



Commonwealth of Massachusetts  
Executive Office of Energy & Environmental Affairs

## Department of Environmental Protection

Northeast Regional Office • 205B Lowell Street, Wilmington MA 01887 • 978-694-3200

DEVAL L. PATRICK  
Governor

RICHARD K. SULLIVAN, JR.  
Secretary

KENNETH L. KIMMELL  
Commissioner

January 30, 2013

Mr. Richard Terrill  
c/o Fafard Real Estate and Development  
120 Quarry Road  
Milford, MA 01757

RE: WETLANDS/AMESBURY  
DEP File #002-1015  
Summit Avenue and Route 150  
Superseding Order of Conditions/Denial

Dear Mr. Terrill:

The Northeast Regional Office of the Massachusetts Department of Environmental Protection Wetlands Program ("MassDEP") has completed its review of the above referenced filing in preparation to issuing a Superseding Order of Conditions (SOC). Pursuant to the provisions of the Wetlands Protection Act (the Act) under Massachusetts General Laws, Chapter 131, Section 40, MassDEP is issuing the enclosed SOC denying the project based upon; 1) information contained in the file to date and plans submitted; 2) information gathered during the July 30, 2013 site inspection by MassDEP; and 3) reasons MassDEP has deemed necessary to protect the statutory interests identified in the Act.

The project site, approximately 26.5 acres, is currently owned by the City of Amesbury and includes an area formerly utilized as a gravel pit. The site is located adjacent to Bailey's Pond to the east, residential areas to the north and east, Route 150 to the south and Interstate 495 to the west. The site is bisected by a culverted perennial stream that daylight on the northern edge of the property adjacent to Summit Avenue. The proposed project is for the construction of a 136 unit residential development with associated utilities, driveways, parking, and stormwater management systems.

MassDEP's review of the file and site inspection confirms that the project site contains the following Areas Subject to Protection of the Act: Bordering Vegetated Wetlands (BVW), Land Under Water (LUW), Bank, Bordering Land Subject to Flooding (BLSF) and Riverfront Area (RA). These areas are significant to the statutory interests listed on the attached form.

Wetland impacts associated with the entire project include temporary alteration of approximately 30 linear feet of inland Bank, 187 square feet of LUW, 307 square feet of BLSF and 120 square feet of BVW associated with a perennial stream located on the project site. Additional alterations entail approximately 1,605 square feet of alteration within the first 100 feet

of the RA and 12,554 square feet within the 200 foot RA. This project is also subject to the Stormwater Management Standards as provided in 310 CMR 10.05(6)(k) through (q).

On June 14, 2013, the Amesbury Conservation Commission (the "Commission") issued an Order of Conditions ("OOC") conditionally approving the project. In this decision, the Commission only approved the work outside of the RA. The OOC set forth the Commission's opinion that only portions of the project site met the definition of "degraded" as defined under the Wetlands Protection Act Regulations at 310 CMR 10.58 and that the project was required to meet the performance standards for work in RA under 310 CMR 10.58(4). The Commission's findings were based on its opinion that the site did not qualify as degraded because a majority of the project site is "characterized by pervious, well-vegetated land containing topsoil that provides Riverfront Area function" and that degraded status was not conferred upon the entire site. The Commission also found that the applicant had not provided an adequate alternatives analysis to demonstrate that there were no practicable and substantially equivalent economic alternatives to the work proposed within the Riverfront Area, with less adverse effects on interests protected by the Act, as required by 310 CMR 10.58(4).

On July 5, 2013, you (the applicant) submitted a request to MassDEP for the issuance of a SOC based on your opinion that the OOC was not issued within the required time period, that the OOC includes conditions that are "unreasonable and beyond the Commission's authority," and that the entire site should be reviewed under the redevelopment standards pursuant to 310 CMR 10.58(5) because the site had been utilized in the past for sand and gravel removal operations.

On July 30, 2013, MassDEP conducted a site inspection. In attendance were members of the Commission and its consultants, town officials, you and your representatives and several abutters. MassDEP staff discussed the proposed project and walked areas of the project site to observe existing conditions, including vegetative cover and soil composition. MassDEP observed that a vast majority of the site was heavily wooded with mature trees, some saplings, shrubs and some ground cover. Several test pits were dug in various areas of the project site to allow MassDEP staff to observe existing soil conditions.

It is MassDEP's opinion that the two issues to be examined are whether the site is devoid of topsoil and therefore meets the definition of degraded within the meaning of the regulations; and under which regulatory performance standards for RA should the site be evaluated.

The site has been described by all parties as an abandoned gravel pit. It is unclear how long mining operations were conducted at the site, but it is speculated that operations ceased several decades ago. You have further described the site as a dumping ground for tires, miscellaneous trash, computer monitors, furniture, propane tanks, appliances and car parts, contributing to the degraded nature of the site. You state that "some" of the site is well vegetated but that a majority of the site consists of "weedy brush and invasive species and includes areas of exposed substrate and other degraded conditions due to the extensive historical gravel mining that occurred at the site." It is your opinion that due to past mining activities, much of the site within the RA is devoid of topsoil. The Commission found and MassDEP agrees that the site at present contains pervious, well vegetated land containing topsoil that provides RA functions.

MassDEP agrees with the Commission that some limited locations within the trail footprint (located within the RA) qualify as degraded. However these limited areas of degradation do not confer a degraded status on the entire RA.

The Commission's opinion of site characteristics is based mainly on an evaluation of soils conducted on April 3, 2013 by the Commission's peer reviewer, The BSC Group (BSC), in conjunction with Oak Consulting Group (OCG), your consultant, Hughes Environmental Consulting (HEC), and Jack Tremblay from the Commission. According to a letter from BSC, dated April 22, 2013, the team dug approximately eleven (11) soil pits and one auger hole in various locations on the site within RA. A majority of the test pits were conducted in forested areas on the site. One was dug in an area with herbaceous and shrub vegetation and two others were dug in existing trails that are currently un-vegetated and utilized by ATVs. BSC's conclusion states:

"While significant portions of the RA on the project site appear to have been mined for sand and gravel (based on aerial photograph and OCG/HEC comments) many decades ago, it also appears that the RA has recovered from that disturbance in the intervening time and has become a largely forested area since then, with a functioning RA, herbaceous, shrub and tree layers, and development of topsoil/A horizon within extensive rooting. In some trail locations, the over-use of the trails by ATVs has resulted in the erosion of the topsoil/A horizon. In these specific locations, BSC finds that the absence of topsoil criteria can be met."

BSC found that in some locations the topsoil/A horizon was shallow, ranging from 0.5 inches to 2 inches, but affirms that neither the Act nor the Regulations define the term "topsoil" nor specify a minimum required depth. They cite the definition widely accepted by soil scientists that topsoil is a mineral soil, formed at the surface or below an O horizon with little remnant rock structure, and one or more of the following properties: 1) accumulation of humified organic matter but dominated by mineral matter, and not dominated by E or B horizon properties; 2) properties resulting from cultivation, pasturing, or similar disturbance; or 3) morphology resulting from surficial processes different from the underlying B or C horizons. BSC finds that soils found at the site in the RA are "dark brown colors" observed in an A horizon indicating the presence of organic material. The texture of the soils was sandy loam to loamy sand indicating the presence of a mineral component. Rooted vegetation was also observed within the soil.

In response to BSC's evaluation, your consultant, HEC, submitted a letter to the Commission on May 1, 2013 disagreeing with BSC's conclusions. In this letter HEC disputes that test pit information obtained during the April 3, 2013 site inspection demonstrates evidence of "functioning topsoil." No further arguments or other data are presented in this letter which disputes the actual findings of the soil profiles as determined at the site inspection and as presented in BSC's letter.

During MassDEP's site inspection on July 30, 2013, the parties discussed, and disputed, the evidence discovered during the April 3, 2013 evaluation of soils on the project site. At this site visit several additional samples of the soils were dug by auger within the vicinity of test pits 1, 3, 7, 8 and 9. A separate test pit was dug within the vicinity of test pit 4. Based on soil

profiles and characteristics observed on the project site, and as described in BSC's letter of April 22, 2013, it is MassDEP's opinion that a majority of the site does in fact contain evidence of topsoil as well as a productive vegetative cover. MassDEP did not find that the amount of discarded "debris" on the site, which could be easily carried away, constituted a junk yard or an abandoned dumping ground.

It is MassDEP's opinion that the only areas of the RA that do not contain topsoil are the trails located in the area of test pits 2 and 3. The trails do not appear to include any organic material or vegetation. The remainder of the site appears to have a darker soil layer at the surface that includes organic material and supports vegetation and is therefore not degraded within the meaning of 310 CMR 10.58(5).

The Commission states in its OOC that, "With the exception of some limited portions of trails, the Riverfront Area in the Project site is not degraded, within the meaning of the DEP Regulations for Riverfront Area. Therefore, the project is subject to the performance standards of 310 CMR 10.58(4), and not the standards for redevelopment of a degraded area under 310 CMR 10.58(5)." The Commission allows that locations within "trail footprints" lack topsoil and are un-vegetated and would therefore qualify as degraded, but do not "confer degraded status upon the entire site."

In its letter of April 22, 2013, BSC concurs with the Commission that, with the exception of some existing trails on the project site, the remaining RA contains topsoil, is well vegetated and supports RA functions. Therefore, the project should be reviewed under both 310 CMR 10.58(4) and 10.58(5). In support of this, BSC cites several decisions in which MassDEP concluded that, although a site had been previously developed, current conditions provided evidence of topsoil and vegetative cover which support functions of a RA. They also cite decisions in which MassDEP determined that a site could be reviewed under both performance standards for redevelopment and new development depending on current site conditions.

You state in your appeal to MassDEP that, "the Applicant disputes many of BSC's factual and regulatory conclusions because they are premised on a flawed interpretation and application of the Massachusetts Wetlands Protection Regulations." It is your opinion that applying two different sets of standards within the same RA is not consistent with the RA Regulations. You assert that the performance standards of 310 CMR 10.58(4) apply only to work within a previously developed Riverfront Area when "no portion of the riverfront area is degraded..." Therefore, you believe that the performance standards of 310 CMR 10.58(4) do not apply to any aspect of proposed work in a RA that also contains areas that meet the definition of degraded.

The Regulations under 310 CMR 10.58(5) state that, "Redevelopment means replacement, rehabilitation or expansion of existing structures, improvements of existing roads, or reuse of degraded or previously developed areas." Degraded areas are those areas of a RA that contain impervious surfaces from existing structures or pavement, absence of topsoil, junkyards, or abandoned dumping grounds. While MassDEP is aware that the site was previously altered for mining activities, based on recent observations a majority of the site contains topsoil and is not covered by impervious surfaces such as structures or pavement. These portions of the site

should be reviewed under the performance standards for new development pursuant to 310 CMR 10.58(4). As mentioned earlier, MassDEP concurs that areas of trails on the site that are devoid of topsoil and vegetation would qualify for review under the redevelopment standards pursuant to 310 CMR 10.58(5).

It has been MassDEP's practice to apply both 310 CMR 10.58(4) and 310 CMR 10.58(5) to sites that contain degraded and non-degraded areas. MassDEP does not agree with your conclusions that if any portion of a site contains degraded areas, then the entire site is allowed to be reviewed under the redevelopment standards.

When a site is reviewed under the standards for new development (310 CMR 10.58(4)), the applicant is required to provide an alternatives analysis to demonstrate that there is no practicable and substantially equivalent economic alternative to the proposed project with less adverse effects on the interests of the Act. Several documents and narratives are included with the NOI which explain various design changes that have been made to the project since 2004 as a result of comments from the Amesbury Planning Board and the Commission. However, the NOI filed with the Commission in 2011 does not contain an alternatives analysis for work proposed in the RA. On January 29, 2013, BSC noted that the applicant was required to submit a RA alternatives analysis pursuant to 310 CMR 10.58(4). Although OCG continues to assert that the site qualifies as degraded it submitted a "Supplemental Alternatives Analysis" to the Commission. In this analysis, the applicant reiterates those changes made to the project since its inception. Reference is made to the "Terrasphere Alternative" report conducted in 2001, alternatives proposed in 2004, 2010, 2011 and 2012 as well as a no-build alternative. With regard to examining alternative locations for the building proposed within the RA, OCG states that, "Reducing the number of buildings at this project is not consistent with the project purposes..." and that "if the building was removed from the project the mitigation proposed to compensate for that building would be removed." MassDEP finds the level of detail of the Supplemental Alternatives Analysis lacking. The applicant does not address the requirements of an alternatives analysis as outlined under 310 CMR 10.58(4)(c) which states that evidence be provided demonstrating that there are no practicable and substantially equivalent economic alternatives with less adverse effects on the interests protected under the Act. No evaluation was provided based on cost, existing technology or logistics within the scope of alternatives as set forth in 310 CMR 10.55(4)(c). As the project is for a housing complex, the area under consideration for practicable alternatives extends to the original parcel and the subdivided parcels, any adjacent parcels, and any other land which can reasonably be obtained within the municipality; therefore submittal of an alternatives analysis is a critical component of the RA regulations. Based on the absence of a complete and detailed alternatives analysis and lack of local review and input, MassDEP cannot request further information for which the Commission had no prior chance to review.

In the Matter of Crystal Motor Express, Inc., Docket No. 2001-017 and 2001-019, a similar circumstance occurred where the applicant, Crystal Motors, filed a Notice of Intent with the Lynnfield Conservation Commission (LCC) for the construction of a truck terminal within the 200 foot riverfront area of the Saugus River. The applicant asserted that the project was proposed to be located within an area subject to the redevelopment standards. The LCC eventually denied the project based on its opinion that the site did not qualify as degraded or

previously developed. In its review, MassDEP concluded that because the site was well vegetated, it was subject to review under new development standards and MassDEP subsequently required the submittal of an alternatives analysis. The Final Decision stated that, "Once the Department determined that the project did not qualify as a redevelopment project, it could not, for the first time, consider whether to permit the project under the general performance standards for work in a riverfront area because initial review of the alternatives analysis must be performed by the local conservation commission and no such analysis was submitted to the Lynnfield Conservation Commission here."

In the Matter of Town of Carlisle, Docket No. 97-123, the issue concerned the siting of a leaching system within the riverfront area. The proponent claimed that the project was exempt from the riverfront area performance standards because it involved work in a previously developed riverfront area. No alternatives analysis was provided to the Commission. The proponent argued that it informed the Commission and MassDEP "orally" of possible alternative locations for the leaching system and therefore demonstrated that there were no practicable alternatives. The Final Decision in this case cites the fact that the Wetlands Protection Act requires applicants to submit, with a Notice of Intent, "information sufficient to describe the site, the work, and the effect of the work on wetland interests." This information the Department deemed necessary for "the issuing authority...to fulfill its responsibility to protect the Commonwealth's wetlands resources in accordance with the Wetlands Protection Act. The role of the issuing authority is that of a reviewing agency. It is the applicant's responsibility to provide for this review." The Notice of Intent Form thus called for applicants to "clearly, completely and accurately describe, with reference to supporting plans and calculations where necessary....all measures and designs proposed to meet the performance standards set for under each resource area." Therefore, when the "Rivers Protection Act was enacted and included a performance standard requiring an applicant to show that there is no practicable alternatives to the proposed project, the responsibility fell on an applicant planning an activity in riverfront area to submit a notice of intent that included a complete and accurate description of how the proposed project met the no practicable alternatives performance standard."

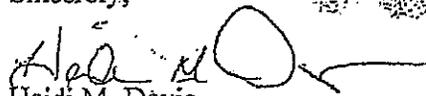
In applying these cases to the current case, it is MassDEP's opinion that the change in characterization of the riverfront area on the project site from degraded to undeveloped is a significant change in how this project should be reviewed and permitted. The applicant did not provide the Commission with a complete and thorough review of all practicable alternatives for the placement of the dwelling units and utilities within RA on the project site in order for the Commission to make an informed decision. Therefore, it is MassDEP's opinion that the applicant should re-file a Notice of Intent with the Commission as MassDEP cannot, under these proceedings, request or consider alternatives not reviewed by the Commission during the public hearing process.

It is MassDEP's opinion that the enclosed Superseding Order of Conditions denying the project as proposed serves to protect the interests of the Wetlands Protection Act, Massachusetts General Laws, Chapter 131, Section 40. Please be advised that it is MassDEP's responsibility to address only those interests identified in the Act. However, MassDEP reserves the right, should there be further proceedings in this case, to raise additional issues and present further evidence as

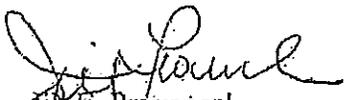
may be appropriate. Should any party dispute these findings, please consult the language in the Order that specifies your rights and procedures for appeal.

Should you have any questions, please contact Jill Provencal at (978) 694-3250.

Sincerely,



Heidi M. Davis  
Acting Section Chief  
Wetlands Program – NERO



Jill E. Provencal  
Environmental Analyst  
Wetlands Program - NERO

cc: Amesbury Conservation Commission





Massachusetts Department of Environmental Protection  
Bureau of Resource Protection - Wetlands  
**WPA Form 5 Superseding Order of Conditions-DENIAL**  
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number:

002-1015  
Provided by DEP

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## B. Findings

Findings pursuant to the Massachusetts Wetlands Protection Act:

Following the review of the above-referenced Notice of Intent and based on the information provided in this application and presented at the public hearing, the Department finds that the areas in which work is proposed is significant to the following interests of the Wetlands Protection Act. Check all that apply:

- |   |  |   |
|---|--|---|
| <input type="checkbox"/> Public Water Supply  | <input type="checkbox"/> Land Containing Shellfish | <input type="checkbox"/> Prevention of Pollution        |
| <input type="checkbox"/> Private Water Supply | <input type="checkbox"/> Fisheries                 | <input type="checkbox"/> Protection of Wildlife Habitat |
| <input type="checkbox"/> Groundwater Supply   | <input type="checkbox"/> Storm Damage Prevention   | <input type="checkbox"/> Flood Control                  |

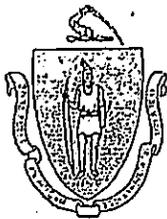
Furthermore, the Department hereby finds the project, as proposed, is:

Denied because:

- the proposed work cannot be conditioned to meet the performance standards set forth in the wetland regulations to protect those interests checked above. Therefore, work on this project may not go forward unless and until a new Notice of Intent is submitted which provides measures which are adequate to protect these interests, and a final Order of Conditions is Issued.

This application for a permit to alter wetlands under Chapter 131, Section 40, is therefore denied for the following reasons:

- 1) MassDEP finds that the project is not degraded within the meaning of 10.58(5), therefore, the performance standards of 10.58(4) are applicable.
- 2) MassDEP finds that the proposed project does not meet the performance standards of 310 CMR 10.58(4)(c); subsequently, said activity is judged not to protect the interests of the Wetlands Protection Act and is, therefore, prohibited under M.G.L. Chapter 131, section 40.



Massachusetts Department of Environmental Protection  
 Bureau of Resource Protection - Wetlands  
**WPA Form 5 Superseding Order of Conditions-DENIAL**  
 Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number:

002-1015

Provided by DEP

**C. ISSUANCE**

This Order is valid for three years from the date of issuance.

Issued by: **Massachusetts Department of Environmental Protection**

Signature *Heidi M. Davis*

Heidi M. Davis, Acting Section Chief, Wetlands Program, Bureau of Resource Protection

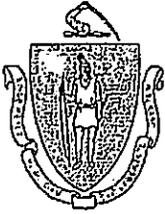
by hand delivery

by certified mail, return receipt requested on

1.30.14

Date

Date



Massachusetts Department of Environmental Protection  
Bureau of Resource Protection - Wetlands  
**WPA Form 5 Superseding Order of Conditions-DENIAL**  
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number:

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## D. Notice of Appeal Rights

### Appeals

#### A) Appeal Rights and Time Limits

The applicant, the landowner, any person aggrieved by this Superseding Order, Determination or the Reviewable Decision as defined at 310 CMR 10.04, who previously participated in the proceedings leading to the Reviewable Decision, the conservation Commission, or any ten (10) residents of the city or town where the land is located if at least one resident was previously a participant in the permit proceeding, are hereby notified of their right to appeal this Reviewable Decision pursuant to M.G.L. c.30A, S. 10, provided the request is made by certified mail or hand delivery to the Department, along with the appropriate filing fee and a MassDEP Fee Transmittal Form within ten (10) business days of the date of issuance of this Superseding Order or Determination, and addressed to

Case Administrator  
Department of Environmental Protection  
One Winter Street - 2<sup>nd</sup> Floor  
Boston, MA 02108

A copy of the request (hereinafter also referred to as Appeal Notice) shall at the same time be sent by certified mail or hand delivery to the Conservation Commission, the applicant, the person that requested the Superseding Order or Determination, and the issuing office of the MassDEP at:

Massachusetts Department of Environmental Protection  
NERO, 205B Lowell Street  
Wilmington, MA 01887

In the event that a ten resident group requested the Superseding Order or Determination, the Appeal Notice shall be served on the designated representative of ten resident group, whose name and contact information is included in this reviewable Decision (when relevant)

#### Contents of Appeal Notice

An Appeal Notice shall comply with the Department's Rules for Adjudicatory Proceedings, 310 CMR 1.01(6) and 310 CMR 10.05(7)(j), and shall contain the following information:

- (a) the MassDEP Wetlands File Number, name of the applicant, landowner if different from applicant, and address of the project;
- (b) the complete name, mailing address, email address, and fax and telephone numbers of the party filing the Appeal Notice; if represented by consultant or counsel, the name, fax and telephone numbers, email address, and mailing address of the representative; if a ten residents group, the same information of the group's designated representative.
- (c) if the Appeal Notice is filed by a ten (10) resident group, then a demonstration of participation by at least one resident in the previous proceedings that led to this Reviewable Decision;
- (d) if the Appeal Notice is filed by an aggrieved person, then a demonstration of participation in the previous proceedings that led to this Reviewable Decision and sufficient written facts to demonstrate status as a person aggrieved;
- (e) the names, telephone and fax numbers, email addresses, and mailing addresses of all other interested parties, if known;
- (f) a clear and concise statement of the alleged errors in the Department's decision and how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c.131, S. 40, including reference to the statutory or regulatory provisions that the party filing the Appeal Notice alleges has been violated by the Department's Decision;



Massachusetts Department of Environmental Protection  
Bureau of Resource Protection - Wetlands  
**WPA Form 5 Superseding Order of Conditions-DENIAL**  
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number:

002-1015

Provided by DEP

**D. Appeals (cont.)**

- (g) a copy of the Department's Reviewable Decision that is being appealed and a copy of the underlying Conservation Commission decision if the Reviewable Decision affirms the Conservation Commission decision;
- (h) a statement that a copy of the request has been sent by certified mail or hand delivery to the applicant and the conservation commission; and
- (i) if asserting a matter that is Major and Complex, as defined at 310 CMR 10.0491), a statement requesting that the Presiding Officer make a designation of Major and Complex, with specific reasons supporting the request.

**Filing Fee and Address**

A copy of the Appeal Notice along with a MassDEP Fee Transmittal Form and a valid check or money order payable to the Commonwealth of Massachusetts in the amount of one hundred dollars (\$100) must be mailed to:

Commonwealth of Massachusetts  
Massachusetts Department of Environmental Protection  
Commonwealth Master Lockbox  
Box 4062  
Boston, MA 02211

The request will be dismissed if the filing fee is not paid, unless the appellant is exempt or granted a waiver. The filing fee is not required if the appellant is a city or town (or municipal agency), county, district of the Commonwealth of Massachusetts, or a municipal housing authority. The Department may waive the adjudicatory hearing filing fee pursuant to 310 CMR 4.06(2) for a person who shows that paying the fee will create an undue financial hardship. A person seeking a waiver must file an affidavit setting forth the facts believed to support the claim of undue financial hardship together with the hearing request as provided above.

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