

THE STATE OF NEW HAMPSHIRE
WETLANDS COUNCIL

Appeal of Rye Conservation Commission

Docket No. 22-03 WtC

STATE OF NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES'
PRE-HEARING MEMORANDUM

The New Hampshire Department of Environmental Services (the “Department”), by and through counsel, the Office of the Attorney General (collectively the “State”), respectfully submits this Pre-hearing Memorandum in advance of the hearing scheduled for January, 2023. The State reserves the right to raise the issues contained in this memorandum and any other issues addressed by the Rye Conservation Commission (the “Appellants”) at the hearing before the Wetlands Council (the “Council”).

INTRODUCTION

1. This appeal arises from the Appellant’s challenge to the issuance of a wetlands permit (the “Permit”) by the Department to Zachariah Malpass (the “Permittee”) in connection with the Permittee’s after-the-fact request to build a weir (the “Project”), in Bailey Brook, a wetland located at 120 Garland Road, depicted on the Town of Rye Tax Map 7 Lot 113 (the “Property”). On December 22, 2021, the Department of Environmental Services Assistant Bureau Administrator for the Wetlands Bureau, Mary-Ann Tilton, approved the permit application in a written decision including 22 findings of fact. Appellant, the Town of Rye Conservation Commission, submitted a Notice of Appeal on January 21, 2022, which was accepted by the Council on February 22, 2022.

STANDARD OF REVIEW

2. Under N.H. RSA 21-O:5-a, the Council is authorized to hear all administrative appeals from department decisions made under RSA 482-A or RSA 483-B and shall decide all disputed issues in appeals in accordance with RSA 21-O:14. On appeal, the Council may affirm the Department decision or may remand the matter to the Commissioner with a determination that the decision complained of is unlawful or unreasonable. N.H. RSA 21-O:14. The Council must specify the factual and legal basis for its determination and identify the evidence in the record created before the Council that supports its decision. *Id.*

3. The applicable standard of review is prescribed by statute. RSA 482-A:10, V states:

Any appeal hearing held by the council shall be an adjudicative hearing as provided in RSA 541-A and the council's rules. . . The burden of proof shall be on the party seeking to set aside the department's decision to show that the decision is unlawful or unreasonable. . . All findings of the department upon all questions of fact properly before it shall be prima facie lawful and reasonable.

FACTS

4. In 2018, the Department was made aware that there was an unpermitted weir constructed at the Property. A site inspection confirmed the presence of a small concrete weir above a culvert and access road which regulated stream flows in Bailey Brook and created an area of impounded water. The Department contacted the Permittee to inform him that he needed to apply for an after-the-fact wetland's permit so the Department could consider whether he should be able to retain the weir.

5. The Permittee hired a certified wetland's scientist, West Environmental, to assist in preparing a Dredge and Fill Wetlands Permit Application for the Project. An initial application was submitted on January 15, 2020. State's Exhibit 1, January 15, 2020, Permit Application. The application quantified the impact area as 300 square feet of perennial stream/river channel

and 200 square feet of scrub-shrub wetland. *Id.* The application also included a project description that stated, “this project proposes to obtain an after-the-fact permit for the construction of a weir in 2013 to manage phragmites and beaver activity and an overflow pipe to help handle larger rain events.” *Id.*

6. The Department marked the application as incomplete and requested additional materials from the Permittee. State’s Exhibit 2, January 16, 2020, DES Letter Requesting Additional Information. On February 10, 2020, the Permittee, through West Environmental, submitted supplemental information including a wetland delineation and classification, functional assessment, aerial photo documentation, and a construction sequence. State’s Exhibit 3, February 10, 2020, Supplemental Permit Submission.

7. On July 30, 2020, West Environmental submitted additional information to the Department including: (1) A Bailey Brook dam breach analysis; (2) Ross Engineering Plans dated July 23, 2020 which updated plans to the weir to handle a 50-year storm event increasing the project impacts from 500 square feet to 573 square feet; (3) Required upgrades to the wetland crossing for dam safety; (4) A report by Stonehill Environmental; and (5) The results of water sampling upstream and downstream of the Project done by Hydrogeochemical Solutions. State’s Exhibit 4, July 30, 2020, Supplemental Permit Submission.

8. The Hydrogeochemical Solutions report concluded that there was no meaningful difference between constituent concentrations upstream and downstream of the Project and both sampling locations met the applicable NHDES water quality standards. *Id.* at Attachment D. The Stonehill Environmental report concluded that there would be no adverse impact from the Project to two Atlantic White Cedar Swamps located approximately 2,200 feet downstream from the project location. *Id.* at Attachment C.

9. The Permittee submitted a report from Stonehill Environmental on February 7, 2021, to the Department's Drinking Water Bureau, which concluded that the effects of the Project would also not adversely impact the downstream water levels in Bailey Brook. State's Exhibit 5, February 7, 2021, Stonehill Environmental Report. This report was also included as part of the Wetland Bureau's file and was considered by the Department in issuing the wetland permit.

10. On July 6, 2021, the Department requested more information from the Permittee after receiving a letter outlining the Appellant's concerns. The Department requested information related to impacts from the conversion of vegetated wetland to open water, and input from the Rye Water District regarding adjacent drinking water wells. State's Exhibit 6, July 6, 2021, DES Request for More Information.

11. On August 24, 2021, the Department sent an addendum to its July 6, 2021, request for more information and requested: (1) A quantification of the area of phragmites eradicated and square footage of the area enhanced; (2) Provision of a waiver request to construct a dam pursuant to Env-Wt 526.02(e), (3) Establishment of a monitoring plan under Env-Wt 525.03(e), and (4) Recording of a permit to run with the land. State's Exhibit 7, August 24, 2021, DES Amended Request for More Information.

12. On September 7, 2021, the Permittee, through West Environmental, submitted materials to satisfy the Department's request for more information. State's Exhibit 8, September 7, 2021, Supplemental Permit Submission. The Permittee's response included an amendment request to the initial wetland application as required by the Department's rules. *Id.* In addition, the Permittee explained that the Project did not convert vegetated wetlands to open water but instead converted shallow marsh to deep marsh habitat. *Id.* This determination was based on the depth of water in the wetland, which was below the threshold to consider the system an open water or

lacustrine system. *Id.* West Environmental also provided evidence that the Project had enhanced wetlands functions and values and should be considered an enhancement project pursuant to Env-Wt 525. *Id.* The response indicated that construction of the weir had removed approximately 26,249 SF (.60 acres) of invasive phragmites which had increased wetland functions including ecological integrity, wetland-dependent wildlife habitat, scenic quality, flood storage, groundwater recharge, and nutrient trapping/retention/transformation. *Id.*

13. On October 20, 2021, the Department issued an additional request for more information. State's Exhibit 9, October 20, 2021, DES Request for More Information. In this request, the Department requested a direct response from the Rye Water District regarding the Project, and clarification regarding whether two culverts associated with the Project would remain on Rye Water District property. *Id.*

14. On November 17, 2021, the Rye Water District finally responded in writing to the Department regarding this Project and indicated that it was concerned that the impounded water from the Project may have altered the hydraulic gradient and groundwater recharge conditions near Rye Water District wells and that a change in water quality could possibly be linked to the change in upstream surface water hydraulics due to the Project. State's Exhibit 10 November 12, 2021, Rye Water District Letter.

15. On November 18, 2021, the Appellants submitted a letter and report from CEI Environmental to the Department in opposition to the permit. The letter and report stated that: (1) The project impacted 1.25 acres by converting an emergent wetland system to a lacustrine pond system; (2) Avoidance and minimization alternatives to the project impacts were not properly considered; (3) The weir was likely not properly tied to the embankment which will probably impair the stability of the embankment and expose downstream properties to risk; (4)

The project is causing siltation downstream; (5) The project altered the historic streamflow of Bailey Brook; and (6) The project may have changed where groundwater withdrawals for the Rye Water District wells originate and may have been why data for the Cedar Run Well demonstrates that iron and manganese levels increased since the project inception in November 2013. State's Exhibit 11, November 18, 2021, CEI Report.

16. In response, Stonehill Environmental submitted another report to the Department on November 19, 2021. State's Exhibit 12, November 19, 2021, Stonehill Environmental Report. The report pointed out that the Rye Water District claimed that the Project could be responsible for increased iron and manganese concentrations in the Cedar Run Well but neglected to mention that concentrations of iron and manganese in the Bailey Brook Well, which was close to the Project, had decreased or remained constant since 2000. *Id.* The Stonehill Environmental report concluded that based on several sources of data, it remained their professional opinion that this Project would not result in a measurable impact on the local aquifer water levels and would not have a detrimental impact on Rye Water District's drinking water supply quantity or quality. *Id.*

17. On December 22, 2021, the Department issued a permit decision granting the after-the fact permit application. State's Exhibit 13, December 22, 2021, Permit Decision. The permit specifically categorized the Project as an enhancement pursuant to Env-Wt 525. This finding has not been challenged on appeal. In addition, the Department found that the professional reports submitted by the Permittee showed there was no adverse impact to drinking water quality pursuant to Env-Wt 313.03(b)(8). *Id.*

LEGAL ISSUES

18. The Department is required to comply with the statutory requirements found in RSA 482-A when considering permit applications and is also obligated to follow department rules containing additional requirements for issuing wetland permits contained in Env-Wt 100-800.

19. The Appellant raised four issues in their notice of appeal. The Appellant cannot meet their burden of proof on any issue because it cannot prove that the Department acted unreasonably or unlawfully in granting this permit. The Department undertook a careful and thorough analysis before granting the permit and based their decision on ample scientific data provided by both the Permittee and the Appellant.

A. Issue 1 – “The Department unlawfully and unreasonably quantified the area of impact not accounting for approximately 56,055 square feet of wetland impacts.”

20. The Department derives authority to issue wetland permits from statute and administrative rule. The statutory authority lies in RSA 482-A:3,I, which states “[n]o person shall excavate, remove, fill, dredge, or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from the department.” It is well established that a decisionmaker should look first to the language of the statute or rule when engaging in matters of statutory interpretation. See *State v. Cobb*, 143 N.H. 638, 643 (1999); *State v. Comeau*, 142 N.H. 84, 86 (1997).

21. When interpreting agency rules, where possible, courts ascribe the plain and ordinary meanings to the words used. *In re Town of Nottingham* 153 N.H. 539 (2006). Rule Env-Wt 311.04(g) requires an applicant state “[t]he square feet of wetland impact areas and the linear feet of surface water impact areas for temporary and permanent impacts based on type of jurisdiction area” Permanent impacts are defined as “impacts resulting from activities in jurisdictional areas that are intended to remain, or that do remain, after the activities have ceased.” Temporary

impacts are defined as “adverse conditions or effects that will be reversed when the authorized work has been completed and pre-construction conditions have been re-established.” The term includes but is not limited to ruts caused by heavy machinery that are smoothed when the work is completed and the installation and subsequent removal of swamp mats, construction mats, geotextile fabric, or other erosion or sediment control practices. Env-Wt 104.36.

22. The rules go on to define those activities listed in the statute. “Construction activity means any activity that creates, constructs, installs, erects, or otherwise places any structure, as defined by RSA 482-A:2,IX, in a jurisdictional area.” Env-Wt 102.42. “Dredging activity means any activity that removes or ruts any organic or inorganic substance from or in any jurisdictional area, regardless of whether the material is of natural or human origins.” Env-Wt 102.62. “Filling activity” means any activity that places any fill into any jurisdictional area.” Env-Wt 103.06. Finally, the rules define “fill” as a noun as “any rock, soil, gravel, sand, or other natural or man-made material that has been deposited or caused to be deposited by human activity.” Env-Wt 103.04. In short, the rules define an impact area to be the jurisdictional area in which dredging or filling will occur.

23. Both the statutory authority and corresponding administrative rules are clear and unambiguous and do not include a prohibition on impounding water or raising water levels in a jurisdictional area. The Appellant is asking this Council to add language into the statute or administrative rules that the legislature or rule-making authority did not see fit to include. The language in the statute and corresponding administrative rules make clear that the activities that qualify as impacts when evaluating a wetland permit application are those that are listed in the statute - excavating, removing, filling, dredging, or constructing in or adjacent to waters of the state.

24. Caselaw in New Hampshire clearly directs the Department to confine its definition of “impacts” to those set forth in the statute. This specific issue was addressed by the New Hampshire Supreme Court in *Greenland Conservation Com’n. v. New Hampshire Wetlands Council* where the Court held that “DES review is for impacts that arise directly from its assessment of proposed filling and dredging in wetlands – the activities that give DES jurisdiction in the first place, and for which an applicant seeks a permit.” 154 N.H. 529, 537 (2006). In *Greenland Conservation Com’n*, the plaintiffs argued that the Department erred by only considering the impacts to areas that would be filled or dredged, and not impacts caused by a resulting subdivision that included both upland and wetland components. *Id.* at 534.

25. The New Hampshire Supreme Court first noted that the title of chapter 482-A, “Fill and Dredge in Wetlands,” “strongly indicates that the legislature intended it to protect wetlands only from the effects caused by dredging and filling within their boundaries.” *Id.* at 535. The Court went on to hold that the impact area under RSA 482-A, did not include upland areas noting that the legislature determined that the Department was only authorized to regulate those activities enumerated in the statute. *Id.*¹ The Court noted even though RSA 482-A limits DES to assessment of construction activities in wetlands when it issues dredge and fill permits, other activities, like upland construction activities may be regulated by other forms of DES review. *Id.*

26. Notably, here the Permittee will need to secure a dam permit from the Department to retain the weir in addition to receiving approval of a wetland’s permit. In addition, the Department considered impacts which arise directly from the proposed filling activity, creation

¹ The Court in *Greenland Conservation Com’n* did allow the department to assess the effects of wetlands dredge or fill outside of the immediate impact area. See *Greenland Conservation Comm’n*, 154 N.H. 529, 536 (2006) (finding no error in a permit for the Troy Bypass where the department “addressed the impact of wetland destruction on the habitat value of upland areas connected by the 6.9 acres of wetlands that the department of transportation proposed to dredge and fill”). However, the Appellant does not claim that the department did not evaluate the secondary impacts of jurisdictional fill but claims that the department erred by not counting impounded water, itself, as jurisdictional fill.

of the weir, as well as the secondary impacts that may result from the filling activity. In assessing both the direct and secondary impacts, the Department concluded that this Project was an enhancement project pursuant to Env-Wt 525.04. The Appellant does not contest that determination and does not contend that DES failed to consider secondary impacts, but instead claims that DES acted unlawfully or unreasonably in not considering impounded water as “fill” instead of a secondary impact. The Department’s decision was firmly within the bounds of the law established in *Greenland Conservation Com’n* and the Appellant is unable to meet their burden to show otherwise.

27. The New Hampshire Supreme Court reached a similar decision involving groundwater withdrawals in *In re Town of Nottingham* 153 N.H. 539 (2006). In its holding, the Court found that the Groundwater Protection Act, RSA 485-C:21, provided the sole criteria that the Department must follow in issuing groundwater withdrawal permits. *Id.* In *Town of Nottingham*, a permittee applied for a permit to withdraw groundwater pursuant to RSA 485-C:21. *Id.* The permit application was approved by the Department and on appeal plaintiffs argued that the Department erred when it did not also consider RSA 482-A governing fill and dredge in wetlands because the drawdown of water from a prime wetland constituted a removal of water for purposes of RSA 482-A:3. *Id.* The Court relied on the principles of statutory interpretation to conclude that RSA 482-A:3 did not require the permittee to apply for a wetland permit in reference to draw down of waters in a wetland. *Id.* Specifically, the Court noted the plain language of RSA 482-A:3 only governed statutorily enumerated activities in, or adjacent to, waters of the state and the statute did not enumerate the drawdown of waters in a wetland as an activity triggering jurisdiction under the statute. *Id.* (noting that the appellant’s “interpretation, however, adds a word to the statute that is not there; namely, water.”)

28. The Appellant here claims that water impounded in the jurisdictional area should be considered an area of impact and classified as “fill” just like the appellant in *Town of Nottingham* urged the Supreme Court to consider the drawdown of water in a jurisdictional area as “dredging.” While the definition of both “fill” and “dredging” in RSA 482-A are not exhaustive, neither definition specifically lists “water” as a material that should be regulated under RSA 482-A when added or removed from a jurisdictional area. The Supreme Court rejected this interpretation of RSA 482-A in *Town of Nottingham* and the Department could not have lawfully applied such an interpretation when considering this permit.

29. The Appellant cannot meet their burden with respect to the first claim because there is no legal precedent to support the request for the Department to look outside of the statutory authority granted under RSA 482-A and to consider the retention of water caused by building a weir as an impact area where this activity is not specifically enumerated in the statute. In both *Greenland Conservation Com’n.* and *Town of Nottingham* the New Hampshire Supreme Court rejected requests to read additional language into the statute or rules in order to consider activities as jurisdictional impacts where they are not specifically enumerated. The Department followed the unambiguous language in the statute and rules coupled with established case law to make the lawful and reasonable determination that retained water did not constitute a dredge or fill activity that should be quantified as an area of impact.

B. Issue 2: “The Department unlawfully and unreasonably accepted the applicant’s purported reason for wetland impacts, which was phragmites management.”

30. The application requirements for a wetlands permit are set forth in Env-Wt 311.04. There are eleven enumerated items and one of those is contained in section (i) and states “a brief description of the project and the purpose of the project, outlining the scope of work to be performed and whether impacts are temporary or permanent.”

31. The Permittee's application indicated that the permit was for construction of a weir to manage phragmites and beaver activity and an overflow pipe to help handle larger rain events. State's Exhibit 1, January 15, 2021, Permit application.

32. The requirement in Env-Wt 311.04 is simply for a brief description of the project and project purpose and sets forth no other legal requirements related to the reason for the project. There is no requirement found in the statute or rules that an applicant prove that the purpose of their project is meritorious and instead, the rule simply states that the applicant must provide a brief description of the project and the purpose of the project. Nonetheless, the construction of the weir in 2013 was successful in both decreasing the quantity of invasive phragmites at the site and controlling beaver activity. Approximately 0.6 acres of phragmites were eradicated as a result of the construction of the weir and the resulting water level change. State's Exhibit 8, September 7, 2021, Supplemental Permit Submission. This reduction in invasive species and creation of wetland habitat for a variety of native species is documented through Google Earth images which depict the reduction in phragmites after construction of the weir. *Id.*

33. To the extent the Appellant is claiming that the applicant has not demonstrated sufficient "need" for the Project, the "need" criteria was taken out of the NHDES wetlands rules in 2019. Nevertheless, even if the need requirement existed, the applicant has satisfied such a requirement. In *Appeal of Cook*, the N.H. Supreme Court, with respect to the then-existing wetlands rules, stated: "As in Appeal of Town of Nottingham, we conclude that the most relevant definition of "need" is "a want of something requisite, desirable, or useful." *Appeal of Cook*, 170 N.H. 746, 752 (2018). Even at that time, an applicant had some latitude in defining the need of a project, i.e., the project's purpose. *Id.* (allowing an applicant to state a need for

“dock access on his property,” rather than dock access generally). Here, the applicant has stated a need for the proposed Project, specifically phragmites management and beaver control.

34. The Department had all the above-referenced information when they made their decision on this permit application. In fact, the Department specifically requested, and received, additional information relating to the area of phragmites that were eradicated as a result of the Project. *See* State’s Exhibit 7, August 24, 2021, DES Request for More Information; *See also* State’s Exhibit 8, September 7, 2021, Supplemental Permit Submission. The Appellant cites to no statute or rule that the Department violated by granting the permit with the project description that was included in the permit application. Accordingly, the Appellant will be unable to meet their burden to show that the department acted unreasonably or unlawfully in accepting the Permittee’s reason for the Project.

C. Issue 3: “The Department unlawfully and unreasonably found that the unpermitted pond and weir satisfied the legal requirements of avoidance and minimization because of the numerous, readily available, and less-impactful alternatives, to the applicant’s asserted reason for the wetland impacts.”

35. The Appellant will be unable to meet its burden to show that the Department acted unreasonably or unlawfully in finding that the Permittee satisfied the legal requirements of avoidance and minimization. Env-Wt 313.01(c) sets forth the requirements for avoidance and minimization. It states: “The requirements to avoid and minimize shall not be deemed to be met if: (1) There is a practicable alternative that would have a less adverse impact on the area and environments under the department’s jurisdiction; (2) The project will cause random or unnecessary destruction of wetlands; or (3) The project would cause or contribute to: (a) The significant degradation of waters of the state; or (b) the loss of any PRAs [priority resource areas].”

36. Env -Wt 300 Appendix B cites to the New Hampshire Department of Transportation Manual regarding control of invasive species. The New Hampshire Department of Transportation Manual lists phragmites as one of five priority invasive species in the State. It also states: “If areas containing common reed plants [phragmites] must be excavated, the removal of plant material and associated soil within a five-foot radius beyond the lateral limit of the plant surface growth and to a depth of three feet is required.” State’s Exhibit 14, Excerpt NH DOT Manual Best Management Practices for the Control of Invasive and Noxious Plant Species. Other potential methods of control for phragmites include herbicides, cutting, burning, or flooding. It is often recommended that multiple control methods be used in conjunction with one another for best results as phragmites can be very difficult to control. State’s Exhibit 15, Excerpt FWS Guide to the Control and Management of Invasive Phragmites.

37. The Appellant’s CEI report suggests excavation or routine cutting combined with native plantings and herbicide treatment as potential alternatives to flooding. However, the same report cautions that herbicide treatment may not be appropriate for areas in close proximity to water supply wells as is the case here. State’s Exhibit 11, November 18, 2021, CEI Report. The Property directly abuts land belonging to the Rye Water District, which provides drinking water to Rye’s residents.

38. The alternatives suggested by Appellant would be more impactful than retaining the weir. For instance, excavation would require the Permittee to excavate wetlands to a depth of at least three feet over a significant area which would disturb wetland function, wildlife habitat, and native species. Herbicide treatment represents an unknown risk due to the location of the nearby Rye Water District Wells, which the Appellant acknowledges in its expert report.

39. Furthermore, the Department was presented with information when reviewing the permit application that the Project did not create any significant adverse impact to drinking water quality or on the general quality of water in Bailey Brook. *See* State’s Exhibit 12, November 19, 2021, *See also* Stonehill Environmental Report; State’s Exhibit 4, July 30, 2020 Supplemental Permit Submission, Attachment D. This information established that the Project had limited impact on the wetland and surrounding areas and in fact was found to be an enhancement by the Department. This determination coupled with the lack of feasible alternatives proposed by the Appellant clearly show that Appellant cannot meet its burden of proving that the Department was unreasonable when it determined that the applicant had minimized and avoided adverse impacts; indeed, the Appellant cannot show how any of the suggested alternatives would be less impactful than retaining the weir that is currently in place.

D. Issue 4: “The Department unlawfully and unreasonably found that the unpermitted pond and weir would not adversely impact the quantity or quality of drinking water available to those served by the Rye Water District.”

40. Env-Wt 313.03(b)(8) requires an applicant demonstrate that “the project avoids and minimizes impacts to wetlands that would be detrimental to adjacent drinking water supply and groundwater aquifer levels.” The Department had a plethora of water quality information available when deciding whether to grant or deny the permit for this Project. All the information established that there was no measurable impact to water quality as a result of this Project.

41. Prior to issuing a decision on this permit application, the Department requested additional information related to impacts on drinking water quality to the Rye Water District. *See* State’s Exhibit 6, July 6, 2021, DES Request for More Information; *see also* State’s Exhibit State’s Exhibit 9, October 20, 2021, DES Request for More Information. The Department received a report submitted by the applicant completed by Stonehill Environmental that assessed the

impacts of the Project on nearby Atlantic White Cedar Swamps. The report concluded that the potential impact of the Project on Bailey Brook water quality is minimized and that the Project likely had no impact on groundwater levels or quality in the vicinity of the Atlantic White Cedar Swamps. State's Exhibit 8, September 7, 2020, Supplemental Permit Submission, Attachment C.

42. The Department was also provided with a report by Hydro-Geochemical Solutions LLC, which analyzed whether there was a significant difference between upstream and downstream surface water analytical results. State's Exhibit 8, September 7, 2020, Supplemental Permit Submission, Attachment D. The water quality sampling contained in the report showed that even though there were some small differences between the upstream and downstream constituent, the concentrations were so small they should be considered negligible and that none of the water samples exceeded the DES Water Quality Standards. The report further concluded that there was no distinguishable difference between the ionic composition of the upstream and downstream surface water samples.

43. Stonehill Environmental later submitted another report which concluded that the Rye Water District wells likely had a much greater influence on reduction in Bailey Brook streamflow than the Project did. State's Exhibit 5, February 7, 2021, Stonehill Environmental Report. Finally, Stonehill Environmental submitted a third report in November 2021, to address concerns laid out by the Rye Water District. State's Exhibit 12, November 19, 2021, Stonehill Environmental Report. In that report, Stonehill Environmental concluded that it was their opinion that based on available data from numerous sources the Project had not resulted in a measurable impact on local aquifer water levels and had not had a detrimental impact to the Rye Water District's drinking water supply quantity or quality.

44. Appellants submitted a report by Comprehensive Environmental Incorporated (CEI) that assessed water quality upstream and downstream of this Project. State's Exhibit 11, November 18, 2021, CEI Report. The CEI report noted that its samples "showed relatively minor variations in upstream and downstream water quality results (e.g., slightly higher downstream temperatures and slightly lower dissolved oxygen levels.*)" State's Exhibit 11, November 18, 2021, CEI Report. This report did not state that these minor variations had any impact on Rye Water District drinking water quality. *Id.* The CEI report noted that variations may be greater in the summer months but provided no sampling data or other data to support a theory that drinking water quality was significantly affected by this Project. *Id.* The CEI report referenced the possibility of water quality changes as a result of changes in streamflow caused by the Project but did not provide facts or data to support this opinion. *Id.*

45. A Rye Water District Letter opines that there may be ties between the Project and water quality in Rye Water District wells but provides no scientific sampling to support this supposition and instead states "although, the above suppositions are anecdotal in nature, the RWD believes they are sufficient enough to raise questions and/or concerns relative to the potential effects the impounded water may have on recharge to the Cedar Run Well, which could have resulted in the declined in water quality in RWD's bedrock wells." State's Exhibit 10, November 12, 2021, Rye Water District Letter. Meanwhile, the Stonehill Environmental Report concluded that the impoundment had no significant impact on flows or water quality in Bailey Brook. State's Exhibit 12 November 19, 2021, Stonehill Environmental Report.

46. When the Department granted the permit application it referenced the Stonehill Environmental reports as well as the Hydro-Geochemical Solutions Report to support a finding that the activities would not adversely impact drinking water supplies. State's Exhibit 13,

December 22, 2021, DES Permit Decision. Appellant's report from CEI did not provide any data that contradicted the conclusions contained in the Stonehill Environmental or Hydro-Geochemical Solutions Report. Accordingly, the Department had no scientific evidence to suggest that this Project adversely affected drinking water supplies in the Rye Water District. Consequently, Appellants are unable to meet their burden and show that the Department acted unreasonably or unlawfully in granting this permit application.

CONCLUSION


47. The Appellant will be unable to show that the Department acted either unlawfully or unreasonably when it granted the Permittee's after-the-fact permit application. The Department requested and received considerable evidence that supported issuance of the permit to the Permittee. Accordingly, the Council should uphold the Department's decision to grant the wetland's permit for this Project.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL
SERVICES

JOHN M. FORMELLA
ATTORNEY GENERAL


Date: November 17, 2022



Melissa E. Fales, Bar #20629
Attorney
Environmental Protection Bureau
33 Capitol Street
Concord, NH 03301-6397
(603) 271-1222
melissa.e.fales@doj.nh.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via e-mail to counsel of record for the Appellant, Amy Manzelli Esq. and for the Intervenor, Justin Richardson, Esq.



Melissa E. Fales