



September 8, 2023

Sudbury Conservation Commission
Department of Public Works Building
275 Old Lancaster Road
Sudbury, MA 01776

Re: RDA Supplemental Letter
821 Boston Post Road, Sudbury, MA

Dear Sudbury Conservation Commission,

Goddard Consulting, LLC, (Goddard) is pleased to submit this letter on behalf of William Conti, (the Applicant), to provide responses to questions and comments issued by the Sudbury Conservation Commission regarding the Request for Determination of Applicability (RDA) filed for 821 Boston Post Road.

SIZE OF IVW

The isolated vegetated wetland is approximately 5,280 square feet in size.

BANK/STREAM

In our professional opinion there is no Bank located anywhere within the isolated wetland. The wetland sits at a relatively level spot between two hills where water collects. For the isolated depression on site to be Bordering Vegetated Wetlands (BVW), there would need to be a hydrological connection (in the form of BVW or a stream) from this area to another downgradient Area Subject to Protection under the WPA. "Stream" is defined under the Wetlands Protection Act as,

"a body of running water, including brooks and creeks, which moves in a definite channel in the ground due to a hydraulic gradient, and which flows within, into or out of an Area Subject to Protection under M.G.L. c. 131, § 40. A portion of a stream may flow through a culvert or beneath a bridge. Such a body of running water which does not flow throughout the year (i.e., which is intermittent) is a stream except for that portion upgradient of all bogs, swamps, wet meadows, and marshes." (310 CMR 10.04) Bordering Vegetated Wetlands (BVW) must border or touch a creek, river, stream, pond, or lake under 310 CMR 10.55 (2)(a).

Likewise, "intermittent stream" is defined under the Sudbury Wetlands Protection Regulations as, "a defined channel with a hydraulic gradient through which water flows during part of the year and which either flows out of, into, or within a wetland resource under this bylaw."

The isolated depression on-site lacks hydraulic connection to another downgradient resource area because of two main observations; there is no regular flow nor a definite channel downgradient, the poorly defined swale area on-site lacks stream features.

THE NEED FOR STREAM FEATURES

There is a semi-concentrated flow path feature the SCC Agent observed in the vicinity of Flags GC A11-A13 and A37-A39. It was observed that this semi-concentrated flow path area as well as areas upgradient and downgradient

lacks stream features that have been used as critical determinants in past case law determinations.

The Bradshaw case (Exhibit A) establishes that a physical feature in the ground must be obvious and objective enough for a non-scientific person to recognize a stream channel, and stream features must be present. The Bradshaw case states,

“Therefore, the definite channel of a stream “need not be a distinct cut in the earth, nor need it be evidenced by a break in vegetation” instead, a “readily identifiable feature,” such as a swale, can qualify as a definite channel where the flow of water along this feature, ‘is also a clearly identifiable, measurable feature.”

The Bradshaw case also explains the need for a channel to serve as a regular conduit as well. As stated in this case,

“The evidence observed is insufficient to establish, with any reasonable degree of certainty, that the alleged stream has a readily identifiable definite channel that serves, or can serve, as a *regular* conduit and connection of clearly identifiable measurable flow.”

It is important to note that the terms “regular”, “continuous” and “definite channel” are used repeatedly in these cases. Each case reiterates the need for a channel to serve as a regular conduit and connection from one resource area to another to be considered a jurisdictional area. No stream with readily identifiable definite channel features that could serve as a regular conduit has been observed at 821 Boston Post Road on or off-site by Goddard or SCC.

In the Matter of Tassinari, (Exhibit B) the DEP Commissioner found that a drainage swale leading from a wetland to a culvert was a stream because,

“the channel in question was definite enough in nature to be susceptible of observation, measurement, and description by the parties...”

No water flow was observed during any of the site visits. The Bradshaw case discusses physical features that must also be present without water as a factor. The narrative explains,

“Where the water flow of an intermittent stream is not observed directly, the definite channel of stream flow may be indicated in the field by a continuous line of observable features along a line, path, bed, break, depression or course that are consistent with stream flow; such observable features include banks, trapped silt or sediment, exposed sand and gravel, a thin or narrow band of wetland indicator species, disturbed leaf litter, a difference in appearance of leaf litter or an absence of leaf litter, or leaf litter or other detritus trapped on the upper stream side of plants.”

No evidence of any of these features is present in the semi-concentrated flow path area. Evidence of this consists of

- no exposed sand or gravel
- no thin band of wetland indicator species
- no disturbed leaf litter
- no difference in appearance of leaf litter, and
- no detritus trapped on the upper stream side of plants

The Tassinari case describes additional critical stream features,

“One would expect to find a scouring effect caused by the velocity of the water, with a break of vegetation and gravel and sand lining the channel.”

No scouring effect caused by the velocity of water with a break of vegetation were observed and no gravel or sand lining the channel were observed in the swale. The Bucko (Exhibit C) case also explains physical features as evidence for a stream,

“Her photographs show evidence of past flow, such as flattened vegetation and scouring, and at least one break in a slight topographic high or berm, where the flow leaves the area.”

No signs of flattened vegetation or scouring were observed in the area downgradient of the 821 Boston Post Road isolated area.

In the Bucko case, someone testified that the swale in question was not cut into the ground, which was supporting evidence for the hydraulic connectivity of water. In the case of 821 Boston Post Road, the feature can be described as a semi-concentrated flow area because of sheet flow from the surrounding landscape which funnels to this area (the low spot).

The Westport (Exhibit D) case addresses that areas either need be Isolated Land Subject to Flooding (ISLF) – which uncontestedly is not the case at Boston Post Road – or must be a stream/hydrological connection to achieve jurisdictional status. The case states the following,

“In order for these areas to qualify as wetland resource areas, they must either isolate or contain flood waters within an enclosed basin (Isolated Land Subject to Flooding) or maintain a hydrological connection to an adjacent resource area as bordering vegetated wetland.”


The isolated depression on-site is not large enough or deep enough to be ISLF.

CONCLUSION

The isolated wetland on-site lacks hydraulic connection to any downgradient resource area because the semi-concentrated flow path feature does not have stream features (and does not provide a regular conduit for hydraulic connectivity) and the downgradient wet area lacks a definite channel and any regular flow.

It is our professional opinion that the wetland on site is isolated in nature and therefore not subject to regulation under the Wetlands protection Act or the Sudbury Wetlands Protection Bylaw.

Sincerely,
Goddard Consulting, LLC



Scott Goddard, PWS



Ryan Roseen, Wildlife Biologist & Wetland Scientist

CC: Bill Conti, 12 Patricia Road Sudbury, MA 01776

Exhibit A

IN THE MATTER OF BRADSHAW REALTY TRUST, DOCKET 87-083, FILE
NO. 346-68, (DECEMBER 24, 1990)

Westlaw.

1990 WL 455017 (Mass.Dept.Env.Prot.)

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1990 WL 455017 (Mass.Dept.Env.Prot.)

Department of Environmental Protection
Commonwealth of Massachusetts

*1 IN THE MATTER OF BRADSHAW REALTY TRUST

Docket No. 87-083

File No. 346-68

December 24, 1990

Winchester
Subject: Wetlands

Procedural: Tentative Decisions

TENTATIVE FINAL DECISION- PHASE I [LOCATION AND BOUNDARY OF WETLANDS RESOURCE
AREAS ON SUBJECT PROPERTY]

Background

This is an appeal by petitioner Bradshaw Realty Trust (“Bradshaw” or “the petitioner”) from a wetlands Superseding Denial Order issued to it by the Department pursuant to M.G.L. c.131, §40 on June 10, 1987. The property in question, an approximately 9 acre undeveloped parcel containing freshwater wetlands, streams, and upland areas (“the property”), is located in the Town of Winchester, south of Forest Street, north and west of Bellevue Avenue, and west of Interstate 93. The Superseding Order denied Bradshaw's proposal to construct upon the property a 24-lot residential subdivision, together with drainage-related structures and two access roadways (Eugene Drive and Edith Lane) terminating in a common cul-de-sac. The project was subsequently revised to 23 developed lots and 2 undeveloped lots to be used for storm water detention and compensatory flood storage; this revised design will be referred to below as “the proposed project”.

Bradshaw seeks approval of the proposed project on appeal. In addition to Bradshaw and the Department, the Winchester Conservation Commission is a party to this appeal, as is a “ten citizens group” consisting of Winchester residents and abutters to the Bradshaw property who intervened (“the Intervenors”) and who oppose the proposed project.

The Department denied the project as originally presented in the Notice of Intent primarily because:

- (1) it would alter freshwater wetland resource areas on the property, specifically bordering vegetated wetlands, land under a waterway (streams), bordering land subject to flooding, and banks (of streams);
- (2) Bradshaw's plans did not accurately delineate the extent of wetland resource areas;
- (3) the wetlands extended further toward the northeast corner of the property (into Lots 23 and 24) and further

north in the southern portion of the property (onto Lot 13);^[FN1]

(4) the project as then proposed would alter more than 5,000 square feet of bordering vegetated wetlands and therefore could not be approved under 310 CMR 10.55(4)(b).

The Superseding Denial Order expressed the Department's concern that an area in the southwestern corner of the property (in the area of Lots 16 and 17) containing wetland vegetation and standing water might be a freshwater wetland resource area, namely either isolated land subject to flooding or bordering vegetated wetland, and that this area might be hydrologically connected to a bordering vegetated wetland located in the southeast corner of the property. in the area of Lots 10, 11, 12 and 13- the so-called Fox Pond wetland.^[FN2] The Superseding Denial Order also noted the absence of data and calculations necessary to determine whether the project plans proposed appropriate flood storage compensation for the filling of bordering land subject to flooding in the area of Lots 2, 3, 4 and 5, where Bradshaw proposed to culvert approximately 140 linear feet of a stream.

*2 Bradshaw has since revised its wetlands delineation to the Department's satisfaction; its most recent surveys show the existence of bordering vegetated wetlands in the northwest area of the property (in the area of Lots 23 and 24), the southwest (in the area of Lots 16 and 17) and the south-southeast (the Fox Pond wetland in the area of Lots 10, 11, 12 and 13). The Intervenor agree that there are wetlands in these areas, but they assert that these wetlands extend well beyond the boundaries shown by Bradshaw, and that there are wetlands and streams on the property which Bradshaw's revised surveys still do not show. The Winchester Conservation Commission agrees with the Department and Bradshaw on the delineation of bordering vegetated wetlands. It is, however, concerned with the proximity to these wetlands of the homes that would be constructed on the 23 development lots.

The wetlands boundary and location issue was severed for separate and initial determination by adjudicatory hearing. Fifth Interim Hearing Memorandum and Order, November 22, 1988. The parties requested a tentative decision on this issue. All parties, except the Winchester Conservation Commission, submitted prefiled direct and rebuttal testimony. A view of the property ("the site visit") was conducted by the Administrative Law Judge on December 12, 1988. The adjudicatory hearing on the wetlands resource area location and boundary issue was held on February 13, 14 and 15, 1989 and on March 6, 1989. Expert testimony on the location and boundaries of wetland resource areas on the property was presented by Bradshaw^[FN3] and by the Department.^[FN4] The Intervenor's proposed expert withdraw before Bradshaw concluded its voir dire of him, and before cross-examination could begin. The hearing produced four transcript volumes^[FN5] and 40 exhibits.^[FN6] The parties filed post-hearing memoranda, as did the Massachusetts Association of Conservation Commissions, which was allowed to participate in this manner following the hearing. Memorandum Decision and Order on Motion to Participate by Filing Amicus Brief, June 2, 1989. Bradshaw, the Department and the Intervenor have also each filed proposed findings of fact and conclusions of law.

This Decision addresses the wetlands resource area location and boundary issue ("Phase I" of this appeal). The issue to be determined is whether there are wetlands and streams in three disputed areas on the property: Disputed Area 1 (extending from the Fox Pond wetland into lots 8, 9, 10, 11, 12 and 13); Disputed Area 2 (within proposed Eugene Drive and lot 6); and Disputed Area 3 (three small areas adjacent to the easterly edge of the bordering vegetated wetland on lots 16 and 17) [see map at page A-1, below, for the approximate location of these areas].

On the basis of the Findings and Conclusions below, it is determined:

As to Disputed Area 1, that:

- (a) A portion of the Fox Pond wetland boundary, at the southern end of lot 10, has been established with a reasonable degree of certainty;
- *3 (b) The northern boundary of the Fox Pond wetland in lots 11, 12 and 13 may be as it is shown on Bradshaw's most recent surveys, or it may lie between Bradshaw's boundary and a more distant boundary asserted by the Intervenor; however, it has not yet been established with a reasonable degree of certainty, and must now be established correctly in accordance with the schedule ordered at the end of this Decision;
- (c) With the exception of any areas of Disputed Area 1 that may be found to lie within the outer boundary of the Fox Pond wetland, that portion of Disputed Area 1 lying at or below el. 169.2 in lots 8, 9, 10 and 11 is Bordering Land Subject to Flooding;
- (d) That portion of Disputed Area 1 that is neither within the boundary of the Bordering Land Subject to Flooding nor found to be a part of the Fox Pond wetland is not a Bordering Vegetated Wetland;
- As to Disputed Area 2, that there is no stream or bordering vegetated wetland in this area; and
- As to Disputed Area 3, that it has not yet been shown with a reasonable degree of certainty that the outer boundary of the Bordering Vegetated Wetland on lots 16 and 17 does not extend into any of the three small areas of Disputed Area 3, and a further boundary determination must therefore also be made in accordance with the schedule ordered below.

PRELIMINARY RULINGS

1. This appeal has generated a substantial volume of motion practice and, as a result, many interlocutory decisions and orders. All interlocutory decisions and orders previously issued in this appeal are confirmed.
2. Because the Intervenor's proposed expert, Brian Donohoe, withdrew from this proceeding before his voir dire was concluded [TR.IV, 7], he was unavailable for cross-examination. The parties have not agreed to the submission of his written prefiled testimony without cross-examination. Mr. Donohoe's written testimony must therefore be stricken in its entirety, pursuant to 310 CMR 1.01(8)(f).^[FN7]
3. This Decision is issued in the form of separately stated and numbered Findings of Fact and Conclusions of Law. A number of these adopt, with or without modifications, findings of fact and conclusions of law proposed by the parties. Any finding of fact or conclusion of law proposed by a party which is not expressly adopted (with or without modification) in this Decision is denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Agreed Facts

1. The parties have signed a stipulation of agreed facts. Stipulation I, Statement of Agreed Facts Applicable to Adjudication of Bordering Vegetated Wetland Boundary (signed by the Department on February 9, 1989, by the Intervenor on April 5, 1989, by the Winchester Conservation Commission on April 10, 1989, and by Bradshaw on April 14, 1989) ["Stipulation I"].
2. The following proposed findings of fact and conclusions of law submitted by Bradshaw ("Bradshaw FF/CL") are substantially the same as the terms of Stipulation I and are therefore adopted:^[FN8]
 - *4 a. As to the parties, Bradshaw FF/CL 2-5;
 - b. As to the proposed project, Bradshaw FF/CL 6;
 - c. As to the nature of this appeal and the applicable Wetlands Protection Regulations [310 CMR 10.00

(1983 rev.)), Bradshaw FF/CL 7;

d. As to the history of the proposed project from the filing of the wetlands Notice of Intent through the site visit conducted by the ALJ, Bradshaw FF/CL 8-21, and 22 with the following modification: the reduced copy of Chalk P-16 included by Bradshaw to show the approximate locations of the three Disputed Areas has been modified for purposes of clarity and photo-reproducibility (see p. A1, below);

e. As to the identification of the agreed bordering vegetated wetlands, Bradshaw FF/CL 23-25;

f. As to the identification of the areas remaining in dispute, Bradshaw FF/CL 26, except that Bradshaw's diagram has been modified as noted above (at d).

Applicable Statutory and Regulatory Definitions

3. Determining the existence, location and boundary of an alleged wetland resource area on the property requires the application and interpretation of the Wetlands Protection Act, M.G.L. c. 131, §40 ("the Act") and the applicable Wetlands Protection Regulations promulgated by the Department, 310 CMR 10.00 et seq., rev. 1983 ("the Regulations").

4(a). The term "wetland resource area" has been used in this proceeding, and is used in this Decision, as a shorthand term for an "Area Subject to Protection Under the (Wetlands Protection) Act."

(b). "Areas Subject to Protection Under the Act" include (but are not limited to) "(a)ny bank, any freshwater wetland....any marsh or any swamp bordering on....any stream," "(1)and under" any stream, and "(1)and subject to flooding." 310 CMR 10.02(1).

5. The statutory definition of freshwater wetlands" appears at M.G.L. c. 131, §40, seventh. It states:

The term 'freshwater wetlands,' as used in this section, shall mean wet meadows, marshes, swamps, bogs, areas where groundwater, flowing or standing surface water or ice provide a significant part of the supporting substrate for a plant community for at least five months of the year; emergent and submergent plant communities in inland waters; that portion of any bank which touches any inland waters.

6. The areas on the property which the parties agree are wetlands [2.e above and Bradshaw FF/CL 23-25, at pp. A24-25 below] are defined under the Act as freshwater wetlands generally and as "swamps" specifically. The Act defines "swamps"as:

areas where ground water is at or near the surface of the ground for a significant part of the growing season or where runoff water from surface drainage frequently collects above the soil surface, and where a significant part of the vegetational community is made up of, but not limited to nor necessarily include (sic) all of the following plants or groups of plants: alders (*Alnus*), ashes (*Fraxinus*), azaleas (*Rhododendron canadense* and *R. viscosum*), black alder (*Ilex verticillata*), black spruce (*Picea mariana*), button bush (*Cephalanthus occidentalis*), American or white elm (*Ulmus americana*), white Hellebore (*Veratrum viride*), hemlock (*Tsuga canadensis*), highbush blueberry (*Vaccinium corymbosum*), larch (*Larix laricina*), cowslip (*Caltha palustris*), poison sumac (*Toxicodendron vernix*), red maple (*Acer rubrum*), skunk cabbage (*Symplocarpus foetidus*), sphagnum mosses (*Sphagnum*), spicebush (*Lindera benzoin*), black gum tupelo (*Nyssa sylvatica*), sweet pepper bush (*Clethra alnifolia*), white cedar (*Chamaecyparis thyoides*), willow (*Salicaceae*).

*5 M.G.L. c. 131, §40, eighth.

7. These agreed-upon wetlands are also "bordering vegetated wetlands," as defined in the Regulations at 310 CMR 10.55(2)(a), which states that:

Bordering Vegetated Wetlands are freshwater wetlands which border on creeks, rivers, streams, ponds and

lakes. The types of freshwater wetlands are wet meadows, marshes, swamps and bogs. They are areas where the topography is low and flat, and where the soils are annually saturated. The ground and surface water regime and the vegetational community which occur in each type of freshwater wetland are specified in the Act.

8. The Regulations define the “boundary of Bordering Vegetated Wetlands” as:
the line within which 50 percent or more of the vegetational community consists of the wetland plant species identified in the Act.
310 CMR 10.55(2)(c).

9. As used in the definition of the boundary of bordering vegetated wetlands set forth at 310 CMR 10.55(2)(c), “plant species identified in the Act” means plants specifically listed in the various definitions of types of freshwater wetlands set forth in the Wetlands Protection Act and plants not listed in the Act but which are generally considered to be freshwater wetlands indicators. Wetlands Program Policy 85-1.

10. Of the various waterways and water bodies listed at 310 CMR 10.55(2)(a) as those on which bordering vegetated wetlands border, only “streams” are found on the property. The Regulations state that:
Stream means a body of running water, including brooks and creeks, which moves in a definite channel in the ground due to a hydraulic gradient, and which flows within, into or out of an Area Subject to Protection Under the Act. A portion of a stream may flow through a culvert or beneath a bridge. Such a body of running water which does not flow throughout the year (i.e., which is intermittent) is a stream except for that portion upgradient of all bogs, swamps, wet meadows and marshes.
310 CMR 10.04 (1983 rev.), seventy-eighth [emphasis in original].

11(a). “Land Subject to Flooding,” one of the “Areas Subject to Protection Under the Act,” includes “Bordering Land Subject to Flooding” [defined at 310 CMR 10.57(2)(a)] and “Isolated Land Subject to Flooding” [defined at 310 CMR 10.57(2)(b)].

(b) The Regulations define “Bordering Land Subject to Flooding” as:
an area with low, flat topography adjacent to and inundated by flood waters rising from creeks, rivers, streams, ponds or lakes. It extends from the banks of these waterways and water bodies; where a bordering vegetated wetland occurs, it extends from said wetland.
310 CMR 10.57(2)(a)(1).

(c) The boundary of “Bordering Land Subject to Flooding” “is the estimated maximum lateral extent of flood water which will theoretically result from the statistical 100-year frequency storm.” 310 CMR 10.57(2)(a)(3).

(d) The Regulations define “Isolated Land Subject to Flooding” as:
*6 an isolated depression or closed basin without an inlet or an outlet. It is an area which at least once a year confines standing water to a volume of at least 1/4 acre-feet and to an average depth of at least six (6) inches.

12. The Regulations state that “bordering” means “touching,” and that an area such as a bank, freshwater wetland, marsh or swamp is “bordering” on a water body such as a stream “if some portion of the area is touching the water body or if some portion of the area is touching another area...” (such as a bank, freshwater wetland, marsh or swamp) “some portion of which is in turn touching the water body.” 310 CMR 10.04 (1983 rev.), fifteenth.

FINDINGS AND CONCLUSIONS AS TO DISPUTED AREA 1 (Area Adjacent to Fox Pond Wetland and Located in Lots 8, 9, 10, 11, 12 and 13)

A. Boundary of Fox Pond Wetland

13. The parties have agreed that the Fox Pond wetland, located within lots 10, 11, 12 and 13, is a bordering vegetated wetland. Bradshaw FF/CL 24.

14. The outer boundary of a bordering vegetated wetland is established exclusively by vegetative characteristics. In the Matter of Yankee Compact Realty Trust, Docket No. 86-062, File No. 34-213 (Hingham), Final Decision After Reconsideration at 12, 8 MELR 1031, 1042 (January 25, 1990).

15(a). The Intervenor's analysis of the Fox Pond wetland boundary and the presence of wetlands in Disputed Area 1 was included in the prefiled testimony stricken above, and is therefore not considered in this Decision.

(b). Bradshaw analyzed vegetation, soils and hydrology along the Fox Pond wetland boundary which its experts flagged in the field, and along the Intervenor's wetlands flags at the Fox Pond wetland and in Disputed Area 1. Its analysis is set forth in several detailed reports; these furnish most of the admissible evidence relevant to the determination of the Fox Pond wetland boundary and the presence of wetland resource areas in Disputed Area 1. See Exhibit A to (hearing) Exhibit P-1 (Daylor Consulting Group, Inc. and Sanford Ecological Services, "Wetland Resource Evaluation and Replacement Criteria, Forest Glen Estates, Winchester, Massachusetts," July 6, 1988), at Attachment III-3 ("Notes and Indicator Species at Flagged Stations" at "Swale at the Rear of the Property"), Attachment IV-3 ("Documentation Stations...Table 3, Vegetative Analysis of Station 1, rear of the property"), and attached Plan 7 ("Plan of Land Showing Wetland Flags, Field Locations of June 1987 and June 1988," rev. through July 5, 1988); see also Exhibit P-21 [single-page affidavit of Dr. Lisa A. Standley, sworn-to December 1, 1988, incorporating an attached Report of same date which sets forth a field analysis of conditions observed at the Intervenor's wetlands flags].

(c). The Department concurs with the Fox Pond wetland boundary shown by Bradshaw and has found no bordering vegetated wetland in Disputed Area 1. Exhibit D-3 (supplemental prefiled testimony of Tracy Peter, December 8, 1988).

i. Fox Pond Wetland Boundary Flagged by Bradshaw

*7 16. Bradshaw's analyses show vegetative distribution at only 1 of 12 stations along the wetland line which it flagged in lots 10, 11, 12 and 13 (station #1, located on lot 12 and within Bradshaw's wetland boundary). Exhibit A to Exhibit P-1 at Attachment III-3 [notes for Station #1, but for none of the other stations, are supported by a "Documentation Table" at Attachment IV-3; Attachment IV-3 shows, by the "percent cover method," the average wetland species contribution "upgradient" and "downgradient" of the flag at Station 1; for each of these sides of the wetland flag there is shown the percent cover for identified wetland and upland species in the tree layer, shrub layer and herbaceous layer, and the percent wetland species contribution when figures for all three layers are averaged].

17. The northeast boundary of the Fox Pond wetland in lots 10, 11, 12 and 13 was placed by Bradshaw at the transition from the wetlands community in a wooded swamp at the fringe of the Fox Pond wetland to an uplands wood community. In the wooded swamp, the tree layer was dominated by wetland species (red maple, swamp white oak, tupelo and white ash), the shrub layer was dominated by wetland species (sweet pepperbush, high-

bush blueberry and arrowwood), and a sparse herbaceous layer was dominated by wetland species (jewelweed and cinnamon fern). The tree and shrub layers of the uplands wood community contained both species listed in the Act [tree layer: red maple, ash; shrub layer: sweet pepperbush and highbush blueberry, both listed in the Act for swamps, and (sheep) laurel, listed in the Act for bogs] and species not listed in the Act but listed in generally accepted scientific literature as uplands species or species as likely or more likely to occur in uplands as in wetlands. Exhibit A to Exhibit P-1, at Attachment VII-2, 3.

18. However, no data is given by Bradshaw regarding the distribution of wetland species in the upland woods community or in the transition between the wooded swamp and the uplands wood community, and there is no data showing the distribution or dominance of species in these areas. Id.

19. Along the northeast boundary of the Fox Pond wetland, Bradshaw used soils analysis to “confirm the limit of the wetland resource area” in an area where “the abundance of Sweet Pepperbush throughout the understory makes the limit of the wetland community somewhat obscure.” Exhibit A to Exhibit P-1, at Attachment VII-2, 3. The location of part of this boundary was based upon “soil parameters” as well as vegetative analysis. TR.II, 48 (testimony of Dr. Standley).

20. It is therefore not clear whether the northeast boundary of the Fox Pond wetland was established exclusively by vegetative characteristics, as required under the Act and Regulations, or whether, in delineating the wetland boundary, vegetative characteristics (particularly, the dominance of statutory wetland species in at least one vegetative layer) were improperly offset or discounted on the basis of soils analysis. See *In the Matter of Yankee Compact Realty Trust*, supra; Final Decision After Reconsideration at 12, 8 MELR at 1042.

*8 21. Bradshaw's determination of the northeast boundary of the Fox Pond wetland appears to have been based upon either a discounting or an exclusion of the presence of sweet pepperbush, a plant specifically listed in the Act as an indicator of swamps. Exhibit P-14 (Prefiled rebuttal testimony of Robert F. Daylor, Lisa A. Standley, Gary R. Sanford and Frederick D. Dewsnap, Jr., August 12, 1988) at 6 [statements that “the fact that sweet pepperbush is identified in the Massachusetts Wetlands Protection Act is not conclusive evidence that it is a wetlands indicator species,” that sweet pepperbush has been classified as a “facultative” species, and that “sweet pepperbush commonly occurs in uplands”].

22. Notwithstanding the treatment or classification of sweet pepperbush by other wetlands identification methodologies as an uplands indicator or as a species as likely to occur in uplands as in wetlands, the discounting or exclusion of sweet pepperbush from consideration as a wetlands indicator in determining the outer boundary of the Fox Pond wetland was legally impermissible. See *In the Matter of Yankee Compact Realty Trust*, supra; Final Decision After Reconsideration at 10, 8 MELR at 1040 (same principle applied with respect to red maple).

ii. Bradshaw's Field Analysis at Intervenors' Flags

a.

23. Bradshaw's field analysis at wetlands flags placed by the Intervenors 3-10 feet beyond, and roughly parallel to, the Fox Pond wetland line presently shown in lots 12 and 13 (Intervenors' flags BD 20-25) was that “only” 2 of the 5 “facultative” species that were dominant “in both upgradient and downgradient communities” were wetland indicators (red maple and arrowwood), that more plant species occurred “downgradient” of these flags than “upgradient,” and that “(t)here is almost complete overlap in the plant species that occur above and below the line.” Exhibit P-21, attached Report at 3, §2.1, and 10, Table 2.

24. This field analysis supports Bradshaw's conclusion that the Intervenor's flags did not "delimit a wetland."

25. However, this field analysis is not supported by vegetative distribution data or by data showing whether or not the two wetland indicator species were themselves dominant within the dominant community of "facultative" species; stated another way, there is no way to tell how many individuals of each of the different species counted were present in the area analyzed, or what the spatial distribution of these individuals was, or (assuming that the "percent cover method" was used), what was the percentage composition of the vegetational community, based upon percentage of ground cover lying directly beneath plant canopies. See, as to the "percent cover method" employed by Bradshaw's experts, Exhibit A to Exhibit P-1, at Attachment I-1 through I-4.

26. In addition, it is not clear whether dominance of wetland indicator species was considered at all, or whether Bradshaw merely counted the number of different plant species present.

*9 27. Therefore, Bradshaw's field analysis at Intervenor's flags BD 20-25 does not corroborate the outer boundary of the Fox Pond wetland in lots 11 and 12 as shown on its most recent surveys (Exhibits P-2 and P-17); nor does it prove that this boundary could not extend beyond the line presently shown and within the line claimed by the Intervenor along these flags.

b.

28. Bradshaw's field analysis at wetlands flags placed by the Intervenor in a "lobe"-shaped area projecting from the Fox Pond wetland at lot 11 and across lot 12 (Intervenor's flags 25-40) ("the lobe") was that "(f)ifty seven percent of the species immediately upgradient of this line also occur downgradient of the line" and that "(s)ixty-two percent of the species found below the line also occur upgradient."

29. This analysis supports Bradshaw's conclusion that the Intervenor's flags do not indicate a line between an upland and wetland plant community in "the lobe."

30. Bradshaw's analysis of "a vegetation sample taken in this area" was that wetland species (including species listed in the Act) contributed 47 percent of the tree canopy cover and 82 percent of the cover in the shrub layer, and (based upon a subsequent examination) 0 percent of the herbaceous layer, and that the total contribution of wetland species to this community was 43 percent, so that no bordering vegetated wetland was present. Exhibit P-21, attached Report at 3-4, 11 (Table 3), and 14 (Table 6).

31. However, Bradshaw's analysis does not show where the "vegetation sample" was taken within "the lobe" (whose width exceeds that of the Fox Pond wetland), the composition of the sample, or whether it was representative of vegetative distribution along and within the line demarcated by the Intervenor's 16 flags.

32. In addition, there is no showing that herbaceous plants were actually present in an abundance justifying either (i) the inclusion of a herbaceous layer having a wetland species contribution of 0 percent in computing the average percent wetland composition value for the plant community in the entire "lobe;" or (ii) the assumption, implicit in such inclusion, that the herbaceous layer was equal in value to the tree or shrub layer as an indicator of wetlands.^[FN9] See Exhibit A to Exhibit P-1, at I-3 (regarding the inclusion of vegetative layers when using the "percent cover method").^[FN10]

33. Therefore, Bradshaw's field analysis at Intervenor's flags BD 25-40 does not corroborate the outer boundary of the Fox Pond wetland in lot 11 as shown on its most recent surveys (Exhibits P-2 and P-17); nor does it prove

that this boundary could not extend beyond the line presently shown on lot 11 and into "the lobe," within the line claimed by the Intervenor along these flags.

c.

34. Bradshaw's field analysis at wetlands flags placed by the Intervenor in a "band of variable width" extending from the Fox Pond wetland at lot 10 across the proposed cul-de-sac and into lots 9 and 8 (Intervenor flags 40-49 and 49A-36A) ("the band area") was that species composition above and below the line of these flags was similar.

*10 35. This supports Bradshaw's contention that the line of these flags does not define a bordering vegetated wetland boundary.

36. Bradshaw's analysis was also that "no wetland plant community may be distinguished" along the line of the Intervenor flags in "the band area" because "(t)he upgradient community has 19% wetland species, while the downgradient community has 32% wetland species." Exhibit P-21, attached Report at 4, 12 (Table 4).

37. However, this conclusion is based upon a simple ratio of numbers of wetland species to the total number of species identified (above the line: 4 wetland species to 21 species total; below the line, 6 wetland species to 19 species total) and is not supported by any showing of species distribution, abundance or dominance along the line of wetlands flags analyzed. Id.

38. Bradshaw also analyzed "a vegetation sample in this area" and found that the contribution of wetland species, as determined by the "percent cover method," was 44 percent to the tree canopy, 80 percent to the shrub layer, and (based upon a subsequent examination), 0 percent to the herbaceous layer, and therefore 41 percent to the entire vegetational community upon averaging the percent cover of wetland species for the three layers. Exhibit P-21, attached Report at 4, 15 (Table 7).

39. However, Bradshaw's analysis does not show where the "vegetation sample" was taken within "the band area" (which extends into four lots), the composition of the sample, or whether it was representative of vegetative distribution along and within the line demarcated by the Intervenor 24 flags.

40. In addition, there is no showing that herbaceous plants were actually present in an abundance justifying either (i) the inclusion of a herbaceous layer having a wetland species contribution of 0 percent in computing the average percent wetland composition value for the plant community in the entire "band area;" or (ii) the assumption, implicit in such inclusion, that the herbaceous layer was equal in value to the tree or shrub layer as an indicator of wetlands.^[FN11] See Exhibit A to Exhibit P-1, at I-3 (regarding the inclusion of vegetative layers when using the "percent cover method").^[FN12]

41. Therefore, Bradshaw's field analysis at Intervenor flags BD 40-49 and BD 49A-36A does not corroborate the outer boundary of the Fox Pond wetland in lot 10 as shown on its most recent surveys (Exhibits P-2 and P-17); nor does it prove that this boundary could not extend beyond this line and into "the band area" within the line claimed by the Intervenor along these flags.

d.

42. Bradshaw's field analysis at wetlands flags placed by the Intervenor parallel to the Fox Pond wetland boundary as presently shown at the southern end of lot 10 (Intervenor flags 36A-33A, placed 3-10 feet outside

the presently-shown wetland boundary) corroborates the boundary as it is presently shown. Bradshaw's description of the Intervenor's flagging as being "one to two feet uphill" of the presently-shown wetland boundary is un rebutted. It is consistent with what Exhibit P-17, the most detailed topographic survey in the record, shows for this area (a rise roughly from el. 168 to el. 170). This topographical rise tends to support Bradshaw's location of the vegetative boundary of the wetland; it also tends to show that the relative low, flat topography of the Fox Pond wetland does not extend to the line of the Intervenor's wetland flags 36A-33A. Exhibit P-21, supra; attached Report at 4-5; Exhibit P-17, at 1 (surveyed topography in and around Fox Pond wetland showing elevation contours in half-foot intervals).

e.

*11 43. Based upon Findings and Conclusions 13 through 42 above:

- a. The boundary of the Fox Pond wetland at the southern end of lot 10, as shown on Bradshaw's most recent surveys [Exhibits P-2 and P-17], has been established with a reasonable degree of certainty;
- b. The actual outer (northern) boundary of the Fox Pond wetland in lots 11, 12 and 13 lies somewhere between the line as shown on Bradshaw's most recent surveys and the line claimed by the Intervenor, or it may in fact be the line as shown on Bradshaw's most recent surveys. However, it has not yet been established with a reasonable degree of certainty, and must be established (see Scheduling Order below).

B. Portion Of Disputed Area 1 That Is Not Part Of The Fox Pond Wetland

44. Although the parties have agreed that the Fox Pond wetland is a bordering vegetated wetland, they have not agreed upon or delineated on a survey the water body or water course which this wetland borders.

45. There is no evidence in the record that the Fox Pond wetland borders on a creek, river, lake or pond.

46. There is sufficient evidence in the record that a stream flows intermittently into the Fox Pond wetland at its northeastern end via a rock pile (on lot 13 and in the bed of proposed Edith Lane) from the bordering vegetated wetland on lots 16 and 17; it is, accordingly, an intermittent stream flowing between two wetland resource areas [see 310 CMR 10.04 (1983 rev.) 10.04, seventy-eighth]. TR.IV, 31-32, 40, 43, 78-79, and Exhibit D-1 at 6-7 [[both: testimony of Department's expert, Tracy Peter, as to evidence and flow of this intermittent stream, including water flow in a distinct path, an absence of leaves where water would flow, a continuous band of wetland indicator species interrupted only by the rock pile, and a depression just before the rock pile into which water would flow].

47. There is also sufficient evidence that an intermittent stream flows through the Fox Pond wetland to an outlet at property located at the southeastern end of this wetland. TR.I, 101-02 (testimony of Dr. Lisa A. Standley that an intermittent stream flows from lot 13 to the outlet at the Chesterton property, which is at the southeast end of the Fox Pond wetland).

48. Accordingly, the Fox Pond wetland borders on an intermittent stream, as intermittent stream is defined in the Regulations at 310 CMR 10.04 (1983 rev.) seventy-eighth.

49. Bradshaw asserts that there is a ridge, saddle, or other such topographical feature which blocks the flow of flood waters arising out of the 100-year frequency storm from the Fox Pond wetland area to Disputed Area 1.

50. The existence of such a ridge, saddle or other topographical feature has not been shown with a reasonable

degree of certainty; the evidence shows, to the contrary, that there exists adjacent to the Fox Pond wetland and within Disputed Area 1 an area that is not physically separated from the Fox Pond wetland by a ridge, saddle, or other such topographic feature. This finding is based upon:

***12 a.** Bradshaw's own evidence and testimony on this issue. Compare Exhibit P-17, p.2 ("Cross Section Demonstrating the Containment of Surface Water Within Fox Pond During the 100 year Storm Event," December, 1988) and TR.I, 67-68, 72-73 [both: during 100 year storm event, water in Fox Pond wetland would not flow toward depression in lots 7 and 8, and would not overtop el. 169.2, and water would not flow around points at el. 169.2 through points of lower elevation in the area between Fox Pond wetland and Disputed Area 1, because there is a ridge, saddle or high point traversing this area that would block the flow of water] with Exhibit P-17, p.1 (topographic survey of Fox Pond wetland and Disputed Area 1, showing elevation contours in half-foot intervals, December 14, 1988) and TR.I, 71 [both: Exhibit P-17, p.1 does not show any contour line for el. 169.2 in the Fox Pond wetland or adjacent areas of Disputed Area 1, including Lot 10 and the proposed "cul-de-sac;" instead, el. 169.2 appears at several elevation points, along with points of lower elevation (including elevations between and including el. 168.2-169.0] for which contour lines are also not shown; and with TR.I, 68-69 [applicant's civil engineer/registered land surveyor's statement that he would "reserve...comments" on whether water would flow out of Fox Pond wetland toward depression in Lots 7 and 8 during storms of greater frequency than the 100 year storm"] and TR.I, 72-73 [area in question is "very flat" and topographical change where ridge or saddle is allegedly located is "so...subtle a change that we couldn't walk out there-- and I don't think anyone can-- and say: this is exactly where that ridge is."]; and also with December 12, 1988 site visit [at which no definite, continuous ridge or saddle separating the Fox Pond wetland from Disputed Area 1 was established in the field or shown to be clearly visible].

b. The Department's testimony on this issue. TR.IV, 71-73 [testimony that there "appears to be a topographic high" that was "less than six inches" higher than the Fox Pond wetland, but "(t)here appear to be some breaks in there...."].

51. The contour of the maximum lateral extent of flood waters that will theoretically result from the 100-year frequency storm and that will rise from the stream on which the Fox Pond wetland borders is at el. 169.2. Exhibit P-17; TR.I, 67-68, 72-73.

52. The area adjacent to the Fox Pond wetland, and within Disputed Area 1, that is not physically separated from the Fox Pond wetland by a ridge, saddle or other such topographic feature (Finding/Conclusion 50, supra), has an elevation at and below el. 169.2.

53. This area, at or below el. 169.2, extends from lot 11, through the cul-de-sac, and into lot 8 (falling roughly within the closest contour shown by Bradshaw's surveys, at el. 170 on Exhibit P-17, p.1 and Exhibit P-2).

54. This area has a low, flat topography similar to that of the Fox Pond wetland, as evidenced by the following:

***13 a.** There is some evidence in the record that this area is, in whole or in part, wet for at least part of the year. Exhibit I-4, attached "Photographic Sheets" 3, 4 and 5 (photographs taken in April, 1987 showing standing water in areas of lots 7, 8, 9, 11 and the proposed cul-de sac, and also showing root buttressing on trees in the area of the proposed cul-de-sac); TR.IV, 63-67 (testimony of Department's expert, Tracy Peter, regarding conditions shown by these photographs including buttressing, and testimony that buttressing occurs when trees lie within saturated soils);

b. The conditions shown by these photographs are not noticeably different from the wet conditions visible in the Exhibit I-4 photographs showing portions of the Fox Pond wetland at the same time of year;

BRADSHAW

- c. Portions of the Fox Pond wetland lie at or below el. 169.2 (Exhibits P-2 and P-17, p.1); and
- d. There has been no showing with a reasonable degree of certainty that there is a ridge, saddle, or other topographical feature which blocks the flow of flood waters from the Fox Pond wetland to that portion of Disputed Area 1 lying at or below el. 169.2. Finding/Conclusion 50, supra.

55. Therefore, with the exception of any areas of Disputed Area 1 on lots 9, 10 and 11 that may later be found to lie within the actual outer boundary of the Fox Pond wetland, that portion of Disputed Area 1 lying at or below el. 169.2 in lots 8, 9, 10 and 11 is Bordering Land Subject to Flooding, as defined in the Regulations at 310 CMR 10.57(2)(a), and therefore an Area Subject to Protection Under the Act.

56. The Remainder of Disputed Area 1 (that portion which is not bordering land subject to flooding or which, upon further analysis, will not be found to lie within the Fox Pond wetland boundary) is not a bordering vegetated wetland as alleged by the Intervenor, for the following reasons:

- a. As noted above (at Findings/Conclusions 24, 29 and 35), the evidence supports the conclusion that the Intervenor's wetland flags in Disputed Area 1 do not indicate a wetland boundary.
- b. Although there is evidence of isolated pockets of wetland vegetation on lots 8-11, there is insufficient evidence of any stream (as defined in the Regulations) bordering these vegetative pockets. ✓

57. That portion of the Remainder of Disputed Area 1 which lies within a line extending 100 feet horizontally from the Fox Pond wetland boundary (as determined following the required further analysis) or from el. 169.2 (the boundary of the bordering land subject to flooding), lies within the Buffer Zone of these areas [see definition of Buffer Zone at 310 CMR 10.04 (1983 rev.), eighteenth].

FINDINGS AND CONCLUSIONS AS TO DISPUTED AREA 2 (Within Proposed Eugene Drive and Lot 6)

58(a). The bordering vegetated wetland alleged by the Intervenor to exist in Disputed Area 2 is located in a bowl-like, oval-shaped depression extending roughly from the west side of proposed Eugene Drive into the western portion of lot 6.

*14 (b). The stream alleged by the Intervenor to exist in Disputed Area 2 is said to flow intermittently from this alleged wetland downhill to the southeast, along a "line of red maples," through lot 6 and into an area of wetland vegetation along the eastern side of lot 7.

59(a). The regulatory requirement that a stream flow in a "definite channel" [[310 CMR 10.04 (1983 rev.), seventy-eighth] is functional- the "definite channel" must be able to serve as "a regular conduit and connection" of water flow (e.g., from a wetland to a culvert). In the Matter of Joan Francis and Victoria Tassinari, Docket No. 83-39 (Haverhill), Final Decision at 9, 1984 DEP 128, 136, 2 MELR 1151, 1159 (May 29, 1984).^[FN13]

(b). Therefore, the definite channel of a stream "need not be a distinct cut in the earth, nor need it be evidenced by a break in vegetation." Id. Instead, a "readily identifiable feature," such as a swale, can qualify as a definite channel where the flow of water along this feature "is also a clearly identifiable, measurable feature." Id.; Final Decision at 7, 1984 DEP at 134, 2 MELR at 1157. 3

60. Where the water flow of an intermittent stream is not observed directly, the definite channel of stream flow may be indicated in the field by a continuous line of observable features along a line, path, bed, break, depression or course that are consistent with stream flow; such observable features include banks, trapped silt or sediment, exposed sand and gravel, a thin or narrow band of wetland indicator species, disturbed leaf litter, a differ-

ence in the appearance of leaf litter or an absence of leaf litter, or leaf litter or other detritus trapped on the upstream side of plants. See TR.II, 127-28, 146-47 (Daylor testimony); see also TR.IV, 40, 52-53 (Peter testimony).

61(a). No water flow, no definite channel, and no flow in a definite channel was observed by the Department's expert witness in Disputed Area 2. TR.IV, 30, 42, 54-59 (Peter testimony); Exhibit D-3 (Peter supplemental pre-filed testimony), at 3.

(b). No water flow, no definite channel, and no flow in a definite channel was observed by Bradshaw's expert witnesses in Disputed Area 2. TR.I, 32-33, 61 (Dewsnap testimony) and Exhibit P-28 (Dewsnap post-hearing affidavit responding to question posed by Administrative Law Judge at adjudicatory hearing; measurable rainfall during three site visits by affiant in spring-summer 1986); TR.I, 120 and TR.II, 61 (Standley testimony); TR.II, 74-75, 109 (Sanford testimony); TR.II, 130-33, 153-55 (Daylor testimony).

62(a). At the December 12, 1988 site visit, there was pointed out no clearly visible, definite channel in the ground demarcating an intermittent stream; nor was there pointed out a clearly visible, continuous line of observable phenomena consistent with stream flow in a definite channel, such as those listed in Finding/Conclusion 60, *supra*.

(b). Although individual red maples were pointed out on lots 6 and 7 during the site visit, the alleged "line" of red maples was not clearly distinguishable from other trees or other possible "lines" of trees. In addition, the suggested "line" of red maples appeared to contain approximately the same number of individuals of species not listed in the Act and not listed as wetlands indicator species in the wetlands identification references in evidence (e.g., red oak, bracken fern and black huckleberry). See, e.g., the Department's Guide to Inland Wetlands in Massachusetts (March, 1988) and U.S. Fish and Wildlife Service, National List of Plant Species That Occur in Wetlands: 1988-Massachusetts [both included in Exhibit I-7].

*15 63. The topographic surveys in evidence show no contours defining a definite channel in the ground; instead, they show a concave-shaped valley that begins at the western end of lot 6 and extends down a widening slope into lot 7. Exhibit P-2; TR.II, 154 (Daylor testimony).

64. The evidence is therefore insufficient to establish, with any reasonable degree of certainty, that the alleged stream has a readily identifiable definite channel that serves, or can serve, as a regular conduit of clearly identifiable or measurable water flow.

65. The existence of the alleged stream in Disputed Area 2 has therefore not been shown with any reasonable degree of certainty.

66. No other stream or water body has been shown to be associated with the alleged wetland in Disputed Area 2.

67. As there is no showing that there exists any stream or other water body on which the alleged wetland in Disputed Area 2 borders, the alleged wetland cannot be a bordering vegetated wetland. See 310 CMR 10.55(2)(a).

68. There is no evidence in the record that this alleged wetland meets the definitional criteria for bordering land subject to flooding [310 CMR 10.57(2)(a)] or isolated land subject to flooding [310 CMR 10.57(2)(b)].

DISPUTED AREA 3

(3 Small Areas Adjacent to Eastern Edge of Bordering Vegetated Wetland on Lots 16 and 17)

69(a). Bradshaw has agreed to treat a low area on lots 16 and 17 as a bordering vegetated wetland for the purpose of computing the total area of bordering vegetated wetland on the property that would be altered by the proposed project.

(b). It does not, however, concede that this area borders a stream.

(c). Bradshaw's experts do not concede that this area can be classified as a bordering vegetated wetland; their analyses treat it as a "basin-like depression" or "an isolated ponding area" occupied by a wetlands plant community that dominates all three vegetative layers. Exhibit P-21, Attachment VII at 3-5.

70. There is, however, sufficient evidence in the record that an intermittent stream flows from this area and into the Fox Pond wetland via a rock pile on lot 13 and in the bed of proposed Edith Lane. Finding/Conclusion 46, *supra*, and cited references.

71. Since this area borders on an intermittent stream, is in an area of relatively low topography, and contains a dominant wetland plant community, it is a bordering vegetated wetland under the regulatory definition. 310 CMR 10.55(2)(a).

72. The Intervenor's alleged wetland boundary on lots 16 and 17 roughly tracks Bradshaw's boundary except at three small areas, all located on lot 17. With the exception of these three small areas, therefore, the boundary of the bordering vegetated wetland on lots 16 and 17 has been established as being the line shown on Exhibit P-4.

73. Bradshaw's vegetative analysis at these three small areas shows that the ratio of the number of wetland species to the total number of plant species was 2:6 "upgradient" of the Intervenor's flags and 1:7 "downgradient" of these flags. Exhibit P-21, attached Report at 16-17.

*16 74. However, Bradshaw's analysis does not show species distribution, abundance or dominance within any of the three small areas, and the species ratios provided do not furnish sufficient evidence as to whether or not any of the three small areas are dominated by a wetland plant community.

75. Therefore, the evidence is insufficient to establish that the outer boundary of the bordering vegetated wetland on lots 16 and 17 does not extend into any of the three small areas in question.

SCHEDULING ORDER

In accordance with the above Findings of Fact and Conclusions of Law, the following schedule of further proceedings is ordered:

1. Each party shall have 7 days from the date of its receipt of this Tentative Decision to serve and file any objections thereto, together with supporting arguments. 310 CMR 1.01(10)(n).

2. The Tentative Decision has identified segments of the outer boundary of the Fox Pond wetland and the bordering vegetated wetland on lots 16-17 that have not yet been established by sufficient evidence of vegetative characteristics. Unless these remaining wetlands boundary segments are established by sufficient evidence of vegetative characteristics, no determination can be made as to whether or not the project, as now proposed, will alter more than 5,000 square feet of bordering vegetated wetlands or, therefore, whether the project as presently

proposed can be approved under 310 CMR 10.55(4). Accordingly:

(a) Each party shall have 30 days from the date of this Tentative Decision to prepare, file and serve its analyses and contentions regarding the remaining wetlands boundary segments only. These analyses and contentions shall be supported by sufficient data regarding vegetative characteristics, including but not limited to, distribution and dominance of plant species, and abundance of plants in any vegetative layer in which the wetlands species contribution is nonexistent or very low.

(b) The first page of this submission shall contain the caption of this proceeding and the title, "Further Supplemental Prefiled Testimony- Phase I-Remaining Wetlands Boundary Segments."

(c) A certificate of service shall appear on the last page of this submission.

(d) This submission shall be organized in a clear and concise manner. It shall state the party's evidence and contentions succinctly and in logical sequence. With the exception of large surveys, charts, etc., this submission shall be presented in a single volume. Brevity, clarity, focus upon wetland boundary determination, and ease of reading and reference by the presiding officer are of the essence.

(e) This material shall not include any testimony ordered stricken by the Tentative Decision.

(f) This submission shall not include any testimony, argument or analysis to the effect that:

- (i) plant species identified in the Act are not, or should not be considered, wetland indicator species; or that
- (ii) the presence of such plant species in or adjacent to an area found by the Tentative Decision to be a bordering vegetative wetland should be discounted in whole or in part on the basis of soil-related or other non-vegetative data.

*17 (g) No extension of time to prepare, file or serve this submission shall be granted on account of any difficulties, delays or problems occasioned by or associated with the search for, retention of, payment of, or change of, experts, consultants, advisors, counsel or representatives, or other similar ground.

3. A "mini-hearing" on the remaining wetlands boundary segments will be held at 10 a.m. on February 14, 1991 at the Department of Environmental Protection, 1 Winter Street, Boston, Massachusetts in the 3rd floor conference room. Any party requesting leave to transcribe the "mini-hearing" stenographically in accordance with 310 CMR 1.01(10)(k) shall file and serve a simple motion therefor at least 5 business days prior to the "mini-hearing."

4. A "Supplemental Tentative Decision" on the remaining wetlands boundary segments shall be issued within 30 days of the close of the "mini-hearing."

5. Each party shall have 7 days from the date it receives the Supplemental Tentative Decision to file and serve objections thereto, together with supporting arguments.

6. The Final Decision on "Phase I" shall order a schedule for:

- (a) the preparation and filing of surveys of the outer boundaries of the Fox Pond wetland, the bordering land subject to flooding in Disputed Area 1, the bordering vegetated wetland on lots 16 and 17, and the intermittent stream running from the bordering vegetated wetland on lots 16 and 17 to the Fox Pond wetland; and
- (b) the filing of calculations of the total area of bordering vegetated wetland that would be altered by the proposed project, consistent with the wetland boundaries shown on the post-Final Decision-Phase I surveys.

7. There will then be no adjudication of any remaining substantive or policy-related issues unless it shall appear from the post-Final Decision-Phase I surveys and calculations that the proposed project will not alter more than 5,000 square feet of bordering vegetated wetlands.

FN1 The property, the proposed lots, and the approximate location of agreed and alleged wetland resource areas on the property, are shown on the map appended to this Decision (at A-1). This map is a reduced and modified copy of two exhibits introduced into evidence at the adjudicatory hearing (Exhibit P-3 and an overlay, Chalk P- 16).

FN2 The name "Fox Pond" appears to derive from local custom and usage; there is no evidence that it is in fact a "pond" as defined in the Regulations at 310 CMR 10.04 (1983 rev.), sixty-second (surface area of at least 10,000 square feet observed or recorded during the last 10 years; never without standing water due to natural causes, except during periods of extended drought), and none of the parties has claimed that it is such a pond.

FN3 The expert witnesses who testified on Bradshaw's behalf, and the subjects on which they were qualified to give expert testimony, were: Dr. Lisa A. Standley, a wetlands biologist (wetlands identification and boundary delineation); Frederick D. Dewsnap, Jr., a Massachusetts civil engineer and registered land surveyor (hydrological calculations; surveying and topographical analysis); Robert F. Daylor, a Massachusetts registered professional engineer and registered land surveyor (engineering and hydrology); and Dr. Gary R. Sanford, a wetlands biologist (wetlands identification and boundary delineation).

FN4 The Department's expert testimony was presented by Tracy Peter, an environmental analyst employed by the Department; she was qualified to offer expert opinion regarding wetlands boundary delineation.

FN5 References in this Decision to the hearing transcript use the abbreviation "TR." followed by a Roman numeral indicating the volume and by the numbers of the page(s) within that volume where the cited testimony is to be found (e.g., TR.I, 17-18).

FN6 Hearing exhibits are marked, and are referred to in this Decision, as follows: petitioner Bradshaw's exhibits, P-1 through P-30; the Intervenor's exhibits, I-1 through I-7; and the Department's exhibits, D-1 through D-3.

FN7 The stricken material includes all of Mr. Donohoe's prefiled direct and rebuttal testimony; any and all affidavits sworn-to by Mr. Donohoe that were filed in this proceeding at any time; any topographical representations (maps, plans, etc.) prepared by Mr. Donohoe that were filed in this proceeding at any time, except to the extent that they show, or are used in other exhibits or in the map attached to this Decision (at p. A-1) to show or refer to, the location of the Intervenor's alleged wetland boundaries; and any and all attachments, exhibits or appendices to the Intervenor's post-hearing submissions that state, restate, tabulate, redact, summarize, analyze or interpret, in whole or in part, Mr. Donohoe's prefiled testimony, affidavits, opinions, topographical representations, or field work.

FN8 These are appended below as pp. A2 through A26.

FN9 These matters are hardly academic. Exclusion of the herbaceous layer would produce a total wetland species contribution to the vegetational community of 66 percent, thereby showing that the area sampled was vegetatively a wetland under the "percent cover method;" assigning the herbaceous layer less weight than the tree or shrub layers would produce a total wetland contribution to the vegetational community within a range between 43 and 66 percent and might therefore indicate that the area sampled was vegetatively a wetland (that is, if the

total wetland contribution were 50 percent or greater).

FN10 On that page of the Report attached to Dr. Standley's December 1, 1988 Affidavit, it is stated:

"An unbiased means of estimating total contribution of wetland species to the vegetational community is to average all layers. By averaging the three layers, each strata is assumed to be of equal value as an indicator of wetlands. On occasions, a single layer may be absent or in very low abundance. In such circumstance, inclusion of this layer produces a distortion in the average percent wetland composition value and an erroneous location of the wetland boundary. Experience of SES (Sanford Ecological Services) personnel has shown that, if total cover of a layer is below 10%, the layer should not be included in the average percent wetland composition calculation."

FN11 Exclusion of the herbaceous layer would produce a total wetland species contribution to the vegetational community of 62 percent, thereby showing that the area sampled was vegetatively a wetland under the "percent cover method;" assigning the herbaceous layer less weight than the tree or shrub layers would produce a total wetland contribution to the vegetational community within a range between 41 and 62 percent and might therefore indicate that the area sampled was vegetatively a wetland (that is, if the total wetland contribution were 50 percent or greater).

FN12 See footnote 10.

FN13 The presence of a definite channel also makes it possible to measure, analyze and interpret hydrological data pertaining to the stream and, therefore, to quantify the stream's contribution to two critical functions of the wetlands with which they are associated: flood control and storm damage prevention. See, e.g., Exhibit P-19 [Linsley, R.K., Kohler, M.A. and Paulhus, J.L.H., *Applied Hydrology* (McGraw-Hill, New York, 1949)], one of the learned treatises recognized by Bradshaw's hydrologist, Mr. Dewsnap, at 182, where it is noted that "(s)treameflow is the only portion of the hydrologic cycle in which moisture is so confined as to make possible reasonably accurate measurements of the volumes involved."

*18 Mark L. Silverstein
Administrative Law Judge

I hereby adopt, in its entirety, the foregoing Decision of Administrative Law Judge Mark L. Silverstein as my "Tentative Decision-Phase I" in this proceeding.

Daniel S. Greenbaum
Commissioner

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

II. Statement of Agreed Facts

2. Bradshaw Realty Trust (the "Petitioner") is the developer of that land which is the subject of the appeal filed in DEQE Docket No. 87-83 (hereinafter, the "Site").
Stipulation I, Paragraph 1.

3. The Department of Environmental Protection (formerly the Department of Environmental Quality Engineering) (the "Department") is the agency authorized by M.G.L. c. 131, §40, the "Wetlands Protection Act", to protect the interests of the Commonwealth pursuant to said Act. The Department has promulgated Wetlands Protec-

tion Rules and Regulations at 310 CMR 10.00. Daniel S. Greenbaum is the duly appointed Commissioner (the "Commissioner") of the Department.

Stipulation I, Paragraph 2.

4. The Intervenor are the following persons and residents of Winchester who intervened on August 4, 1987 in the appeal filed in Docket No. 87-83: S. Tod and Gloria Rosensweig, E. Charles and Lila Iana, Daniel J. and Natalie A. O'Connell, William F. and Mary A. Meader, Carolyn Thorne, Robert and Lucille Bourque, Joseph and Lorraine Tozza, William and Irene Strazzullo, David Brooks, John and Millie Johnston, Howard Wittett, Robert and Ivy Watson, David Wurtz and Keith Mullan, and Sean and Mary Ellen Lynch. Mary and Arthur Myette were added as Intervenor by letter of Intervenor's counsel dated May 19, 1988.

Stipulation I, Paragraph 3.

5. The Conservation Commission of the Town of Winchester (the "Commission") is the Commission duly appointed pursuant to M.G.L. c.40, Section 8C.

Stipulation I, Paragraph 4.

The Project

6. The project which is the subject of this appeal (the "Project" ^[FN1]) is a residential subdivision comprised of twenty three (23) house lots and two non-building lots which would serve as a compensatory flood storage area (Lot 5) and a detention area (Lot 8), located within the easterly section of the Town of Winchester, north and east of Bellevue Avenue, south of Forest Street and west of Interstate 93. The Project includes proposed Eugene Drive and Edith Lane, utilities and the locations of all houses and driveways. The total acreage of the Project is approximately nine acres. The Project is described in Exhibit "A" to the Petitioner's prefiled direct testimony filed in this case on July 7, 1988, as amended by the Affidavit of Robert F. Daylor, Lisa A. Standley and Gary R. Sanford, sworn to on December 1 and 2, 1988. (Exhibit P-1) The Petitioner's plans relevant to the adjudication of the location and boundary of Bordering Vegetated Wetlands on the Site are entitled as follows:

-- "Plan of Land Showing Existing Wetland Areas and Existing Topography," dated November 6, 1987 and revised to November 23, 1988 (Exhibit P-2)

*19 -- "Mitigating Measures: Areas Affected," dated November 6, 1987 and revised to November 23, 1988 (Exhibit P-3)

-- "Plan of Land Showing Wetland Flags (field locations of June, 1987 and June 1988)," dated November 6, 1987 and revised to July 5, 1988. (Exhibit P-4)

Stipulation I, Paragraph 5.

The Proceeding

7. This proceeding is an appeal filed by the Petitioner on June 22, 1987, under the Department's Rules for Adjudicatory Proceedings, 310 CMR 1.00 et seq. in which the Petitioner seeks to have the Commissioner supplant the superseding order of denial issued by the Department's Northeast Regional Office in DEQE File No. 346-68 on June 10, 1987 by issuing a final order of conditions allowing the Project. The applicable substantive regulations are the Department's Wetlands Protection Regulations, 310 CMR 10.00 et seq., rev. 1983.

Stipulation I, Paragraph 6.

History of the Project

8. A notice of intent dated September 12, 1986, was filed with and received by the Commission and the Depart-

ment in DEQE File No. 346-68. An amendment to the notice of intent was dated October 23, 1986 and filed with and received by the Commission and the Department on October 24, 1986. (notice of intent, as amended, entered as Exhibit P-5).

Stipulation I, Paragraph 7.

9. Pursuant to the provisions of M.G.L. c. 131, §40, a public hearing on the notice of intent was held by the Commission. As part of this hearing, a site visit was held by the Commission.

Stipulation I, Paragraph 8.

10. By an order of conditions dated November 20, 1986, (Exhibit P-6), the Commission approved the project as described in the notice of intent, as amended.

Stipulation I, Paragraph 9.

11. A request for a superseding order of conditions denying the project, (Exhibit P-7), was filed on December 4, 1986 by the following abutters: Gloria Rosensweig, Tod Rosensweig, Carolyn Thorne, Lucille Bourque, Mary A. Meader, Mr. and Mrs. E. C. Iana, Natalie A. O'Connell, William Strazzullo.

Stipulation I, Paragraph 10.

12. The Winchester Planning Board approved the definitive subdivision plan of the Project on February 10, 1987. The Town Clerk's Certification on the plan is dated March 13, 1987.

Stipulation I, Paragraph 11.

13. A site visit was held by the Northeast Region of the Department on May 14, 1987.

Stipulation I, Paragraph 12.

14. On June 10, 1987, the Northeast Region of the Department issued a superseding order of conditions and cover letter, (Exhibit P-8), denying the project.

Stipulation I, Paragraph 13.

15. On June 22, 1987, the Petitioner filed a notice of claim for an adjudicatory hearing, (Exhibit P-9), seeking a final order of conditions permitting the project.

Stipulation I, Paragraph 14.

16. On August 4, 1987, the Intervenors filed a request for intervention in the adjudicatory hearing filed in Docket No. 87-83, (Exhibit P-10).

Stipulation I, Paragraph 15.

17. On June 3, 1988, a pre-hearing conference was held pursuant to 310 CMR 1.01 (10)(a).

*20 Stipulation I, Paragraph 16.

18. A site inspection was held on June 16, 1988 and was attended by all parties, their technical experts and attorneys.

Stipulation I, Paragraph 17.

19. In preparation for the adjudicatory hearing, the Petitioner and the Intervenors submitted their wetland delin-
eations and all parties submitted prefiled and rebuttal testimony.

Stipulation I, Paragraph 18.

20. On August 19, 1988, Hearing Officer (now Administrative Law Judge) Mark L. Silverstein sent a notice of hearing to all parties. Mr. Silverstein remains the Administrative Law Judge assigned to this matter. (the "Administrative Law Judge").

Stipulation I, Paragraph 19.

21. A series of settlement conferences, including a site visit, were conducted by the Administrative Law Judge between September 14, 1988 and November 21, 1988. However, settlement was not possible because the Intervenor's disagreed fundamentally with the Bordering Vegetated Wetland boundary on the Site as delineated by the Petitioner and endorsed by the Department. The Administrative Law Judge ordered that the wetlands boundary issue be severed for separate and initial determination by adjudicatory hearing, and scheduled a view of the Site for December 12, 1988 and an adjudicatory hearing on the wetlands boundary issue for December 19, 20 and 30, 1988.

Stipulation I, Paragraph 20.

22. A view of the Site ("Site Visit") was conducted by the Administrative Law Judge on December 12, 1988 as part of the adjudicatory hearing. Representatives of all parties, including technical experts and attorneys were present. At the commencement of the Site Visit, the parties agreed to focus the Site Visit on the only significant areas in which the Intervenor's Bordering Vegetated Wetlands boundary differed fundamentally from the boundary agreed upon by the Petitioner and the Department, specifically, (1) the extension of the "Fox Pond" Bordering Vegetated Wetland to Lot 8 (hereinafter referred to as "Disputed Area 1") as shown on the Intervenor's sketch labeled "Topographic Plan of Land, Fox Pond Area, Forest Glen Estates, Winchester, MA" prepared by Brian Donahoe, dated December 5, 1988, (Exhibit I-1) and (2) an area of land within the proposed Eugene Drive and Lot 6, which the Intervenor's allege is connected by an intermittent stream to the alleged Bordering Vegetated Wetland on Lots 7 and 8 (hereinafter referred to as "Disputed Area 2") as shown on a sketch labeled "Brian M. Donahoe's Revised Bordering Vegetated Wetlands Line as to Lots 12, 11, 10, 9 and 6, Forest Glen Estates, October 19, 1988" (Exhibit I-2). In these areas, at the site visit, the technical experts for the Intervenor's, Petitioner and Department described the reasons for their respective delineations of Bordering Vegetated Wetlands.

Stipulation I, Paragraph 21.

See Chalk P-16, a reduced copy of which is included as Figure 1, for approximate locations of Disputed Areas 1, 2 and 3.

*21 Areas which Parties Have Agreed are Bordering Vegetated Wetlands.

23. In the course of the settlement conferences, it became apparent that the Department and the Petitioner disagreed about the characterization of only two areas on the Site. These areas have been referred to as Disputed Area A (Lots 16 and 17 to Lot 13) and Disputed Area B (that portion of proposed Eugene Drive located between Lots 22 and 4). The Petitioner maintained that neither an intermittent stream nor Bordering Vegetated Wetland existed in either Disputed Area A or B, while the Department maintained that an intermittent stream and Bordering Vegetated Wetland existed in both Disputed Area A and B. In order to resolve the only differences between their respective delineations of Bordering Vegetated Wetlands on the Site, the Petitioner and the Department stipulated that portions of Disputed Area A and Disputed Area B shall be defined as Bordering Vegetated Wetlands, as shown on the Petitioner's plans designated as Exhibits P-2 and P-3. The Commission joined in this stipulation. The Intervenor's also joined in this stipulation to treat Disputed Areas A and B as Bordering Vegetated Wetlands.

Stipulation I, Paragraph 22.

24. All parties also agree that the following areas, as delineated on Exhibit P-2 are Bordering Vegetated Wet-

lands:

- (1) the "Fox Pond" wetland area within Lots 10, 11, 12 & 13;
- (2) the wetlands area within the drainage and water easement on Lots 2, 3, 4 and 5;
- (3) the wetland area shown on Lots 22, 23 & 24 which extends southeasterly into proposed Eugene Drive. Stipulation I, Paragraph 23.

25. The Department and the Commission agree with the Petitioner that there are no Bordering Vegetated Wetlands on the site other than those that are depicted within the areas shown as "Bordering Vegetated Wetlands" or "areas of wetland vegetation" or "square feet to be filled to construct roadway" on Exhibits P-2 and P-3.

Stipulation I, Paragraph 24.

The Areas Remaining in Dispute.

26. The Intervenors maintain that Bordering Vegetated Wetlands exist in Disputed Areas 1 and 2 (described in Paragraph 22 above), and in three small areas located along the easterly edge of former Disputed Area A, defined as the area where the Intervenors' flags 1A, 2, 5, 6, 8 and 9 depart from the Petitioner's flags, as shown on an exhibit entitled "Intervenors' Wetland Boundary Flag Locations", (Exhibit P-11), which shall be referred to as Disputed Area 3. The Intervenors' delineation of Bordering Vegetated Wetlands is shown on "Map A - Pre-filed Direct Testimony of Brian M. Donahoe for the Intervenors, July 14, 1988, revised August 8, 1988" (Exhibit I-3) as modified by the sketch labeled "Brian M. Donahoe's Revised Bordering Vegetated Wetlands Line as to Lots 12, 11, 10, 9 and 6, Forest Glen Estates, October 19, 1988" (Exhibit I-2), and as further modified by the sketch labeled "Topographic Plan of Land, Fox Pond Area, Forest Glen Estates, Winchester, MA" (Exhibit I-1).

*22 Stipulation I, Paragraph 25.

See Chalk P-16, a reduced copy of which is included as Figure 1, for approximate locations of Disputed Areas 1, 2 and 3.

FN1 The term "project" is used here to refer to the project as approved by the Conservation Commission and denied by the Department in the superseding order.

Exhibit B

WETLANDS DETERMINATION OF APPLICABILITY, HAVERHILL (JOAN
FRANCIS AND VICTORIA TASSINARI) DOCKET NO. 83-039, (MAY 29,
1984)

WestlawNext

RELATED TOPICS

Environmental Law

Water, Wetlands, and Waterfront Conservation

Wetlands Commission

WETLANDS DETERMINATION OF APPLICABILITY, HAVERHILL (JOAN FRANCIS AND VICTORIA TASSINARI)
1984 WL 148079 (Mass. Dept. Env. Prot.)
Department of Environmental Protection May 29, 1984

Return to list 2 of 128 results Department of Environmental Protection

Commonwealth of Massachusetts

RE: WETLANDS DETERMINATION OF APPLICABILITY,
HAVERHILL (JOAN FRANCIS AND VICTORIA TASSINARI)

Docket No. 83-039

May 29, 1984

***1 Subject: Wetlands**

Procedural: Final Decisions

Judith Pickett, Esquire

Bramberg & Hanada

29 Commonwealth Avenue

Boston, MA 02116

Robert Pothier, Esquire

Pothier & Lambert

376 Main Street

Haverhill, MA 01830

Ted Rader

185 Salem Street

Bradford, MA 01830

Haverhill Conservation Commission

City Hall

Haverhill, MA 01830

Mr. Lawrence Gil

Department of Environmental Quality Engineering

Northeast Regional Office

323 New Boston Street

Woburn, MA 01801

Dean S. Spencer, Esquire

Department of Environmental Quality Engineering

One Winter Street

Boston, MA 02108

Final Decision

PROCEDURAL HISTORY AND SUMMARY OF ISSUES

This decision concerns a Request for Determination of Applicability filed by Joan M. Francis and Victoria R. Tassinari (the Applicants) on April 28, 1983 pursuant to the Wetlands Protection Act, G.L. C131 sec.40 and the Wetlands Regulations thereunder, 310 CMR 10.00. The Applicants requested a Determination of Applicability with regard to their property listed on Haverhill City map as #734, Block 11, and abutting the rear of Agawam Avenue.

The Haverhill Conservation Commission issued a Determination of Applicability on May 19, 1983, finding that the area in question was subject to the Wetlands Protection Act. The Applicants, on May 24, 1983, requested the Department to issue a Superceding Determination of Applicability which would find that their land was not subject to the Act. On May 27, 1983, the Applicants' attorney made a formal request to D.E.Q.E. to issue a negative Superceding Determination of Applicability based on the Applicant's contention that the land is an isolated wetland and thus not an area subject to protection under the Act since it does not border on any creek, river, stream, pond or lake pursuant to 310 CMR 10.02(1)(a).

The Department's Northeast Regional Office issued a Superceding Determination of Applicability on August 5, 1983, which generally concurred with the positive determination made by the Haverhill Conservation Commission and classified the site as a Bordering Vegetated Wetlands as defined in 310 CMR 10.55. The Department found that the wetland was drained by an intermittent stream into a 12" concrete culvert passing under Salem Street.

On August 17, 1983, the Applicants filed a Notice of Claim for an adjudicatory hearing with regard to the above described property on the grounds that the area is an isolated wetland not subject to the Wetlands Protection Act, and specifically that there is no intermittent stream on the property as defined in 310 CMR 10.04.

A pre-hearing conference was held on September 19, 1983. Present at that conference were Joan Francis, applying petitioner and her attorney, Judith Pickett, and Lawrence W. Gil of the Departmental staff. An abutter, Mr. Robert Gordon, was permitted to intervene. Mr. and Mrs. George Nice, Jr., represented by Attorney Robert Pothier were also permitted to intervene but did not participate in the pre-hearing conference.

*2 All parties agreed that the sole factual issue to be determined in the proceeding was whether the edge of the wetland borders a stream. Two subsidiary questions to be decided were the location of the edge of the wetland and whether "flow lines" described by Mr. Gil constituted a stream.

An Order for Further Proceedings was issued on January 12, 1984, setting out a schedule for submission of pre-filed direct testimony and a time and place for an adjudicatory hearing.

Pursuant to that order, Mr. Robert Gordon was to notify the hearing officer and all parties if he wished to continue to be a party to the proceedings. Having failed so to do, he is dismissed as a party.

(Mr. Ted Rader, an abutter, telephoned the hearing officer on March 7, 1984, requesting to be on the mailing list as he had purchased the Gordon property, but did not seek to intervene as a party.)

A hearing was conducted on April 18, 1984. The hearing was attended by Mr. Lawrence Gil of the Departmental staff; Dean S. Spencer, Esq., representing the Department staff; Mrs. Joan Francis and her attorney, Judith Pickett, Esq.; Robert Daylor and Ingeborg E. Hegemann of B.S.C. Engineering, witnesses for the applicants; Mr. George Nice, an abutter and his attorney, Robert Pothier, Esq.

STATEMENT OF ISSUES

The question presented is whether the subject land is an area Subject to Protection Under the Act as defined in the regulations 310 CMR 10.02 (a)-(e). More specifically,

the issue is whether pursuant to 310 CMR 10.02(1)(a), the freshwater wetland on the subject property borders on any stream, and is thus a bordering vegetated wetland as defined in 310 CMR 10.55(1). The parties agree that the subject property contains wetlands within the meaning of the Wetlands Protection Act based on inspections of the site and observations of the characteristic wetlands vegetation. The parties also agreed that the wetland area was not an Isolated Land Subject to Flooding. The sole factual issue to be determined was whether the edge of the wetland borders a stream. There was no dispute that if the channel entering a culvert under Salem Street which flows into Peabody Brook and the Merrimack River is connected by a "stream" to the wetland area on lots 11 and 20, the area would be subject to the Act.

SUMMARY OF TESTIMONY

Pre-filed direct testimony was submitted by B.S.C. Engineering, which had been prepared by Robert F. Daylor and Ingeborg E. Hegemann on behalf of the applicant. Based on resumes submitted along with pre-filed testimony, both were found to be qualified as experts and their testimony was adopted and became part of the record. Mr. Daylor was the first witness presented for cross examination and rebuttal purposes. Mr. Daylor testified to the presence of a facultative wetland present on lots 11 and 20 and described its drainage as exiting in a culvert which is part of the Salem Street drainage system.

He described a swale, a topographic feature he defined as distinct from a channel, which carried water from the edge of the wetland area towards the culvert under Salem Street where it eventually drained. He further stated that this feature was different from a channel. A channel would have a definite cut if it were a stream. One would expect to find a scouring effect caused by the velocity of the water, with a break in vegetation and gravel and sand lining the channel.

*3 Mr. Daylor testified on cross examination that when he visited the site on April 10, 1983, water was seeping or flowing the length of the swale to the culvert and that the swale conveys a portion of the water that leaves the wetland to the culvert. He testified that there is a definite channel within the meaning of the regulations for approximately 15 feet before entering the culvert. Eight to ten feet are lined with grass and not characterized by a break in vegetation. He sketched the wetland area and the swale on a map attached to Exhibit 6. Under cross examination by Mr. Pothier, he characterized the topographic feature previously described as a swale as a "drainage swale."

Ingeborg E. Hegemann was the next witness. She generally agreed with Mr. Daylor's description of the area and his conclusions. She agreed with the sketch made by Mr. Daylor on Exhibit #6. On cross examination she also described a fifteen foot channel entering the culvert on lot 20. She stated that the channel was grassy and the grass was the same grass as that in the swale.

Mr. Lawrence Gil testified for the Department staff. He adopted his pre-filed direct testimony which included his resume. Mr. Gil testified from a series of slides. He described the wetland area and the braided stream which eventually combines to form what he described as an intermittent stream which travels along the swale previously described by the witness for the applicant. He testified that the braided stream area is entirely within the wetland area. The swale touches the edge of of the wetland area. The water in the stream flowed in a positive gradient leaving the wetland and exiting through the culvert. The hearing officer denied the applicant's motion for a view upon finding the photographs and slides presented at the hearing sufficient to make a determination.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

There is a wetland area on lots 11 and 20 which is roughly delineated on Exhibit B of the applicant's direct testimony. The predominant vegetation includes typical fresh water wetlands vegetation including Red Maple, American Elm, Northern Arrowwood, Jewel Weed, Sensitive Fern, Dock, Meadow Sweet, Purple Loosestrife, and Cattail. The soils in this area are thick and poorly drained. More than 50% of the vegetational community consists of wetland species identified in C131, sec.40. The parties have all presented evidence consistent with these findings.

There is a topographic feature known as a swale which begins at the edge of the wetland area on lot 20. The swale extends to a drainage culvert which travels under Salem Street and eventually drains into the Peabody Brook and eventually the Merrimack River. The swale conveys water from the wetland downgradient to the culvert under Salem Street. The flow of water is intermittent, flowing during periods of heavy rainfall and runoff. The swale is a readily identifiable feature described by all the witnesses. The flow of water along the swale is also a clearly identifiable, measurable feature described by all the witnesses. The flow of water is a body of running water which is in a definite channel from where it leaves the wetland area to where it enters the culvert. There is no distinction between the vegetation in the area described as a swale by the witnesses for the applicant and the last 15 feet prior to where the culvert is located which they describe as a definite channel.

*4 All the witnesses were in basic agreement in their descriptions of the features present at the site. All were able to identify the flow of water in dispute and locate that flow on maps which were part of their testimony. Their descriptions included approximate measurements of the depth and breadth of the flow of water. Since the channel in question was definite enough in nature to be susceptible of observation, measurement and description by the parties, I find it to be a definite channel and thus an intermittent stream within the meaning of 310 CMR 10.04. It is worth noting that although the applicants would define channel differently, as a cut in the earth evidenced by a break in the vegetation, and a sand or gravel bottom, both witnesses for the applicant admitted that in much of the fifteen foot distance leading to the culvert area on lot 20 which they would characterize as a "channel", there is no break in vegetation and the grass present is the same as that present in the area they would characterize not as a channel but a swale.

There is no question that water regularly flows from the wetland to the culvert along the same path in an observable, measurable amount. Even under the definition of channel from the Glossary of Geology, A.G.I., provided by the applicants in their supplemental testimony, a channel can be defined as "... a natural passageway or depression of perceptible extent containing continuously or periodically flowing water, or forming connecting link between two water bodies; a water course."

Thus, even under a definition supplied by the applicants there need be no "cut in the earth's surface" and the applicants have admitted there need not necessarily be a break in vegetation. They are thus forced to argue that even though they are able to locate and describe a regular flow of water along an identifiable path, this is not a definite channel within the meaning of the regulations. However, the significance of a "definite channel" within the regulations is functional - the ability to serve as a regular conduit and connection from the wetland in question to the Salem Street drainage system, Peabody Brook and the Merrimack River. There is no dispute that this is the case. I therefore find the area in question is a bordering vegetated wetland connected by an intermittent stream to the Salem Street drainage system, Peabody Brook and the Merrimack River. An intermittent stream is one which is a body of running water, including brooks and creeks, which moves in a definite channel in the ground due to a hydraulic gradient. (310 CMR 10.04) Such a channel need not be a distinct cut in the earth, nor need it be evidenced by a break in vegetation.

CONCLUSION

The area in question is an Area Subject to Protection Under the Act, and any removing, filling, dredging of that area requires the filing of a Notice of Intent.

The parties to this proceeding are hereby notified of their right to file a motion for reconsideration of this decision, pursuant to 310 CMR 1.01(10)(p). Such motion must be filed within ten days of the postmark date of this decision and must include a statement of all matters alleged to have been erroneously decided and, if applicable, a statement as to any newly discovered matters or circumstances that have arisen subsequent to this decision. Any such motion shall be filed with the Hearing Officer and all parties.

*5 The parties to this proceeding are hereby further notified of their right to appeal this decision to the Superior Court pursuant to the Massachusetts Administrative Procedure

Act, G.L. c.30A, Chapter 14(1). The complaint must be filed in Court within thirty days of receipt of this decision.

Anthony D. Cortese, Sc.D.
Commissioner

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Exhibit C

IN THE MATTER OF LINDA-ANN CINTRON, TRUSTEE BUCKO FAMILY
REALTY, DOCKET NO. DEP-04-530, (NOVEMBER 10, 2005)

Division of Administrative Law Appeals
Commonwealth of Massachusetts

***1** IN THE MATTER OF **LINDA-ANN CINTRON**, TRUSTEE BUCKO FAMILY REALTY TRUST

Docket No. DEP-04-530
File No. SDA

November 10, 2005

RECOMMENDED FINAL DECISION

SUMMARY

The landowner petitioner failed to come forward with evidence to show that the area on its property vegetated with wetland plants did not border on a creek, river, stream, pond, or lake. It also failed to come forward with proof that the watercourse on an adjacent property is not a stream.

John P. Gallo, Esq. (Gallo, Walker & DiMarco, P. C.), **Malden**, for the Petitioner.

Tracy A. Peter, West Newbury, for the Intervenor.

Deirdre C. Desmond, Esq., Boston, for the Department of Environmental Protection.

INTRODUCTION

This wetlands appeal presents the question of whether a watercourse flows out of an area vegetated with wetland plants and into a catch basin that connects eventually to the Merrimack River. If so, and because the watercourse does not flow throughout the year, it would be an intermittent stream; and the vegetated area on the petitioner's property would be a "bordering vegetated wetland," a protected resource area under M. G. L. c. 131, § 40, the Wetlands Protection Act. Bordering vegetated wetlands are surrounded by a 100 foot buffer zone. Activities in the buffer zone that may alter the wetland also are regulated under the Act.

According to the Department of Environmental Protection and the intervenor, the watercourse satisfies the regulatory definition of a stream. The petitioner disagrees.

Following a hearing, I conclude that the watercourse is an intermittent stream. It borders the wetland vegetated area upgradient of it; and it flows intermittently due to a hydraulic gradient through a channel and swale system to a catch basin and eventually into the Merrimack River. Consequently, the bordering vegetated wetland on the petitioner's property falls within the DEP's jurisdiction under the Act. The DEP's superseding determination of applicability is thus made final.

DISCUSSION

Background

Linda-Ann Cintron, Trustee, Bucko Family Realty Trust, owns an undeveloped lot on Norino

Drive in West Newbury, Massachusetts. The lot originally was created as part of a subdivision known as "Eagle Estates" and was designated as Lot 1F. Sometime later, the petitioner acquired additional property at the rear of Lot 1F. The new lot is designated as Lot 23. The developed property to the west of Lot 23 is 2 Norino Drive.

According to a drainage plan for Eagle Estates prepared in 1997,^[FN1] the vegetated area extends across the back portion of 2 Norino Drive, Lot 23, and Lot 1G, which is to the east of Lot 23. According to the DEP and the intervenor, Tracy A. Peter, the stream flows out of the vegetated area on 2 Norino Drive.

Upon the creation of Lot 23, the intervenor became an abutter to it. Ms. Peter filed a request for a determination of applicability with the West Newbury Conservation Commission after she observed the cutting of vegetation in the wetland vegetated area on Lot 23.^[FN2] The West Newbury Conservation Commission failed to render a decision on the request. Consequently, the intervenor and the petitioner requested that the DEP issue a superseding determination of applicability.^[FN3]

*2 The DEP agreed with the intervenor that the vegetated area was within its jurisdiction. The DEP determined that the flow exited the vegetated area on the abutting property at 2 Norino Drive and flowed in a continuous path to a catch basin that eventually discharged to the Merrimack River. Accordingly, it issued a superseding determination of applicability that identified a bordering vegetated wetland on the petitioner's property. The petitioner requested an adjudicatory appeal.

Regulatory Framework

Isolated wetlands are not regulated under the Act, unless they qualify as isolated land subject to flooding.^[FN4] An area where 50% or more of the vegetation consists of wetland indicator plants and where saturated or inundated soil conditions exist is a bordering vegetated wetland provided it borders a creek, river, stream, pond, or lake. 310 CMR 10.55 (2)(a) and (c). "Bordering" is defined as touching.^[FN5] 310 CMR 10.04.

The petitioner does not contest that the vegetated area contains 50% or more of wetlands indicator species. In the petitioner's view the area is an isolated wetland because it does not border on a water body and does not meet the criteria to be considered isolated land subject to flooding. While the vegetated area is delineated on the 1997 plan of Eagle Estates, the request for determination did not seek, and the DEP did not identify, a precise boundary for the wetland area.

To be considered a stream, the watercourse must be a body of running water, move in a definite channel in the ground due to a hydraulic gradient, and flow within, into, or out of a resource area. 310 CMR 10.04. A portion of a stream may flow through a culvert. *Id.* A watercourse that does not flow throughout the year is an intermittent stream provided it is downgradient of all wet meadows, marshes, swamps, and bogs, *i.e.*, freshwater wetlands. *Id.*; 310 CMR 10.55 (2)(a) (defining freshwater wetlands as wet meadows, marshes, swamps, and bogs).

The sole issue in this appeal is whether, under the regulatory scheme just described, the wetland vegetated area on the petitioner's lot is a bordering vegetated wetland because a stream flows out of the portion of the vegetated area on the abutting lot at 2 Norino Drive.

Evidence and Argument

The landowner petitioner's sole witness was Joseph **Cintron**. He is the husband of the trustee, **Linda-Ann Cintron**, and a beneficiary of the Trust. He filed an affidavit and ten exhibits.

Exhibits 1-6 consist of correspondence and reports prepared by the petitioner's environmental consultants. The individuals who drafted the correspondence and reports did not file testimony or appear at the hearing for cross examination. Mr. **Cintron's** affidavit referenced the exhibits but did not offer any further testimony about them.

Mr. **Cintron** also testified about his observations during seven visits to the site between February 28, 2004 and April 21, 2004. He testified that he visited the property on days when it was raining or following a rain storm. Exhibits 7-10 were letters to the petitioner's counsel about his observations.

***3** The petitioner's rebuttal testimony consists of an affidavit signed by petitioner's counsel and photographs of the Trust property. The affidavit responds to the DEP's and the intervenor's testimony much in the style of an answer to a civil complaint, although it offers few facts to rebut their testimony. Rather, it offers argument challenging the witnesses' qualifications or alleges bias on their part. The petitioner also filed black and white copies of photographs taken by Mr. **Cintron** during the spring of 2004. Following the hearing, the petitioner filed color copies of the photos with hand notations identifying the date on which they were taken. These photographs were previously provided to the DEP and the intervenor during the superseding determination review.

The petitioner's testimony has several deficiencies. The various letters and reports prepared by its environmental and engineering consultants are hearsay. Hearsay may be admitted in administrative proceedings under the evidentiary standard recited at M.G.L. c. 30A, § 11(2), provided it is shown to be sufficiently reliable. No indicia of reliability have been shown here. Mr. **Cintron** admitted that he is not an expert in wetlands identification. He is not competent to adopt as his own the opinions expressed by his experts. Moreover, he has no firsthand knowledge of the underlying facts supporting their conclusions.

The letters and reports also may be viewed as unsworn testimony by witnesses who failed to appear for cross examination. *Matter of Bourne*, Docket No. 98-150, Final Decision, 6 DEPR 184, 185 (August 31, 1999). Such testimony cannot be taken into the record unless the other parties agree. 310 CMR 1.01 (13)(h) 3. No party moved to strike the exhibits on this basis, but nothing in the record explicitly supports a finding that the parties would agree to include the documents in the record absent an opportunity for cross-examination. Whether I strike the letters and reports from the record or allow them to remain but assign no weight to them, however, the end result is the same. I allow the documents to remain in the record, but I give them no weight because Mr. **Cintron** is not competent to adopt the expert opinions contained in the reports.

The photographs attached as Exhibit A to the petitioner's rebuttal testimony were not clearly identified as having been taken by Mr. **Cintron** or otherwise authenticated. Nonetheless, it is apparent that at least some of the photos show Lot 23 and 2 Norino Drive because I recognize the house and driveway at 2 Norino Drive, as well as the watercourse along the driveway, in several of the photos.^[FN6]

To summarize then, in considering the petitioner's case, I look to Mr. **Cintron's** direct testimony and Exhibits 7-10 relating to his observations, the photographs in Exhibit A of the rebuttal testimony, and the supplemental affidavit and color copies of the photographs submitted after the hearing.

Although no party moved to dismiss on this basis,^[FN7] I conclude that the petitioner's direct case is insufficient to meet its burden of going forward. 310 CMR 10.03 (2) provides that a person contesting the DEP's position in an appeal must come forward with credible evidence from a competent source in support of the position taken. In this case, the petitioner needed to come forward with credible evidence that the vegetated area did not border on a creek, river, stream, pond, or lake. See *Matter of Royal Oak Trust, Inc.*, Docket No. 2001-015, Recommended Final Decision, 8 DEPR 210 (October 25, 2001), *adopted by Final Decision*, 8 DEPR 210 (November 27,

2001). The petitioner failed to do so.

***4 Mr. Cintron** made no observations on 2 Norino Drive where the alleged stream exits the wetland area. His observations of Lot 23 are too limited to be of use in resolving the issue to be decided. To the extent the petitioner thought that the wetland vegetated area must border a water body on its property in order for jurisdiction to attach to that parcel, it is mistaken. Nothing in the wetlands regulations supports such a narrow view of wetlands jurisdiction.

The petitioner failed to come forward with proof that that the watercourse on 2 Norino Drive is not a stream, either because it does not border the wetland vegetated area, does not move in a definite channel due to a hydraulic gradient, or does not flow in a continuous path within, into, or out of a resource area. The petitioner's failure to support its position leads me to dismiss its appeal for failure to sustain a direct case.

I note as well that the testimony of the intervenor, Ms. Peter, and that of the DEP's witness, Rachael Freed, is more than sufficient to establish that the DEP has jurisdiction over the vegetated area on the petitioner's property. It also is more than sufficient to overcome the petitioner's allegations concerning inadequate expert opinion and witness bias. Accordingly, based on the testimony and documentary evidence of Ms. Peter and Ms. Freed, I find that an intermittent stream exits the vegetated area on 2 Norino Drive, flows in a path easterly and then curves around the driveway and flows southerly in a path adjacent to the driveway. The flow continues westerly through a culvert under the driveway and through a swale adjacent to the road along the front of 2 Norino Drive. It discharges to a catch basin that connects eventually to the Merrimack River.^[FN8]

Ms. Peter has been a conservation agent for several towns since 1995, most recently for the town of Newburyport. Previously, she was an environmental analyst in the wetlands division at the DEP for seven years. Ms. Freed has been employed by the DEP as an environmental analyst in the wetlands division since 1990.

Both witnesses relied on photographs taken by Ms. Peter in spring, 2004 of the flow through the defined channel in the backyard of 2 Norino Drive, through the shallow swale along the driveway, and along the front of 2 Norino Drive.^[FN9] Ms. Peter has observed the flow, which occurs over a period of approximately six weeks, every April since 2003. She did not photograph flow exiting the wetland vegetated area because it had ceased by June 2004 when she photographed that area. Her photographs show evidence of past flow, such as flattened vegetation and scouring, and at least one break in a slight topographic high, or berm, where the flow leaves the area. Her photographs show a channel through the grass across the backyard, then the flow flattens out and disperses somewhat as it curves around the driveway and flows south to the driveway culvert. The dispersed flow across the front of the yard to the catch basin is through a shallow swale.

***5 Ms. Freed's** testimony was similar in all material respects. In addition, Ms. Freed acknowledged that the swale next to the driveway was not cut into the ground, although she observed banks along its side. Nonetheless, she observed that the water flowed in a continuous path in an observable, measurable amount. The markings on the topography left by the flow distinguished it from sheet flow, in her opinion. Since Ms. Peter testified that the watercourse flowed at least once during the year, Ms. Freed testified that the flow occurred often enough to be considered intermittent. Ms. Freed testified that, in the DEP's view, flow that occurred less frequently than once each year was not frequent enough for jurisdiction to attach.

As Ms. Freed explained, an early wetlands adjudicatory appeal decision provides some guidance in this case. *In Matter of Tassinari*, Docket No. 83-39, Final Decision (May 29, 1984), the DEP Commissioner found that a drainage swale leading from a wetland into a culvert was a stream because "the channel in question was definite enough in nature to be susceptible of observation, measurement and description by the parties." The significance of the phrase "a definite channel"

in the wetlands regulations is functional and relates to whether the feature has the ability to serve as a regular conduit and connection from the wetland to the culvert and eventually to the Merrimack River. *Id.* The facts here are virtually identical to those in *Tassinari*. Accordingly, the evidence presented by the intervenor and the DEP was sufficient to establish the existence of an intermittent stream and a bordering vegetated wetland.

DISPOSITION

The petitioner's appeal is dismissed for failure to sustain a case. The superseding determination of applicability is made final.

NOTICE

This decision is a recommended final decision of the Administrative Magistrate. It has been transmitted to the Commissioner of the Department of Environmental Protection for his final decision in this matter. This decision is therefore not a final decision subject to reconsideration and may not be appealed to the Superior Court pursuant to M.G.L. c. 30A, § 14(1). 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 portion of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

Bonney Cashin
Administrative Magistrate

FN1. "Drainage Information," Eagle Estates, prepared by Christiansen and Sergi, March 26, 1997, revised through September 2, 1997.

FN2. Ms. Peter's request for a jurisdictional determination was limited to Lot 23. Accordingly, although the vegetated area extends beyond the borders of Lot 23, the findings and conclusions in this decision apply only to that lot. *Matter of Haddad*, Docket No. 98-028, Final Decision, 6 DEPR 172, 175 (August 11, 1999) (scope of a determination is limited by the scope of the request).

FN3. 310 CMR 10.05 (7)(b) 4 provides that persons permitted to request a superseding determination of applicability may request one when a conservation commission has failed to hold a public hearing or issue a determination within the time period specified in the Act.

FN4. "Isolated land subject to flooding is an isolated depression or closed basin without an inlet or an outlet. It is an area which at least once a year confines standing water to a volume of at least 1/4 acre-feet to an average depth of at least six inches." 310 CMR 10.57 (2)(b). No party contends that the vegetated area meets this definition.

FN5. The definition at 310 CMR 10.04 continues: "An area listed in 310 CMR 10.02 (1)(a) is bordering on a water body listed in 310 CMR 10.02 (1)(a) if some portion of the area is touching the water body or if some portion of the area is touching another area listed in 310 CMR 10.02 (1)(a) some portion of which is in turn touching the water body."

FN6. At the hearing, I asked that color copies be provided to me and the parties. They were provided, together with an affidavit from **Cintron**. DEP moved to strike portions of the affidavit as redundant and as exceeding the scope of what I asked the petitioner to provide. I deny the motion because Mr. **Cintron** merely repeated paragraphs of his direct testimony regarding his observations and assigned dates to the photos. Such redundancy is of no real consequence.

FN7. A motion to dismiss for failure to sustain a case may be brought following the petitioner's submission of its prefiled testimony or following the close of all the evidence. 310 CMR 1.01(11)(e).

FN8. West Newbury's highway superintendent told Ms. Peter that the catch basin connects to the Merrimack River. The petitioner did not refute the existence of such a connection.

FN9. Several of Mr. **Cintron's** photographs show water flowing at the same location along the driveway as the photographs submitted by the DEP and the intervenor.

2005 WL 4124542 (DivAdmLawApp)

END OF DOCUMENT

Exhibit D

WESTPORT – WETLANDS – SUPERSEDEDING DETERMINATION OF
APPLICABILITY WESTBROOK REALTY TRUST, (JUNE 2, 1989)



Daniel S. Greenbaum
Commissioner

Gilbert T. Joly
Regional Director

The Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of Environmental Quality Engineering
Southeast Region

Lakeville Hospital, Lakeville, Massachusetts 02347

(508) 947-1231, Ext. 680-684
June 2, 1989

Jerome B. Carr, Ph.D.
Carr Research Laboratory, Inc.
17 Waban Street
Wellesley, Massachusetts 02181

RE: WESTPORT--Wetlands - Superseding
Determination of Applicability
Westbrook Realty Trust

Dear Mr. Carr:

Following a review of the above-referenced file and in accordance with Massachusetts General Laws, Chapter 131, Section 40, the Department of Environmental Quality Engineering has issued the enclosed Superseding Determination of Applicability. The Department has determined that the area as described by the Request for a Determination of Applicability is not an area subject to protection under the Wetlands Protection Act.

Information submitted to the Department and on-site inspection of an old gravel pit area indicates three (3) pockets of wetland indicator species with drainage exiting each pocket or depression. In order for these areas to qualify as wetland resource areas, they must either isolate or contain flood waters within an enclosed basin (Isolated Land Subject to Flooding) or maintain a hydrological connection to an adjacent wetland resource area as bordering vegetated wetland.

By definition and in accordance with 310 CMR 10.57(2)(b)(1), Isolated Land Subject to Flooding is an isolated depression or closed basin with no inlet or outlet. All three (3) depressions at the site have exiting channels or outlets.

In order to qualify as bordering vegetated wetland, an intermittent stream must connect each depression with an adjacent wetland resource area. Each drainage channel leaving these depressions loses channel definition prior to flow into bordering vegetated wetland/salt marsh downgradient of these depressions. By definition, a stream (including intermittent streams) must convey water in a definite channel into or out of an area subject to protection under the Act. No vegetational connection (wetland indicator species) exists from the terminus of drainage channels to the bordering vegetated wetland/salt marsh area. Since no vegetational or hydrological connection exists at this site for the three (3) depressions, it is the Department's judgement that these areas are not subject to jurisdiction under the Wetlands Protection Act.

The Department has issued the enclosed Negative Superseding Determination of Applicability. This Determination addresses the three (3) depressions only as described by your Request for a Determination of Applicability. The Department notes that an extensive salt marsh area exists in this area, which may include an area of bordering vegetated wetland at the marsh periphery. Any work proposed either within a 100-year flood plain or within 100 feet from the edge of bordering vegetated wetland or salt marsh must be defined by a Request for a Determination of Applicability or Notice of Intent application separate from the Determination enclosed.

Very truly yours,



Robert P. Fagan, Regional Engineer
Resource Protection

F/GJM/jt

CERTIFIED MAIL #P 965 994 710
RETURN RECEIPT REQUESTED

cc: Conservation Commission

Westbrook Realty Trust
45 Boylston Street
Brookline, MA 02146

Victor and Leonard Fagundes
202 Pine Hill Road
Westport, MA 02790



Commonwealth of Massachusetts

City/Town WESTPORT

Applicant Carr Research Laboratory, Inc.

Determination of Applicability Massachusetts Wetlands Protection Act, G.L. c. 131, §40

From Department of Environmental Quality Engineering Issuing Authority

To Jerome B. Carr (Name of person making request) Victor & Leonard Fagundes (Name of property owner)

Carr Research Laboratory, Inc.

Address 17 Waban Street, Wellesley Address 202 Pine Hill Road, Westport, MA

This determination is issued and delivered as follows:

- by hand delivery to person making request on _____ (date)
- by certified mail, return receipt requested on June 2, 1989 (date)
P965 994 710

Pursuant to the authority of G.L. c. 131, §40, the DEQE has considered your request for a Determination of Applicability and its supporting documentation, and has made the following determination (check whichever is applicable):

This Determination is positive:

1. The area described below, which includes all/part of the area described in your request, is an Area Subject to Protection Under the Act. Therefore, any removing, filling, dredging or altering of that area requires the filing of a Notice of Intent.

2. The work described below, which includes all/part of the work described in your request, is within an Area Subject to Protection Under the Act and will remove, fill, dredge or alter that area. Therefore, said work requires the filing of a Notice of Intent.

3. The work described below, which includes all/part of the work described in your request, is within the Buffer Zone as defined in the regulations, and will alter an Area Subject to Protection Under the Act. Therefore, said work requires the filing of a Notice of Intent.

This Determination is negative:

1. The area described in your request is not an Area Subject to Protection Under the Act.
2. The work described in your request is within an Area Subject to Protection Under the Act, but will not remove, fill, dredge, or alter that area. Therefore, said work does not require the filing of a Notice of Intent.
3. The work described in your request is within the Buffer Zone, as defined in the regulations, but will not alter an Area Subject to Protection Under the Act. Therefore, said work does not require the filing of a Notice of Intent.
4. The area described in your request is Subject to Protection Under the Act, but since the work described therein meets the requirements for the following exemption, as specified in the Act and the regulations, no Notice of Intent is required: _____.

Issued by the Department of Environmental Quality Engineering.

Signature *Robert P. Fagan*
 Robert P. Fagan, Regional Engineer for Resource Protection

On this *2nd* day of *June*, 19 *89*, before me personally appeared Robert P. Fagan, to me known to be the person described in, and who executed, the foregoing instrument, and acknowledged that he/she executed the same as his/her free act and deed.

Jeanne E. Turney My commission expires *Sept. 21, 1995*
 Notary Public
 F/GJM/jt

This Superseding Determination does not relieve the applicant from complying with all other applicable federal, state or local statutes, ordinances, by-laws or regulations. This Superseding Determination shall be valid for three years from the date of issuance.

The applicant, the owner, any person aggrieved by this Superseding Determination, any owner of land abutting the land upon which the proposed work is to be done, or any ten persons pursuant to G.L. c. 30A, § 10A, are hereby notified of their right to request an adjudicatory hearing pursuant to G.L. c. 30A, § 10, providing the request is made by certified mail or hand delivery to the Department within ten days from the date of issuance of this Superseding Determination, and is addressed to: Docket Clerk, Office of General Counsel, Department of Environmental Quality Engineering, One Winter Street, Boston, MA 02108. A copy of the request shall at the same time be sent by certified mail or hand delivery to the conservation commission, the applicant, and any other party.

A Notice of Claim for an Adjudicatory Hearing shall comply with the Department's Rules for Adjudicatory Proceedings, 310 CMR 1.01(6), and shall contain the following information:

- (a) the DEQE Wetlands File Number, name of the applicant, and address of the project;
- (b) the complete name, address and telephone number of the party filing the request, and, if represented by counsel, the name and address of the attorney;
- (c) the names and addresses of all other parties, if known;
- (d) a clear and concise statement of (1) the facts which are grounds for the proceeding, (2) the objections to this Superseding Determination, including specifically the manner in which it is alleged to be inconsistent with the Department's Wetlands Regulations. (310 CMR 10.00) and (3) the relief sought through the adjudicatory hearing, including specifically the changes desired in the Superseding Determination;
- (e) a statement that a copy of the request has been sent to the applicant, the conservation commission and each other party or representative of such party, if known.

Failure to submit all necessary information may result in a dismissal by the Department of the Notice of Claim for an Adjudicatory Hearing.