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

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

March 31, 2008

In the Matter of Mark Hubbard,
No. 4 Keystone Road, Gloucester, MA

OADR Docket No. WET-2008-021
DEP File No. Wetlands/Gloucester
Negative Superseding Determination of Applicability
Lot No. 4 Keystone Road
Gloucester, MA

FINAL DECISION
DISMISSING APPEAL

INTRODUCTION

Under 310 CMR 1.01(11)(a)2.f, a "Presiding Officer may summarily dismiss a case *sua sponte*," when the appellant fails to prosecute the appeal or fails to comply with an order issued by the Presiding Officer. For the same reasons, the Presiding Officer may also dismiss an appeal pursuant to 310 CMR 1.01(5)(a)15 and 310 CMR 1.01(10)(e).[1]

In this case, I am dismissing the petitioner Stevan Goldin's appeal for failure to comply

[1] Under 310 CMR 1.01(5)(a)15, Presiding Officers may "prescreen appeals and determine their potential amenability to settlement through alternative dispute resolution and early resolution through motions to dismiss." The prescreening authority of Presiding Officers also includes the power to "issu[e] orders to [the] parties [to the appeal], including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending prescreening conferences and ordering parties to provide more definite statements in support of their positions." 310 CMR 1.01(5)(a)15.

Under 310 CMR 1.01(10)(e), a Presiding Officer may "dismiss[s] [an] appeal as to some or all of the disputed issues" where the appellant fails to comply with a Presiding Officer's order, fails to prosecute an appeal, or "demonstrates an intention to delay the proceeding[s] or resolution of the proceedings" in an appeal.

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with my Order to Show Cause of March 13, 2008 ("March 13th Show Cause Order").[2] My March 13th Show Cause Order directed the petitioner to demonstrate in writing by Friday, March 21, 2008, why this appeal should not be dismissed due to his failure to comply with the pleading and service requirements of 310 CMR 10.05(7)(j)2.a and 310 CMR 10.05(7)(j)2.b. The petitioner has not filed any response to my March 13th Show Cause Order, and the deadline for filing a response expired 10 days ago.

PRIOR APPELLATE PROCEEDINGS

On March 6, 2008, the Office of Appeals and Dispute Resolution ("OADR") of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department")[3] received the petitioner's Appeal Notice[4] challenging the February 19, 2008 Superseding Negative Determination of Applicability ("negative SDA") that the Department's Northeast Regional Office issued to Mark Hubbard ("the applicant") regarding the real property at Lot 4 Keystone Road, Gloucester, Massachusetts ("the Property"). The petitioner purportedly filed the

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[2] Today, I also issued a Final Decision dismissing the petitioner's appeal In the Matter of Mark Hubbard, No. 1 Keystone Road, Gloucester, MA, OADR Docket No. WET-2008-020, for failure to comply with my March 10, 2008 Order to Show Cause.

[3] OADR is separate and independent of MassDEP's program offices, Regional Offices, and Office of General Counsel ("OGC"). OADR is staffed by a Case Administrator, an Administrator of Alternative Dispute Resolution ("ADR"), and Presiding Officers. A Chief Presiding Officer, who reports to MassDEP's Commissioner, supervises Presiding Officers and other OADR staff.

Presiding Officers in OADR are experienced attorneys at MassDEP appointed by MassDEP's Commissioner to serve as neutral hearing officers, and are responsible for facilitating settlement discussions between the parties in administrative appeals, and to resolve appeals by conducting hearings and making Recommended Final Decisions on appeals. See 310 CMR 1.01(1)(a); 310 CMR 1.01(1)(b); 310 CMR 1.01(5)(a)15. Under 310 CMR 1.03(7), Ex Parte communications between OADR's Presiding Officers and MassDEP personnel regarding a pending appeal are expressly prohibited and all MassDEP staff involved in the appeals process are informed of these requirements. Additionally, Recommended Final Decisions of Presiding Officers in appeals are subject to review by MassDEP's Commissioner pursuant to 310 CMR 1.01(14). Under the regulation, the Commissioner may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision. All Final Decisions are subject to judicial review pursuant to G.L. c. 30A, § 14. These provisions ensure that the appeal process at MassDEP will be fair and will result in unbiased decision-making.

[4] The Appeal Notice is entitled "Request For An Adjudicatory Hearing."

Appeal Notice on behalf of a ten-citizen group. The petitioner, however, failed to comply with the pleading and service requirements of 310 CMR 10.05(7)(j)2.a and 310 CMR 10.05(7)(j)2.b.

Under 310 CMR 10.05(7)(j)2.a, the party appealing a SDA must file an Appeal Notice with OADR within 10 business days after the SDA's issuance, and must serve copies of the Appeal Notice upon the following parties within the same time period:

> (1) the regional Department office that issued the SDA;
>
> (2) the local conservation commission (unless the appellant is the commission);
>
> (3) the applicant (unless the appellant is the applicant); and
>
> (4) any person that requested action by the Department that resulted in the SDA (unless the appellant is the person who made the request).

Here, the petitioner failed to provide proof to OADR that he served copies of his Appeal Notice upon the Department's Northeast Regional Office, the Gloucester Conservation Commission, and the applicant within 10 business days after the Department issued the negative SDA. His Appeal Notice was also deficient under 310 CMR 10.05(7)(j)2.b.

Under 310 CMR 10.05(7)(j)2.b, a petitioner must include certain information in its Appeal Notice, including the following:

> i. the petitioner's complete name, address, phone number, fax number, and email address[,] . . .;
>
> iii. if filed by an aggrieved person, a demonstration of participation in previous proceedings, in accordance with 310 CMR 10.05(7)(j)(3)(a) and sufficient written facts to demonstrate status as a person aggrieved;
>
> iv. if filed by a ten resident group, demonstration of participation in previous proceedings, in accordance with 310 CMR 10.05(7)(j)(3)(a); and
>
> v. a clear and concise statement of the alleged errors contained in the SDA and how each alleged error is inconsistent with 310 CMR 10.00 and does

> not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c. 131, § 40, including reference to the statutory or regulatory provisions the petitioner alleges has been violated by the SDA, and the relief sought, including specific changes desired in the SDA . . . .

Here, the petitioner's Appeal Notice did not contain this required information. As a result, his appeal was subject to dismissal pursuant to 310 CMR 10.05(7)(j)2.c.

In accordance with my authority as a Presiding Officer under 310 CMR 1.01(5)(a)15 to "prescreen appeals and determine their potential amenability to settlement through alternative dispute resolution and early resolution through motions to dismiss,"[5] I issued my March 13th Show Cause Order directing the petitioner to demonstrate in writing by Friday, March 21, 2008, why this appeal should not be dismissed due to his failure to comply with the pleading and service requirements of 310 CMR 10.05(7)(j)2.a and 310 CMR 10.05(7)(j)2.b. Specifically, my March 13th Show Cause Order directed the petitioner to file a response with OADR by March 21, 2008 containing the following information:

> (1) proof that the petitioner served copies of his Appeal Notice upon the Department's Northeast Regional Office, the Gloucester Conservation Commission, and the applicant within 10 business days after the Department issued the negative SDA;
>
> (2) the petitioner's complete name, address, phone number, fax number, and email address;
>
> (3) facts demonstrating participation in previous proceedings, in accordance with 310 CMR 10.05(7)(j)(3)(a) and sufficient written facts to demonstrate status as a person aggrieved;
>
> (4) if proceeding as a ten resident group appeal, demonstration of participation in previous proceedings, in accordance with 310 CMR 10.05(7)(j)(3)(a); and
>
> (5) a clear and concise statement of the alleged errors contained in the negative SDA and how each alleged error is inconsistent with 310 CMR

[5] See footnote 1, at p. 1 above.

> 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c. 131, § 40, including reference to the statutory or regulatory provisions the petitioner alleges has been violated by the negative SDA, and the relief sought, including specific changes desired in the SDA.

My March 13th Show Cause Order made clear that the petitioner had to file his response by March 21, 2008 with "OADR's Case Administrator, Anne Hartley, One Winter Street, 2nd Floor, Boston, MA 02108," and that he had to "serv[e] [copies of his response] on the other parties in the case (identified on the attached service list) pursuant to 310 CMR 1.01(4)(f)." See March 13th Show Cause Order, at p. 4. My March 13th Show Cause Order also made clear that I would dismiss this appeal pursuant to 310 CMR 1.01(5)(a)15.f.vi and 310 CMR 1.01(10) if the petitioner failed to file the required response with OADR by the March 21, 2008 deadline.

As of this date, March 31, 2008, the petitioner has not filed any response with OADR to my March 13th Show Cause Order. All he has done is to serve a copy of a document dated March 20, 2008 on the Department and the applicant entitled "Completeness of Petitioner's Request of Adjudicatory Hearings."[6] The document's title is misleading because the document fails to contain the information that I directed the petitioner to provide OADR in my March 13th Show Cause Order. The document also makes clear that the petitioner does not recognize the authority of OADR and its Presiding Officers to issue orders directing him to comply with appellate regulations. The document states that the petitioner "considers the 'prescreening process'" of OADR "contrary to law" and demands that this appeal be transferred for hearing before the Division of Administrative Law Appeals ("DALA"), an agency within the Executive Office of Administration and Finance. The petitioner's claim is groundless, and this case is one of four appeals in recent months in which the petitioner has asserted that groundless claim. See

[6] See Department's Motion to Dismiss, March 26, 2008; Department's Supplemental Information to Department's Motion to Dismiss, March 28, 2008; and Applicant's Motion to Dismiss, March 27, 2008.

In the Matter of Richard Cretarolo, OADR Docket No. WET-2007-002, Final Decision on Reconsideration, February 21, 2008; In the Matter of Dunfudgin, LLC, OADR Docket No. WET-2008-012, Recommended Final Decision, March 24, 2008; In the Matter of Mark Hubbard, No. 1 Keystone Road, Gloucester, MA, OADR Docket No. WET-2008-020, Final Decision Dismissing Appeal, March 31, 2008.

ORDER

For the reasons set forth above, this appeal is dismissed pursuant to 310 CMR 1.01(5)(a)15.f.vi; 310 CMR 1.01(10)(e); and 310 CMR 1.01(11)(a)2.f due to the petitioner's failure to comply with my March 13th Show Cause Order.

The parties to this proceeding are notified of their right to file a motion for reconsideration of this Final 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 Final Decision. Any party may appeal this Final 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 Final 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.

Date: _____

_____
Salvatore M. Giorlandino
Acting Chief Presiding Officer

SERVICE LIST

Applicant: Mark Hubbard
20 Pew Avenue
Gloucester, MA 01930;

Legal representative: James M. McKenna, Esq.
63 Middle Street
Gloucester, MA 01930;

Petitioners: Steven Goldin
14 Hodgkins Street
Gloucester, MA 01930;

Legal representative: None identified in Appeal Notice;

The Local Conservation Commission:

Gloucester Conservation Commission
Gloucester City Hall
9 Dale Avenue
Gloucester, Massachusetts 01930;

Legal representative: None identified in Appeal Notice;

Ten Citizens Group: Petitioner contends that he represents a ten-citizen group**;**

The Department: Michael Abell
MassDEP/Northeast Regional Office
Bureau of Resource Protection
205B Lowell Street
Wilmington, Massachusetts 01887;

Jenny Ewing Outman, Counsel
MassDEP/Office of General Counsel
One Winter Street
Boston, Massachusetts 02108;

Heidi Zisch, Chief Regional Counsel
MassDEP/Northeast Regional Office
Bureau of Resource Protection
205B Lowell Street
Wilmington, Massachusetts 01887.