



Date: December 7, 2020

To: Randall Brownrigg, Chairman
Hudson Conservation Commission

Cc: Brian Kutz, Hillwood
John Smolak, Smolak & Vaughan
Justin Pasay, Donahue, Tucker & Ciandella
Nathan Kirschner, Langan

From: Brendan Quigley, Gove Environmental Services. Inc.

Re: Hudson Logistics Center
Responses to Member Comments and BCM Environmental Law/Marc Jacobs submittal
received at 11/16/20 Meeting

We are pleased to provide the following responses to questions and comments raised at the November 16, 2020 Conservation Commission meeting and some of the issues raised in the letter submitted by BCM Environmental & Land Law that was prepared by wetland and soil scientist Marc Jacobs. Further responses to this letter are being prepared and will be submitted along with a final revised CUP application.

Brett Gagnon (Commission Member)

My interpretation of this regulation is not literal regarding the use “beyond” the wetland conservation district, but instead, a use that outweighs the need for a wetland district. That being said, It will take strong, factual and quantifiable evidence to prove that the importance of wetlands in our ecosystem should be outweighed by an economically focused project such as this.

Response: This comment constitutes a distortion of the applicable standard. The Hudson Wetland Conservation Overlay District Ordinance (Article IX) specifically permits the “[c]onstruction of streets, roads, and other access ways, including driveways, footpaths, bridges, and utilities if essential to the productive use of land beyond the Wetlands Conservation Overlay District” if they meet the conditional use permit criteria outlined in §334-37. Zoning Ordinance, §334-36(C)(2). Section 334-37 requires an analysis of the proposed conditional use and a balancing of that use against its impact and the efforts undertaken by the applicant to minimize, avoid, and mitigate against that impact. In this case, the Applicant has undertaken a robust effort to demonstrate compliance with those criteria and intends to further supplement its responses. The standard described in this comment, whereby a conditional use permit application would be denied unless the Planning Board found that the proposed use “outweighs the need for a wetland district” is not contained within the Wetland Conservation Overlay District Ordinance and not correct. Such a standard would be unconstitutionally vague.

A reference to the Hudson town ordinance 334-35 (B)(1)(d) which stated that “The proposed use within the wetland conservation district is not based primarily on economic considerations”. The response was that this ordinance was removed in March of 2020 right before this applicant presented. Although this falls outside the scope of tonight’s meeting, this raises a red flag to me. This previous ordinance seemed reasonable in the protection of our environment against only economic benefits forcing applicants to show a greater need for said development. It is critical that we balance our economic wants with those of sustainable practices.

Response: The amendments to the District Ordinance occurred prior to the Applicant making a filing with the Conservation Commission. We assume, however, that multiple public meetings were held well in advance of these Ordinance amendments, and that any member of the public, including and Conservation Commission Members, could have objected to these proposed amendments but extensive Town-wide acceptance of the District Ordinance amendments was expressed via their adoption by Town Meeting vote on March 10, 2020 by an approximate 77% voter approval (i.e., a vote of 2,976 in favor to 866 against).

More importantly, the proposed use within the Wetland Conservation Overlay District are not based primarily on economic considerations. Rather, the use is nearly entirely related to providing access to the significant upland area of the property over wetland area on the eastern side of the same.

You have proposed that the Merrimack shoreland and the remaining undisturbed wetland region will be given a conservation easement as “mitigation” for the disturbance elsewhere on the property. With that in mind, I’d like to highlight the definition of “mitigation” and “mitigant” as:

- The process or result of making something less severe*
- A factor that mitigates or alleviates something*

Since the land along the Merrimack river and within the wetland region on the front of the property is currently undisturbed and experiencing low levels of noise and pollution in contrast to the finished proposed project in front of us today, adding a “conservation easement” title to these areas does not seem to meet the definition of an action that alleviates or makes the proposed disturbance less severe. Put differently if you fill in half of a pond and state that the other half of the pond will be protected, you still destroy half a pond and its functions. Thus I am truly looking for actionable items that will properly offset the disturbances you are proposing in order to maintain the current ecological balance of our region and/or propose an environmentally friendly project that will benefit our residents in their quest to connect with nature.

Response: The term “mitigation” or “mitigate” is not as defined as above, but guidance under the District Ordinance regarding the type and extent of compensatory mitigation is found with the New England District Compensatory Mitigation Guidance, US Army Corps of Engineers, New England District, Regulatory Division, 7-22010 as amended, which the Applicant has followed. Moreover, the example of filling of a manmade pond is misplaced since the Hudson



Wetland Conservation District Ordinance expressly excludes from the definition of wetlands any manmade facilities and we understand the “pond” in question is a manmade facility and thus excluded from protection under the Zoning Ordinance.

Paula Hubert (Former Alternate Commission Member)

Concern regarding the possibility of turtles returning to ponds after they have been impacted to lay eggs.

Response: The potential impacts due to turtles returning to their former ponds will be mitigated in several ways. Turtles don’t actually utilize the ponds themselves to lay eggs, they utilize sandy areas near the waterbodies they normally occupy to excavate nests and lay eggs. During construction, turtles will be prevented from returning to the impacted ponds by the perimeter erosion control. This will also prevent them from utilizing open sandy areas that are likely to be present in the work area during this time. Turtle nesting habitat is also being preserved by maintaining the existing sand traps in the proposed preservation areas. These lie in close proximity to the pods and should serve as good nesting habitat once golf activity ceases. Together with the restoration of more naturalized restoration plantings, it is expected that little or no impact on turtle nesting would be experienced.

Other Abutters Comments:

How will you know the ponds have adequate capacity to accept the relocated wildlife.

Response: We anticipate the relocated wildlife to include turtles, snakes and amphibians. It is not likely mature fish populations occur in the pond as the winter ice and snow conditions in this region generally result in high and in some cases total fish mortality due to anoxic conditions in shallow ponds that do not have freshwater inlets. The amphibian and reptile species can be affected by this as well, but many, due to their oxygen requirements or overwintering behavior, are less affected. The carrying capacity of the ponds that receive the relocated animals may or may not be at maximum capacity and due to the distribution of the animals from one pond into the remaining three ponds, the loss of animals due to any carrying capacity issue will be eliminated or reduced significantly.

Can Hillwood provide an example of habitat enhancement next to a facility such as this?

Response: Restoration of degraded land for habitat enhancement is a common practice and is routinely carried out in connection with large developments, particularly redevelopment projects. It is also often requested by New Hampshire Fish and Game, especially in conjunction with permanent protection as is being proposed here

The following consists of a response to several of the comments described in a letter from Marc Jacobs, dated November 13, 2020, and submitted by BCM Environmental Land Law, PLLC by letter, dated November 16, 2020



The following preliminary responses are offered to the comments issued in the above referenced letter. They have been organized by heading as appearing in the letter. The Applicant will provide additional answers to issues raised in Mr. Jacobs' letter in advance of the anticipated 4 January 2021 Conservation Commission meeting.

Wetland Delineation Data Sheets - Appendix B

1. *The applicant has not prepared or submitted wetland delineation data sheets in support of the delineation of jurisdictional wetlands at this location.*

Response: In all cases, wetlands have been delineated in accordance with the defining criteria and procedures specified in the Corps of Engineers Wetlands Delineation Manual and Northcentral/Northeast Regional Supplement as required by the NH General Permit (GP) and state wetland regulations. The New Hampshire Certified Wetland Scientist program and corresponding plan stamp attesting to the delineation having been conducted in accordance with these standards. Wetland delineation data forms were not initially prepared for this project because they are not routinely completed for projects falling under the NH General Permits issued on August 18, 2017, as amended (GP). The ACOE conducts weekly review of projects submitted to the New Hampshire Department of Environmental Services to determine eligibility under the GP and is afforded significant discretion on what may or may not be required. The ACOE and NHDES only occasionally request data forms for GP projects, generally in special circumstances or in specific areas and none have been requested for this project. We recognize, however that this is a significant project in the Town of Hudson and wish to provide the best possible documentation of wetland boundaries. Data forms have therefore been prepared for the vegetated wetland boundaries in all proposed impact areas and are attached.

2. *I also note that some of the wetland flags were located via Global Positioning System (GPS). (The site plans do not indicate which flags.) This method of surveying the flags that identify the wetland-upland boundary is not as accurate as conventional survey instruments.*

Response: All wetlands flags were located by Hayner Swanson, Inc. and have been stamped by a Licensed Land Surveyor. The use of GPS equipment by land surveyors to locate wetland flagging (and for other purposes) is a common and supported practice.

Previously Filled Wetlands—Appendix B

3. *The applicant has provided no information to identify and quantify previously filled wetlands as required in sections 2.6 and 2.8 of the Appendix B form Importantly, the Appendix B form does not specifically identify a date after which previously filled wetlands do not need to be identified or quantified.*

Response: The purpose of this section of the Appendix B form is not to identify historic wetland fill or potential unauthorized activities as the letter appears to suggest. Rather, the Appendix B form is a screening tool for federal regulators to determine if a project complies with General



Condition #5 requiring a “Single and Complete Project”. This relates to the concept of incremental development by a property owner or developer at a single location such that the ACOE would have an interest in evaluating the impacts cumulatively, and potentially requiring an activity requiring Individual Permit. The currently proposed project involves the redevelopment of a golf course created in the early part of 1960s into an industrial use by an entirely different entity. This is very clearly a different project and should be treated as such.

The Appendix B form aims for simplicity and relies on project review and embedded core concepts such as a Single and Complete Project. An example is that the previous version of this form did not ask about previously filled wetlands but instead asked for impervious surface. Having received no comments from the ACOE on the provided answer there does not appear to be a deficiency.

- 4. The delineation report states that "wetlands are characterized by a long history of alteration predating the regulation of freshwater wetlands" but I note that the property applied for wetlands permits in 1987, 1990 and 1991 (permit numbers 1987-00148, 1990-02446 and 1991-01691 respectively) for activities that include restoring wetlands, dredging ponds and constructing a golf range. Permits to restore wetlands suggests that wetlands were filled without prior authorization.*

Response: The long history of wetland alteration referenced above includes the period prior to golf course operations when the land was managed for agriculture and as a part of a sand and gravel operation. During this time, wetlands were likely altered for drainage purposes or to maximize arable land. The development of the golf course primarily altered wetlands by dredging ponds along Limit Brook and the main ditch running north along the eastern side of the course. As recalled by the owners this was done in coordination with the Soil Conservation Service (SCS), which played an important role in such activities. The SCS was also involved in making recommendations to the NH DES (Wetlands Board at the time) in connection with the 1991 permit referenced in the letter. The work under this permit involved dredging the pond south of Steele Road, moving of a cart path and restoration of the former cart path. The 1990 permit was for restoration of a small wetland disturbance near the area of the existing Sam’s Club. A letter of compliance was issued for this work. The earliest permit from 1987 was for construction of the World Cup Driving Range located off the project site. Rather than pointing to a history of unauthorized activity, these permits demonstrate a history of adherence to applicable wetland regulation and should resolve any concerns the Conservation Commission may have regarding previous work.

- 5. It also appears that numerous opportunities exist to restore drainage and wetland hydrology which was interrupted or diverted by ditching and the construction of the golf course as well as Steele Road.*

Response: Portions of Steel Road served as access to the property when it was a farm and appears on maps dating back to the 1930’s. The flow path along Limit Brook, and on the golf course, remains largely the same as existed prior to the course being constructed. Alteration of the Steel Road crossing or the hydrology of the ponds would significantly alter wetland habitat



that has existed for decades. It would also likely have negative effects on the flood storage and water quality function being supported in this area. This is particularly important given the substantial changes that have occurred within the Limit Brook Watershed upstream of the site. The Applicant's proposed restoration focuses on revegetating riparian areas, wetland buffers, and other uplands surrounding the primary wetland systems on the site. Some of these areas have been cleared for upwards of 90 years. Together with the permanent protection, this will have a comparatively greater benefit from a wildlife habitat perspective while also maintaining the function created by the past alterations.

Wetland Functional Assessment

6. *The applicant has not evaluated site wetlands for Ecological Integrity as required by NH RSA 482-A:2 XI.*

...My experience suggests that access and parking, or more specifically lack thereof, are frequently the most significant impediment to a wetlands ability to provide educational opportunities. However, access and parking at this site are not impediments.

The WFA fails to include the master list of considerations and qualifiers known as Appendix A

...the applicant should issue a revised wetland functional assessment (WFA) as required by Env-Wt 311.10 so that the project impacts can be properly evaluated.

Response: Ecological Integrity was evaluated on the NHDES Functional Assessment Worksheet but was not discussed in the text of the WFA. The WFA has been revised to include discussion of this variable. The revised WFA also includes a copy of Appendix A that provides a reference to the consideration and qualifier codes used by the Highway Methodology Workbook and Supplement. As to the educational potential of the wetlands on site, I do not believe parking availability is a factor limiting *the suitability of the wetland as a site for an "outdoor classroom" or as a location for scientific study or research potential*, as its defined in the Highway Methodology guidance. The primary limiting factor is the setting and disturbed condition of many of the wetlands on the site, both of which are specified as considerations in the aforementioned Appendix A. An exception does exist in the Merrimack River itself which was noted as having educational potential though not a primary function. It is also important to consider that the intent is not to extend education potential to every line of research or educational opportunity that can be imagined since this would have the effect of including almost all wetlands. It is worth noting that both access and setting will substantially improve beyond existing conditions for all the significant wetlands on this site once the proposed restoration and preservation is implemented. The educational potential of the wetlands in these areas will therefore significantly improve.

7. *Conflicting information has been provided by the applicant regarding the isolated pond identified as wetland impact area 6. In their Response to Conservation Commission Member Comments dated November 9, 2020, Gove Environmental Services, Inc. (GES)*



indicates (number 31 - page 10) that impacts to this pond have been removed in the latest design. However, a review of the site plans indicate that this pond will be eliminated to construct proposed Distribution Warehouse B.

Response: The comment from Conservation Commission Member Ken Dickinson to which that response was given appears to have been either misstated or transcribed incorrectly. The comment refers to Impact Area 6 but discusses the southernmost pond closest to abutters where a partial impact was initially proposed. I had also discussed this with Mr. Dickinson directly and understood the comment to involve this area which is Impact Area 5. Importantly, Impact Area 5 was in fact avoided by shifting the site layout northward.

NH RSA 482-A:3 IV (b) - Certain Exemptions

8. *In their September 8, 2020 response, GES states, in part, "the existing pond is being impacted to construct several elements of the development, including grading for stormwater BMP's but will not ... serve as stormwater or water quality treatment. .. " It is unclear how the GES response is intended to demonstrate compliance with Env-Wt Env-Wt 524.04(b)*

Response: The response is intended to make a clear distinction between using a wetland or surface water to treat stormwater and proposing fill to accommodate a portion of a constructed stormwater management feature, among other elements of the development. Prior to the implementation of the above referenced rule, wetlands were commonly coopted for stormwater management by directing untreated or minimally treated runoff into wetlands areas and modifying outlets to increase storage and treatment. The impact referenced by this comment does not rely on the pond for this purpose and is no different than a wetland impact for a parking lot which also may contain drainage pipes, water quality swales and catch basins.

9. *The applicants reference that local regulations have recently been revised to bring them more into line with state law regarding man-made wetlands. It is therefore useful to review the language of the statute, NH RSA 482-A:3 IV (b), which regulates the maintenance (emphasis added) of man-made features which develop into wetlands with the passage of time...*

...Since the ponds were not constructed to perform or provide any of the uses identified in the NH RSA 482-A:3 IV(b), the exemption identified in the law does not apply.

Response: This comment conflates State and local Hudson jurisdiction. Under State law, manmade features, such as a golf-course pond, are subject to regulation, though there is a statutory exemption which applies to certain manmade wetland features. We note that all manmade ponds on the site have been fully accounted for in the Applicant's State wetland filings and no exemption for the same has been sought pursuant to RSA 482-A:3, IV(b).

Manmade features are treated differently by the Town's Wetland Conservation Overlay District Ordinance, however. Specifically, the Wetland Conservation District does not include those



wetlands which have developed as a result of the construction of stormwater treatment and/or detention facilities, agricultural use, waste treatment, or other water-dependent structures or uses. Zoning Ordinance, §334-35(C). The Wetland Conservation Overlay District also expressly does not include “manmade facilities.” Zoning Ordinance, §334-35(C).

Neither “manmade” nor “facility” is defined in the Zoning Ordinance, and even though such terms should be taken at their plain and ordinary meaning, their dictionary definitions are worthy of consideration. “Man-made” is defined by Merriam-Webster Dictionary as “produced by humans rather than natural processes.” “Facility” is defined by Merriam-Webster Dictionary as “something that is built, installed, or established to serve a particular purpose.”

Here, the golf course ponds on the property are not naturally occurring. Rather, they were constructed, installed and established by human beings for the particular purpose of establishing golf hole hazards and storage for irrigation water. As they plainly constitute manmade facilities, they are not defined as “wetlands” under the Wetland Conservation Overlay District. This interpretation is consistent with the interpretation provided to the Applicant by the Town since the inception of its Applications. Further, the Wetland Conservation Overlay District Zoning Ordinance was completely overhauled and replaced by the vote of a vast majority of the Legislative Body at the 2020 Town Meeting. Had the Legislative Body determined there was a need to assign a definition to the term “manmade facility” beyond its plain language and meaning, it would have done so.

In conclusion, the manmade facility which is the subject of this comment is beyond the Town’s jurisdiction under the Wetland Conservation Overlay District.

§334-36 of Article IX, the Hudson Wetland Conservation Overlay District.

10. I also note that the Hudson Zoning Ordinance defines surface waters as "Those portions of the state, as defined in RSA 485-A:2XIV, which have standing or flowing water at or on the surface of the ground. This includes, but is not limited to, perennial and seasonal streams, lakes, ponds and tidal waters." I note that this zoning definition was amended as recently as March 10, 2020. Since the state regulates all natural and artificial surface waters, this zoning definition conflicts with the exemption for man-made wetlands in Hudson Zoning Article IX, §334-35 C, which was also revised as recently as March 2020, purportedly to correspond to the state exemption for manmade areas which develop into wetlands. I note that while §334-35 A.I. specifically identifies surface waters as part of the Wetlands Conservation Overlay District, §334-35 C does not mention surface waters so the ponds would not be exempt from Wetlands Conservation Overlay District zoning.

Article IX, §334-35 C states that "the Wetlands Conservation Overlay District shall not include those wetlands (emphasis added) which have developed as a result of the construction of storm water treatment and/or detention facilities, agricultural use, waste treatment or other water dependent structures or uses, and manmade facilities. As was discussed earlier, the ponds in question were not constructed for storm water



management or as detention facilities. The ponds in question were not constructed for agricultural use or waste treatment (such as sewage lagoons) and do not support any water dependent structures. As discussed above, the Hudson zoning ordinance fails to define what constitutes a manmade facility. Furthermore, we have demonstrated that the ponds constitute surface waters. §334-35 C fails to specifically exclude surface waters from the Wetlands Conservation Overlay District therefore the two ponds proposed to be impacted must be included in the district and must be included in any application for a CUP, which means the applicant must demonstrate how the request to eliminate or convert the ponds complies with the Conditional Use Permit Criteria in §334-37.

Response: This comment distorts the plain language of Section 334-35(C) and omits critical provisions of the Zoning Ordinance.

Mr. Jacobs’ argument regarding the application of the Wetland Conservation Overlay District Ordinance to the manmade ponds on the golf course is as follows:

- 1) The definition of “surface water” in the Zoning Ordinance refers to RSA 485-A:2, XIV.
- 2) RSA 485-A:2, XIV applies to natural and artificial surface waters.
- 3) Section 334-35(C) of the Zoning Ordinance, specifically defining the boundaries of the Wetland Conservation Overlay District and specifically exempting “manmade facilities”, doesn’t include the words “surface water”.
- 4) So therefore, Mr. Jacobs concludes that the exemption to “manmade facilities” does not apply to manmade facilities that are surface waters.

This analysis is simply incorrect.

While Section 334-35(C) does not contain the words “surface water”, as Mr. Jacobs point out, it does state that the Wetland Conservation Overlay District “does not include those *wetlands* . . . [to include] manmade facilities.” (Emphasis added). Though not mentioned by Mr. Jacobs, the definition of the term “wetland” in the Zoning Ordinance, also amended as of March 2020, is very broad, specifically refers to RSA 482-A:2, X and includes any “area that is inundated or saturated by *surface* or groundwater at a frequency and duration sufficient to support, and that under normal conditions does support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” Zoning Ordinance, Article II (emphasis added). In other words, the Zoning Ordinance’s definition of “wetland”, which controls, is inclusive of surface waters.

This omission from Mr. Jacobs is critical because, as referenced above, the Zoning Ordinance specifically carves out from the boundaries of the Wetland Conservation Overlay District “wetlands” which are “manmade facilities.” Here, though the wetland in question happens to contain surface waters, they are wetlands under the Zoning Ordinance, and they are indisputably manmade. Again, this interpretation is consistent with the interpretation provided to the Applicant by the Town and is consistent with the word usage and interpretation provision of the Zoning Ordinance. See Zoning Ordinance, §334-5. Accordingly, they are outside the boundaries of the Wetland Conservation Overlay District based on the plain language of the Zoning Ordinance.



The Town's Legislative Body was obviously aware of the inter-play between these definitions as they were both amended in 2020. Had it intended Mr. Jacobs' interpretation, it would have so legislated. It did not. Manmade golf course ponds are plainly outside the Wetland Conservation Overlay District and the Town's jurisdiction.

