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

August 18, 2017

In the Matter of
Weiss Farm Apartments, LLC

OADR Docket No. WET-2016-015
Stoneham, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

The Petitioner, the Stoneham Conservation Commission ("Commission"), brought this appeal to challenge the Superseding Order of Conditions ("SOC") that the Massachusetts Department of Environmental Protection's Northeast Regional Office ("DEP") issued to the Applicant, Weiss Farm Apartments, LLC ("Weiss"). The SOC approved Weiss' project to build a large residential development with associated infrastructure ("the project"), pursuant to G.L. c. 40B. The project would be located at 170 Franklin Street, Stoneham ("Property"). The SOC was issued pursuant to the Wetlands Protection Act, G.L. c. 131, § 40, and the Wetlands Regulations, 310 CMR 10.00. The protected wetlands jurisdictional Resource Areas at the Property include Bank and Land Under Water ("LUW") associated with a drainage channel, which is a protected Intermittent Stream; Bordering Land Subject to Flooding; and Bordering Vegetated Wetlands ("BVW").

The project would include demolition of two existing barns; substantial grading of existing upland wooded areas; construction of three 5-story apartment buildings providing approximately 249 units of housing; construction of five three-unit townhouse buildings; and

construction of one seven-car free standing garage, a clubhouse and pool, creation of paved on-site parking for 438 cars, a footpath and bridge for access to approximately 3 acres of uplands on the site, and stormwater management infrastructure, including catch basins, drains, roof drainage, pretreatment devices, a water quality basin, and 4 underground infiltration structures.

Although no work will take place in wetlands jurisdictional areas, some will occur in the buffer zones to those areas. Provencal PFT¹, p. 6. The buffer zone work includes asphalt parking areas, native non-invasive plantings, part of a townhouse, and stormwater management system components. The innermost 25 feet will be left in an undisturbed vegetated state, with the exception of minor work to an existing walkway leading to a bridge crossing. Provencal PFT, p. 7.

After Weiss requested that the Commission close its review of the project, the Commission denied Weiss' Notice of Intent, finding there was insufficient information pursuant to 310 CMR 10.05(7)(h) and 310 CMR 10.05(6)(c); and, alternatively, that the project did not meet the performance standards for work in the buffer zone or the stormwater standards.

Weiss appealed that denial to DEP pursuant to 310 CMR 10.05(7). DEP issued the SOC approving the project, after it determined that the Commission had sufficient information under 310 CMR 10.05(6)(c) and 310 CMR 10.05(7)(h) and that the project complied with the Wetlands Act and Regulations.

The Commission appealed DEP's SOC decision to the Office of Appeals and Dispute Resolution ("OADR"). I held a Pre-Hearing Conference, after which the parties submitted pre-filed direct and rebuttal testimony and exhibits. I then held an evidentiary adjudicatory hearing during which the witnesses listed below were available for cross examination.

¹ "PFT" refers to the pre-filed written testimony filed for each witness.

The Commission presented testimony from the following witnesses, who were cross-examined at the adjudicatory hearing²:

1. Robert H. Griffin. Griffin is the Managing Partner of Griffin Engineering Group, LLC. He is a registered professional engineer in Massachusetts. Griffin has over 30 years of experience as a consulting engineer, primarily providing engineering design and permitting services associated with site development, drainage, and utility projects. He has prepared technical reviews of drainage designs for hundreds of projects. Griffin has been extensively involved with the site, having worked on behalf of the Commission with respect to issues at the site since at least 2011. Griffin also worked on behalf of the Commission in reviewing and commenting on the NOI and related documents. Griffin PFT, p. 2. Griffin holds a BS in civil engineering and an MS in environmental engineering.
2. Robert A. Parsons. Parsons is the acting co-chairman of the Stoneham Conservation Commission, serving as a member for 15 years. He is a Massachusetts registered professional engineer.
3. Ingeborg E. Hegemann. Hegemann is a senior vice president and a principal of BSC Group, Inc. She is responsible for BSC's ecological sciences group. She has over 30 years of consulting experience in environmental planning, wetlands assessment and impact analysis, regulatory permitting, and public participation. She is a Professional Wetlands Scientist. She is also an adjunct professor of wetlands ecology at the University of Massachusetts, Lowell, Graduate School of Civil and Environmental

² The Commission had designated another witness, Thomas C. Houston, but his testimony was stricken from the administrative record when he failed to appear for cross examination at the adjudicatory hearing. Adjudicatory Hearing Transcript ("Hearing Transcript"), pp. 401-404; 310 CMR 1.01(13)(h)3.

Engineering. She has other substantial experience in wetlands ecology and conservation. She holds a BS in geology and an MS in regional planning.

Weiss presented testimony from these witnesses:

1. James M. White, PE. White is the Vice President of H.W. Moore Associates, Inc., where he has been employed for 38 years as a civil engineer and project manager. He has over 40 years of experience as a civil engineer, with a primary focus on site planning, preparation of development plans, and design of stormwater management systems. He is a Massachusetts registered professional engineer. He holds a BS degree in civil engineering.
2. Dennis J. Lowry. Lowry is a Senior Wetland Ecologist at AECOM Environment, where he has been employed for 40 years as a consulting wetland ecologist and environmental permitting ecologist. He holds an MS in wetland ecology and a BS in biology.

DEP presented testimony from the following witness:

1. Jill Provencal. Provencal is an environmental analyst who has worked for DEP since 1989 on many matters related to wetlands permitting and enforcement. Her work has involved but is not limited to evaluation of engineering and survey plans, soil logs, vegetation surveys, geographic data, flood storage and drainage calculations, analysis of compliance with stormwater regulations, and delineation of wetlands boundaries. She holds a BS in cartography and has completed formal trainings regarding wetlands.

Based upon my review of the testimonial and documentary evidence in the administrative record, I recommend that DEP's Commissioner issue a Final Decision and a Final Order of

Conditions affirming the SOC, but with the minor project changes discussed in this decision. Those changes include a special condition requiring maintenance of the weir and reference to the updated plans that include the stormwater infrastructure changes that brought the project into compliance with Stormwater Standard 3. In short, a preponderance of the evidence in the administrative record demonstrates that: (1) the Commission had sufficient information to issue a decision on the merits of the project, (2) the work in the buffer zone is sufficiently conditioned to avoid adverse impacts to the Resource Areas, and (3) the project complies with the Stormwater Standards.

BACKGROUND

The project would be located on approximately 10.2 acres (“the development area”) of the 26 acre Property. The 10.2 acre development area is on the southern part of the Property, lying adjacent to and on the north side of Franklin Street, and west of Ellen Road. The project would create approximately 5.5 acres of new impervious surfaces at the site. The development area is surrounded to the northwest, north, and east by a drainage channel approximately 10 to 15 feet wide. The channel was reportedly created in the 1950s by the U.S. Army Corps of Engineers to help address flooding problems. It is an intermittent stream under the Wetlands Regulations. See 310 CMR 10.58 and 10.04. Just to the north of the stream on the Property and up-gradient of the development area is a large wetland of approximately 12 acres.

The development area is presently occupied by Weiss Farm, Inc. (“the Farm”), which has utilized it for many years as the site of a composting and landscaping business, mainly to generate loam and mulch. Over the years, the Farm has generated and stored stockpiles of materials at the development area; those stockpiles may currently exist and may be created, changed, or removed on a daily, weekly, or monthly basis. Provencal PFT, ¶25.

The development area is part of a much larger watershed to the north and west. The watershed generally ultimately drains to two different culverts under Franklin Street, flowing from north to south: one culvert is the 18 inch culvert located at the southeast corner of the Property and the other is a 36 inch culvert located about 1,200 feet to the west of the Property. White PFT, ¶ 18. The 18 inch culvert receives water that flows in the channel from the northwest to the southeast. The invert of the 18 inch culvert is higher in elevation than the adjacent land, which has periodically resulted in localized flooding of the southeasterly portion of the farm fields during severe storms. As a consequence, approximately 60 years ago a stormwater pump station was installed in the channel and just north of the 18 inch culvert to help alleviate flooding. The pump is designed to lift water up to a concrete trough, where it flows from the trough by gravity into the culvert. See June 8, 2015, Stormwater Pump Station and Weir Dam Improvement report. The pump is in good working order but could use some updates and maintenance. Id.

The Farm has operated the pump station since its construction. The pump only operates when the water rises to a level that is high enough to raise a float control that actuates the electrical power to the pump. From there the water flows under the street and discharges on the south side of Franklin Street to the ground surface.

In addition to the southeast corner of the Property experiencing occasional flooding, residential areas downgradient of the two culverts, south of Franklin Street and not part of the Property, have also experienced flooding over the years. Those downgradient areas are partially impacted by what is referred to as the Sunset Road culvert; it is a culvert that is downgradient of the Property which was installed at too high of an elevation and too little slope. White PFT, ¶ 15.

The Farm has experienced a history of alleged wetlands violations, including alteration of BVW and LUW (associated with the stream/channel) as a consequence of the Farm's composting activities and other material management practices on the development area of the Property. This resulted in DEP entering with the Farm an August 2006 Administrative Consent Order with Penalty (No. ACOP -NE-06-6W018) and a July 2010 Administrative Consent Order with Notice of Noncompliance (No. ACO-NE-10-6W002). The Applicant, Weiss, was not involved with the Property at the time and is not a party to those consent orders. Generally, the alleged violations caused untreated runoff containing pollutants to enter wetland Resource Areas on site, including the stream and BVW. 2010 ACO, p. 2. The 2010 ACO required a number of remedial measures to better manage stormwater runoff, including the requirement that the Farm install a "check dam" in the channel just upgradient of the pump station. In furtherance of that, the Farm installed a precast concrete weir dam to replace an existing earthen dam in the eastern part of the drainage ditch. The weir "reduces flow to the [18 inch] culvert by restoring natural water elevations to the upstream 25 acre wetland area and directing flow to [the 36 inch culvert that flows under Franklin street to the west of the Property]." June 8, 2015, Stormwater Pump Station and Weir Dam Improvement report, p. 4. The weir is designed to let a small amount of stormwater flow to the culvert. Id.

In response to requests by the Commission to consider measures which could be implemented off the Property to address issues associated with drainage and flooding adjacent to and downstream of the project area, Weiss commissioned a watershed study. Lowry PFT, p. 14. The study describes, among other things, measures that could be implemented to address pre-existing drainage issues that are independent of the stormwater management measures proposed for the project and which extend beyond the limits of the Property. Lowry PFT, p. 15. Lowry

testified that Weiss “attempted in good faith” to contribute to prudent and feasible options toward working with the town to help resolve off-site flooding issues. They included the watershed study, restoration of the weir to its intended condition, improvements to the pump station, and contributing \$20,000 to the town to remove debris from existing drainage conveyances. Lowry PFT, p. 15. Lowry testified that none of these measures are needed for the project to comply with the stormwater standards, but they may contribute to improving off-site flooding or drainage issues. This testimony was corroborated by Provencal and White, and I credit their testimony and Lowry’s testimony on this issue, and discuss it more fully below.

The Commission held several public hearings to review the project and there was a substantial exchange of information between Weiss and the Commission to respond to the Commission’s concerns or questions. At the last public hearing, held on July 9, 2015, Weiss provided a letter responding to the July 7, 2015 comments from the Commission’s peer review consultant, Griffin Engineering Group, LLC. At that hearing, the Commission requested that Weiss continue the hearing so that a number of issues including the proposed grading plan could be addressed. In response, Weiss requested at the hearing that the Commission close the public hearing process, which it did.

On July 27, 2015, the Commission issued an Order of Conditions (“OOC”) denying the project. In the OOC, the Commission found that Weiss had submitted insufficient information to describe the site, the work, or the effect of the work on the interests identified in the Wetlands Act. The Commission also issued the denial on the alternative grounds that the project could not be conditioned to meet the performance standards in the Wetlands Act and Regulations, and thus it also denied the project on the merits. OOC, p. 3.

Weiss subsequently appealed the OOC to DEP. On September 22, 2015, DEP alerted Weiss that the project may be subject to the Massachusetts Environmental Policy Act (“MEPA”), G.L. c. 30, §§ 61-62H, possibly requiring the filing of an Environmental Notification Form (“ENF”) and Environmental Impact Report (“EIR”). That is because under 310 CMR 11.03(1)(b)2, an ENF and other MEPA review may be required for the creation of five or more acres of impervious surface. The project proposed adding approximately 5.9 acres of impervious surface. Weiss submitted an ENF to MEPA, and DEP submitted a comment letter on December 14, 2015. DEP’s comments were based on the project information contained within the ENF, including information that the Site and surrounding area experience drainage issues from existing unmanaged stormwater runoff and inadequate and unmaintained stormwater drainage infrastructure within the watershed. Provencal PFT, p. 3.

On January 22, 2016, the Secretary of the Executive Office of Energy and Environmental Affairs (“EOEEA”) issued a certificate stating that an EIR was not required. As a consequence, DEP proceeded with its review of the project under the Wetlands Act and Regulations. On April 11, 2016, DEP issued an information request letter that sought information from Weiss relative to the weir. Provencal PFT, p. 4, Exhibit 2.

On May 18, 2016, the Farm requested a letter from DEP stating that the site had returned to compliance with respect to the 2010 ACO. After a DEP staff inspection of the site and review of information submitted, DEP determined that all requirements of the ACO had been met and the site had been returned to compliance.

On July 8, 2016, DEP issued the SOC, concluding that the Commission had sufficient information and that the project met all applicable performance standards. Provencal PFT, p. 4. The Commission appealed that decision to OADR. I issued a Scheduling Order, held a Pre-

Hearing Conference, and issued a schedule for submission of pre-filed written testimony. That was followed by an adjudicatory hearing at which witnesses who had submitted pre-filed written testimony were made available for cross examination.

REGULATORY FRAMEWORK

Buffer Zone. For work in the buffer zone there are a number of regulatory provisions and decisions dictating that the work is subject to less scrutiny than work which takes place in the Resource Areas themselves. First, buffer zone work is not per se regulated under the Act or the Regulations. See 310 CMR 10.02(2)(b). Instead, only that work “which, in the judgment of the issuing authority, will alter [a Resource Area] is subject to regulation under M.G.L. c. 131, § 40 and requires the filing of a Notice of Intent.” Id. Thus, the buffer zone may generally be altered if it will not alter a Resource Area, as determined by the issuing authority. In contrast, any alteration of a Resource Area is generally subject to jurisdiction under the Act and Regulations. See 310 CMR 10.02(2)(a). “Alter means to change the condition of any Area Subject to Protection Under M.G.L. c. 131, § 40. Examples of alterations include, but are not limited to, the following: . . . (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 (“Alter”).

When reviewing buffer zone work for compliance with the Act and Regulations, the ultimate issues are whether the work will alter the Resource Area *and* whether the alteration will adversely affect the ability of the Resource Area to contribute to the protection of one or more of the interests of the Act. 310 CMR 10.53(1); Matter of Kornblith and Newman, Docket No. WET-2010-016, Recommended Final Decision (October 8, 2010), adopted by Final Decision (November 16, 2010); Matter of Trammell Crow Residential, Docket No. WET 2010-037,

Recommended Final Decision (April 1, 2011), adopted by Final Decision (April 21, 2011); Matter of Nielsen, Docket No. WET 2008-046, Recommended Final Decision (April 12, 2010), adopted by Final Decision (May 11, 2010); Matter of Princeton Development, Inc., Docket No. 2006-157, Final Decision (February 5, 2009).

The regulation at 310 CMR 10.53(1) governs the conditioning of buffer zone work to avoid Resource Area alterations that will adversely affect the ability of the areas to contribute to the protection of one or more of the interests of the Act. It provides, in pertinent part, the following:

For work in the buffer zone subject to review under 310 CMR 10.02(2)(b)3., [which is the case here,] the issuing authority shall impose conditions to protect the interests of the Act identified for the adjacent resource area. The potential for adverse impacts to resource areas from work in the buffer zone may increase with the extent of the work and the proximity to the resource 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 resource areas. Conditions may include limitations on the scope and location of work in the buffer zone as necessary to avoid alteration of resource 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 resource area and/or other measures commensurate with the scope and location of the work within the buffer zone to protect the interests of the Act. . . .

310 CMR 10.53(1); see Matter of Travis Snell, Docket No. 2005-226, Final Decision (May 1, 2007).

BVW. The Wetlands Regulations define BVW as:

freshwater wetlands which border on creeks, rivers, streams, ponds and lakes. The types of freshwater wetlands are wet meadows, marshes, swamps and bogs. Bordering Vegetated Wetlands are areas where the soils are saturated and/or inundated such that they support a predominance of wetland indicator plants. The ground and surface water regime and the vegetational community which

occur in each type of freshwater wetland are specified in [Wetlands Act].

310 CMR 10.55(2)(a) (emphasis supplied). "Bordering Vegetated Wetlands are likely to be significant to public or private water supply, to ground water supply, to flood control, to storm damage prevention, to prevention of pollution, to the protection of fisheries and to wildlife habitat." 310 CMR 10.55(1). "The plants and soils of Bordering Vegetated Wetlands remove or detain sediments, nutrients (such as nitrogen and phosphorous) and toxic substances (such as heavy metal compounds) that occur in run off and flood waters." *Id.* "Prevention of Pollution means the prevention or reduction of contamination of surface or ground water." 310 CMR 10.04 ("Prevention of Pollution"). "Significant means plays a role. A resource area is significant to an interest identified in M.G.L. c. 131, § 40 when it plays a role in the provision or protection, as appropriate, of that interest. . . ." 310 CMR 10.04 ("Significant").

Stormwater Standards. In addition to the above, DEP regulates certain other work that occurs in the buffer zone, under the Regulations' Stormwater Standards.³ 310 CMR 10.05(6)(k); Matter of Capital Group, Docket No. WET 2012-012, Recommended Final Decision (February 11, 2013), adopted by Final Decision (April 16, 2013). DEP applies the Stormwater Management Standards pursuant to its authority under the Wetlands Protection Act, M.G.L. c. 131, § 40, and the Massachusetts Clean Waters Act, M.G.L. c. 21, §§ 26-53. DEP Stormwater Handbook (2008) ("Stormwater Handbook"), V. 1, ch. 1, p. 1.

³ "Except as expressly provided, stormwater runoff from all industrial, commercial, institutional, office, residential and transportation projects that are subject to regulation under M.G.L.c. 131, § 40 including site preparation, construction, and redevelopment and all point source stormwater discharges from said projects within an Area Subject to Protection under M.G.L.c. 131, § 40 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 following Stormwater Management Standards as further defined and specified in the Massachusetts Stormwater Handbook." 310 CMR 10.05(6)(k) (emphasis added).

“Stormwater runoff results from rainfall and snow melt and represents the single largest source responsible for water quality impairments in the Commonwealth’s rivers, lakes, ponds, and marine waters. 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.” Stormwater Handbook, V. 1, ch. 1, p. 1.

Unless specifically exempted, stormwater runoff from proposed projects in Resource Areas or the Buffer Zone must meet stormwater management standards identified in the regulations. See 310 CMR 10.05(6)(k)-(q). DEP has issued an updated Stormwater Handbook (2008), to use as guidance in interpreting the standards. See also DEP Hydrology Handbook for Conservation Commissioners (2002).

When a project is subject to the standards, all stormwater is regulated according to the “best management practices [BMPs] to attenuate pollutants and to provide a setback from the receiving waters and wetlands in accordance with the following Stormwater Management Standards as further defined and specified in the Massachusetts Stormwater Handbook” 310 CMR 10.05(6)(k); see also 310 CMR 10.05(6)(b) (“The Order of Conditions shall impose such conditions as are necessary to meet the performance standards set forth in . . . the Stormwater Management Standards provided in 310 CMR 10.05(6)(k) through (q). The Order shall prohibit any work or any portion thereof that cannot be conditioned to meet said standards.”).

The Stormwater Handbook sets forth numerous BMPs for appropriately handling stormwater. Some are “non-structural” in nature and relate to site design practices, source control, and pollution prevention. Others are structural, and depend on incorporating various

structures into the site design to properly handle stormwater. Stormwater Handbook, Vol. 2, Ch. 1, 2, and 4. BMPs are often constructed or designed in what is known as a BMP treatment train. A BMP treatment train is a series of BMPs in sequence to maximize pollutant removal. Stormwater Handbook, Vol. 2, Ch. 1, p. 32. There are also several categories of BMPs: pretreatment, treatment, conveyance, and infiltration. Stormwater Handbook, Vol. 2, Ch. 1, p. 22.

Proprietary Stormwater BMPs are manufactured systems that use proprietary settling, filtration, absorption/adsorption, vortex principles, vegetation, and other processes to meet the Stormwater Management Standards. There are two general types of Proprietary BMPs: hydrodynamic separators and filtering systems. Stormwater Standards, Vol. 2, Ch. 4, p. 1.

THE BURDEN OF PROOF

As the party challenging DEP's issuance of the SOC in this *de novo* appeal, the Commission had the burden of going forward by producing credible evidence from a competent source in support of its position. 310 CMR 10.03(2); see Matter of Town of Freetown, Docket No. 91-103, Recommended Final Decision (February 14, 2001), adopted by Final Decision (February 26, 2001) ("the Department has consistently placed the burden of going forward in permit appeals on the parties opposing the Department's position."). Specifically, the Commission was required to present "credible evidence from a competent source in support of each claim of factual error, including any relevant expert report(s), plan(s), or photograph(s)." 310 CMR 10.05(7)(j)3.c. So long as the initial burden of production or going forward is met, the ultimate resolution of factual disputes depends on where the preponderance of the evidence lies. Matter of Town of Hamilton, DEP Docket Nos. 2003-065 and 068, Recommended Final Decision (January 19, 2006), adopted by Final Decision (March 27, 2006).

“A party in a civil case having the burden of proving a particular fact [by a preponderance of the evidence] does not have to establish the existence of that fact as an absolute certainty. . . . [I]t is sufficient if the party having the burden of proving a particular fact establishes the existence of that fact as the greater likelihood, the greater probability.”
Massachusetts Jury Instructions, Civil, 1.14(d).

The relevancy, admissibility, and weight of evidence that the parties sought to introduce in the Hearing 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), “[t]he weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. . . .”

PRIOR RULING ON THE COMMISSION’S MOTION TO DISMISS

The day before the adjudicatory hearing and long after the parties had submitted all of their pre-filed evidence, the Commission filed a motion to dismiss the appeal and vacate the SOC. I denied the motion to dismiss, which arose out of the following circumstances:

On March 19, 2015, the Commission denied the project pursuant to a Stoneham Wetlands Bylaw provision that prohibits alteration of the innermost 25 feet of the buffer zone. The alteration at issue was the proposed modification of the existing dirt path to a bridge over the stream by creating a stone dust surface on the path. The bylaw denial was not appealed to Superior Court. Instead, Weiss continued with the public hearing process before the

Commission to obtain approval of the project under the Commonwealth's Wetlands Act and Regulations. That process ultimately led to the OOC denial, the SOC approval, and the appeal to OADR (all as discussed above). I subsequently issued a scheduling order that required each party to file a Pre-Hearing Statement setting forth the "list of legal issues for resolution in this appeal." That was followed by a Pre-Hearing Conference in which the issues to be adjudicated were identified and discussed. I then issued a Pre-Hearing Conference Report and Order framing the issues for adjudication. At no time, did the Commission identify Weiss' failure to appeal the bylaw denial as an issue to adjudicated in this appeal. Approximately 4 months passed while the parties submitted their pre-filed testimony and legal memoranda, with no briefing of the bylaw denial.

Then, the day before the adjudicatory hearing, the Commission filed a Motion to Dismiss and Vacate Superseding Order of Conditions. The motion argued that this appeal should be dismissed because the project could not move forward without bylaw approval, which had been denied and not appealed; that, according to the Commission, rendered this appeal moot because even if Weiss prevailed in this appeal, the project could not proceed without the bylaw approval. The motion was also based upon General Condition 3 of the SOC. General Condition 3 is a standard condition stating that the order of conditions does not "relieve the permittee or any other person of the necessity of complying with all other applicable federal, state, or local statutes, ordinances, bylaws, or regulations." Generally speaking, Condition 3 is intended to provide notice to the applicant that it is not relieved of the necessity of complying with other applicable federal, state, or local laws and obtaining required permits.

I denied the motion to dismiss and a stay of the appeal, for two reasons. First, I agreed with DEP and Weiss, concluding that because this matter falls under G.L. c. 40B §§ 20-23, the

applicable statutory and regulatory law dictates that all local permit decisions that are normally issued by local boards, including the Conservation Commission, are subsumed by the comprehensive permit issued by the Zoning Board of Appeals ("ZBA"). See 760 CMR 56; 310 CMR 10.05(4)(e); Zoning Board of Appeals of Amesbury v. Housing Appeals Comm., 457 Mass. 748, 761 (2010); Zoning Board of Appeals of Sunderland v. Sugarbush Meadow, LLC, 462 Mass. 166, 191-92 (2013); Dennis Housing Corp. v. Zoning Board of Appeals of Dennis, 439 Mass. 71, 76 (2003); Matter of Princeton Development, Inc., Docket No. 2006-157, Final Decision (February 5, 2009), Decision on Motion for Reconsideration (May 21, 2009).

Although the Commission disagrees with this position, it failed to present any persuasive authority based upon c. 40B to the contrary. I thus denied the motion to dismiss on the merits.

Here, the ZBA partially approved the proposed project but denied the waiver with respect to the local wetlands bylaws 25 foot buffer provision, which arguably operated as a bylaw denial by the ZBA. That denial was appealed to the Massachusetts Housing Appeals Committee. From there it may be appealed to the Massachusetts Superior Court. Under these circumstances, the Adjudicatory Proceeding Regulations may arguably provide the basis for a stay.⁴ See 310 CMR 1.01(6)(h); 310 CMR 1.01(5)(a)(3). Nevertheless, I denied the motion to dismiss and motion to stay on the alternative grounds that the Commission's delay in raising the bylaw issue without good cause demonstrates an intention to delay the proceeding or resolution of the proceeding. 310 CMR 1.01(10); See Matter of Tucard, LLC, Docket No. 2009-076, Recommended Final Decision (September 2, 2010), adopted by Final Decision (September 28, 2010). In particular, the Commission chose to wait until the day before the adjudicatory hearing to raise the bylaw dismissal argument; by then, unfortunately, several months had passed and the parties had

⁴ I decline to address the validity or effect of the Commission's bylaw denial; those issues are outside the scope of my jurisdiction under these circumstances.

expended substantial resources preparing for the adjudicatory hearing. I therefore exercised my discretion to proceed with the adjudicatory hearing while the bylaw issue was prosecuted in the appropriate forum.

DISCUSSION

I. The Commission Had Sufficient Information To Describe The Site, The Work, And The Effect Of The Work On The Interests Identified In The Wetlands Act

The Commission denied Weiss' request for an Order of Conditions based upon its finding that Weiss had not submitted sufficient information with its Notice of Intent. See G.L. c. 131 § 40, 310 CMR 10.05(7)(h), 310 CMR 10.05(6)(c); see e.g. Matter of Silva, Docket No. WET 2008-002 and 003, Recommended Final Decision (May 23, 2008), adopted by Final Decision (June 20, 2008). The Wetlands Regulations specify that the information submitted by the applicant with the Notice of Intent must be "sufficient to describe the site, the work or the effect of the work on the interests identified in M.G.L. c. 131, § 40" Commissions may request additional information from applicants when necessary. Matter of Silva. When a commission issues a denial for lack of information it must "specify the information which is lacking and why it is necessary." 310 CMR 10.05(6)(c); see Matter of Diamond Hill Corporation, Docket #99-018, Recommended Final Decision, (December 12, 2000), adopted by Final Decision (January 5, 2001) (specifying missing information and why it was necessary).

When, as here, an applicant appeals a denial for insufficient information to DEP the determination whether the Commission was correct must be based solely on "the information submitted to the conservation commission." 310 CMR 10.05(7)(h). If it is determined that insufficient information was submitted, DEP shall affirm the denial and instruct the applicant to re-file with the conservation commission and include the appropriate information. Id. If DEP determines that sufficient information was submitted, it shall proceed to review the merits of the

project and determine whether to issue a Superseding Order denying or approving the project on its merits. At this stage, review may be based upon additional information that was not before the Commission. Likewise, on the appeal of the SOC to OADR, once it is determined that the Commission had sufficient information, the appeal is de novo and information that was not before the Commission may be submitted and considered. Matter of Silva, *supra.*; Matter of Terrill, Docket No. 05-293, Recommended Final Decision (July 13, 2010), adopted by Final Decision (January 7, 2011).

Here, the sufficiency of information inquiry must begin with the Commission's denial in order to determine what information the Commission "specif[ied]" as "lacking" and "why [that information] is necessary." 310 CMR 10.05(6)(c). I therefore turn to the Commission's proceedings and findings.

The Commission opened the public hearing on January 6, 2015, and additional public hearings were held on February 5, March 19, April 9, May 7, June 4, and July 9, 2015.⁵ A site walk was conducted on April 25, 2015. Throughout the time that the NOI was under consideration, there was a robust flow of information from Weiss in response to questions and requests for information from the Commission. White PFT, pp. 8-9; Lowry PFT, p. 4, ¶ 10. In its OOC, the Commission noted that Weiss "generally responded to [Commission] inquiries in a timely and responsive manner, and considerable improvements to the Project Plans were made by the Applicant through this process. However, . . . certain information the [Commission] requested and was expecting to receive was not provided by the Applicant." OOC, p. F-2.

At the July 9, 2015, meeting Weiss provided the Commission with a letter of the same date responding to Griffin Engineering's July 7, 2015 comments. Weiss' July 9 letter stated that

⁵Griffin's pre-filed testimony raised additional alleged areas of insufficient information that were not raised in the OOC. Unless those issues were raised in the OOC and discussed above, they have been waived and will not be addressed here. See Griffin PFT, ¶10, 11, 12, 13, 14,

it would provide additional information at a future date. During the course of the July 9, 2015 hearing, however, Weiss changed course and decided to request that the Commission close the public hearing process and issue a decision. The Commission honored that request, as it was generally obligated to do.

The Commission issued the OOC on July 22, 2015. The Commission stated that without additional requested information the plans “cannot, in their submitted form, comply” with the Wetlands Act and Regulations performance standards. OOC, p. F-2. The Commission added that Weiss’ “documents are not compliant with DEP Stormwater” Standards. “In addition, [Weiss’] plans are incomplete in certain respects (discussed below), preventing the [Commission] from fully assessing the project impacts from [Weiss’] proposal.” OOC, p. F-2.

Below I discuss the merits of the Commission’s separate claims of insufficient information in the OOC:

Landscaping. The Commission concluded that its request for additional information pertaining to the landscaping plan had not been adequately addressed by Weiss. OOC, p. F-4, ¶ 6. In particular, the Commission’s peer reviewer, Griffin, “recommend[ed] that the landscaping plan identify specific plants and locations to better demonstrate the design intent, the ability to improve wildlife habitat at the site and how the buffer zones will be restored.” Griffin PFT, Exhibit B, ¶ 27. Hegemann also testified that it was deficient because there was no actual plan showing plant locations, density, sizes, and installation specifications or requirements for survival. Hegemann Rebuttal PFT, p. 1.

Under the Wetlands Regulations minor activities in the buffer zone, such as planting native species of trees, shrubs, or groundcover (but not turf) is exempt from regulation if the planting is done in a manner that reduces the potential for any adverse impacts to the resource

area during construction, and with post-construction measures implemented to stabilize any disturbed areas. Factors to consider when measuring the potential for adverse impacts to resource areas include the extent of the work, the proximity to the resource area, the need for erosion controls, and the measures employed to prevent adverse impacts to resource areas during and following the work. 310 CMR 10.02(2)(b)(1) and (2)(d). Landscaping in the upland outside of wetlands jurisdiction is not regulated unless and until it alters an area subject to protection.

Weiss' July 9, 2015, letter included information stating that native plants would be placed within the Town's 25' buffer zone and that Weiss was amenable to a condition requiring this. A notation to this effect was added to the plans. Provencal PFT, p. 7. Also, at the July 9, 2015, meeting Weiss offered to prepare a detailed landscape plan. July 9, 2015 Transcript, p. 19.

Provencal testified that Weiss had submitted sufficient information to the Commission. The plan titled "Landscape Plan," sheet L-1, dated June 20, 2014, specifically identifies that Weiss intends to plant native trees, shrubs, or groundcover in the buffer zone. White PFT, Tab E, p. 8, ¶ 27. She testified that outstanding issues concerning landscaping could have been addressed through a condition in the OOC, and thus additional information was not necessary. Indeed, DEP included a condition in the SOC on this topic, stating: "All landscape plant material shall be native to the New England region and not listed on the Massachusetts Prohibited Plant List and the USDA Invasive Plants Database at the time of document submission. Two weeks prior to the preconstruction meeting, a final list of all plant species shall be submitted to DEP for its review and approval and copied to the Stoneham Conservation Commission." Provencal testified that this condition "allows the issuing authority to review the list of plants selected, numbers of plants and location for planting. It also gives the issuing authority the ability to require the applicant to make changes to the planting plan until the issuing authority is satisfied."

Provencal PFT, ¶ 22. She testified that this condition and conditions 30 (requiring monthly reports from the Environmental Monitor) and 35 (requiring review of construction sequencing) allowed the issuing authority (DEP) to withhold a Certificate of Compliance until it was satisfied with the plan for plantings. Provencal PFT, ¶ 23.

I find that the information submitted by Weiss was sufficient to describe the site, the work, or the effect of the work on the Wetlands interests. In particular, the administrative record before the Commission disclosed that the presently degraded buffer zone would be considerably improved with the project. Indeed, the innermost 25 feet would be restored to an undisturbed vegetated state with native plantings, including trees. The buffer zone itself has a relatively flat and gradual gradient, and certainly does not have the sort of steep gradient that could precipitate strong erosive forces. In light of all the above, there was enough information submitted for the Commission to determine and ensure that project alterations to the buffer zone would be sufficient and would not adversely impact the wetlands interests.

Stockpiled Soils. Weiss' topographic plans included large piles of stockpiled soil or materials associated with the Farm, approximately 4,000 to 6,000 cubic yards near wetland flags AF 28-AF 31.3. The piles are located directly adjacent to wetland resource areas. The Commission concluded that the proposed grading plan did not demonstrate how the areas would be graded to avoid damage to the wetlands. OOC, p. F-4, ¶ 7. The Commission contends that the proposed grading plan is incomplete because there was no attempt to blend existing contours into proposed contours, making it "impossible" for the Commission to understand the proposed drainage conditions that will exist. Notice of Claim, p. 5. The Commission first raised this issue in April 2015, and Weiss' July 9, 2015 letter notes that the issue remained pending. *Id.* At the July 9, 2015 hearing, the Commission requested that Weiss continue the hearing so that a

number of issues, including the alleged grading deficiencies, could be addressed. Weiss refused and asked that the hearing be closed.

Sheet C-1, titled “Existing Conditions Plan” (dated April 30, 2015) depicts the location of the stockpiled materials and existing grades. Sheet C-3, titled “Site Grading and Drainage Plan” depicts proposed grades. Provencal testified that additional information on this issue was not necessary because the removal of materials could have been conditioned to ensure against impacts to the resource areas. Provencal PFT, ¶ 25. She believes that DEP accomplished that in the SOC through a number of Special Conditions at ¶¶ 28-36, examples of which are discussed below:

Special Condition 28 requires Weiss to employ an Environmental Monitor (or “EM”) to oversee all work within 100 feet of the buffer zone to the stream bank and BVW, “including but not limited to supervision of the maintenance and replacement of all erosion controls and storm water structures.” The EM is “responsible for ensuring compliance with th[e] SOC during construction.”

Further, Special Condition 33 requires that prior to “the pre-construction meeting, a plan shall be submitted to DEP for its review and approval showing any existing soil or any material stockpiles on the project site. The plan shall include a description of how these materials will be removed and an erosion control plan to ensure that these materials do not slump or erode into the wetlands.” The SOC requires a pre-construction meeting prior to the “commencement of any activity on the site”; the meeting shall take place among the project supervisor, the contractor, the EM, the Commission representative, and DEP. SOC ¶ 34.

Special Condition 35 requires that “[p]rior to the start of work, the applicant shall submit a construction sequence to DEP and [the Commission], for approval by DEP. The construction

sequence shall include a plan showing the location of soil, material stockpile areas, and any temporary, construction period, stormwater BMPs. Work shall not commence until DEP has approved the construction sequence.”

Special Condition 29 requires the EM to inspect all erosion controls on a weekly basis and after any storm events; it also empowers the EM to modify existing controls or require additional controls if he or she deems it necessary. It requires the EM to immediately control any erosion problems that occur. Special Condition 30 requires the EM to do monthly reporting to DEP and the Commission when work is being performed in the buffer zone. The report must include at a minimum: “a description of any erosion control problems, progress on construction and grading, changes in construction schedule, and actions taken to address problems and any other recommendations for site management.” Special Condition 30. The SOC contains numerous other Special Conditions that address and prohibit erosion into resource areas before, during, and after construction. See e.g. SOC, ¶¶ 36-46.

I find that the information submitted by Weiss was sufficient to describe the site, the work, or the effect of the work on the Wetlands interests. In particular, the administrative record before the Commission disclosed that there were stockpiled soils and other materials at the site, which were generated from the Farm’s ongoing operation. As Provencal testified, those conditions may vary with the ongoing operations—stockpiles may be moved or become larger or smaller. As consequence, it was not practicable to specify final removal plans. Instead, the SOC contains numerous conditions that will help to ensure that work in the buffer zone does not adversely impact the resource areas. In light of all the above and the gradual gradient in the buffer zone, I find there was sufficient information before the Commission.

Weir. The question whether there was sufficient information regarding the weir should begin with how it became an issue in the appeal. It was not an issue when Weiss filed the NOI. As Provencal testified, the NOI did not include the weir or any work on it as part of the project. Hearing Transcript, pp. 265-268. That is because no work on it was necessary for the project to comply with the Wetlands Act and Regulations, as persuasively shown by Weiss.⁶ The project's compliance with stormwater standards was properly focused on the development area. In particular, Weiss honed in on how the project will impact the development area; possible impacts to adjacent wetland resource areas (including the channel); and compliance with stormwater standards from development area impacts.⁷ Lowry PFT, p. 6. Indeed, Provencal testified correctly that DEP could have issued the SOC without the weir included in it. Hearing Transcript, pp. 370-71. As DEP asserted, the weir is ancillary to the project and its compliance with applicable regulations.⁸ Provencal PFT, p. 7.

In particular, the project meets the stormwater standards without having to restore the weir or do any work on the pump station. Hearing Transcript, pp. 302, 306. The weir was not included as part of the project's stormwater management system. It does not generate stormwater runoff and its function is not to manage or treat stormwater from the project. The project complies with the standards independent of the weir. As a consequence, DEP and Weiss

⁶ See infra, Section III.

⁷ The decision to analyze the project's stormwater infrastructure and compliance based solely on the development area footprint is discussed more fully below in Section III.

⁸ Even though the NOI did not include the weir as part of the project, Provencal testified that the SOC includes authorization to repair the weir. Hearing Transcript, p. 270-2. This was done because it was "added" to the project and included in the OOC. Id. at p. 270-2.

concluded the project could proceed under the Wetlands Act and Regulations without the weir replacement project.⁹

Despite the weir's ancillary nature to the project itself, during the course of the proceedings before the Commission, the Commission had questions concerning the weir's functionality and its relationship to downgradient, off-site flooding issues. Lowry PFT, pp. 6. In response, Weiss completed the Stormwater Pump Station and Weir Dam Improvements report (Revised June 8, 2015) ("Pump and Weir Report") and a Watershed Study (June 10, 2015).

The Pump and Weir Report discusses the history and purpose of the weir. It arose out of the Farm's alleged discharge of sediment laden waters that flowed downstream and off-site, where there were flooding issues during severe storms. The weir was designed to modulate downstream, off-site flow by reducing flow to the 18 inch culvert and restoring natural water elevations to the upstream 25 acre wetland and directing flow to the 36 inch culvert. Pump and Weir Report, p. 4; White PFT, ¶¶ 25-26; Provencal PFT, ¶ 26; ACO ¶ 8.E. It was thus installed as part of the 2010 ACO, as a precast concrete structure. *Id.* at p. 5.

The weir consists of 5 precast concrete blocks, each block being 6 feet long, 2 feet wide. It was constructed with two blocks on the bottom fitting into the channel and three blocks along the top with a 2 foot wide opening between the center block and the westerly block. The opening allows the water to flow through when it exceeds the height of the bottom of the opening. Pump and Weir Report, p. 5 and Appendix D to Report (for diagram).

The Pump and Weir Report stated that the structure had settled and is leaking in a few different places, and "therefore should be repaired." The report recommended that the weir be "restored to the conditions which DEP intended to achieve in accordance with the DEP consent

⁹ DEP points out in a footnote that if the weir were to be considered a stormwater management system, the regulations contain provisions at 310 CMR 10.02(3)-(4) that exempt maintenance and allow increases in the total or peak volume of stormwater managed by the system, subject to certain conditions. DEP Closing Brief, p. 2.

order.” It specified repair recommendations. *Id.* at p. 5 and Appendix E (proposed Operation and Maintenance Plan).

Weiss had not proposed to alter the function of the weir, but instead restore it to its original design, which had been previously completed by the environmental consulting firm FSL Associates, pursuant to the ACO. White PFT, p. 11; Lowry PFT, p. 6, ¶ 16; July 5, 2015, Hearing Transcript, p. 18. Given the weir was not part of the project, that was an appropriate approach. There is no evidence in the administrative record indicating anything other than when the weir was operating as originally designed and intended under the 2010 ACO it had no adverse impacts on the wetland resource areas, including the upgradient wetlands. Moreover, there is no evidence in the administrative record that the properly functioning weir led to an increase in off-site flooding problems from the 36 inch culvert. Last, and most important, Weiss’ stormwater analysis demonstrates that the project would not lead to an increased amount of water reaching the weir.¹⁰ Rather, if anything, there would be less water reaching the weir, and the water that reached it would almost certainly have significantly less sediment than that which reaches it now from the Farm.

Notwithstanding the above and Weiss’ report on the weir in response to the Commission, the Commission desired more information about the weir because it was concerned that despite Weiss’ proposed reconstruction of the weir it would continue to experience structural problems in the future. OOC, ¶ 10. The Commission was also concerned that the work Weiss proposed for the weir would divert runoff to Meetinghouse Brook and the 36 inch culvert to the west of the development area and, as a consequence, cause flooding of the properties to the west of the development area. OOC, p. F-5, ¶¶ 9-10. The Commission was further concerned that the

¹⁰ See *infra*, Section III.

“proposed diversion of flow could alter hydrologic conditions affecting wetland resources on the subject site” July 9, 2015 Commission Hearing, pp. 29-31, 32-33, 38, 58-60.

In response to the Commission’s concerns, at the July 9, 2015, Commission hearing, Lowry verbally provided a detailed assessment of the weir’s impact on the upstream wetlands. July 9, 2015, Hearing Transcript, pp. 33-36. He explained why the proposed maintenance repairs were consistent with the ecological functions of the upstream wetland, and how more extreme changes could indeed adversely impact the forested upstream wetland. Lowry PFT, p. 7, ¶ 16; July 5, 2015, Hearing Transcript, pp. 18, 61-63. He explained that restoring the weir to its original condition would place water levels in the wetland to the hydrologic norms of the forested wetland. *Id.* The goal of doing work on the weir was to preserve the status quo, i.e. reconstruct the weir as it was previously designed pursuant to the ACO. Hearing Transcript, pp. 381-82.

Lowry added that the Watershed Study submitted as of July 9, 2015, addressed all the items advocated by MEPA and DEP in analyzing the hydrologic conditions at the vicinity of the site. Lowry PFT, p. 8, ¶ 18. It provided the necessary data to understand the hydrology at the site. *Id.* In addition, the watershed study made numerous recommendations to improve on-site and off-site flooding conditions, even though the off-site flooding issues were beyond the scope of the project. Lowry PFT, p. 9, ¶ 19.

I find that the information submitted by Weiss with respect to the weir was sufficient to describe the site, the work, or the effect of the work on the Wetlands interests. For the above reasons, information concerning the weir was ancillary to the project, like the weir itself. The project meets all applicable stormwater and other wetlands requirements independent of the weir. As a consequence, the additional requested information was unnecessary. Regardless, the

information that was submitted should have assured the Commission that the proposed recommendations for work on the weir would do nothing more than return it to the level of functionality achieved under the ACO. The Commission's concern that the weir may continue in the future to deteriorate and lose its functionality may be readily addressed by a special condition in the Final Order of Conditions that requires Weiss to regularly maintain the weir to avoid degradation and loss of function. Indeed, I recommend including the Weiss Farm Precast Concrete Weir Dam Operation and Maintenance Plan, which was part of the Pump and Weir Report, as a special condition. It required, among other things, monthly inspections for compliance with the detailed criteria checklist; weekly inspections when the water level above the dam is above elevation 163; and an annual inspection by a licensed professional engineer. In light of all the above, I find there was sufficient information before the Commission.

There remains one argument concerning the weir. The Commission asserts that during the SOC review process DEP sought and obtained information about the weir from Weiss (specifically Lowry) that was not before the Commission. The Commission argues that this breached DEP's obligation to limit its information sufficiency review to the administrative record that was before the Commission. I disagree, and find that DEP did not breach that requirement.

Approximately 3 months after EOEEA completed the MEPA review, DEP requested additional information from Weiss concerning the weir. Provencal requested the following information: "calculations demonstrating that the placement of the weir will not impact the up-gradient wetland by increasing flood storage capacity of the wetland to the extent that the existing wetland hydrology, vegetation and functions are impacted and that the existing channel, in which the weir is located, will not exceed bankfull conditions. The return period storm event

for both the wetland and the channel should be included in the calculations. Please also include a plan of the weir showing the primary and notch elevation as well as a description of the type and shape of the proposed notch.” Basic Documents, April 11, 2016, letter to Mahoney.

Provencal testified that she issued this request because she was focused on returning the condition of the weir to what was required in the ACO. Hearing Transcript, p. 292. It was important that the weir not be constructed at an elevation higher than before so that it would not impact the hydrology of the northern wetlands. Hearing Transcript, p. 293. On May 11, 2016, Lowry responded in a letter on behalf of Weiss. Provencal testified that the May 11 letter “clarif[ied] information contained in the NOI that demonstrated that the reconstruction of the weir would not create impacts to the upgradient wetland hydrology, vegetation, wetland functions or bankfull conditions.” Provencal PFT, p. 4.

There are a number of reasons why this exchange of information did not breach the requirement that DEP confine its review to the record before the Commission. First, because the information was ancillary to the project itself, DEP’s consideration of the evidence was harmless. Second, Provencal testified that she sent out the information request *after* she had determined that there was sufficient information to describe the site, the work, and the effect of the proposed work on the wetlands interests. Provencal PFT, ¶ 31. She said that she requested the additional information to “clarify[]” the “information contained in the NOI and the report entitled ‘Stormwater Pump Station and Weir Dam Improvements’ which asserts that the reconstruction of the weir will not create impacts to wetland hydrology, vegetation, or functions.” Provencal PFT, ¶ 31. She believes that the data had been previously provided to the Commission, with the exception of water elevations upstream and downstream of the weir.

Hearing Transcript, p. 295. I credit Provencal's testimony on this issue.¹¹ Third, as Lowry testified, his May 11, 2016, response letter was "largely a reiteration and consolidation of information that was previously presented to the SCC either in printed document form or verbally. The May 11, 2016 response letter largely draws from the June 10, 2015 Watershed Study and the June 8, 2015 Weir and Pump Station Report . . . and also draws from the verbal testimony [Lowry] provided at the July 9, 2015 [Commission hearing]." Lowry PFT, pp. 9-10. For this additional reason, consideration of the additional information was harmless.

Pump Station. The Commission found that the proposed work to repair existing on-site drainage deficiencies at the Stormwater Pump Station "was incomplete and insufficient to demonstrate reliable future operation." OOC, p. F-5, F-7. The Commission requested plans and specifications for the pump station. *Id.* I conclude that the Commission's findings suffer from the same problem as the weir—no work on it was necessary for the project to meet applicable stormwater standards.

The pump station found its way into the project in the same way as the weir—it was not part of the NOI, and only became part of the Commission proceedings after the Commission requested that Weiss report on its status, and Weiss obliged. White studied the pump station and testified that it is functioning properly, but recommended some upgrades in the June 8, 2015 Pump and Weir Report. White PFT, pp. 9-10, 13. But the pump, for the same reasons as the weir, is not part of the project, and Provencal testified that no work for it was approved as part of the SOC. As a consequence, Weiss would have to file a new Notice of Intent to perform any work on the pump station. Hearing Transcript, pp. 267, 271, 370-71, 377, 397-8; Provencal PFT,

¹¹ In the future, however, it would be a better practice for DEP to state in its information request that it had determined that there was sufficient information but that it was following up and requesting additional information.

¶¶ 27, 32; White PFT, p. 9. For the above reasons, there was not an insufficient amount of information with respect to the pump.

Offsite Flooding. The Commission was also concerned with offsite flooding issues and that the project would exacerbate those issues. As Provencal testified, however, the offsite flooding issues are not attributable to the proposed project or a lack of compliance with stormwater regulations or applicable performance standards.¹² It is undisputed that no part of the project will occur in BLSF. For the above reasons, the offsite flooding issues are therefore not a part of the project that falls within DEP's jurisdiction in this appeal. Provencal PFT, ¶ 27.¹³

II. The Project Complies With The Requirements For Work In The Buffer Zone Under 310 CMR 10.53(1)

For the work in the Buffer Zone, the ultimate issue is whether that work as conditioned under 310 CMR 10.53(1) will alter the Resource Areas *and* whether the alteration will adversely affect the ability of the Resource Area to contribute to the protection of one or more of the interests of the Act. Matter of McNiff, Docket No. 2011-016, Recommended Final Decision (July 25, 2013) (discussing relatively rigorous elements of proof), adopted by Final Decision

¹² Even though offsite flooding is outside the jurisdiction over this project, Weiss proposed several offsite drainage improvements that could be performed and it offered to contribute \$20,000 towards the Town of Stoneham performing the offsite work.

¹³ The Commission makes several assertions regarding the project's compliance with MEPA. They allude to statements that were made during the MEPA process by MEPA and DEP regarding problems with flooding in the general vicinity but outside of the development area. The Commission uses these comments to contend that Weiss should have been required to undertake a comprehensive flood study analysis of the watershed. There are several reasons why the Commission's arguments miss the mark. First, MEPA compliance was never raised as an issue for adjudication, and thus it cannot now be raised as an issue. Matter of Old Barn, LLC, Docket No., WET-2010-013, Recommended Final Decision (October 20, 2010), adopted by Final Decision (November 16, 2010). Second, there has been no showing that MEPA compliance should properly be considered in this appeal. Indeed, as a general matter, challenges to a project's status under MEPA ... cannot be decided in a Department appeal. Matter of JKEA Property, Docket No. DEP-04-669, Ruling on Motion to Dismiss (March 10, 2005); Matter of Pioneer Valley Energy Center, LLC, Docket No. 2011-010, Recommended Final Decision (September 23, 2011), adopted by Final Decision (November 9, 2011). There has been no showing to the contrary in this appeal. Given these factors, this appeal has properly focused on whether the project complies with Wetlands Act and Regulations. See generally, 301 CMR 11.01(3)(b)

(July 31, 2013); Matter of Kornblith, supra.; Matter of Trammell Crow Residential, supra.; Matter of Nielsen, supra.; cf. Matter of Capital Group Properties, LLC, Docket No. WET 2012-012, Recommended Final Decision, (February 11, 2013), adopted by Final Decision (April 16, 2013).

An overwhelming preponderance of the evidence demonstrates that the project satisfies 310 CMR 10.53(1). The work in the buffer zone is generally limited to site grading associated with stormwater management. The work will not occur on steep slopes, only gradual slopes; in fact, the buffer is zone is relatively flat. In addition, the project requires adequate erosion control measures; there will be a clear limit of work a significant distance from the Resource Areas; and there will be numerous plantings of native shrubs and other vegetation in the buffer zone itself.

The administrative record demonstrates that the project will actually improve some conditions in the buffer zone. Over the years the buffer zone has been subject to significant disturbance from the landscaping and farm operations, resulting in sedimentation of the resource areas. The project plans provide that more than 75 trees will be planted around the perimeter of the project area within the buffer zone of the wetlands. This will significantly benefit the buffer zone, it is presently devoid of trees. Lowry PFT, p. 4. No work will occur within 25 feet of the wetlands, with the exception of improving an existing dirt path to a bridge over the stream by adding a stone dust base to it. The SOC requires an erosion and sedimentation control plan to minimize the potential for indirect impacts from construction activity. It is very likely that after the development there will be less sedimentation of the wetlands from the site, and specifically the buffer zone. As a consequence, certain wetland interests could be enhanced as a result of the rehabilitation of the buffer zone. Lowry PFT, p. 11.

In addition to the above, Weiss is required to employ an Environmental Monitor (“EM”) to oversee all work within the buffer zone. SOC, Special Conditions, ¶¶ 28-31. The Special Conditions require the EM to conduct weekly inspections and after any storm events, make appropriate adjustments, immediately control any problems, and report monthly to DEP and the Commission. There are numerous other provisions governing work in the buffer zone and erosions controls. SOC, Special Conditions, ¶¶33-44.

The above factors persuasively indicate that the work in the Buffer Zone is more than adequately conditioned to avoid any adverse impacts to the Resource Areas. Hegemann, the Commission’s wetlands expert, disagreed. She testified that there are “two concerns with maintenance of the lawn area within close proximity to the wetland resource areas: application of fertilizers and snow disposal.” Hegemann PFT, p. 6. She testified that the landscape plan shows areas of lawn adjacent to the 25 foot setback area. She claims that some portions of the lawn area are on a slope draining toward the wetland resource area. And an area of snow storage is shown as being associated with this lawn area. Hegemann PFT, p. 6. She testified that fertilizers, if not appropriately applied, have the potential to allow excessive nutrient loading. She added that without management of snow disposal and snow melt, the adjacent downgradient wetland resource area will receive sediment and other contaminants, such as road salt, litter, and automotive pollutants.

Weiss and DEP provided testimony that sufficiently rebutted the Commission’s concerns with the buffer zone. The snow storage area within the buffer zone is small, approximately .2 acre, and it is situated outside the innermost 25 feet of the buffer zone on a relatively flat gradient. In addition, the snow storage areas are broadly distributed around the perimeter of the site, dispersing melt-water in a non-concentrated manner. Lowry PFT, pp. 11-12. Provencal

testified that the snow storage area is in compliance with the DEP Snow Disposal Guidance No. BWR G2015-01. The goal is to avoid disposing of snow directly into waterbodies or sensitive areas and to allow the snow melt to filter into the soil, leaving sand and debris behind. Provencal PFT, p. 16. The snow storage location accomplishes that objective.

Hegemann's concern with fertilizers suffers from a number of problems. First, she failed to provide any evidence that application of fertilizers under the circumstances of this case will adversely alter resource areas. See e.g. Matter of Kornblith, supra.; Matter of Capital Group Properties, supra. Raising questions without a supporting factual foundation offers no probative value. See Matter of Cheney, Docket No. 98-096, Final Decision (October 26, 1999); Matter of McNiff, supra.; Matter of Nielsen, supra. Indeed, Lowry testified that the small area of landscaped lawn on the site and associated fertilizer use is inconsequential to the nutrient regime of the site wetlands. None are of a type considered sensitive to nutrient enrichment. Second, Provencal testified that fertilizers "can potentially contribute nutrients to wetland resource areas, however, it has been DEP's practice to not include conditions in SOC's pertaining to application of fertilizers or deicing materials within the buffer zone as these are considered unenforceable conditions." Provencal PFT, p. 16.

For the above reasons, an overwhelming preponderance of the evidence shows that the work in the buffer zone is sufficiently conditioned under 310 CMR 10.53(1) to avoid adverse impacts to adjacent Wetland Resource Areas.

III. The Project Complies With The Stormwater Standards At 310 CMR 10.05(6)(k)

At issue in this appeal is whether the project complies with Stormwater Standards 2 and 9.¹⁴

¹⁴Weiss previously remedied the project's prior noncompliance with Standard 3 (which was brought to Weiss' attention by the Commission's peer review consultant) by redesigning a component of the recharge system. The Matter of Weiss Farm, LLC, OADR Docket No. WET-2016-015 Recommended Final Decision
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Stormwater Standard 2. This standard provides: “Stormwater management systems shall be designed so that post-development peak discharge rates do not exceed pre-development peak discharge rates. . . .” 310 CMR 10.05(6)(k)(2).

The rate at which runoff discharges from a given site is known as the runoff rate or discharge rate. The peak rate of runoff from a given site (also referred to as the peak flow rate, peak runoff rate, or peak discharge rate) is the maximum rate of runoff that occurs during a particular storm event. DEP Hydrology Handbook for Conservation Commissioners, p. 2-6 (2002). Development changes in soils, surface cover, and topography can alter runoff conditions and thus influence peak rates of discharge. “Such alterations can change the water budget of a wetland, with resulting changes in wetland functions.” DEP Hydrology Handbook for Conservation Commissioners, pp. 2-6, 3-4, 6-1, and 6-2 and § 4.5 (2002). Such changes include increased flooding, erosion, and sedimentation. *Id.* Standard 2 is designed to prevent damage to resource areas that may occur from peak discharges during storms and to prevent downstream off site flooding. Stormwater Handbook, V. 1, ch. 1, p. 5.

Final Order of Conditions should specifically reference the plan changes that corrected the Standard 3 deficiency. The plan changes are appropriately allowed because they conform to DEP’s “Wetlands Program Policy 91-1: Plan Changes” and prior adjudicatory decisions—the changes are not substantial, they reduce potential environmental impacts, and the Commission has not opposed them. The Supreme Judicial Court has recognized that the Department has very broad discretion to approve plan changes in wetlands permitting proceedings, especially when environmental impacts are reduced. Matter of Princeton Development, Inc., Docket No. 2006-157, Final Decision (February 5, 2009) (allowing plan changes on stormwater issues after close of hearing and citing authority) (citing Citizens for Responsible Environmental Management v. Attleboro Mall, Inc., 400 Mass. 658, 673-74 (1987)); see also Matter of Robert Rinaldi, Docket No. 2008-058, Recommended Final Decision (February 18, 2009), adopted by Final Decision (March 12, 2009) (discussing acceptance of plan changes at late stages in an appeal, including “at any time prior to a Final Decision”); Matter of Community of Khmer Buddhist Monks, Inc., OADR Docket No. WET-2013-001, Recommended Final Decision (September 20, 2013), adopted by Final Decision (September 27, 2013); Matter of Karen McNiff, Trustee Chocoura Realty Trust, Docket No. WET-2011-016, Recommended Final Decision (July 25, 2013), adopted by Final Decision (July 31, 2013); Matter of A.W. Perry South, Inc., 11 DEPR 158 (1996); compare Matter of Capital Group Properties, LLC, OADR Docket No. WET-2012-012, Recommended Final Decision on Reconsideration (June 21, 2013), adopted by Final Decision on Reconsideration (June 24, 2013) (changes proposed after Final Decision were denied).

“Standard 2 requires that the post-development peak discharge rate is equal to or less than the pre-development rate from the 2-year and the 10-year 24-hour storms. BMPs that slow runoff rates through storage and gradual release, such as LID techniques, extended dry detention basins, and wet basins, must be provided to meet Standard 2.” Stormwater Handbook, V. 1, ch. 1, p. 5. “Proponents must also evaluate the impact of peak discharges from the 100-year 24-hour storm.” Stormwater Handbook, V. 1, ch. 1, p. 5.

In order to determine peak discharge rates, design points must be utilized as locations where peak rates of discharge are measured and calculated. DEP has provided policies specifying where to locate design points. As discussed in the Stormwater Handbook, in the “typical” case, the design point is at the lowest point of discharge at the downgradient property boundary. Stormwater Handbook, V. 1, ch. 1, p. 5. At a project like this one, however, it is appropriate to measure discharge where the stormwater runoff flows from the development area to the stream on the site in order to assess impacts to the stream as a Resource Area. DEP Hydrology Handbook for Conservation Commissioners, § 3.2, p. 3-4; §4.5, pp. 4-10 & 4-11 (2002) (appropriate to use boundary of on-site resource area as design point).

Here, Weiss correctly utilized a stormwater design point at the edge of the development area, where the development area stormwater flows to the channel (the boundary of the resource area). That design point properly focuses on the impact of the project to stormwater flows to the stream that almost entirely encircles the development area. See e.g. Capital Group Properties, LLC, supra. Although the large wetland area to the north may discharge water from the Property to the west, it was unnecessary to capture that discharge point as a design point because the status quo will remain with the upgradient wetland to the north, i.e. it will not be impacted by the project; thus, the development area analysis properly and fully gauged the project’s potential

impact. Hearing Transcript, pp. 231-233, 189-190, 213-215, 223, 346, 368-369, 399; see DEP Hydrology Handbook for Conservation Commissioners, § 3.2, pp. 3-4 and § 4.5 (2002) (under certain circumstances it is appropriate to use the boundary of a resource area as the design point). It was also unnecessary to have a design point at the most downgradient location—the 18 inch culvert—because the development area stormwater analysis shows that the development area’s stormwater contributions to the stream will remain the same or be decreased, as reflected by: the recharge system replicating current conditions and showing no net loss; and the Standard 2 discharge analysis showing that the project “will reduce both the peak rate of runoff and the volume of runoff to the adjacent wetlands by above 20%.” White PFT, ¶52. The volume of stormwater runoff will be 50,094 cubic feet, which is less than the existing volume of 64,469 cubic feet. This is a 22% reduction. White PFT, ¶ 53; Hearing Transcript, p. 130. The proposed project will have no negative impacts on the pump. White PFT, p. 13.

Lowry also testified that the proposed “stormwater management system will serve to protect and maintain the ecological integrity of the wetland resources on the site, and therefore will contribute to the protection of the Act’s interests. By proposing to distribute site runoff in a manner replicating natural runoff patterns, with treatment to reduce sediment and improve water quality, and by recharging the groundwater in dispersed locations around the upland are of the site the hydrologic parameters that support and sustain the wetland resource areas will be maintained.” Lowry PFT, p. 16.

The Commission’s expert, Griffin, contended that 5.9 acres of new impervious surfaces will significantly increase stormwater runoff volumes and speed conveyance of stormwater runoff to the pond by its piping system. He also claims that the soil is too impermeable, and that groundwater will flow too quickly to the stream and overwhelm it, the pump station, and the

pond. Griffin PFT, pp. 17-20. He adds that this is compounded by the pump station not properly functioning and pumping water from the site. Griffin PFT, p. 16. He concludes that the volume of the pond will be significantly increased as a consequence of the project.

While I understand Griffin's concerns with the project, he has provided no evidentiary support for a theory that is inconsistent with and contradicted by the Stormwater Standards and Weiss' stormwater analysis (as discussed above). Indeed, a significant flaw in Griffin's analysis is that he improperly combines recharged stormwater that is subject to Standard 3 with water that is subject to Standard 2. There is no support for this approach. In contrast, White's data-driven analysis shows that the recharge will be similar to existing conditions and peak flows will be reduced. White Rebuttal PFT, p. 14. Also, the pond that Griffin refers to in the southeast part of the site is actually BLSF and BVW. It is a healthy and functioning BVW, and the BLSF extends beyond its limits to elevation 163.65. Lowry PFT, p. 14. The project is designed to avoid impacts to the resource areas. Griffin's analysis is also compromised by his use of outdated HydroCAD calculations that had been changed in later submissions. Hearing Transcript, pp. 144-145.

Stormwater Standard 9. Standard 9 requires that a long-term operation and maintenance plan shall be developed and implemented to ensure that stormwater management systems function as designed.

The NOI included an Operation and Maintenance Plan for the stormwater management system. See Special Conditions 20 and 45; Provencal PFT, p. 355. The Commission contends, however, that the project does not comply with Standard 9 because Weiss "failed to explain how it will ensure operation of the pump station, which is currently not operating properly."

Petitioners' Post-Hearing Memorandum of Law. In addition to the Commission incorrectly

stating that the pump is not operating properly, it was previously noted that the pump is not part of the project at issue in this appeal and that a separate Notice of Intent will have to be filed to perform any work on the pump.

CONCLUSION


For all the above reasons, I recommend that DEP's Commissioner issue a Final Decision and Final Order of Conditions that affirm and adopt the SOC, but with the minor project changes discussed in this decision. Those changes include a special condition requiring maintenance of the weir and reference to the updated plans that include the stormwater infrastructure changes that brought the project into compliance with Stormwater Standard 3. In short, a preponderance of the evidence in the administrative record demonstrates that: (1) the Commission had sufficient information to issue a decision on the merits of the project, (2) the work in the buffer zone is sufficiently conditioned to avoid adverse impacts to the Resource Areas, and (3) the project complies with the Stormwater Standards..

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the 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 may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

Date: 8/18/17



Timothy M. Jones
Presiding Officer

SERVICE LIST

In The Matter Of:

Weiss Farm Apartments, LLC

Docket No. WET-2016-015

File No. 297-0371
Stoneham

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