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EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

September 10, 2008

In the Matter of Dorothy Peterson

OADR Docket No. WET-2008-015
DEP File No. SE 76-1974
West Wareham, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

In this appeal, David and Susan Mackley (“the Petitioners”) challenge a Superseding Order of Conditions (“SOC”) that the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued in January 2008 to Dorothy Peterson (“the Applicant”) authorizing her to construct a single family home on her real property in Wareham, Massachusetts. The Petitioners, who either live or own real property in the area, oppose the Applicant’s construction of the home because it will purportedly harm surrounding wetlands in violation of the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 (“MWPA”), and the Wetlands Regulations at 310 CMR 10.00, et seq. The Petitioners, however, have failed to substantiate their claims notwithstanding that they have the burden of proof in this case, and notwithstanding the multiple opportunities that I have provided to them over the last seven months to set forth a minimal factual and legal basis for their appeal. Accordingly, I recommend

that MassDEP's Commissioner issue a Final Decision dismissing the Petitioners' appeal and affirming the SOC that the Applicant received from the Department.

GOVERNING STATUTORY AND REGULATORY SCHEME

I. THE COMMONWEALTH'S EXPEDITED WETLAND PERMIT APPEAL POLICY

It is the policy of the Commonwealth of Massachusetts to resolve wetland permit appeals such as this case within six months of the appeal's filing because delays in wetland permit appeals are costly to private and public parties involved in the permitting process. See Wetlands Appeal Streamlining Regulations, Preamble, October 31, 2007; 310 CMR 10.05(7)(j), effective October 31, 2007. The Commonwealth's policy is set forth in the streamlined wetland permit appeal regulations that the Department adopted on October 31, 2007. *Id.* As will be discussed below, this six month timeline for resolving wetland permit appeals will not be achieved in this case because the Petitioners delayed final resolution of this appeal by repeatedly failing and refusing to articulate their claims. See below, at pp. 11-18.

II. THE PARTIES WHO MAY APPEAL AN SOC AND THE PLEADING REQUIREMENTS FOR AN APPEAL NOTICE

Under 310 CMR 10.05(7)(j)2.a, various parties may appeal an SOC, including any "aggrieved person if previously a participant in the permit proceedings."¹ "Previously

¹ Other parties who may appeal an SOC are the following:

- (1) the applicant (the person who filed the Notice of Intent ("NOI"), or on whose behalf the notice was filed with the local conservation commission that approved or denied the project that is the subject of the SOC);
- (2) the landowner (the owner of record of the land or an interest in the land that is the subject of the SOC);
- (3) the local conservation commission that approved or denied the project that is the subject of the SOC; or

participating in the permit proceeding” means:

the submission of written information to the [local] conservation commission prior to [its] close of the public hearing [on the applicant’s wetland permit application], requesting an action by the Department that would result in a Reviewable Decision, or providing written information to the Department prior to issuance of a Reviewable Decision.

310 CMR 10.05(7)(j)2.a. An “aggrieved person” is “any person who, because of an act or failure to act by the [Department in issuing the SOC], may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in M.G.L. c. 131, § 40.” 310 CMR 10.04; compare, Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20, 33-37 (2006) (plaintiff appealing zoning decision “[must] prove standing, which requires that the plaintiff ‘establish -- by direct facts and not by speculative personal opinion -- that his injury is special and different from the concerns of the rest of the community’”). Such a person must file an Appeal Notice with MassDEP’s Office of Appeals and Dispute Resolution (“OADR”)² within 10 business days after the SOC’s

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- (4) any 10 residents of the city or town where the land is located, if at least one resident was previously a participant in the permit proceeding.

310 CMR 10.04; 310 CMR 10.05(7)(j)2.a.

² 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.

issuance. 310 CMR 10.05(7)(j)2.a.

The Appeal Notice must contain the following information:

- . . . iii. . . . demonstration of participation [by the petitioner] in previous [permit] proceedings, . . . and sufficient written facts to demonstrate status as a person aggrieved; . . .
- v. a clear and concise statement of the alleged errors contained in the [SOC] 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, section 40, including reference to the statutory or regulatory provisions [that the petitioner] alleges has been violated by the [SOC], and the relief sought, including specific changes desired in the [SOC]; [and]
- vi. a copy of the [SOC] appealed and a copy of the underlying [local] Conservation Commission decision if the [SOC] affirm[ed] the [local] Conservation Commission decision. . . .

310 CMR 10.05(7)(j)2.b.

The provisions of 310 CMR 10.05(7)(j)2.a make clear that “[a]ny party . . . that fails to timely file an Appeal Notice[,] . . . shall be deemed to have waived its right to appeal the [SOC].” Likewise, 310 CMR 10.05(7)(j)2.c, makes clear that “[a]n Appeal Notice that does not contain all of the information required in [Section 10.05(7)(j)2.b] may be dismissed.”

III. THE BURDEN OF PROOF IN AN APPEAL CHALLENGING AN SOC

The party challenging an SOC (“the appellant” or “the petitioner”) has the burden of proof on all issues, including whether the party has standing to appeal the SOC as an aggrieved person and whether the Department improperly issued the SOC. See 310 CMR 10.05(7)(j)2.b.iv; 310 CMR 10.05(7)(j)2.b.v; 310 CMR 10.05(7)(j)3.a; 310 CMR 10.05(7)(j)3.b; compare, Standerwick, supra. Section 10.05(7)(j)3.a of 310 CMR provides that:

[a] Party who has timely filed an Appeal Notice must file with the Department and serve a copy on all parties its *Direct Case* no later than forty-five days after

the *Pre-screening Conference*.³

(emphasis supplied). The petitioner’s “Direct Case” is:

the evidence that [the petitioner] seeks to introduce in support of its position, as well as any legal argument the [petitioner] wishes to provide. The Direct Case may include, but is not limited to, statements under oath by lay witnesses and expert witnesses, technical reports, studies, memoranda, maps, plans, and other information that a party seeks to have the Presiding Officer review as part of the adjudicatory proceeding.

Under 310 CMR 10.05(7)(j)3.b:

[t]he Petitioner has the burden of going forward pursuant to 310 CMR 10.03(2), and proving its direct case by a preponderance of the evidence.

This means that the petitioner must “produce at least some credible evidence from a competent source in support of [the petitioner’s] position[s].” 310 CMR 10.03(2); 310 CMR 10.05(7)(j)3.b; compare, Standerwick, supra, 447 Mass. at 37 (plaintiff’s case cannot consist of “unfounded speculation to support their claims of injury”). Indeed, in challenging MassDEP’s factual determinations in the SOC, the petitioner must present “credible evidence from a competent source in support of each claim of factual error, including any relevant expert report(s), plan(s), or photograph(s).” 310 CMR 10.05(7)(j)3.c. The petitioner’s failure to present that evidence will constitute a waiver of the petitioner’s claims. Id.

III. THE CASE MANAGEMENT AUTHORITY OF PRESIDING OFFICERS UNDER 310 CMR 1.01 AND 310 CMR 10.05(7)(j)7.

A. The Presiding Officer’s Pre-Screening Authority

The Wetland Permit Appeal regulations at 310 CMR 10.05(7)(j)7.a and 7.b provide that “[u]pon receipt of [an] Appeal Notice, the Presiding Officer will schedule” two events: (1) “a prescreening conference to be conducted [with the parties] pursuant to 310 CMR 1.01(5)(a)15”

³ As discussed below at pp. 5-8, the Pre-Screening Conference is a critical component of the appeal process and the time when the issues for resolution at hearing are finalized if the appeal cannot be settled by agreement of the parties. The parties’ participation in that process is mandatory. Here, the Petitioners refused to participate in that process, and their failure to do so justifies dismissal of their appeal. See below, at pp. 14-18.

within 30 days after the appeal's filing, and (2) a hearing in the appeal to be conducted within 120 days after the appeal's filing.⁴

The purpose of the pre-screening conference is to discuss potential settlement of the appeal and the issues for resolution in the appeal if it cannot be settled by agreement of the parties. 310 CMR 1.01(5)(a)15; 310 CMR 10.05(7)(j)7.g. "All parties must attend [the pre-screening conference] and be prepared to discuss settlement and the narrowing of issues" for resolution at the subsequent evidentiary hearing. 310 CMR 10.05(7)(j)7.g. For any appeal not resolved at the pre-screening conference, "the Presiding Officer [is to issue] a pre-screening conference report . . . containing a list of issues that are in dispute and which are legally relevant, and that are to be addressed in the parties' direct and rebuttal cases" for the hearing. Id.

To assist the Presiding Officer in identifying the issues for resolution in the appeal and managing the proceedings in the appeal, the Presiding Officer's pre-screening authority includes the power to "issu[e] orders to parties, *including without limitation*, ordering parties to show cause, ordering parties to . . . atten[d] prescreening conferences[,] and ordering parties to provide more definite statements in support of their positions." 310 CMR 1.01(5)(a)15 (emphasis supplied). It also includes the power to require the parties to file a Pre-hearing Statement setting forth their respective positions in the case, including, but not limited to:

- a concise summary of the evidence that will be offered by the parties;
- the facts agreed upon by the parties;
- contested issues of fact and law; and

⁴ The Pre-Screening Conference in this case took place six months after the appeal's filing because of the Petitioners' delays in the case, including their repeated failure to set forth a minimal factual and legal basis for their appeal. See below, at pp. 11-18. During that six month period, I provided the Petitioners with multiple opportunities to properly set forth their claims, including in mediation before a Department mediator. Id. After mediation failed, the Petitioners refused to attend the Pre-Screening Conference that I scheduled to put the case on track for final resolution. Id.

- a list of witnesses to be called, including the designation of those who will be offered as expert witnesses, and a brief summary of the testimony of each witness.

See also 310 CMR 1.01(9)(b).

B. Enforcement of the Presiding Officer's Orders

Under 310 CMR 1.01(11)(a)2.f, a “Presiding Officer may summarily dismiss a case *sua sponte*,” when the petitioner 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).

The Presiding Officer may also impose sanctions on a party where “[the] party . . . demonstrates an intention to delay the proceeding[s] or resolution of the proceedings” in an appeal. 310 CMR 1.01(10). This includes a party who files pleadings or other papers in an appeal “interposed for delay,” 310 CMR 1.01(4)(b), or containing “impertinent or scandalous matter.” 310 CMR 1.01(11)(c).

The range of sanctions that a Presiding Officer may impose on a party, include, “without limitation,” an order:

- (a) designating facts or issues as established against the party being sanctioned;
- (b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;
- (c) denying summarily late-filed motions or motions failing to comply with 310 CMR 1.01(4);
- (d) striking pleadings in whole or in part;⁵
- (e) dismissing the appeal as to some or all of the disputed issues;

⁵ Under 310 CMR 1.01(11)(c), “the Presiding Officer may [also] strike from a pleading any insufficient allegation or defense or any redundant, irrelevant, immaterial, impertinent or scandalous matter.”

- (f) dismissing the party being sanctioned from the appeal; and/or
- (g) issuing a final decision against the party being sanctioned.

310 CMR 1.01(10).

PRIOR PROCEEDINGS

I. PROCEEDINGS BEFORE THE WAREHAM CONSERVATION COMMISSION

The Petitioners either live or own real property at 52 Leonard Street in West Wareham, Massachusetts. The Applicant is the owner of a 5,000 square foot parcel of land at 53 Leonard Street (“the Property”). Applicant’s Pre-Hearing Statement, August 11, 2008, at p. 1.

Under the MWPA and the Wetlands Regulations, the Property is located in a coastal wetland resource area because the Property is “Land Subject to Coastal Storm Flowage” or “LSCSF.” 310 CMR 10.04. LSCSF is any “land subject to any inundation caused by coastal storms up to and including that caused by the 100-year storm, surge of record or storm of record, whichever is greater.” *Id.* The MWPA and Wetlands Regulations authorize residential development of LSCSF under proper conditions.

In June 2007, the Applicant filed a Notice of Intent (“NOI”) with the Wareham Conservation Commission (“the Commission”) seeking authorization under the MWPA and the Wetlands Regulations to construct a 16’ x 30’ single family home on the Property along with a “septic system, driveway[,] . . . utilities, and landscaping” (“the Project”). Applicant’s Pre-Hearing Statement, August 11, 2008, at p. 1; SOC. The proposed Project called for the filling of 106 square feet of Bordering Vegetated Wetlands (“BVW”) at the Property, but the replication of 162 square feet wetland area. *Id.*⁶

Between June and October 2007, the Commission conducted hearings on the Applicant’s

⁶ The Wetland Regulations at 310 CMR 10.55(4) authorize the filling of wetlands under certain conditions. See below, at pp. 21-24.

NOI. Applicant's Pre-Hearing Statement, August 11, 2008, at p. 1; Commission's Order of Conditions, October 24, 2007 ("Commission's OOC"), at pp. 1-2. The Petitioners contend they attended those hearings, and that the Commission's minutes for those hearings evidence "[their] attendance and opposition to this project." See Petitioners' More Definite Statement, March 4, 2008 ("Supplemental Appeal Notice").

On October 24, 2007, the Commission issued an OOC denying approval of the Project. Applicant's Pre-Hearing Statement, August 11, 2008, at p. 1; Commission's OOC, at pp. 1-2. The Commission denied approval because, in its view, "the proposed work [could not] be conditioned to meet the performance standards set forth in the [W]etlands [R]egulations" at 310 CMR 10.55(4)(b). Commission's OOC, at p. 2 and Statement of Reasons for Denial.⁷ According to the Commission, the Applicant's proposed replication of 162 square feet of wetland area "would not adequately reproduce the [106 square feet of BVW] being filled and would not provide the same wetland functions as the existing wetland." *Id.* The Commission was also of the opinion that "[c]onstruction as proposed [by the Applicant] would result in permanent disturbance of the land right up to edge of the BVW" and that "[t]here [were] no provisions in the [Applicant's] plan to account for runoff from impervious surfaces . . . proposed [by the Project], nor [was] there any room or groundwater elevation relief to allow for the installation of stormwater structures" at the Property. *Id.*

II. PROCEEDINGS BEFORE THE DEPARTMENT'S SERO OFFICE

The Applicant filed a timely appeal of the Commission's denial to the Department's Southeast Regional Office ("SERO Office") in Lakeville, Massachusetts. See SOC. On January 29, 2008, the Department's SERO Office issued an SOC approving the Project. *Id.* The

⁷ The provisions of 310 CMR 10.55(4) are discussed below, at pp. 21-24.

Department's SERO Office found that the Project "as proposed [by the Applicant] and conditioned [by the SOC] adequately protects the interests the [MWPA]." Id. The SOC imposed 33 conditions for the Project to proceed, including the following:

- No. 19: All work [authorized by the SOC must] . . . comply with Massachusetts Stormwater Policy Standards; . . .
- No. 27: The design and installation [of the single family home] shall be in accordance with 780 CMR 5323 of the seventh edition of the Massachusetts State Building Code and the Federal Emergency Management Agency [(“FEMA”)][,] [and] [t]he building's first floor elevation shall be at or above the 100-year flood plain elevation (Elevation 15.0') or two feet above existing grade, whichever [was] higher;⁸
- No. 28: The placement of fill in [BVW] is strictly limited to 106 square feet as shown on the [Applicant's] plan of record;
- No. 29: The 162 square feet wetland replication shall be graded and replanted immediately following construction, [and] [n]otification of this completion shall be provided [by the Applicant] to [the Department's SERO Office] and the . . . Commission;
- No. 30: The base grade of the excavated wetland replication area shall be certified by a Massachusetts Registered Professional Engineer or Land Surveyor;
- No. 31: The seasonal elevation of ground water shall be verified [by the Applicant] in the proposed wetland replication area once the area has been excavated to base grade[,] [and] [i]f seasonal high ground water is not present at or within sufficient depth to support wetlands vegetation, then the Applicant or [her] successor(s) will be required to create a perched condition, or substantiate the elevation of ground water at another location subject to the Department's approval;
- No. 32: [The proposed wetlands replication area must meet or exceed the performance standards of 310 CMR 10.55(4)(b)1-7, and] [t]he replication area [must] be replanted to ensure that the surface area of the wetland replication area [is] at least 75% established with indigenous wetland plants within two growing seasons[,] [and]

⁸ Under 780 CMR 5323.1, “[b]uildings and structures constructed in flood hazard areas (including A or V Zones) as established by FEMA Flood Insurance Rate Maps shall be designed and constructed in accordance with Appendix 780 CMR 120.G.” The regulations at Appendix 780 CMR 120.G require all buildings and structures “[to] be constructed and elevated” in accordance with the regulations. 780 CMR 120.G201.1.

[s]hould the replication area fail to meet this standard, the Department may require [the Applicant perform] additional measures necessary to achieve compliance; and

- No. 33: At the end of each growing season, a progress report of the relative success or failure of the replication effort shall be submitted [by the Applicant] to [the Department's SERO] Office by a qualified wetlands scientist[,] [and] [t]he report shall include percent of vegetation cover, a list of type of plants growing in the replication area, coverage of wetland plants as a percentage of all plants, and relative vigor of the plants[,] [and] recommendations for improvement of poorly established wetland areas.

III. PROCEEDINGS BEFORE OADR

The Commission did not appeal the SOC to OADR. See 310 CMR 10.05(7)(j)2.a (local conservation commission may appeal an SOC overturning commission's OOC denying project approval). By not appealing, the Commission waived any right to challenge the SOC. Id.

The Petitioners, however, appealed the SOC to OADR.

A. The Petitioners' Failure To File A Proper Appeal Notice

The current proceedings began on February 14, 2008, when OADR received from the Petitioners a "Fee Transmittal Form/Request for Adjudicatory Appeal" concerning the SOC. The Petitioners did not include any other documents indicating what they were appealing with respect to the SOC. Specifically, the Petitioners failed to include a proper Appeal Notice in accordance with the requirements of 310 CMR 10.05(7)(j).

On February 25, 2008, I gave the Petitioners the opportunity to comply with the pleading requirements of 310 CMR 10.05(7)(j)2.a and 310 CMR 10.05(7)(j)2.b by entering an order directing them to file a More Definite Statement (a proper Appeal Notice) by Tuesday, March 4, 2008, containing the required appeal information:

- (1) demonstration of participation in the previous permit proceedings before the Department that led to the issuance of the SOC;

- (2) sufficient written facts to demonstrate status as a person aggrieved;
- (3) a clear and concise statement of the alleged errors contained in the SOC 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, section 40, including reference to the statutory or regulatory provisions that the petitioner alleges has been violated by the SOC, and the relief sought, including specific changes desired in the SOC; and
- (4) a copy of the SOC appealed and a copy of the underlying local Conservation Commission decision if the SOC affirmed the local Conservation Commission decision.

My February 25th Order for a More Definite Statement informed the Petitioners that their appeal would be dismissed if they failed to file a proper Appeal Notice containing the required information. The Order also gave the Applicant and the Department until Tuesday, March 11, 2008, to review any Appeal Notice filed by the Petitioners in response to the Order and make a determination whether the Appeal Notice satisfied the pleading requirements of 310 CMR 10.05(7)(j)2.a and 310 CMR 10.05(7)(j)2.b. If the Applicant or the Department believed that that the Petitioners' Appeal Notice failed to satisfy the pleading requirements, they had until March 11, 2008 to file a motion seeking dismissal of the Petitioners' appeal.

On March 4, 2008, the Petitioners filed a one page Appeal Notice, which alleged that “[they] wish to see th[e] [P]roject denied” because “it does not protect the [wetland] interests of . . . storm damage prevention, flood control, and pollution prevention.” The Petitioners alleged that “[t]he Project is in a flood zone and wetland area[,] . . . [and] building a dwelling on the [P]roperty [would] creat[e] a potential hazard to the neighborhood” and a nearby sewage pump station. They also alleged that the Project would be harmful to BVW at the Property because there is “limited space” at the Property to “put building materials.”

On March 27 and April 7, 2008, respectively, the Department and the Applicant moved

to dismiss the Petitioners' appeal contending that the Petitioners' Appeal Notice failed to satisfy the pleading requirements of 310 CMR 10.05(7)(j)2.a and 310 CMR 10.05(7)(j)2.b. The Motions to Dismiss contended that the Petitioners had failed to allege sufficient facts showing (1) that they had standing to challenge the SOC as aggrieved parties, and (2) that the Department had erred in issuing the SOC. The Petitioners opposed the Motions to Dismiss.

B. The Petitioners' Delay The Proceedings In Mediation

I deferred action on the Department's and Applicant's Motions to Dismiss, because the Petitioners agreed to attempt settlement of the appeal with the assistance of a Department mediator. With the parties' assent, I appointed Thomas Massimo, the Department's Acting Deputy Commissioner for the Bureau of Administrative Services ("Mr. Massimo"), to serve as mediator in the case. I also appointed Mr. Massimo to serve as mediator because of the Petitioners' contentions that they had been treated unfairly by Department personnel. By virtue of his senior management position in the Department, Mr. Massimo had the requisite professional expertise to make an independent assessment of those claims.

With the parties' assent, on April 28, 2008, Mr. Massimo scheduled a mediation session with all of the parties for 1:30 p.m., June 13, 2008, in MassDEP's Boston Office ("the June 13th mediation session"). All parties were required to attend the June 13th mediation and set forth their respective positions in the case. They were also required to set forth their respective positions in written position statements that they were to provide Mr. Massimo well in advance of the June 13th mediation session.

The Petitioners did not provide a written position statement to Mr. Massimo prior to the June 13th mediation session. They also failed to attend the June 13th mediation session.

The Applicant and her attorney attended the June 13th mediation session, as did the

Department Wetlands Analyst involved in the SERO Office's issuance of the SOC. The Department was also represented by counsel at the June 13th mediation session.

Upon inquiry by Mr. Massimo, the Petitioner Susan Mackley ("Ms. Mackley") contended during the late evening of June 13, 2008 that the Petitioners had not attended the mediation session because they had been under the belief that the mediation session had been postponed due to the schedule of the Department's Wetlands Analyst. Ms. Mackley did not have a reasonable basis to make that claim, as there is no record on OADR's docket of any request by either the Department or its Wetlands Analyst for a delay of the mediation.

Although the Petitioners failed to attend the June 13th mediation session, Mr. Massimo nevertheless attempted to keep mediation and settlement efforts alive by meeting separately with the parties. First, on June 13, 2008, he met with the Applicant, the Applicant's counsel, and the Department representatives, including the Wetlands Analyst involved in the SERO Office's issuance of the SOC. On the next business day, Monday, June 16, 2008, Mr. Massimo met with Ms. Mackley to communicate the Respondents' positions and provide the Petitioners with an opportunity to respond to those claims. Mr. Massimo continued those discussions with Ms. Mackley during the next month to provide the Petitioners with opportunities to proffer a reasonable settlement offer to the Respondents. The settlement offer never came; on July 18, 2008, Mr. Massimo returned the matter to me for resolution after concluding that the parties were at an impasse.

C. The Petitioners' Failure To Comply With My July 18, 2008 Scheduling Order And Failure To Attend The August 19, 2008 Pre-Screening Conference.

On the same date that the case was returned to me for resolution, I provided the Petitioners with an additional opportunity to properly present their claims in the appeal by

denying without prejudice, the Applicant's and the Department's motions to dismiss the Petitioners' appeal. However, I also issued a Scheduling Order to the parties that scheduled the case for a Pre-Screening Conference on August 19, 2008 and an evidentiary Hearing on November 18, 2008. Scheduling Order, ¶¶ 4, 9.

The Scheduling Order informed the parties that I would meet with them at the August 19, 2008 Pre-Screening Conference to identify the issues for resolution in the case, and made clear that “[a]ll parties [were] . . . required to attend the Pre-Screening Conference, and . . . be prepared to fully discuss their respective positions in the appeal” Scheduling Order, ¶¶ 4, 5. The Scheduling Order also made clear that “[t]he failure of any party to attend the Pre-Screening Conference, to participate in the Conference in good faith, or to comply with any requirements of th[e] [Scheduling] Order [would] result in the imposition of appropriate sanctions on that party pursuant to 310 CMR 1.01(10).” Scheduling Order, ¶ 5. The Scheduling Order put the Petitioners on notice that the range of sanctions included possible dismissal of their appeal if they failed to attend the Pre-Screening Conference. *Id.*

The Scheduling Order required the parties to file Pre-Hearing Statements prior to the Pre-Screening Conference setting forth their respective positions in the case. Scheduling Order, ¶¶ 6-8. Each party's Pre-Hearing Statement was required to contain the following information:

- (1) a brief summary of the SOC being appealed in this case;
- (2) a brief summary of the final relief that the party [was] seek[ing] in this appeal;
- (3) a list of disputed relevant facts for resolution in this appeal and the party's position on each issue (what the party expect[ed] to prove at the Hearing on the appeal);
- (4) a list of legal issues for resolution in this appeal, and the party's position on the issue; and

- (5) the names and addresses of each party's witnesses, including expert witnesses, who [would] be filing Pre-filed Testimony.

Scheduling Order, ¶ 7. The Scheduling Order warned the parties that “[a] party’s failure to list a witness in the Pre-Hearing [Statement] [could] lead to an order precluding the testimony of that witness unless the party demonstrate[d] good cause for having omitted the individual from the witness list.” Id.

Under the Scheduling Order, the Petitioners’ Pre-Hearing Statement was due for filing at least three (3) business days prior to the Pre-Screening Conference or by Thursday, August 14, 2008. Scheduling Order, ¶ 6. The Applicant’s and the Department’s respective Pre-Hearing Statements had to be filed “as soon as possible thereafter, but no later than one (1) business day prior to the Pre-Screening Conference” or by Monday, August 18, 2008. Id.

The Petitioners did not file a proper Pre-Hearing Statement as required by my Scheduling Order. Instead, on August 14, 2008, they forwarded a lengthy e-mail message to me that was merely a restatement of their long standing opposition to the Applicant’s construction of the single family home on the Property. Moreover, the Petitioners’ August 14th e-mail message failed to contain the information required by ¶ 7 of my Scheduling Order, including the names and addresses of the Petitioners’ witnesses and expert witnesses who would be submitting Pre-filed Testimony on their behalf.

During the morning of Friday, August 15, 2008, I informed the Petitioners by e-mail that their e-mail message of the previous date did not constitute a proper Pre-Hearing Statement, and I directed them to file an Amended Pre-Hearing Statement by no later than 10:00 a.m., the following Monday, August 18th, that complied with ¶ 7 of my Scheduling Order. My August 15th e-mail message warned the Petitioners that their “failure to file a satisfactory Amended Pre-Hearing Statement [would] result in the imposition of appropriate sanctions pursuant to 310

CMR 1.01(10).” My August 15th e-mail set forth the range of sanctions, including possible dismissal of the Petitioners’ appeal.

The Petitioners did not file an Amended Pre-Hearing Statement. Instead, during the very early morning of Monday, August 18th, at 12:10 a.m., the Petitioners forwarded an e-mail message to me stating that “heeding [the] advice” of unnamed individuals, they had “cho[sen] to abandon [their] protest [of the SOC] at this time and [would] challenge it in another venue.” Attached to their e-mail message were copies of e-mail messages that they had exchanged on August 15th with Tena Davies (“Ms. Davies”) of the Wetlands Program in MassDEP’s SERO Office. Relying on their e-mail exchange with Ms. Davies, the Petitioners contended in their e-mail message to me of August 18th that they were “surprised” that Ms. Davies had questioned the relevance of the assertions that they had made to me in their e-mail message of August 14th, and, as result, they had concluded “that the DEP’s [Final] decision [on the SOC] ha[d] already been made.”

At 11:09 a.m., Monday, August 18th, I forwarded an e-mail message to the Petitioners informing them that Ms. Davies’ statements did not constitute a Final Decision by the Department on the propriety of the SOC, and that the Final Decision Maker on that issue is the Department’s Commissioner or her designee. My e-mail message also reminded the Petitioners they had yet to file a satisfactory Pre-Hearing Statement in accordance with ¶ 7 of my Scheduling Order, and informed them that the Pre-Screening Conference would still proceed at 10:00 a.m., the next morning, August 19th, notwithstanding that they had “cho[sen] to abandon [their] protest [of the SOC] at this time and [would purportedly] challenge it in another venue.”

My August 18th e-mail message also warned the Petitioners that if they failed to attend the Pre-Screening Conference on August 19th, that I would issue a Recommended Final Decision

recommending that the Department's Commissioner dismiss their appeal for failure to prosecute and to comply with the requirements of the Scheduling Order. The Petitioners did not heed that warning; they failed to attend the Pre-Screening Conference on August 19th just as they had failed to attend the mediation session two months earlier on June 13th before Mr. Massimo.

The Applicant and her attorney, however, attended the August 19th Pre-Screening Conference, as did the Department Wetlands Analyst involved in the SERO Office's issuance of the SOC and the Department's counsel. The Applicant and the Department also filed proper Pre-Hearing Statements at least one business day prior to the Pre-Screening Conference setting forth their positions in the case as required by ¶ 7 of the Scheduling Order.

DISCUSSION

MassDEP's COMMISSIONER SHOULD ISSUE A FINAL DECISION DISMISSING THE PETITIONERS' APPEAL AND AFFIRMING THE SOC.

The prior proceedings in this appeal as discussed above at pp. 11-18 lead to the conclusion that the Petitioners have failed, and even refused, to set forth a minimal factual and legal basis for their appeal of the SOC. During the past seven months, the Petitioners have failed to properly setting forth their claims notwithstanding their burden of proof, the pleading requirements of the appellate rules, and my directives that they file a proper Appeal Notice. They have also failed to participate in good faith in mediation/settlement discussions with the Respondents even though they agreed to conduct those discussions with the Respondents, and I facilitated those discussions by deferring action on the Respondents' respective motions to dismiss the Petitioners' appeal. It appears that the Petitioners used mediation as a vehicle to delay final resolution of the case instead of a vehicle to reach a settlement of the case.

After mediation failed in July 2008, I could have issued a Recommended Final Decision recommending that MassDEP's Commissioner dismiss the Petitioners' appeal for lack of

standing and failure to state a claim. Instead, I gave the Petitioners another chance by denying without prejudice the Respondents' respective motions to dismiss the Petitioners' appeal, and scheduling the case for a Pre-Screening Conference on August 19, 2008 and evidentiary Hearing on November 18, 2008. All of the parties to the appeal, including the Petitioners, were required to attend the August 19th Pre-Screening Conference to finalize the issues for resolution at the November 18th Hearing. At the Pre-Screening Conference, all of the parties, including the Petitioners, were required to set forth their respective positions in the case and witnesses for the November 18th Hearing, including Wetlands experts who would support the parties' respective claims. See Scheduling Order, July 18, 2008 ("Scheduling Order"), ¶¶ 4-8.

Prior to the Pre-Screening Conference, each of the parties, including the Petitioners, were required to file Pre-Hearing Statements setting forth their positions in the case and witnesses for the November 18th Hearing, including expert witnesses. The Petitioners refused to provide that information, and when I pressed them for it, they responded by stating that they were "abandon[ing] [their] protest [of the SOC] at this time and [would] challenge it in another venue."

In sum, it is appropriate for me to conclude that the Petitioners:

[have] fail[ed] to file documents as required, respond to notices, . . . comply with orders issued and schedules established in orders[,] [and have] fail[ed] to prosecute th[is] . . . appeal; demonstrate[d] an intention not to proceed [with this appeal]; and demonstrate[d] an intention to delay the proceeding[s] or resolution of the proceedings [in this appeal].

310 CMR 1.01(10). Accordingly, I recommend that MassDEP's Commissioner issue a Final Decision dismissing the Petitioners' appeal and affirming the SOC.

Dismissal of the Petitioners' appeal and affirmance of the SOC would also be appropriate because the Petitioners have failed to demonstrate that they have standing to appeal the SOC as

aggrieved persons. Notwithstanding their burden of proof, the pleading requirements of 310 CMR 10.05(7)(j)2.a, and the directives of my February 25, 2008 Order for a More Definite Statement, the Petitioners' Appeal Notice of March 4, 2008 fails to allege a minimum quantum of facts demonstrating that they have standing to appeal the SOC as aggrieved persons. The Petitioners' Appeal Notice fails to demonstrate how their specific wetlands interests are affected by construction of the Applicant's proposed single family home on the Property. Put another way, the Petitioners have failed to show that the new home will harm wetlands interests in a manner unique to them. The Petitioners' Appeal Notice also fails to specify how the SOC violates the MWPA and the Wetlands Regulations.

Even if they have standing to appeal the SOC as aggrieved persons, the Petitioners lose on the merits. Based on my independent review, I find that the Department properly issued the SOC pursuant to the MWPA and the Wetlands Regulations. Indeed, the Commission's decision not to appeal the SOC is a tacit admission on its part that the SOC satisfies the MWPA and the Wetlands Regulations. See 310 CMR 10.05(7)(j)2.a (party that fails to appeal an SOC waives its claims concerning the propriety of the SOC).

As discussed previously, the Commission's primary reason for denying the Project was because 106 square feet of BVW would be filled in at the Property to construct the single family home, and, in the Commission's view, "the proposed work [could not] be conditioned to meet the performance standards set forth in the [W]etlands [R]egulations" at 310 CMR 10.55(4)(b). Commission's OOC, at p. 2 and Statement of Reasons for Denial.⁹ The Commission, however,

⁹ The Commission also expressed stormwater concerns regarding the Project, but the SOC addressed them in Condition No. 19 requiring that "[a]ll work [authorized by the SOC must] . . . comply with Massachusetts Stormwater Policy Standards." The Petitioners failed to present any data from a Wetlands expert that the SOC fails to satisfy those standards.

was incorrect in its assessment because the Project meets the performance standards of 310 CMR 10.55(4) for the following reasons.

It is well settled that activities impacting BVW are regulated by 310 CMR 10.55. The regulation defines BVW as:

freshwater wetlands which border on creeks, rivers, streams, ponds and lakes. The types of freshwater wetlands are wet meadows, marshes, swamps and bogs. [BVW] are areas where the soils are saturated and/or inundated such that they support a predominance of wetland indicator plants. The ground and surface water regime and the vegetational community which occur in each type of freshwater wetland are specified in M.G.L. c. 131, § 40.

310 CMR 10.55(2)(a).

“[BVW] are likely to be significant to public or private water supply, to ground water supply, to flood control, to storm damage prevention, to prevention of pollution, to the protection of fisheries and to wildlife habitat.” 310 CMR 10.55(1). “The plants and soils of [BVW] remove or detain sediments, nutrients (such as nitrogen and phosphorous) and toxic substances (such as heavy metal compounds) that occur in run off and flood waters.” Id.

“Where a proposed activity involves the removing, filling, dredging *or altering* of [BVW],” the Department must presume that the area at issue is significant to the interests specified in 310 CMR 10.55(1): public or private water supply, ground water supply, flood control, storm damage prevention, prevention of pollution, and the protection of fisheries and to wildlife habitat. 310 CMR 10.55(3) (emphasis supplied).¹⁰ “This presumption is rebuttable and

¹⁰ The Wetlands Regulations at 310 CMR 10.04 define “alter” as “chang[ing] the condition of any Area Subject to Protection Under M.G.L. c. 131, § 40.” Examples of alterations include, but are not limited to, the following:

- (a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas;
- (b) the lowering of the water level or water table;
- (c) the destruction of vegetation;

may be overcome upon a clear showing that the BVW does not play a role in the protection of said interests.” Id. Where this presumption “is not overcome, any proposed work in [BVW] shall not destroy or otherwise impair any portion of said area.” 310 CMR 10.55(4)(a).

Notwithstanding this prohibition, the Department nevertheless has the discretion to issue an SOC:

permitting work which results in the loss of up to 5,000 square feet of [BVW] when said area is replaced in accordance with . . . [seven] general conditions and any additional, specific conditions the [Department] deems necessary to ensure that the replacement area will function in a manner similar to the area that will be lost.

310 CMR 10.55(4)(b).¹¹ In exercising its discretion, the Department must consider the following

-
- (d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water.

310 CMR 10.04.

¹¹ The seven general conditions are the following:

1. the surface of the replacement area to be created ("the replacement area") shall be equal to that of the area that will be lost ("the lost area");
2. the ground water and surface elevation of the replacement area shall be approximately equal to that of the lost area;
3. The overall horizontal configuration and location of the replacement area with respect to the bank shall be similar to that of the lost area;
4. the replacement area shall have an unrestricted hydraulic connection to the same water body or waterway associated with the lost area;
5. the replacement area shall be located within the same general area of the water body or reach of the waterway as the lost area;
6. at least 75% of the surface of the replacement area shall be reestablished with indigenous wetland plant species within two growing seasons, and prior to said vegetative reestablishment any exposed soil in the replacement area shall be temporarily stabilized to prevent erosion in accordance with standard U.S. Soil Conservation Service methods; and
7. the replacement area shall be provided in a manner which is consistent with all other General Performance Standards for each resource area in Part III of 310 CMR 10.00.

310 CMR 10.55(4)(b).

factors:

1. the magnitude of the alteration and the significance of the project site to the interests identified in M.G.L. c. 131, § 40;
2. the extent to which adverse impacts can be avoided;
3. the extent to which adverse impacts are minimized; and
4. the extent to which mitigation measures, including replication or restoration, are provided to contribute to the protection of the interests identified in M.G.L. c. 131, § 40.

310 CMR 10.55(4)(b).

Here, the SOC authorized the filling of 106 square feet of BVW-- well below the maximum 5,000 square feet authorized by 310 CMR 10.55(4)(b). To minimize the filling of 106 square feet of BVW, the SOC requires as mitigation, replication of 162 square feet wetland area. The replication area is approximately 50% more than the BVW being filled in by the Project. The SOC also imposes numerous conditions “to ensure that the replacement area will function in a manner similar to the area that will be lost.” 310 CMR 10.55(4)(b). As discussed above, at pp. 9-11, those conditions include:

- No. 29: The 162 square feet wetland replication shall be graded and replanted immediately following construction, [and] [n]otification of this completion shall be provided [by the Applicant] to [the Department’s SERO Office] and the . . . Commission;
- No. 30: The base grade of the excavated wetland replication area shall be certified by a Massachusetts Registered Professional Engineer or Land Surveyor;
- No. 31: The seasonal elevation of ground water shall be verified [by the Applicant] in the proposed wetland replication area once the area has been excavated to base grade[,] [and] [i]f seasonal high ground water is not present at or within sufficient depth to support wetlands vegetation, then the Applicant or [her] successor(s) will be required to create a perched condition, or substantiate the elevation of ground water at another location subject to the Department’s approval;

- No. 32: [The proposed wetlands replication area must meet or exceed the performance standards of 310 CMR 10.55(4)(b)1-7, and] [t]he replication area [must] be replanted to ensure that the surface area of the wetland replication area [is] at least 75% established with indigenous wetland plants within two growing seasons[,] [and] [s]hould the replication area fail to meet this standard, the Department may require [the Applicant perform] additional measures necessary to achieve compliance; and
- No. 33: At the end of each growing season, a progress report of the relative success or failure of the replication effort shall be submitted [by the Applicant] to [the Department’s SERO] Office by a qualified wetlands scientist[,] [and] [t]he report shall include percent of vegetation cover, a list of type of plants growing in the replication area, coverage of wetland plants as a percentage of all plants, and relative vigor of the plants[,] [and] recommendations for improvement of poorly established wetland areas.

In sum, the Project “as proposed [by the Applicant] and conditioned [by the SOC] adequately protects the interests the [MWPA].” See SOC. Accordingly, the SOC should be affirmed.

CONCLUSION

Based on the foregoing, I recommend that MassDEP’s Commissioner issue a Final Decision dismissing the Petitioners’ appeal of the SOC and affirming the SOC that the Department’s SERO Office issued to the Applicant.

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner’s Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a

motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

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.

Salvatore M. Giorlandino
Acting Chief Presiding Officer

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