

Shutesbury Conservation Commission

Leverett West (ZF-15), DEP File #286-0282

ORAD Extension Request Findings and Determination

11/9/23

F1. On 4/23/21, the Shutesbury Conservation Commission (hereafter, “the Commission) issued an Order of Resource Area Delineation (ORAD) for the “Leverett West” parcel, Lot ZF-15, MassDEP File Number 286-0282. The Applicant for this approval was the landowner, also known as W.D. Cows, Inc. This ORAD was issued for three (3) years, expiring on 4/23/24.

F2. On 11/1/23, the Commission received a request for an ORAD extension for an additional three (3) years. The Applicant stated that no work has commenced on the proposed projects.

F3. The Abbreviated Notice of Resource Area Delineation (ANRAD) review for this application was conducted under both MGL Ch. 131, §40 (hereafter, “the WPA), and its Regulations at 310 CMR 10.00, and also under the Shutesbury General Wetlands Protection Bylaw (hereafter, “the Bylaw) and its Regulations. The Commission reviewed and approved jurisdictional Resource Areas boundaries protected by the WPA and the Bylaw.

F4. Per the Findings contained in the approved ORAD, the Commission did not determine the boundaries of any Resource Area not specifically noted in the document entitled, “Attachment for ORAD at Lot ZF-15, Pratt Corner Road.” The ORAD states, “This Order does not, however, determine the boundaries of any resource area or Buffer Zone to any resource area not specifically noted above, regardless of whether such boundaries are contained on the plans attached to this Order or to the Abbreviated Notice of Resource Area Delineation.”

F5. Under the WPA and its Regulations at 310 CMR 10.00, the following regulatory requirements apply to this extension request:

- **310 CMR 10.05(6) Orders of Conditions Regulating Work and Orders of Resource Area Delineation**

(a) Within 21 days of the close of the public hearing, the conservation commission shall either:

1. make a determination that the area on which the work is proposed to be done, or which the proposed work will remove, fill, dredge or alter, is not significant to any of the interests identified in M.G.L. c. 131, § 40, and shall so notify the applicant and the Department on Form 6;
2. make a determination that the area on which the work is proposed to be done, or which the proposed work will remove, fill, dredge or alter, is significant to one or more of the interests identified in M.G.L. c. 131, § 40, and shall issue an Order of Conditions

for the protection of said interest(s), on Form 5. If the issuing authority also determines that the project meets the eligibility criteria for issuance of a Restoration Order of Conditions set forth in the applicable provisions of 310 CMR 10.00, the Order of Conditions for the project shall be a Restoration Order of Conditions; or

3. make a determination that bordering vegetated wetland and other resource areas subject to jurisdiction have been identified and delineated according to the definitions in 310 CMR 10.00 and shall issue an Order of Resource Area Delineation to confirm or modify the delineations submitted. The Order of Resource Area Delineation shall be effective for three years.

- **310 CMR 10.05(6)(d):**

Except as provided in M.G.L. c. 131, § 40 for maintenance dredging, an Order of Conditions, Order of Resource Area Delineation, or Notification of Non-significance shall be valid for three years from the date of its issuance; provided, however, that the issuing authority may issue an Order for up to five years where special circumstances warrant and where those special circumstances are set forth in the Order. An Order of Resource Area Delineation shall be valid for three years, and may be extended by the issuing authority for one or more years up to three years each under 310 CMR 10.05(8) upon written confirmation by a professional with relevant expertise that the resource area delineations remain accurate.

- **310 CMR 10.05(6)(g):**

Prior to the commencement of any work permitted or required by the Final Order, including a Final Order of Resource Area Delineation, or Notification of Non-significance, the Order or Notification shall be recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property. In the case of recorded land, the final order shall also be noted in the Registry's Grantor Index under the name of the owner of the land upon which the proposed work is to be done. In the case of registered land, the final order shall also be noted on the Land Court Certificate of Title of the owner of the land upon which the proposed work is to be done. Certification of recording shall be sent to the issuing authority on the form at the end of Form 5. If work is undertaken without the applicant first recording the Order, the issuing authority may issue an Enforcement Order (Form 9) or may itself record the Order of Conditions.

- **310 CMR 10.05(8) Extensions of Orders of Resource Area Delineations**

(a) The issuing authority may extend an Order for one or more periods of up to three years each, except as otherwise provided in 310 CMR 10.05(11)(f) (extensions for Test Projects). Any extension granted by the issuing authority shall be made on Form 7. The request for an extension shall be made to the issuing authority at least 30 days prior to expiration of the Order.

(b) The issuing authority may deny the request for an extension and require the filing of a new Notice of Intent for the remaining work or a new Abbreviated Notice of Resource Area Delineation in the following circumstances:

1. where no work has begun on the project, except where such failure is due to an unavoidable delay, such as appeals, in the obtaining of other necessary permits;
2. where new information, not available at the time the Order was issued, has become available and indicates that the Order is not adequate to protect the interests identified in M.G.L. c. 131, § 40; or
3. where incomplete work is causing damage to the interests identified in M.G.L. c. 131, § 40;
4. where work has been done in violation of the Order or 310 CMR 10.00; or
5. where a resource area delineation or certification under 310 CMR 10.02 (2)(b)2. in an Order of Resource Delineation is no longer accurate.

(c) If issued by the conservation commission, the Extension Permit shall be signed by a majority of the commission. A copy of the Extension Permit shall be sent to the conservation commission or the Department, whichever is appropriate, by the issuing authority.

(d) The Extension Permit shall be recorded in the Land Court or the Registry of Deeds, whichever is appropriate. Certification of recording shall be sent to the issuing authority on the form at the end of Form 7. If work is undertaken without the applicant so recording the Extension Permit, the issuing authority may issue an Enforcement Order (Form 9) or may itself record the Extension Permit.

F6. Under the Shutesbury Bylaw and Bylaw Regulations, the following regulatory requirements apply to this extension request:

- **Section 7 of Bylaw:**

The Commission is empowered to deny a permit for failure to meet the requirements of this Bylaw; for failure to submit necessary information and plans requested by the Commission; for failure to meet the design specifications, performance standards, and other requirements in regulations of the Commission; for failure to avoid or prevent unacceptable significant or cumulative effects upon the wetland values protected by this Bylaw and where no conditions are adequate to protect those values. Due consideration shall be given to any demonstrated hardship on the applicant by reason of denial, as presented at the public hearing.

A permit shall expire three years from the date of issuance. Notwithstanding the above, the Commission in its discretion may issue a permit expiring five years from the date of issuance for recurring or continuous maintenance work, provided that annual notification of time and location of work is given to the Commission. Any permit may be renewed once for an additional one-year period, provided that a request for a renewal is received in writing by the Commission prior to expiration.

For good cause the Commission may revoke or modify a permit issued under this Bylaw after public notice and public hearing, and notice to the holder of the permit.

The Commission, at its discretion in an appropriate case, may combine the permit or other action on an application issued under this Bylaw with the order of Conditions issued under the Wetlands Protection Act.

- Bylaw Regulations, Article V: Procedures and Permits, Section 15 Extension of Permit, Subsection 15.1: A DOA or ORAD shall be valid for three (3) years from the date of issuance and may not be extended or renewed.

F7. The Applicant has not provided the Commission with proof of recording of the ORAD at the Franklin County Registry of Deeds as required under 310 CMR 10.05(6)(g).

F8. Because environmental conditions fluctuate over time and affect Resource Area boundaries, the Commission finds that Resource Area Delineations must be inspected and verified by a qualified expert at least every three (3) years in order to determine their accuracy. Flagging in the field must also be inspected and routinely maintained in order for an ORAD Extension to be considered.

F9. The Commission finds that the available information supporting the current ORAD no longer protects the Interests of the WPA and the Values of the Bylaw. Relevant facts supporting this Determination include the following:

- Information about the delineation of all protected Resource Areas under the WPA and Bylaw on the subject parcel was not provided during the Public Hearings for this ORAD. Specifically, in the 3/29/21 Report from Stockman Associates, the Commission's Third Party Reviewer for the ANRAD, the Consultant noted that the Applicant never fully addressed Comments #s 3, 4, and 7.
- Information regarding the possible presence of a Vernal Pool, a Resource Area protected by the WPA and the Bylaw, in the delineated Bordering Vegetated Wetland W-3, was never provided to the Commission, despite recommendations from the Commission's Third Party Reviewer at the time of the Public Hearing. This Resource Area may exist but has not been delineated. No subsequent information has been provided by the Applicant regarding this potential Resource Area.
- The Third Party Reviewer in her 3/29/21 Report did not concur with all of the data presented in the Wetland Determination Data Forms for W-GAR-1-PFO, W-GAR-2-PFO, W-GAR-2-UPL, W-GAR-3-PFO, and W-GAR-3-UPL. The Commission approved the wetland boundary based upon the field inspection, but the Commission does not have a reasonable degree of certainty that these Data Forms are accurate or that the wetland boundary remains accurate at this time.
- On 4/22/21, the Commission approved an ANRAD Policy which requires that ANRADs provide all Wetland Determination Data Forms. While the Commission approved this wetland boundary based upon a Third Party Peer Review during the Public Hearing process, the documented concerns about the accuracy of the Wetland Determination Data Forms relied upon in the original delineation make it impossible for the Commission to assess their continued accuracy.
- The Applicant has not provided the Commission with any credible information from a competent source in support of its assertion that current ORAD, including flagging in the field, is still accurate and reflects all jurisdictional Resource Areas protected by the WPA and the Bylaw. In this matter a competent source is a qualified wetland scientist who has personally inspected the flagging on the site and reviewed all relevant data in support of the Resource Area delineation.
- Since the issuance of this ORAD, the Commission adopted updated Bylaw Regulations. Any future applications shall be subject to these Regulations and the definitions and

standards therein. The current ORAD did not evaluate the presence of all Resource Areas protected by the Bylaw and now defined in the Bylaw Regulations, including Vernal Pools, Intermittent Streams, and Isolated Wetlands under 1,000 square feet in area. Any future review of an application shall require that all Protected Resource Areas on the subject parcel are delineated.

F10. Based on the facts and applicable statutes and regulations, the Commission denies the request for an ORAD Extension.

F11. The Applicant, at its discretion, may either submit a revised and updated ANRAD application or provide a Resource Area delineation at the time of a submittal of any application for permit of any other work, including but not limited to a Notice of Intent. If a new ANRAD is submitted or a Notice of Intent is required for work within the project boundary, the applicant must submit a site plan depicting all jurisdictional Resource Area boundaries under the WPA and Bylaw, including those approved under this original ORAD, and those present but not reviewed and approved under this ORAD. All flagging in the field must be refreshed and be numerically consecutive for any future review.

See attached Certificate of Vote authorizing digital signatures.

Shutesbury Conservation Commission

Miriam DeFant

Mary David

Scott Kahan

Beth Willson

CERTIFICATE OF VOTE AUTHORIZING SIGNATURES PURSUANT TO M.G.L. c.110G

On May 14, 2020, the Shutesbury Conservation Commission met in open session through publicly accessible video-conference software, pursuant to the "Order Suspending Certain Provisions of the Open Meeting Law, G.L. c. 30A, §20," issued by Governor Charles D. Baker on March 12, 2020. At this duly held meeting, the following action was taken:

Motion: Shutesbury Conservation Commission hereby recognizes and accepts the provisions of M.G.L. c.110G regarding electronic signatures and that its members will henceforth execute documents either with electronic signatures or with wet ink signatures and that both will carry the same legal weight and effect. Motion was seconded.

Roll Call vote:

Commissioner Penny Jaques: aye
Commissioner Russ Mizula: aye
Commissioner Robin Harrington: aye
Commissioner Liam Cregan: aye
Vote was Unanimous

The above is a true and accurate account of the proceedings of the Conservation Commission.

Title/Signature: Alice P. Jaques Date: 20 May, 2020

Commonwealth of Massachusetts
County of Franklin, ss.

On this 20 of May, 2020, before me, personally appeared Alice P. Jaques, Chair of said Conservation Commission, as aforesaid, and proved to me through satisfactory evidence of identification, which was Personally Known to me to be the person whose name is signed on the preceding document, and acknowledged to me that she signed it voluntarily for its stated purpose on behalf of the Town of Shutesbury.

Susan Mosher
Notary Public

My Commission Expires: 4/1/2022

Certified by Town/City Clerk:

Susan Mosher Date: May 20, 2020
Susan Mosher

