

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

August 18, 2014

In the Matter of
Kevin Norton

OADR Docket No. WET-2014-006
DEP File No. SE 9-1589
Brewster, MA

FINAL DECISION

The Petitioner Kevin Norton brought this appeal challenging a Superseding Order of Conditions (“SOC”) that the Department’s Southeast Regional Office issued to the Petitioner on March 5, 2014, pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 (“MWPA”), and the Wetlands Regulations, 310 CMR 10.00 et seq. (“the Wetlands Regulations”). The SOC affirmed the Town of Brewster Conservation Commission’s (“BCC”) Order of Conditions (“OOC”) under the MWPA and the Wetlands Regulations approving the Petitioner’s “after-the-fact reconstruction of a rock revetment on a coastal beach and on the face of a coastal beach” at 20 Swift Lane in Brewster, Massachusetts (“the Property”). Department’s SOC Transmittal Letter, at p. 1.

The BCC’s approval of the “after-the-fact reconstruction” of the rock revetment was with conditions, including Special Condition A20 that required the Petitioner to perform annual beach nourishment at the Property with at least 18.5 cubic yards of clean sand by April 15th of each year. *Id.*; Special Condition A20, OCC. The Petitioner objected to that condition contending

that the rock revetment that existed at the Property prior to its re-construction was damaged by a Nor'easter storm on February 8, 2013 and that "[his] repairs to the revetment were done pursuant to [Department's] Emergency Declaration [of] February 7, 2013." Department's SOC Transmittal Letter, at p. 1. He also contended that "[t]he Emergency Declaration did not require the approval of plans or beach nourishment" and that "[t]here [was] no evidence to support . . . [the] requirement for annual [beach] nourishment" as imposed by the BCC and affirmed by the Department in the SOC. Id.

Recently, the Petitioner, the BCC, and the Department (collectively "the parties") filed a proposed Settlement Agreement and Final Order of Conditions ("FOC") for my review and approval pursuant to 310 CMR 1.01(8)(c) to resolve the Petitioner's claims in the appeal. See DEP's Motion to Approve Settlement Agreement and Issue Final Order of Conditions and Final Decision (June 24, 2014); Settlement Agreement; and Final Order of Conditions. After reviewing their proposed Settlement Agreement and FOC, I find that the parties' settlement of this appeal is reasonable and consistent with wetlands protection under the MWPA and the Wetlands Regulations.

The settlement affirms the BCC's OOC in all respects except that Special Condition A20 has been revised to make clearer the beach nourishment requirement.¹ The new Special Condition A20 provides as follows:

As ongoing mitigation for this project, the beach shall be nourished, as required, with compatible grain size sand in order to maintain the beach elevation. DEP will oversee the identification of the existing beach elevation at the intersection of the beach and revetment by July 31, 2014. Four permanent markers (drill holes) of the existing beach elevation shall be established along the length of the revetment. Whenever any of the markers become exposed, nourishment in a quantity

¹ The parties' settlement also does not incorporate Special Conditions A6 and A25 of the BCC's OOC dealing with BCC enforcement of the OOC under local Brewster By-laws or policies. The parties' agreement not to incorporate these provisions is reasonable given that the parties' proposed Settlement Agreement and FOC are governed by the MWPA and the Wetlands Regulations.

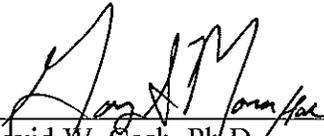
sufficient to cover the markers would be required, but in no event would the nourishment be less than 18.5 cubic yards.

Annually, prior to March 30th, the owner shall provide the Department and the Brewster Conservation Commission with photographic or survey documentation showing the elevation of the beach in relation to the markers. If nourishment is required, it shall be completed by April 30th.

Settlement Agreement, ¶ 8.

Accordingly, I issue this Final Decision approving and incorporating the Settlement Agreement that the parties have reached. I have also signed the FOC in accordance with the Settlement Agreement.

Under the terms of 310 CMR 1.01(8)(c) and the Settlement Agreement, the Petitioner's claims in this appeal are dismissed as he has waived whatever rights he may have had to further administrative review before the Department as well as appeal to court of the SOC that was at issue in the case. Settlement Agreement, ¶ 3.



David W. Cash, Ph.D.
Commissioner

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