

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-10585

TEN LOCAL CITIZEN GROUP and others,
Plaintiffs-Appellants,

v.

NEW ENGLAND WIND, LLC and
THE DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Defendants-Appellees,

*ON DIRECT APPELLATE REVIEW FROM ENTRY OF JUDGMENT
FOR THE DEFENDANTS IN THE SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT*

**AMICUS CURIAE BRIEF OF
ASSOCIATION OF MASSACHUSETTS WETLAND SCIENTISTS
IN SUPPORT OF AFFIRMANCE**

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February 16, 2010

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, Association of Massachusetts Wetlands Scientists states that it is a member-based, not-for-profit Massachusetts corporation. Exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, it has no parent company and has not issued any stock, so there is not any publicly held corporation that owns any such stock.

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STATEMENT OF ISSUES

Whether the Superior Court correctly ruled that proposed open-bottom culverts under bridges traversing but not touching certain streams were subject to the general standard (310 CMR 10.03(1)(a)(3)) for work in the Buffer Zone rather than the onerous five-part performance standards (310 CMR 10.54(4)(a)) for work on a resource area known as Bank.

INTEREST OF THE AMICUS

The Association of Massachusetts Wetlands Scientists, Inc. ("AMWS") files this brief in support of the Defendants-Appellees, Department of Environmental Protection and New England Wind, LLC, and pursuant to the Court's December 4, 2009 solicitation for memoranda from amicus curiae. AMWS is a non-profit Massachusetts corporation supported by its members.

Founded in 1992, AMWS has approximately 300 members from Massachusetts, Connecticut, Rhode Island, New Hampshire and Maine. The members are wetland professionals. They have diverse expertise in the identification, functions, design, construction, and regulation - at the local, state, and federal level -

of wetlands, streams, banks, and other similar areas. They are wetland scientists, educators, ecologists and other environmental experts.

Through the AMWS standing and ad hoc committees, meetings and interaction with local, state, and federal regulators, testimony at public hearings, and participation on government advisory committees, AMWS members have the opportunity to provide scientific expertise that can help shape local, state, and federal policies and regulations for wetlands and related areas such as streams and banks to streams.

AMWS' educational events, Internet presence, and publications make AMWS a leader in the field of wetland protection and related science and policy.

AMWS is familiar with the origin, purpose, nature and implementation of the Wetlands Protection Act, G.L. c. 131, § 40 (the "Act"), the Department of Environmental Protection's ("DEP") Wetland Regulations, 310 CMR 10.00 (the "Wetland Regulations"), and permit decisions and other agency and court rulings regarding how jurisdiction is determined on, in, and near protected Resource Areas, when the applicable standards are triggered, and the policy implications of stream crossing technologies.

The Superior Court decision should be affirmed, as its interpretation of the Act and Wetlands Regulations is consistent with the Act's purpose and years of implementation. Also, reversal would provide no incentive for use of the beneficial, advanced open-bottom culverts at stream crossings, resulting in decreased protection of wetlands and water bodies. The Hoosac Wind project uses for intermittent streams these open-bottom culverts that are generally required by the regulations and guidance documents referenced herein on perennial streams.

STATEMENT OF THE CASE

Plaintiffs challenge, under the Massachusetts Administrative Procedures Act, G.L. c. 30A, § 14, the June 20, 2007 Final Decision of the DEP Acting Commissioner ("Commissioner") that gave final agency permission under the Act, for Defendant New England Wind LLC to construct access roads for a commercial 30-Megawatt renewable energy project in the Berkshire Mountains of Western Massachusetts.

Superior Court Judge Frank M. Gaziano upheld the DEP Commissioner's Final Decision, ruling, among other things, that the DEP Commissioner correctly

interpreted the Wetlands Regulations as not requiring work in the Buffer Zone to meet the more stringent performance standards for work in the adjacent Resource Area, here known as Bank.

STATEMENT OF FACTS

AMWS adopts the Statement of Facts of New England Wind, LLC.

ARGUMENT

I. The Plaintiffs' Interpretation Is Inconsistent With How the Wetlands Protection Act and Regulations Have Been Implemented Since 1983

As AMWS members have learned, and AMWS teaches at its workshops on wetlands laws and regulations, the Wetlands Regulations since their modern codification have always meant that work in the Buffer Zone does not have to meet the performance standards for work in adjacent Resource Areas listed in the Act¹. Superior Court Judge Gaziano's statement that this is so is consistent with the Act and prior appellate court decisions. E.g., T.D.J. Development Corp. v. Conservation Comm'n of North Andover, 36 Mass. App.

Ct. 124, 126-27, cert. denied 418 Mass. 1103 (1994) (a notice of intent must be filed for proposed road in the buffer zone to Resource Areas only when such work will alter such adjacent areas).

This different standard for work in the Buffer Zone, not in Resource Areas, has served to keep work out of Resource Areas. It has the salutary effect of protecting the eight interests of the Act by avoiding work in the protected Resource Areas that serve those interests.

If it were otherwise, there would be little incentive for landowners, contractors, designers, planners, and developers, to keep work out of Resource Areas.

II. Plaintiffs' Reasoning That Buffer Zone Work Should Meet The Resource Area (Bank) Performance Standards Would Result In Greater Harm To Bank, Streams, And Other Water Bodies

As the DEP Commissioner correctly points out in her Final Decision, if adopted, Plaintiffs' assertion that open-bottom culverts will impermissibly alter Bank due to the potential for some plant mortality

¹ Here, the Resource Area at issue is that called Inland Bank. 310 CMR 10.54.

would lead, in this case, to the use of more environmentally damaging closed-bottom or traditional round culverts. See R.A.253, 270.

Traditional, round culverts sit directly in and on a stream. Often, portions of the stream and Bank have to be dug out to accommodate the culvert. The sides and sometimes bottom of the natural stream are converted to an artificial, often smooth and straight surface, commonly concrete or metal. Structures installed in this manner may result in damage to a stream by loss of wildlife habitat, decreased wildlife passage opportunities, increased flows during non-flood flows, and flow restriction during flood events.

By contrast, open-bottom culverts do not touch the stream or Bank, as they span above those areas. The stream and Bank are preserved. Stream flow is typically not disrupted by the placement of a pipe in the stream and on Banks. Generally speaking, no wildlife habitat within the stream or on the Bank needs to be replicated elsewhere.

Based on these scientific principles, the U.S. Army Corps of Engineers ("Army Corps") and DEP and others prepared stream crossing standards which favor,

and in some cases require, use of open-bottom culverts over closed, traditional round culverts. The University of Massachusetts-Amherst led a partnership of state and federal regulatory and natural resource agencies, academics, and private environmental consultants to develop guidelines for crossing streams and rivers.² First issued as a technical guidance in 2004, these stream crossing standards were formalized and published as the "Massachusetts River and Stream Crossing Standards" in March 2006, and soon incorporated into state and federal regulations. See R.A.250, n.2.

The Army Corps has required compliance with these new Stream Crossing Standards in its program for regulating work in wetlands and other aquatic

² This partnership included or received input from: Massachusetts Riverways Program, Massachusetts Watershed Initiative, Trout Unlimited, The Nature Conservancy, the Westfield River Watershed Association, ENSR International, Massachusetts Highway Department (MassHighway), DEP, MA Department of Conservation and Recreation, U.S. Fish and Wildlife Service, United States Geological Service, U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, MA Division of Fisheries and Wildlife, American Rivers, Connecticut River Watershed Council, Connecticut DEP, hydraulic engineering consultants, and experts in Stream Simulation approaches to crossing design.

environments in Massachusetts under Section 404 of the Clean Water Act, 33 U.S.C. 1344. The Army Corps requires or strongly encourages use of such open-bottom culverts in its equivalent programs in Connecticut, Maine, New Hampshire, Rhode Island, and Vermont.

As the Commissioner notes in her Final Decision, the Stream Crossing Standards' principle of utilizing an open-bottom culvert for a stream crossing was adopted by DEP as early as 1995. R.A.250, n.2. More recently, DEP has explicitly adopted the Stream Crossing Standards in its Massachusetts Wildlife Habitat Protection Guidance for Inland Wetlands, also issued in March 2006.

Other New England states have followed suit in publishing their own stream crossing guidelines or standards. In February 2008, the Connecticut Department of Environmental Protection published its "Stream Crossing Guidelines" which ". . . recommends installation of clear span bridges or bottomless arch culverts for the crossing of perennial watercourses." In May 2009, through the University of New Hampshire, New Hampshire published the "New Hampshire Stream

Crossing Guidelines", which specifically adopted as a template the Massachusetts Stream Crossing Standards.

AMWS has presented the Massachusetts Stream Crossing Standards and the science behind these standards at several workshops as well as covered the topic in its quarterly newsletter.

Thus, these open-bottom culverts employed in the Hoosac Wind project, while presumably more expensive to construct, are preferred over closed-bottom culverts in the scientific and regulatory community.

III. This Project Uses the Culvert Type Usually Employed For Perennial Streams and Rivers

The Stream Crossing Standards, discussed above, apply to help protect perennial streams and rivers, as the first two of the standards' three primary goals are to preserve and protect fish passage and to maintain the continuity of the benthic and aquatic elements of the river or stream. While these two goals may serve intermittent streams when they have water flow, the third goal may apply even when they are dry: to facilitate the movement of wildlife, including riparian wildlife.

The Stream Crossing Standards' goals are fully consistent with, and promote, the interests of the Act associated with Bank to protect wildlife habitat, fisheries, and public and private water supply, and to prevent pollution. G.L. c. 131, § 40.

Because the mountain streams at the Hoosac Wind project site are not fish-bearing streams, the Stream Crossing Standards would not require the project to use open-bottom culverts to cross the intermittent mountain streams. The Hoosac Wind project could have proposed traditional, round culverts for every crossing while still complying with the Wetlands Protection Act performance standards. This approach presumably would have been much less expensive. Nevertheless, the project proponent has agreed to use the more protective open-bottom culverts for ten of the twelve proposed access roadway crossings. R.A.691.

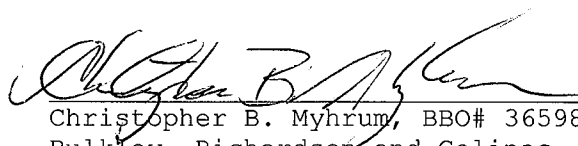
CONCLUSION

For all the above reasons, AMWS requests that this Honorable Court affirm the judgment of the Superior Court.

Respectfully submitted,

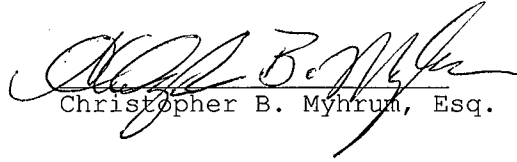
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CERTIFICATE OF SERVICE

I, Christopher B. Myhrum, certify that on February 16, 2010, I have served a copy of the foregoing document upon counsel below for all parties by first class mail, postage prepaid.


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