

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

August 23, 2007

In the Matter of

Conroy Development Corp.

DEP Docket Nos. 2006-091,
2006-092, 2006-093

DEP File No. 59-1060, 59-1062,
59-1064

DALA Docket Nos. DEP-06-865,
06-866, 06-867

Quincy

Final Decision

I adopt the conclusion of the Recommended Final Decision of the Administrative Magistrate that the Department properly dismissed the Petitioner's request for a superseding order of conditions. I provide alternate grounds, as the wetlands regulations are quite clear on the issuance of a local order of conditions and the ten-day timeframe for requests for action by the Department. In this case, an attorney representing the Neponset River Watershed Association visited the Quincy Conservation Commission's office on a Friday and reviewed the order of conditions, but a request for a superseding order was not filed until the following Monday, after expiration of the ten-day appeal period. The issue was whether the time to request Departmental action was tolled either because the Commission did not respond to a written advance request for a copy of the order or because the group believed the public hearing had not closed and the order was therefore not imminent.

Although the practices of conservation commissions in their interactions with interested parties may vary, the Department properly reviews commission activities only to the extent that its regulations require specific actions. Here, the regulatory provisions governing issuance and accessibility of local orders govern the outcome of this case. Upon issuance of the order by the conservation commission, the order must be mailed by certified mail or hand delivered to the applicant and at the same time to the Department. 310 CMR 10.05(6)(e). A copy of the order and the plans must be kept on file by the conservation commission and the Department, and must be available to the public at reasonable hours. 310 CMR 10.05(6)(f). Thus, the applicant and the Department receive individual notice of the issuance of the order, but all other entities who may request Department action must rely on the availability of the order for inspection by the public in the files of the commission or DEP. While the commission may choose to provide individual notice of issuance upon request to parties other than the applicant, nothing in the regulations suggests anyone other than the applicant and the Department is entitled to any notice beyond the placement of the order in the file and its availability to the public for review.

Requests for superseding orders must be sent by certified mail or hand-delivered within ten days of issuance of the order. 310 CMR 10.05(7)(c). This ten-day timeframe applies to anyone who may request Department action, regardless of whether and when they receive individual or constructive notice. This ten-day period is jurisdictional and cannot be extended. It has been tolled only for circumstances such as noncompliance with the regulations for availability for public inspection. See Matter of 29 Hancock

Street, LLC, Docket No. 2001-030, Recommended Decision (Nov. 15, 2001), Final Decision (Dec. 11, 2001)(time period tolled because conservation commission did not place order in file, so it was not available for public review when Petitioner visited the office within the ten day period).

In this case, it is undisputed that the commission properly placed the order in its files and it was available for inspection by the Petitioner. It is undisputed that the Petitioner failed to request Department action within ten days of issuance of the order as required by the regulations. Nothing in the regulations suggests that the time period begins only when a person entitled to constructive notice receives actual notice of issuance or that receipt of notice late within the ten day period provides grounds for tolling. The request is unquestionably untimely and there is no basis for tolling the time period. Persons interested in requesting Department action are responsible for checking commission files for issuance of the order. To place the burden on commissions of providing actual notice upon request, and on the Department to resolve disputes over the action or inaction of commissions, is inappropriate given the clear purpose of the statute to promote efficiency in administration of the Act.¹

The parties to this proceeding are notified of their right to file a motion for reconsideration of this Decision, pursuant to 310 CMR 1.01 (14)(d). The motion must be filed with the Docket Clerk and served on all parties within seven business days of the postmark date of this Decision. A person who has the right to seek judicial review may

¹ I reject the suggestion that the Petitioner here was entitled to receive a copy of the order of conditions in light of its discussions with the applicant; discussions with an applicant do not make a third party equivalent to an applicant for purposes of notice. I also note that the regulations do not require commissions to maintain a service list based upon requests of interested persons to receive orders of conditions upon issuance and therefore reject the suggestion of the Administrative Magistrate that they are under some obligation to implement this practice.

appeal this Decision to the Superior Court pursuant to M.G.L. c. 30A, §14(1). The complaint must be filed in the Court within thirty days of receipt of this Decision.

This final document copy is being provided to you electronically by the Department of Environmental Protection. A signed copy of this document is on file at the DEP office listed on the letterhead.

Arleen O'Donnell
Acting Commissioner