COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

In the Matter of	)	Docket No. DEP-06-939
Robert Zeraschi	)	File No. SDA
	)	Reading
	)	

Recommended Final Decision

The petitioner, Robert Zeraschi, is entitled to prevail in his appeal from the Department of Environmental Protection's determination that his property contains riverfront area pursuant to 310 CMR 10.58; the water body behind Mr. Zeraschi's property is a manmade canal within the meaning of 310 CMR 10.58(2)(a)(1)(g) and, thus, the water body has no riverfront area. The positive riverfront area-related determinations in the Department's superseding determination of applicability therefore must be vacated.

Richard Nylen, Esq. (Lynch, DeSemione & Nylen, LLP, Boston), for the petitioner, Robert Zeraschi.

Donna Gorshel Cohen, Esq. (Brackett & Lucas, Winchester), for the Reading Conservation Commission.

Elizabeth Kimball, Esq. (Office of General Counsel, Boston), for the Department of Environmental Protection.

Natalie S. Monroe, Administrative Magistrate.

In this appeal, Robert Zeraschi challenges the Department of Environmental Protection's determination that a waterway known as Walkers Brook is not a manmade canal within the meaning of the Wetlands Regulations, 310 CMR 10.00, *et seq.* For the reasons set forth below, I conclude that the portion of Walkers Brook that was built as a drainage channel is a manmade canal under the regulations.

Statutory Framework

Under the Wetlands Protection Act, M.G.L. c. 131, § 40 (the "Wetlands Protection Act" or the "Act"), any person who intends to "remove, fill, dredge or alter" a wetland resource area must obtain a permit from the local conservation commission. See M.G.L. c. 131, § 40; 310

CMR 10.05(4). If a person is unsure whether his property contains wetland resource areas within the meaning of the Act or the Wetlands Regulations, he may file with the conservation commission a "request for a determination of applicability." See 310 CMR 10.05(3)(a). The commission then must determine whether the property contains any resource areas and, if so requested, also must identify the boundaries of those areas. See 310 CMR 10.05(3)(b).

The Wetlands Regulations also limit work within a one-hundred-foot "buffer zone" to wetland resource areas. Thus, a person also may submit a request for a determination of applicability to confirm the boundaries of any buffer zones on his property. See 310 CMR 10.05(3)(a)(2).

This case focuses on one wetland resource: riverfront area. The Wetlands Protection Act defines a riverfront area as:

> that area of the land situated between a river's mean annual high-water line and a parallel line located two hundred feet away, measured outward horizontally from the river's mean annual high-water line.

M.G.L. c. 131, § 40 (fourteenth para.).[1] Unless otherwise exempted, moreover, every river and perennial stream has an associated riverfront area.[2] The exemption at issue here applies to manmade canals. That exemption states:

> [m]anmade canals (*e.g.*, the Cape Cod Canal and canals diverted from rivers in Lowell and Holyoke) and mosquito ditches associated with coastal rivers do not have riverfront areas.

310 CMR 10.58(2)(a)(1)(g).

[1] Under certain circumstances not relevant here, the boundary of a riverfront area may be less than two hundred feet from a river's mean annual high-water line. See 310 CMR 10.58(2)(a)(3).
[2] The Wetlands Regulations define the term "river" to include perennial streams. See 310 CMR 10.58(2)(a)(1). Thus, unless an exemption applies, every perennial stream has a riverfront area.

Procedural History

Robert Zeraschi owns two adjacent parcels of land (collectively, the "property") located at 10 Torre Street in Reading. On March 8, 2006, Mr. Zeraschi filed a request for determination of applicability with the Reading Conservation Commission. In his request, Mr. Zeraschi asked the Conservation Commission to determine the jurisdictional status of a waterway known as Walkers Brook that flows behind his property and to confirm the locations of the inland banks on the brook. See Request for Determination of Applicability, dated March 8, 2006 ("RDA"), at Narrative pp. 1, 4. See also 310 CMR 10.54 (regulation pertaining to "inland bank" resource areas). In his request, moreover, Mr. Zeraschi took the position that while Walkers Brook meets the definition of a perennial stream under the Wetlands Regulations, it also is a manmade canal within the meaning of 310 CMR 10.58(2)(a)(1)(g). See RDA at Narrative p. 4. Mr. Zeraschi therefore contended that Walkers Brook does not have an associated riverfront area. Id. at 1-3.[3]

On March 27, 2006, the Conservation Commission issued a determination of applicability in which it found that Walkers Brook is a perennial stream with inland banks on both sides. The commission rejected Mr. Zeraschi's claim that the brook is a manmade canal and therefore found that it has an associated riverfront area, a portion of which extends onto Mr. Zeraschi's property. The commission further found that Walkers Brook contains "land under water bodies" pursuant to 310 CMR 10.56, and that it has "bordering land subject to flooding" pursuant to 310 CMR 10.57. See Determination of Applicability, dated March 27, 2006, at Attachment pp. 4-5. The Conservation Commission did not identify the boundaries of these resource areas; it did determine, however, that Mr. Zeraschi's property contains buffer zones to the inland banks. Id. at 4.

Mr. Zeraschi appealed the Conservation Commission's findings to the Department of Environmental Protection (the "DEP"). On July 5, 2006, the DEP affirmed all of the

[3] See footnote 2.

commission's findings. See Cover Letter to Superseding Determination of Applicability, dated July 5, 2006, at p. 1. This appeal followed.

In his notice of appeal, Mr. Zeraschi challenged just one aspect of the DEP's superseding determination of applicability: whether his property contains riverfront area pursuant to 310 CMR 10.58. Specifically, Mr. Zeraschi asserted that Walkers Brook is a manmade canal within the meaning of 310 CMR 10.58(2)(a)(1)(g) and therefore has no riverfront area. See Request for Adjudicatory Hearing, dated July 19, 2006. Mr. Zeraschi did not appeal any of the DEP's other findings. Id. ("The applicant concurs that Walkers Brook is a perennial stream and has associated Bank and Land Under Water resource areas and has an associated 100-foot buffer zone in the vicinity of the subject lot").

After "pre-screening" at the DEP, the appeal was transferred to the Division of Administrative Law Appeals on October 30, 2006. I held a pre-hearing conference on February 20, 2007,[4] during which the parties asked for a stay for thirty days in order to explore the possibility of settlement. I granted the parties' request and stayed the case until March 20, 2007. On March 23, 2007, Mr. Zeraschi's counsel reported that settlement was unlikely and asked to lift the stay. Consequently, on March 30, 2007, I issued an order establishing a schedule for both pre-filed and live testimony.

Pursuant to the established schedule, Mr. Zeraschi submitted the pre-filed testimony of two witnesses: Curtis Young, a professional wetlands scientist; and Paul Finocchio, a registered land surveyor. The Reading Conservation Commission proffered testimony from its Conservation Administrator, Frances Fink, and the DEP submitted pre-filed testimony from two of its environmental analysts, Jill Provencal and Heidi Davis.

The live portion of the hearing was held on July 30, 2007. Each party filed a closing brief on September 20, 2007, and a reply brief on October 5, 2007, after which the record closed.

[4] The conference originally was scheduled for January 3, 2007, but the DEP asked to re-schedule it.

Findings of Fact

Based on the evidence presented, I make the following findings of fact. Additional findings of fact are included in the discussion section of this decision, as necessary.

I. Mr. Zeraschi's Property.

As previously discussed, Robert Zeraschi owns two adjacent parcels of land (collectively, the "property") in a residential neighborhood in Reading. Young Dir. at ¶ 10; Young Exh. 17.[5] Torre Street forms the northern boundary of the property, while residential lots are located to the east and west. Young Exh. 17; Finocchio Exh. 2. The back – or southern border – of the property abuts a row of three small, narrow lots. Id. The southern boundary of these three lots abuts a waterway that the parties refer to as Walkers Brook. See, e.g., Young Exh. 17.

Because the waterway is central to this appeal, I discuss it in more detail in the next section.

II. The Disputed Waterway.

Before the mid-1940s, no water body flowed behind Mr. Zeraschi's property; the land behind his was upland. In the early- to mid-1940s, the Commonwealth built a drainage system in Reading to drain marshes that caused extensive area flooding. The main channel of this drainage system (the "Main Channel") was placed behind Mr. Zeraschi's property. When it was first built, and for decades thereafter, the Main Channel was referred to as a canal (and, in at least one instance, as a drainage ditch). At some point long after it was built, the Main Channel started being treated as part of a longer waterway called Walkers Brook.

[5] Citations to the record are as follows. The witnesses' pre-filed direct testimony and pre-filed rebuttal testimony are cited as "Dir." and "Reb.", respectively. An exhibit submitted with a witness's pre-filed testimony is referred to by the witness's last name, followed by "Exh. __." Testimony given during the hearing is cited by the name of the witness, followed by "Test." Finally, an exhibit that was admitted into evidence during the hearing is cited as "Hearing Exh. __."

A. The Construction and Location of the Main Channel.

Lake Quannapowitt is located in Wakefield, close to the Reading town line. Fink Exhs. 3, 5. Until the mid-1940s, there were hundreds of acres of marshland along the border of Wakefield and Reading, near the western shoreline of Lake Quannapowitt. Fink Exhs. 20, 21. Four streams traversed the marshes and then emptied into Lake Quannapowitt; these streams were known as Ash Street Brook, Eaton Street Brook, John Street Brook and Salem Street Brook. See, e.g., Finocchio Exh. 8.[6] Especially during heavy runoff, water from the marshes and streams caused extensive flooding on the Reading side of Lake Quannapowitt. See, e.g., Fink Exhs. 20, 21, 23.

In 1939, the Commonwealth authorized the construction of a drainage system to drain the marshes and divert water flows around Lake Quannapowitt. Finocchio Exh. 8; Fink Exhs. 21, 22. The drainage system was completed in the mid-1940s. It was comprised of the Main Channel, which captured and re-routed water around Lake Quannapowitt; three smaller channels that connected to the Main Channel; and dikes around portions of Lake Quannapowitt to further separate the lake from the wetlands. Id.

The Main Channel starts between Cross Street and Brook Street in Reading, where it captures the flow of Ash Street Brook (as it was called in 1939), and prevents the stream from flowing into Lake Quannapowitt. See Finocchio Exh. 8. The Main Channel then runs northeast for approximately a mile and a half, traveling past the western side of Lake Quannapowitt. See, e.g., Finocchio Exh. 8; Fink Exh. 3. It then turns to the east and travels around the northern tip of the lake. Id. It continues past the lake for a short distance and then empties into the Saugus River, below the outlet of Lake Quannapowitt. Id.[7]

[6] Some documents refer to the streams by other names. Unless otherwise noted, I use these names in this decision. In addition, street names have changed over time. For consistency, all street names are taken from Finocchio Exhibit 8, while distances were measured by cross-referencing that exhibit with Fink Exhibit 3.

[7] The Saugus River begins at the outlet of Lake Quannapowitt.

The first segment of the Main Channel (roughly twenty-five hundred feet) was built over a branch of the former Ash Street Brook. Finocchio Exh. 8.[8] The rest was dredged from marshes and upland, where no stream previously existed. See, e.g., id.; Young Exhs. 8-10; Fink Exh. 21. When it was first built, moreover, the Main Channel was lined with timber and was equipped with stop planks that could be used to control water flow and water level. See, e.g., Finocchio Exh. 8; Fink Exh. 21; Young Dir. at ¶ 16.[9] Water flows in the channel all year; water depth has been observed to be between twelve and twenty-four inches deep at various times. Young Dir. at ¶ 12.

Mr. Zeraschi's property is located near the northeast stretch of the Main Channel between Harvest Road and Salem Street, shortly before the channel turns to the east. Young Exh. 17; Finocchio Exh. 8. The section of the channel that runs behind Mr. Zeraschi's property – that is, the section between Harvest Road and Salem Street – was built in an area that had been upland. See, e.g., Provencal Test.; Young Dir. at ¶16; Fink Exh. 21 (describing the area at issue as "upland"); Young Exhs. 8-10 (maps and drainage plans from 1893, 1923, and 1944 depicting area in question as upland, without any streams or wetlands). The sides of the channel in this area are steep and are reinforced with concrete in places. The bottom is comprised primarily of muck, peat and sediments; some segments are concrete. Fink Dir. at ¶ 17(f); Fink Test.

Finally, the Main Channel flows roughly parallel to the southern border of Mr. Zeraschi's property. Young Dir. at ¶¶ 10, 11; Young Exh. 17. At its closest point, the waterway is approximately twenty feet from Mr. Zeraschi's property line; at its furthest point, it is roughly ninety feet away. See Finocchio Exh. 2; Fink Dir. at ¶ 3.

[8] Before the Main Channel was built, Ash Street Brook originated in a swamp well to the north of Cross Street; it flowed southeast and then forked approximately halfway between Cross Street and Brook Street. After the fork, the main branch originally flowed east into Lake Quannapowitt. The second branch, which the Main Channel followed, originally flowed northeast for roughly three thousand feet, ending shortly before John Street. See Finocchio Exh. 8.
[9] In certain areas, concrete and/or a clay-gravel borrow may have been used instead of timber. See Fink Exh. 21.

B. Renovations to the Main Channel.

The Main Channel has been re-routed twice. First, a section between John Street and Line Road was re-routed when Reading expanded its former landfill. Second, portions north of Salem Street were re-routed to build Route 128.

C. The Naming of the Main Channel and the Full Reach of Walkers Brook.

Before the Main Channel was built, there was no "Walkers Brook" in Reading. See, e.g., Fink Exhs. 19, 25; Young Exhs. 9-10; Finocchio Exh. 8. For several decades after the project was completed, moreover, maps and plans referred to the channel as the "Reading Drainage Canal," the "Reading Drain Canal," the "canal" and the "bypass channel." See, e.g., Young Exhs. 8, 12, 15-23. The first reference to "Walkers Brook" in evidence is a 1981 Flood Insurance Rate Map for the Town of Reading. Fink Exh. 5. This and one subsequent map depicts Walkers Brook as a waterway made up of (1) the upper reaches of the former Ash Street Brook; and (2) the Main Channel. See Fink Exhs. 3, 5. The maps show Walkers Brook beginning where the former Ash Street Brook originated, in a swamp west of Main Street in Reading. It then follows the same path as the former Ash Street Brook, flowing southeast under Cross Street until it connects to the Main Channel. Id.

Other maps continue to refer to the Main Channel as the "Canal" and the "Reading Drainage Canal." See Young Exhs. 17, 19 (1988 Flood Insurance Rate Map for the Town of Wakefield; 2007 Assessors Map).

Discussion

I. Is Walkers Brook a River?

In his closing brief, Mr. Zeraschi argues that Walkers Brook is not a perennial stream or river within the meaning of 310 CMR 10.58. Mr. Zeraschi did not raise this claim in his notice of appeal. See Request for Adjudicatory Hearing, dated July 18, 2006. Nor did he identify it as an issue for adjudication at the pre-hearing conference. See Pre-Hearing Conference Report, dated March 30, 2007, at p. 1. See also Petitioner's Status Report, dated March 20, 2007 ("This matter involves … the issue of whether the Property contains Riverfront Area or whether Walkers Brook is a canal"). Indeed, at the start of this proceeding, Mr. Zeraschi conceded that Walkers Brook qualifies as a perennial stream, and therefore as a river, under the Wetlands Regulations. See Request for Adjudicatory Hearing, dated July 18, 2006, at p. 2 ("The applicant concurs that Walkers Brook is a perennial stream"). I therefore do not need to consider Mr. Zeraschi's new argument that the waterway is not a perennial stream or river.

II. Is Walkers Brook a Manmade Canal?

As set forth above, the fundamental dispute in this case is whether Walkers Brook qualifies as a manmade canal as that term is used in 310 CMR 10.58(2)(a)(1)(g). That provision reads:

> [m]anmade canals (*e.g.*, the Cape Cod Canal and canals diverted from rivers in Lowell and Holyoke) and mosquito ditches associated with coastal rivers do not have riverfront areas.

310 CMR 10.58(2)(a)(1)(g). The Wetlands Regulations do not define "manmade canal." Id. I therefore look to the traditional rules of statutory construction. See Warcewicz v. Department of Environmental Protection, 410 Mass. 548, 550, 574 N.E.2d 364, 365 (1991) (a regulation is interpreted "in the same manner as a statute, and according to traditional rules of construction"). This means that I must accord the words in 310 CMR 10.58(2)(a)(1)(g) their usual and ordinary meanings. Id., citing Nantucket Conservation Found., Inc. v. Russell Mgmt., Inc., 380 Mass.

212, 214, 402 N.E.2d 501 (1980). A word's "usual and accepted meanings" are derived "'from sources presumably known to the [regulation's] enactors, such as their use in other legal contexts and dictionary definitions.'" Police Dept. of Boston v. Fedorchuk, 48 Mass. App. Ct. 543, 548, 723 N.E.2d 41, 46 (2000), quoting Commonwealth v. Zone Book, Inc., 372 Mass. 366, 369, 361 N.E.2d 1239 (1977).

Black's Law Dictionary defines a canal as "an artificial waterway used for navigation, drainage or irrigation of land." Black's Law Dictionary 186 (5th ed. 1979). The American College Dictionary defines a canal as "an artificial watercourse for navigation, irrigation, etc.," while Merriam-Webster defines it as "an artificial waterway for navigation, or for draining or irrigating land." The American College Dictionary 174 (1964); Merriam-Webster Collegiate Dictionary 164 (10th ed. 1994).

The section of Walkers Brook that was built as a drainage channel – *i.e.*, the Main Channel – falls squarely within the above definitions. The Main Channel did not exist before the mid-1940s. It is an artificial waterway that the Commonwealth created in order to drain marshland and alleviate area flooding. Its width, depth, gradient, banks and length are all manmade. It was dredged primarily from land where no stream previously flowed. Indeed, large sections of the channel, including the portion that runs behind Mr. Zeraschi's property, were excavated from upland. See, e.g., Finocchio Exh. 8; Fink Exh. 21. I also note that the Main Channel originally was lined with timber and had stop planks to control its flow. While these details are not critical to finding that the Main Channel is a manmade canal, they further highlight the fact that it is. I also found probative, although not decisive, the fact that maps and state highway plans labeled the channel as a canal for decades after it was built; the moniker "Walkers Brook" did not appear until much later.

Moreover, the Main Channel did not replace an existing stream. It is true that the first segment of the Main Channel was built over a branch of the former Ash Street Brook. Before

the canal was built, however, that branch naturally ended shortly before John Street; the Main Channel extends nearly a mile beyond John Street. Thus, it cannot be said that the Main Channel "replaced" or "re-routed" that branch. Furthermore, before the Main Channel was built, the primary branch of Ash Street Brook flowed east and emptied into Lake Quannapowitt. It strains credulity to state that the Main Channel – which travels in an entirely different direction and discharges into a different water body – is a "re-routed" version of that stream. In this regard, I expressly reject Ms. Fink and Ms. Provencal's testimony that the Main Channel is a "re-routed" stream and that Walkers Brook existed before the drainage system was built in the 1940s.

Further, I do not find persuasive the DEP and Conservation Commission's argument that the term manmade canal should be construed narrowly to include only those waterways that are similar to the canals listed in the Wetlands Regulations: the Cape Cod, Lowell and Holyoke canals.[10] Specifically, they contend that the Cape Cod Canal was built to enhance commerce by improving navigation to Cape Cod, while the Holyoke and Lowell canals divert only part of a river's flow and were designed to provide hydroelectric power to factories. Thus, they posit that a manmade canal should include only "navigation" and "diversion" canals that were built for commercial or industrial purposes.

Their claim rests on the fact that 310 CMR 10.58(2)(a)(1)(g) specifically names the Cape Cod, Lowell and Holyoke canals. In construing regulations, however, there are terms of limitation ("*i.e.*") and terms of expression ("*e.g.*"). The reference to the Cape Cod, Lowell and Holyoke canals is modified by the latter term ("*e.g.*"), which means "for the sake of an example." Black's Law Dictionary 462 (5th ed. 1979). Thus, the Cape Cod Canal and the canals diverted from rivers in Lowell and Holyoke simply are examples of manmade canals and do not exclude all other canals from 310 CMR 10.58(2)(a)(1)(g). Furthermore, aside from the

[10] The Conservation Commission and DEP's closing briefs are near mirror images of one another, with the same arguments presented nearly word-for-word. I therefore address their arguments together.

three named canals, the regulations go on to exempt mosquito ditches associated with coastal rivers, which suggests that the DEP sought to broadly encompass manmade water diversions, even relatively minor ones.

In addition, the DEP and Conservation Commission's interpretation would be inconsistent with the use of "canal" elsewhere in the Wetlands Regulations. See Singer Friedlander Corp. v. State Lottery Comm'n, 423 Mass. 562, 565, 670 N.E.2d 144, 146 (1996) (a regulation "should be read as a whole to produce an internal consistency"). For example, an "abutter" is defined as:

> the owner of land sharing a common boundary or corner with the site of the proposed activity in any direction, including land located directly across a street, way, creek, river, stream, brook or **canal**.

310 CMR 10.04 (emphasis added). Similarly, "land in agriculture use" includes land used in a manner related to producing or raising agricultural products, including but not limited to land used for "canals." Id. See also 310 CMR 10.04(c)(1)(e) (providing that under certain circumstances related to agriculture, the construction of bypass canals do not require a wetlands permit); 310 CMR 10.04 (the "normal maintenance of land in agricultural use" includes cleaning, clearing, repairing or restoring "man-made or natural water management systems such as … **canals/channels**….) (emphasis added).

The term canal in these provisions is not limited to navigation and diversion canals. Indeed, such a limitation would be nonsensical in the abutter provision and would render the word canal meaningless in the sections related to agriculture. By contrast, applying the plain and ordinary meaning of canal in 310 CMR 10.58 is consistent with the use of that term in the rest of the Wetlands Regulations.[11]

[11] The DEP and Conservation Commission's argument is flawed for a number of other reasons as well. For example, the agencies have not explained why a canal's original purpose should be used as the defining feature that determines whether a canal falls within the manmade canal exemption or not.

Moreover, none of the witnesses had experience regulating manmade canals; nor were they involved in drafting 310 CMR 10.58(2)(a)(1)(g). Since none of the witnesses was qualified to provide expert testimony on the meaning of "manmade canal" in the regulations, I accord no weight to their testimony concerning their personal interpretations of the term.

Finally, I recognize that "an exception from the coverage of a [regulation] is ordinarily to be construed narrowly so as to prevent the purposes of the [regulation] from being rendered ineffective." Martin v. Rent Control Bd. of Cambridge, 19 Mass. App. Ct. 745, 747, 477 N.E.2d 426, 428 (1985). A finding that the Main Channel is a manmade canal will not conflict with the purposes of the Wetlands Regulations. Such a determination simply means that the waterway does not have an associated riverfront area. The Main Channel still will be regulated as a river. It has inland banks, land under water bodies and bordering land subject to flooding. Any activity in, or within one hundred feet of, these resource areas must comply with the Wetlands Regulations. I also note that the Riverfront Protection Act is aimed at preserving the "natural integrity" of rivers and riverfront area. See 310 CMR 10.58 (preamble). Where a waterway is manmade, there is no "natural" river or riverfront area to preserve.

The Conservation Commission and DEP offer two alternative methods for evaluating whether a waterway is a manmade canal. First, the agencies assert that a side-by-side analysis is needed to determine whether the Main Channel is truly "like" the Cape Cod, Holyoke or Lowell canals. Second, they argue that the Main Channel is not a manmade canal because it has riverine characteristics.

Moreover, the DEP does not adhere to its own proposed definition. For instance, the DEP ruled that one waterway was a manmade canal because it is not fed by a network of tributaries; another is considered to be a manmade canal even though it is used for water supply, rather than for navigation or as a diversion canal. See Davis Dir. at ¶ 4 and Davis Test. (testifying about why two waterways – a narrow channel in Natick and the Salem-Beverly water supply canal – were manmade canals under 310 CMR 10.58(2)(a)(1)(g)). See, e.g., Morin v. Comm'r of Public Welfare, 16 Mass. App. Ct. 20, 24-25, 448 N.E.2d 1287, 1290-91 (1983) (where agency does not consistently interpret or apply its own regulations, the agency's interpretation of that regulation is entitled to no weight).

1. *"Side-by-Side" Comparisons*

Harkening back to their original argument that manmade canals must be similar to the Cape Cod, Lowell and Holyoke canals, the DEP and Conservation Commission purport to compare the Main Channel to each of these three canals and argue that, because the channel is not like any of them, it is not a manmade canal. By way of example, the two agencies assert that the Cape Cod Canal (1) is a tidal saltwater body; (2) was built to provide navigation to improve commerce; and (3) still provides navigation for business and recreation. They contend that the Main Channel (1) is a freshwater body; (2) was not built for navigation; and (3) provides storm damage prevention and flood control. According to the DEP and Conservation Commission, because the Main Channel does not have the same characteristics as the Cape Cod Canal, it cannot be a manmade canal under the regulations.

This argument is without merit. First, as previously discussed, the manmade canal exemption is not limited to canals that are similar to the Cape Cod, Holyoke and Lowell canals. Second, the proposed "rule" is so vague that it would be subject to inconsistent and arbitrary application. For instance, the two agencies distinguish the Main Channel from the Cape Cod Canal in part because the channel is a freshwater waterway while the Cape Cod Canal is a tidal saltwater body. The arbitrariness of this distinction is highlighted by the fact that the Lowell and Holyoke canals are freshwater bodies like the Main Channel. Likewise, the agencies argue that the Main Channel is dissimilar to the Lowell and Holyoke canals because flow in the channel is not controlled by locks or gates, while the other two canals had control mechanisms. Yet, both agencies concede that flow in the Cape Cod Canal is not artificially controlled. See, e.g., Novak v. Department of Environmental Protection, 1995 WL 1146156, *7 (Mass. Super. 1995) ("Inconsistent application of what is supposed to be the same standard is persuasive evidence that the agency is acting arbitrarily and capriciously and abusing its discretion").

Finally, some of the supposed distinctions are inconsistent with the evidence in this case. The DEP and Conservation Commission argue, for example, that a manmade canal cannot be fed by tributaries, while a river or stream can. However, tributaries flow into many canals in Massachusetts, including the Cape Cod Canal. See, e.g., Hearing Exhs. 1-5; Provencal Test.; Davis Test.; Young Reb. at ¶ 6 (rebuttal to J. Provencal testimony). In fact, the Cape Cod Canal is fed by a dendritic network of tributaries, which DEP environmental analyst Heidi Davis testified was the "hallmark" of a stream. See, e.g., Hearing Exh. 2; Young Reb. at ¶ 6.[12]

2. *Functionality Test*

As their last argument, the Conservation Commission and DEP claim that Walkers Brook (including the Main Channel) is not a manmade canal because it functions as a river and has riverine characteristics. The argument is circular. The manmade canal exemption is at issue solely because Walkers Brook is a river under the regulations. It makes no sense to then say that Walkers Brook is not a manmade canal because it is a river.

Additionally, the proposed "functionality" test does not comport with the plain language of the regulation, which exempts "manmade canals," not "manmade canals that do not function as a river." See 310 CMR 10.58(2)(a)(1)(g). Indeed, the canals listed in the regulations have the very riverine functions and characteristics that allegedly prevent the Main Channel from being a manmade canal. For instance, the Lowell and Holyoke canals "flow in a definite channel in the ground due to a hydraulic gradient…." 310 CMR 10.04. See, e.g., Provencal Dir. at ¶ 12. Further, the Cape Cod Canal and other recognized canals in Massachusetts are fed by tributaries and have a watershed. See, e.g., Young Reb. at ¶¶ 5-6 (rebuttal to J. Provencal testimony); Young Reb. at ¶¶ 2, 4 (rebuttal to H. Davis testimony); Hearing Exhs. 1-5. Moreover, the Cape

[12] Ms. Davis explained that a "dendritic network of tributaries" refers to the treelike shape created by a stream and its tributaries, with the main trunk, branches and twigs corresponding to the main stream, tributaries and subtributaries, respectively. I also note that tributaries flow into the Main Channel only because it was built that way.

Cod, Holyoke and Lowell canals all perform some wetlands functions, such as wildlife habitat, flood control and storm damage prevention. See, e.g., Provencal Test.; Davis Test.; Young Reb. at ¶ 5 (rebuttal to J. Provencal testimony).

Finally, I emphasize that the Main Channel qualifies a river under the Wetlands Regulations and still will be regulated as one, with inland banks, land under water, bordering land subject to flooding, and associated buffer zones. A determination that the Main Channel is a manmade canal simply means that it does not have any riverfront area.

Conclusion and Disposition

For the reasons set forth above, I conclude that the portion of Walkers Brook that was built as a drainage channel – *i.e.*, the Main Channel – is a manmade canal within the meaning of the Wetlands Regulations. I therefore vacate the findings in the superseding determination of applicability that (1) the waterway behind Mr. Zeraschi's property is not a manmade canal and (2) Mr. Zeraschi's property contains riverfront area associated with that waterway. With these two modifications, I make Mr. Zeraschi's superseding determination of applicability final.

Dated: June 12, 2008

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Natalie S. Monroe
Administrative Magistrate