

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

November 29, 2017

In the Matter of
Boston Environmental Corporation

OADR Docket Nos.
WET-2013-033 & 034
DEP File No. SE 15-2186
Dartmouth, MA

RECOMMENDED FINAL DECISION

These two consolidated appeals were filed in December 2013 challenging a Superseding Order of Conditions (“SOC”) that the Southeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to the Applicant Boston Environmental Corporation on December 2, 2013 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 approved the Applicant’s proposed work in protected wetlands areas in connection with its final closure of the Cecil Smith Landfill (“the Landfill”) at 452 Old Fall River Road in Dartmouth, Massachusetts (“the Property”). Specifically, the SOC approved the Applicant’s proposed temporary alteration of approximately 5,900 square feet of Bordering Vegetated Wetlands (“BVW”) and plan to mitigate this alteration “by wetland restoration and supplemental [wetland] replication work”

after “[the] removal and consolidation of waste material along the perimeter of the landfill area.” See Department’s December 2, 2013 SOC Transmittal Letter. The SOC also approved the Applicant’s proposed upgrading of an existing access road and stream crossing at the Property by replacing an existing culvert with a larger culvert. Id. According to the Department, that upgrade would have resulted in “[the] permanent alteration of approximately 236 square feet of BVW that would be mitigated by the [Applicant’s] replication of approximately 2,760 square feet of BVW.” Id.

The Department’s SOC approving the Applicant’s proposed Project overturned the Town of Dartmouth’s Conservation Commission (“DCC”) Order of Conditions of August 20, 2013 (“OOC”) rejecting the Applicant’s proposed Project pursuant to 310 CMR 10.05(6)(c) due to the Applicant’s purported failure to provide sufficient information regarding the proposed Project. See DCC’s Appeal Notice in Docket No. WET-2013-033. The Department’s SOC also generated these two consolidated appeals brought by the DCC and a Ten Residents Group respectively, seeking to vacate the SOC and obtaining affirmance of the DCC’s OOC rejecting the Applicant’s proposed Project. Id.; Ten Residents Group’s Appeal Notice in Docket No. WET-2013-034. Both the DCC and the Ten Residents Group contended that the SOC violated the MWPA and the Wetlands Regulations. Id.

310 CMR 1.01(6)(h) provides that “the Presiding Officer shall stay administratively any appeal of a superseding determination or order of conditions issued under M.G.L. c. 131, § 40 when the determination or order is denied under a local wetlands bylaw and the denial is

appealed to court.”¹ The rationale for this regulation is as follows.

The MWPA “establishes Statewide minimum wetlands protection standards, [but] local communities are free to impose more stringent requirements” by enacting local Wetlands Protection Bylaws. Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich, 449 Mass. 859, 866 (2007); Healer v. Department of Environmental Protection, 73 Mass. App. 714, 716 (2009). As a result, an SOC issued by the Department under the MWPA approving proposed work in protected wetlands areas cannot preempt a timely decision of a local conservation commission denying approval of the proposed work based “on provisions of a local bylaw that are more protective than the [MWPA].” Oyster Creek, *supra*, 449 Mass. at 866. This deference to local regulation is supported by both General Condition No. 3 that appears in every SOC issued by the Department and the stay provision of 310 CMR 1.01(6)(h) discussed above.

General Condition No. 3 provides that the SOC “does not relieve the [applicant] . . . of *the necessity* of complying with all other applicable, federal, state, or *local statutes, ordinances, bylaws, or regulations.*” (emphasis supplied). As discussed above, the stay provision of 310 CMR 1.01(6)(h) provides that “the Presiding Officer *shall stay* administratively any appeal of a superseding determination or order of conditions issued under M.G.L. c. 131, § 40 when the determination or order is denied under a local wetlands bylaw and the denial is appealed to court.”² (emphasis supplied). Indeed, if a project is denied under a local wetlands bylaw, and “[the] denial . . . become[s] final . . . either because it is not appealed or because on appeal the denial is affirmed [by the Court], there remains no doubt that . . . [t]his forecloses [the

¹ Under 310 CMR 1.01(5)(a)3 and 310 CMR 1.01(5)(a)15.d, a Presiding Officer may also stay the proceedings in a wetlands permit appeal “where the failure to previously obtain a final decision required under another law would result in an unnecessary expenditure of the Department’s administrative resources, or for other good cause.”

² See note 1 above.

applicant's ability to comply] with wetlands General Condition [No.] 3 and, . . . therefore, . . . the project cannot [proceed]." In the Matter of Howard Fafard, Docket Nos. 96-040, 96-044, Final Decision (December 4, 1996), 1996 MA ENV LEXIS 122 at 6. In sum, "[a] final local wetlands bylaw denial thus makes . . . further project review under the [MWPA] and [the Wetlands] Regulations, [a] . . . futile academic exercise[e]," and as a result, an administrative appeal challenging an SOC authorizing the project should be dismissed as moot in accordance with 310 CMR 1.01(5)(a)2.³ Fafard, *supra*, at 7. "[The SOC] must [also] be vacated in the final decision dismissing the appeal as moot, since the final local wetlands bylaw denial establishes that the project [cannot] be built as conditioned and [cannot] comply with General Condition 3 if it were built." *Id.*

Here, on January 24, 2014, the Department filed a motion pursuant to 310 CMR 1.01(6)(h) to stay the proceedings in these consolidated appeals because the DCC had denied the Applicant's proposed Project under both the MWPA and the local Town of Dartmouth's Wetlands Bylaw ("Local Bylaw Denial") and the Applicant appealed the Local Bylaw Denial to Bristol Superior Court ("Local Bylaw Appeal"). See Boston Environmental Corporation v. Town of Dartmouth, Bristol Superior Court, C.A. No. BRCV2013-00838. On January 29, 2014, I granted the Department's motion and stayed the proceedings in these consolidated appeals pending the resolution of the Applicant's Local Bylaw Appeal in Bristol Superior Court.

On July 29, 2017, the DCC informed the Case Administrator of the Office of Appeals and Dispute Resolution ("OADR") where these consolidated appeals are pending before me for

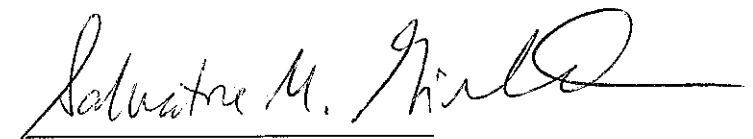
³ 310 CMR 1.01(5)(a)2 provides in relevant part that "[t]he Presiding Officer may, on the Presiding Officer's own initiative or on a party's motion where appropriate . . . dismiss appeals for . . . mootness, . . . or where the record discloses that the proposed project [or] activity has been denied by a local, state or federal agency or authority pursuant to law other than that relied on by the Department in the decision appealed from, and such denial has become final").

resolution, that on April 20, 2017, the Bristol Superior Court issued a judgment affirming the DCC's denial of the Applicant's proposed Project under the Town of Dartmouth's Wetlands Bylaw. Electronic Mail ("E-mail") Message of DCC's Counsel to OADR's Case Administrator (July 29, 2017). As a result of the Bristol Superior Court's judgment, the DCC requested that its appeal of the SOC be dismissed as moot and that the SOC be vacated. To date, the Applicant has not filed any response to the DCC's request.

As a result of my internet review of the Bristol Superior Court's docket, I have confirmed that: (1) on April 20, 2017, the Court issued a judgment affirming the DCC's denial of the Applicant's proposed Project under the Town of Dartmouth's Wetlands Bylaw; and (2) the Applicant did not appeal the Court's judgment to the Massachusetts Appeals Court within 30 days thereafter and consequently the judgment became final. See Docket Entry No. 45 to Docket Sheet of Boston Environmental Corporation v. Town of Dartmouth, Bristol Superior Court, C.A. No. BRCV2013-00838. Accordingly, pursuant to 310 CMR 1.01(5)(a)⁴ and Fafard, supra, I recommend that the Department's Commissioner issue a Final Decision dismissing these consolidated appeals as moot and vacating the SOC that had been appealed by the DCC and the Ten Residents Group because the Applicant's proposed Project cannot proceed as a result of the Bristol Superior Court's judgment affirming the DCC's denial of the Project under the Town of Dartmouth's Wetlands Bylaw.

Date:

11/29/17



Salvatore M. Giorlandino
Chief Presiding Officer

⁴ See note 3 above, at p. 4.

NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Chief Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d) and/or 14(e), and may not be appealed to Superior Court pursuant to 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 and no other person directly or indirectly involved in this administrative appeal shall neither (1) file a motion to renew or reargue this Recommended Final Decision or any part of it, nor (2) communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

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