COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS

DEPARTMENT OF ENVIRONMENTAL PROTECTION

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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

March 14, 2025

In the Matter of
NE Metro Regional Vocational School District

OADR Docket No. WET-2023-014
MassDEP NE-313-0620
Wakefield, MA

RECOMMENDED FINAL DECISION

I. INTRODUCTION

Christine L. Rioux, of 22 Woodland Road in Wakefield, Massachusetts, representing a 10-Resident Group in Wakefield, ("the Petitioners") filed this appeal with the Office of Appeals and Dispute Resolution ("OADR")[1] challenging the Superseding Order of Conditions ("SOC") issued by the Massachusetts Department of Environmental Protection Northeast Regional Office ("MassDEP" or the "Department") to the Northeast Metropolitan Regional Vocational School District ("the Applicant"). The SOC, which was issued under the Wetlands Protection Act ("MWPA"), G.L. c. 131, § 40, and the Wetlands Regulations, 310 CMR 10.00, approved the construction of a new school building and three auxiliary buildings, a related access driveway, parking lots, walkways, sports facilities, including a turf field, track, tennis courts, soccer field, and associated utilities ("proposed Project"). The Wakefield Conservation Commission ("WCC") had

[1] OADR is an independent, neutral, quasi-judicial office within the Massachusetts Department of Environmental Protection whose Presiding Officers (senior environmental attorneys) are responsible for advising MassDEP's Commissioner in the adjudication of appeals filed with OADR.

previously issued an Order of Conditions ("OOC") denying the proposed Project under the MWPA and the Wetlands Regulations.

After thoroughly reviewing the evidence in the administrative record of the appeal, based on a preponderance of the evidence submitted by the Parties at the Hearing and the governing wetlands statutory and regulatory requirements, I recommend that the Department's Commissioner issue a Final Decision affirming the SOC, with the addition of one condition, proposed by the Applicant, discussed below.

II. EVIDENCE

The evidence in the administrative record of the appeal includes the Department's basic records and the pre-filed, sworn written testimony and exhibits submitted by witnesses on behalf of the Parties.[2] The witnesses below were available for cross-examination at the Hearing.[3]

For the Petitioners:

1. Christine Rioux: Ms. Rioux is an environmental scientist who has been involved with the proposed Project since May 2022, attended site visits, and provided comments to the WCC and to MassDEP. Ms. Rioux testified as a fact witness and is also the representative for the Petitioner 10-Resident Group.
2. Douglas Heath: Mr. Heath is a hydrogeologist with over 40 years of experience. He received a Bachelor of Science degree in geology from the University of Massachusetts Amherst and a Master of Science degree in hydrology from the New Mexico Institute of Mining and Technology. He is a Certified Ground Water Professional and worked for the

[2] Throughout this Recommended Final Decision, the witnesses' Pre-Filed Direct Testimony is referred to as "[Witness] PFT, ¶ X" and Pre-Filed Rebuttal Testimony will be referred to as "[Witness] PFR, ¶ X." Exhibits to testimony are referred to as "[Witness] Ex. X."

[3] The witnesses' cross examination testimony offered at the Hearing is referred to as "[Witness] TR, page:line."

Environmental Protection Agency as a Senior Hydrogeologist for nearly 30 years, during which he studied and assessed soil and water contamination. Mr. Heath is qualified as an expert witness.

3. John Chessia: Mr. Chessia is a civil engineer with Chessia Consulting Services, LLC. He received a Bachelor of Science in civil engineering from Northeastern University. He is a Registered Professional Engineer and Certified Soil Evaluator in Massachusetts and has over 30 years of engineering experience. He specializes in general civil engineering in relation to real estate development projects, including stormwater and wastewater engineering. Mr. Chessia is qualified as an expert witness.

For the Applicant:

1. David Conway: Mr. Conway is a professional engineer and Executive Project Manager with Nitsch Engineering. He received a Bachelor of Science degree in civil engineering from Tufts University. He is a Registered Professional Engineer in Massachusetts with 32 years of engineering experience. He has been involved in over 100 public school building projects and has experience in drainage, water supply, wastewater collection, site layout, site grading, preparation of erosion and sediment control plans, and construction administration. Mr. Conway is qualified as an expert witness.
2. Andrea Kendall: Ms. Kendall is a Senior Environmental Scientist with LEC Environmental Consultants, Inc. She received a Bachelor of Science degree from Binghamton University and a Master of Science degree in environmental engineering sciences from the University of Florida Gainesville. She is a Professional Wetland Scientist and has over 25 years of experience. She has prepared over 500 environmental permitting applications under federal, state, and local regulations, and has represented clients before regulatory officials over 1,000 times. Ms. Kendall is qualified as an expert witness.

For the Department:

1. Tyler Ferrick: Mr. Ferrick is an environmental analyst with MassDEP. He is a Professional Wetland Scientist with over 11 years of experience. He is responsible for reviewing Notices of Intent ("NOIs") and assessing projects for SOCs. He is also responsible for preparing testimony and acting as an expert witness for MassDEP in adjudicatory proceedings. Mr. Ferrick is qualified as an expert witness.

The Property

The project site ("Property") is an approximately 59-acre plot located at 100 Hemlock Road in Wakefield, Massachusetts. Conway PFT, ¶ 6; Kendall PFT, ¶ 9; SOC cover letter, p. 1. The Property is bounded by Breakheart Reservation to the north and east, Farm Street to the south, and a mix of residential, private, and public properties to the south, west, and northwest. Conway PFT, ¶ 6; Kendall PFT, ¶ 9; SOC cover letter, p. 1. The existing school building is located on the northern portion of the Property and consists of a +/-210,000 square foot school building, constructed in 1968, as well as associated sports fields and facilities, driveways, parking, and utilities. Conway PFT, ¶ 6; Kendall PFT, ¶ 9; SOC cover letter, p. 1. Parking lot and roof runoff from the existing school facility is collected via catch basins and conveyed to a closed drainage system with outfalls that discharge to adjacent BVWs. Conway PFT, ¶ 7; Kendall PFT, ¶ 10; SOC cover letter, p. 1. No water quality treatment is provided, and the existing conditions do not comply with the Stormwater Standards. Conway PFT, ¶ 7; Kendall PFT, ¶ 10; SOC cover letter, p. 1. The existing school building, parking lots, tennis courts, and utility (electric, water, sewer, drainage) systems will remain open during construction of the proposed project and later will be demolished. Conway PFT ¶ 11; Kendall PFT, ¶ 11; Ferrick PFT, ¶ 4. Wetlands surround the existing school development to the east, north, and west. Conway PFT, ¶ 8; Kendall PFT, ¶ 10.

The southern portion of the Property consists of vacant forested land. SOC cover letter, p. 1; Conway PFT, ¶ 8; Kendall PFT, ¶ 10. The proposed Project area includes wetlands resource areas identified by type, wetland flags and location as follows: six (6) Bordering Vegetated Wetlands ("BVW") associated with intermittent streams, one (1) BVW associated with the Saugus River[4] and six (6) banks to intermittent streams, one (1) bank to mean annual high water and one (1) Riverfront Area. There are also four (4) non-jurisdictional Isolated Vegetated Wetlands ("IVW"), one of which includes a certifiable vernal pool. Ferrick PFT, ¶ 3; Conway PFT, ¶ 8; Kendall PFT, ¶ 10; Stormwater Report, p. 6.

The Proposed Project

The proposed Project involves the construction of a new 135,000 square foot school building and three auxiliary buildings: a 3,100 square foot locker room building, a 8,500 square foot maintenance building, and a 1,300 square foot concession stand.[5] Conway PFT, ¶ 9. The proposed Project also includes the construction of an access driveway, parking lots, walkways, sports facilities, and utilities. Conway PFT, ¶ 9; Kendall PFT, ¶ 11; Ferrick PFT, ¶ 4. The proposed Project will result in a net increase of 4.57 acres of impervious area. Ferrick PFT, ¶ 4.[6]

As modified during the public hearing process, the proposed Project will not result in any permanent impacts to protected wetland resource areas. Ferrick PFT, ¶¶ 5, 23; Conway PFT, ¶ 79; Kendall PFT, ¶¶ 13-16, 21, 22. Natural vegetation within the Buffer Zone of 10-35 feet will be

[4] The Saugus River is classified as an impaired waterbody. Stormwater Management Report ("Stormwater Report"), Appendix F.

[5] The NOI originally listed the locker room building as 2,000 square feet and the maintenance building as 3,137 square feet. Ferrick PFT, ¶ 4. The maintenance building and associated pavement were relocated outside the Buffer Zone which reduced development by +/-8,300 square feet of development from within the Buffer Zone and approximately 15,000 square feet of contributing impervious area. Kendall PFT, ¶ 14.b.

[6] Because the proposed Project will disturb more than one acre of land, a National Pollutant Discharge Elimination System ("NPDES") Stormwater Construction General permit was obtained from the U.S. Environmental Protection Agency. Conway PFT, ¶¶ 20, 32; See also Stormwater Report, p. 17.

maintained between the limit of work and the BVW depending on the work area, except for select drainage outfalls. Kendall PFT, ¶ 14; Conway PFT, ¶ 18; Conway Ex. 3, Nitsch Engineering's Buffer Zone Area Take Offs (Exiting Condition, Proposed Condition, Table), revised June 12, 2023.[7] Steep slopes in the proposed Project footprint would be flattened to control erosion. Kendall PFT, ¶¶ 14.f, 20; Conway PFT, ¶ 78. To limit the need for grading, some locations will utilize retaining walls. Conway PFT, ¶ 16. Mature native trees were surveyed along Wetland Series 1 to be maintained to provide a planted buffer. Conway PFT, ¶ 17. Construction of the access driveway will impact 741 square feet of non-jurisdictional IVW. Ferrick PFT, ¶ 5. 116,823 square feet of the 100-foot Buffer Zone to BVW and Bank will be developed, resulting in 77,099 square feet of temporary impacts and 39,724 square feet of permanent impacts. Ferrick PFT, ¶ 5; Conway PFT, ¶ 18; SOC cover letter, p. 3. The proposed access driveway will cross over an intermittent stream, with a concrete 3-sided open bottom culvert to span the Bank of the intermittent stream to avoid direct impacts. SOC cover letter, p. 3. Additionally, invasive species management will result in temporary impacts to 22,001 square feet of Buffer Zone to BVW and Bank and 6,629 square feet of Riverfront Area.[8] Ferrick PFT, ¶ 5.

The proposed stormwater management system involves treatment and management of stormwater discharge via deep sump hooded catch basins, proprietary water quality structures, eight subsurface detention/infiltration systems with isolator rows, and, located outside of wetlands

[7] These measures include a minimum 25-foot natural buffer except in select drainage outfall/level spreader locations; a minimum 10-foot offset between the driveway retaining wall and BVW 3; and a 35-foot natural buffer from BVW 10 and maintenance of existing offsets within the existing development to BVW 6, BVW 7, BVW 8 and BVW 9 except for select outfalls. Id. The shortest distance between the limit of the proposed Project disturbance and the wetland boundary is 2 linear feet. See SOC, Section B.3.

[8] Work proposed in the Riverfront Area was not identified as an issue for adjudication. The SOC concluded that the invasive species work in the Riverfront Area results in "temporary" impacts and therefore does not result in alteration of the Resource Area. SOC cover letter, pp. 2-3; Ferrick PFT, ¶¶ 5, 41; Ferrick TR 158:14-24, 166:23-167:12. The invasive species removal and installation of native plantings will temporarily impact 6,629 square feet of Riverfront Area. SOC, Section B.9.

jurisdiction, two areas of porous pavement. Ferrick PFT, ¶ 4. Portions of three of the subsurface systems would be located in the Buffer Zone to BVW and/or Bank and four of the subsurface systems' discharge points would be located in the Buffer Zone to BVW and/or Bank. Ferrick PFT, ¶ 4. Stormwater would be directed through these stormwater management treatment structures to level spreaders before being discharged. Conway PFT, ¶ 27. Specific quantities of water would be directed to each wetland to maintain water balance and mimic existing conditions. Conway PFT, ¶¶ 28, 34, 55-56. During the pendency of these proceedings, the Applicant agreed to an additional condition that would prohibit the use of deicing agents containing sodium chloride on the Property. Conway PFT, ¶ 31; Kendall PFT, ¶ 14.e.[9]

Procedural Background

On July 15, 2021, the WCC issued an Order of Resource Area Delineation ("ORAD")[10] approving the jurisdictional status of wetland resource areas at the Property. Ferrick PFT, ¶ 3. The ORAD was not appealed, and it expired on July 15, 2024. Ferrick PFT, ¶ 3; Ferrick Ex. B, "Topographical Survey, Northeast Metro Regional Voc. School," dated June 3, 2020, revised July 7, 2021, prepared by Nitsch Engineering.

While the ORAD was in effect, on September 21, 2022, the Applicant submitted an NOI to the WCC for the proposed Project. Ferrick PFT, ¶ 4. On June 6, 2023, the WCC denied the proposed Project, concluding that it did not meet the performance standards in 310 CMR 10.54(4)(a)6 and 310 CMR 10.55(4)(b) for stream crossings and BVW respectively. Ferrick PFT, ¶

[9] See also email from Applicant's counsel, Julie Barry, to OADR Case Administrator which offered a broader chloride prohibition: "RE: In the Matter of NE Regional Vocational School District, OADR Docket No. WET-2023-014" (February 14, 2024): "Further, as to the second issue, please be advised that to the extent the Petitioners intend to address the use of chloride at the Project as indicated during the prehearing conference, the Applicant agrees to an additional condition prohibiting use of chloride at the Project site - in spite of the proximity to Farm St. and town's use of deicing agents there and at other nearby town roadways."

[10] An ORAD is a determination that a BVW or other Resource Area is subject to MWPA jurisdiction and is effective for 3 years, unless extended for up to 3 additional years upon confirmation by a professional with relevant expertise that the Resource Area delineations remain accurate. See 310 CMR 10.05(6)(a)3; 310 CMR 10.05(6)(d).

6. The denial also stated that the proposed Project's stormwater management system, tree removal, wildlife impacts, and snow management did not protect the interests of the MWPA and the Wetlands Regulations. Ferrick PFT, ¶ 6.

On June 14, 2023, the Applicant submitted a Request for SOC to MassDEP. Ferrick PFT, ¶ 7. On September 27, 2023, MassDEP informed the Applicant that its proposed stormwater management system did not meet Stormwater Standard 2, 310 CMR 10.05(6)(k)2, and requested revisions to the plans. Ferrick PFT, ¶ 9. The Applicant submitted revised plans to MassDEP on October 3, 2023, and submitted further revisions on October 26, 2023. Ferrick PFT, ¶¶ 10-11. During the SOC review process, MassDEP received correspondence connected to the proposed Project from various parties, including the Petitioners. Ferrick PFT, ¶ 13; Rioux PFT, ¶ 6. MassDEP asserts that it considered all information it received, although it did not specifically respond to the individual comments submitted. Ferrick PFT, ¶ 13; Rioux PFT, ¶ 2.[11] On November 2, 2023, MassDEP issued an SOC reversing the WCC's denial and approving the proposed Project, as revised during the SOC review, under the MWPA and the Wetlands Regulations. Ferrick PFT, ¶ 14.

The Petitioners filed an appeal with OADR to challenge the SOC on November 15, 2023. On January 10, 2024, the Applicant filed a Motion to Dismiss for Failure to State a Claim and to Expedite the Proceedings. The Motion to Dismiss argued that the Petitioners' claim did not set forth any specific objections to the SOC or their desired relief. The Motion to Expedite argued that it was in the public interest to expedite the proposed Project and that Petitioners' goal was simply to

[11] At the Hearing, during cross examination of Mr. Ferrick, the Petitioners' representative raised for the first time that the Petitioners had filed a separate SOC. Mr. Ferrick testified that he received letters and emails from interested parties and the Petitioners' SOC request and considered them during the SOC review process. Ferrick PFT, ¶ 13; Ferrick TR, 153:12-23. See also Chessia PFR, ¶ 25, which is a list of documents Mr. Chessia testified to having provided to MassDEP and includes "Ten Residents' Appeal of Superseding Order of Conditions, November 15, 2023." A copy of this document is not in the record.

delay the proposed Project. A Pre-Hearing Conference was held on February 5, 2024, and I issued a Pre-Hearing Conference Report and Order on February 7, 2024, ruling on the Applicant's Motions and proposing issues for adjudication.[12] I denied the Motion to Dismiss because the Applicant itself, with MassDEP's concurrence, had identified one issue for adjudication relating to 310 CMR 10.55 in the Joint Status Report, and the Petitioners' appeal request specifically requested that the SOC be vacated. I also denied the Motion to Expedite. Following comments from the Parties, I issued the Amended Issues for Adjudication on February 16, 2024.[13]

On March 27, 2024, the Applicant moved to strike portions of the Pre-Filed Direct Testimony of all three of the Petitioners' witnesses. The Applicant argued that Mr. Heath's testimony contained irrelevant references to chloride and impermissible hearsay in the form of scientific studies; Ms. Rioux was testifying as an expert witness despite not being disclosed as an expert witness; and Mr. Chessia's testimony was argumentative and contained impermissible conclusions of law. On April 9, 2024, I denied the Motion to Strike, ruling that Mr. Heath's testimony regarding chlorides was relevant and the scientific studies were admissible despite being hearsay; Ms. Rioux was testifying as a fact witness and her testimony would be given appropriate weight; and Mr. Chessia's testimony would be given appropriate weight.

A Hearing was held in-person at MassDEP's Northeast Regional Office in Woburn, Massachusetts on May 9, 2024. The Applicant provided a stenographer for the Hearing and a

[12] The Joint Status Report the Parties filed on January 16, 2024, did not contain a joint list of proposed issues for adjudication despite the November 17, 2023 Scheduling Order requiring the Parties to submit such a list. Therefore, the issues for adjudication were discussed at the Pre-Hearing Conference and I proposed two issues in the Pre-Hearing Conference Report and Order and gave the Parties one week to comment.

[13] Over a period of several weeks, OADR responded to numerous inquiries from the Petitioners regarding process, whether their representative, Ms. Rioux, could also be a witness, and how to file testimony. They also inquired whether they had to file a Memorandum of Law, as directed in the PHC Report and Order. The Applicant and MassDEP moved to waive the Memorandum of Law for all Parties, contending that the Petitioners waived the right to file one. I denied the Motion and allowed extensions for relevant filings.

transcript was prepared and provided to the Parties on May 28, 2024. The Parties submitted their post-hearing briefs on June 25, 2024.

III. ISSUES FOR ADJUDICATION

Based on the Parties' respective positions in the appeal regarding approval of the proposed Project, the Issues for Adjudication in the appeal are the following.

> Issue 1: Whether the proposed Project has been conditioned to meet the requirements of 310 CMR 10.53(1) for proposed work in the Buffer Zone to the BVW;
>
> Issue 2: Whether the proposed Project has been conditioned to meet the requirements of 310 CMR 10.55(3) and 310 CMR 10.55(4) for proposed work in the BVW; and
>
> Issue 3: Whether the proposed Project as conditioned meets the stormwater performance standard requirements of 310 CMR 10.05(6)(k)1-6?

IV. STATUTORY & REGULATORY FRAMEWORK

The MWPA and the Wetlands Regulations have as their purpose the protection of wetlands and the regulation of activities affecting wetlands areas in a manner that promotes the following interests: (1) protection of public and private water supply; (2) protection of ground water supply; (3) flood control; (4) storm damage prevention; (5) prevention of pollution; (6) protection of land containing shellfish; (7) protection of fisheries; and (8) protection of wildlife habitat. G.L. c. 131, § 40; 310 CMR 10.01(2); see In the Matter of Kristen Kazokas, OADR Docket No. WET-2017-022, Recommended Final Decision (August 29, 2018), 2018 WL 9847851, *3, adopted by Final Decision (September 18, 2019), 2019 WL 5209254, citing Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 224 (2010).

V. BURDEN OF PROOF AND STANDARD OF REVIEW

As the Party challenging the Department's issuance of the SOC, the Petitioners had the burden of proof to produce credible evidence from a competent source to support their positions.[14] Specifically, the Petitioners were required to present "credible evidence from a competent source in support of each claim of factual error [made against the Department], including any relevant expert report(s), plan(s), or photograph(s)."[15]

My review of the evidence presented by the Parties at the Hearing is *de novo*, meaning that my review was anew, irrespective of any prior determination of the Department in issuing the SOC. In the Matter of Brian Corey, OADR Docket No. WET 2016-023, Recommended Final Decision (February 28, 2018), 2018 WL 2002973, *19, adopted as Final Decision (March 15, 2018), 2018 WL 2002972.

The relevancy, admissibility, and weight of evidence that all parties sought to introduce at the Hearing was governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h). 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 . . . rest[ed] within the discretion of the Presiding Officer." Speculative evidence was accorded no weight given its lack of probative value in resolving the issues in the case. In the Matter of Sawmill

[14] See 310 CMR 10.03(2); 310 CMR 10.05(7)(j)2.b.iv; 310 CMR 10.05(7)(j)2.b.v; 310 CMR 10.05(7)(j)3.a; 310 CMR 10.05(7)(j)3.b.

[15] See 310 CMR 10.05(7)(j)3.c. "A 'competent source' is a witness who has sufficient expertise to render testimony on the technical issues on appeal." In the Matter of Diamond Development Realty Trust, Docket No. WET-2018-016, Recommended Final Decision (April 2, 2019), 2019 WL 4735457, *5-6, adopted as Final Decision (April 8, 2019), 2019 WL 4735456.

Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), 2015 WL 5758252, *29, adopted as Final Decision (July 7, 2015), 2015 WL 5758285 (petitioners' expert testimony "that pharmaceuticals, toxins, and other potentially hazardous material would be discharged from effluent generated by . . . proposed [privately owned wastewater treatment facility] . . . was speculative in nature and not reliable"); In the Matter of Indian Summer Trust, Docket No. 2001-142, Recommended Final Decision (May 4, 2004) (insufficient evidence from competent source showing that interests under MWPA were not protected), adopted by Final Decision (June 23, 2004); In the Matters of Jean T. Ricupero and Karen and Thomas Doyle, OADR Docket No. WER 2017-015; WET 2017-016, Recommended Final Decision (June 16, 2018), 2018 WL 6040713, *4, adopted as Final Decision, (July 13, 2018), 2018 WL 6040712 (argumentative expert testimony and conclusory statements without factual support fail to carry burden of going forward).

VI. THE MassDEP COMMISSIONER'S ROLE AS THE FINAL DECISION-MAKER IN THE APPEAL

Notwithstanding my independent, neutral role as the Presiding Officer in making factual and legal findings and recommendation to MassDEP's Commissioner on the challenged Draft Permit in this appeal, it is the Commissioner, as the Final Decision-Maker in the appeal, who has the ultimate authority over the Permit's fate. 310 CMR 1.01(14)(b); In the Matter of the Prysmian Group and Prysmian Cables & Systems USA, LLC, Docket No. 2024-006, Recommended Final Decision (August 26, 2024), 2024 WL 4920921, *4, adopted as Final Decision (September 26, 2024), 2024 WL 4920920. It is a well settled principle that "[MassDEP's] commissioner determines 'every issue of fact or law necessary to the [final] decision [in an appeal,] [and] . . . may adopt, modify, or reject a [Presiding Officer's] recommended decision [in the appeal], with a statement of reasons [based on the evidence in the record]." New England Wind, 457 Mass. at 231; Prysmian, 2024 WL 4920921, *4. "[T]he commissioner's interpretation of [the governing] regulations [and statutes],"

and not that of the Presiding Officer, "is conclusive at the agency level, and is the only interpretation that is entitled to deference by a reviewing court" on judicial review pursuant to G.L. c. 30A, § 14. New England Wind, 457 Mass. at 228; Prysmian, 2024 WL 4920921, *4.

VII. FINDINGS

1. MassDEP properly issued the SOC, with conditions, satisfying the requirements of 310 CMR 10.53(1) for proposed work in the Buffer Zone to the BVW.[16]

Some wetlands resource areas protected by the MWPA and the Wetlands Regulations, including BVW, have a Buffer Zone that is defined as an area of land extending 100 feet horizontally outward from the boundary of any protected wetlands. 310 CMR 10.02(2)(b); 310 CMR 10.04; In the Matter of Diane Mercadante, OADR Docket No. WET-2009-029, Recommended Final Decision (November 12, 2009), 2009 WL 5698021, *5, adopted as Final Decision (November 23, 2009), 2009 WL 5865650. Work in the Buffer Zone is not *per se* regulated under the Act or the Regulations. See 310 CMR 10.02(2)(b). Instead, the regulations address that work "which, in the judgment of the issuing authority, will alter wetlands resource areas and requires the filing of a Notice of Intent." Id. As a result, the Buffer Zone may generally be altered if it will not alter a Resource Area, as determined by the issuing authority.[17] Work in the Buffer Zone does not invoke the performance standards applicable to adjacent resource areas as a matter of law. See In the Matter of Burley Street, LLC, OADR Docket No. 2005-228, Final Decision (October 17, 2008), 2008 WL 5071124, *4.

[16] In her testimony on behalf of the Petitioners, Ms. Rioux testified regarding the application of 310 CMR 10.53(3)(e) which applies to limited projects in Resource Areas and is not applicable to the proposed Project. See Rioux PFT, ¶ 16; Conway PFR, ¶ 75.

[17] "Alter" means to change the condition of any Area Subject to Protection Under G.L. c. 131. Sect 140. Examples of alterations include, but are not limited to, the following: (a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas; (b) the lowering of the water level or water table; (c) the destruction of vegetation; (d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water ..." See 310 CMR 10.04: Alter.

Ms. Rioux testified on behalf of the Petitioners regarding Issue 1. Ms. Rioux is a fact witness, and while highly accomplished based on her professional background, she did not provide testimony as an expert witness with experience in wetlands permitting under the MWPA and Wetlands Regulations. Accordingly, I have accorded minimal probative value to her testimony opining that MassDEP improperly issued the SOC. BP, 2016 WL 8542559, at *5; Barstow, 2020 WL 2616472, at *4.

Ms. Rioux testified that there are no conditions in the SOC[18] to prevent adverse impacts from the work proposed in the Buffer Zone which will result in alterations of the BVW. Rioux PFT, ¶¶ 13, 14, 15, 23.[19] Ms. Rioux contends that over an acre of vegetation within all three strata (trees, shrubs, herbaceous), would be eliminated from the Buffer Zone of BVW-1 and 50% of the Buffer Zone of BVW-3. Rioux PFT, ¶¶ 10, 29; Rioux PFR, ¶ 3.[20] Ms. Rioux contends that only a few trees will be left between the limit of work and the BVW which will not provide the same canopy cover, will likely be killed from the impacts of the heavy equipment on their roots, and will not be replaced. Rioux PFR, ¶¶ 14, 22. Ms. Rioux testified regarding various guidance documents that include recommendations for minimum buffer zones less of than 100 feet. Rioux PFT, ¶¶ 11, 12; Rioux PFR, ¶ 19.[21]

[18] Ms. Rioux does acknowledge that the SOC is conditioned to provide that "[the] limit of tree clearing/grading within the 100-foot Buffer Zone to be resource areas onsite must be clearly marked for the pre-construction meeting. Canopy trees immediately adjacent to the limit of work must be protected from construction activities." Rioux PFT, ¶¶ 10, 22; See SOC, Special Condition 34.

[19] Ms. Rioux references "permanent takes" in her testimony. The Wetlands Regulations do not include this phrase.

[20] Ms. Rioux's testimony does not include the calculations for these estimates. In her rebuttal testimony, Ms. Rioux contends that the Applicant's percentage references relative to Buffer Zone area impacted are incorrect. See Rioux PFR, ¶ 7. However, Ms. Rioux is not an expert witness and there is no regulatory requirement that a percentage of Buffer Zone be preserved, and I have not given particular weight to the Petitioners' or the Applicant's referenced estimates in this Recommended Final Decision.

[21] Ms. Rioux's testimony includes a partial quote from the MassDEP's Wildlife Habitat Protection Guidance which discusses the narrative standard for work in the Buffer Zone and states that extensive work within the inner 50-foot buffer zone is likely to alter the resource areas. Rioux PFT, ¶ 26; MassDEP's Wildlife Habitat Protection Guidance, p. 8.

Disputing the "temporary" nature of the proposed work in the Buffer Zone, Ms. Rioux contends that the increase in sunlight penetration due to loss of shading from mature vegetation will result in a "permanent" change to the BVW. Rioux PFT, ¶ 28; Rioux PFR, ¶¶ 3, 6.[22] Additionally, she contends that the proposed new, impervious driveway bisects multiple wetland habitats and is not a temporary impact. Rioux PFT, ¶ 18. On behalf of the Petitioners, Mr. Chessia concluded that the proposed design would alter the existing grades resulting in impoundments or ponding instead of the existing flow condition, and cause erosion, altering the BVW. Chessia PFT, ¶ 6.

The Applicant contends that the proposed Project, as conditioned in the SOC, meets the requirements for work in the Buffer Zone to the BVW. Kendall PFT, ¶¶ 15-16; Conway PFT, ¶ 15. Mr. Conway testified that approximately two-thirds of total Buffer Zone will be untouched by the Project. Conway PFR, ¶¶ 12, 80; Conway Ex. 3.[23] The changes made during the review of the proposed Project include shifting the driveway alignment east from Farm Street to the proposed Project site to avoid impacts to BVW Series 1 and 3, and the use of retaining walls to limit slope grading and site disturbance. Conway PFT, ¶ 16.[24] Mature trees in the Buffer Zone along Wetland Series 1 have been surveyed and the SOC plan alters the driveway to maintain these trees and to provide a planted buffer. Conway PFT, ¶ 17.[25] Controls to address construction related impacts are also included in the Site Plans. Conway PFT, ¶ 29, citing Site Plan Sheets C-300 to C-305, and C-700.

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[22] Ms. Rioux cites to the OOC denial to support her contention that the loss of mature vegetation is a permanent impact. The plans were revised following the OOC denial, however. Rioux PFR, ¶ 6.

[23] Mr. Conway testified that there is a total of 383,362 square feet of Buffer Zone on the project Property. Conway PFR, ¶ 18. The SOC authorizes 39,723 square feet of permanent impacts or 10% of the Buffer Zone. Id.

[24] These alterations take into account the proximity to property boundaries, site topography (adjacent hillside) and non-jurisdictional IVW Series 2. Conway PFT, ¶ 16.

[25] In her rebuttal testimony Ms. Rioux cites the general provisions applicable to work in the Buffer Zone and contends that this provision "calls" for preservation of natural vegetation, not replanted buffer. Rioux PFR, ¶ 2. However, this regulation provides that the issuing authority may require preservation of natural vegetation and may also consider measures to restore natural vegetation. See 310 CMR 10.53(1).

Ms. Kendall testified on behalf of the Applicant regarding planned measures to mitigate the potential for adverse impacts to the Resource Areas from work in the Buffer Zone. Kendall PFT, ¶ 14.a-f. Minimum "natural buffers" outside the limit of work within the Buffer Zone itself will be maintained to mitigate potential impacts to the BVW, preserving the natural vegetation within the Buffer Zone by consolidating the project footprint. Kendall PFT, ¶ 14.a;[26] Kendall TR, 111:7-17. The proposed Project also incorporates invasive species management and associated restoration to improve functions and values of the Buffer Zone and associated protection of adjacent wetlands. Kendall PFT, ¶ 14.c.[27]

MassDEP also contends that the work in the Buffer Zone is conditioned to protect the BVW. On behalf of the Department, Mr. Ferrick testified that most of the Buffer Zone impacts are associated with construction of the new access driveway, including approximately 741 square feet of non-jurisdictional IVW. Ferrick PFT, ¶ 5. The remaining Buffer Zone impacts are associated with portions of the stormwater management structures, sports field/track, tree clearing and associated grading. Ferrick PFT, ¶ 5; SOC cover letter, p. 2.

Specifically, Mr. Ferrick testified that the SOC requires that the limit of work be clearly defined and bound by erosion control devices which include temporary construction fencing around the limit of work and a second layer of erosion control devices around the perimeter of the BVW. Ferrick PFT, ¶ 19. The natural vegetated buffer that would be preserved between the limit of work and the BVW provides protection to the BVW. The invasive species management, including removal of invasives and installation of native plantings are improvements. Ferrick

[26] Citing Conway Ex. 3, Nitsch Engineering's Buffer Zone Area Take Offs (Existing Condition, Proposed Condition, Table), revised June 12, 2023.

[27] These enhancements are associated with Buffer Zone to BVW-1, BVW-3 and BVW-8. Kendall PFT, ¶ 14.c; citing Invasive Species Management Plan prepared by LEC, revised March 28, 2023 (Exhibit 5) and Landscape Plan, sheets L-501, L-502, and L-504 (Exhibit 6).

PFT, ¶¶ 5, 20.[28] Mr. Ferrick testified that several Special Conditions are included in the SOC for work in the Buffer Zone that will prevent direct impact to resource areas.[29] He further testified that these Special Conditions would protect the canopy trees immediately outside the limit of work that are marked for preservation. Ferrick PFT, ¶ 22; Ferrick TR 183:1-11.[30]

A. Temporary and Permanent Impacts

In issuing the SOC, MassDEP determined that the majority of the impacts to Buffer Zone[31] are "temporary" rather than "permanent" and that there are no impacts to BVW. On cross-

[28] In the Buffer Zone there are four (4) areas of invasive species management identified as areas 1-4. Areas 1 (4,259 sf), 2 (3,977 sf), 3 (1,884 sf), and portions of Area 4 (11,881 sf). The remainder of Area 4 (6,629 sf) is in Riverfront Area to the Saugus River. Ferrick PFT, ¶ 20.

[29] See Ferrick PFT, ¶ 22: To ensure work within the Buffer Zone does not directly impact wetland resource areas the SOC includes Special Conditions, #33, #34, #35, #37, and #38.

a. Special Condition 33: Requires a pre-construction site walk to ensure that all parties are aware of and understand all conditions of the SOC.

b. Special Condition 34: Requires the limit of work to be clearly marked in the field and canopy trees immediately adjacent to the limit of work be protected from construction activities.

c. Special Condition 35: Forbids alteration of BVW or Bank under the SOC.

d. Special Condition 37: Requires an Environmental Monitor ("EM") submit weekly reports to MassDEP. The reports will summarize all site activities occurring in RA and the 100-foot Buffer Zone to BVW and Bank. The reports will confirm the activities are being performed in compliance with the approved plans and conditions of the SOC. The reports will additionally include, but are not limited to, a description of construction status and activities; overall site conditions; condition of erosion control devices; activities in RA; Buffer Zone activities; and whether erosion is present, and if so, how the problem will be corrected, along with recommendations on how to prevent future erosion issues.

e. Special Condition 38: Requires an EM to submit monthly monitoring reports to document compliance with the conditions of the SOC. The reports are to be completed until erosion is no longer a concern due to stabilized conditions and/or due to seasonal conditions.

[30] On cross examination, Mr. Ferrick testified that he understood that portions of the limit of work would be in some of the drip lines of some of the existing trees immediately outside the limit of work and that in his opinion the trees would be fine. Ferrick TR, 185:9-186:12. No party provided testimony from an arborist. Ms. Rioux's rebuttal testimony included a memorandum titled "Unconditioned risks of damage to trees and bordering vegetated wetlands from heavy equipment in the buffer zones at the NE Metro Regional School site (NEMT)." See Rioux PFR, ¶ 6; Rioux Ex. 5. However, the author of Ms. Rioux's Ex. 5 was not offered as a witness and there is no evidence of peer-reviewed publication, and as such this exhibit and related testimony is hearsay without sufficient indicia of reliability.

[31] Regarding Buffer Zone, on behalf of MassDEP, Mr. Ferrick testified that the proposed Project will result in 77,099 square feet of temporary impacts and 39,724 square feet of permanent impacts to Buffer Zone. Ferrick TR, 160:10-12; see also SOC cover letter, p. 3.

examination, Mr. Ferrick testified that MassDEP routinely applies the terms "temporary" and "permanent" to qualify impacts when conducting wetlands reviews, whether reviewing jurisdictional wetlands or not. Ferrick TR, 161:1-7.[32] See also Conway PFT, ¶¶ 18, 77, 80.

While the Wetlands Regulations do not distinguish between "temporary" and "permanent" impacts, Mr. Ferrick testified that the Department defines "permanent" impacts to mean those areas that are physically built including impervious areas or structures associated with impervious areas. Ferrick TR, 158:18-159:11, 160:8-24. As a result, he agreed with the Petitioners and the Applicant that the driveway to be constructed in the Buffer Zone is a permanent impact in the Buffer Zone. Ferrick PFT, ¶ 42; Rioux PFT, ¶ 18; Conway PFT, ¶ 18; see also Conway PFR, ¶ 77.

Mr. Ferrick defined "temporary" impacts to include vegetated areas and pervious areas including riprap slopes. Ferrick TR, 158:18-160:24. Mr. Ferrick testified that because vegetation is pervious, the changes that will result from tree cutting and other vegetation clearing are "temporary," whether replaced with stone riprap or vegetation. Ferrick TR, 160:15-24. The length of time for plants to reach maturity is not relevant. Id. Mr. Ferrick acknowledged that it takes time for replacement plantings to mature and that different plant species have different growth rates, but that they can and will provide the necessary functions. Id. Disagreeing with the Petitioner that the loss of mature vegetation is "permanent," Mr. Ferrick described the vegetative impacts as temporary even where replantings may provide a different function, as appears to be the case here, before plantings mature.[33] Mr. Ferrick testified that cleared vegetation will be replanted (except where replaced with stone riprap), including with herbaceous shrubs and canopy tree saplings,

[32] When asked on cross-examination, Mr. Ferrick stated that he did not know if the regulatory definitions included the terms permanent and temporary. Ferrick TR, 161:1-10. He did not answer the question of whether there is a relevant guidance document or memorandum but testified that these qualifying terms are commonly used in regard to impacts to resource areas. Ferrick TR, 161:11-20.

[33] See Rioux PFT, ¶ 28 ("this dense canopy provides shade and temperature regulation to the wetlands"); See also Rioux PFR ¶¶ 3, 6, 10, 16.

which plantings will serve "a function" as long as they are alive. Ferrick TR, 164:13-22.[34]

A review of MassDEP Commissioner Final Decisions issued in administrative appeals of wetlands permitting matters supports the conclusion that MassDEP has long distinguished temporary and permanent wetland impacts. Temporary impacts include those that will be restored, during or after completion of a project,[35] including clearing vegetation even if not replaced with the same plantings,[36] and restoration planned over a reasonable number of years.[37] Mr. Ferrick's testimony, that temporary impacts include those to vegetation replanted with vegetation, different in type, size or maturity, or replaced with stone riprap, remains pervious and therefore provides a function, is consistent with the Department's previous rulings.

I am guided by long standing legal principles established by the Massachusetts Supreme Judicial Court governing enforcement of mandatory and discretionary duties of state agencies. Specifically, "[a]dministrative agencies must abide by their internally promulgated policies."[38] "[T]he Department's own documents, such as decisions and guidance documents, would be the best

[34] Petitioners assert in their closing brief that Mr. Ferrick testified that riprap is the equivalent of a multi-layer forested Buffer Zone; however, his testimony was that because the stone riprap is porous it would provide "a function." He did not testify that it would provide the same function. Pet. Closing Brief, p. 20.

[35] See In the Matter of Algonquin Gas Transmission LLC, OADR Docket No. WET 2016-025, Recommended Final Decision (October 16, 2019), 2019 WL 5693699, *20, adopted as Final Decision (October 24, 2019), 2019 WL 5693698 (disturbance of Riverfront Area temporary where area of pipe installation will be backfilled and restored to its current condition of either parking area or gravel driveway parking area); In the Matter of Town of Amesbury, OADR Docket No. 2009-051, Recommended Final Decision (March 18, 2010), 2010 WL 1782308, adopted as Final Decision (April 1, 2010), 2010 WL 1782307 (temporary impacts will be completely restored after completion of the project).

[36] See In the Matter of Jeff Amero, DEP Docket No. 2001-057, Recommended Final Decision (May 13, 2002), 2002 WL 1354609, adopted as Final Decision (August 23, 2002), 2002 WL 31082733 (vegetation cutting will be temporary effect for the vegetation will regrow); In the Matter of Princeton Development Inc. AKA Princeton Properties, OADR Docket No. 2006-0157, Final Decision (February 5, 2009), 2009 WL 1404101, *26 ("Princeton Properties") (temporary impacts include re-vegetated disturbed Buffer Zone even when not precisely the same vegetation as that which was removed).

[37] See North Shore Community College, DEQE Docket No. 86-092, Final Decision (February 12, 1988), 1988 WL 363334 (temporary roadway into wetlands approved with restoration of wetlands within a reasonable time not to exceed 45 months).

[38] Biogen IDEC MA, Inc. v. Treasurer & Receiver General, 454 Mass. 174, 186 (2009) (State Treasurer was bound by his predecessor Treasurer's policy).

evidence of its policy or practice." In the Matter of Cohasset Heights, Ltd., Docket No. 97-170, Rulings on Applicant's Witnesses and Proposed Witness Testimony (July 2, 1998), 1998 WL 484037, *6. Further, MassDEP has discretion to interpret the regulatory language, which it has done consistently over time. As long as the interpretation is not arbitrary and capricious such that it constitutes an abuse of the agency's discretion, it should be upheld.[39] Such application is also consistent with due process principles.

Together these final adjudicatory decisions and Mr. Ferrick's testimony detail the Department's long standing and consistent interpretation of the regulations using the qualifying terms of "temporary" and "permanent." In sum, I find that the Petitioners have failed to demonstrate that the work to be conducted in the Buffer Zone will alter the BVW. Mr. Chessia's conclusory statement that the design would alter existing grades and is incorrectly modeled is unsupported. The proposed Project, as revised and approved in the SOC, appropriately conditions the temporary and permanent impacts in the Buffer Zone through maintenance of natural vegetated Buffer Zone to the Resource Areas, conditions to manage erosion, and improvements to portions of Buffer Zone through invasive species management, in accordance with the MWPA and the Wetlands Regulations to prevent impacts to the BVW.

The Petitioners also contend that road-salt used in the Buffer Zone would result in chloride-polluted water being discharged into the BVW. Heath PFT, ¶ 29.[40] Mr. Heath testified that the deicers or road salts to be used at the Property include chlorides, a toxic pollutant, and has negative impacts on freshwater wetland animals and plants and that the stormwater discharges will result in

[39] Frawley v. Police Commissioner of Cambridge, 473 Mass. 716, 728 (2016); Garrity v. Conservation Commission of Hingham, 462 Mass. 779, 792 (2012); Sierra Club v. Commissioner of Department of Environmental Management, 439 Mass. 738, 748-49 (2003); Forsyth Sch. for Dental Hygienists v. Board of Registration in Dentistry, 404 Mass. 211, 217 (1989).

[40] The current school facility discharges stormwater to adjacent BVW with no water quality treatment. Conway PFT, ¶ 7; Kendall PFT, ¶ 10; SOC cover letter, p.1.

alterations to the BVW and wildlife. Heath PFT, ¶¶ 9, 11-12, 18; Stormwater Report (rev. October 3, 2023), Fig. 3, Appendix E.[41] Acknowledging the public safety concerns that result in the use of deicers, Mr. Heath opined that there are no reasonable alternatives to the use of chlorides available for the proposed Project. Heath PFT, ¶¶ 13, 33. Further, Mr. Heath contends that the MassDOT deicer application rates referenced in the Applicant's plans will result in high levels of chlorides from the proposed Project. Heath PFT, ¶¶ 18-22, 24.[42]

Regarding chlorides, on behalf of the Applicant, Mr. Conway testified that the Long-Term Pollution Plan and Stormwater Operations and Maintenance Plan includes pollution prevention measures for stormwater management systems operation and maintenance. Conway PFT, ¶ 30.[43] Mr. Conway testified that the Applicant has agreed to work with the Wakefield Department of Public Works to determine final rates and types of chemicals and sand/salt ratios consistent with those used in other sensitive areas in Massachusetts. Conway PFT, ¶ 30.

The Wetlands Regulations do not prohibit the use of road salt with chlorides, instead directing parties to manage use through reduction and project planning.[44] In implementing the stormwater standards, MassDEP issued the MassDEP Stormwater Handbook (2008) ("Handbook"), which indicates that road salt and other pollutants can be toxic to aquatic life and recommends reduced salt areas next to wetlands and surface waters. Handbook, Vol. 1., c. 1, p. 17-18. The

[41] Mr. Heath's testimony included a list of studies, the texts of which are not included in his exhibits, which he contends support his opinion regarding the negative impacts of chloride concentrations in stormwater on wetland resources. Heath PFT, ¶ 11; Heath Ex. C. Other than the Applicant's motion to strike his testimony, which I denied, neither the Department nor the Applicant offered opposing testimony on this topic.

[42] Neither the Applicant nor MassDEP provided testimony countering Mr. Heath's conclusions regarding the impacts from deicer usage in the Buffer Zone if discharged to BVW.

[43] The snow/salt management plan was based on research from MassDOT work in the Cambridge Reservoir watershed. Id. See also Stormwater Management Report, section 2.7, Management of Deicing Chemicals and Snow.

[44] See discussion of Issue 3, Stormwater Standards, p. 27.

Handbook provides guidance for minimizing use, with additional requirements in Critical Areas, although there are no Critical Areas associated with the Property.[45]

Nonetheless, the Applicant proposed an additional condition, which the Department did not oppose, that the proposed Project would not use sodium chloride to control ice and snow as follows: "The use of sodium chloride on the property as a deicer or as part of any snow management plan is prohibited. Signs stating that the use of salt is prohibited will be posted at the entrances to the site and at both ends of the driveway connecting the upper and lower campuses." See Conway PFT, ¶ 31; Kendall PFT, ¶ 14.e; See also Conway TR, 39:11-43:3.[46] While this condition would not prohibit the use of all deicers, including other chloride deicers, given that the Applicant proposed the condition, I deem it reasonable and recommend that it be included in any Final Order of Conditions issued by the Commissioner in this appeal.

In sum, based upon my review of the documentary and testimonial evidence introduced at the Hearing, I find that the Department appropriately reviewed, approved and conditioned the proposed Project and that the SOC was proper, with the addition of the Applicant's proposed condition prohibiting the use of sodium-chlorides, as follows:

> The use of sodium chloride on the property as a de-icer or as part of any snow management plan is prohibited. Signs stating that the use of salt is prohibited will be posted at the entrances to the site and at both ends of the driveway connecting the upper and lower campuses.

[45] Critical Areas include Outstanding Resource Waters as designated in 314 CMR 4.00, Special Resource Waters as designated in 314 CMR 4.00, recharge areas for public water supplies as defined in 310 CMR 22.02 (Zone Is, Zone IIs and Interim Wellhead Protection Areas for groundwater sources and Zone As for surface water sources), bathing beaches as defined in 105 CMR 445.000, cold-water fisheries as defined in 310 CMR 10.04 and 314 CMR 9.02, and shellfish growing areas as defined in 310 CMR 10.04 and 314 CMR 9.02. Handbook, Vol. 1, c. 1, p. 3. See also Ferrick TR, 172:1-5, 173:3-6, 175:16-20, 178:17-24.

[46] Mr. Ferrick testified that he was aware that the Applicant was amenable to adding a condition prohibiting the use of sodium chloride but offered no opinion regarding the proposed condition. Ferrick TR, 180:1-3.

2. The SOC does not authorize work within the BVW and the performance standards of 310 CMR 10.55(3) and 310 CMR 10.55(4) do not apply.

Bordering Vegetated Wetlands ("BVW") are wetlands resource areas that are protected by the MWPA and the Wetlands Regulations. See 310 CMR 10.02; 310 CMR 10.02; 310 CMR 10.55.[47] BVW are likely to be significant to the wetlands interests of public or private water supply, ground water supply, flood control, storm damage prevention, prevention of pollution, and protection of fisheries and to wildlife habitat. 310 CMR 10.55(1). "The plants and soils of [BVW] 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.

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. BVW 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 [MWPA]. 310 CMR 10.55(2)(a).

The Wetlands Regulations addressed in Issue 2 state that "[w]here a proposed activity involves the removing, filling, dredging or altering of a Bordering Vegetated Wetland," the BVW shall be presumed to be significant to the interests of the MWPA. 310 CMR 10.55(3). The Regulations go on to provide that where the presumption is not overcome, "any proposed work in a Bordering Vegetated Wetland shall not destroy or otherwise impair any portion of said area." 310 CMR 10.55(4)(a). Additionally, the Regulations allow for the loss of up to 5,000 square feet of BVW where the BVW is replaced and sets a number of requirements for replacement to be adequate. 310 CMR 10.55(4)(b). The Regulations also allow for the loss of up to 500 square feet

[47] See In the Matter of Town of Hopkinton, OADR Docket No. WET-2007-010, Recommended Final Decision, 15 DEPR 203, 205 (May 1, 2008), adopted as Final Decision (May 30, 2008), affirmed, Morrison v. Massachusetts Department of Environmental Protection, Middlesex Superior Court, C.A. MICV2008-02876 (October 16, 2009); In the Matter of Ronald and Lois Enos, OADR Docket No. WET-2012-019, Recommended Final Decision (February 22, 2013), 2013 WL 1702133, *6, adopted as Final Decision (March 22, 2013), 2013 WL 1702130; In the Matter of Brian Corey, OADR Docket No. WET-2016-023, Recommended Final Decision (February 28, 2018), 2018 WL 2002973, *5, adopted as Final Decision (March 15, 2018), 2018 WL 2002972.

of BVW without replacement when the BVW "extends in a distinct linear configuration ('finger-like') into adjacent uplands" and scaling down the proposed work is infeasible. 310 CMR 10.55(4)(c). Work is prohibited it if would have an adverse effect on specified habitat sites of rare vertebrate or invertebrate species. 310 CMR 10.55(4)(d). Also prohibited is work that would destroy or otherwise impair BVW within an Area of Critical Environmental Concern. 310 CMR 10.55(4)(e).

The SOC did not authorize any work to take place within the BVW. SOC cover letter, p. 3; SOC Special Condition 35; Ferrick PFT, ¶¶ 23, 26, 41, 43, 44; Conway PFT, ¶¶ 14, 23, 79; Conway TR, 32:23-24; Kendall PFT, ¶¶ 17-18, 21-22, 29. Nor did the Petitioners offer any testimony that the SOC authorizes removing, filling, or dredging of a BVW. As discussed above, the Petitioners have not demonstrated that the work in the Buffer Zone will alter the BVW. As a result, in issuing the SOC, it was appropriate for MassDEP to conclude that there would be no direct impacts to BVW. SOC cover letter, p. 3. In sum, based on the evidence presented, I find that because the SOC does not authorize any work within the BVW, the performance standards of 310 CMR 10.55(3) and 310 CMR 10.55(4) do not apply.

3. MassDEP conditioned the SOC to meet the stormwater performance standard requirements of 310 CMR 10.05(6)(k)1-6.

Storm damage prevention and flood control are among the statutory interests of the MWPA, and the Wetlands Regulations are intended to protect these interests. G.L. c. 131, § 40; 310 CMR 10.01(2). "Stormwater runoff from rainfall and snow melt 'represents the single largest source responsible for water quality impairments in the Commonwealth's rivers, lakes, ponds, and marine waters.'" In the Matter of Algonquin Gas Transmission LLC, OADR Docket No. WET-2016-025, Recommended Final Decision (October 16, 2019), 2019 WL 5693699, *22, adopted as Final Decision (October 24, 2019), 2019 WL 5693698, citing, In the Matter of Elite Home Builders, LLC, OADR Docket No. WET-2015-010, Recommended Final Decision (November 25, 2015),

2015 WL 9999153, *5, adopted as Final Decision (December 17, 2015), 2015 WL 9999152, citing, Handbook, Vol. 1, c. 1, p. 1.[48]

MassDEP's Wetlands Regulations at 310 CMR 10.05(6)(k)-(q) "address water quality (pollutants) and water quantity (flooding, low base flow and recharge) by establishing standards that require the implementation of a wide variety of storm water management strategies[,] … includ[ing] environmentally sensitive site design and low impact development [('LID')] techniques to minimize impervious surface and land disturbance, source control and pollution prevention, structural [stormwater Best Management Practices ('BMPs')], construction period erosion and sedimentation control, and the long-term operation and maintenance of storm water management systems." See Handbook, Vol. 1, c. 1, p. 1. Some BMPs are "non-structural" and relate to site design practices, source control and pollution prevention. Others are structural components incorporated into site design to address pretreatment, treatment, conveyance and infiltration of stormwater. Handbook, Vol. 2., c. 1, p. 22. BMPs are implemented in a sequence to maximize pollutant removal and are often referred to as a treatment train. Handbook, Vol. 2, c. 1, p. 32. Proprietary BMPs are manufactured systems that use proprietary settling, filtration, absorption/adsorption, vortex principles, vegetation and other processes to meet the Stormwater Management Standards. Handbook, Vol. 2, c. 4, p. 1. The effectiveness of Proprietary BMPs varies with size, flow design and site conditions and must be evaluated to determine removal rates, which have been calculated for a variety of traditional BMPs. Handbook, Vol. 1, c. 1, pp. 10-11, Table TSS. Consideration of Proprietary BMPs is encouraged where appropriate to the site. Handbook, Vol. 1, c. 1, p. 11; Vol. 2, c. 4, p. 2.

[48] MassDEP applies the Stormwater Management Standards pursuant to its authority under the MWPA, and the Massachusetts Clean Waters Act, G.L. c. 21, §§ 26-53. Handbook, Vol. 1, c. 1, p. 1.

Specifically, the Wetlands Regulations at 310 CMR 10.05(6)(k) provide in pertinent part that:

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

Unless specifically exempted, stormwater runoff from proposed projects in Resource Areas or the Buffer Zone must meet the stormwater management standards identified in the regulations. See 310 CMR 10.05(6)(k)-(q). The Handbook provides that:

> The term "treated" refers to the implementation of stormwater management systems that are specifically designed to achieve sediment and contaminant removal rates that adequately protect groundwater, surface waters and wetlands in accordance with all applicable statutes, regulations, permits, and approvals, the other standards, and the technical specifications set forth in Volume 2 of the Massachusetts Stormwater Handbook. The level of treatment required by the other standards is based on whether the discharge impacts a critical area, is from a land use with a higher potential pollutant load, or to soils with a rapid infiltration rate. (Emphasis supplied.) Handbook, Vol. 1, c. 1, p. 4.

Neither the Wetlands Regulations nor the Handbook prohibit the use of road salt or provide a removal rate for stormwater discharging road salt runoff to wetlands. Instead resource areas are protected by addressing pollution prevention strategies through design, use reductions and alternative deicers, with additional requirements in Critical Areas.[49]

[49] See ftnt 46 for the definition of Critical Areas. Regarding projects near Critical Areas, the Handbook provides that: The use of salt for the deicing of impervious surfaces must be minimized within water supply protection areas and any area near an Outstanding Resource Water, Special Resource Water, fresh water beach, or cold-water fishery. The long-term pollution prevention strategies for sites near critical areas must also incorporate designs that allow for shutdown and containment where appropriate to isolate the system in the event of an emergency spill or other unexpected event. Proponents of MassHighway projects may satisfy this requirement by implementing the containment procedures outlined in the Mass Highway Stormwater Handbook. Handbook, Vol. 1, c. 1, p. 16.

It is the Petitioners' burden to "demonstrate that a party did not comply with the stormwater standards, but also that its noncompliance would result in an adverse impact to a wetlands resource that would impair its ability to serve the interests of the Act."[50] Stormwater Standards 1 through 6 were identified as issues for adjudication in this appeal.

The Petitioners provided no evidence related to Stormwater Standard 5, Land Uses with Higher Potential Pollutant Loads ("LUHPPL"). The Petitioners had more than adequate prior notice of the Wetlands Regulations requiring Petitioners to support their position with sworn testimony from wetlands experts.[51] Because they presented no evidence on Standard 5, the Petitioners have failed to sustain their burden of going forward on Standard 5.[52] In sum, I find, based upon the evidentiary record, the Petitioners waived the issue of whether the Department accurately determined that the Applicant's proposed Stormwater Management System, as approved by the SOC, complies with Stormwater Standard 5. Absent any evidence to the contrary, I determine as a matter of law that the Department accurately determined that the proposed Project complies with Stormwater Standard 5, 7-10. See 310 CMR 10.05(7)(j)3.b and 310 CMR 10.05(7)(j)3.c.ii.[53]

Moreover, the Petitioners have not met their burden and the evidence presented by the Applicant and MassDEP demonstrates compliance with Standards 1-4 and 6. See 310 CMR 10.03(2); 310 CMR 10.05(7)(j)2.b.iii; 310 CMR 10.05(7)(j)2.b.v; 310 CMR 10.05(7)(j)3.a; 310 CMR 10.05(7)(j)3.b.

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[50] Princeton Properties, 2009 WL 1404101, *12.

[51] Scheduling Order, November 27, 2023; Pre-Hearing Conference Report and Order, February 8, 2024; see also 310 CMR 1.01(13)(h)1, 310 CMR 1.01(12)(f), 310 CMR 1.01(13)(h)2.

[52] MassDEP and the Applicant testified that the proposed Project meets Standard 5 by treating a water quality volume equal to 1-inch times the total required impervious area of the post-development site. Ferrick PFT, ¶¶ 33-35; Conway PFT, ¶ 42.

[53] See also Algonquin, 2019 WL 5693699, *23.

Standard 1: Treatment and Erosion Prevention

Stormwater Standard 1 allows the direct discharge of stormwater to waters and wetlands provided the discharge is adequately treated. Handbook, Vol. 1, c. 1, p. 4. Standard 1 provides, "No new stormwater conveyances (e.g. outfalls) may discharge untreated stormwater directly to or cause erosion in wetlands or waters of the Commonwealth." 310 CMR 10.05(6)(k)1. To avoid erosion,[54] BMPs and associated pipes and other conveyances must be properly designed and installed in accordance with Volume 2 of the Handbook. Handbook, Vol. 1, c. 1, p. 5. Directing runoff from roof tops to landscaping or undisturbed areas is encouraged.[55]

Treatment:

As discussed above, neither the Wetlands Regulations nor the Handbook provide a removal rate for stormwater discharges containing road salt runoff to wetlands. Petitioners' testimony that the identified stormwater management BMPs do not treat for chloride does not affect compliance with Standard 1.[56] The stormwater management systems proposed here are designed to capture runoff from the pavement, remove debris and Total Suspended Solids ("TSS"),[57] then route stormwater runoff to several outfalls in the Buffer Zones. Ferrick PFT, ¶¶ 14, 28; Conway PFT, ¶ 26; Heath PFT, ¶ 27. [58] For road salt management, the SOC includes a condition to follow the

[54] Avoiding erosion means there must be no wearing away of the soil or land surface in excess of natural conditions. Handbook, Vol. 1, c. 1, p. 5.

[55] See Handbook, Vol. 1, c. 1, p. 4. Runoff from non-metal roofs may be discharged to a dry well without any pretreatment. Handbook, Vol. 1, c. 1, p. 7. Mr. Conway testified on cross examination that "the stormwater handbook says … runoff from roofs is considered clean and is eligible to be discharged." Conway TR, 38:4-7.

[56] See Handbook, Vol. 1, c. 1, p. 16. For Parties' testimony, see Ferrick TR, 172:1-5, 175:17-20; Chessia PFT, ¶ 8; Heath PFT, ¶¶ 28-29; Conway TR, 40:1-6.

[57] TSS are the particles in runoff, as opposed to dissolved pollutants. In the Matter of M.G. Hall Company, OADR Docket No. WET 2012-023, Recommended Final Decision (May 7, 2013), 2013 WL 8473953, *20, adopted as Final Decision (March 19, 2014), 2014 WL 1997067.

[58] Ms. Rioux also offered her opinion regarding compliance with Standard 1, but she is not an expert and her statements are conclusory. Rioux PFT, ¶ 20.

MassDOT protocols for road salt discharges to wetlands, as recommended in the Handbook.[59] In his testimony, Mr. Chessia concluded that some impervious surfaces are untreated, although he does not identify which surfaces. Chessia PFT, ¶ 8.[60] To the extent he refers to roof runoff, such discharges may be discharged without treatment.[61]

On behalf of the Applicant, Mr. Conway testified that the stormwater standards apply to impervious areas exposed to vehicle traffic and that pedestrian and roof areas are considered clean. Conway PFT, ¶ 72; Conway TR, 39:4-7. Mr. Ferrick testified that the project utilizes numerous stormwater treatment systems, including: deep sump and hooded catch basins,[62] proprietary hydrodynamic water quality units,[63] subsurface detention and infiltration systems with isolator rows,[64] level spreaders, [65] and porous pavement.[66] Ferrick PFT, ¶ 28. Mr. Conway on behalf of the Applicant, and Mr. Ferrick on behalf of MassDEP, testified that the stormwater systems are designed so that no untreated stormwater will discharge directly to or cause erosion in wetlands or

[59] The Applicant also testified an intent to work with the Wakefield Department of Public Works to determine final rates, type of chemicals and sand/salt ratios. Conway PFT, ¶ 30; Conway TR, 42:20-23.

[60] In his testimony regarding Stormwater Standard 4, Mr. Chessia testified that he estimates that approximately 15,600 square feet of impervious surface would not be treated, but without reference to which impervious surfaces. Chessia PFT, ¶ 11. The Applicant assumes the Petitioners are referring to rooftop runoff, although neither the Petitioners' testimony nor its legal memoranda make that statement. See App. Closing Brief; Pet. Final Memo., p. 14.

[61] See ftnt 55.

[62] Deep Sump and Hooded Catch Basins are underground retention systems designed for pretreatment to remove to remove trash, debris and course sediment from stormwater runoff, and serve as temporary spill containment devices for floatables such as soils and greases. Handbook, Vol. 2, c. 2, pp. 1-5; See Stormwater Report, p. 8.

[63] Proprietary separators are flow-through structures with a settling or separation unit to remove sediments and other pollutants. They typically use the power of swirling or flowing water to separate floatables and courser sediments and must be sized correctly for the site's soil conditions and flow profiles. Handbook, Vol. 2, c. 2, pp. 10-12; See Stormwater Report, p. 8.

[64] Subsurface Detention Systems are underground systems that capture runoff and gradually infiltrate it into groundwater through rock and gravel. Handbook, Vol. 2, c. 2, pp. 103-106; See Stormwater Report, pp. 8-9.

[65] A level spreader is a BMP accessory, a technique used to improve the efficiency of other BMPs, which at the point of discharge, converts concentrated flow from channels or outlet structures to sheet flow in order to minimize erosion. Handbook, Vol. 1, c. 1, p. 5; Vol. 2, c. 2, p. 128.

[66] The porous pavement is a paved surface with a higher than normal percentage of air voids to allow waste to pass through it and infiltrate into the subsoil. Handbook, Vol. 2, c. 2, p. 118.

waters of the Commonwealth. Ferrick PFT, ¶ 28; Conway PFT, ¶¶ 26-32, 46-47; Stormwater Report, Table 6, Treatment Train Summary; and Appendix A, calculations spreadsheets for TSS removal and water quality structure sizing. The Applicant and the Department persuasively testified that the discharges are treated in accordance with these requirements. The Petitioners did not provide testimony that these systems will not provide the referenced treatment in compliance with Standard 1.

Erosion:

The Petitioners testified that there are steep slopes in the existing grade that would concentrate flow, causing erosion, that outlets are too close to the wetlands to avoid impacts and that there is insufficient data to demonstrate compliance with Standard 1. Chessia PFT, ¶ 8; Chessia PFR, ¶¶ 2, 5-6.[67] However, the Applicant testified that slopes would be graded to avoid erosion and that the level spreaders are sited in proximity to the Resource Areas for the purpose of providing water to those Resource Areas. Kendall PFT, ¶ 14.f; Conway PFT, ¶ 20; Conway PFR, ¶ 78. Water discharging from the subsurface systems will be directed to level spreaders which are designed to reduce the velocity of the water and to prevent erosion. Ferrick PFT, ¶ 28; Conway PFT, ¶¶ 27-28. The Petitioners did not provide testimony regarding the revised grades to be used in implementing the stormwater management BMPs. The Petitioners' testimony speculating regarding outcomes contending that insufficient information has been provided is not persuasive. Mr. Conway and Mr. Ferrick testified persuasively that the proposed Project would satisfied Standard 1. In sum, the Petitioners have failed to demonstrate by a preponderance of the evidence that the proposed Project fails to comply with Standard 1 and results in an adverse impact to the Resource Areas.

[67] Ms. Rioux also offered her opinion regarding compliance with Standard 1, but she is not an expert and her statements are conclusory. Rioux PFT, ¶ 20.

Standard 2: Control of Peak Rates

To prevent storm damage and downstream and off-site flooding, Stormwater Standard 2 requires that post-development peak discharge rates do not exceed pre-development peak discharge rates. 310 CMR 10.05(6)(k)(2); Handbook, Vol. 1, c. 1, p. 5. In calculating runoff rates from pre-existing and post-development conditions, Applicants are to measure peak of discharge rates at a design point, typically the lowest point of discharge at the downgradient property boundary. Id. Applicants must also evaluate the impact of peak discharge from the 100-year 24-hour storm. BMPs are used to lower runoff rates through storage and gradual release. Id. "The development of an undeveloped site typically involves the construction of impervious surfaces which increase both the volume of run off by decreasing infiltration and increasing peak rates as velocity of runoff over impervious surfaces increase." In the Matter of M.G. Hall Company, OADR Docket No. WET 2012-023, Recommended Final Decision, (May 7, 2013), 2013 WL 8473953, *17, adopted as Final Decision (March 19, 2014), 2014 WL 1997067.

The Petitioners' testimony questions the modeling assumptions and design of the stormwater management system relating to the existing conditions, the proposed conditions, the soil testing, and the stormwater modeling. Chessia PFT, ¶ 9; Chessia PFR, ¶ 7. For example, Mr. Chessia contends that downstream culverts were not properly assessed, citing concerns with existing culverts and the off-site multi-purpose field. See Chessia PFT, ¶ 9. He also speculates about flows at individual Design Points[68] and alleges errors in the time of concentration calculation which he asserts, without support, is unrealistic. Chessia PFT, ¶ 9; Chessia PFR, ¶ 3; See also in response, Conway PFR, ¶

[68] The Stormwater Report identifies on-site sub-catchment (watershed) areas discharging to 13 Design Points utilizing an existing conditions survey and on-site observations. Stormwater Report, p. 11, Table 5.

Mr. Chessia's testimony regarding the multi-purpose field is an area that is outside the scope of the proposed Project and speculation regarding future projects at the Property are not relevant to the SOC. See Chessia PFT, ¶ 9; Conway PFT, ¶ 51.

53. Mr. Chessia's testimony speculated about potential errors in design, also without support, contending that the design is in noncompliance and will alter the wetlands. See Chessia PFT, ¶¶ 3, 9; Chessia PFR, ¶¶ 9-10. Mr. Chessia's testimony, however, is speculative, addressing conditions he contends should be addressed and outcomes that could result. He does not, however, demonstrate that the proposed Project will result in an increase in the rate of runoff from the site.

Addressing Mr. Chessia's testimony, Mr. Conway testified that all wetland flags were located in the field by a wetland scientist and verified through the ANRAD process. Conway PFT, ¶ 35; Conway PFR, ¶ 52. He further testified that the wetland flags and corresponding grading were field surveyed, and that survey contour data was used in conjunction with field observation to make overflow predictions. Id. Site visits were conducted at various times of year and during various weather events to verify the existing site conditions. Id. I find nothing in his testimony to cause me to question his veracity regarding these facts.

Mr. Conway and Mr. Ferrick testified that the proposed Project has reduced the peak runoff rates at all Design Points to at or below the pre-existing rates and therefore meets Standard 2. Conway PFT, ¶¶ 33, 48, 50-51, 62-64; Ferrick PFT, ¶¶ 10, 29; Ferrick Ex. D2, Stormwater Report, Summary of Pre and Post Discharge Rates, Table 5, pp. 13-14; Conway PFR, ¶ 51. I find their testimony persuasive and conclude that the Petitioners have failed to demonstrate by a preponderance of the evidence that the proposed Project fails to comply with Standard 2 and results in an adverse impact to the Resource Areas.

Standard 3: Recharge to Groundwater

Stormwater Standard 3 is intended to address the creation of impervious surfaces such as roofs and pavements which reduce water infiltration into the ground. Standard 3 requires that an Applicant must minimize or eliminate loss of annual recharge to ground water, so that the annual recharge from the post-development site approximates the annual recharge from pre-development

conditions based on soil type. 310 CMR 10.05(6)(k)(3); Handbook, Vol. 1, c. 1, p. 5. The required recharge volume that must be infiltrated is determined by multiplying the recharge volume for the soil group times the total impervious area within the soils group. Handbook, Vol. 1, c. 1, p. 6; Vol. 3, c. 1, pp. 15-16.[69] Where infiltration of the entire recharge may not be possible for sites comprised solely of C and D soils and bedrock, Applicants are required to infiltrate the required recharge volume only to the maximum extent practicable for those conditions. Handbook, Vol. 1, c. 1, p. 7.

The Petitioners contend that the proposed Project has not demonstrated compliance with Standard 3 because other locations have soils more suitable for infiltration than the location of the proposed Project. Chessia PFT, ¶ 10. Mr. Chessia contends that more soil testing should have been required because the site has variable soils and shallow depth to ledge. Chessia PFT, ¶ 10; Chessia PFR, ¶ 4. However, Mr. Chessia does not cite to any requirement that the proposed Project must be moved from its planned location or redesigned to bring more fill onto the property to provide groundwater separation. Chessia PFT, ¶ 10.[70]

Mr. Conway testified that extensive geotechnical work was performed consisting of 51 test pits, 29 borings, 7 ground water observation wells and a bedrock depth investigation. Conway PFT, ¶ 39, citing Stormwater Report, Appendix G, Geotechnical Report. The proposed Project was designed using environmentally sensitive site design and will approximate the annual recharge from pre-development conditions. Conway PFT, ¶ 37. The Applicant and MassDEP contend that given the soil conditions at the project Property and the presence of bedrock and high groundwater, the

[69] Recharge may be maintained at a site through infiltration measures and site design. Soil groups are classified into four hydrologic groups, A through D. Group A soils typically have the lowest runoff and the highest infiltration rates, while Group D soils have the highest runoff and the lowest infiltration rates. Handbook, Vol. 1, c. 1, p. 6.

[70] The majority of the soils are Hydraulic Soil Group ("HSG") D. Stormwater Report, p. 5. The Petitioners contend that the Property includes HSG B and A soils, asserting that some are outside the Property. It is unclear where on the Property the Petitioner alleges these soils exist except that they appear to be located outside the proposed Project footprint. See Chessia PFT, ¶ 10.

proposed Project was designed to meet Standard 3 to the maximum extent practicable. Ferrick PFT, ¶ 30; Conway PFT, ¶¶ 36, 39, 66; See also Stormwater Report, Appendix G, Geotechnical Report. Mr. Conway testified that infiltration is proposed only in subsurface systems that are located in fill and with appropriate separation to bedrock. Id.[71] The proposed Project exceeds the recharge volume and therefore the Applicant and MassDEP contend that the proposed Project complies with Standard 3 to the maximum extent practicable because the required recharge volume is 12,858 cubic feet and 12,921 cubic feet of recharge is proposed. Ferrick PFT, ¶ 31; Conway PFT, ¶¶ 37, 38, citing Stormwater Report, Table 7, Proposed Recharge Volumes for Stormwater BMPs. I find Mr. Conway and Mr. Ferrick' testimony persuasive. The Petitioners have failed to demonstrate by a preponderance of the evidence that the proposed Project fails to comply with Standard 3 and results in an adverse impact to the Resource Areas.

Standard 4: 80% Removal of Total Suspended Solids

Stormwater Standard 4 requires the selection of BMPs to achieve a total removal rate of 80% TSS. 310 CMR 10.05(6)(k)4; Handbook, Vol. 1, c. 1, pp. 9-11. The Applicant proposed a combination of structural stormwater BMPs including deep sump and hooded catch basins, proprietary hydrodynamic quality units and subsurface detention systems with isolator rows and infiltration trenches. The systems are sized to capture the required water quality volume and to remove 80% TSS. Conway PFT, ¶¶ 40, 69, 70; Ferrick PFT, ¶ 33; Ferrick Ex. D, Stormwater Report excerpts, Treatment Trains Summary and Required Recharge Summary, pp. 16-17; Stormwater Report, TSS Removal Calculation Worksheets, pp. 31-38. The calculations were reviewed by Nitsch Engineering to ensure their accuracy. Conway PFT, ¶ 40. Because the site is considered LUHPPL, all water quality treatment BMPs were sized to the 1-inch rule for calculating

[71] "Subsurface detention systems are proposed to provide peak flow reduction and water quality treatment. The systems will be lined with 40-millimeter impermeable membranes to prevent infiltration, as the systems are not likely to provide two feet of cover between the bedrock/groundwater and the bottom of the system." Stormwater Report, p. 15.

water quality. Ferrick PFT, ¶¶ 11, 33; Conway PFT, ¶ 40, citing Stormwater Report, Table 6, Proposed Treatment Train Summary. Additionally, source control and pollution prevention measures have been incorporated into the Long-Term Operation and Maintenance Plan. Conway PFT, ¶ 41; Ferrick PFT, ¶ 32; Stormwater Report, Ex. E, Long-Term Pollution Prevention and Stormwater Operation and Maintenance Plan; See also Handbook Vol. 2, c. 1, p. 11-12.[72]

The Petitioners contend that the plans assume a TSS removal rate of 77% by the proprietary system, but that the Applicant provided no data to support this claim in the Stormwater Report, contending that therefore MassDEP could not have determined that the system complies. Chessia PFT, ¶ 11.[73] However, the Stormwater Report indicates that the BMP treatment train will exceed 80% TSS removal.[74] Mr. Chessia also testified that there is insufficient information provided to demonstrate compliance, and without identifying the location, contends that 15,600 square feet of impervious surfaces will be untreated. Chessia PFT, ¶ 11.[75]

The record supports a conclusion that the SOC approves a stormwater management system that is designed to remove greater than 80% of the average annual post-construction load of TSS, consistent with the Handbook requirements for Standard 4. Conway PFT, ¶¶ 69, 70; Handbook, Vol. 1, c. 1, p. 9. A Long-Term Operation and Maintenance Plan has been prepared, which includes the elements listed in the Handbook, including proper management of deicing chemicals

[72] The source control and pollution prevention plan is intended to identify potential sources of pollution that may affect the quality of stormwater discharges and describe the implementation practices to reduce the pollutants in stormwater discharges. Handbook, Vol. 2, c. 1, p. 12.

[73] Mr. Chessia testified that a third party determined that the TSS removal rate for this system was only 50%. Chessia PFR, ¶ 23.

[74] Mr. Chessia's contention that information included in Mr. Conway's testimony regarding the TSS rate should be excluded as being too late to be considered is incorrect. My review is *de novo*, and Mr. Conway's testimony and supporting documentation was timely filed. See Chessia PFR, ¶ 23.

[75] See ftnt 60.

and snow. See Handbook, Vol. 1, c. 1, p. 9.[76] I find Mr. Conway and Mr. Ferrick's testimony persuasive. The Petitioners have failed to demonstrate by a preponderance of the evidence that the proposed Project fails to comply with Standard 4 and results in an adverse impact to the Resource Areas.

Standard 5: Discharge to Critical Area

As discussed above, there are no "Critical Areas" within or near the proposed Project.[77] Ferrick PFT, ¶ 35; Conway PFT, ¶ 43. Mr. Ferrick acknowledged in his testimony that Wetland Series 5, a non-jurisdictional IVW, contains a vernal pool that could be certified in accordance with the requirements of the Natural Heritage and Endangered Species Program. Ferrick PFT, ¶¶ 36, 37.[78] The Wakefield Conservation Commission issued an ORAD confirming this jurisdictional status on which the Applicant is entitled to rely. Ferrick PFT, ¶ 37. While MassDEP is not barred from protecting a vernal pool that is not certified, [79] in this case there is no vernal pool within a jurisdictional Resource Area.

Nonetheless, regarding protection of this non-jurisdictional wetland area, the Applicant testified that the level spreader near the IVW and the vernal pool, would discharge from the roof of the school, which is considered clean.[80] Conway PFT, ¶ 72. Mr. Conway testified that this level

[76] The plan provides that snow will be stored outside of wetlands jurisdictional Resource Areas. See Conway PFT, ¶ 30.

[77] See ftnt 45 for definition of Critical Area.

[78] While Mr. Chessia's testimony referred to the vernal pool as certified, he provided no evidence of certification. Chessia PFT, ¶ 12.

[79] See In the Matter of Michael Carrigan, Carrigan Development, LLC, OADR Docket No. WET-2021-027, Recommended Final Decision (May 4, 2023), 2023 WL 10950106, *15, adopted as Final Decision (May 31, 2023), 2023 WL 10950105, appeal to superior court dismissed, January 2, 2024. See Carrie Fryklund, and Pamela Fryklund, Trustee and Carrie Fryklund, Trustee of the Donald Fryklund Trust, v. Mass. Dept. of Envir. Protection and Carrigan Development, LLC, C.A. No. 23-1478B.

[80] The Stormwater Report states that "volumes of stormwater runoff feeding the two vernal pools have been maintained to within 10% of the existing conditions and matched as closely as possible for Design Points directly related to a wetland series." Stormwater Report, p. 19.

spreader has been calculated to ensure that the vernal pool would receive similar water-balance conditions post development. Id.[81] I find Mr. Conway and Mr. Ferrick's testimony persuasive. The Petitioners have failed to demonstrate by a preponderance of the evidence that the proposed Project fails to comply with Standard 6 and results in an adverse impact to the Resource Areas.

VIII. CONCLUSION

After thoroughly reviewing the evidence in the administrative record, based on a preponderance of the evidence submitted by the Parties at the Hearing and the governing wetlands statutory and regulatory requirements, I have determined that the proposed Project complies with the MWPA and Wetlands Regulations for work in Buffer Zone and for Stormwater Standards 1-4 and 6, that the SOC does not authorize work in the BVW and that the proposed Project does not result in an adverse impact to the wetlands Resource Areas. As a result, I recommend that the Department's Commissioner issue a Final Decision affirming the SOC, with the addition of the following condition proposed by the Applicant, without opposition, during the course of the appeal:

> Special Condition 54:
>
> The use of sodium chloride on the property as a de-icer or as part of any snow management plan is prohibited. Signs stating that the use of salt is prohibited will be posted at the entrances to the site and at both ends of the driveway connecting the upper and lower campuses.

Date: March 14, 2025

Margaret R. Stolfa
Presiding Officer

[81] On cross examination, Mr. Conway was asked to verify the elevations which resulted in some confusion regarding the plan pages and elevations reviewed. Mr. Conway testified nonetheless that if, when construction is underway, a slope proved to be too steep, leveling would be implemented to ensure any discharge did not cause erosion, even in this area that is outside the scope of the MWPA and Wetlands Regulations. Conway TR, 58:7-10, 58:24-59:9.

NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to MassDEP's Commissioner for her 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 G.L. c. 30A. The MassDEP Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain notice to that effect. Once the Final Decision is issued "a party may file a motion for reconsideration setting forth specifically the grounds relied on to sustain the motion" if "a finding of fact or ruling of law on which a final decision is based is clearly erroneous." 310 CMR 1.01(14)(d). "Where the motion repeats matters adequately considered in the final decision, renews claims or arguments that were previously raised, considered and denied, or where it attempts to raise new claims or arguments, it may be summarily denied. . . . The filing of a motion for reconsideration is not required to exhaust administrative remedies." Id.

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

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