Gray PFT at ¶ 5. These include tilling, regrading of soil, planting trees/shrubs, irrigation of plants, composting, use of fertilizers, manures, compost materials and other soil amendments, repair of existing access roads, management of temporary fencing, cleaning, clearing, and dredging man-made water systems. Gray PFT at ¶ 5. Mr. Gray participated in the preparation of the RDA application filed on December 13, 2018, and the public hearing on January 16, 2019 during the Sandwich Conservation Commission's review of the RDA application. Gray PFT at ¶ 7. Mr. Gray testified that in the 2008 Farm Plan the Applicant proposed planting a variety of woody plants in the bog areas and modifying the soil by filling and grading to develop distinct hydrologic zones for each species of plant stock. Gray PFT at ¶ 6. The SCC determined in 2008 that the land was LIAU when it approved the 2008 RDA. Gray PFT at ¶ 9.

Mr. Gray testified that Mr. Wild excavated the approved ponds (4.0 acres approved/3.8 acres developed) and placed soil on the former cranberry bog beds to raise the elevations to prepare them for planting of various tree/shrub plants, as described on page 1 of 4 of the approved Conservation Plan). Gray PFT at ¶ 9. He acknowledged that the ponds are configured differently from the Horticultural Plan. Gray PFT at ¶ 25. He testified that these activities were

exactly what Mr. Wild had been approved to do by the 2008 DOA. These activities happened in the areas the SCC determined at that time to be LIAU. If the "Land in Agricultural use" is farmed and activities (work) occurs that constitutes "Normal Maintenance and Improvements in Land in Agricultural Use", the agricultural exemption continues, unless the land is inactive for 5 years. Gray PFT at ¶ 9. Mr. Gray believes the SDA was correct and based on recognition by MassDEP that specific portions of the property are Land in Agricultural Use and that the proposed activities (work) constitute Normal Maintenance and Improvement of Land in Agricultural Use. Gray PFT at ¶ 17. He further testified that there is no prohibition on placing fill in Land Subject to Coastal Storm Flowage ("LSCSF") unless the fill is being placed in another regulated wetland resource area and there are no requirements for "compensatory flood storage" in LSCSF. Fill placed in and around the homestead was in accordance with an Order of Conditions, and Mr. Wild has planted trees in and around Field F5 and has performed agricultural activities in this field. Gray PFT at ¶ 24. Gray Ex. 1 contains 20 aerial photographs of the property from Google Earth from 1991 to 2018. Mr. Gray testified that these photographs provide evidence of Agricultural Use, Normal Improvements of LIAU and Normal Improvements of LIAU. Gray PFT at ¶ 18. He notes that the photographs dated 5-10-2010 and 5-20-2010 clearly depict the approved farming activities, filling and grading within the former cranberry bogs, the creation of the approved farm ponds, tilling/soil management around Pond #1 and within the "tree staging area." Id. He continues to describe the images depicted in the photographs as evidence of ongoing farming activities, including the planting of nursery stock in various locations and the on-going growth of this nursery stock. In his opinion, these photographs "establish past, present and ongoing agricultural practices consistent with 310 CMR 10.04 [Agriculture] (a) (b) and (c). Id.

Mr. Gray disputes Ms. Boretos's opinion that the restoration plan has been a "dismal failure." He faults her for her lack of scientific analysis on which to base her statement. He notes that she testified she did not leave her vehicle and visited the site only once. She took no soil samples to distinguish upland from hydric soils, did not evaluate the wetland hydrology of the fields and did not analyze the hydrophytic vegetation. Finally, she failed to apply the scientific methodology required in 310 CMR 10.55(2c) nor the methodology required by the ACOE. Gray at ¶ 25. He also criticizes Ms. Boretos for testifying that the bogs may be BLSF yet offers no evidence to support her conclusions. Mr. Gray testified that BLSF has never been determined to exist in the bogs mentioned by Ms. Boretos. Id.

Mr. Arsenault testified that relative to the restoration:

> Based on the functional assessment, Stantec concluded that the overall wetland function of the altered cranberry beds surpasses that of the former cranberry beds and conversion of the cranberry beds has not resulted in a loss of wetland functions. The results of the assessment indicate that cranberry beds, although classified as jurisdictional wetland resources, do not provide many of the functions typically attributed more natural wetlands, and that the constructed ponds and adjacent wet meadow habitats at the time of the assessment added many functions that were absent from the cranberry beds. In particular, the functions of Wildlife Habitat and Fish & Aquatic Habitat as well as Ecological Integrity greatly benefitted from the cessation of annual fertilizer and pesticide application to the former cranberry beds that negatively affected the wildlife and groundwater resources.

Arsenault PFT at ¶ 11. The Restoration Plan contains provisions for monitoring wetland restoration success. Following completion of the restoration methods, 5 years of monitoring is required to document that the wetland restoration areas are meeting the standards of success as established by the Plan and the Consent Decree. This includes monitoring groundwater levels to confirm that the agreed upon wetland hydrology criterion is met, monitoring vegetation to confirm hydrophytic vegetation is supported, and monitoring and control (if necessary) of

invasive species. Arsenault PFT at ¶ 17. The Consent Decree sets for Performance Standards for the restoration. Arsenault PFT at ¶ 17a.-d. In Mr. Arsenault's opinion the restoration is ongoing and going according to plan. Arsenault PFT at ¶ 18.

Mr. Schweisberg testified that he visited the Property eight times between 2013 and 2019. Schweisberg PFT at ¶ 12. He reviewed and commented on the Stantec plans. Schweisberg PFT at ¶ 13. He testified that the irrigation ponds and reservoirs associated with cranberry farms provided several moderate to high level ecological functions, e.g., wildlife habitat, flood water storage, water quality improvement. Schweisberg PFT at ¶ 18. The Restoration Plan called for restoring what were 14.7 acres of low value cranberry beds with 12.7 acres of much higher functioning wetlands. Schweisberg PFT at ¶ 19. He criticized Ms. Boretos's opinion as based on a single visit and from a car, and he stated that delineating the boundaries of BVWs is a field-oriented task. It is particularly difficult and unreliable to identify wetlands visually that are dominated by grasses. Schweisberg PFT at ¶¶ 34-36. He faulted her for performing no field work, providing no MassDEP Field Data Forms or other support for her opinion that the restoration has been a failure. Schweisberg PFT at ¶ 40.

Mr. Makuch testified on behalf of the Department that both Farm or Conservation Plans prepared for the Applicant are good evidence of continuing farming practice on the Property. Makuch PFT at ¶ 16. He also reviewed photographs for the years 1996 through 2008, attached as exhibits to his testimony, and opined that the cranberry bogs appeared to be actively managed and maintained during this period. Makuch PFT at ¶ 17. In his opinion, MassDOT photographs, dated 7/29/2015 and 5/28/2017, attached as exhibits to his testimony show the completion of cranberry bog conversion to ponded areas with surrounding rows of planted trees, and that planting trees and shrubs for horticultural purposes is consistent with the goals and objectives of

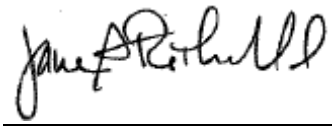
the 2018 NRCS Plan. Makuch PFT at ¶ 18. Pursuant to 310 CMR 10.04 Agriculture (c), a change in crop can be considered an improvement activity within LIAU. Id. Although the emphasis on crop management at the Property has changed since the implementation of horticulture in 2008, in Mr. Makuch's opinion, "each of the various activities listed in the [Applicant's] Farm Schedule [describing activities from 2008 to 2018, dated 3/6/2019] would qualify as either maintenance and/or improvement activities" for LIAU. Makuch PFT at ¶ 19. The Farm Schedule is at Applicant's Record Appendix at pp. 21-31. Based on his personal observations during the on-site inspection on April 3, 2019, his review of plans and information submitted with the RDA, review of MassGIS maps and a review of the record in this appeal, it is his opinion that the work described by both the 2008 and 2018 RDAs is allowed as an improvement activity under the regulations. Makuch PFT at ¶¶ 21, 24.

A preponderance of the evidence presented at the Hearing supports the conclusion that the activities proposed in the 2018 RDA are normal maintenance or improvement activities. A preponderance of the evidence also supports the conclusion there are not ongoing violations or unauthorized alterations of Resource Areas at the Property. The evidence demonstrates that Mr. Wild is doing the restoration per the Consent Decree. The testimonies of Messers. Gray, Arsenault and Schweisberg far outweigh that of Ms. Boretos and Mr. Hanlon (who is not a wetlands scientist). Ms. Boretos's testimony was not persuasive because her opinion was based on her very limited ability to evaluate site conditions, which renders her opinion speculative because it is not based on wetlands data from the site or on-site observations. The testimony of Messers. Gray, Arsenault and Schweisberg was based on first-hand, on-site observations and calculations and I give their testimony more weight. Based on their testimony, I find that the Applicant resolved his alleged Clean Water Act violations in a judicial Consent Decree entered

in 2016, paid a fine, and is in the process of implementing a prescribed remedy at the Property. Based on these findings, I conclude that in 2018 when the Applicant filed its RDA, the Applicant was not precluded from asserting a claim to the agricultural exemption because of its prior bad acts.

CONCLUSION

Based on the findings above, I recommend that the Department's Commissioner issue a Final Decision affirming the negative SDA regarding farm field F2 and reversing the negative SDA with respect to all other fields at the Property. None of the fields aside from F2 qualify as land in agricultural use LIAU because they are not presently and primarily being used to raise agricultural commodities for a commercial purpose.



Date: 2/14/2024

Jane A Rothchild
Senior Presiding Officer

SERVICE LIST

IN THE MATTER OF: **Peter and Betsy Wild, Idlewild Acres, LLC**

Docket Nos. WET-2019-019, 020 **Sandwich**

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APPENDIX

RULINGS ON MOTIONS

Prior to the Adjudicatory Hearing the Applicant filed the following motions. Below are descriptions of the motions and my rulings thereon.

1. Motion to Dismiss (dated 7/2/2019) as to WET-2019-019 for failure to allege prior participation in the proceedings. The Applicant withdrew this motion at the Pre-hearing Conference after being presented with evidence that at least one of the residents had previously participated.

2. Motion for a More Definite Statement (dated 7/2/2019) as to WET-2019-020, requiring the Petitioners to provide a more definite statement to support their right to appeal as "persons aggrieved". I granted the motion at the Conference, and the Petitioners subsequently filed a more definite statement to support their claim.

3. Motion to Strike (dated 7/2/2019) directed to the letter sent by the Commission to the Department's Southeast Regional Office. At the Conference, I denied the Motion to Strike, stating that the letter had not been filed with the Office of Appeals and Dispute Resolution as any sort of pleading. However, to the extent the letter purports to be an appeal of the SDA, it was neither timely nor properly filed, and the Commission had, as the Applicant argues in its Motion, waived any right to appeal the Department's determinations in the SDA.

4. Motion in Limine (dated 7/2/2019) requesting that the Applicant and the Commission be limited to the introduction of evidence and testimony which is not contradictory to the SDA. I granted the Motion in Limine. 310 CMR 10.05(7)(j)2.a. identifies the individuals or entities who may file an appeal of an SDA, including a local conservation commission. While 310 CMR 10.05(7)(j)2.f. affords a local conservation commission party status in an appeal of an SDA, that

status is limited, and does not include the right to collaterally attack the SDA through the appeals of the Petitioners, where the commission itself failed to appeal the SDA. The Commission is bound by the SDA it failed to appeal. See Matter of Thomas Vacirca, Jr., OADR Docket No. WET-2016-017, Recommended Final Decision (April 11, 2017), 2017 MA ENV LEXIS 22, adopted by Final Decision (April 18, 2017), 2017 MA ENV LEXIS 28. The Commission was allowed to file factual testimony consistent with this ruling, and I did not preclude the Commission from filing a memorandum of law which articulates its position on the appeals.

5. Motion to Dismiss (dated 8/30/2019) directed to the Amended Appeal Notice of Mr. Karl and Ms. Walter was denied. The Petitioners' Amended Appeal Notice sufficiently states facts supporting a claim that they are "persons aggrieved."