

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

March 31, 2017

In the Matter of
Sunset City, Inc.

OADR Docket No. WET-2016-016
DEP File No. 128-1536
Charlton, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

In this appeal, Steven Chidester ("Mr. Chidester"), as the Designated Representative of more than 10 residents of Charlton, Massachusetts (collectively "the Petitioners"), challenges a Superseding Order of Conditions ("SOC") that the Central Regional Office of the Massachusetts Department of Environmental Protection ("the Department" or "MassDEP") issued to Sunset City, Inc. ("the Applicant") on July 15, 2016, 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"). The SOC approved the Applicant's proposed Project on 22 acres of land located off Brookfield Road in Charlton owned by Gary W. Jennings and Iris A. Jennings ("the Jennings") and identified in documents recorded in the Worcester South District Registry of Deeds in Book 5221, Page 286; Book 17487, Page 59; Book 11350, Page 278; Book 6394,

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Page 352; and Book 28485, Page 279 (“the Property”). Specifically, the SOC authorized the construction on the Property of an off-road vehicle/motocross facility for training, riding, and staged events. SOC Transmittal Letter, at p. 1. Access to the proposed Project area from Brookfield Road will be provided via a 24-foot wide gravel roadway/driveway. Id. Proposed Site work includes vegetation removal, grading, and construction of the access roadway, track, parking spaces, buildings, and a stormwater management system. Id.

The Petitioners contend that the Department erred in issuing the SOC approving the proposed Project because in their view the Project will be detrimental to wetlands and not satisfy several of the Department’s Stormwater Management Standards as set forth in the Wetlands Regulations at 310 CMR 10.05(6)(k). Petitioners’ Appeal Notice, at pp. 2-3; Petitioners’ Pre-Hearing Statement, at pp. 1-2. The Applicant and the Department dispute the Petitioners’ claims, contending that the Department properly issued the SOC, and request that the SOC be affirmed. See Applicant’s Pre-Hearing Statement and Department’s Pre-Hearing Statement.

On December 20, 2016, I conducted an evidentiary Adjudicatory Hearing (“Hearing”) to resolve the following issues raised by the Petitioners’ appeal of the SOC¹:

1. Whether the proposed Project has been conditioned to meet the requirements of 310 CMR 10.02(2)(b)3 and 10.53(1) for proposed work in [the] Buffer Zone [to wetlands areas protected by the MWPA and the Wetlands Regulations]?
2. Whether the proposed Project complies with Stormwater Management Standard 4 at 310 CMR 10.05(6)(k)4, which requires that a “Stormwater management system . . . be designed to remove 80% of the average annual post-construction load of Total Suspended Solids (TSS)”?

¹ All of the issues set forth above were established at the Pre-Screening Conference (“Pre-Hearing Conference”) that I conducted with the parties on August 26, 2016. Pre-Screening Conference Report and Order, August 30, 2016 (“Conf. Rept. & Order”), at pp. 3-5.

3. Whether the proposed Project complies with Stormwater Management Standard 5 at 310 CMR 10.05(6)(k)5, which requires that “[f]or land uses with higher potential pollutant loads, source control and pollution prevention shall be implemented in accordance with the Massachusetts Stormwater Handbook to eliminate or reduce the discharge of stormwater runoff from such land uses to the maximum extent practicable”?
4. Whether the proposed Project complies with Stormwater Management Standard 6 at 310 CMR 10.05(6)(k)6, which provides in relevant part that: “stormwater discharges near or to any . . . critical area require the use of the specific source control and pollution prevention measures and the specific structural stormwater best management practices determined by the Department to be suitable for managing discharges to such area as provided in the Massachusetts Stormwater Handbook. . .” ?
5. Whether the proposed Project complies with Stormwater Management Standard 8 at 310 CMR 10.05(6)(k)8, which requires that “[a] plan to control construction related impacts including erosion, sedimentation and other pollutant sources during construction and land disturbance activities (construction period erosion, sedimentation and pollution prevention plan) shall be developed and implemented”?
6. Whether the proposed Project complies with Stormwater Management Standard 9 at 310 CMR 10.05(6)(k)9, which requires that “[a] long-term operation and maintenance plan shall be developed and implemented to ensure that the stormwater management system functions as designed”?
7. Whether the proposed Project complies with Stormwater Management Standard 10 at 310 CMR 10.05(6)(k)10, which provides that “[a]ll illicit discharges to the stormwater management system are prohibited”?

In accordance with the standard practice of the Office of Appeals and Dispute Resolution (“OADR”), the Hearing was digitally recorded, and following the Hearing, the parties were provided internet access to the recording, which assisted them in drafting and filing their respective Post-Hearing or Closing Legal Memoranda in the case.

At the Hearing, the parties presented witnesses and documentary evidence in support of their respective positions in the case. A total of four witnesses filed sworn Pre-filed Testimony

("PFT") on behalf of the parties for the Hearing in support of the parties' respective positions in the case and were cross-examined under oath. The parties' respective witnesses were as follows.

Mr. Chidester was the Petitioners' sole witness. He is a hydrologist with very limited experience in wetlands permitting under the MWPA and the Wetlands Regulations. Pre-filed Testimony of Steven D. Chidester ("Mr. Chidester's PFT"), at p. 1, lines 9-17 and p. 2, line 1; Exhibit SC-SDC-2 to Mr. Chidester's PFT. At the Hearing, Mr. Chidester stated that he did not consider himself a wetlands expert.

The Applicant's witnesses were: (1) Glenn Krevosky, a wetlands expert ("Mr. Krevosky"); and (2) Jason D. Dubois, a Massachusetts Professional Civil Engineer. Both have significant experience in wetlands permitting under the MWPA and the Wetlands Regulations. Pre-filed Direct Testimony of Glenn Krevosky ("Mr. Krevosky's PFT"), p. 2, lines 5-22 and Exhibit 2 to Mr. Krevosky's PFT; Pre-filed Direct Testimony of Jason D. Dubois, P.E. ("Mr. Dubois's PFT"), at p. 2, lines 6-29 and p. 3, lines 30-35; and Exhibit 2 to Mr. Dubois's PFT.

The Department's witness was Gary Dulmaine, a wetlands expert and Environmental Analyst in the Wetlands Program of the Department's Central Regional Office since 1994. Pre-filed Direct Testimony of Gary Dulmaine ("Mr. Dulmaine's PFT"), ¶¶ 1-4; Attachment No. 1 to Mr. Dulmaine's PFT. Mr. Dulmaine has significant experience in wetlands permitting under the MWPA and the Wetlands Regulations. Id. During his tenure with the Department, Mr.

Dulmaine:

[has] administer[ed] and enforce[ed] the [MWPA and the Wetlands Regulations]
.... Performance of these duties [have] includ[ed] technical review of Notices of
Intent, Orders of Conditions[,] topographic and engineering plans, hydrologic
calculations, stormwater management reports, [and] soil log data[;] [and]
analy[zing] vegetation and soils using proper scientific methodologies to

determine and verify the identification and boundaries of vegetated wetlands for jurisdictional determinations. . . .

Mr. Dulmaine's PFT, ¶ 2. His duties also have "includ[ed] the performance of site evaluations and compliance assessments in connection with the Department's issuance of Superseding Determinations of Applicability, Superseding Orders of Conditions, and Superseding Orders of Resource Area Delineations. . . ." Id.

Prior to the Hearing, both the Applicant and the Department moved for a Directed Decision pursuant to 310 CMR 1.01(11)(e), contending that the Petitioners had failed to sustain their case with credible expert testimony.² Exercising my discretion under 310 CMR 1.01(11)(e), I reserved making a ruling on the motion until after the Hearing.

Based on the testimonial and documentary evidence introduced at the Hearing as discussed in detail below, I recommend that the Department's Commissioner issue a Final Decision: (1) affirming the SOC and (2) either: (a) granting the Applicant's and Department's Motion for Directed Decision because the Petitioners' evidentiary submissions were deficient as a matter of law; or (b) finding that a strong preponderance of the evidence introduced at the Hearing demonstrated that the Department properly issued the SOC

² 310 CMR 1.01(11)(e) provides as follows:

Upon the petitioner's submission of prefiled testimony, or at the close of its live direct testimony if not prefiled, any opposing party may move for the dismissal of any or all of the petitioner's claims, on the ground that upon the facts or the law the petitioner has failed to sustain its case Decision on the motion . . . may be reserved until the close of all the evidence. . . .

The legal standard governing motions under 310 CMR 1.01(11)(e) is discussed below, at pp. 8-9.

approving the Applicant's proposed Project pursuant to the MWPA and the Wetlands Regulations.

STATUTORY AND REGULATORY FRAMEWORK

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, 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

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Decision (December 17, 2015), 22 DEPR 202, 204 (2015).

The MWPA and the Wetlands Regulations provide that “[n]o person shall remove, fill, dredge[,] or alter³ any [wetlands] area subject to protection under [the MWPA and Wetlands 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, supra, 2014 MA ENV LEXIS 76, at 7; Webster Ventures, supra, 2015 MA ENV LEXIS 14, at 11-12; Elite Home Builders, supra, 22 DEPR at 204. “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

³ 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;
- (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.

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 construction activities in protected wetlands areas and "are allowed to 'impose such conditions as will contribute to the protection of the interests described [in MWPA and the 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 wetland delineations forming the basis of the Orders, are valid for three years from the date of the Order's issuance. 310 CMR 10.05(6)(d). However, any "order [by the Department] shall supersede the prior order of the conservation commission . . . and all work shall be done in accordance with the [Department's] order." Healer, supra.⁴

FINDINGS

- I. THE APPLICANT AND THE DEPARTMENT ARE ENTITLED TO A DIRECTED DECISION AFFIRMING THE SOC, OR IN THE ALTERNATIVE, THE SOC SHOULD BE AFFIRMED BECAUSE A STRONG PREPONDERANCE OF EVIDENCE INTRODUCED AT THE HEARING DEMONSTRATED THAT THE DEPARTMENT PROPERLY ISSUED THE SOC.**

"Dismissal [of an appeal pursuant to 310 CMR 1.01(11)(e)] for failure to sustain a case, also known as a directed decision, is appropriate when a party's direct case - generally, the

⁴ Here, the Town of Charlton's Conservation Commission approved the proposed Project on October 7, 2015 and the Petitioners thereafter sought an SOC from the Department to overturn the Commission's decision. Mr. Dulmaine's PFT, ¶¶ 5-16. The Petitioners did not prevail in their request and brought this appeal to overturn the Department's SOC approving the proposed Project. Id.

testimony and exhibits comprising its prefiled direct testimony - presents no evidence from a credible source in support of its position on the identified issues.” Webster Ventures, supra, 2015 MA ENV LEXIS 14, at 32-33; In the Matter of Jodi Dupras, OADR Docket No. WET-2012-026, Recommended Final Decision (July 3, 2013), 2013 MA ENV LEXIS 40, at 14-15, adopted as Final Decision, (July 11, 2013), 2013 MA ENV LEXIS 41, citing, In the Matter of Trammell Crow Residential, OADR Docket No. WET-2010-037, Recommended Final Decision (April 1, 2011), 2011 MA ENV LEXIS 21, at 6-8, adopted as Final Decision (April 21, 2011), 2011 MA ENV LEXIS 20; In the Matter of Town of Truro, Docket No. 94-066, Final Decision (August 21, 1995), aff’d sub nom., Worthington v. Town of Truro, Memorandum of Decision and Order on Plaintiff’s Complaint for Judicial Review (Suffolk Super. Ct., May 30, 1996)).

As discussed in detail below, the Petitioners’ evidentiary submissions in the PFT of their witness, Mr. Chidester, were deficient as a matter of law and warrant a directed decision in the Applicant’s and the Department’s favor affirming the SOC. In the alternative, I find, based on a strong preponderance of the evidence introduced at the Hearing that the Department properly issued the SOC approving the proposed Project.

II. THE PETITIONERS’ BURDEN OF PROOF AT THE HEARING

As I explained at the August 26, 2016 Pre-Hearing Conference that I conducted with the parties and later confirmed in my Conf. Rept. and Order of August 30, 2016 (pp. 5-7) that followed the Conference, the Petitioners had the burden of proving by a preponderance of the evidence at the Hearing that the Department erred in issuing the SOC approving the proposed Project. 310 CMR 10.03(2), 10.05(7)(j)2.b.iv, 10.05(7)(j)2.b.v, 10.05(7)(j)3.a, 10.04,

10.05(7)(j)3.b; Vecchione, supra, 2014 MA ENV LEXIS 76, at 9-12; Elite Home Builders, supra, 22 DEPR at 205.

Specifically, the Petitioners were required to present “credible evidence from a competent source in support of each claim of factual error [made against the Department], including any relevant expert report(s), plan(s), or photograph(s).” 310 CMR 10.05(7)(j)3.c; Dupras, 2013 MA ENV LEXIS 40, at 11; Vecchione, supra, 2014 MA ENV LEXIS 76, at 10; Elite Home Builders, supra, 22 DEPR at 205. “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; Dupras, supra, 2013 MA ENV LEXIS 40, at 11-12; Vecchione, supra, 2014 MA ENV LEXIS 76, at 10; Elite Home Builders, supra, 22 DEPR at 205. 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. Pittsfield Airport Commission, supra, 2010 MA ENV LEXIS 89, at 36-39 (petitioner’s failure to submit expert testimony in appeal challenging MassDEP Commissioner’s issuance of 401 Water Quality Certification Variance to Pittsfield Airport Commission fatal to petitioner’s claims 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”); Dupras, supra, 2013 MA ENV LEXIS 40, at 36-37 (petitioner not

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qualified to interpret technical data involving Shellfish Suitability Areas); Vecchione, supra, 2014 MA ENV LEXIS 76, at 26 (petitioner not qualified to testify as to impacts on wetlands resources areas due to his lack of expertise in wetlands protection).

As for the relevancy, admissibility, and weight of evidence that the Petitioners, the Applicant, and the Department sought to introduce at the Hearing, these issues were 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)(1), “[t]he weight to be attached to any evidence . . . rest[ed] within the discretion of the Presiding Officer. . . .”

III. THE PETITIONERS FAILED TO MEET THEIR BURDEN OF PROOF AT THE HEARING

A. The proposed Project has been conditioned to satisfy the requirements of 310 CMR 10.02(2)(b)3 and 10.53(1) for proposed work in the Buffer Zone.

As noted above, a party must file an NOI for “[a]ny activity . . . proposed or undertaken within 100 feet of [any protected wetlands]” described as “the Buffer Zone” by the Wetlands Regulations, “which, in the judgment of the [permit] issuing authority, will alter [any protected wetlands].” 310 CMR 10.02(2)(b). The provisions of 310 CMR 10.53(1) set forth the standards for work in a Buffer Zone adjacent to a protected wetlands area. The regulation provides that the

local Conservation Commission and the Department:

shall impose conditions to protect the interests of the [MHPA] identified for the adjacent [wetlands] area. . . . The issuing authority may consider the characteristics of the buffer zone, such as the presence of steep slopes, that may increase the potential for adverse impacts on [the adjacent wetlands] areas. Conditions may include limitations on the scope and location of work in the buffer zone as necessary to avoid alteration of [the adjacent wetlands] areas. The issuing authority may require erosion and sedimentation controls during construction, a clear limit of work, and the preservation of natural vegetation adjacent to the [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 [MHPA]. . . .

310 CMR 10.53(1).

At the Hearing, Mr. Chidester admitted in his testimony that “[b]ased on the change of [the proposed Project’s] plans approved by [the Department][,] . . . portions of the [proposed] Motocross Facility development have been moved outside the 100 foot Bordering Vegetated Wetland buffer zones,” and that “[t]his change has alleviated many of the [Petitioners’] concerns regarding conditioning [the Project] to meet the requirements of 310 CMR 10.02(2)(b)3 and 10.53(1) for the proposed work in the Buffer Zone.” Mr. Chidester’s PFT, p. 5, lines 4-8. He testified that the Petitioners’ “remaining significant Concern” regarding proposed work in the Buffer Zone “is that there is approximately [a 12 inch wide and 370 foot long pipe or] culvert which[,][according to Mr. Chidester,] is illegally piping a stream immediately downgradient (approximately 100 feet downslope) of the [proposed] Motocross Facility.” Mr. Chidester’s PFT, p. 5, lines 8-11. He testified that the pipe “is part of the stream that is in close proximity to the [proposed] Motocross Facility and feeds the BioMap2 Core Habitat Wetlands associated with McKinstry Brook which is a State registered Cold Water Fish Resource (SARIS ID 4129175 and 4129192) located in the Town of Sturbridge adjacent to [the]

Facility.” Mr. Chidester’s PFT, p. 5, lines 13-17. He testified that “[d]uring the SOC review process, the Petitioners requested that the Department require the daylighting (removal) of the unpermitted culvert as this would benefit the health of the stream and associated wetlands.” Mr. Chidester’s PFT, p. 5, lines 19-21.

In response, the Department, through its witness, Mr. Dulmaine, acknowledged that during the SOC process, specifically, on December 16, 2015, the Department requested the Applicant submit “[a] redesigned plan showing the removal of the existing unpermitted culvert.” Mr. Dulmaine’s PFT, ¶ 18; Attachment 1 to Mr. Dulmaine’s PFT. Mr. Dulmaine testified that the Department made that request because at the time, the proposed Project called for the construction of “[a] campground roadway . . . over that area[,]” that would connect to a proposed campground on a separate parcel of land. Mr. Dulmaine’s PFT, ¶ 18. He testified that “the campground proposal was [later] removed from the [proposed] [P]roject,” and that “[n]o work is now proposed on [the] separate parcel of land[,] . . . which currently contains a single family residence, barn, and horse paddock.” Mr. Dulmaine’s PFT, ¶ 18. He testified that “[w]hile MassDEP would support the culvert removal, it has no authority to require its removal in this permitting proceeding.” Mr. Dulmaine’s PFT, ¶ 18.

Mr. Dulmaine’s testimony was corroborated by the testimony of the Applicant’s witnesses, Mr. Krevosky. Mr. Krevosky, a wetlands expert, confirmed that the pipe at issue “[is] on a separate piece of property from the proposed [P]roject” that “[is] not included nor . . . in the scope of the [P]roject” Mr. Krevosky’s PFT, at p. 7, lines 160-165.

Other than making note of the culvert which is not part of the proposed Project, the Petitioners presented no evidence refuting Mr. Dulmaine’s testimony that “[in his] professional

opinion[,] . . . the SOC issued by MassDEP has been appropriately conditioned to meet the requirements of 310 CMR 10.02(2)(b)3 . . . [and] 310 CMR 10.53(1) for proposed work in the buffer zone.” Mr. Dulmaine’s PFT, ¶ 19. Accordingly, I find that the proposed Project comports with the requirements of 310 CMR 10.02(2)(b)3 and 10.53(1).

B. The proposed Project comports with the Department’s Stormwater Management Standards.

As noted above, flood control and storm damage prevention are two of the eight statutory interests the MWPA and the Wetlands Regulations are intended to advance. “Stormwater runoff from rainfall and snow melt ‘represents the single largest source responsible for water quality impairments in the Commonwealth’s rivers, lakes, ponds, and marine waters.’” Elite Home Builders, supra, 22 DEPR at 205, citing, MassDEP Stormwater Handbook (2008) (“Stormwater Handbook”), Vol. I, ch. 1, p. 1. “New and existing development typically adds impervious surfaces and, if not properly managed, may alter natural drainage features, increase peak discharge rates and volumes, reduce recharge to wetlands and streams, and increase the discharge of pollutants to wetlands and water bodies.” Id. As a result, the Department has adopted stormwater regulations as part of the Wetlands Regulations at 310 CMR 10.05(6)(k)-(6)(q) to “address water quality (pollutants) and water quantity (flooding, low base flow and recharge) by establishing standards that require the implementation of a wide variety of stormwater management strategies[,] . . . includ[ing] environmentally sensitive site design and low impact development [(“LID”)] techniques to minimize impervious surface and land disturbance, source control and pollution prevention, structural [stormwater Best Management Practices (“BMPs”)], construction period erosion and sedimentation control, and the long-term

operation and maintenance of stormwater management systems.” Id.

The Department’s stormwater regulations at 310 CMR 10.05(6)(k) provide in pertinent part that:

[e]xcept as expressly provided, stormwater runoff from all industrial, commercial, institutional, office, residential and transportation projects that are subject to regulation under [the MWP] including site preparation, construction, and redevelopment and all point source stormwater discharges from said projects within [a wetlands] Area Subject to Protection under [the MWP] or within the Buffer Zone shall be provided with stormwater best management practices to attenuate pollutants and to provide a setback from the receiving waters and wetlands in accordance with the [10] Stormwater Management Standards as [set forth in 310 CMR 10.05(6)(k)1-(k)10 and] further defined and specified in the [MassDEP] Stormwater Handbook . . .⁵

As discussed below, here, the Petitioners, through their sole witness, Mr. Chidester, contended at the Hearing that the proposed Project fails to comport with a number of the Stormwater Management Standards. The Petitioners failed to prove any of their claims.

1. The proposed Project complies with Stormwater Management Standard 4 at 310 CMR 10.05(6)(k)4.

Among the Stormwater Management Standards is Standard 4 at 310 CMR 10.05(6)(k)4,

⁵ Certain projects are exempt from the Stormwater Management Standards. 310 CMR 10.05(6)(l); Stormwater Handbook, Vol. I, ch. 1, pp. 2-3. These projects are:

- (1) A single-family house;
- (2) Housing development and redevelopment projects comprised of detached single-family dwellings on four or fewer lots provided that there are no stormwater discharges that may potentially affect a critical area;
- (3) Multi-family housing development and redevelopment projects with four or fewer units, including condominiums, cooperatives, apartment buildings and townhouses, provided that there are no stormwater discharges that may potentially affect a critical area; and
- (4) Emergency repairs to roads or their drainage systems.

Id. These exemptions are not pertinent in this case.

which requires that a “Stormwater management syste[m] . . . be designed to remove 80% of the average annual post-construction load of Total Suspended Solids (TSS).” This Standard is satisfied if:

- a. Suitable practices for source control and pollution prevention are identified in a long-term pollution prevention plan and thereafter are implemented and maintained;
- b. Structural stormwater best management practices [(“BMPs”)] are sized to capture the required water quality volume determined in accordance with Massachusetts Stormwater Handbook; and
- c. Pretreatment is provided in accordance with the Massachusetts Stormwater Handbook.

310 CMR 10.05(6)(k)4.

The Petitioners, through Mr. Chidester, contended at the Hearing that the proposed Project fails to comply with Stormwater Management Standard 4 because the proposed Project’s Plan of Record “[does] not include specific site features required by the [Town of Charlton’s Planning Board,] . . . includ[ing][:] [1] completed and approved noise mitigation structures and a Life-flight approved landing zone, . . . [2] site drainage calculations; [3] the amount of impervious surfaces; and [4] work within jurisdictional wetland buffer zones.” Mr. Chidester’s PFT, p. 7, lines 13-20; p. 8, lines 1-6. Mr. Chidester testified that “[t]hese features are required in the conditions listed in the Town of Charlton Planning Board[’s] [August 13, 2015] . . . Site Plan Application Decision [for the proposed Project].” Mr. Chidester’s PFT, lines 6-8; Exhibit SC-SDC-9 to Mr. Chidester’s PFT. Condition 15 of the Planning Board’s Site Plan Application Decision states that “[p]rior to the issuance of a building permit, the [A]pplicant will submit to the . . . Board design details for additional noise abatement structures to be incorporated into the motocross course design” and that “HMMH [the peer review noise consultant is to] review the

submitted noise abatement structures submittal and provide the Planning Board with [a] written recommendation for the Board to review and finalize/accept at a scheduled . . . Board meeting prior to the Board issuing a Notice-To-Proceed for the building permit issuance.” Mr.

Chidester’s PFT, p. 8, lines 9-15.

In response, the Applicant’s witnesses, Mr. Dubois, disputed Mr. Chidester’s contention that the proposed Project fails to comport with Stormwater Management Standard 4. Mr. Dubois’s PFT, p. 2, lines 24-29; p. 3, lines 30-35. Mr. Dubois testified that “[in his] professional opinion as a Professional Engineer[,] . . . the stormwater management system designed for [the proposed] [P]roject meets the applicable criteria set forth in the Massachusetts Stormwater Handbook” and “that there is [no] merit to the Petitioners’ claim that the . . . system . . . does not comply with [the] criteria established by the . . . [Stormwater Management Standards and the Massachusetts Stormwater] Handbook.” Mr. Dubois’s PFT, p. 3, lines 52-56; p. 4, lines 58-62.

I credit and accord Mr. Dubois’s testimony greater weight than Mr. Chidester’s testimony because, unlike Mr. Chidester, Mr. Dubois is a Massachusetts Professional Civil Engineer (“P.E.”) who has considerable experience in designing stormwater management systems for residential and commercial projects, including “larg[e] . . . systems for multi-lot commercial subdivisions and residential subdivisions, business operation centers, and small and large ground mount solar array sites.” Mr. Dubois’s PFT, p. 2, lines 27-29; p. 3, lines 30-32. As a P.E., Mr. Dubois is licensed by the Commonwealth’s Board of Registration of Professional Engineers and Professional Land Surveyors (“the Board”) and, as such, his design of the proposed Project’s stormwater management system and his sworn certification at the Hearing that the system comports with the Department’s Stormwater Management

Standards, are subject to the Board's vigorous licensing and engineering practice requirements. <http://www.mass.gov/ocabr/licensee/dpl-boards/en/about-the-board.html>.

"Board members are members of the National Council of Examiners for Engineering and Surveying, which prepares national examinations for the regulated professions, develops uniform standards for comity registration among the states, and acts as a clearinghouse for the law enforcement activities of its member boards." *Id.* Through a Code of Regulations at 250 CMR 2.00-7.00, which includes Rules of Professional Responsibility,⁶ the Board "establishes, monitors and enforces qualifying standards for the engineering and land surveying professions . . . to [e]nsure that persons practicing in these professions are competent to practice and are not endangering the life, health, safety and welfare of the public." *Id.* According to the Board, it "applie[s] strict standards of education and experience for its licensees, as well as in administering examinations in Fundamental Knowledge and Principles and Practice to determine a candidate's competence to practice engineering and land surveying." *Id.* The Board licenses Professional Engineers and land surveyors by conducting interviews, and oral and written examinations of license applicants to verify their qualifications. *Id.* The Board also takes disciplinary action against licensees for engineering or land surveyor practices that do not comport with established engineering or surveying standards. *Id.*

The Petitioners did not present any testimonial and documentary evidence from a Massachusetts Professional Engineer to demonstrate that Mr. Dubois's design of the proposed Project's stormwater management system and his sworn certification at the Hearing that the system comports with the Department's Stormwater Management Standards violate the Board's

⁶ The Board's Rules of Professional Responsibility are set forth in 250 CMR 5.01-5.09.

engineering standards and practice requirements as set forth in the Board's regulations at 250 CMR 2.00-7.00, including the Board's Rules of Professional Responsibility for Professional Engineers. As such, the Petitioners have failed to demonstrate that the proposed Project fails to comport with Stormwater Management Standard 4 (and the other Standards discussed below).

It is important to note that the Department's witness, Mr. Dulmaine, corroborated Mr. Dubois's opinion that the proposed Project comports with Stormwater Management Standard 4. Mr. Dulmaine's PFT, ¶¶ 20-22, 40. Mr. Dulmaine also confirmed that certain features of the proposed Project, required by the Charlton Planning Board (noise abatement structures and a Life-flight approved land zone) "are not shown on the [proposed Project's] [P]lan of [R]ecord [because] [o]nly the work shown on the [P]lan is under review in this proceeding" and since "[they] are not a part of the current project design, they are outside the scope of the [Department's] administrative review" of the Project under the MWPA and the Wetlands Regulations. Mr. Dulmaine's PFT, ¶ 21. He testified that "[i]n the event these features are proposed [by the Applicant in the future] within wetlands jurisdiction, a request to amend any [wetlands] permit [issued by Department] must be filed [with the Department]." Mr. Dulmaine's PFT, ¶ 21. He testified that "[i]f such an amendment were [approved by the Department], appeal rights would attach to that amendment." Mr. Dulmaine's PFT, ¶ 21. He noted, however, that "[i]f these features are proposed in an upland area, they [would be] outside of wetlands jurisdiction." Mr. Dulmaine's PFT, ¶ 21.

In sum, I find that as currently approved by the Department, the proposed Project satisfies

the requirements of Stormwater Management Standard 4.

2. Stormwater Management Standard 5 at 310 CMR 10.05(6)(k)5 does not apply to the proposed Project.

Stormwater Management Standard 5 at 310 CMR 10.05(6)(k)5 provides in relevant part that:

[f]or land uses with higher potential pollutant loads, source control and pollution prevention shall be implemented in accordance with the Massachusetts Stormwater Handbook to eliminate or reduce the discharge of stormwater runoff from such land uses to the maximum extent practicable. . . .

(emphasis supplied). The Wetlands Regulations at 310 CMR 10.04 define “land uses with higher potential pollutant loads” or “LUHPPL” as including “[a] parking lo[t] with high intensity use.” The Massachusetts Stormwater Handbook defines such a parking lot as a parking lot with 1,000 vehicle trips per day or more. Massachusetts Stormwater Handbook, Vol. I, ch. 1, p. 12. The Handbook also provides that “a stormwater discharge from a [LUHPPL] . . . requires treatment by the specific structural BMPs determined by MassDEP to be suitable for treating discharges from such use,” and that “[l]ike all stormwater discharges, stormwater discharges from [LUHPPL] require the use of a treatment train that provides 80% TSS removal prior to discharge.” *Id.*, at p. 13. The Handbook requires that “this treatment train . . . provide for at least 44% TSS removal prior to discharge to the infiltration BMP and shall also be designed to treat 1.0 inch of runoff times the total impervious area at the post-development site.” *Id.*

The Petitioners, through Mr. Chidester, contended at the Hearing that the motocross facility contemplated by the proposed Project does not comply with Stormwater Management Standard 5 because the Department purportedly “[failed to] designate the . . . [f]acility as a . . .

LUHHPL for the purposes of treating stormwater runoff prior to discharge.” Mr. Chidester’s PFT, at p. 3, lines 1-3. Mr. Chidester testified that the facility is akin to a parking lot with high intensity use, and as such, Department should have designated the facility as a LUHPPL. Mr. Chidester’s PFT, p. 9, lines 5-23; p. 10, lines 1-10. He contended that “[a]lthough ‘motocross racing facilities’ are not specifically listed as a LUHPPL [in 310 CMR 10.04,] . . . they have characteristics very similar to . . . a parking lot with high intensity use.” Mr. Chidester’s PFT, p. 9, lines 19-23; p. 10, lines 1-2. Mr. Chidester contended that “[m]otocross training and racing involves motorcycles travelling on a closed course dirt race track” and that “motorcycles generate pollution which accumulates in the air and on the ground [in] same way that . . . vehicles generate pollution at the facilities listed in the definition of a LUHPPL,” including “a parking lot with high intensity use.” Mr. Chidester’s PFT, p. 9, lines 21-23; p. 10, 1-2. He contended that the proposed motocross facility will be a parking lot with high intensity use because the facility “[will] involve[e] trucks and automobiles driving in and out of the facility to convey the motorcycles and riders, and . . . intensive use of the race track and surrounding gravel roadways by the motorcycles,” and that “[b]ased on [his] analysis, the . . . [f]acility [will have] much higher vehicle usage than a parking lot with high intensity use” Mr. Chidester’s PFT, p. 10, lines 4-9; Exhibit SC-SDC-10 to Mr. Chidester’s PFT. Using the purported vehicle usage of the Walmart shopping center parking lot in Sturbridge, Massachusetts as a means of comparison, Mr. Chidester contended that there will be a minimum of 1,196 vehicle trips per day generated by the proposed Project, thus exceeding the 1,000 vehicle trips per day mark of the Massachusetts

Stormwater Handbook for a parking lot with high intensity use. Exhibit SC-SDC-10 to Mr. Chidester's PFT.

I do not find Mr. Chidester's testimony that the proposed Project is subject to Stormwater Management Standard 5 to be persuasive and find that the Standard does not apply to the Project for the following reasons.

First, Mr. Chidester is neither a wetlands expert nor a traffic expert qualified to render an opinion that a motocross facility is akin to a parking lot with high intensity use for purposes of compliance with Stormwater Management 5.

Second, by Mr. Chidester's own admission, a motocross facility is not listed as a LUHPPL in 310 CMR 10.04. This was confirmed by Mr. Dubois and Mr. Dulmaine in their respective testimony. Mr. Dubois's PFT, p. 3, lines 37-50; Mr. Dulmaine's PFT, ¶ 24. Because a motocross facility is not listed as a LUHPPL, the stormwater management system for the proposed Project was properly designed using the 0.5 inch of runoff rule for water quality rather than the 1.0 inch of runoff rule for a LUHPPL. *Id.*

Third, Mr. Chidester's contention that there will be a minimum of 1,196 vehicle trips per day generated by the proposed Project is questionable based on the March 18, 2016 MEPA Advisory Opinion⁷ that the Applicant received from the Massachusetts Executive

⁷ "MEPA" is the acronym for the Massachusetts Environmental Policy Act, G. L. c. 30, §§ 61-62H. MEPA and the MEPA Regulations at 301 CMR 11.00 "establish a process to ensure that State permitting agencies [such as the Department] have adequate information on which to base their permitting decisions, and that environmental impacts of the project are avoided or minimized." *City of Brockton v. Energy Facilities Siting Board*, 469 Mass. 196, 201, n.12 (2014) ("Brockton I"); *In the Matter of Brockton Power Co., LLC*, OADR Docket Nos. 2011-025 & 026, Recommended Final Decision (July 29, 2016), at 85, n. 44, adopted as Interlocutory Decision [of MassDEP Commissioner] (March 13, 2017). "Pursuant to MEPA, a project proponent requiring a permit from a State agency files an environmental notification form (ENF) with the [EEA] Secretary[,] . . . who determines whether the project meets the review threshold requiring an . . . [Environmental Impact Report ("EIR")]."*Id.* "If so, and after submission of a final environmental impact report (FEIR) and opportunity for review by the public, the [EEA]

Office of Energy and Environmental Affairs ("EEA"), which stated "that the [proposed] Project can be expected to generate a total of approximately 600 vehicle trips on weekend days when races would be held" Unmarked Exhibit to Applicant's [Pre-Hearing] Memorandum (December 1, 2016); Mr. Dulmaine's PFT, ¶ 24. The 600 vehicle figure was based on a traffic study that had been prepared by the Applicant's traffic consultant in January 2015,⁸ and was 50% lower than Mr. Chidester's figure of 1,196 vehicles per day.

Mr. Chidester's 1,196 vehicle trips per day figure is also questionable because the bulk of the figure is based on his contention that 1,096 vehicle trips per day will be generated by motorcycles operating on the motocross track. Exhibit SC-SDC-10 to Mr. Chidester's PFT, at p. 4.⁹ As Mr. Dulmaine testified at the Hearing, under the revised proposed Project Plan, the motocross track has been removed from the Buffer Zones to BVW, and thus, is outside of the regulatory jurisdiction of the MWPA and the Wetlands Regulations. Mr. Dulmaine's PFT, ¶ 25.

Lastly, to the extent Mr. Chidester contends that Stormwater Management Standard 5

Secretary certifies whether the FEIR has complied with MEPA" *Id.* A Certification by the EEA Secretary that the FEIR complies with MEPA "does not constitute final approval or disapproval of a particular project, which ultimately is left to various permitting agencies." *Id.* The Certification "[also] does not mean that a proposed project meets applicable permitting standards." *In the Matter of Stephen D. Peabody*, Final Decision on Reconsideration (December 27, 2011), 2011 MA ENV LEXIS 141, at 47-48. "Instead, it only means that the project's proponent has adequately described the environmental impacts and addressed mitigation" as required by MEPA. *Id.* The permitting agency "retains [its] authority to fulfill its statutory and regulatory obligations in permitting or reviewing [the] Project that is subject to MEPA review" 301 CMR 11.01(1)(b).

⁸ A copy of the Applicant's traffic study is attached to the Applicant's Pre-Hearing Memorandum as an unmarked exhibit.

⁹ Mr. Chidester arrived at the 1,096 figure by multiplying the number of motorcycles he contends will operate per day on the motocross track by the number of vehicle trips he contends will be generated by each motorcycle operating on the track. Exhibit SC-SDC-10 to Mr. Chidester's PFT, at p. 4. He contended that 50 motorcycles will operate per day on the motocross track and that one lap around the track by one motorcycle will equate to 21.9 vehicle trips were day. *Id.*

applies to the proposed Project because “motorcycles generate [air] pollution,” the contention fails because the MWPA and the Wetlands Regulations do not regulate air pollution. Town of Wayland, OADR Docket WET-2014-012, Recommended Final Decision (November 12, 2014), 2014 MA ENV LEXIS 89, at 13-16, adopted as Final Decision (November 25, 2014), 2014 MA ENV LEXIS 88. In Town of Wayland, a citizen’s group challenged an SOC that the Department issued to the Town of Wayland authorizing work on an existing paved roadway that runs from U.S. Route 20 to the Town of Wayland’s transfer station. 2014 MA ENV LEXIS 89, at 1. The citizen’s group contended that “vehicle emissions, especially diesel emissions, from the [Town] DPW’s heavy trucks and equipment that would use the [roadway] would lead to substantially more air pollution in the area” and “that the additional air pollution would [adversely affect the wetlands in the area by] either settl[ing] directly into the wetlands [in the area] or run[n]g off the road and settl[ing] into and pollut[ing] the wetlands” 2014 MA ENV LEXIS 89, at 5. The citizen’s group’s claim was rejected because: (1) the group failed to present expert testimony quantifying the amount of resultant emissions and the amount of pollution necessary to negatively alter wetlands areas protected by the MWPA and the Regulations, and (2) it has long been settled that the MWPA and the Wetlands Regulations do not regulate air pollution. 2014 MA ENV LEXIS 89, at 10-14. Air pollution is “expressly regulated [by the Department] under the [Massachusetts] Clean Air Act and its related regulations.” 2014 MA ENV LEXIS 89, at 14, citing, G.L. c. 111, §§ 142A-O; 310 CMR 7.00; Department Policy 90-001.

In summary, the Petitioners have failed to prove that Stormwater Management Standard 5 applies to the proposed Project.

3. The proposed Project is not subject to Stormwater Management Standard 6 at 310 CMR 10.05(6)(k)6.

Stormwater Management Standard 6 at 310 CMR 10.05(6)(k)6 provides in relevant part that:

stormwater discharges near or to any . . . *critical area* require the use of the specific source control and pollution prevention measures and the specific structural stormwater best management practices determined by the Department to be suitable for managing discharges to such area as provided in the Massachusetts Stormwater Handbook. A discharge is near a *critical area*, if there is a strong likelihood of a significant impact occurring to said area, taking into account site-specific factors. . . .

(emphasis supplied). The Massachusetts Stormwater Handbook provides that “[c]ritical areas [include] . . . cold-water fisheries as defined in [the Water Quality Certification Regulations at] 314 CMR 9.02¹⁰ and [the Wetlands Regulations at] 310 CMR 10.04.” Massachusetts Stormwater Handbook, Vol. I, ch. 1, p. 15. Both 314 CMR 9.02 and 310 CMR 10.04 define a “cold-water fishery” as:

[w]aters in which the mean of the maximum daily temperature over a seven day period generally does not exceed 68°F (20°C) and, when other ecological factors are favorable (such as habitat), are capable of supporting a year round population of cold-water stenothermal aquatic life

Both regulations also provide that:

Waters designated as cold-water fisheries by . . . the [Massachusetts] Division of

¹⁰ The WQC Regulations at 314 CMR 9.00 “[were] adopted [by the Department] pursuant to . . . the [Massachusetts Clean Waters Act (“MCWA”), G.L. c. 21, §§ 26-53], . . . and establishe[d] procedures and criteria for the administration of Section 401 of the federal Clean Water Act, 33 USC 1251, for discharge of dredged or fill material, dredging, and dredged material disposal in waters of the United States within the Commonwealth” 314 CMR 9.01(1); In the Matter of Tennessee Gas Pipeline Company, LLC, OADR Docket No. 2016-020, Recommended Final Decision (March 22, 2017), adopted as Final Decision (March 27, 2017), at pp. 5-6.

Fisheries and Wildlife¹¹ are cold-water fisheries[,] [and] [w]aters where there is evidence based on a fish survey that a cold-water fishery and habitat exist are also cold-water fisheries. . . .

The Petitioners, through Mr. Chidester, contended at the Hearing that the proposed Project is subject to, and does not comply with, Stormwater Management Standard 6 because the motocross facility contemplated by the Project: (1) “is in close proximity to a BioMap2 Core Wetland Habitat that is associated with McKinstry Brook which is a State registered Cold Water Fish Resource” and (2) “poses a significant threat to the downgradient Critical Area due to the likelihood of migration of hydrocarbon contamination.” Mr. Chidester’s PFT, p. 10, lines 17-22; p. 11, lines 7-9.

Mr. Chidester’s testimony was effectively refuted by the testimony of the Applicant’s witness, Mr. Krevosky, whose expertise is on cold-water fisheries. Mr. Krevosky’s PFT, p. 4, lines 67-86; p. 5, lines 88-97. Based on his testimony, I find that the proposed Project is not subject to Stormwater Management Standard 6 because the stormwater discharges from the proposed Project will not be “near or to” the McKinstry Brook cold-water fishery for the following reasons.

Mr. Krevosky’s expertise in cold-water fisheries is long established, dating back to at least 1979 when he began working on a six year project (1979 to 1985) to restore the headwater trout in Wellington Brook, an Eastern Brook Trout Fishery in Oxford, Massachusetts, that “had been decimated due to agricultural sedimentation and gravel pit sedimentation.” Mr. Krevosky’s PFT, p. 4, lines 67-70. “[He] restored 3,000 feet of the main stem of [Wellington]

¹¹ “The Massachusetts Division of Fisheries and Wildlife (MassWildlife) is [a state agency of the Commonwealth] responsible for the conservation - including restoration, protection, and management - of fish and wildlife resources for the benefit and enjoyment of the public.” <http://www.mass.gov/eea/agencies/dfg/dfw/about-masswildlife>.

[B]rook and its 70 tributaries between 1979 and 1985 and studied the stream and trout response from 1979 to 1991.” Mr. Krevosky’s PFT, p. 4, lines 70-72. “[He has] worked on a number of high profile cold-water fishery projects in Charlton, Hopkinton, Leicester, Oxford, Plainville, Sutton, Webster, Westminster[,] and Worcester[,] [Massachusetts].” Mr. Krevosky’s PFT, p. 4, lines 72-74.

With respect to the proposed Project, in 2015, Mr. Krevosky contacted the Massachusetts Division of Fisheries and Wildlife and obtained its most recent data regarding the McKinstry Brook cold-water fishery. Mr. Krevosky’s PFT, p. 4, lines 75-76. The Division’s “most recent data [was] from 1999 consist[ing] of three electroshocking [fishing] locations¹² downgradient of [U.S.] Route 20.” Mr. Krevosky’s PFT, p. 4, lines 77-78. The 1999 data shows that “[above [U.S.] Route 20, the brook system turns into a low gradient meandering stream system through shallow marshes and warm-water ponds[,] [which] are directly down gradient from the [proposed] [P]roject.” Mr. Krevosky’s PFT, p. 4, lines 78-80. “The [McKinstry Brook] cold-water fishery . . . is separated from the [P]roject by a minimum of 7,500 linear feet [or 1.42 miles]¹³ of low gradient warm fishery habitat. Water discharging from the site enters directly into two shallow (4 feet ±) warm-water ponds, one on the east side of Ladd Road and one on the west side of Ladd Road. These ponds . . . warm up to around 82 [degrees] in the summer [and] [u]pper level temperature for Trout is 72 [degrees].” Mr.

¹² Electroshocking fishing “uses direct current electricity flowing between a submerged cathode and anode [that] affects the movement of the fish so that they swim towards the anode where they can be caught.” <https://en.wikipedia.org/wiki/Electrofishing>. “Electrofishing is a common scientific survey method used to sample fish populations to determine abundance, density, and species composition,” and “[w]hen performed correctly, electrofishing results in no permanent harm to fish, which return to their natural state in as little as two minutes after being caught.” *Id.*

¹³ One mile is approximately 5,280 linear feet and 1.42 miles is approximately 7,500 linear feet. [http://www.convertunits.com/from/linear+feet/to/mile+\[statute,+US\]](http://www.convertunits.com/from/linear+feet/to/mile+[statute,+US]).

Krevosky's PFT, p. 4, lines 80-86. 7; p. 5, lines 88-97. For these reasons, Mr. Krevosky correctly concluded that "[the] [proposed] [P]roject['s] discharging stream [will] flo[w] into a warm-water fishery, not a cold-water fishery," and that "[the] [P]roject [will] not impact the [McKinstry Brook] cold-water fishery, as it is too far removed." Mr. Krevosky's PFT, p. 5, lines 95-97.

I further note that the Department's witness, Mr. Dulmaine, concurred with Mr. Krevosky's testimony that the stormwater discharges from the proposed Project will not be "near or to" the McKinstry Brook cold-water fishery. Mr. Dulmaine's PFT, 28. For this additional reason, the Petitioners failed to demonstrate that the proposed Project is subject to Stormwater Management Standard 6.

4. The proposed Project complies with Stormwater Management Standard 8 at 310 CMR 10.05(6)(k)8.

Stormwater Management Standard 8 at 310 CMR 10.05(6)(k)8 provides that:

[a] plan to control construction related impacts including erosion, sedimentation and other pollutant sources during construction and land disturbance activities (construction period erosion, sedimentation and pollution prevention plan) shall be developed and implemented.

The Massachusetts Stormwater Handbook elaborates on Standard 8 by explaining that:

[d]uring land disturbance and construction activities, project proponents must implement controls that prevent erosion, control sediment movement, and stabilize exposed soils to prevent pollutants from moving offsite or entering wetlands or waters. Land disturbance activities include demolition, construction, clearing, excavation, grading, filling, and reconstruction.

Massachusetts Stormwater Handbook, Vol. I, ch. 1, p. 22. The Handbook further states that:

[f]or all projects subject to Wetlands jurisdiction, a ***construction period erosion, sedimentation, and pollution prevention plan*** that identifies the party or parties responsible for implementing the plan or any components thereof must be submitted. The Order of Conditions [issued by the local Conservation

Commission] should require the responsible party or parties to implement the plan as approved by the . . . Commission, until the site is fully stabilized and the temporary erosion and sedimentation controls are removed.

Id. (emphasis supplied). The construction period erosion, sedimentation, and pollution prevention plan must:

- (1) identify all stormwater management activities that are needed during land disturbance and construction, including source control and pollution prevention measures, BMPs to address erosion and sedimentation, stabilization measures, and procedures for operating and maintaining the BMPs, especially in response to wet weather events and frost; and
- (2) include a schedule for sequencing construction and stormwater management activities that minimizes land disturbance by ensuring that vegetation is preserved to the extent practicable, and disturbed portions of the site are stabilized as quickly as possible.

Id.

At the Hearing, the Petitioners, through Mr. Chidester, contended that the proposed Project does not comport with Stormwater Management 8 because “[t]he [Department’s] SOC [approving the Project] [does] not specifically address actions to be taken during the removal of erosion controls post construction and site stabilization.” Mr. Chidester’s PFT, p. 11, lines 16-20. Mr. Chidester testified that “Special Condition #28 in the SOC addresses the implementation and maintenance of erosion controls but does not specify removal actions and disposal of accumulated siltation and sedimentation.” Mr. Chidester’s PFT, p. 11, lines 20-22. On behalf of the Petitioners, he “request[ed] that an additional condition be added to the SOC to specify erosion control removal that is protective of the wetland resource areas.” Mr. Chidester’s PFT, p. 11, lines 22-23; p. 12, line 1. As discussed below, Mr. Chidester’s testimony was effectively refuted by Mr. Dulmaine’s and Mr. Krevosky’s testimony, as well as by the provisions of the

SOC and the Applicant's Erosion and Sediment Control Plan for the proposed Project that was approved by the Department.

In his testimony, Mr. Dulmaine pointed out that contrary to Mr. Chidester's claims, the SOC does address the actions to be taken by the Applicant during the removal of erosion controls post construction and site stabilization, including specifying removal actions and disposal of accumulated siltation and sedimentation. Mr. Dulmaine's PFT, ¶ 32. Specifically, Mr. Dulmaine cited SOC General Condition No. 19h, one of the 12 General Conditions in the SOC (Nos. 19a-19j) that set forth the stormwater control and maintenance requirements for the proposed Project. Mr. Dulmaine's PFT, ¶ 32; SOC, at pp. 4-5. General Condition No. 19h provides that "[a]ll sediment or other contaminants removed from stormwater BMPs shall be disposed of in accordance with all applicable federal, state, and local laws and regulations." Mr. Dulmaine also cited SOC Special Condition No. 31, which provides that "[o]nce the site is stabilized, all fabric sedimentation fencing shall be removed and properly disposed." Mr. Dulmaine's PFT, ¶ 32; SOC, at p. 6.

Mr. Dulmaine supported his testimony by also referring to the Applicant's Erosion and Sediment Control Plan ("Plan") for the proposed Project, which he reviewed and approved during the Department's SOC review of the proposed Project. Mr. Dulmaine's PFT, ¶ 33. The Plan provides that "[a]ll measures stated on [the] . . . [P]lan, and in the [Applicant's] storm water pollution prevention plan, [must] be maintained in fully functional condition until no longer required for a completed phase of work or final stabilization of the site." Plan, Sheet 11 of 13. The Plan also provides that:

[a]ll erosion and sedimentation control measures [must] be checked by a qualified person in accordance with the contract documents or the applicable

permit, whichever is more stringent, and repaired in accordance with the following: . . .

3. Silt fences shall be repaired to their original conditions if damaged, sediment shall be removed from the silt fences when it reached on half the height of the silt fences. . . .
6. Outlet structures in the sedimentation basins shall be maintained in operation conditions at all times. Sediment shall be removed from sediment basins or traps when the design capacity has been reduced by 50%.

Plan, Sheet 11 of 13.

I also find that the proposed Project complies with Stormwater Management 8 because the Department cannot issue a Certificate of Compliance to the Applicant for the proposed Project if exposed soils at the Project site are not stabilized. A Certificate of Compliance “[is] a written determination by the [Department] that the work or a portion thereof has been completed in accordance with an [SOC authorizing the work].” 310 CMR 10.04 (definitions of “Certificate of Compliance” and “Order”). In his testimony, Mr. Krevosky explained that:

[w]hen [a project proponent] requests a Certificate of Compliance, the [project] engineer and sometimes the consultant submit statements [to the Department] indicating that the work [authorized by the SOC] has been completed in Substantial Compliance with the submitted and approved plans and the site is stabilized. If the site, including exposed soils are not stabilized[,] . . . a Certificate of Compliance [should not be issued to the project proponent]. . . . [I]f the site is stabilized[,] the removal of the silt fence, which is imbedded 4” into the soil, does

not constitute an unstable area. . . . Silt fence removal happens after construction. When the silt fence is pulled out of the ground, that [fence] line is so narrow and minimal that it [does not] have enough surface area to destabilize anything.

Mr. Krevosky's PFT, p. 7, lines 169-176; p. 8, lines 177-179, 182-184.

5. The proposed Project complies with Stormwater Management Standard 9 at 310 CMR 10.05(6)(k)9.

Stormwater Management Standard 9 at 310 CMR 10.05(6)(k)9 provides that "[a] long term operation and maintenance plan shall be developed and implemented [by the project proponent] to ensure that the stormwater management system functions as designed." The Massachusetts Stormwater Handbook requires that the project proponent's long term operation and maintenance plan ("LTOM") include:

- (1) the stormwater management system(s) owners;
- (2) the party or parties responsible for operation and maintenance, including how future property owners will be notified of the presence of the stormwater management system and the requirement for proper operation and maintenance;
- (3) the routine and non-routine maintenance tasks to be undertaken after construction is complete and a schedule for implementing those tasks;
- (4) a plan that is drawn to scale and shows the location of all stormwater BMPs in each treatment train along with the discharge point;
- (5) a description and delineation of public safety features; and
- (6) an estimated operations and maintenance budget.

Massachusetts Stormwater Handbook, Vol. I, ch. 1, p. 23.

The Petitioners do not dispute that with respect to the Applicant's compliance with Stormwater Management Standard 9, the Applicant submitted a Long-term Pollution Prevention Plan ("LTPPP") and a Stormwater Operation and Maintenance Plan ("SOMP") for the proposed

Project, which were approved by the Department. Mr. Chidester's PFT, p. 12, lines 10-11; Mr. Dubois's PFT, p. 3, lines 52-56 and p. 4, lines 58-62; Mr. Dulmaine's PFT, ¶¶ 35-37. The only dispute is over whether the SOMP complies with Stormwater Management Standard 9. *Id.*

The Petitioners, through Mr. Chidester, claimed at the Hearing that the SOMP does not comply with Stormwater Management Standard 9 because the SOMP "indicates that the . . . information [required by Stormwater Management Standard 9] is present in the [SOMP] with the exception of the reference to the "Plans" being found in the 'site plan for the Solar Energy Installation'." Mr. Chidester's PFT, p. 12, lines 10-13. Mr. Chidester also testified that the SOMP is deficient because in his view, "[it] . . . provide[s] bare minimum information and detail as to operation and maintenance of the stormwater controls." Mr. Chidester's PFT, p. 12, lines 13-15. He testified that "[d]ue to the potential for high sedimentation and siltation [at proposed Project site], . . . the stormwater controls will be highly impacted, and require more frequent maintenance." Mr. Chidester's PFT, p. 12, lines 15-17. He testified that "[a] Motocross Facility is unique when compared with other typical commercial facilities in that a large portion is comprised of dirt surfaces," and "[t]hese dirt surfaces pose a significant threat of erosion and sedimentation." Mr. Chidester's PFT, p. 12, lines 18-20. He testified that "[t]his facility when completed and operational as a race track [will be] akin to a large construction site that has not been stabilized" and, as such, "special conditions should be added to [the SOC to] monitor sedimentation in the storm water controls." Mr. Chidester's PFT, p. 12, lines 20-23; p. 13, lines 1-3.

Mr. Chidester's contentions are not persuasive because they are based on speculation.

Also, as discussed above, the motocross track in the proposed Project has been removed from

the Buffer Zones to BVW, and thus, is outside of the regulatory jurisdiction of the MWPA and the Wetlands Regulations. Mr. Dulmaine's PFT, ¶ 25. In addition, Mr. Dubois, the designer of the proposed Project's stormwater management system, certified under oath in his testimony at the Hearing that the Project's SOMP "meets the applicable criteria set forth in the Massachusetts Stormwater Handbook for projects of this nature." Mr. Dubois's PFT, p. 3, lines 52-56 and p. 4, lines 58-62. I credit and accord Mr. Dubois's testimony greater weight than Mr. Chidester's testimony because, as discussed above, Mr. Dubois is a Massachusetts Professional Civil Engineer who has considerable experience in designing stormwater management systems for residential and commercial projects, and his design of the proposed Project's stormwater management system and his sworn certification at the Hearing that the system comports with the Department's Stormwater Management Standards, are subject to vigorous State licensing and engineering practice requirements. Mr. Dubois's PFT, p. 2, lines 27-29; p. 3, lines 30-32; <http://www.mass.gov/ocabr/licensee/dpl-boards/en/about-the-board.html>.

6. The proposed Project complies with Stormwater Management Standard 10 at 310 CMR 1 0.05(6)(k)10.

Stormwater Management Standard 10 at 310 CMR 1 0.05(6)(k)10 provides that "[a]ll illicit discharges to the stormwater management system are prohibited." The Massachusetts Stormwater Handbook states that "[i]llicit discharges to the stormwater management system are discharges that are not entirely comprised of stormwater[,] . . . [but these discharges do] not include discharges from[:] . . . [1] firefighting, [2] water line flushing, [3] landscape irrigation, [4] uncontaminated groundwater, [5] potable water sources, [6] foundation drains, [7] air conditioning condensation, [7] footing drains, [8] individual resident car washing,

[9] flows from riparian habitats and wetlands, [10] dechlorinated water from swimming pools, [11] water used for street washing[,] and [12] water used to clean residential buildings without detergents.” Massachusetts Stormwater Handbook, Vol. I, ch. 1, p. 25.

The Handbook also states that: “

[p]roponents of projects within Wetlands jurisdiction must demonstrate compliance with [Stormwater Management Standard 10] by submitting to the [Department] an Illicit Discharge Compliance Statement verifying that no illicit discharges exist on the [project] site and by including in the pollution prevention plan measures to prevent illicit discharges to the stormwater management system, including wastewater discharges and discharges of stormwater contaminated by contact with process wastes, raw materials, toxic pollutants, hazardous substances, oil, or grease.

Id. The Handbook precludes the Department from “issu[ing] a Certificate of Compliance [for work authorized by an SOC] until it has . . . verified that there are no illicit discharges at the [project] site.” Id.

Mr. Dulmaine testified at the Hearing that the Applicant complied with Stormwater Management Standard 10 by “[submitting] [a]n Illicit Discharge Compliance Statement . . . in accordance with the requirements of the Stormwater Management Standards and regulations verifying that there are no illicit discharges (now or proposed) to the Stormwater Management System at the proposed [P]roject site.” Mr. Dulmaine’s PFT, ¶ 39. Mr. Dubois corroborated Mr. Dulmaine’s testimony. Mr. Dubois’s PFT, p. 2, lines 27-29; p. 3, lines 30-32.

In response, the Petitioners failed to address the Applicant’s Illicit Discharge Compliance Statement at all. Instead, through Mr. Chidester’s testimony, the Petitioners contended that “there is no designated fueling and vehicle maintenance area [at the proposed Project site],” and that “[w]ith no specific area that is designated specifically for participants [in motocross activities] to fuel and conduct maintenance involving hazardous fluids, there is significant

potential for illicit discharges.” Mr. Chidester’s PFT, at p. 13, lines 11-15. The Petitioners contentions are without merit.

First, Special Condition No. 22 in the SOC¹⁴ provides that: “[r]efueling of vehicles shall be in an area outside of the buffer zone” and that “[i]f a spill of oil and/or hazardous material occurs, [the Applicant is to] immediately comply with the requirements of MGL 21E and the MCP 310 CMR 40.0000 [and] [c]ontact MassDEP Emergency Notification at 888-304-1133.” Additionally, the approved “Landscape/Parking Plan” for the proposed Project at Sheet 3 of 13 contains “Track Rules” which contain the following requirements:

Sealed 5-gallon (or under) gas containers only – nothing larger permitted.
(Re)fuel in vehicle/trailer it was brought on. Do not leave containers along the fence or at starting gate. No changing oil or other fluids.

The Applicant is responsible for ensuring compliance with these Track Rule requirements as well as those of Special Condition No. 22, as discussed above, and will be subject to enforcement action by the Department for non-compliance. For these reasons and because the Petitioners failed to refute Mr. Dulmaine’s and Mr. Dubois’s testimony that the Applicant submitted a proper Illicit Discharge Compliance Statement to the Department, I find that the proposed Project complies with Stormwater Management Standard 10.

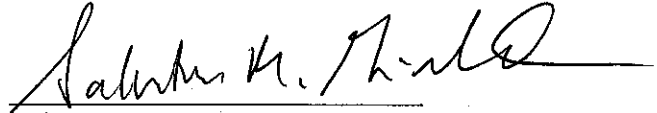
CONCLUSION

Based on the testimonial and documentary evidence introduced at the Hearing as discussed above, I recommend that the Department’s Commissioner issue a Final Decision: (1) affirming the SOC and (2) either: (a) granting the Applicant’s and Department’s Motion for Directed Decision because the Petitioners’ evidentiary submissions were deficient as a

¹⁴ The SOC has two Special Conditions numbered as 22. SOC, at p. 5. The Special Condition No. 22 discussed above in the text is the second Special Condition numbered as 22 in the SOC. Id.

matter of law; or (b) finding that a strong preponderance of the evidence introduced at the Hearing demonstrated that the Department properly issued the SOC approving the Applicant's proposed Project pursuant to the MWPA and the Wetlands Regulations.

Date: 3/31/17


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.

In the Matter of Sunset City, Inc.,
OADR Docket No. WET-2016-016
Recommended Final Decision

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