October 15, 2021

BY FIRST CLASS MAIL
AND ELECTRONIC MAIL: conscom@townofnewbury.org

Newbury Conservation Commission
Newbury Municipal Offices
12 Kent Way, Suite 101
Byfield, MA 01922

Re: Notice of Intent, “The Villages at Cricket Lane,” 55 Pearson Drive, Newbury, MA

Dear Members of the Commission:

On behalf of neighbors and abutters to the above-referenced residential development project (the “Project”) at 55 Pearson Drive (the “Site”), I am writing to provide the Commission with comments on the above-referenced Notice of Intent (“NOI”) application, which was filed by Ranger Engineering Group, Inc. (“Ranger”) on behalf of Walter Eriksen (the “Applicant”). I am also submitting technical analyses from the following experts:

1. Patrick C. Garner, wetlands scientist – vernal pool water budget and wetlands impacts; and

As explained in these technical reports: (1) the “water budget” for the Certified Vernal Pool (“CVP”) is not properly balanced post-development, and therefore the Project will predictably impact protected Wildlife Habitat and Vernal Pool Habitat in violation of the performance standards in the Massachusetts Wetlands Protection Act, M.G.L. c. 131, §40 (the “WPA”) and its accompanying regulations at 310 CMR 10.00 et seq. (the “Regulations”); and (2) the Project does not comply with the MassDEP Stormwater Management Standards (“Stormwater Standards”).

By way of introduction, I have been practicing wetlands law for 20 years. Over that time, I have represented public and private clients in wetlands-related matters across eastern Massachusetts. I regularly appear before conservation commissions and handle wetlands appeals before MassDEP, and the Office of Appeals and Dispute Resolution (“OADR”). I was also chair of the Somerville Conservation Commission for 10 years.

I have reviewed all of Ranger’s submissions to the Commission for this Project, including the revised plan set for the 40B Comprehensive Permit, which was re-submitted to the Commission on March 8, 2021.

1 This firm represents: Bart Bracken, 69 Pearson Drive; Melissa Goldner, 19 Pearson Drive; Peter Franggos, 41 Pearson Drive; Daniel Linden, 68 Pearson Drive; and Brad Smith, 6 Pearson Drive, all of Byfield, MA 01922.
The Project’s failure to meet state wetlands and stormwater standards necessitates a Denial Order of Conditions, unless the Applicant significant re-designs its plans. The Newbury Zoning Board’s review of the Comprehensive Permit application for the Project did not address or correct these deficiencies. Therefore, we urge the Commission to deny an Order of Conditions for the Project. We further request that the Commission obtain its own independent peer review of the Project’s wetlands and stormwater impacts, since the peer review before the Zoning Board was cursory, and cannot be relied upon for compliance with wetlands and stormwater regulations within the Commission’s jurisdiction.

I. The Project would impermissibly alter the “water budget” of the CVP, negatively impacting Wildlife Habitat and Vernal Pool Habitat in violation of WPA performance standards.

Mr. Garner’s October 14, 2021 water budget analysis (the “Garner Analysis”) finds that the Project would adversely impact Wildlife Habitat and Vernal Pool Habitat, and as such, “fails to protect these jurisdictional areas under the WPA.” See Garner Analysis, p. 1. A “water budget” is a comparison of pre- and post-development conditions regarding changes to watershed areas, impervious areas, and water velocity and volume changes entering the CVP. The MassDEP has confirmed that a water budget analysis is essential to evaluating development impacts on protected Wildlife Habitat and Vernal Pool Habitat due to work in the buffer zone:

It is well known that vernal pool habitat is particularly susceptible to impacts from certain work in the buffer zone because of the habitat’s relative fragility. Vernal pool habitat is sensitive to changes in water, light, and chemical influences. Generally, in order for vernal pool habitat to continue to function and co-exist with nearby development its water budget must be sustained post-development. If surface runoff is redirected or groundwater recharge in proximity to the vernal pool is reduced by impervious surfaces, then the vernal pool water budget could be adversely impacted, potentially resulting in adverse impacts to the vernal pool habitat. Land use changes, such as clearing, increases in impervious surfaces, and changes in the watershed can increase or decrease water runoff, which could alter the amount of water received by a vernal pool, destroying the water budget that is necessary to sustain the habitat of that pool. Vernal pools with a significantly disturbed watershed generally have a higher pH, more mineral substrate, and more algae, which negatively impacts the habitat.... This susceptibility to changes in light, chemicals, or water is why in similar cases project applicants have performed detailed assessments to determine how work in the buffer zone will impact the vernal pool habitat, particularly its water budget.

Matter of Bosworth, OADR Docket No. WET-2015-015, Recommended Final Decision (February 17, 2016) adopted by Final Decision (March 14, 2016) (emphasis added, internal citations omitted) (attached as Exhibit A); see also Matter of Scott Nielsen and The Levi-Nielsen Company, Inc. (April 12, 2010) (improperly-designed stormwater system that deprives a vernal pool of its water budget would fail to meet the Act’s performance standard for BVW under 310 CMR 10.55(4)).
Mr. Garner’s water budget analysis determined that: “the CVP would be adversely impacted by the Project. CVP impacts are found in all measurable parameters, such as watershed area, impervious area, runoff velocity (measured in cu. ft/sec, or cfs), and volume.” See Garner Analysis, p. 6. Post-development alterations would be as follows:

- the volume of stormwater entering the CVP increases by 14%;
- the timing of volume entering the pool by increases by 23%;
- the amount of impervious area in the CVP watershed increases by 13%;
- the depth of stormwater entering the pool increases by 50%; and
- the velocity of stormwater entering the CVP watershed increases by 53%.

See Garner Analysis, p 6. Based on these impacts, Mr. Garner concluded that “the CVP’s hydroperiod would be altered by the Project, and that pre- and post-development conditions are not balanced for the CVP, as is required.” See Garner Analysis, p 7. Mr. Garner’s analysis further determined that:

it is my professional opinion that the numerous alterations proposed in the vicinity of the CVP would impair the functions of the pool, negatively impact the ORW and wildlife habitat, and would introduce pollution in violation of 310 CMR 10.01(2). In addition, the Project would significantly alter the hydrology of the CVP and impact the habitat of this Resource. (Garner Analysis, p. 8)

and that

the changes brought about by the Project will alter the CVP and adversely impact the Wildlife Habitat function of the BVW associated with the CVP. As such, the Project fails to adequately protect Wildlife Habitat and Vernal Pool Habitat under the WPA. (Garner Analysis, p. 10).

As a result, the proposed Project does not comply with performance standards under 310 CMR 10.53(1) for the protection of Wildlife Habitat (an “interest” under 310 CMR 10.01(2)), and the protection of Vernal Pool Habitat, as defined under 310 CMR 10.04 and 310 CMR 10.60(2)(c). The standard for reviewing impacts to vernal pools from work that occurs in the Buffer Zone, as is the case here, was clearly articulated by the MassDEP in Matter of Bosworth:

When reviewing Buffer Zone work for compliance with the Act and Regulations, the ultimate issues are whether the work will alter the Resource Area and whether the alteration will adversely affect the ability of the Resource Area to contribute to the protection of one or more of the interests of the Act. 310 CMR 10.53(1); Matter of Kornblith and Newman, Docket No. WET-2010-016, Recommended Final Decision (October 8, 2010), adopted by Final Decision (November 16, 2010); Matter of Trammell Crow Residential, Docket No. WET 2010-037, Recommended Final Decision (April 1, 2011), adopted by Final Decision (April 21, 2011); Matter of Nielsen, Docket No. WET 2008-046, Recommended Final Decision (April 12, 2010), adopted by Final Decision (May 11, 2010); Matter of Princeton Development, Inc., Docket No. 2006-157, Final Decision (February 5, 2009)... Work in the buffer zone of a bordering vegetated wetland that will alter the wetland, including any vernal pool habitat within the wetland, is subject
to regulation. Matter of Travis Snell, Docket No. 06-80, Ruling on Motion for Directed Decision (August 11, 2006); 310 CMR 10.02(2)(b). Projects that have an adverse impact on wetland vernal pool habitat have been denied wetlands permits. See Matter of Travis Snell, supra. As a consequence, work in the Buffer Zone to BVW may not impair the capacity of the vernal pool habitat to function as wildlife habitat.


Since the Project, which includes proposed work in the Buffer Zone to BVW, will impair the capacity of the Vernal Pool Habitat to function as Wildlife Habitat, the Project does not comply with the performance standards in the WPA and the Regulations, and therefore cannot be approved under the WPA.

II. The Commission should require the Applicant to file an “Appendix B” Wildlife Habitat Evaluation.

Mr. Garner’s report also concluded that the Project would result in direct alteration of the CVP (Garner Analysis, pp. 9-10), and therefore the Applicant is required to file an “Appendix B” Wildlife Habitat Evaluation with the Commission, including a certification that the Project’s alterations will have “no adverse effect” on wildlife habitat.2 According to MassDEP’s “Massachusetts Wildlife Habitat Protection Guidance for Inland Wetlands”:

In all resource areas, any direct alteration associated with certified or documented vernal pool habitat requires a detailed wildlife habitat evaluation (Appendix B). A finding that impacts to vernal pool habitat will not result in an adverse effect will only occur under rare and unusual circumstances. A finding of no adverse effect must include consideration of the restoration and/or replication proposed after two growing seasons. However, replication and restoration of vernal pool habitat is difficult to successfully accomplish. Therefore, avoidance of impacts to vernal pool habitat is almost always necessary to meet performance standards. (p. 8).

We respectfully request that the Commission require the Applicant to file an “Appendix B” Wildlife Habitat Evaluation before any further review of the Project occurs. If the Applicant refuses to submit an “Appendix B,” the Commission should deny the Project for failure to provide necessary requested information under 310 CMR 10.05(6)(c), as well as on the merits of the proposal. See Matter of Bosworth, OADR Docket No. WET-2015-015, Recommended Final Decision (February 17, 2016) (upholding conservation commission’s denial based on failure to provide sufficient information and on the merits).

2 “Massachusetts Wildlife Habitat Protection Guidance for Inland Wetlands,” (March 2006), Table 2. Inland Wetland Resource Areas and Wildlife Habitat Summary, p. 10 (“All alterations to certified or documented vernal pool habitat” must meet the standard of showing “no adverse effect/no impairment.”)
III. The Commission should find that the PVP also contains Vernal Pool Habitat

Mr. Garner notes in his Report that there is a Potential Vernal Pool (“PVP”) on the site. The PVP is located along the southern boundary of the Property, within the Isolated Land Subject to Flooding (“ILSF”) Resource Area. The Commission should find that the PVP also contains Vernal Pool Habitat and protect it accordingly, even though the PVP has not yet been certified by the Massachusetts Natural Heritage and Endangered Species Program (“NHESP”).

The Regulations at 310 CMR 10.53(1) give the Conservation Commission discretionary authority to protect wetland resources, including uncertified Vernal Pool Habitat. See 310 CMR 10.53(1) (“If the Issuing Authority determines that a Resource Area is significant to an interest identified in M.G.L. c. 131, § 40 for which no presumption is stated in the Preamble to the applicable section, the Issuing Authority shall impose such conditions as are necessary to contribute to the protection of such interests. For work in the Buffer Zone ... the Issuing Authority shall impose conditions to protect the interests of the Act identified for the adjacent Resource Area.”). According to the “Massachusetts Wildlife Habitat Protection Guidance for Inland Wetlands” (p. 7):

the presumption that an area is vernal pool only when certified prior to the filing of a NOI is rebuttable, and may be overcome upon a clear showing to the contrary. In LSF where there is no certified vernal pool there is a presumption that vernal pool habitat does not exist. However, when there is clear and convincing evidence that an area is a vernal pool, an issuing authority can issue a finding overcoming the presumption and establishing that the area is vernal pool habitat.

(Emphasis added). Accordingly, if information is presented to the Commission which clearly shows that a resource area is functioning as a vernal pool (i.e. meets the NHESP “Guidelines for Certification of Vernal Pool Habitat”), the Commission can condition a project to protect the wildlife habitat value of the uncertified vernal pool.

Here, information was submitted to NHESP sufficient to meet its criteria for certification of the PVP as a vernal pool. Although NHESP has not yet made a decision on certification, the information provided is sufficient for the Commission to find that the PVP contains Vernal Pool Habitat, and to ensure that the Project meets the standard of causing “no adverse impact” to the PVP, as well. Mr. Garner’s analysis determined that:

all impacts I cite in this report to the CVP would also occur — and in fact be magnified — for the PVP. The watershed surrounding the PVP has far more proposed impervious area than that proposed within the CVP watershed. In addition, habitat around the PVP, if the Project were built according to the present design, would be almost 100% lost to buildings, roads, lawns and infrastructure. Garner Analysis, p. 1.

Accordingly, the Commission should also require the Applicant to submit an “Appendix B” Wildlife Habitat Evaluation due to proposed impacts to the PVP, and should evaluate the Project to ensure that it causes “no adverse impact” to Vernal Pool Habitat associated with the PVP.
IV. The Project does not comply with MassDEP Stormwater Management Standards.

Chessia Consulting Services, LLC’s October 15, 2021 review of the Project found numerous areas of noncompliance with the MassDEP Stormwater Management Standards. In particular, Mr. Chessia determined that:

- “the Applicant has not provided sufficient documentation to demonstrate compliance with [Stormwater] Standard 2. The proposed submittal does not provide sufficient documentation regarding soils, and collection and conveyance of runoff.” (Chessia review, pp. 5-8);
- “The Project does not demonstrate that Standard #3 has been met.” (Chessia review, pp. 8-9); and
- Insufficient data has been provided to confirm compliance with Standard #4. (Chessia review, pp. 9-10).

In addition, Mr. Chessia found that the Applicant has submitted insufficient data or documentation to assess numerous other aspects of the Project. For example: (1) complete soil testing data, including full soil evaluation reports, in the area of the proposed stormwater management systems has not been provided [p. 3]; (2) complete design data, including elevations, inverts, and seasonal high groundwater elevations, has not been provided for the proposed roof and foundation drains, such that it cannot be confirmed whether they will function as designed [p. 4]; (3) information on utility construction is missing, such that it cannot be confirmed whether utility construction would occur outside of jurisdictional wetlands or buffer zones [p. 4]; and (4) additional information is required to determine if the Project meets the requirement in Stormwater Standard #1 [p. 5], among other deficiencies.

The Commission should require the Applicant to submit all of the missing information to the Commission. We further recommend that the Commission obtain its own independent peer review of the Project’s compliance with the DEP Stormwater Standards to make sure that the Project meets state standards, and does not cause flooding on surrounding properties.

V. Conclusion.

Mr. Garner’s water budget analysis confirms that the Project would directly alter the CVP, negatively impacting Wildlife Habitat and Vernal Pool Habitat in violation of the WPA’s performance standards. Accordingly, the Applicant is required to file an “Appendix B” Wildlife Habitat Evaluation with the Commission, and to certify that the Project will have “no adverse effect” on Wildlife Habitat and Vernal Pool Habitat. The Commission should require such certification for both the CVP and PVP on the site.
Mr. Chessia’s stormwater review also confirms that the Project does not comply with the DEP Stormwater Standards, and that the Applicant has failed to provide necessary information to enable a complete evaluation of the development. Therefore, we respectfully request that the Commission require the Applicant to submit this missing information before any further review of the Project. If the Applicant refuses to comply with such a request, we ask that the Commission deny the Project pursuant to 310 CMR 10.05(6)(c).

Thank you in advance for your consideration of these comments.

Sincerely yours,

/s/ Elizabeth M. Pyle

Elizabeth M. Pyle

Encls.
Exhibit A
THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

February 17, 2016

In the Matter of
David A. Bosworth Co., Inc.

OADR Docket No. WET-2015-015
Dighton, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

In this appeal, the Dighton Conservation Commission ("Commission") challenges the Superseding Order of Conditions ("SOC") that the Massachusetts Department of Environmental Protection's Southeast Regional Office ("DEP") issued to David Bosworth Co., Inc. ("Bosworth"). The SOC approved Bosworth's proposal to construct a large G.L. c. 40B residential development, with associated infrastructure ("the project") at 766 Somerset Avenue, Dighton ("the Property"). The SOC was issued pursuant to the Wetlands Protection Act, G.L. c. 131 § 40, and the Wetlands Regulations, 310 CMR 10.00.

The appeal is rooted in the Commission's denial of the project, citing insufficient information pursuant to 310 CMR 10.05(7)(h) and 310 CMR 10.05(6)(c). Alternatively, the Commission denied the project on its merits, finding, among other things, that Bosworth failed to show that the project: (1) would not adversely impact the habitat of numerous certified vernal pools located within Bordering Vegetated Wetlands and Isolated Land Subject to Flooding and (2) complied with the Stormwater Regulations. Bosworth appealed the Commission's denial to

1 See 310 CMR 10.05(7)(d) (identifying who may appeal a Superseding Order of Conditions).
DEP pursuant to 310 CMR 10.05(7). DEP issued the SOC approving the project, after it determined that the Commission had sufficient information under 310 CMR 10.05(6)(c) and 310 CMR 10.05(7)(h) to review the project and that the project complied with the Wetlands Act and Regulations.

The Commission appealed that decision to the Office of Appeals and Dispute Resolution ("OADR"). The parties submitted pre-filed direct and rebuttal testimony and exhibits. After holding an evidentiary adjudicatory hearing and conducting a view of the Property pursuant to 310 CMR 1.01(13)(j), I recommend that DEP’s Commissioner issue a Final Decision and a Final Order of Conditions denying the project, affirming the Commission’s denial, and vacating the SOC. In short, a preponderance of the evidence in the administrative record demonstrates that the Commission had insufficient information to describe the site, the work, or the effect of the work on the interests identified in G.L. c. 131 § 40.

On numerous occasions the Commission’s peer reviewer identified several deficiencies in the information submitted to the Commission. Specifically, the plans on which the project is based were never established to be sufficiently reliable; the plans were not stamped by a licensed professional land surveyor despite the Commission’s request to do so and despite numerous issues concerning their reliability; the plans did not fully and accurately describe Wetlands Resource Areas and their boundaries that are located within 100 feet of the proposed limit of work; topographic contours on the plans did not accurately represent site conditions; the Isolated Land Subject to Flooding was not specifically designated on the plans; the certified vernal pools were not specifically designated on the plans; an intermittent stream was not included on the plans; and the location of the boundaries established in an Order of Resource Area Delineation were uncertain.
The Commission properly found that these problems relate materially to jurisdictional determinations and the final quantification of impacts to wetlands interests. This is particularly true here where substantial work is proposed to occur as close as 25 feet to certified vernal pools within Bordering Vegetated Wetlands. Certified vernal pools contain wetlands habitat that is highly vulnerable to changes in water, light, and chemical composition from development in the buffer zone. Under these circumstances, the Conservation Commission correctly determined that Bosworth failed to provide it with sufficient information. In sum, there was insufficient information to reliably predict impacts to wetlands and their habitats, and thus to permit reliably the project. As a consequence, this decision does not address the merits of whether the project complies with the Wetlands Act and Regulations. Instead, and pursuant to established law, Bosworth should be required to file a new Notice of Intent under 310 CMR 10.02 if it desires to proceed with the project.

BACKGROUND

Bosworth’s proposed project would involve construction of a 9 building, 180 unit apartment housing project with 332 parking spaces, associated infrastructure (sidewalks, landscaping, stormwater and utility infrastructure), and 2 access roads along Somerset Avenue in Dighton. The project was filed as a proposed mixed-income housing rental apartment complex based on an application for a comprehensive permit under G.L. c. 40B §§ 20-23, which enabled Bosworth to obtain waivers from complying with the Town of Dighton’s more stringent wetlands bylaws.

With the exception of a vacant house on Somerset Avenue and a 125 foot wide electric power easement bisecting the Property in a north-south direction, the Property is undeveloped forest upland and wetlands. It also includes five certified vernal pools (or “CVP”) that generally
encompass the project. In particular, bordering the project on its southwest side is a Bordering Vegetated Wetland ("BVW") approximately 540' by 840', for a footprint of approximately 453,600 square feet ("the large BVW"). Exhibit B, Permit Set, Sheet WB-1. Lying generally at the eastern edge of and within the large BVW are three certified vernal pools (CVP Nos. 7434, 7435, and 7438). Those vernal pools have footprints of approximately 4,800, 8,000, 12,000 square feet in size, respectively. Certified vernal pool 7437 lies approximately 120 feet upland from the large BVW and in between CVP Nos. 7434 and 7435. It does not exist within a Resource Area, as defined in 310 CMR 10.02. It has a footprint of approximately 1,500 square feet. In the southeast corner of the Property is another relatively large BVW—the A-Series BVW—which is approximately 250' by 180', for a footprint of approximately 45,000 square feet. Approximately 360 feet north of the A-Series BVW and 180 feet east of CVP 7434 by approximately 180 feet is another certified vernal pool, No. 7436, which is also an Isolated Land Subject to Flooding ("ILSF"). See 310 CMR 10.57 (isolated land subject to flooding definition and performance standards). It has a footprint of approximately 3,200 square feet.

In addition to substantial areas of BVW and CVPs, the Commission found that the Property contains, Outstanding Resource Waters ("ORW") and Zone A and C Surface Water Protection Areas on the majority of Parcel A.² M. Nover PFT, ¶ 23; McKenzie PFT, ¶ 15. The ORWs on the site are comprised of the intermittent streams and a BVW bordering the Zone A Surface Water Protection Area. M. Nover PFT, ¶ 26; Garner PFT, ¶ 20; M. Nover Rebuttal PFT, ¶ 15. The certified vernal pools are also ORWs. M. Nover PFT, ¶ 26. Most of the Property is mapped BioMap2 Ccre Habitat 630 which include a Wetland Core, Vernal Pool Core, and a

² Outstanding Resource Waters in Massachusetts include public water supply reservoirs, their tributaries, and associated wetlands, as well as vernal pools and other water bodies that may be specifically identified. 310 CMR 10.04; 314 CMR 4.06(1)(d); 314 CMR 4.06(1)(d)2.a.
³ "PFT" refers to the pre-filed direct and rebuttal testimony filed by the parties.

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Species of Conservation Concern. Exhibit G. BioMap2 identifies the top 5% most interconnected clusters of Potential Vernal Pools in the state, or Vernal Pool Core. BioMap2 Core Habitat is critical for long term persistence of rare species and other species of concern. Exhibit A, Nover-Armstrong February 18, 2014 letter to Commission.

On February 8, 2006, a prior Property owner, Ronald J. Madeiros, filed an Abbrieviated Notice of Resource Area Delineation ("ANRAD") for the Property pursuant to 310 CMR 10.05. In response, on December 26, 2007, the Commission issued an Order of Resource Area Delineation ("ORAD") for the Property. The ORAD confirmed that the BVW boundaries described in the November 9, 2007 plans submitted with the ANRAD were accurate but it also noted that the Property contained 6 confined basin depressions that met the vernal pool definition under the local bylaws; they were identified with wetland flagging. There is no dispute that the definitions of vernal pool under the bylaws and the Wetlands Regulations are similar. See 310 CMR 10.04 (vernal pool). The ORAD noted that the vernal pools had not yet been delineated nor certified by the Massachusetts Natural Heritage and Endangered Species Program ("NHESP"). Exhibit VV, ORAD. The ORAD also found that the boundaries for the Isolated Land Subject to Flooding were inaccurate.

It is undisputed that on April 11, 2013, the Commission issued an enforcement order against David A. Bosworth for allegedly: driving heavy equipment through wetlands and buffer zone, removing trees in wetlands and buffer zone, and working within buffer zone of a vernal pool at the Property. Pursuant to the enforcement order, Bosworth ceased the work and filed a

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4 Under 310 CMR 10.04 vernal pools are defined as a "confined basin depressions which, at least in most years, hold water for a minimum of two continuous months during the spring and/or summer, and which are free of adult fish populations, as well as the area within 100 feet of the mean annual boundaries of such depressions, to the extent that such habitat is within an Area Subject to Protection Under M.G.L. c. 131, § 40 as specified in 310 CMR 10.02(1).”

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restoration plan with the Commission, which included reestablishment of wetland flagging, seeding disturbed areas, and removing felled trees from the wetlands and Buffer Zone.

On August 29, 2013, Bosworth filed a Notice of Intent ("NOI") with the Commission under 310 CMR 10.02 to obtain an Order of Conditions to proceed with the proposed project under the Wetlands Act and Regulations. The NOI identified the property as Lots 11, 12-1, and 14 on Assessor’s Map 9. The total acreage for that area equaled approximately 120 acres.

To assist with its review of the NOI and the proposed project the Commission retained Nover-Armstrong Associates, Inc., as its peer review consultant. Nover-Armstrong provided the professional services of a wetlands scientist, Martha Nover, and a licensed professional engineer, Henry Nover. In February 2014, Nover-Armstrong identified to the commission 5 basins that were likely certifiable vernal pools. In April 2014, Nover-Armstrong confirmed that they were certifiable using the NHESP Obligate Species method for certification. In October 2014, NHESP officially certified the 5 vernal pools, as follows: CVP#7434, CVP#7435, CVP#7436, CVP#7437, and CVP#7438.

On June 14, 2014, Bosworth revised the NOI to, among other things, reflect that approximately 81.3 acres of the site had been subdivided and sold. The remaining acreage for the project was approximately 38.7, and only on Lot 11.

On February 4, 2015, the Commission issued an Order of Conditions ("OOC") denying the project, on two grounds. First, it found that the information submitted by Bosworth was insufficient to describe the site, the work, or the effect of the work on the interests identified in the Act. See 310 CMR 10.05(7)(h) and 310 CMR 10.05(6)(c). Second, it found that the project as proposed cannot be conditioned to meet the performance standards set forth in 310 CMR
10.55 (BVW), 10.57 (ILSF), and 10.60 (wildlife habitat evaluation) and the project does not satisfy the stormwater standards set forth in 310 CMR 10.05(6)(k).\(^5\)

Bosworth appealed that decision under 310 CMR 10.05(7), requesting that DEP issue a Superseding Order of Conditions ("SOC") approving the project. Bosworth claimed that the Commission had sufficient information to review the project and that it complied with all applicable Wetlands Regulations and the Wetlands Act. Bosworth prevailed, and DEP issued an SOC approving the project. The Commission then appealed the SOC here, to OADR under 310 CMR 10.05(7)(j). The parties submitted pre-filed direct and rebuttal testimony from several witnesses, who were later cross examined in an adjudicatory hearing.

The Commission presented testimony from the following witnesses:

1. Patrick C. Garner. Garner is a wetlands scientist, professional land surveyor, and hydrologist with more than 30 years of experience. He is a certified Massachusetts Professional Land Surveyor and Soil Evaluator. He was Director of the Massachusetts Association of Conservation Commissions from 1997 to 2000 and again in 2008 and President between 2004-2006 and 2010-2012. He has taught workshops and seminars for the Association of Massachusetts Wetlands Scientists and the Massachusetts Association of Conservation Commissions. He has received a number of accolades related to his wetlands work. He has held several other leadership roles regarding wetlands and hydrology. He holds a BS degree and has taken numerous post graduate courses in wetlands, hydrology, stormwater.

2. Marta J. Nover. Ms. Nover is employed as the Principal, Senior Wetland Scientist and Permitting Expert with Nover-Armstrong Associates, Inc., an environmental and engineering consulting firm. Ms. Nover holds a BS degree in earth and natural sciences with a degree in forestry. She has over 30 years of wetlands consulting experience.

\(^5\) The Order of Conditions states that the Project Plans were last revised on September 4, 2014. The plans submitted by the Commission in this proceeding include plans last dated January 6, 2015. Exhibit AA. The most recently dated plan set in the Commission’s possession is dated January 15, 2015. Garner PFT, ¶ 22. The SOC, however, states that the September 4, 2014 plan set is the final approved plan. Garner PFT, ¶ 22. Garner testified that to his understanding there are only “nominal” differences between the plan sets. Id. Given that and the fact that the SOC was based upon the September 4, 2014 plan set this decision will also be based upon the September 4, 2014 plan set, which shall be referred to as the “Project Plans.”
3. Henry T. Nover. Mr. Nover has been a Registered Professional Engineer in the Commonwealth of Massachusetts since 1981. He has been an approved soil evaluator since 1994. He has 41 years of experience in site engineering, including field surveys, design, permitting and construction of stormwater management facilities, evaluation of surface hydrology and stormwater runoff, riverine hydraulic analysis, and floodplain impact assessments. He holds a BS degree in civil engineering. He is employed with Nover-Armstrong Associates, Inc., an environmental and engineering consulting firm.

Bosworth submitted testimony from these witnesses:

1. Geoffrey P. Signorelli. Signorelli is a civil engineer employed by David A. Bosworth Co., Inc., a real estate development company. He is a Massachusetts licensed civil professional engineer, with 13 years of experience in civil engineering, site planning, environmental engineering, surveying, and drafting. He holds a BS degree in environmental/civil engineering.

2. Brad Holmes. Holmes is the principal and manager of Environmental Consulting & Restoration, LLC, and environmental consulting firm. He is a professional wetlands scientist with more than 17 years of experience. He holds a BS degree in wildlife and fisheries biology and an MS degree in environmental engineering.

3. Bradley C. McKenzie. McKenzie is a Massachusetts licensed professional engineer. He is the president and founder of McKenzie Engineering Group, Inc., a land surveying and civil engineering firm established in 1994. He holds a BS degree in civil engineering and an MBA. He has over 31 years of experience in management, design, and construction administration of residential, commercial, recreational, and public works civil engineering projects.

The following witness testified for MassDEP:

1. Gary J. Makuch. Makuch has been employed as an environmental engineer and analyst with DEP since 1986 in its wetlands and waterways program. He holds a BS degree in Environmental Science and a Masters degree in Environmental Pollution Control.

REGULATORY FRAMEWORK

Buffer Zone. This is a Wetlands permit appeal, filed under the Wetlands Act and the Regulations. 310 CMR 10.05(7)(j). The proposed project involves substantial work in the Buffer Zone to BVW. There are a number of regulatory provisions and decisions dictating that the work is subject to less scrutiny than work which takes place in the Resource Areas themselves. First, Buffer Zone work is not per se regulated under the Act or the Regulations.
See 310 CMR 10.02(2)(b). Instead, only that work "which, in the judgment of the issuing authority, will alter [a Resource Area] is subject to regulation under M.G.L. c. 131, § 40 and requires the filing of a Notice of Intent." Id. Thus, the Buffer Zone may generally be altered if it will not alter a Resource Area, as determined by the issuing authority. In contrast, any alteration of a Resource Area is generally subject to jurisdiction under the Act and Regulations. See 310 CMR 10.02(2)(a). "Alter means to change the condition of any Area Subject to Protection Under M.G.L. c. 131, § 40. Examples of alterations include, but are not limited to, the following: ... (c) the destruction of vegetation; (d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water. ..." 310 CMR 10.04 ("Alter").

When reviewing Buffer Zone work for compliance with the Act and Regulations, the ultimate issues are whether the work will alter the Resource Area and whether the alteration will adversely affect the ability of the Resource Area to contribute to the protection of one or more of the interests of the Act. 310 CMR 10.53(1); Matter of Kornblith and Newman, Docket No. WET-2010-016, Recommended Final Decision (October 8, 2010), adopted by Final Decision (November 16, 2010); Matter of Trammell Crow Residential, Docket No. WET 2010-037, Recommended Final Decision (April 1, 2011), adopted by Final Decision (April 21, 2011); Matter of Nielsen, Docket No. WET 2008-046, Recommended Final Decision (April 12, 2010), adopted by Final Decision (May 11, 2010); Matter of Princeton Development, Inc., Docket No. 2006-157, Final Decision (February 5, 2009).

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

For work in the buffer zone subject to review under 310 CMR 10.02(2)(b)3., [which is the case here,] the issuing authority shall impose conditions to protect the interests of the Act identified for the adjacent resource area. The potential for adverse impacts to resource areas from work in the buffer zone may increase with the extent of the work and the proximity to the resource area. The issuing authority may consider the characteristics of the buffer zone, such as the presence of steep slopes, that may increase the potential for adverse impacts on resource areas. Conditions may include limitations on the scope and location of work in the buffer zone as necessary to avoid alteration of resource areas. The issuing authority may require erosion and sedimentation controls during construction, a clear limit of work, and the preservation of natural vegetation adjacent to the resource area and/or other measures commensurate with the scope and location of the work within the buffer zone to protect the interests of the Act. . . .

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

**BVW.** The Wetlands Regulations define BVW as:

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

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


“Stormwater runoff results from rainfall and snow melt and represents the single largest source responsible for water quality impairments in the Commonwealth’s rivers, lakes, ponds, and marine waters. New and existing development typically adds impervious surfaces and, if not properly managed, may alter natural drainage features, increase peak discharge rates and volumes, reduce recharge to wetlands and streams, and increase the discharge of pollutants to wetlands and water bodies.” Stormwater Handbook, V. 1, ch. 1, p. 1.

Unless specifically exempted, stormwater runoff from proposed projects in Resource Areas or the Buffer Zone must meet stormwater management standards identified in the

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⁶“Except as expressly provided, stormwater runoff from all industrial, commercial, institutional, office, residential and transportation projects that are subject to regulation under M.G.L.c. 131, § 40 including site preparation, construction, and redevelopment and all point source stormwater discharges from said projects within an Area Subject to Protection under M.G.L.c. 131, § 40 or within the Buffer Zone shall be provided with stormwater best management practices to attenuate pollutants and to provide a setback from the receiving waters and wetlands in accordance with the following Stormwater Management Standards as further defined and specified in the Massachusetts Stormwater Handbook.” 310 CMR 10.05(6)(k) (emphasis added).

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

The Stormwater Handbook sets forth numerous BMPs for appropriately handling stormwater. Some are “non-structural” in nature and relate to site design practices, source control, and pollution prevention. Others are structural, and depend on incorporating various structures into the site design to properly handle stormwater. Stormwater Handbook, Vol. 2, Ch. 1; Vol. 2, Ch. 2; Vol. 2, Ch. 4. BMPs are often constructed or designed in what is known as a BMP treatment train. A BMP treatment train is a series of BMPs in sequence to maximize pollutant removal. Stormwater Handbook, Vol. 2, Ch. 1, p. 32. There are also several categories of BMPs: pretreatment, treatment, conveyance, and infiltration. Stormwater Handbook, Vol. 2, Ch. 1, p. 22.

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

**THE BURDEN OF PROOF**

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

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

The relevancy, admissibility, and weight of evidence that the parties sought to introduce in the Hearing were governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):
[u]nless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

Under 310 CMR 1.01(13)(h), “[t]he weight to be attached to any evidence in the record will res: within the sound discretion of the Presiding Officer. . . .”

**DISCUSSION**

I. **The ORAD does not preclude recognition of the certified vernal pools.**

Bosworth bases his ORAD preclusion argument on the principle that ORADs are generally entitled to preclusive effect for a period of three years, or longer if they are extended.

See Matter of Tompkins-Desjardins Trust, Docket No. WET-2010-035, Recommended Final Decision (April 1, 2011), adopted by Final Decision (April 7, 2011). The purpose is to facilitate reasonable reliance and predictability for those affected by the ORAD property. Here, when the Commission issued the ORAD in 2007 the vernal pools had not yet been certified. In fact, they were not certified until approximately five months after Bosworth filed the NOI and five months before the Commission issued the OOC.

There is no dispute that the ORAD was binding at the time that Bosworth filed the NOI, as a consequence of it having been extended on three occasions by the Commission. Bosworth therefore argues that the absence of the certified vernal pools on the ORAD precludes their recognition in the NCI process. DEP and the Commission disagree. They argue that that the absence of certified vernal pools is not entitled to preclusive effect because: (1) vernal pools are not Resource Areas that need to be delineated in an ORAD and (2) the ORAD identified the
locations of likely vernal pools and contained a brief discussion of their status and location. I agree with the Commission and DEP.

The Wetlands Regulations at 310 CMR 10.05 (3)(a)1 provide that any person who wishes to know whether the Wetlands Act applies to land or to work that may affect a resource area may file a request for a determination of applicability with the local conservation commission. This ANRAD process provides a procedure for a party to confirm the delineation of wetland Resource Areas that are identified on the plans filed with the Conservation Commission. 310 CMR 10.05(4)(b)2. An ORAD is binding as to the location of resource areas identified by the proponent. 310 CMR 10.05(6)(a)3. It is not binding with respect to resource areas at the property that were not identified by the proponent. Matter of Boston Properties, LP, Docket No. WET 2004-012, Recommended Final Decision (May 4, 2012), adopted by Final Decision (May 11, 2012). The regulations are clear: "when requested to issue a [SORAD], the Department shall limit its review to the resource area delineations. The Department shall consider the objections to the resource area delineations stated in the request." 310 CMR 10.05(7)(g). The "Findings" section of the ORAD states that it determines the boundaries of resources areas noted, but "[t]his Order does not, however, determine the boundaries of any other resource area or Buffer Zone to any resource area not specifically noted above, regardless of whether such boundaries are contained on the plans attached to this Order or the [ANRAD]." Exhibit VV.

Here, there are two reasons why the 2007 ORAD does not preclude recognition of the certified vernal pools. First, vernal pools are not included as a Resource Area subject to protection under the Wetlands Act and Regulations.7 See 310 CMR 10.02(1). Vernal pools do,

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7 Resource Areas include bank, riverfront area, freshwater wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean or on any estuary, creek, river, stream, pond or lake, or any land under said waters or any land subject to tidal action, coastal storm flowage, or flooding. G.L. c. 131 § 40; 310 CMR 10.02.

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however, receive protection under the Wetlands Act and Regulations as a provider of important wetlands habitat within the pools when the pools are located within a protected Resource Area. Makuch PFT, Exhibi: 4 (NHESP Guidelines for Certification of Vernal Pool Habitat). As a consequence, because vernal pools are not a Resource Area they do not fall within the intended scope of the ORAD process. Second, and regardless whether vernal pools are a Resource Area, here the 2007 ORAD put Bosworth on notice of the vernal pools’ existence six years before he filed the NOI. In fact, the ORAD identified the location of six potential vernal pools. That notice to Bosworth undermines his claim that he relied upon the absence of the pools’ certification in the ORAD. Indeed, in the NOI the project was proposed to be built around the vernal pools, with no direct alterations to them.

Bosworth’s reliance on Matter of Old Barn, LLC, Docket No. WET 2010-013, Recommended Final Decision (October 20, 2010), adopted by Final Decision (November 16, 2010), to argue that ORAD should preclude recognition of the certified vernal pools is misplaced. In that case, the Intervener was precluded from asserting the presence of an alleged vernal pool because the argument was not previously raised, and had only been asserted near the very end of the adjudicatory proceeding. Moreover, the ORAD at issue included no notice of the existence of a vernal pool. Here, in contrast, the ORAD provided explicit notice of the potential vernal pools and their location. The statement in Old Barn that the applicant was entitled to rely on the absence of the vernal pool in the ORAD should not be relied upon as binding or persuasive authority, both because the parties did not argue whether a vernal pool must be delineated in an ORAD and also because it was dicta.
II. There was insufficient information to describe the site, the work, or the effect of the work on the interests identified in G.L. c. 131 § 40.

Information Sufficiency Standard. The Commission denied Bosworth's request for an Order of Conditions based upon its finding that Bosworth had not submitted sufficient information with its Notice of Intent. See G.L. c. 131 § 40, 310 CMR 10.05(7)(h), 310 CMR 10.05(6)(c); see e.g. Matter of Silva, Docket No. WET 2008-002 and 003, Recommended Final Decision (May 23, 2008), adopted by Final Decision (June 20, 2008). The Wetlands Regulations specify that the information submitted by the applicant with the Notice of Intent must be “sufficient to describe the site, the work or the effect of the work on the interests identified in M.G.L. c. 131, § 40 . . .” Commissions may request additional information from applicants when necessary. Matter of Silva.

Further, pursuant to 310 CMR 10.05(4)(h), the Commission may require that supporting plans and calculations be prepared and stamped by a registered professional engineer when, in its judgment, the complexity of the proposed work warrants this professional certification. The Commission may also require the preparation of supporting materials by other professionals including, but not limited to, registered landscape architect, registered land surveyor, environmental scientist, geologist or hydrologist when in its judgment the complexity of the proposed work warrants the relevant specialized expertise. 310 CMR 10.05(4)(h).

When a commission issues a denial for lack of information it must “specify the information which is lacking and why it is necessary.” 310 CMR 10.05(6)(c); see Matter of Diamond Hill Corporation, Docket #99-018, Recommended Final Decision, (December 12, 2000), adopted by Final Decision (January 5, 2001) (specifying missing information and why it was necessary).
When, as here, there is an appeal of a denial for insufficient information the
determination whether the Commission was correct must be based solely on “the information
submitted to the conservation commission.” 310 CMR 10.05(7)(h). If it is determined that
insufficient information was submitted, DEP shall affirm the denial and instruct the applicant to
re-file with the conservation commission and include the appropriate information. Id. If DEP
determines that sufficient information was submitted, it shall proceed to review the merits of the
project and determine whether to issue a Superseding Order denying or approving the project on
its merits. At this stage, review may be based upon additional information that was not before
the Commission. Likewise, on the appeal of the SOC, once it is determined that the Commission
had sufficient information, the appeal is de novo and information that was not before the
Commission may be submitted and considered. Matter of Silva, supra; Matter of Terrill, Docket
No. 05-293, Recommended Final Decision (July 13, 2010), adopted by Final Decision (January
7, 2011).

**Commission’s Findings.** The sufficiency of information inquiry must begin with the
Commission’s denial in order to determine what information the Commission “specif[ied]” as
“lacking” and “why [that information] is necessary.” 310 CMR 10.05(6)(c). I therefore turn to
the Commission’s Findings, attached to its Order of Conditions. The Commission determined
that there was insufficient information because:

1. The latest revised plan set did not identify the five NHESP certified vernal pools, it
   only designated the certified vernal pools as “potential vernal pools”;

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8 All parties, but mostly Bosworth, submitted additional evidentiary information regarding the Property to bolster
their arguments regarding the information sufficiency issue. None of that information, however, can be relied upon
in determining whether the information before the commission was sufficient. Much of the information submitted
by Bosworth was information that had been sought by the Commission, but Bosworth did not provide it and has
only done so now when it is too late. As the Commission asserts, it is “telling that much of the information
[Bosworth] has submitted since the Commission’s denial . . . turns out to be [some of] the very same information
requested by the Commission during the NOI process.” Commission’s Post-Hearing Brief, p. 3.

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2. The latest revised plan set did not fully describe the existing wetland resource areas and their boundaries within 100 feet of the proposed work, specifically:
   a. The ILSF, which encompasses a certified vernal pool (#7436), was not identified—the area was only identified as a potential vernal pool within the G-Series wetland (BVW);
   b. The topographic contours on the latest plan set did not accurately represent site conditions—the Commission determined that this “finding materially affects jurisdictional determinations during the NOI hearing process and final quantification of resource area impacts presented by the applicant”;
   c. The BVW boundary depicted on the latest revised plan set was revised by the applicant without allowing for proper review by the Commission and Nover-Armstrong. The revision was in response to the Commission’s finding that the BVW boundary did not accurately represent the boundary confirmed by the 2007 ORAD. The Commission determined that the way in which the revision was unilaterally conducted “brings the entire boundary location with respect to the property boundary and proposed limit of work into question”;
   d. The applicant can only closely approximate the location of the ORAD confirmed BVW boundary because it does not possess the CAD-Drawing;
   e. BVW boundary revisions are not illustrated adequately on the latest plan set;
   f. Bosworth did not provide the McKenzie Engineering Group’s 2009 Existing Conditions Plan, which plan was the basis for the NOI Project Plans;
   g. The stream on which the A-Series BVW bordered was not depicted on the plan set, even though it was requested by the Commission; and
h. The latest revised plan set is not stamped and certified by a Massachusetts
Registered Professional Land Surveyor, despite the Commission’s request to
do so.

_Vernal Pools and Their Habitat._ Much of the dispute over whether sufficient
information was provided to the Commission centers around the extent to which the work
proposed for the buffer zone will impact the certified vernal pools’ wildlife habitat. It is thus
important to better understand that habitat and the extent to which it is protected.

Vernal pools became eligible for protection when the Wetlands Regulations were revised
in 1987 to include wildlife habitat as an interest to be protected under the Wetlands Act. Work
in the buffer zone of a bordering vegetated wetland that will alter the wetland, including any
vernal pool habitat within the wetland, is subject to regulation. _Matter of Travis Snell,_ Docket
No. 06-80, Ruling on Motion for Directed Decision (August 11, 2006); 310 CMR 10.02(2)(b);
Makuch PFT, Exhibit 4. Projects that have an adverse impact on wetland vernal pool habitat
have been denied wetlands permits. _See Matter of Travis Snell, supra._ As a consequence, work
in the Buffer Zone to BVW may not impair the capacity of the vernal pool habitat to function as
wildlife habitat.⁹ Makuch PFT, Exhibit 4.

Vernal Pool Habitat is defined as confined basin depressions which, at least in most
years, hold water for a minimum of two continuous months during the spring and/or summer,
and which are free of adult fish populations, as well as the area within 100 feet of the mean
annual boundaries of such depressions, to the extent that such habitat is within an Area Subject

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⁹ 310 CMR 10.05(3)(a)2 provides: Any person who proposes to perform work within the Buffer Zone shall submit
to the conservation commission either a Notice of Intent for such work or a Request for Determination of
Applicability. Said request shall include sufficient information, as required on Form 1, to enable the conservation
commission to find and view the area and to determine whether the proposed work will alter an Area Subject to
Protection under G.L. c. 131, § 40.
to Protection under M.G.L. c. 131, § 40 as specified in 310 CMR 10.02(1).\(^{10}\) 310 CMR 10.04 (Vernal Pool Habitat), 310 CMR 10.57(3).

Vernal pools constitute a unique and increasingly vulnerable type of wetland habitat. Makuch PFT, Exhibit 4. Vernal pools are “essential breeding habitat, and provide other extremely important wildlife habitat functions during non breeding season as well, for a variety of amphibian species such as wood frog (*Rana sylvatica*) and the spotted salamander (*Ambystoma maculatum*), and are important habitat for other wildlife species.” 310 CMR 10.04 (Vernal Pool Habitat), see also Makuch PFT, Exhibit 4. Vernal pools are unique wildlife habitats best known for the amphibians and invertebrate animals that use them to breed. Many species are dependent upon vernal pools for their survival because they cannot withstand predation by fish and require an environment free of fish to survive. These are known as obligate species, which include Fairy Shrimp, Wood Frogs, Spotted Salamanders, Jefferson Salamanders, Marbled Salamanders, and Mole Salamanders. Makuch PFT, Exhibit 4. Vernal pools, also known as ephemeral pools, autumnal pools, and temporary woodland ponds, typically fill with water in the autumn or winter due to rainfall and rising groundwater and remain ponded through the spring and into summer. Vernal pools dry completely by the middle or end of summer each year, or at least every few years. Occasional drying prevents fish from establishing permanent populations, which is critical to the reproductive success of many amphibian and invertebrate species that rely on breeding habitats free of fish predators. Id.

Isolated Land Subject to Flooding, where it is vernal pool habitat (as in this appeal), is an essential breeding site for certain amphibians which require isolated areas that are generally flooded for at least two continuous months in the spring and/or summer and are free from fish predators. Id.

\(^{10}\) Procedures for calculating the boundary of a vernal pool in isolated and bordering land subject to flooding are at 310 CMR 10.57(2)(a)6.

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predators. Most of these amphibians remain near the breeding pool during the remainder of their lifecycle. Many reptiles, birds and mammals also feed here. 310 CMR 10.57(1)(b)(4).

Work outside a Resource Area, such as BVW, but in its buffer zone may affect the wildlife habitat of that Resource Area. “Extensive work in the inner fifty (50)-foot portion of the buffer zone, particularly clearing of natural vegetation and soil disturbance is likely to alter the physical characteristics of resource areas by changing their soil composition, topography, hydrology, temperature, and the amount of light received. Alterations to biological conditions in adjacent resource areas may include changes in plant community composition and structure, invertebrate and vertebrate biomass and species composition, and nutrient cycling. These alterations from extensive work in the buffer zone can occur through the disruption and erosion of soil, loss of shading, reduction in nutrient inputs, and changes in litter and soil composition that filters runoff, serving to attenuate pollutants and sustain important wildlife habitat within resource areas.” Makuch PFT, Exhibit 5 (MassDEP Wildlife Habitat Protection Guidance).

It is well known that vernal pool habitat is particularly susceptible to impacts from certain work in the buffer zone because of the habitat’s relative fragility. Makuch PFT, Exhibit 4.

Vernal pool habitat is sensitive to changes in water, light, and chemical influences. Garner PFT, ¶ 18; Exhibit LL\(^\text{11}\); Exhibit MM\(^\text{12}\). Generally, in order for vernal pool habitat to continue to function and co-exist with nearby development its water budget must be sustained post-development. M. Nover Rebuttal PFT, ¶ 6, 13; Exhibit LL. If surface runoff is redirected or groundwater recharge in proximity to the vernal pool is reduced by impervious surfaces, then the vernal pool water budget could be adversely impacted, potentially resulting in adverse impacts to

\(^{11}\) Colburn, Vernal Pools, Natural History and Conservation (2004), pp. 245 and 249.


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the vernal pool habitat. M. Nover Rebuttal PFT, ¶ 6, 13; Exhibit LL. Land use changes, such as clearing, increases in impervious surfaces, and changes in the watershed can increase or decrease water runoff, which could alter the amount of water received by a vernal pool, destroying the water budget that is necessary to sustain the habitat of that pool. Exhibit LL. Vernal pools with a significantly disturbed watershed generally have a higher pH, more mineral substrate, and more algae, which negatively impacts the habitat. Exhibit LL; M. Nover Rebuttal PFT, ¶ 6, 13.

For a Conservation Commission to determine sufficiently that a proposed project will not impact a protected Resource Area, it is critical to have a high level of topographic accuracy when project components are proposed for the buffer zone proximate to Resource Areas, such as BVW. Garner Rebuttal PFT, ¶ 19. This is particularly true with certified vernal pools because of their susceptibility to changes in their water budgets and chemical influences from water runoff. In fact, surface runoff is generally a major source of water for vernal pools. Runoff from rainstorms and melting snow is often considered the primary factor causing springtime maximum in water levels and volume. Garner Rebuttal PFT, ¶ 38.

This susceptibility to changes in light, chemicals, or water is why in similar cases project applicants have performed detailed assessments to determine how work in the buffer zone will impact the vernal pool habitat, particularly its water budget. For example, in a relatively recent case involving work in the buffer zone of BVW containing a CVP, “[t]he Applicant performed extensive analysis and modeling to determine the effect that the work would have on the CVP habitat, particularly its hydrology. It was determined that the BVW and CVP would continue to receive an appropriate supply of water to sustain the CVP... ‘Therefore the depth and volume of the pool will not be altered as a result of the proposed project.’” Matter of Nielsen, Docket No.
2008-046, Recommended Final Decision (April 12, 2010), adopted by Final Decision (May 11, 2010).

**The Vernal Pools and Work in This Case.** This appeal presents a complex and delicate situation. Significant work is proposed 25 to 50 feet from certified vernal pools in BVV that are part of a relatively dense complex of vernal pools. In fact, Garner testified that he has “never observed such a density of interconnected CVPs and PVPs in such a small area.” Garner PFT, ¶ 18.

The work proposed proximate to the vernal pools is quite substantial. The project, including buildings, a roadway, and parking lots, would generally lie in an elongated “T”-shaped area. The vertical portion of the T generally lies between the large BVV and CVPs on the western side of the property (Nos. 7434, 7435, 7437, and 7438) and the A-Series BVV and CVP 7436 and ILSF that lie on the eastern side of the property.

Work, including grading, clearing, construction of a building and a parking lot, is proposed to occur within approximately 25 to 50 feet of CVP 7438. Work, including grading, clearing, and construction of a basin (and associated discharge), are proposed to occur within approximately 25 to 50 feet of CVP 7434. And work, including grading, clearing, and construction of a road, are proposed to occur within 40 to 50 of CVP 7436. Stormwater will be discharged into the buffer zones for the BVVs containing the CVPs 7436 and 7437.

Under these circumstances, it was incumbent upon Bosworth to present sufficient information to the Commission demonstrating that the project, including the stormwater BMPs, meet the performance standards of having no adverse impact on the BVV and habitat functions of the CVPs within the BVV and ILSF. See Stormwater Handbook, Vol. 1, Ch. 1. Bosworth did not do that. Instead, the administrative record reflects that Nover-Armstrong and the
Commission repeatedly identified material deficiencies in the information submitted by Bosworth. As discussed in detail below, those deficiencies include fundamental omissions, ranging from the identification of resource areas, to clearing up topographical ambiguities in plans, to providing the foundation or basis from which the Project Plans were derived in order to determine their accuracy. The last deficiency is of particular concern here because Nover-Armstrong discovered numerous inconsistencies that called into question the accuracy and reliability of the Project Plans. These deficiencies are unacceptable when, as here, the proposed project would involve substantial clearing, grading, and development (including impervious surfaces) in close proximity to certified vernal pools, whose habitats depend upon a delicate balance of water, light, and chemical influences.

**Record of Material Information Gaps.** As early as February 18, 2014, almost a year before the Commission issued the OOC denying the project, Nover-Armstrong informed the Commission that it had not received sufficient information and project details to review the project. That correspondence alerted the Commission to numerous problems and questions concerning the Project Plans. Importantly, it noted that the Project Plans specifically stated that they were based upon plans developed by McKenzie Engineering, which were not part of the record before the Commission. In particular, a disclaimer on the plans reads: “Existing conditions and property line info taken from a plan by McKenzie Engineering Group, Inc. titled ‘Existing Conditions Plan,’ dated July 20, 2009; dwg. No. EC-1; project no.; 29-154.” (hereinafter “the 2009 McKenzie Plan”). See Exhibit AA. Garner testified that this “statement is an unequivocal disclaimer that data shown on the plans presented to the Conservation Commission was not professionally produced or verified by the designer” of the Project Plans. Garner PFT, ¶ 26. Given this, Garner testified that Bosworth’s existing conditions plans appear
to be based on old, unverified information and not based on ground surveys by Bosworth. Garner PFT, ¶ 26. He testified that industry engineering standards require that the information be accurate and contemporary. See M. Nover PFT, ¶¶ 36-55.

The February 18, 2014 letter also alerted the Commission to numerous problems and questions concerning delineation of resource areas. Among other things, it observed that new wetland flag locations had been added to the referenced base existing conditions plan developed by McKenzie Engineering. M Nover PFT, ¶ 36. Indeed, the wetland resources on the property had been re-delineated in 2013, following the prior 2007 ORAD. Exhibit A. Given the numerous problems that Nover-Armstrong observed, it stated that the plans should be stamped by professional licensed surveyor. It added that “[a]t a minimum, the Applicant should provide the referenced [2009 McKenzie Plan] as part of the NOI submittal for comparison.” Exhibit A, p. 2 (emphasis added). Importantly, Bosworth did not perform either of those measures during the NOI proceedings. M Nover PFT, ¶ 36, 55. As will become apparent below, discrepancies with the Project Plans and actual site conditions increased, making the need for the 2009 McKenzie Plan and review by a licensed surveyor even more imperative. See M. Nover PFT, ¶¶ 36-55.

The Nover-Armstrong February 18, 2014, letter also reported to the Commission that the project would lead to fragmentation of the vernal pool complex and the pools’ water budget would “likely be impacted by site development.” Exhibit A. The letter added that “[e]xtensive scientific data has documented development activities within a minimum of 100 feet of a vernal pool depression will adversely impact successful breeding, dispersal, overwintering, foraging, and migration of vernal pool species.” Exhibit A. It recommended that Bosworth address potential impacts to the vernal pools’ water budget as a result of site development and stormwater management. Exhibit A; See M. Nover PFT, ¶¶ 36-55.
That letter also informed the Commission of Nover-Armstrong’s position that in addition to substantial areas of BVW, the property contains Outstanding Resource Waters, Zone A and C Surface Water Protection Areas on the majority of Parcel A. M Nover, ¶ 23, 55; Exhibit A. The ORW on the site is a BVW bordering the Zone A Surface Water. There are five certified vernal pools, comprising a vernal pool complex. Most of the Property is mapped BioMap2 Core Habitat 630 which include a Wetland Core, Vernal Pool Core, and a Species of Conservation Concern.13 BioMap2 identifies the top 5% most interconnected clusters of Potential Vernal Pools in the state, or Vernal Pool Core. BioMap2 Core Habitat is critical for long term persistence of rare species and other species of concern. Exhibit A, Nover-Armstrong February 18, 2014 letter to Commission; See M. Nover PFT, ¶¶ 36-55.

Nover-Armstrong continued to find and report problems with the Project Plans. During a March 23, 2014 site inspection Nover-Armstrong noted that one wetland flag marked with WH-11 was located approximately 25 feet up gradient of the new wetlands flag, WF-11. In the March 31, 2014, comment letter to the Commission Nover-Armstrong questioned whether the wetland boundaries on the NOI Project Plans matched the ORAD plan and questioned how the wetland boundaries in the field had been reestablished. Exhibit Q; M. Nover PFT, ¶ 37, 55. It repeated that the wetlands in the field had been re-delineated in 2013 and it was not clear whether that delineation coincided with the 2007 ORAD or the Permit Plans. It also noted that the vernal pool depressions had not been flagged in the field nor included on the NOI Plans.

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13 The Natural Heritage & Endangered Species Program and The Nature Conservancy completed BioMap2, an enhanced biodiversity conservation plan that updates and will replace the original BioMap (2001) and Living Waters (2003) plans. BioMap2 is designed to guide strategic biodiversity conservation in Massachusetts by focusing land protection and stewardship on the areas that are most critical for ensuring the long-term persistence of rare and other native species and their habitats, exemplary natural communities and a diversity of ecosystems. http://www.mass.gov/eea/agencies/dfg/dfw/natural-heritage/publications-forms/publications/

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Nover-Armstrong recommended that Bosworth address these discrepancies. See M. Nover PFT, ¶¶ 36-55.

A May 14, 2014 letter from Nover-Armstrong to the Commission updated the Commission. It reported that the intermittent stream that was bordered by the A-Series wetland still had not been delineated on the Project Plans. Exhibit K; See M. Nover PFT, ¶¶ 36-55.

On October 8, 2014, Nover-Armstrong provided additional comments to the Commission. The letter again emphasized the need for Bosworth to investigate possible impacts to the certified vernal pools, including vernal pool water budget, species breeding, dispersal, overwintering, and foraging. It emphasized that the project would likely change the pools’ water budgets and chemical make-up and render the pools unsuitable for successful vernal pool breeding. The letter also pointed to continuing concerns with the accuracy of the Project Plans. It stated that “resource area boundaries including BVW and vernal pool depressions were re-delineated by ERC in 2013. But in the field older wetland flags were observed upgradient of the ERC boundary and there were ORAD referenced areas that were not depicted on the NOI Plans.” Exhibit Z, Nover-Armstrong October 8, 2014 letter to Commission. The letter noted that despite several requests by the Commission and Nover-Armstrong there still had not been verification by Bosworth of the wetland resource boundaries shown on the NOI Plan. Exhibit Z, p. 2. Last, the letter noted that Bosworth still had not located the stream in the A-series BVW. M. Nover PFT, ¶ 55; See M. Nover PFT, ¶¶ 36-55.

On November 12, 2014, Nover-Armstrong commented again to the Commission. Exhibit D. It repeated its prior concerns that the project would adversely impact vernal pool habitat and its concerns with the accuracy of the Project Plans. Nover-Armstrong also pointed out that it compared the ORAD plan of record with the NOI Project Plans and found discrepancies with the
location of several wetland flags. Wetland flags were observed in the field which would bring the wetland boundary upgradient of the limit of work, but that was not portrayed on the Project Plans. Exhibit D, p. 3. Also, the ORAD referenced protected Resource Areas that were not depicted on the Project Plans. It noted that after “several requests by the Commission and abutters the applicant has yet to provide proof of the wetland resource area boundaries used on the plan.” Exhibit D, p. 4. The intermittent stream in the A-Series wetland still had not been delineated. Discrepancies of up to 25 feet were discovered in the location of several BVVW flags, specifically between WF 27 and WF 53, at the location of CVP 7438, which would move the limit of work adjacent to CVP 7438. M. Nover PFT, ¶ 39, 55. Bosworth acknowledged and agreed that the BVVW boundary in these locations was not shown accurately on the site plans of record, and prepared Sheet GR-4, dated January 15, 2015 to address the problem. However, Sheet GR-4 was never submitted into the record before the Commission and is not part of the plan set. M. Nover Rebuttal PFT, ¶ 7; M. Nover PFT, ¶¶ 39-40.

On January 12, 2015, Nover Armstrong reported additional concerns with the plans’ topography. Exhibit UU. Among the problems noted was inaccurate topography near the A-Series BVVW and work that was to be done in that area. Nover-Armstrong stressed the importance with accurate topography because the work proposed in that area could result in a grade change that could ultimately impact the BVVW. Nover-Armstrong commented on Bosworth’s inability to overlay the ORAD Plan on the Project Plans because of distortion with the scanned version of the ORAD Plan. Bosworth did not have access to the digital files that were used to produce the ORAD because of a dispute between the prior owner of the Property and Outback Engineering, Inc. Signorelli PFT, ¶ 22. The ORAD referenced a plan prepared by Outback Engineering, Inc. dated July 25, 2006, revised as of November 9, 2007, which was not
produced to the Commission during the NOI proceedings. As a consequence, it could not be verified that the Project Plans accurately portrayed the ORAD plans. Given the above, Nover-Armstrong again questioned the accuracy of the Project Plans because they are purportedly based on the 2009 McKenzie Plan, which had not been provided, nor had it been established that the 2009 McKenzie Plan was created with a reliable methodology. Exhibit UU, p. 2; See M. Nover PFT, ¶¶ 36-55.

Also, the only copy of the 2007 Outback Plan made available to the Commission was distorted by a crease in the original plan when the copy was made. No electronic version existed to confirm data on the plan. Nover Armstrong found material wetland discrepancies between the Outback Plan and the Project Plans. H. Nover PFT, ¶ 19; M. Nover Rebuttal PFT, ¶ 5. In light of the above, Nover-Armstrong raised a number of legitimate and material questions that required more information, such as: “Was the wetland boundary transposed using a scale conversion factor from the ORAD Plan to the MEG 2009 Existing Conditions Plan that the Development Plans are based on?” Exhibit UU. The materiality of this is that it could affect whether the work that is proposed directly or indirectly adversely impacts the wetland resource areas. Id.; See M. Ncver PFT, ¶¶ 36-55.

During a January 7, 2015, site visit Nover-Armstrong discovered additional significant errors with the topography shown on the Project Plans. Nover-Armstrong investigated the G-Series wetland, which included a certified vernal pool (#7436), to check the topography reported on an untitled, undated plan attached to McKenzie’s October 29, 2014, letter. Mr. Nover observed differences between the reported topography and the actual site conditions at the south end of the basin. H. Nover, ¶ 23; Exhibit UU. The survey demonstrated that ground elevations located south of the G-Series wetland were incorrect and were off by as much as a foot. H.
Nover, ¶23; Exhibit P; Exhibit UU. With this correction in the topography the depression met
the definition of Isolated Land Subject to Flooding under 310 CMR 10.57 because the revised
topography demonstrated that the basin had a volume of 10,890 cubic feet, or one-quarter acre.
Exhibit UU; H. Nover Rebuttal PFT, ¶15-16. Despite this and Nover-Armstrong’s statement that
the ILSF needed to be delineated more precisely, the G series wetland was not labeled as an
ILSF on the Project Plans referenced in the SOC and Bosworth did not more precisely delineate
the ILSF. M. Nover PFT, ¶¶45-47, 55; Exhibit R, Order of Conditions.

Nover-Armstrong’s January 12, 2015, letter to the Commission reported other
discrepancies between the Plans’ topography and field observations near the A series BVW.
Exhibit UU; H. Nover Rebuttal PFT, ¶11. This was important because a retaining wall is
proposed be constructed a distance of 1.5 to 6.5 feet from the BVW. Last, the Applicant had not
identified on the Project Plans any of the Property as containing Certified Vernal Pools. M.
Nover PFT, ¶¶ 30-35.

In light of the inadequate body of information provided to the Commission, and based
upon Nover-Armstrong’s recommendation, the Commission denied the Order of Conditions
based upon insufficient information. Specifically, it found Bosworth failed to provide the 2009
McKenzie Plan, which was the purported source of the Project Plans; the Project Plans did not
fully and accurately describe Wetlands Resource Areas and their boundaries that are located
within 100 feet of the proposed limit of work; topographic contours do not accurately represent
site conditions; the ILSF is not specifically designated on the Project Plans; the CVPs are not
specifically designated on the Project Plans; the location of the ORAD boundaries are uncertain;
and the Project Plans were not stamped by a licensed professional land surveyor despite the
Commission’s request to do so and despite all of the material questions raised with respect to the

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Project Plans’ reliability. The Commission noted that the inaccurate topographical contours materially affect jurisdictional determinations during the hearing process and final quantification of Resource Area impacts. Exhibit R. Indeed, there is no topography of the large BVW, making it extremely difficult to understand the hydrology and watershed. Although the Project Plans bear Signorelli’s licensed professional engineer stamp, a preponderance of the evidence demonstrates that the plans cannot be reliably used to accurately predict impacts to the wetlands and the habitat within them. Bosworth could have cured the problem by having the plans stamped by a Registered Professional Land Surveyor, as requested by the Commission, but for unknown reasons Bosworth did not do that. See M. Nover PFT, ¶¶ 36-55.

The Commission’s testimony at the adjudicatory hearing emphasized the importance of the above omissions in the record before the Commission. The 2009 McKenzie Plan was necessary to verify the source of the topography on the Applicant’s plan set submitted with its NOI. Garner PFT, ¶ 37. This was particularly important because Nover-Armstrong and Garner had observed a number of discrepancies between the Project Plans, the ORAD, and conditions in the field. The Commission was unable to verify topography on the Project Plans without the 2009 McKenzie Plan, which was never provided to the Commission before it issued the Order of Conditions, despite requests that it be provided. Garner PFT, ¶ 37; See M. Nover PFT, ¶¶ 36-55.

Mr. Nover testified regarding the insufficient information before the Commission. He testified, consistent with Nover-Armstrong’s position before the Commission, that the topographic elevations shown on the plans do not accurately represent existing site conditions. H. Nover PFT, ¶ 12. Garner testified that actual field conditions are in variance with the topography on the plans. Garner Rebuttal PFT, ¶ 17. Areas of depressions and hummocks,
abrupt topographical changes, and intermittent stream channels are either missing from the plans or depicted incorrectly. Garner Rebuttal PFT, ¶ 17; Garner Rebuttal PFT, ¶ 39. In addition, in Garner’s experience as both a wetlands expert and a Conservation Commission peer reviewer he has never known an applicant to refuse to specifically identify a protected Resource Area. Garner Rebuttal PFT, ¶ 39. Here, Bosworth failed to show the intermittent stream on which the A-Series BVW bordered and that the G-Series wetland with its CVP was in fact an ILSF, despite requests by the Commission and Nover-Armstrong. Garner Rebuttal PFT, ¶ 39. Having all Resource Areas on the plans allows a commission to thoroughly evaluate a project. For example, without the stream shown on the plan the Commission could not evaluate its importance and could not evaluate whether the project would in fact impact the stream. Garner Rebuttal PFT, ¶ 39. It also serves as an accurate historical record that puts others on notice of the Resource Areas at the Property.

The boundary discrepancies “affect jurisdictional determinations and final quantification of Resource Area impacts presented by the [Bosworth].” M Nover PFT, ¶ 40. Indeed, much of the proposed work will be set back within a minimum 25 feet from CVPs 7428, 7434, 7436, and 7437, all four of which are located in Resource Areas. Under these circumstances, it was incumbent upon Bosworth to present sufficient information to the Commission demonstrating that the project, including the stormwater BMPs, met the performance standards of having no adverse impact on habitat functions of the CVPs. Stormwater Handbook, Vol. 1, Ch. 1.

**DEP’s and Bosworth’s Positions on the Commission’s Information.** DEP’s witness did not sufficiently explain why he found there to be sufficient information, despite all of the above. Makuch PFT, ¶ 11. He simply reached the general conclusion that in his “opinion the applicant has properly delineated the wetland resource areas on the SOC approved plans.” To him, the
project plans appeared sufficient. Makuch PFT, ¶ 13. He based his opinion on the ORAD delineation and his site view. The ORAD, however, only located the resource areas and, as discussed above, there was an abundance of evidence relating to: the ORAD being inaccurately transposed onto the Project Plans; the Project Plans being based upon the unproduced 2009 McKenzie Plans; the wetlands being differently delineated in 2013 (after the ORAD); conflicts with delineations of BVW in the field, on the Project Plans, and in the ORAD; and numerous topographical inaccuracies. There was no explanation how the DEP witness reconciled these problems. In particular, there was no explanation how the Project Plans could be relied upon given these problems and their inclusion of an express disclaimer based upon the 2009 McKenzie Plan, which was never produced. These problems could have been resolved by a professional land surveyor, as requested by the Commission, but Bosworth never did that. In light of the sensitivity of the certified vernal pools and the work that is proposed with 25 feet of some of the pools, these problems are highly material to determining what impact the buffer zone work will have on the BVW and the certified pools within BVW.

Bosworth’s response regarding its failure to provide the 2009 McKenzie Plan to the Commission is problematic, for Bosworth. Bosworth’s engineer, Signorelli, testified that he did not “recall this being a significant issue during the course of the NOI public hearing.” Signorelli PFT, ¶ 48.g. Signorelli’s testimony and credibility are undermined by the occasions on which Nover-Armstrong highlighted this omission and the numerous plan discrepancies to the Commission and stated that Bosworth should provide the 2009 McKenzie Plan.

Likewise, Signorelli testified that they accurately transferred the ORAD Plan onto the project plans. They “believe” the ORAD Plan was surveyed in using known control points. Signorelli PFT, ¶ 48.f. He testified that those control points had been established and verified by
McKenzie Engineering Group prior field surveys. This testimony is problematic for a number of reasons. First, Signorelli only “believes” the plan was surveyed using known control points. More importantly, that information and the McKenzie Engineering methodology was not before the Commission during the NOI proceedings, but it should have been.

Bosworth admitted that it did not identify the CVPs on the Project Plans. Instead it identified the CVPs as PVPs, or potential vernal pools. It purportedly did this because they are “not wetland resource areas for purposes of the NOI.” Signorelli PFT, ¶ 48. In addition, Signorelli and Holmes claim they are protecting the CVPs by maintaining a 25 foot buffer except for the A-Series wetland. Id.; Holmes PFT, ¶ 13; Exhibit 18; Exhibit 20. These positions are flawed, for several reasons. First, it was necessary to show the certified vernal pools as a matter of accurately representing the Resource Areas and the wetlands habitat interests served by those Resource Areas. This Property contains numerous substantial BVWs with certified vernal pool habitat that is subject to protection from direct or indirect impacts. Second, the positions are based upon the faulty premise that a 25 foot separation is per se sufficient and if there is no direct alteration of the Resource Area and the vernal pool within it, no more protection or analysis with regard to the habitat in the vernal pool is necessary. Id. These positions completely ignore possible indirect impacts from work within the buffer zone to the BVWs in which the certified vernal pools are located.

Bosworth also argued it was entitled to rely upon the ORAD and the absence of any certified vernal pools on it, and thus it was not necessary to designate the CVPs on the Project Plans. Bosworth Memorandum of Law, p. 11, 17. Bosworth argued that it “designed the project based on the wetland resource areas delineated in the effective ORAD. Since the vernal pools were not certified at the time of the ORAD, Bosworth is not required to comply with
Massachusetts Stormwater Handbook, Table CA2: Standard 6, Note 3, which relates only to certified vernal pools.” Bosworth Memorandum of Law, p. 18; Holmes PFT, ¶18; Stormwater Handbook, Vol. 1, Ch. 1 (p. 18). In other words, Bosworth contended, it is not required to setback any stormwater BMPs 100 feet from any certified vernal pool. Bosworth Memorandum of Law, p. 18. This position is misplaced. As discussed above in considerable detail, the ORAD does not preclude the Commission from recognizing and protecting the certified vernal pools’ habitat. Indeed, vernal pool habitat is susceptible to adverse impacts from alterations to the buffer zone of BVW that contains vernal pool. That is why in other similar cases project applicants have performed detailed assessments to determine how work in the buffer zone will impact the vernal pool habitat. See Matter of Nielsen, supra. Further, Holmes also based this conclusion on the erroneous decision that CVP habitat did not need to be protected because no CVPs were designated on the ORAD.

Next, Bosworth admits that there is ILSF in the G-Series wetland and that it was not shown as ILSF on the Project Plans. Id.; McKenzie PFT, ¶37-38. Nevertheless, Bosworth contends it has acknowledged the existence of the ILSF and located it accurately. Id. That recognition of the ILSF only came after Bosworth first denied its existence before the Commission based upon what it claimed at the time was “conservative” topographical “contouring.” Exhibit 19; Exhibit 20. Its designation on the Project Plans was necessary for purposes of an accurate record that appropriately reflected the wetlands interests to be protected and the performance standards to be met. See 310 CMR 10.57.

Bosworth also admitted that it did not delineate the stream in the A-Series BVW. But it claims that the information was simply “not necessary” because the stream is intermittent, is located entirely within BVW, and [Bosworth] is not proposing to alter the BVW in any fashion.”
Signorelli PFT, ¶ 48.1; Holmes PFT, ¶ 20. That position is not persuasive. It was necessary to
delineate the stream so that the Commission could determine the extent to which there would be
impacts on it from work in the buffer zone. See 310 CMR 10.53(1), 10.56, 10.54. It was also
necessary to delineate the stream to establish whether the buffer zone to the stream’s banks
extended outside the buffer zone to the BVW. That might occur if any part of the stream’s banks
extended outside of the BVW. Moreover, delineation of the stream would further accurate
delineation of site topography and watershed, which are material to determining impacts on
certified vernal pool habitat within BVW or ILSF.

Portions of McKenzie’s testimony relate to credibility, further undermining Bosworth’s
position and the credibility of its witnesses. McKenzie notes that the 2009 McKenzie Plans that
the Commission was not permitted to see contain a notation that states “the topographic and
detail information was compiled and ‘should be considered approximate only.’” McKenzie PFT,
¶ 20. McKenzie states that this note is “customarily used in applications where [McKenzie] has
assumed information from another source and was not retained to thoroughly field verify all
existing conditions data.” He concludes by stating that at the time McKenzie prepared the 2009
Plan it was intended to be used as a base plan for the preparation of a “preliminary plan for use in
obtaining a Comprehensive Permit and not the preparation of plans suitable for construction.
The level of detail of existing and proposed conditions information required to obtain a
Comprehensive Permit . . . is far less extensive than that shown on construction drawings that are
customarily submitted to Conservation Commissions in connection with Notice of Intent
applications.” Thus, by McKenzie’s own admission the information that was submitted to the
Conservation Commission was based upon the 2009 McKenzie Plan which did not contain
sufficient detail of existing and proposed conditions for Notice of Intent applications. The
remainder of the evidence that was before the Commission did little to overcome the preponderance of the evidence showing the Commission had insufficient information. See e.g. Applicant’s Exhibits 9-21.

Bosworth’s argument that the Commission’s insufficiency argument must fail because it also issued a decision on the merits is not persuasive. Indeed, it has been held that “[n]othing in the regulations precludes a commission from denying a project on two grounds, lack of sufficient information and on the merits.” Matter of Richard Terrill, Docket No. 05-293, Final Decision (January 7, 2011) (citing Matter of Crystal Motor Express, Inc., Docket No. 2001-017 and 2001-019, Final Decision (January 11, 2002).

Bosworth reliance upon Matter of Eveningside Realty Corp., Docket No. 2001-082, Recommended Final Decision (December 16, 2002), adopted by Final Decision (January 17, 2003), is misplaced. In that decision, the administrative magistrate merely noted that the Commission could have ruled solely upon the sufficiency of information issue, and not also ruled on the merits. Instead, it was unclear from the Commission’s ruling whether it ruled solely on the merits or also based upon lack of information. Given that ambiguity and given the detailed analysis of the merits, the administrative magistrate focused on the merits. Here, in contrast, the Commission clearly ruled upon both the sufficiency of information and the merits.

Lastly, Bosworth’s position ignores the important role that local conservation commissions have in determining whether proposed projects comport with the requirements of the Wetlands Protection Act and the Regulations. Under the Act and the Regulations, local conservation commissions generally have the initial review of a proposed project and must be provided with sufficient information from the project proponent to make that determination. Otherwise, a project proponent can make an end run around a local conservation commission by
failing to provide sufficient information to the commission and proceed to DEP with an SOC request presenting new information under the guise of “de novo” review.

CONCLUSION

For all the above reasons, I recommend that DEP’s Commissioner issue a Final Decision and a Final Order of Conditions denying the project, affirming the Commission’s denial of the Order of Conditions, and vacating the SOC. In short, a preponderance of the evidence in the administrative record demonstrates that the Commission had insufficient information to describe the site, the work, or the effect of the work on the interests identified in G.L. c. 131 § 40.

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner’s Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

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

Date: 2/17/16

Timothy M. Jones
Presiding Officer
SERVICE LIST

In The Matter Of: David A. Bosworth Co., Inc.
Docket No. WET-2015-015 File No. SE 17-346
Representative Dighton
Party

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