

# HUGHES ENVIRONMENTAL CONSULTING

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May 1, 2013

John Lopez, Conservation Agent  
63 Friend Street  
Town Hall  
Amesbury, MA 01913

RE: Response to Peer Review Comments  
Village at Bailey's Pond  
Amesbury, Massachusetts

Dear Mr. Lopez,

We are in receipt of a letter prepared by Gillian T. Davies of the BSC Group, dated April 22, 2013. This letter provides a report of the site visit conducted on April 3, 2013, comments on the applicants February 19, 2013 submission, and Ms. Davies opinions on regulatory interpretations of the Wetlands Protection Act. In response to BSC's letter we offer the following for the Commission's consideration as well as the enclosed revised C-013C showing a correction of the degraded area based on the site visit.

Many of the issues raised in BSC's letter are already addressed in the materials submitted to the Commission previously, including those submitted on February 19, 2013. However, it is worth addressing here a few of the central points.

Most importantly, 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. Under BSC's approach, the redevelopment standards of 310 CMR 10.58(5) would apply to certain portions of a project within a particular Riverfront Area and the general performance standards of 310 CMR 10.58(4) would apply to other portions of the same project, within the same Riverfront Area, on the same lot. This approach of applying two different sets of standards within the same Riverfront Area is inconsistent with the overall structure of the Riverfront Area regulations and is in direct conflict with the unambiguous language of 310 CMR 10.58(5).

BSC acknowledges that the Riverfront Area at issue here was previously developed and also that within that area are several thousand square feet of currently degraded areas. Due to these undisputed facts alone, the redevelopment standards of 310 CMR 10.58(5) apply to the proposed activities within that Riverfront Area – and not only to those portions of the project that fall within the footprint of the degraded areas. We discussed this issue at great length in our letter dated February 19, 2013. In summary, though, the plain language of 10.58(5)(e) makes clear that the redevelopment standards apply to all of the activities proposed within a Riverfront Area that contains degraded areas – including those beyond the footprint of the degraded areas. The regulations specifically allow work that involves alterations exceeding the degraded areas, so long as mitigation measures are also conducted in accordance with 10.58(5)(f) and (g).

The general performance standards of 310 CMR 10.58(4) only apply to work within a previously developed Riverfront Area when “no portion of the riverfront area is degraded . . . .” 310 CMR 10.58(5)(a) (emphasis added). They do not apply to any aspect of the proposed work when, as here, the riverfront area at issue contains degraded areas. The language in 10.58(5)(f) and (g) also supports this interpretation of the regulations. Both paragraphs refer to alterations involving an “...area of alteration not conforming to the criteria”. Generally speaking, paragraph (f) requires certain mitigation at a ratio of 1:1 for direct mitigation of degraded areas, and paragraph (g) requires certain mitigation at a ratio of 2:1 for alterations outside of and in excess of the area of the degraded areas. Even if you narrowly interpret the extent of degraded areas on site as BSC has done, and even if the square footage figure for those areas were reduced, the extensive proposed mitigation would still exceed the mitigation requirements of 10.58(f) and (g) – at a ratio far exceeding 2:1 (closer to 7:1).

Our interpretation is also supported by my recent discussions with DEP staff.

With regards to the field observations of BSC, the majority of test pits conducted during the peer review were within “Area 2” as shown on the Degraded Area Plan submitted with our February 19 package – those areas with vegetation. We dispute that the conditions observed within Area 2 demonstrate the presence of established, functioning topsoil. Regardless, with the exception of a short length of trail (about 100 feet) around test pit 8, all other areas observed within “Area 3” were confirmed to be devoid of topsoil, even under the criteria applied by BSC. (An area around test pit 5 has been changed from Area 3 to Area 2 on the plan due to the presence of vegetation). While we disagree that this is the limit of degraded riverfront on site, the areas where BSC and the Applicant agree are enough to trigger the applicability of the redevelopment standards to the proposed work.

In addition, even current estimates of the undisputed degraded areas were reduced by 50%, the regulatory analysis would remain the same – that is, the redevelopment standards would still apply. Moreover, given the extent of mitigation and enhancements proposed, the project would still comply with (and exceed) the applicable redevelopment standards. So, we do not believe there is any benefit to the additional time and expense involved in flagging and surveying the undisputedly degraded areas.

It is also important for the Commission to understand that the only reason that building 10 is within the Riverfront Area at all is because the Riverfront Area boundaries recently changed as a result of beavers constructing 3 dams across the stream after the Notice of Intent was filed. The original bank and MHW flags were reviewed by John Lopez in April, 2010, and found to be satisfactory at the time. BSC did not have the opportunity to review the MHW prior to the construction of the beaver dams. In other cases, DEP has considered beaver dams to be transient features that should not define the RA. However, for purposes of moving forward we adjusted the MHW flags as requested by BSC.

Also, please note that the correct alteration areas for the project as proposed are included in this previous submission within the alternative riverfront impacts table. The area considered alteration totals 21,006 square feet of which 9,225 square feet is temporary disturbance that will be revegetated with native species, leaving a permanent alteration area of 11,781 square feet. The stormwater management structures are not considered alteration under 10.58, and the reason they must be located within the Riverfront is explained in prior submissions and the design has undergone extensive review by BSC Group during the permitting process with both the Conservation Commission and the Planning Board.

Based on the clear and common sense interpretation of the Riverfront Regulations, the only remaining issue before the Commission is whether it desires any modifications to the proposed mitigation measures – which we believe exceed the requirements of 10.58(5)(f) and (g). Since February, we have sought input on our mitigation proposal. In BSC’s January 29, 2013 review, they commented that “*BSC concurs with the Applicant that the following mitigation ideas generally represent opportunities to enhance ecological functioning on the site:*

*-Restoration of the IVW*

*-Restoration of ATV-impacted Bank*

*-Invasive species control*

*-Enhancement/Supplementation of impacted soils (specific locations to be determined in consultation with the ACC) and planting of high-value native species*

*-Restoration/stabilization of eroded areas*

*-Removal of debris, trash, paintball bridges and yard waste*

If the Commission desires refinements to the mitigation proposal, we welcome that discussion. However, we are proposing substantial mitigation, whose benefits to the Riverfront Area would clearly enhance the functioning of the RA as a whole, even when considering any impacts of the alterations proposed.

In conclusion, we disagree that the project as proposed is subject to both the requirements of 10.58(4) and 10.58(5), as BSC suggests. The project is governed by the redevelopment standards of 310 CMR 10.58(5). To suggest that two sets of standards apply to the same project within the same Riverfront Area on the same parcel of land is in conflict with the regulatory structure and language.

We ask that the Commission approve the project as proposed , subject to our discussion at Monday’s hearing related to any mitigation measures that the Commission may desire.

We look forward to discussing the plan changes and these comments with the Conservation Commission on March 4, 2013. If you have any questions, please feel free to call us at your earliest convenience.

Sincerely,



Thomas G. Hughes, BS, MA

Cc: Mike Abell, MADEP

Enclosure: Revised C-013C – Riverfront Area Degraded Area Plan