

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

August 9, 2018

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In the Matter of  
Robert J. Cote

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OADR Docket No. WET-2017-014  
DEP File No. 197-0604  
Leicester, MA

**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

Robert J. Cote ("the Applicant") is the owner of real property on Cedar Meadow Pond at 63 Fairview Drive in Leicester, Massachusetts ("the Property"). In this appeal, the Applicant's neighbors, Cory LH Lee and Tommy J. Lee (collectively "the Petitioners"), challenge a Superseding Order of Conditions ("SOC") that the Central Regional Office of the the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") issued to the Applicant 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"), approving his proposed Project at the Property. Specifically, the SOC authorized the Applicant to remove and relocate a 30-foot section of an existing stone wall that directly abuts Cedar Meadow Pond to approximately six feet to the east of its current configuration in order to allow access for a boat ramp. The SOC affirmed the Town of Leicester's Conservation

Commission's ("LCC") prior approval of the proposed Project.

In their appeal, the Petitioners assert that the Department approved the proposed Project in violation of the requirements of the MWPA and the Wetlands Regulations, and request that the SOC be vacated. Petitioners' Appeal Notice, at pp. 1-2; Petitioners' First Amended Pre-Hearing Statement, at pp. 3-5. The Applicant and the Department dispute the Petitioners' contentions and request that the SOC be affirmed. Applicant's E-mail Message of August 14, 2017 to OADR's Case Administrator; Department's Pre-Screening Conference Memorandum, at pp. 1-2.

I conducted an evidentiary Adjudicatory Hearing ("Hearing") to resolve the Petitioners' claim that the Department erred in issuing the SOC.<sup>1</sup> Specifically, the Issues for Resolution at the Hearing were:

1. Whether the Department had sufficient information from the Applicant to review and approve the proposed Project pursuant to the MWPA and the Wetlands Regulations?
2. If so, did the Applicant overcome the presumption in 310 CMR 10.54(1) and 10.54(3) that the 30 linear feet of Bank impacted by the proposed Project is significant to advancement of the MWPA interests of:
  - (a) protection of public and private water supply;
  - (b) protection of ground water supply;
  - (c) flood control;
  - (d) storm damage prevention;
  - (e) prevention of pollution;

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<sup>1</sup> Per the standard practice of the Office of Appeals and Dispute Resolution ("OADR"), the Hearing was digitally recorded. Following the Hearing, OADR's Case Administrator made the digital recording available to the parties for downloading from the internet, which the Petitioners and the Department relied on in drafting and filing their respective Closing Briefs in the case. The Applicant did not file a Closing Brief, but joined in the Department's Closing Brief requesting affirmance of the SOC.

- (f) protection of fisheries; and/or
  - (g) protection of wildlife habitat?
3. If the 30 linear feet of Bank that will be impacted by the proposed Project is significant to advancement of one or more of the MWPA interests listed above, can the proposed Project nevertheless be approved under the MWPA and the Wetlands Regulations?
- (a) Does the proposed removal and relocation of the 30 linear feet of Bank satisfy the Performance Standards of 310 CMR 10.54(4)?
  - (b) Does the proposed work in the Buffer Zone to the Bank satisfy the requirements of 310 CMR 10.53(1)?
  - (c) Are the erosion and sedimentation controls that the Applicant has proposed to utilize during the removal and relocation of the 30 linear feet of Bank adequate to protect the Bank?

At the Hearing, all of the parties presented witnesses and documentary evidence in support of their respective positions in the case. Additionally, all of the parties, with the exception of the Applicant, were represented by legal counsel.<sup>2</sup> The witnesses were cross-examined under oath on sworn Pre-filed Testimony (“PFT”) that they had filed prior to the Hearing in support of the parties’ respective positions in the case.

The witnesses who testified at the Hearing were as follows:

- (1) for the Petitioners: Glenn Krevosky, a wetlands expert and private environmental consultant (“Mr. Krevosky”);
- (2) for the Applicant: Arthur Allen, CPSS, CWS, a wetlands expert and private environmental consultant (“Mr. Allen”); and
- (3) for the Department: Meghan P. Selby, a wetlands expert and

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<sup>2</sup> Although he did not have legal counsel at the Hearing, the Applicant’s wetlands expert, Arthur Allen, was present with the Applicant throughout the Hearing.

Environmental Analyst in the Wetlands Program of the Department's  
Central Regional Office ("Ms. Selby").

As discussed in detail below, based on a preponderance of the expert testimony and documentary evidence presented by the parties at the Hearing, I find that the Department properly issued the SOC for the following reasons.

First, the Department had sufficient information from the Applicant to review and approve the proposed Project pursuant to the MWPA and the Wetlands Regulations.

Second, although the Applicant and the Department presented evidence that the 30 linear feet of Bank which will be impacted by the Proposed Project is significant to flood control, one of the interests protected by the MWPA and 310 CMR 10.54(1) and 10.54(3), the Project can nevertheless be approved under the MWPA and the Wetlands Regulations because the proposed removal and relocation of the 30 linear feet of Bank satisfies the Performance Standards of 310 CMR 10.54(4) and this resource area will be further enhanced/protected by two additional conditions proposed by the Department at the Hearing, as discussed below.

Third, while the proposed work in the Buffer Zone to the Bank already satisfies the requirements of 310 CMR 10.53(1), the erosion and sedimentation controls that the Applicant has proposed to utilize during the removal and relocation of the 30 linear feet of Bank will be further enhanced/protected by one of the additional conditions proposed by Department, as discussed below.

Lastly, while the erosion and sedimentation controls that the Applicant has proposed to utilize for the removal and relocation of the 30 linear feet of Bank, as conditioned and approved by the Department in the SOC, are adequate to protect the Bank, these measures will be further

enhanced/protected by one of the additional conditions proposed by the Department at Hearing, as discussed below.

Accordingly, I recommend that the Department's Commissioner issue a Final Decision affirming the Department's issuance of the SOC approving the proposed Project and directing the Department to issue a Final Order of Conditions ("FOC") approving the Project that includes the following two conditions as proposed by the Department at the Hearing, to further enhance/protect both the Bank's stability, and the Bank and Buffer Zone from potential erosion and sedimentation impacts of the proposed Project:

Additional Condition No. 1: Upon removal of the existing retaining wall, the area under the wall will be examined for the presence of a footing or other stable base. The retaining wall will be relocated using a footing or base that is similar to what is under the existing retaining wall; and

Additional Condition No. 2: Any area that is exposed after relocation of the retaining wall will be stabilized in such a way as to prevent erosion and sedimentation impacts to the wetland resource areas. Stabilization measures could include using at least 4 inches of compacted peastone or gravel with particles that are at least one-quarter inch (minimum) in diameter.

## **STATUTORY AND REGULATORY FRAMEWORK**

### **I. THE PERMITTING REQUIREMENTS OF THE MWPA AND THE WETLANDS REGULATIONS**

The purpose of the MWPA and the Wetlands Regulations is to protect wetlands and to regulate activities affecting wetlands areas in a manner that promotes the following eight statutory interests:

- (1) protection of public and private water supply;
- (2) protection of ground water supply;
- (3) flood control;
- (4) storm damage prevention;

- (5) prevention of pollution;
- (6) protection of land containing shellfish;
- (7) protection of fisheries; and
- (8) protection of wildlife habitat.

G.L. c. 131, § 40; 310 CMR 10.01(2); In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 6-7, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77; In the Matter of Webster Ventures, LLC, OADR Docket No. WET-2014-016 (“Webster Ventures I”), Recommended Final Decision (February 27, 2015), 2015 MA ENV LEXIS 14, at 10-11, adopted as Final Decision (March 26, 2015), 2015 MA ENV LEXIS 10; In the Matter of Elite Home Builders, LLC, OADR Docket No. WET-2015-010, Recommended Final Decision (November 25, 2015), adopted as Final Decision (December 17, 2015), 22 DEPR 202, 204 (2015); In the Matter of Sunset City, Inc., OADR Docket No. WET-2016-016, Recommended Final Decision (March 31, 2017), 2017 MA ENV LEXIS 35, at 9-10, adopted as Final Decision (April 21, 2017), 2017 MA ENV LEXIS 33.

The MWPA and the Wetlands Regulations provide that “[n]o person shall remove, fill, dredge[,] or alter<sup>3</sup> any [wetlands] area subject to protection under [the MWPA and Wetlands

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<sup>3</sup> The Wetlands Regulations at 310 CMR 10.04 define “alter” as “chang[ing] the condition” of any wetlands area subject to protection under the MWPA and the Wetlands Regulations. Examples of alterations include, but are not limited to, the following:

- (a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas;
- (b) the lowering of the water level or water table;
- (c) the destruction of vegetation;

Regulations] without the required authorization, or cause, suffer or allow such activity . . . .”

G.L. c. 131 § 40, ¶ 32; 310 CMR 10.02(2)(a); Vecchione, 2014 MA ENV LEXIS 76, at 7; Webster Ventures I, 2015 MA ENV LEXIS 14, at 11-12; Elite Home Builders, 22 DEPR at 204; Sunset City, 2017 MA ENV LEXIS 35, at 10. “Any activity proposed or undertaken within [a protected wetlands] area[,] . . . which will remove, dredge or alter that area, is subject to Regulation under [the MWPA and the Wetlands Regulations] and requires the filing of a Notice of Intent (“NOI”)” with the permit issuing authority. 310 CMR 10.02(2)(a). A party must also file an NOI for “[a]ny activity . . . proposed or undertaken within 100 feet of [any protected wetlands]” described as “the Buffer Zone” by the Regulations, “which, in the judgment of the [permit] issuing authority, will alter [any protected wetlands].” 310 CMR 10.02(2)(b).

The “[permit] issuing authority” is either the local Conservation Commission when initially reviewing the applicant’s proposed work in a wetlands resource area protected by the MWPA and the Wetlands Regulations, or the Department when it assumes primary review of the proposed work or review on appeal from a local Conservation Commission decision. Healer v. Department of Environmental Protection, 73 Mass. App. Ct. 714, 717-19 (2009). Under the MWPA, a local Conservation Commission may issue an Order of Conditions authorizing or precluding proposed activities in protected wetlands areas and “[is] allowed to ‘impose such conditions as will contribute to the protection of the interests described [in MWPA and the

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(d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water.

310 CMR 10.04. “Dredge” is defined as “deepen[ing], widen[ing], or excavat[ing], either temporarily or permanently” a protected wetlands area, and “[f]ill means to deposit any material [in a protected wetlands area] so as to raise an elevation, either temporarily or permanently.” Id.

Wetlands Regulations]” and to require that “all work shall be done in accordance’ with the conditions they might impose. . . .” Id.

Orders of Condition, including any findings and wetlands delineations forming the basis of the Orders, are valid for three years from the date of the Orders’ issuance. 310 CMR 10.05(6)(d). However, any “order [by the Department] shall supersede the prior order of the conservation commission [issued pursuant to the MWPA and the Wetlands Regulations] . . . and all work shall be done in accordance with the [Department’s] order,” Id., unless the Commission has properly denied the proposed project pursuant to a local Wetlands Protection Bylaw that is more protective than the MWPA. Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich, 449 Mass. 859, 866 (2007). This is the case because the MWPA “establishes Statewide minimum wetlands protection standards, [but] local communities are free to impose more stringent requirements” by enacting local Wetlands Protection Bylaws. Oyster Creek, 449 Mass. at 866; Healer, 73 Mass. App. At 716. As a result, an SOC issued by the Department under the MWPA approving proposed work in protected wetlands areas cannot preempt a timely decision of a local conservation commission denying approval of the proposed work based “on provisions of a local bylaw that are more protective than the [MWPA].” Oyster Creek, 449 Mass. at 866. However, this issue is not present in this case, because both the LCC and the Department approved the proposed Project pursuant to the MWPA and the Wetlands Regulations.

## **II. THE PROTECTED WETLANDS AREAS OF BANK AND BUFFER ZONE**

### **A. Bank**

The proposed Project consists of the relocation of a stone wall that abuts Cedar Meadow Pond, and the protected wetlands resource area that will be impacted by the wall’s removal and



relocation will be 30 linear feet of Bank. SOC, at p. 2. The Wetlands Regulations at 310 CMR 10.54(2)(a) define Bank as “the portion of the land surface which normally abuts and confines a water body,” and it “may be partially or totally vegetated, or . . . comprised of exposed soil, gravel or stone.” Bank “[is] likely to be significant” to the advancement of all eight MWPA interests listed above. 310 CMR 10.54(1). As a result, there is a presumption under the Wetlands Regulations that “[when] a proposed activity involves the removing, filling, dredging[,] or altering of a Bank, the [local conservation commission and the Department must] presume that [the] area is significant to the [advancement of these MWPA] interests . . . .” 310 CMR 10.54(3). However, “[t]he presumption is rebuttable and may be overcome upon a clear showing [by the project proponent] that the Bank does not play a role in the protection of [these MWPA] interests.” *Id.* In the event the local conservation commission or the Department determines that the project proponent has “overcome” the presumption, it “[must] make a written determination to this effect, setting forth its grounds” on Department Form 6. *Id.*

“Where the presumption . . . is not overcome [by the project proponent],” the project can only be authorized by the local conservation commission and/or the Department if the project satisfies the General Performance standards in 310 CMR 10.54(4) governing proposed work in Bank. Specifically, the project can only be approved if it does not impair:

- (1) the Bank’s physical stability;
- (2) the water carrying capacity of any existing channel within the Bank;
- (3) groundwater and surface water quality;
- (4) the Bank’s capacity to provide breeding habitat, escape cover, and food for fisheries;
- (5) the Bank’s capacity to provide important wildlife habitat functions; and

(6) any stream crossing within the Bank.

310 CMR 10.54(4).

**B. Buffer Zone**

The proposed Project will also impact the Buffer Zone to the Bank because it is within 100 feet of a protected wetlands area. As discussed above, under 310 CMR 10.53(1), for work in the Buffer Zone to a protected wetlands area, the local Conservation Commission or the Department “shall impose conditions to protect the interests of the [MWPA] identified for the adjacent [protected wetlands area].” These “[c]onditions may include limitations on the scope and location of work in the Buffer Zone as necessary to avoid alteration of [the protected wetlands area]” and “requir[ing] erosion and sedimentation controls during construction, a clear limit of work, and the preservation of natural vegetation adjacent to the [protected wetlands area] and/or other measures commensurate with the scope and location of the work within the Buffer Zone to protect the interests of [the MWPA].” 310 CMR 10.53(1).

**III. THE PERMIT REVIEW PROCESS UNDER THE MWPA AND THE WETLANDS REGULATIONS**

As discussed above, at pp. 7-8, under the wetlands statutory and regulatory scheme, the “[permit] issuing authority” is either the local Conservation Commission when initially reviewing the applicant’s proposed work in a wetlands resource area protected by the MWPA and the Wetlands Regulations, or the Department when it assumes primary review of the proposed work or review on appeal from a local Conservation Commission decision. An appeal to the Department of a local Conservation Commission’s Order of Conditions (“OOC”) approving or denying a project is made through an SOC request to the Department. 310 CMR 10.05(7)(a)-(7)(d). The SOC request must be made to the Department “in writing and [must] be

sent [to the Department] by certified mail or hand delivered within ten [business] days of [the OOC's] issuance . . . .” 310 CMR 10.05(7)(c). The SOC request must “state clearly and concisely the objections to the [OOC], . . . [and] how the [OOC] is inconsistent with [the Wetlands Regulations] and does not contribute to the protection of the interests identified in [the MWPA].” Id.

It is well settled that, in the normal instance, when the Department receives an SOC request, “[t]he Department [conducts] a de novo review of [the proposed] Project [at issue],” meaning that the review of the Project starts anew, and that the Department makes a determination independent of any local conservation commission determination regarding whether the Project should be authorized pursuant to the MWPA and the Wetlands Regulations. In the Matters of Richard Cuda and Town of Orleans Board of Selectmen, OADR Docket Nos. WET-2015-012 and WET-2016-014 (“Cuda”), Recommended Final Decision (December 13, 2017), at p. 40, adopted as Final Decision (January 8, 2018), citing, In the Matter of Chappaquonsett Realty Trust, OADR Docket No. 1988-222, Order of Dismissal and Grant of Motion to Intervene (July 19, 1989), 7 MELR 1421, 1426 (1989); In the Matter of Ali and Elaine Bigdeliazari, OADR Docket No. WET-2016-027, Recommended Final Decision (May 8, 2018), 2018 MA ENV LEXIS 29, at 22, adopted as Final Decision (May 15, 2018), 2018 MA ENV LEXIS 28. Indeed, in issuing the SOC affirming a local conservation commission’s approval of a proposed Project, the Department is not required by either the MWPA or the Wetlands Regulations “[to] adopt conditions identical to those adopted by [the] conservation commission.” Id.

Likewise, an appeal of the Department’s SOC to OADR is a de novo proceeding, where the Presiding Officer conducts an evidentiary hearing that includes the presentation of both

sworn testimony and documentary evidence to address the issues that were previously identified for adjudication in the Presiding Officer's Pre-Screening Conference Report and Order. 310 CMR 10.05(7)(j)3-9; Bigdeliazari, 2018 MA ENV LEXIS 29, at 23. Consistent with the powers enumerated in 310 CMR 1.01(5)(a), Presiding Officers are authorized to conduct trial-like evidentiary Adjudicatory Hearings which include, among other things, the right to administer oaths to witnesses, the imposition of limitations upon and the management of the evidence and the participation of the parties in order to develop an adequate and comprehensive adjudicatory record, the right to conduct views of the project site, and the right to issue subpoenas as appropriate. Id. Although the rules of evidence (other than privilege) applicable to court proceedings do not apply to evidentiary Adjudicatory Hearings (See 310 CMR 1.01(13)(h)), at the conclusion of the Hearing, Presiding Officers make findings of fact and rulings of law on every issue identified for adjudication based upon the parties' testimonial and documentary evidence, and then issue a Recommended Final Decision based upon a preponderance of the evidence for consideration by the Department's Commissioner, who is the Final Decision-Maker in the appeal. Id.; 310 CMR 1.01(14)(a); In the Matter of John Soursourian, OADR Docket No. WET-2013-028, Recommended Final Decision (2014), 2014 MA ENV LEXIS 49, at 36, adopted as Final Decision, 2014 MA ENV LEXIS 47 (2014) ("The Presiding Officer [responsible for adjudicating the administrative appeal] is not bound by MassDEP's prior orders or statements [in the case], and instead is responsible . . . for independently adjudicating [the] appeal[1] and [issuing a Recommended Final Decision] to MassDEP's Commissioner that is consistent with and in the best interest of the [MWPA, the Wetlands] Regulations, and MassDEP's policies and

practices”); Bigdeliazari, 2018 MA ENV LEXIS 29, at 23-24.

#### **IV. THE PETITIONERS’ BURDEN OF PROOF AT THE HEARING**

At the Hearing, the Petitioners had the burden of proving by a preponderance of the evidence that the Department erred in issuing the SOC. Bigdeliazari, 2018 MA ENV LEXIS 29, at 25, citing, 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. Specifically, the Petitioners were required to “produce [at the Hearing] at least some credible evidence from a competent source in support of [their] position” that the Department erred in issuing the SOC. Id. This “credible evidence [had to come] 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 as Final Decision (August 19, 2010), 2010 MA ENV LEXIS 31; Bigdeliazari, 2018 MA ENV LEXIS 29, at 26. Whether the witness had such expertise depended “[on] whether the witness ha[d] 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 as 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 as 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 as Final Decision (May 9, 2003); Pittsfield Airport Commission, *supra*, 2010 MA ENV LEXIS 89, at 36-39 (petitioner's failure to submit expert testimony in appeal challenging Department's Commissioner's issuance of 401 Water Quality Certification Variance to Pittsfield Airport Commission fatal to petitioner's claims in appeal because Variance was "detailed and technical . . . requiring expert testimony on issues . . . implicated by the Variance," including . . . (1) wetland replication, restoration, and enhancement, (2) mitigation of environmental impacts to streams, and (3) stormwater discharge and treatment[, ] [and (4)] . . . runway safety and design").

As for the relevancy, admissibility, and weight of evidence that all of the parties presented at the Hearing, this 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. . . ."

### **FINDINGS**

#### **I. THE DEPARTMENT HAD SUFFICIENT INFORMATION FROM THE APPLICANT TO REVIEW AND APPROVE THE PROPOSED PROJECT PURSUANT TO THE MWPA AND THE WETLANDS REGULATIONS**

Through their wetlands expert, Mr. Krevosky, the Petitioners asserted at the Hearing that

the Applicant's Notice of Intent ("NOI") application for the proposed Project, with specific emphasis upon the NOI's March 13, 2017 hand-drawn sketch Plan prepared for the Applicant by Barry Grenier ("Mr. Grenier") of Dynamek Services Inc. ("the Plan"), presented insufficient information for the Department to review and approve the proposed Project pursuant to the MWPA and the Wetlands Regulations. In his Direct PFT, Mr. Krevosky testified that there were a number of insufficient details regarding the proposed Project, including the lack of site stabilization details after Project completion; no plan for treatment of the Buffer zone; no stone wall installation details; and a failure to require that the stone wall be designed by a structural engineer. Mr. Krevosky's Direct PFT, ¶¶ 6-8, 10. In his Rebuttal PFT, Mr. Krevosky also testified that the Plan "is lacking in almost every respect from what [is expected for] altering resource areas of [B]ank... [and] buffer zone." Mr. Krevosky's Rebuttal PFT, Response to Question 9 (Rebuttal Question and Answers are unnumbered).

Based upon Mr. Krevosky's testimony, the Petitioners asserted at the Hearing that the Applicant's NOI and Plan insufficiencies, including the Plan not having been drawn to scale, the lack of a plan stamped by a Registered Land Surveyor or Professional Engineer, and insufficient construction details, required the Applicant to file a new NOI application with the LCC for the proposed Project pursuant to the MWPA and the Wetlands Regulations. Petitioners' December 7, 2017 Closing Brief, at pp. 2-3. Due to these purported information deficiencies, the Petitioners claimed that: (1) the Department erred in issuing its SOC approving the proposed Project; and (2) the Applicant failed to overcome the presumption in 310 CMR 10.54(1) and 310 CMR 10.54(3) that the impacted Bank is significant to the MWPA interests. *Id.*, at p. 2.

In response, the Department's wetlands expert, Ms. Selby, testified in her PFT that the NOI application, including the Plan at issue, provided the Department with sufficient information

regarding the existing conditions, the proposed conditions, and the construction erosion details, for her to analyze the proposed Project's impacts upon the resource areas of Bank and Buffer Zone. Ms. Selby's PFT, ¶¶ 10-12. Ms. Selby also testified that the Applicant submitted the Plan in response to the LCC's request for a more detailed engineering plan, and subsequently became the site plan of record for the LLC's approval the proposed Project. *Id.*, ¶¶ 10-11. Based upon the NOI application, including the Plan, Ms. Selby testified that she had sufficient information to review, condition, and approve the proposed Project in accordance with the MWPA and the Wetland Regulations. *Id.*, ¶¶ 12, 19.

At the Hearing, Ms. Selby further testified that, while the Plan is not an engineered plan, both the content of the Plan, and her view of the proposed Project location, provided her with sufficient information to review, condition, and approve the proposed Project as required by the MWPA and the Wetland Regulations. Digital Recording of Hearing, at 1:31:51. Ms. Selby also testified that the LCC would not have approved the Plan for the proposed Project if it determined that an engineering plan was necessary. *Id.* Ms. Selby also testified that, in her experience, sketch plans such as the Plan at issue in this appeal, were common for small scale projects, for work activities that impacted both resource and Buffer Zone areas.

The Applicant's expert witness, Mr. Allen, concurred with Ms. Selby's analysis regarding the adequacy of the Plan. Specifically, Mr. Allen testified that the straw wattles for erosion control were adequately depicted on the Plan; that, while the Plan does not depict existing grades, the Property is level so that these details were not problematic; and that, given that this is a simple project, the Plan is sufficient for "moving an existing wall to a new location." Digital Recording of Hearing, at approximately minutes 28-39. Mr. Allen further testified that Mr. Grenier, the contractor in charge of the proposed Project, was experienced in projects



involving wetland resources and performed work of “very good quality” and that he had supervised Mr. Grenier’s work in the past. Digital Recording of Hearing, at approximately 06:31.

In assessing the Petitioner’s claim that the Plan was insufficient for the Department to issue the SOC approving the proposed Project pursuant to the MWPA and the Wetlands Regulations, it is necessary to assess the claim in accordance with the requirements of the MWPA and, in particular, the Wetlands Regulations. At 310 CMR 10.04, the Wetlands Regulations broadly define “Plan,” in pertinent part, as follows:

Plan means such data, maps, engineering drawings, calculations, specifications, schedules and other materials, if any, *deemed necessary by the issuing authority to describe the site and/or the work, to determine the applicability of [the MWPA] or to determine the impact of the proposed work upon the interests identified in [the MWPA]* . . . .

(emphasis supplied). As this definition makes clear, it is within the discretion of the permit issuing authority – both on the local Conservation Commission level and on appeal to the Department -- to determine what is “necessary” in a plan in order to evaluate, condition, and approve a proposed project in accordance with the requirements of the MWPA and the Wetlands Regulations. As confirmed by Ms. Selby’s testimony at the Hearing, when the Applicant initially presented the proposed Project to the LCC, the latter specifically requested the Applicant to provide a more detailed plan. After receiving the Plan from the Applicant, the LLC subsequently determined that the Applicant had submitted sufficient information to enable the LLC to issue an OOC approving the proposed Project.

Since, as noted above, the Department’s review of the LCC’s OOC upon appeal is de novo, the Department also had the authority during its SOC review of the proposed Project to require the Applicant’s submittal of additional information, including but not limited to the

submission of an additional or more detailed plan. See 310 CMR10.05 (7)(f), (g). However, based upon Ms. Selby's review of the Plan and the other proposed Project materials, in conjunction with her site visit, she determined on behalf of the Department that there was already sufficient information for the Department to condition and approve the Project. This determination that there was sufficient information for issuing the SOC affirming the LCC's prior approval of the proposed Project is fully within the Department's discretion and expertise. I also note and credit Ms. Selby's testimony that "engineered plans" are not automatically required by the Wetlands Regulations' "Plan definition" in the interests of equity, because if every wetlands project required "engineered plans," the costs for relatively small projects (including the one at issue in this case) would be prohibitively expensive.

Accordingly, based upon Ms. Selby's testimony and that of the Applicant's expert, Mr. Allen, I find that the Department had sufficient information from the Applicant, including but not limited to the information contained in the Plan, to appropriately condition and approve the proposed Project in accordance with the MWPA and the Wetlands Regulations.

**II. THE APPLICANT AND THE DEPARTMENT PRESENTED EVIDENCE AT THE HEARING THAT THE 30 LINEAR FEET OF BANK WHICH WILL BE IMPACTED BY THE PROPOSED PROJECT IS SIGNIFICANT TO FLOOD CONTROL, ONE OF THE INTERESTS PROTECTED BY THE MWPA AND THE PERTINENT WETLANDS REGULATIONS AT 310 CMR 10.54(1) AND 10.54(3)**

As noted previously at pp. 13-14 above, the Petitioners had the burden of proving at the Hearing, through the presentation of credible evidence from a competent source, that the Applicant failed to overcome the presumption that the proposed Project's impacts to the 30 linear feet of Bank is significant to one or more of the MWPA's interests and the pertinent Wetlands regulations at 310 CMR 10.54(1) and 10.54(3). In their Closing Brief at pp. 1-2, the Petitioners

acknowledged their burden of proof obligations in the adjudicatory process. However, at the Hearing, they failed to present any expert testimony or other documentary evidence on this issue, relying instead upon their expert witness, Mr. Krevosky's assertion that the Applicant's insufficient NOI application (including the Plan) in and of itself demonstrated that the Applicant could not overcome the presumption of significance. See Petitioners' Closing Brief at p. 2.

Due to their failure to meet their burden of proof on this issue, I find that the Petitioners have waived this issue. However, the Applicant and the Department, through their respective expert witnesses, Mr. Allen and Ms. Selby, concurred that the proposed Project's impacts to Bank will have some limited impact upon at least one MWPA interest: flood control. See Mr. Allen's PFT, ¶ 4 (assessing proposed Project's impacts upon each of the eight MWPA interests); Ms. Selby's PFT, ¶ 13 (concurring with Mr. Allen's opinion on this issue). Mr. Allen testified at the Hearing that the proposed Project will increase the flood storage volume of the Cedar Meadow Pond, and as a result, the Project has been conditioned and approved by the Department to address that impact.

For these reasons, I find that Applicant and the Department presented credible evidence indicating that the proposed Project's impacts to Bank is significant to flood control, one of the MWPA interests. Therefore, since the Applicant has not overcome the presumption of significance set forth in the Wetlands Regulations at 310 CMR 10.54(1) and 10.54(3), the Applicant's proposed Project must satisfy the General Performance Standards relating to Bank as set forth in 310 CMR 10.54(4), and the Department was required to condition the Project to protect the relevant MWPA interests relating to the potential Bank impacts. See Ms. Selby's PFT, ¶¶ 13, 14 ("[B]ecause the Bank has some significance, albeit limited, to the interests of the

[MWPA], I conditioned the Project to protect the interests of the [MWPA] for which Bank is presumed to be significant.”)

**III. ALTHOUGH 30 LINEAR FEET OF BANK WILL BE IMPACTED BY THE PROPOSED PROJECT AND THE BANK IS SIGNIFICANT TO THE ADVANCEMENT OF FLOOD CONTROL, ONE OF THE MWPA INTERESTS, THE PROPOSED PROJECT CAN NEVERTHELESS BE APPROVED UNDER THE MWPA AND THE WETLANDS REGULATIONS**

As noted previously at pp. 8-10 above, where a proposed project’s impacts to Bank are deemed to be significant to one or more of the MWPA interests, the project proponent must ensure that the project activities comply with the General Performance Standards set forth in 310 CMR 10.54(4). As discussed below, the Petitioners failed to present any probative evidence at the Hearing that the proposed Project fails to comply with these Performance Standards. However, the Applicant and the Department presented persuasive and credible expert testimony establishing that the proposed Project activities fully comply with the General Performance Standards for Bank as required by 310 CMR 10.54(4), and the Department’s SOC appropriately conditioned and approved these Project activities to ensure protection of the MWPA interests relating to this resource area. In addition, the Department has offered to incorporate two additional conditions in the FOC approving the proposed Project to further enhance and protect the Bank resource area, which I find to be consistent with the goals and purpose of the MWPA and the Wetlands Regulations. For these reasons, I find that the proposed Project can be approved pursuant to the MWPA and the Wetland Regulations.

**A. While The Proposed Removal And Relocation Of The 30 Linear Feet Of Bank Already Satisfies The General Performance Standards Of 310 CMR 10.54(4), This Resource Area Will Be Further Enhanced/Protected By Two Additional Conditions Proposed By The Department**

Mr. Krevosky, the Petitioners’ expert witness, did not present any testimony or evidence

specifying why or how the proposed Project activities fail to meet the General Performance Standards for Bank as set forth in 310 CMR 10.54(4). Instead, both his Direct PFT and Rebuttal PFT focused exclusively upon: (1) the purported inadequacy of the Applicant's NOI application materials, with particular emphasis upon the Plan (a claim which I rejected above, at pp. 14-18; (2) the soil characteristics and erosion propensities of the "site" (including photographs); and (3) a generalized assertion that Applicant has failed to propose how to stabilize the "site" (with no detailed discussion of "Bank" stability). Mr. Krevosky's Direct PFT, ¶¶ 6, 7, 9, 12; Mr. Krevosky's Rebuttal PFT, Answer to Question 10 (no number references). While Mr. Krevosky also asserted generally that both the Applicant's Plan and the Department's SOC are insufficient "to ensure Best Management Practices are followed in order to adhere to Performance Standards," he did not address any specific Performance Standards pertaining to Bank in this Rebuttal PFT, or anywhere else in his testimony. See Mr. Krevosky's Rebuttal PFT, Answer to Question 13 (no number references). Due to the Petitioners' lack of any specific evidence addressing the proposed Project's alleged failure to comply with the General Performance Standards for Bank as set forth in 310 CMR 10.54(4), I find that Petitioners have failed to meet their burden of proof, and, consequently, have waived this issue.

In addition, based upon the persuasive and credible testimony of the Applicant's and the Department's respective expert witnesses, Mr. Allen and Ms. Selby, I find that the proposed Project fully complies with the General Performance Standards for Bank set forth at 310 CMR 10.54(4), and has appropriately been conditioned and approved through the Department's SOC, to address any potential MWPA interests for Bank, for the following reasons.

First, Mr. Allen in his PFT and at the Hearing, comprehensively addressed all five

applicable General Performance Standards pertaining to Bank,<sup>4</sup> and testified as to how the proposed Project complied with these Standards, as follows:

1. The Bank's physical stability (310 CMR 10.54(4)(a)1): Mr. Allen testified in his PFT that the Bank's stability will not be changed negatively by the relocation of the stone retaining wall, because the wall in the relocated area will continue to provide the same function. Mr. Allen's PFT, ¶ 5. At the Hearing, Mr. Allen testified that since the existing wall is stable and functional, the proposed relocation of this structure will be to put it back in a similar configuration, and that although he did not know if the existing wall had a footing, he stated that walls of this type are normally built on gravel and, if the wall remained level and drained properly, it should remain stable upon relocation. (Digital Recording of Hearing, at 1:03).
2. The water carrying capacity of the existing channel within the Bank (310 CMR 10.54(4)(a)2): In his PFT, Mr. Allen testified that the water carrying capacity of the existing channel within the Bank will not be altered, but rather, expanded by the proposed Project activities, by increasing the volume of storage capacity within the Cedar Meadow Pond and corresponding flood zone. Mr. Allen's PFT, ¶ 5.
3. Groundwater and surface water capacity (310 CMR 10.54(4)(a)3): In his PFT, Mr. Allen testified that groundwater and surface water capacity will not be altered because the proposed Project includes siltation control barriers. Mr. Allen's PFT, ¶ 5. In addition, he recommended that the proposed Project activities be performed during dry/drawdown conditions and work areas subsequently restored to existing pervious, non-erosive conditions. *Id.* At the Hearing, Mr. Allen further testified that, although he did not expect to see the stockpiling of materials for a project of this size, any stockpiles would be covered to prevent erosion and located as from the resource area as possible, and also noted that SOC Special Condition No. 31 addresses this issue.<sup>5</sup>

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<sup>4</sup> Bank General Performance Standard 310 CMR 10.54(4)(a)6, which requires that any proposed Bank project not impair "any stream crossing" within the Bank, is not applicable to this Project.

<sup>5</sup> SOC Special Condition No. 31 provides as follows:

Any debris, construction material, fill, and excavated material shall be stockpiled as far away from designated wetland resource areas as practicable, and at a location to prevent any impact to wetland resource areas. At no time shall any material (i.e., fill, stumps, brush, logs, slash, rubbish or construction debris, etc.) be disposed or buried within wetland resource areas. To prevent impact to wetland resource areas, any soil stockpiled within the Buffer Zone shall be surrounded with appropriate sediment control measures and covered daily until such time when it will be used, or moved to outside the Buffer Zone.

4. The capacity of the Bank to provide breeding habitat, escape cover and food for fisheries (310 CMR 10.54(4)(a)4): Mr. Allen testified in his PFT that, since the existing walled Bank does not currently provide these functions, the relocated wall will have the same characteristics. Mr. Allen's PFT, ¶ 5.
5. The Bank's capacity to provide important wildlife habitat functions (310 CMR 10.54(4)(a)5): In his PFT, Mr. Allen testified that both the current, and the proposed, walled Bank does not, and will not, provide important wildlife habitat functions such as food, shelter, migratory and breeding habitat or overwintering areas. Mr. Allen's PFT, ¶ 5.

In her PFT, Ms. Selby concurred with Mr. Allen's assessment and analysis, as described above, of how the proposed Project satisfies the General Performance Standards for Bank set forth in 310 CMR 10.54(4) and has been conditioned and approved through the Department's SOC to adequately satisfy these Standards. Ms. Selby's PFT, ¶¶ 15, 16. In addition, at the Hearing, Ms. Selby addressed the issue of "footings" for the wall to ensure Bank stability, re-emphasizing that, since the Applicant's new wall must be a replication of the existing wall, the Applicant would need to install a footing for the wall if one exists on the current structure. Digital Recording of Hearing, at approximately 1:58; Ms. Selby's PFT, ¶ 15 ("The proposed retaining wall (Bank) will have the same characteristics as the existing retaining wall."). Ms. Selby further testified that, in the event that footings were found during the proposed Project activities, the Applicant would be required to notify the Department in accordance with SOC Special Condition No. 21, because this circumstance would constitute a change in the proposed plans.<sup>6</sup> Id. However, at the Hearing, Ms. Selby also pointed out that she saw no evidence that

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<sup>6</sup> SOC Special Condition No. 21 provides as follows:

MassDEP shall be notified in writing of any changes in the plans for this project. MassDEP will determine whether the changes will require the filing of a new application or whether the changes are of relatively minor nature and can be considered as an amendment to the final order of conditions.

the current wall was unstable during her site visit for this Project. Id.

Finally, Ms. Selby also corroborated Mr. Allen's testimony at the Hearing that the stockpiling of materials to control potential erosion was conditioned by SOC Special Condition No. 31 discussed above, because stockpiling is not permitted on the (Cedar Meadow Pond) bed, which is a resource area, and SOC Special Condition No. 35 precludes any further alteration of resource areas.<sup>7</sup> Indeed, Ms. Selby testified that her greatest concern regarding the proposed Project was the potential for erosion and siltation into the Cedar Meadow Pond during the construction activities. Ms. Selby's PFT, ¶ 17. For this reason, she also testified at the Hearing that, while the site was stable at the time of her inspection, her review of the Petitioners' rebuttal photographs indicating ongoing site erosion caused her to suggest that it would be useful for the Applicant to propose a method for long term stabilization.

Based upon Mr. Allen's and Ms. Selby's unrefuted expert testimony, I find that the proposed Project has already met the General Performance Standards for Bank as set forth in 310 CMR 10.54(4) and has been appropriately conditioned and approved by the Department in the SOC to protect the MWPA interests relating to Bank impacts. However, in response to the issues raised at the Hearing regarding the footings for the retaining wall, and the potential for erosion and sedimentation problems in connection with the proposed Project, the Department has offered to add the following two conditions in the FOC approving the Project as follows:

Additional Condition No. 1: Upon removal of the existing retaining wall, the area under the wall will be examined for the presence of a footing or other stable base.

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<sup>7</sup> SOC Special Condition No. 35 provides as follows:

If any wetland resource areas are altered or disturbed beyond that permitted in this Order, MassDEP shall be notified immediately and a restoration plan submitted. Any unpermitted alterations to wetland resource areas shall be restored.



The retaining wall will be relocated using a footing or base that is similar to what is under the existing retaining wall.

Additional Condition No. 2: Any area that is exposed after relocation of the retaining wall will be stabilized in such a way as to prevent erosion and sedimentation impacts to the wetland resource areas. Stabilization measures could include using at least 4 inches of compacted peastone or gravel with particles that are at least one-quarter inch (minimum) in diameter.

I find that the Department's proposed addition of these two conditions in the FOC will further enhance and protect the Bank resource area and is consistent with the goals and purpose of the MWPA and the Wetland Regulations. For these reasons, I find that while the proposed Project already meets the General Performance Standards for Bank, I also accept the Department's recommendation of the inclusion of Additional Conditions Nos. 1 and 2 into the FOC approving the Project.<sup>8</sup>

**B. While The Proposed Work In The Buffer Zone To The Bank Already Satisfies The Requirements Of 310 CMR 10.53(1), The Erosion And Sedimentation Controls That The Applicant Has Proposed To Utilize During The Removal And Relocation Of The 30 Linear Feet Of Bank Will Be Further Enhanced/Protected By One Of The Additional Conditions Proposed By The Department**

As noted previously at pp. 7 and 10 above, where proposed project activities occur in the Buffer Zone to a wetlands resource area, 310 CMR 10.53(1) requires the local Conservation Commission (or the Department on appeal) to condition the work activities in order to protect the MWPA interests in the adjacent resource areas. These conditions may require, among other

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<sup>8</sup> I also note for the record that the Petitioners proposed 10 additional conditions for incorporation into the FOC "along with any additional conditions as may be recommended by the Department based on hearing testimony in furtherance of the purposes of the MWPA." Petitioners' Closing Brief, pp. 3-6. I reject Petitioners' proposed 10 conditions for the following reasons: (1) the Petitioners have failed, in their case in chief, to provide any testimony as to why the Department's current SOC conditions are inadequate to address the impacts of the proposed Project activities; (2) several of the Petitioners' proposed conditions are already addressed by the SOC (e.g., Stockpiling of materials, as discussed above); and (3) several the Petitioners' proposed conditions, including but not limited to No. 1 (requiring, among other things, revised plans consisting of a stamped land surveyor plan), No. 2, (requiring among other things, an independent environmental consultant to oversee all work activities), and No. 7 (requirement to stake the mean high water level mark by a licensed land surveyor) are unduly burdensome and appear designed to prevent the Applicant from pursuing this Project in a reasonable and cost-effective manner.

things, “limitations on the scope and location of the work in the Buffer Zone ... to avoid alteration of [the protected MWPA resource]” and the requirement of “erosion and sedimentation controls during construction [and] a clear limit of work . . . .” At the Hearing, the Petitioners failed to prove that the proposed Project work activities in the Buffer Zone fail to meet the requirements of 310 CMR 10.53(1).

At the Hearing, the Petitioners’ expert witness, Mr. Krevosky, only made generalized statements, without specific opinion or recommendation as to how any alleged deficiencies should be addressed, regarding the proposed Project’s alleged inadequacy of Buffer Zone protections, including the following:

1. Mr. Krevosky’s Direct PFT, ¶ 6 - “the Applicant has failed to provide sufficient details for the proposed work to demonstrate that the site will be stable upon completion.”
2. Mr. Krevosky’s Direct PFT, ¶ 7 - “No treatment of the buffer zone is indicated, which leads me to believe that the Bank and the Buffer Zone will be unstable given the soil conditions on site.”
3. Mr. Krevosky’s Direct PFT, ¶ 12 - “the Applicant has failed to demonstrate how he proposes to stabilize the site to take into account the soils on site and the potential for erosion that exists.”

Furthermore, while Mr. Krevosky offered, through his Rebuttal PFT, photographs depicting some erosion existing at the proposed Project site, he failed to present any testimony as to how the Applicant’s proposed Project has (or has not) addressed potential erosion and sedimentation issues through the NOI application or Plan materials (which, as described above, he simply deemed to be “insufficient”).

In response, the Applicant’s and the Department’s respective expert witness, Mr. Allen and Ms. Selby, presented credible and persuasive testimony that the proposed Project’s erosion and sedimentation measures, together with the SOC conditions, will protect the Buffer Zone and

the Bank and satisfies the requirements of 310 CMR 10.53(1). In ¶ 6 of his PFT, Mr. Allen refuted Mr. Krevosky's statement that the proposed Project has no treatment plan to prevent erosion by pointing out that the Plan specifies that straw wattles and a silt fence will be installed at the limit of work, the existing stone retaining wall will be removed and re-set, the wall will then be backfilled with crushed stone and filter fabric, and the existing grass surface on the Property will be tapered down slightly to meet the top of the wall. With respect to these proposed erosion measures, Mr. Allen testified that "the proposed wattle and silt fence, if properly toed into the ground and used during dry/drawdown conditions, are adequate to prevent erosion and to protect wetland resources in the vicinity of the Project," and that "if the Project area is returned to stable and non-erosive conditions, . . . there will be no adverse impact to wetland resource areas." Mr. Allen's PFT, ¶ 5. At the Hearing, Mr. Allen also noted that SOC Special Conditions Nos. 32 and 37 have been imposed by the Department for the proposed Project in order to protect the Buffer Zone.<sup>9</sup>

In her PFT, Ms. Selby concurred with Mr. Allen's analysis and conclusion that the Applicant's erosion measures have been conditioned and approved by the Department to satisfy the requirements of 310 CMR 10.53(1). Ms. Selby's PFT, ¶ 16. Ms. Selby further testified that SOC Special Conditions Nos. 32 and 37, discussed above, protect the Buffer Zone by requiring site stabilization to occur as soon as the work has been completed, and also require the Applicant

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<sup>9</sup> SOC Special Conditions Nos. 32 and 37 respectively provide as follows:

Special Condition No. 32: Upon completing construction-related activities and final grading, all disturbed soil surfaces shall be temporarily stabilized against erosion, then permanently stabilized as soon as possible.

Special Condition No. 37: Once the site is permanently stabilized the Applicant shall request written permission from MassDEP for the removal of erosion and sedimentation controls.

to keep all erosion and sedimentation controls in place until the site has been stabilized. Ms. Selby's PFT, ¶ 18.<sup>10</sup>

Based on Mr. Allen's and Ms. Selby's testimony, I find that the Applicant's erosion and sedimentation control measures for the proposed Project, as conditioned and approved by the Department in the SOC, satisfy the requirements of 310 CMR 10.53(1). I also note that the Department's proposed Additional Condition No. 2 for inclusion in the FOC (see pp. 5 and 25 above) provides additional protection for both the Bank and Buffer Zone, by requiring stabilization of any areas exposed after relocation of the existing wall and recommending the use of at least four inches of compacted peastone/gravel of a minimum diameter to facilitate the stabilization process. As a result, I also recommend the inclusion of Additional Condition No. 2 in the FOC as discussed above to further enhance and protect both the Bank and Buffer Zone areas from potential erosion/sedimentation impacts that may result from the proposed Project.

**C. While The Erosion And Sedimentation Controls That The Applicant Has Proposed To Utilize For The Removal And Relocation Of The 30 Linear Feet Of Bank, As Conditioned And Approved By The Department In The SOC, Are Adequate To Protect The Bank, These Measures Will Be Further Enhanced/Protected By One Of The Additional Conditions Proposed By The Department**

This last Issue for Resolution in the appeal is closely related to the preceding issue (see pp. 25-28 above) regarding whether the proposed work in the Buffer Zone to the Bank satisfies the requirements of 310 CMR 10.53(1), and focuses upon the adequacy of the Applicant's proposed erosion and sedimentation controls to protect the Bank (and, by implication, the Buffer Zone as well) during proposed Project activities. As noted several times previously, the Petitioners had the burden of proof on all Issues for Resolution in this appeal. Based upon my

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<sup>10</sup> See also discussion below, at pp. 28-31, of the final adjudicatory issue regarding the adequacy of the Applicant's proposed erosion and sedimentation controls to protect the Bank, where there is an expanded discussion of the Department's SOC requirements to address the proposed Project's potential erosion/sediment impacts.

review of the record, Petitioners again failed to meet their burden, since it appears that their evidence on this issue consisted solely of the PFT of Mr. Krevosky that I summarized in the preceding section of this Decision, which was both inadequate, and thoroughly and effectively refuted by Mr. Allen's and Ms. Selby's testimony. Consequently, the Petitioners' failure to sustain their burden of proof results in their waiver of this issue.

In addition, Mr. Allen and Mr. Selby presented persuasive and credible testimony that specifically addressed the issue of how the Applicant's erosion and sedimentation measures, as conditioned and approved by the Department in the SOC, are adequate to protect the Bank resource area (and the Buffer Zone) from potential negative Project impacts. After summarizing the proposed erosion and sedimentation controls for the proposed Project (see prior discussion at pp. 26-28 above), Mr. Allen testified that "[t]he proposed backfill with stone and fabric, combined with restoration of grass up to the wall, will preserve the stability of the Bank and Buffer Zone," and assuming that the work is conducted during the dry/drawdown period of the Cedar Meadow Pond, "the proposed wattle and silt fence barrier will be sufficient to control erosion and sedimentation into the [Pond] during construction." Mr. Allen's PFT, ¶ 6. Mr. Allen further testified that "if the wall (i.e., the Bank) is removed and re-constructed, in accordance with the plan and in a similar configuration, the re-constructed wall should be every bit as stable as the existing wall . . . ." Id.

Ms. Selby concurred with Mr. Allen's analysis regarding the stability of the re-constructed wall. Ms. Selby's PFT, ¶ 19. In addition, Ms. Selby extensively addressed in her testimony how the SOC conditions, including General Condition No. 18 and Special Conditions Nos. 22, 23, and 25-32, address the prevention of erosion and sedimentation into Cedar Meadow

Pond in order to protect both the Bank and the Buffer Zone areas by requiring the following measures:

1. The installation of erosion and sedimentation barriers prior to the initiation of work activities;
2. Notification by the Applicant to both the LCC and the Department prior to the initiation of the proposed Project so that there can be verification of the proper installation of the erosion and sedimentation controls;
3. The maintenance of all erosion and sedimentation barriers until all disturbed areas have been fully stabilized;
4. The requirement that the Applicant is not limited to and/or must utilize additional erosion and sedimentation measures (in addition to those shown on the Plan) to prevent a discharge;
5. The inspection of all erosion and sedimentation controls at the end of each construction day, and the maintenance, reinforcement, and/or repair of these controls as necessary; and
6. The requirement that the Project work activities take place during the annual drawdown of the Pond (i.e., during low flow conditions).

Ms. Selby's PFT, ¶ 17. At the Hearing, Ms. Selby reconfirmed that she will inspect the erosion and siltation controls prior to initiation of the proposed Project work activities and require corrections to these controls if necessary.

Based on Mr. Allen's and Ms. Selby's expert testimony on this issue, I find that the Applicant's erosion and sedimentation control measures for the proposed Project, as conditioned and approved by the Department in the SOC, are adequate to protect the Bank (and the Buffer Zone as well). In addition, as I noted in the preceding section of my Decision (see pp. 25-28 above), the Department's proposed Additional Condition No. 2 for inclusion in the FOC approving the proposed Project provides additional protection for both the Bank and Buffer Zone, by requiring stabilization of any areas exposed after relocation of the existing wall and

recommending the use of at least four inches of compacted peastone/gravel of a minimum diameter to facilitate the stabilization process. Accordingly, I recommend the inclusion of Additional Condition No. 2 in the FOC to further enhance and protect both the Bank and Buffer Zone areas from potential erosion/sedimentation impacts that may result from this Project.

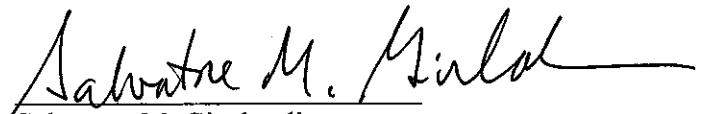
### **CONCLUSION**

For the foregoing reasons, I recommend that the Commissioner issue a Final Decision affirming the Department's issuance of the SOC approving the proposed Project and directing the Department to issue an FOC approving the Project that includes the following Additional Conditions No. 1 and 2 proposed by the Department to further enhance/protect both the Bank's stability, and the Bank and Buffer Zone from potential erosion and sedimentation impacts of the Project:

Additional Condition No. 1: Upon removal of the existing retaining wall, the area under the wall will be examined for the presence of a footing or other stable base. The retaining wall will be relocated using a footing or base that is similar to what is under the existing retaining wall; and

Additional Condition No. 2: Any area that is exposed after relocation of the retaining wall will be stabilized in such a way as to prevent erosion and sedimentation impacts to the wetland resource areas. Stabilization measures could include using at least 4 inches of compacted peastone or gravel with particles that are at least one-quarter inch (minimum) in diameter.

Date: 08/09/18

  
Salvatore M. Giorlandino  
Chief Presiding Officer

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

This decision is a Recommended Final Decision of the Chief Presiding Officer. It has

been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d) and/or 14(e), and may not be appealed to Superior Court pursuant to G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect. Because this matter has now been transmitted to the Commissioner, no party and no other person directly or indirectly involved in this administrative appeal shall neither (1) file a motion to renew or reargue this Recommended Final Decision or any part of it, nor (2) communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.



## **SERVICE LIST**

**Petitioners:** Corey LH Lee and Tommy J. Lee;

**Legal representative:** Donald J. O'Neil, Esq.  
688 Pleasant Street  
Worcester, MA 01602  
**e-mail:** djo@oneilbarrister.com

**Applicant:** Robert J. Cote  
63 Fairview Drive  
Leicester, MA 01524  
**e-mail:** BOB.603@hotmail.com;

**Legal representative:** None listed in Petitioners' Appeal Notice;

**Conservation Commission:** Town of Leicester Conservation Commission  
c/o Barbara Knox  
3 Washburn Square  
Leicester, MA 01524  
**e-mail:** KnoxB@leicesterma.org;

**Legal representative:** Peter L. Mello, Esq.  
Petrini & Associates, P.C.  
372 Union Avenue  
Framingham, MA 01702  
**e-mail:** pmello@petrinilaw.com;

**The Department:** Denise Child, Section Chief, Wetlands Program  
MassDEP/Central Regional Office  
Bureau of Water Resources  
8 New Bond Street  
Worcester, MA 01606  
**e-mail:** Denise.Child@state.ma.us;

Meghan Selby, Wetlands Analyst  
MassDEP/Central Regional Office  
Bureau of Water Resources  
8 New Bond Street  
Worcester, MA 01606  
**e-mail:** Meghan.Selby@state.ma.us;

**Legal representative:** Elizabeth Kimball, Senior Counsel

MassDEP Office of General Counsel  
One Winter Street  
Boston, MA 02108;  
**e-mail:** Elizabeth.Kimball@state.ma.us;

**cc:** Anne Berlin Blackman, Chief Regional Counsel  
MassDEP/Central Regional Office  
8 New Bond Street  
Worcester, MA 01606;  
**e-mail:** Anne.Blackman@state.ma.us;

Leslie DeFilippis, Paralegal  
MassDEP/Office of General Counsel  
One Winter Street  
Boston, MA 02108.