



Marcia Barrett, Docket Clerk
MA Division of Administrative Law Appeals
133 Portland St, 3rd flr
Boston, MA 02114

March 2, 2005

**RE: Docket No. DEP-04-734
(DEP Docket No. 2003-166)
DEP File # 059-0854
MWRA BLUE HILLS COVERED STORAGE/Quincy**

Dear Ms Barrett:

Please find enclosed for filing Petitioners's Closing Argument

Very truly yours

Thomas Palmer
on behalf of Petitioner Friends of the Blue Hills

CERTIFICATE OF SERVICE

I hereby certify that I served this letter and the attached Closing Argument by surface mail on March 2, 2005 to the following parties:

Rhonda L. Russian, MWRA, 100 First Avenue, Boston, MA 02129
Dorothy Montouris, DEP, One Winter St., 3rd flr, Boston, MA 02108

by email/PDF

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COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

In the matter of

Docket No. DEP-04-734

MWRA
Blue Hills Covered Storage Project/Quincy

DEP Docket No. 2003-166
DEP file # 059-0854

PETITIONER'S CLOSING ARGUMENT

On December 15 and 16, 2004 and January 5 and 6, 2005 a live hearing on this matter was held at the offices of the Division of Administrative Law Appeals at 133 Portland St., Boston, magistrate Mark Silverstein presiding. A transcript was subsequently prepared by Doris O. Wong Associates of Boston.

On December 15, 2004 Petitioner Friends of the Blue Hills' witness Thomas Palmer adopted his written testimony and was cross-examined by Applicant Metropolitan Water Resources Authority's representative Rhonda Russian. Also on this date Applicant's witnesses Michael McBride, Fred Brandon, and Edward Ionata adopted their written testimony and were cross-examined by Petitioner's representative Thomas Palmer.

On December 16, 2004 Applicant's witness Kenneth Deshais adopted his written testimony and was cross-examined by Petitioner's representative Thomas Palmer.

On January 5, 2005 Massachusetts Department of Environmental Protection's witness Rachel Freed adopted her written testimony and was cross-examined by Petitioner's representative Thomas Palmer.

On January 6, 2005 Department's witness Lisa Rhodes adopted her written testimony and was cross-examined by Petitioner's representative Thomas Palmer.

On January 28, 2005 magistrate Silverstein issued a directed decision in favor of Applicant MWRA on two of the three issues identified for adjudication and ordered all parties to file post-hearing briefs by March 2, 2005.

The remaining issue for adjudication is whether the project meets the variance standard at 310 CMR 10.05 (10)a(2): "that mitigating measures are proposed that will allow the project to be conditioned so as to contribute to the protection of the interests identified in M.G.L. c. 131, § 40."

Project mitigation is outlined on pp. 6-11 of the Variance issued by the Department on November 7, 2003. P. 6 states that

Mitigation for this project includes: 1) reservoir restoration and enhancement 2) on-site vegetated wetland habitat creation; 3) stormwater control and treatment from the new water storage tank site and erosion and sedimentation control; and 4) landscape and upland habitat restoration

1. How much mitigation is enough?

Petitioner Friends of the Blue Hills does not dispute that a modicum of mitigation is proposed for the net loss of 8-9 acres of protected wetlands that the project will generate. Furthermore, if the standard in the Department's regulations at 310 CMR 10.05 (10)a(2) is met whenever any mitigation is proposed, no matter how little, then the project meets the standard.

However, the Department has made abundantly clear in its regulations, policy, and practice that a modicum of mitigation—in other words, any amount more than zero—does not suffice to “contribute to the protection of the interests identified in M.G.L. c. 131, § 40.” Indeed, if a modicum were all that were required, then the Department’s implementation of M.G.L. Chapter 131 Sec. 40, the Wetlands Protection Act, would soon become pointless because, absent any relation between impacts and mitigation, wetlands would be no better protected than if there were no legislation purporting to do so. The same modicum could be proposed for any project, and no project could be denied on the ground that the proposed mitigation does not condition the work “to contribute to the protection of the interests” because any mitigation at all would meet the standard.

But the Department has not, in fact, allowed projects requiring a variance to go forward without providing more than a modicum of mitigation for impacts. Between May 1999 and March 2004 the Department issued sixteen variances for public projects and all of them, the permit at issue excepted, required that lost wetlands be replaced at ratio near to or greater than 1:1 (see attachment A).

Hence the Department has made evident, by its permitting practice, what sort of mitigation is necessary to contribute to the protection of the interests. For every project other than Blue Hills Covered Storage, it issued variances requiring public agencies to replace wetlands at a scale comparable to losses, and in each instance it quantified this replacement in terms of land area.

Wetlands replacement is costly and demanding work. If the Department considered that large public projects could contribute to the interests named in the Act without replicating wetlands on a scale comparable to losses, why did it require such replication in fifteen of sixteen variances issued since 1999?

A requirement to replicate lost wetlands at a ratio at or near 1:1 is not only a long-standing feature of variances issued by the Department, but is likewise consistent with law. The wetlands statute and regulations, read together, provide the boundaries of what the Commissioner may and may not allow as mitigation in a variance case.

The Wetlands Protection Act, M.G.L. c. 131, s. 40 states:

the department shall ... by written order ... signed by the commissioner or his designee, impose such conditions as will contribute to the protection of the interests described herein... Rules and regulations shall be promulgated by the commissioner to effectuate the purposes of this section

The Wetlands Regulations at 310 CMR 10.01(1) cite the Wetlands Protection Act, M.G.L. c. 131, s. 40, as its sole statutory authority. 310 CMR 10.01(2) states:

(2) Purpose. M.G.L. c.131, §40 sets forth a public review and decision-making process by which activities affecting Areas Subject to Protection Under M.G.L. c.131, §40 are to be regulated in order to contribute to the following interests:

- protection of public and private water supply
- protection of ground water supply
- flood control
- storm damage prevention
- prevention of pollution
- protection of land containing shellfish
- protection of fisheries
- protection of wildlife habitat

The purpose of 310 CMR 10.00 is to define and clarify that process by establishing standard definitions and uniform procedures by which conservation commissions and the Department may carry out their responsibilities under M.G.L. c.131, §40...

Thus the Wetlands statute requires the Department, via its Wetlands regulations, to effectuate the Act's purposes, among which is to impose on wetlands projects "such conditions as will contribute to the protection of the interests of the Act." The Wetlands regulations specifically concur that this is their

purpose. Thus the Wetlands regulations represent the Department's legally binding opinion as to the type of measures that will and will not contribute the protection of wetland interests.

The Wetlands regulations at 310 CMR 10.00 nowhere and under no conditions cite wetlands "enhancement" as acceptable mitigation for the destruction of protected wetlands except for a single variety of "limited" projects:¹ vegetation removal at airports.² For all other projects not requiring a variance the regulations require 1:1 replication for losses of bordering vegetated wetland, bank, and land under water that exceed certain thresholds. These thresholds and requirements appear at 10.55(4)b for bordering vegetated wetland, 10.54(4)a(5) and 10.60(3)a-f for bank, and 10.56(4)a(3-4) and 10.60(3)a-f for land under water.

2. How did MWRA's mitigation proposal develop?

Adequacy of mitigation for permanent wetland losses is an issue that Petitioner FBH first identified in writing in its April 20, 2000 comments on the Applicant's expanded Environmental Notification Form for the Blue Hills Covered Storage project dated March 15, 2000.³ The ENF did not propose any replication of wetland resource areas as mitigation for loss of over half of the reservoir.⁴

On January 31, 2001 Applicant MWRA submitted a Single Environmental Impact report. Like the ENF, it proposed no wetland replication to mitigate permanent impacts to over eight acres of protected resource areas in the Blue Hills Reservation.⁵

¹ Blue Hills Covered Storage is not a limited project because it will substantially enlarge existing structures via the importation of 100,000 tons of steel, concrete and fill. See CMR 10.53(3)i.

² CMR 10.53(3)n(5)e. Note that applicants for such projects are required to evaluate possibilities for wetland replication. MWRA never evaluated such possibilities for Blue Hills Covered Storage.

³ FBH's letter is included in Appendix B of Exhibit 5 of MWRA's prefiled testimony.

⁴ see "Mitigation Summary" on p. 16 of the ENF, included as Exhibit 4 of MWRA's prefiled testimony.

⁵ see "Mitigation Summary" on p. 41 of the Single EIR, included as Exhibit 5 of MWRA's prefiled testimony.

In a March 12, 2001 comment letter⁶ on Applicant's Single Environmental Impact Report, the Department stated

In reviewing details of the EIR, the Department has determined the project will have significant impacts on two wetland resource areas subject to protection under the Wetlands Protection Act Regulations; Inland Bank (310 CMR 10.54) and Land Under Waterbodies and Waterways (310 CMR 10.56). The General Performance Standards associated with both Inland Bank and Land Under Waterbodies and Waterways include provisions that any proposed work within these resource areas shall not impair the capacity of these resource areas to provide breeding habitat, escape cover, and food for fisheries; and shall not impair the capacity of these resource areas to provide important wildlife habitat functions. As noted in the EIR, proposed activity, including filling the eastern portion of the reservoir, will permanently impact 2,210 linear feet of Bank, and 8.2 acres of Land Under Water. It is the Department's opinion this proposed activity does not meet the General Performance Standards noted above, and therefore the project will require a Variance of the Wetlands Protection Act Regulations.

Here the Department rejected MWRA's bizarre claim that it could fill over eight acres of the reservoir without impairing its ability to support the fisheries and habitat interests.

On November 15, 2001 MWRA submitted a Final Environmental Impact Report.⁷ Curiously, the only project modification which could be construed to lessen or mitigate impacts to fisheries or wildlife habitat was a proposal to create a quarter-acre isolated wetland on old fill west of the reservoir.⁸ Evidently MWRA did not consider that the Department's opinion cited above that the proposed work would indeed impair the reservoir's ability to support the fisheries and habitat interests required it to propose additional mitigation that would materially affect the interests. Instead, it simply repackaged the application with a fig-leaf addition.

⁶ Appendix B of Exhibit 5 of MWRA's prefiled testimony.

⁷ Exhibit 6 of MWRA's prefiled testimony.

⁸ See p. 4 of MWRA Exhibit 6.

The Department made no public comment on the FinalEIR. In its certificate dated December 31, 2001, EOEa stated

I expect that the MWRA and the permitting agencies will consider the issues raised by the Friends of the Blue Hills regarding wetland compensation. I find that the review process on the Variance request can provide such additional review and impose further mitigation, as necessary.⁹

Despite this rather pointed hint, the Department's public review of the project, which began with MWRA's submission of a Notice of Intent in Quincy in May, 2002 and lasted until the variance issued in November, 2003, did not succeed in modifying plans in the slightest in regard to mitigation for large-scale impacts to the fisheries and habitat interests. No replication of land under water, bank, or bordering vegetated wetland was proposed. Statements by DEP, EPA, and the Quincy Conservation Commission that mitigation was inadequate did not convince the Applicant of the need to supply such mitigation for permitting purposes.¹⁰

3. How much mitigation is proposed?

We have rehearsed this history to underline the Department's opinion stated in its March, 2001 MEPA comment that the aspects of the project which made a variance necessary were unpermissible impacts to fisheries and habitat interests associated with the loss of over eight acres of bank, bordering vegetated wetland, and land under water. Therefore a review of proposed mitigation pursuant to the variance standard at 310 CMR 10.05 (10)a(2) ought properly to focus on the extent to which mitigation addresses such impacts to the fisheries and habitat interests. Mitigation for impacts to other interests,

⁹ Exhibit 7, MWRA prefiled testimony.

¹⁰see pp. 35-37 of FBH's prefiled testimony.

such as storm damage prevention and prevention of pollution, are of lesser relevance because they do not address the impacts which prompted the variance requirement.

In live testimony given on December 5, 2004 MWRA project manager Fred Brandon tallied mitigation costs associated with the project. He stated that these costs amounted to \$6.6 million, increasing total project cost by thirty-five percent. These costs included:

- \$4.3 million — for backfill and structural upgrade to bury tanks
- \$1.5 million— for new dam dividing the reservoir in two
- \$431,000 — regrading for proposed peninsula and shelf, 10,000 sq ft of out-of-kind replication, and fish restocking
- \$300,000 — landscaping, upland habitat restoration, and public access for parks and recreation

Note that of these three items only the third, which represents seven percent of Brandon's \$6,531,000 estimate of mitigation costs, directly addresses impacts to the fisheries and habitat interests. The fourth item is for work in uplands which will have little if any impact on these interests, and the first two, representing eighty-nine percent of total mitigation costs, will in fact impair the interests further, because they will require additional permanent filling of resource areas that support the interests.

During cross-examination on December 16, 2004, the following exchange occurred between environmental scientist Edward Ionata, testifying for MWRA, and Thomas Palmer, representing FBH.

PALMER: So the fill [over the tanks], although quite expensive, is not wetlands mitigation, right?

IONATA: Not directly.

PALMER: The dam will fill more land under water, won't it, like the fill? So both of the things that I think you might have been referring to when you spoke about costly mitigation being performed at the reservoir, both of these things, although they might be referred to as 'mitigation' in some context, will actually result in additional filling of wetlands, correct?

IONATA: Correct.

A table on p. 25 of the variance sums the amount of wetlands to be permanently eliminated by the project at approximately 8.7 acres, or 378,972 square feet. The variance requires on p. 27 that a total of 10,000 square feet of new wetlands be created. Hence the variance approves a mitigation-to-impact ratio of about 1:38, in that one square foot of wetlands will be created for every 38 square feet that are lost.

A 1:38 ratio is not remotely adequate to fulfill the performance standards for replication set forth at 10.55 through 10.60, which generally require that “the replacement area shall be equal to the lost area.” The lost area is 8.7 acres, and the replacement area is less than one-quarter acre. The replacement area is less than 3% of the lost area. Therefore replication or replacement of lost wetlands—the predominant form of mitigation prescribed and deemed acceptable in 310 CMR 10.00 for impacts to fisheries and habitat interests supported by bank, bordering vegetated wetland, and land under water—is not a significant part of the variance.

The variance also cites “restoration and enhancement” as mitigation that contributes to the interests, and describes these actions on p. 7. All the actions will take place in the surviving portion of the reservoir after more than half is permanently filled. The actions are of a sort that generally require permits, rather than justify awarding them. Much of the testimony at the recent hearing concerned whether these actions will produce any improvement over existing conditions with regard to the area’s ability to support the fisheries and habitat interests. In fact, they will produce no such improvement; they will merely substitute shallow habitat for deep habitat, and replace existing soils, vegetation, and fish with rearranged or imported materials.

Although the variance accepts the Applicant's claim that these actions will improve habitat for certain species,¹¹ it ignores their impacts on others. Fish habitat, for instance, will not benefit when MWRA "mitigates" for project impacts by filling an additional 9900 square feet of open water for the proposed peninsula. The notion that one can mitigate for major losses of wetland habitat by reworking existing habitat is specifically rejected by the preamble to the Department's 1987 regulatory revisions, which states at III(B) that

Unfortunately, what is excellent habitat for one species is frequently inadequate for another. For this and other reasons, scientists are currently incapable of setting objective standards for rating the relative value to all wildlife (mammals, reptiles, birds, and amphibians) of sites within most wetland resource areas.¹²

In short, the so-called enhancements to fisheries and wildlife habitat will provide at best a modicum of improvement over the current ability of the reservoir's western portion to support the protected interests. They will represent little gain either over the natural regeneration that will occur upon project completion if the proponent simply walks away from the site and doesn't rearrange soils or plant any cattails. Furthermore, the "restoration and enhancement" will do nothing to address the permanent loss of the 8.7 acre balance of the reservoir, as was admitted by Applicant's wetlands scientist Kenneth Deshais, who stated at a private pre-permit conference with the Department on April 6, 2001 that "we are not mitigating the eastern side."¹³ Similarly, the Department's wetland analyst Lisa Rhodes wrote that MWRA claims regarding habitat benefits of the proposed regrading and replanting in the remnant of the reservoir "would only be valid if both habitats were the same size after the project. In the case of this project, 8.7 acres of land under water habitat will be lost."¹⁴

¹¹p. 7, note 14

¹²see also p. 19 of Petitioner's prefiled testimony.

¹³p. 2 of conference minutes included in Exhibit O of Petitioner's prefiled testimony.

¹⁴see Exhibit M of Petitioner's prefiled testimony

4. What is the relation of the proposed mitigation to project impacts?

The variance counterbalances the effect of large losses of land under water, bank, and bordering vegetated wetland on the protected fisheries and habitat interests with a spritz of replication and a twist of restoration/enhancement. Whatever can be said for this mitigation, it will have little effect on total project impacts. These impacts, quantified as permanent wetland losses, will be approximately 8.7 acres before mitigation, and at least 8.45 acres after mitigation. Therefore the mitigation that, according the Department, “contributes to the protection of the interests” does so by reducing project impacts by less than three percent.

The relationship between mitigation and impacts is important because it is the standard used throughout the Department’s regulations for evaluating appropriate mitigation for projects not requiring a variance—in other words, most projects that the Department reviews. If Blue Hills Covered Storage were such a project, it could not be approved unless MWRA proposed to create 8.7 acres of land under water to replace the 8.7 acres it proposes to eliminate.

Projects requiring a variance differ from most projects because they involve greater impacts than can be allowed under the regulations. For instance, Blue Hills covered storage will eliminate seventy-two times the amount of land under water (5000 square feet) that can be eliminated without replication by projects not requiring a variance.

Evidently, then, the Department wishes to establish a two-tier system of requirements for applicants seeking approvals to fill land under water. Private proponents, who are generally not eligible for a variance, will not be permitted to eliminate over 5000 square feet of land under water significant to the habitat and fisheries interests without replicating on a 1:1 basis, as set forth at 310 CMR 10.56 and

10.60. Public proponents, in contrast, will sometimes be required to replace land under water on at least a 1:1 basis, as was MA Highway for projects in Franklin and Chelmsford,¹⁵ and sometimes will be excused from replacing any land under water, as was MWRA at Blue Hills Reservoir. Regardless of the extent of replication—zero percent or one hundred percent—such projects will be considered to “contribute to the protection of the interests” in accordance with the variance standard at 310 CMR 10.05(10)a(2).

Interestingly, the same proponents will sometimes be required to provide 1:1 replication, and sometimes will not be required to provide any replication. MWRA, for instance, was obliged by a variance issued in 1999 for its Norumbega covered storage project in Weston to create 2.1 acres of bordering vegetated wetland to replicate the 1.9 acres it proposed to fill (see attachment A). In contrast, the Department declined to impose any replication requirement on MWRA for losses of land under water at Blue Hills Reservoir, even though these losses are four times greater, in areal terms, than in Weston.

It is not easy to understand why fifteen variances issued since 1999 required 1:1 replication so as to condition projects to “contribute to the interests,” while a sixteenth required virtually no replication, and yet was deemed to meet the same standard. In fifteen projects the Department interpreted “conditioned so as to contribute to the interests” to mean achievement of a rough parity between impacts and replication—in the sixteenth, however, there was no parity. Instead, a net loss of 8.7 acres of protected wetlands was produced. In testimony offered under oath on January 6, 2005, Departments’ witness Lisa Rhodes, who has been professionally employed in applying for and issuing

¹⁵In Chelmsford MA Highway filled .37 acres of land under water and was required to replicate 3.62 acres. In Franklin MA Highway filled 1533 sq ft land under water and was required to replicate 7365 sq ft. See Attachment A.

Wetlands Act variances since 1989, stated that she was aware of no other variance issued by the Department permitting a net wetland loss of this magnitude.

5. Is the proposed mitigation consistent with the Department's no-net-loss policy?

In answer to an interrogatory submitted earlier in this proceeding by FBH to the Department, environmental analyst Lisa Rhodes wrote

DEP did not apply a "no net loss of wetlands" policy in reviewing MWRA's variance application ("Variance Application") and/or in conditioning the Variance it issued. In its review of the Variance Application, DEP applied the variance criteria established at 310 CMR 10.05(a) 1-3, inclusive.

It is hard to see how Rhodes' answer could have been otherwise, considering that the variance approves a net loss of 8.7 acres of protected wetlands. These wetlands comprise more than fifty percent of those where work will occur.

The Department's "no net loss of wetlands" policy was first formulated in 1990, and has never been disavowed. On December 19, 1990 EOECA Commissioner John DeVillars and DEP Commissioner Daniel Greenbaum signed a document entitled "No Net Loss of Wetlands Policy."¹⁶

This document states, in part:

On March 3, 1990, the Executive Office of Environmental Affairs and the Department of Environmental Protection joined ... in supporting a policy of 'no net loss of wetlands' in Massachusetts. We ... expressed a commitment to pursuing this policy...in order to achieve the short-term goal of no net loss and the longer-term goal of an increase in our wetlands base.

The document then cites the Massachusetts Water Resources Commission's parallel "no net loss of wetlands" policy¹⁷ and continues:

¹⁶included in Petitioner's December 8, 2004 Motion to Supplement.

¹⁷included in Petitioner's December 8, 2004 Motion to Supplement.

This policy stresses a hierarchy of avoidance of wetlands losses and impacts; minimization of unavoidable losses and impacts; and mitigation, based on function and acreage, for losses and impacts which cannot be avoided or minimized. The same policy has also been adopted by DEP's Division of Wetlands and Waterways.

Most available evidence suggests that this policy remains in force. It was cited in a outline of permitting requirements¹⁸ published by EOE's Office of Coastal Zone Management in fall, 2003. A May 22, 2004 *Boston Globe* story¹⁹ on wetlands which quoted DEP assistant commissioner Cynthia Giles reported

When he was running for governor in 1990, William Weld promised "no net loss" of wetlands. That message was repeated by his successor, Paul Cellucci. Since then, "no net loss" has become a cornerstone of the state Department of Environmental Protection's policy and remains so under Governor Mitt Romney.

More recently, a *Globe* editorial²⁰ quoting DEP Commissioner Robert Gollidge remarked that "these efforts [aerial monitoring] are laudable as a way to uphold the state's "no net loss" policy on wetlands." There is no evidence that the Department asked the *Globe* to publish a correction stating that these pieces referred to a policy that has been discarded.

If the Department has a "no net loss of wetlands" policy, why was that policy not applied to Blue Hills covered storage?

6. Is the proposed mitigation approved by the variance consistent with the Department's regulations, practice, and policy?

Fifteen of the sixteen variances issued between 1999 and 2004 and outlined in Attachment A share certain characteristics. We do not know, for instance, whether the Department's "no net loss of wetlands" policy was applied during their review, but we do know that all fifteen are consistent with that

¹⁸included in Petitioner's December 8, 2004 Motion to Supplement.

¹⁹"State seen weakening on wetlands" by Beth Daley, p. 1, *Boston Globe*, May 22, 2004.

²⁰"Don't go near the water," *Boston Globe*, December 10, 2004.

policy, since all fifteen require that permanent wetland losses be compensated by wetland replication of comparable extent.

We also know that these fifteen variances (all except Blue Hills covered storage) are consistent with the Department's view of what type of mitigation contributes "to the protection of the interests," as embodied in the regulations implementing the Act. These regulations, as stated on page five of this memo, represent the Department's legally binding opinion as to the type of measures that will and will not contribute the protection of wetland interests. None of the fifteen variances rely on wetland "enhancements" to meet the mitigation standard at 310 CMR 10.05(10)a(2). Nor do they subscribe to the notion that one can compensate for major wetland losses by "restoring" a site that would need no restoration if one had not already drained it and used it as a staging area to fill other wetlands. Instead, the fifteen proceed in tandem with the regulations by requiring wetland replication on a scale comparable to proposed losses, which is precisely the mitigation demanded by the regulations for all projects not requiring a variance. At many points in the current hearing a question was raised whether such parity between permanent impacts and replication is possible for Blue Hills covered storage; the fifteen variances demonstrate that not only is such parity routinely possible, but it has been routinely achieved.

In contrast, the sixteenth variance—the one awarded to MWRA for Blue Hills covered storage—is not consistent with the Department's policy, regulations, or practice. By approving a net loss of 8.7 acres of protected wetlands, it violates the "no net loss" policy, abandons the "replacement area shall be equal to the lost area" standard erected in the regulations at 310 CMR 10.60 (3)a, and departs radically from the Department's practice in the other fifteen variances, all of which required replication at, near, or above a one-to-one ratio for lost wetlands significant to the habitat interest.

Which of these two approaches to projects requiring a variance will allow such projects “to be conditioned so as to contribute to the interests” named in the Act? One approach—that embodied in the fifteen—allows projects that are not permissible otherwise to go forward, but requires them to conform in a larger sense to Department’s policy, regulations, and practice, as well as to the purposes of the Act. The other approach—embodied in the sixteenth variance—treats projects which cannot meet any one of the mitigation performance standards in 310 CMR 10.00 as thereby exempt from the operation of others, in particular requirements for area-for-area replacement of wetlands significant to the fisheries and habitat interests. If this second approach became the rule, applicants would be encouraged to propose work that cannot be permitted under the regulations, because their projects would thereby be diverted into variance-land, where there are no standards regarding adequacy of mitigation, provided the Commissioner gives the nod. The Blue Hills variance announces, in effect: “If you’re going to impact wetlands, make sure you impact plenty, because then you’ll need a variance, and variances ride free.”

The second approach does not and cannot condition work in or near wetlands so as to contribute to the protection of the fisheries and habitat interests because it encourages public agencies to fill wetlands. It provides this encouragement by removing a major disincentive to such filling—mitigation costs. By absolving wetland-fillers of responsibility for such costs, it transfers the real costs of wetland destruction from project proponents to people and the landscape. It makes no pretense of scaling mitigation to impacts; in its view, any mitigation satisfies the variance standard, whether it involves less than three per cent replication, or more than one hundred per cent.

Considering that projects require variances because they will eliminate more wetlands than can otherwise be permitted, the second approach has the effect of knocking the roof off the regulatory framework mandated by the Act. Projects that, by their nature, fill more wetlands than any others will

be subject to the least regulatory constraints. No mitigation proposal can be demonstrated to be inadequate, because the definition of adequacy will not be linked to Department's regulations, policies, or practice, but will lie hidden in the Commissioner's brain.

7. How does the Department justify issuance of a variance that flies in the face of its policy, regulations, and practice?

The Blue Hills variance nowhere explains why mitigation standards imposed in the fifteen other variances granted since 1999 were left on the doorstep for the project at issue. At the conclusion of the "Discussion and Findings" section (p. 9), the Commissioner simply states

As a result of the proposed mitigation, as supplemented by the attached Variance Order of Conditions, I find that mitigating measures are proposed and the project has been conditioned so as to contribute to the protection of the interests of MGL C. 131 S. 40.

Significantly, there is no reference in the decision to any other variances, or to the contrast they present with this one, or to other examples of the Commissioner's application of the mitigation standard at 310 CMR 10.05 (10)a(2). One looks in vain for any discussion of how the standard has previously been interpreted, or of the role it performs in the larger structure of the Act and regulations. Most of the decision, in fact, consists of a jumble of claims and assertions lifted from the applicant and repeated verbatim. There is no mention of the request in Quincy's September, 2002 Order of Conditions that 1:1 replication be required.²¹ The "no net loss of wetlands" policy, which the *Boston Globe* termed "a cornerstone" of the Department, makes no appearance. The issue of wetland losses is not treated as a phenomenon of any interest to the Commissioner; it is instead introduced as a concern of FBH:

In particular, the loss of over eight acres of protected wetland resource area in the Blue Hills and the lack of equivalent mitigation was cited throughout FBH's letter. FBH

²¹See No. 3 on p. 5, "Findings in Fact," of Exhibit 9 of Applicant's prefiled testimony.

reiterates the theme throughout their letter that there will be a “net loss” of land under water²²

Note the placement of “net loss” in quotes, as if some doubt exists whether such will occur. The discussion ends here. But concerns about wetland losses are not the sole province of FBH. There is, after all, a statutory responsibility incumbent upon the Department.

In fact, the Department makes no effort to justify the radical differences between this variance and the fifteen others in regard to required mitigation, because it never acknowledges any differences.

8. Is the project conditioned to support the water supply interest?

The one aspect of the project that the decision does cite as justifying special consideration regarding mitigation requirements is its purported support of the water supply interest. In the “Response to Public Comments” section (p. 10), the decision remarks

Although the reservoir is considered a wetland resource area under the WPA, it is manmade and its primary function is as a public water supply. Since the project is proposed for the protection of the public water supply, it will also serve that goal of the WPA.

It returns to this point at the end of the section (p. 11):

...the Department finds that mitigation measures are proposed that will allow the project to be conditioned so as to contribute to the protection of the interests identified in MGL c. 131 S.40. The Department further notes that this project, in and of itself, serves to protect a public water supply, an important interest of the Wetlands Protection Act.

Here the decision takes a project feature that allows it to meet the “overriding public interest” standard, and mistakenly applies it to the “mitigating measures” standard. It implies that because Blue Hills covered storage is a water supply project, it should be held to less rigorous standards than other public projects, because water infrastructure projects support an interest named in the Act.

²²Variance, p. 10

With this argument the Department reaches for authority unrelated to its review process. All the Department can do in this process is protect public interests associated with wetlands. It must do this by conditioning work proposed in or near wetlands to contribute to the protection of these interests.

Insofar as the existing reservoir supports the water supply interest, the Department can and must protect its ability support that interest. But the reservoir cannot continue to protect the interest if the Department permits it to be filled. At that point there is no longer any interest, because the reservoir is no longer a wetland and the Department has no jurisdiction. The Blue Hills variance is in fact harmful to the water supply interest supported by the reservoir, because the reservoir serves the interest by collecting and storing runoff from the adjacent hillside. Once the tanks eliminate more than half of it, it will hold much less water, and its ability to support the interest will be correspondingly weakened.

Here we see the Department attempting, in a confused manner, to make excuses for its determination to shield MWRA from the consequences of the Act. It suggests that because MWRA is in the water supply business, MWRA is privileged to fill wetlands without mitigating impacts to the degree required of other proponents. But this approach is, strictly speaking, illegal; the MWRA's enabling legislation specifically makes it subject to the Wetlands Protection Act.²³ If the legislature had wanted to exempt MWRA from the Act, it could have done so, but it deliberately rejected such exemption.

Perhaps we should expect the MBTA to be awarded similar relief from wetland mitigation requirements, because it pulls drivers off the roads and thereby lessens hydrocarbon pollution of certain wetlands, which is an interest of the Act.

²³*the authority shall also be subject to sections forty and forty A of chapter one hundred and thirty-one of the General Laws—Section 1(i) of Chapter 372 of the Acts of 1984, the MWRA Enabling Act, included as Exhibit 1 of Applicant's prefiled testimony*

We suggest that the Department's efforts to broaden its discretion by favoring certain abstract interests at the expense of the the particular wetlands that support them is unlawful and should be discouraged.

The Department's arguments here are reminiscent of similar statements advanced by its representatives at the hearing—one of whom, environmental analyst Rachel Freed, declared on January 15 that because MWRA is empowered under the Act to drain the reservoir for maintenance purposes, “they can do whatever they want.” On the contrary; both the Act and the regulations carefully distinguish between maintenance and “substantial change or enlargement” of a reservoir, and require standard notice and conditioning for the latter.

Similarly, several witnesses seemed to think that because the reservoir is subject to drainage for maintenance, its ability to support the fisheries and habitat interests is greatly impaired, and merits little protection. No matter that the reservoir has not been drained since 1977, or that it has been off-line since 1981, or that the MWRA has never used water from it. Here is an adverse impact which has little or no prospect of occurring and yet is offered as a boost toward much greater impacts arising from the completely different activities.

We submit that parties defending the variance would have no reason to advance such arguments if better ones lay in reach. But there are none such, apparently. What the hearing revealed was that there is no sound basis in the Act or the regulations for the variance's patent failure to require mitigation proportional to impacts at Blue Hills covered storage.

9. Could the Applicant have proposed mitigating measures that would have conditioned the project to contribute to the protection of the fisheries and wildlife habitat interests?

In a word, yes. In Weston, for instance, the local order of conditions requested MWRA to provide 1:1 replication on-site and off-site for permanent wetland impacts caused by the Norumbega tank, and MWRA complied with the request and performed the mitigation.²⁴

Perhaps the main reason the variance process succeeded in Weston but failed in Quincy can be found in MWRA's response to FBH's comment on its March, 2000 Expanded ENF:

The MWRA, after having conferred with federal regulatory agencies, has taken the approach of concentrating significant mitigation efforts on the area previously impacted by the original construction of the reservoir and directly impacted by the project. Concentrating mitigation efforts and available funds on the project construction area will allow a comprehensive approach to be taken, creating a functional meadow and pond ecosystem and addressing public access, safety, and aesthetic concerns.

This statement, rendered somewhat differently, might read

By limiting work to the project site, where existing constraints preclude replacement of lost resource areas at anything approaching a standard 1:1 ratio, we put all parties on notice that we have no intention of providing wetland mitigation commensurate with the major wetland impacts our project will generate, and we will resist any calls to provide such

Time would show that the second version was indeed lurking inside the first, although we did not see it immediately.

When these words were written MWRA had already received a variance for Norumbega covered storage, and had fresh experience with costs of real-world wetland mitigation. MWRA had also neglected to include such costs in the budget estimates²⁵ prepared in conjunction with its Blue Hills site alternative analysis, and so was perhaps unable to attach a figure to them. Hence it is perhaps not surprising that it chose to submit a project that simply left out wetland mitigation comparable to

²⁴see Exhibit G, photo 8 of FBH prefiled testimony

²⁵see October, 1998 *Blue Hills Covered Storage Project Cost Estimates of Alternatives for Screening*, included as the last appendix to the Applicant's Exhibit 4

impacts—the longer it refused to contemplate such mitigation, the less likely anyone might be to insist on it.

We cannot say that MWRA made any such calculation, but we do know that FBH was not alone in its view of the adequacy of the proposed mitigation,²⁶ even if at length all other critics were silenced.

The following appears in the Department's variance issued for Norumbega covered storage on May 14, 1999:

Due to the extensive area that will be occupied by the proposed storage tank, few opportunities for on-site replication exist. As a result, the only reasonable mitigation sites involved an off-site replication area. After a comprehensive search, an upland area, owned by the Applicant, was selected adjacent to the Weston Reservoir.

There is no reason MWRA could not have performed a similar search for possible off-site replication areas in the neighborhood of the Blue Hills. FBH immediately recognized that such action was necessary if proposed impacts to fisheries and wildlife habitat were to be adequately mitigated, and in its first written comment identified a site. But although MWRA reviewed dozens of locations for the proposed storage tanks, it never consented to look beyond the reservoir's boundaries for mitigation purposes. Here is a relevant exchange from the recent live hearing:

PALMER: ...My question is, how far did you look into replicating that land under water elsewhere? If you could not do it on the project site, what sort of review did you do of replicating land under water without reference to the site or off site—on site or off site?

IONATA: We did virtually no review of replicating land under water off the site.

²⁶see pp. 35-38, FBH prefiled testimony

This reminds me of a comment DEP staffer Michael Stroman made at the April 6, 2001 pre-permit conference, as reported in the draft minutes: “Mike said the CORP and Fish and Wildlife wanted adequate off-site mitigation.”²⁷

So, to repeat the question that opens this section: *Could the Applicant have proposed mitigating measures that would have conditioned the project to contribute to the protection of the fisheries and wildlife habitat interests?*

The answer is yes. Unfortunately, MWRA never took steps that would have enabled it to evaluate prospects for achieving such mitigation, as if it were afraid of what it might discover.

This is not to suggest that its permitting strategy was ineffective. In contrast to the other fifteen public projects listed in attachment A, Blue Hills never consented to provide anything approaching 1:1 mitigation, and yet emerged with a permit just the same. A success for the project team; a defeat for public interests in wetlands.

10. What should this court decide?

- A. We ask that the project be remanded to the Department so that it can at last be conditioned to protect the fisheries and habitat interests identified in the Act, as is consistent with law.

- B. We consider that these interests will not be protected until MWRA formally agrees to create or protect wetlands substantially equivalent to those it proposes to eliminate.

²⁷p. 2 of conference minutes included in Exhibit O of Petitioner’s prefiled testimony.

C. We do not object to work going forward as quickly as is convenient for the proponent, but we will not withdraw our opposition to the variance until a site and all necessary funding are secured—as we have said, we need an outcome, not a process.

Signed on this 2nd day of March, 2005

Thomas Palmer

representing Petitioner Friends of the Blue Hills

5/14/1999 Variance decision on Norumbega Covered Storage

90,550 sq ft BVW wetland replication proposed for 83,150 sq ft project impacts including BVW and ILSF. Replication includes off-site work at Weston Reservoir. Part of collection asked for in FBH 9/22/04 public records request. Included in file reviewed at DEP Winter St. 10/8/04

signed by
DEP/Edward Kunce

applicant
MWRA/Douglas MacDonald

9/21/1999 Variance decision on Leominster commercial building

Denied for lack of public purpose. 30,000 sq ft BVW impact. Only denial in 17 variances issued between 5/99 and 3/04. Included in file reviewed at DEP Winter St. 10/8/04

signed by
DEP/Edward Kunce

applicant
local developer

9/25/2000 Variance decision on Rt 3 widening, Tyngsborough

Says 1:1 mitigation achieved for BVW loss project-wide, plus \$4 million for "open space acquisition and preservation." Included in file reviewed at DEP Winter St. 10/8/04

signed by
DEP/Lauren Liss

applicant
MA Highway

11/10/2000 Variance decision on MBTA Commuter Rail station, Ashland

signed by
DEP/Lauren Liss

Total BVW impact 19,050 sq ft. BVW replication of 43,200 sq ft required--"slightly greater than 2:1."

Included in file reviewed at DEP Winter St. 10/8/04

applicant
MBTA

11/17/2000 Variance decision on Rt. 3 widening, Lowell

signed by
DEP/Lauren Liss

Acknowledges 6.25 acre BVW loss in Lowell and only 2.86 acres will be replicated, but says 1:1 standard will be met "on corridor-wide basis."

Included in file reviewed at DEP Winter St. 10/8/04

applicant
MA Highway

12/22/2000 Variance decision on Norwood Airport

signed by
DEP/probably Lauren
Liss

10,350 sq ft BVW impact. 20,000 sq ft to be replaced, for 2:1 "replication to impact ratio."

Included in file reviewed at DEP Winter St. 10/8/04

applicant
Norwood Airport Commissio

1/26/2001 Variance decision on Rt. 3 widening, Chelmsfordsigned by
DEP/Lauren Liss

4.65 acres permanent loss BVW. 11.83 acres replication.

p. 2: "Full mitigation for the 3,890 linear feet of Bank and 0.37 acres of Land Under Water will be provided by 4,556 linear feet of Bank and 3.62 acres respectively as part of an open water mitigation site."

Part of collection asked for in FBH 9/22/04 public records request. Provided for review on 10/8/04.

applicant
MassHighway**1/26/2001 Variance decision on Rt. 3 widening, Burlington**signed by
DEP/Lauren Liss

.57 acres permanent loss BVW. 1.5 acres BVW to be provided. Language changes (from prior variances) regarding overall BVW mitigation ratio, no longer saying 1:1 but instead "mitigation provided by the project as a whole will serve to replace wetland functions lost in individual communities." Names \$4 million provided for open space acquisition and preservation.

Included in file reviewed at DEP Winter St. 10/8/04

applicant
MA Highway**1/26/2001 Variance decision on Rt. 3 widening, Bedford**signed by
DEP/Lauren Liss

2.08 acres permanent BVW loss. 1.78 acres replication required. Again cites 1:1 ratio on "corridor-wide basis."

Included in file reviewed at DEP Winter St. 10/8/04

applicant
MA Highway

1/26/2001 Variance decision on Rt. 3 widening, Billerica

4.61 acres permanent loss BVW. 3.69 acres replication.
Included in file reviewed at DEP Winter St. 10/8/04

signed by
DEP/Lauren Liss

applicant
MA Highway

5/18/2001 Variance decision on Provincetown Airport

10,200 sq ft permanent BVW impact (salt marsh). Mitigation via financial support for Hatches Harbor salt marsh restoration project, restoring 60-90 acres and potentially creating 7 acres fresh marsh
Included in file reviewed at DEP Winter St. 10/8/04

signed by
DEP/Lauren Liss

applicant
Provincetown Airport

5/12/2002 Variance decision on Rt 495/140 interchange relocation and improvements, Franklin

30,454 sq ft BVW impact. 1,533 sq ft LUW impact. 758 ft bank impact. Mitigation is 64,974 sq ft BVW and 7365 sq ft LUW, for 1.4:1 mitigation/loss (mitigation is 140% size of lost areas).
Included in file reviewed at DEP Winter St. 10/8/04

signed by
DEP/Lauren Liss

applicant
MA Highway

11/18/2002 Variance decision on Greenbush line, Hingham

signed by
DEP/Lauren Liss

Requires 2:1 in-kind replication.
Included in file reviewed at DEP Winter St. 10/8/04

applicant
MBTA

4/16/2003 Variance decision on Westover AFB, Chicopee

signed by
DEP/Edward Kunce

Permanent BVW loss of 43,200 sq ft. Replication is 45,738 sq ft (slightly better than 1:1).
Included in file reviewed at DEP Winter St. 10/8/04

applicant
Westover AFB

11/7/2003 Variance decision for Blue Hills Covered Storage, Quincy

signed by
DEP/Robert Golledge

45 pgs. plus form. Permanent impacts cited as 8.7 acres Land Under Water, 2210 linear feet Bank, and 1057 sq ft BVW. Replication limited to 10,000 sq ft ILSF. No mitigation ratio included.

applicant
MWRA

3/5/2004 Variance decision on Greenbush line, Scituatesigned by
DEP/Robert Golledge

Features impact table w/53,841 sq ft BVW permanent impacts. "Potential mitigation sites to provide 2:1 wetland mitigation to impact ratio"--p. 13. Rosseau property on North River chosen w/replication of 119,000 sq ft BVW, LUW, and salt marsh. Also MBTA proposes to acquire six acres of land in Scituate for wetland mitigation purposes.

applicant
MBTA

Included in file reviewed at DEP Winter St. 10/8/04

3/22/2004 Variance decision on Greenbush line, Cohassetsigned by
DEP/Robert Golledge

Includes impact table showing:

63,447 sq ft permanent BVW impact

1,166 linear feet permanent Bank impact

198 sq ft permanent LUW impact

2,994 sq ft permanent BLSF impact

1,042 sq ft permanent BLSF impact significant to spotted turtle habitat

28,622 sq ft permanent impact to Vernal Pool and potential Vernal Pool

48,846 sq ft permanent impact to spotted turtle habitat (BVW/Bank/LUW/BLSF)

applicant
MBTA

Mitigation in-kind at off-site Davenport & Barnes sites amounts to restoration of 4.26 acres filled wetlands

"The MBTA will achieve in excess of the 2:1 mitigation ratio required by this variance."--p.4