

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 MOTION FOR RECONSIDERATION

In a Final Decision dated September 20, 2005, the Commissioner rejected the Recommended Final Decision dated August 29, 2005 and reaffirmed the Variance issued to Applicant Metropolitan Water Resources Authority on November 3, 2003.

Petitioner Friends of the Blue Hills hereby moves that the Commissioner reconsider the Final Decision because, in contrast to the Recommended Decision, it seeks to relieve applicants for a variance from the Wetlands Protection Act of any responsibility to replace lost wetlands, and likewise attempts to free the Department from any obligation to require such applicants to provide mitigation comparable to impacts.

It is undisputed that the work approved by the variance will result in the loss of approximately 8.7 acres of protected wetlands in the century-old Blue Hills Reservation, which is the largest and finest component of Boston's metropolitan park system. Neither has the Department or any other party challenged Petitioner's statement that none of the 8.7 acres will be replaced. And yet the Final Decision

finds that the project is nonetheless conditioned to protect the interests named in the Act in conformance with M.G.L. Chapter 131 Section 40 because “mitigating measures are proposed that will allow the project to be conditioned to contribute to the protection of the interests,” in accordance with the regulatory standard for variances found at 310 CMR 10.05(10)a(2).

It is not easy to understand how a decision that approves wholesale filling of protected wetlands and does not offset such losses via wetland replacement contributes to the protection of public interests associated with wetlands. How can the interests be protected if the wetlands that support them are not protected?

However, the Final Decision argues on p. 4 that the Commissioner has “broad discretion under the variance provisions,” and the variance indicates just how far, in the Commissioner’s opinion, this discretion can be stretched; it can extend to a project like Blue Hills Covered Storage where many acres of protected wetlands are proposed to be filled and no acres are required to be replaced.

Evidently, then, when variances have required wetlands to be created that are comparable in size to wetlands that will be lost, as has been the case with every other variance issued since 1990, it has not been because the Act or the regulations impose any such requirement, but because it is within the discretion of the Commissioner to approve such replacement or not approve it. If all of the sixteen variances issued since 1999 with the exception of Blue Hills Covered Storage¹ have required wetland creation on the same scale as wetland losses, it is not because they adhere to any objective standard; it is because the Commissioner had in each instance the discretion to require extensive and substantial wetland replication, or to require no replication at all.

¹ see Attachment A to Petitioner’s March 2, 2005 Closing Argument

Hence if we consider the variance at issue as a model for the interpretation of the variance standards at 310 CMR 10.05(10)a(2), we see that, in the Commissioner's view, mitigating measures "that will condition the project to contribute to the protection of the interests" means any such measures at all, regardless of how many wetlands will be lost, or how few will be replaced. Although the principle of matching mitigation to impacts runs like a bright thread throughout the regulations, it need not be applied in variance decisions. It is therefore of no significance that sixteen of seventeen variances issued since 1999 required permanent wetland losses to be balanced by comparable wetland creation; it was within the Commissioner's discretion, had he so wished, to require no such replacement, because eligibility for a variance is not earned by the extent of proposed mitigation measures, or the degree to which they contribute to the protection of named interests, but simply if any such measures are proposed at all.

The danger that this reading of the variance provisions poses to the Department's statutory responsibility is that it makes wetlands protection a matter of discretion, rather than a public purpose established by law. If an agency proposes to drain 100 acres of wetlands and fill 99 of them, but enhance the remaining acre by some action such as the proposed "aquatic shelf and peninsula," or even by the planting of one cattail, there is no argument to be made that the mitigation does not "contribute to the protection of the interests," because any such action contributes, and the question of parity between mitigation and impacts has no relevance.

If, on the other hand, the variance provision regarding mitigation is interpreted to sanction or require such parity, then it ceases to serve as a needle's eye through which any number of major wetland-filling projects may squeeze untouched, depending on the whim of the Commissioner. It becomes, instead, a meaningful instrument for the furtherance of the goals of the Act.

We submit that the Final Decision, by failing to scale mitigation to impacts, and by failing to require replacement of any of the extensive wetlands it permits to be filled, is a radical departure from the Department's past practice in variance decisions, and promotes an interpretation of the variance regulations which would allow a future Commissioner, who might consider that the regulations are too burdensome, to obstruct and defeat the purposes of the Act. We ask that the Commissioner state his views concerning whether projects requiring a variance should be conditioned to provide mitigation comparable to impacts, or whether he has the authority to approve any such projects so long as any mitigation whatsoever is proposed. If, in his view, there are no objective or quantitative standards applicable to the consideration of the sufficiency of mitigation relative to variance projects, we ask him to state how the absence of such standards contributes to the protection of the named interests, and how wetlands can be protected if a Commissioner takes office who believes that his discretion includes the ability shield public agencies from the consequences of the Act.

There are certain extraordinary powers invested by law in the executive branch; a governor may commute a death sentence; a president may issue a pardon. We find nothing, however, in the Act or its implementing regulations that gives the Department's Commissioner authority to hold public agencies harmless if they choose to site major infrastructure projects entirely within protected wetlands. By allowing the Massachusetts Water Resources Authority to eliminate 8.7 acres of protected wetlands in the Blue Hills Reservation, and by failing to require the Applicant to replace even one acre of these wetlands, the Final Decision attempts to dismantle the mitigation standard followed by every other variance issued since at least 1990, and seeks to empower the Commissioner to decide which applicants shall be required to contribute to the protection of the interests, and which shall not.

We also note that the Department, by regulatory revisions effective on February 11, 2005, has sought to remove the right of ten citizens to request an adjudicatory hearing on projects requiring a variance,² even though this right is guaranteed by M.G. L. Chapter 30A, Section 10A.³ Considering that projects requiring a variance require them because they will eliminate more wetlands than can be otherwise be permitted under the regulations, we view this revision and the Final Decision as complementary attempts by the Commissioner to award himself the right to remove the chief hurdle faced by public agencies seeking to work in wetlands; not only shall there be no objective or quantitative standards applicable to the sufficiency of mitigation required by a variance, but citizens who question this sufficiency in the context of a specific variance shall have no right to an adjudicatory hearing.

Petitioner Friends of the Blue Hills does not dispute the Commissioner's authority to vary the regulations for projects deemed to serve an overriding public purpose. However, we do not consider that the Commissioner may therefore abandon his responsibility to fulfill the legislative intent behind the Act. Hence we move that the Final Decision be reconsidered, and that the variance be modified so as to contribute to the protection of the interests named in the Act.

² See 310 CMR 10.05(10)b: "On a request for a variance based on overriding public interest, the Commissioner may dismiss the request to hold an adjudicatory hearing if the request repeats matters adequately considered in the variance decision, renews claims or arguments previously raised, or attempts to raise new claims or arguments not raised during the public comment period."

³ "Notwithstanding the provisions of section ten, not less than ten persons may intervene in any adjudicatory proceeding as defined in section one, in which damage to the environment as defined in section seven A of chapter two hundred and fourteen, is or might be at issue; provided, however, that such intervention shall be limited to the issue of damage to the environment and the elimination or reduction thereof in order that any decision in such proceeding shall include the disposition of such issue. Notwithstanding any other provision of this chapter, any intervener under this section may introduce evidence, present witnesses and make written or oral argument, except that the agency may exclude repetitive or irrelevant material. Any such intervener shall be considered a party to the original proceeding for the purposes of notice and any other procedural rights applicable to such proceeding under the provisions of this chapter, including specifically the right of appeal."

Signed on this 29th day of September, 2005

Thomas Palmer

representing Petitioner Friends of the Blue Hills