

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

January 22, 2019

In the Matter of
Christopher Claussen

OADR Docket No. WET-2018-008
Sudbury, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

A residents group (“Petitioners”) filed this appeal to challenge the decision of the Massachusetts Department of Environmental Protection’s Northeast Regional Office (“MassDEP”) to decline jurisdiction over the Petitioners’ request to appeal an extension of an Order of Resource Area Delineation (“ORAD”) that the Sudbury Conservation Commission (“Commission”) issued to the Applicant, Christopher Claussen. The appeal was filed under the Wetlands Protection Act, G.L. c. 131, § 40, and the Wetlands Regulations, 310 CMR 10.00. MassDEP determined that Commission’s decision extending the ORAD was not appealable because it was not one of the listed decisions that could be appealed to it under 310 CMR 10.05(7)(b). As a consequence MassDEP did not “accept” the Petitioners’ appeal. See July 5, 2018, MassDEP letter refusing appeal. The Petitioners appealed that decision here, to the Office of Appeals and Dispute Resolution (“OADR”).

I issued an order to show cause why the appeal should not be dismissed and MassDEP moved for dismissal, arguing that there is no legal basis to accept jurisdiction of an appeal of a

Commission's ORAD extension. The Petitioners opposed dismissal, arguing that MassDEP has the legal authority to accept the appeal from the Commission. I disagree with the Petitioners, and conclude that there is no regulatory or statutory basis for MassDEP to accept an appeal of a commission's decision to extend an ORAD. As a consequence, I recommend that the Commissioner of MassDEP issue a Final Decision adopting this decision and dismissing the Petitioners' appeal. See 310 CMR 1.01(5)(a)2, (f)iv, and f(v).

DISCUSSION

I. The Petitioners Failed To State A Claim Upon Which Relief May Be Granted Because There Is No Regulatory Or Statutory Basis For MassDEP To Review A Conservation Commission's Decision To Allow Or Deny An ORAD Extension Request

A. Background

Standard of Review. Upon review for failure to state a claim, all facts alleged in the notice of claim must be assumed to be true, but the assumption "shall not apply to any conclusions of law" alleged in notice of claim. 310 CMR 1.01(11)(d)(2).

The ORAD. An ORAD is a procedural mechanism to determine regulatory jurisdiction under the Wetlands Protection Act and the Wetlands Regulations. The Wetlands Regulations at 310 CMR 10.05 (3)(a)1 provide that any person who wishes to know whether the Wetlands Act or Wetlands Regulations apply to land or to work that may affect a resource area may file a request for a determination of applicability with the local conservation commission. Matter of Bosworth, Docket No. WET-2015-015, Recommended Final Decision (February 17, 2016), adopted by Final Decision (March 14, 2016). The process provides a procedure for a party to confirm the delineation of wetland Resource Areas that are identified on the plans filed with the conservation commission. 310 CMR 10.05(4)(b)2. An ORAD is binding as to the location of resource areas identified by the proponent. 310 CMR 10.05(6)(a)3. It is not binding with respect

to resource areas at the property that were not identified by the proponent. Bosworth, supra.; Matter of Boston Properties, LP, Docket No. WET 2004-012, Recommended Final Decision (May 4, 2012), adopted by Final Decision (May 11, 2012).

ORADs are generally entitled to preclusive effect for a period of three years, or longer if they are extended. See Matter of Tompkins-Desjardins Trust, Docket No. WET-2010-035, Recommended Final Decision (April 1, 2011), adopted by Final Decision (April 7, 2011). The purpose of allowing a period for reliance upon the ORAD is to facilitate reasonable reliance and predictability for those affected by the ORAD property. Id.

Here, on August 25, 2015, the Commission issued an ORAD for the Property approving Claussen's proposed delineation of wetlands resource areas. Notice of Claim, p. 2. The Property is undeveloped land that contains the following wetlands resource areas that were delineated in the ORAD: Bordering Vegetated Wetlands ("BVW"), Bordering Land Subject to Flooding ("BLSF"), and Bank associated with a stream known as Mineway Brook. Notice of Claim, p. 2.

ORAD Extension. On June 4, 2018, after a hearing in which the Petitioners participated, the Commission granted Claussen's request to extend the ORAD pursuant to 310 CMR 10.05(8) ("ORAD Extension"). That provision provides that an ORAD (or Order of Conditions) may be extended for "one or more periods of up to three years each" (except for "Test Projects" under 310 CMR 10.05(11)(f)), if the request is filed at least 30 days before expiration. Matter of Jose Verissimo, Docket No. WET 2008-006, Recommended Final Decision (June 5, 2008), adopted by Final Decision (July 3, 2008). The regulations at 310 CMR 10.05(8) outline the Commission's scope of review, stating that the Commission: "may deny the request for an extension and require the filing of a new Notice of Intent for the remaining work or a new Abbreviated Notice of Resource Area Delineation in the following circumstances:

1. where no work has begun on the project, except where such failure is due to an unavoidable delay, such as appeals, in the obtaining of other necessary permits;
2. where new information, not available at the time the Order was issued, has become available and indicates that the Order is not adequate to protect the interests identified in M.G.L. c. 131, § 40;
- or
3. where incomplete work is causing damage to the interests identified in M.G.L. c. 131, § 40;
4. where work has been done in violation of the Order or 310 CMR 10.00; or
5. where a resource area delineation or certification under 310 CMR 10.02 (2)(b)2. in an Order of Resource Delineation is no longer accurate.

On June 18, 2018, the Petitioners attempted to appeal the ORAD Extension to MassDEP by requesting a Superseding Order of Resource Area Delineation. The bases of appeal were the allegations that: (1) the Commission staff member, Deborah Dineen, incorrectly informed the Commission that it had a 21 day deadline to issue a decision on the extension request, which led to a rushed decision without adequate information; (2) Dineen wrongly informed the Commission that the ORAD delineation adequately delineated the resource areas, including a perennial stream, but, the Petitioners' allege, there was no perennial designation in the ORAD, only an intermittent stream designation; and (3) Dineen failed to investigate sufficiently whether wetlands boundaries had changed but nevertheless informed the Commission there had been no boundary alterations. Notice of Claim, pp. 4-5.

On July 5, 2015, MassDEP declined to accept the attempt to appeal the ORAD Extension, stating that it was not listed as an appealable action under 310 CMR 10.05(7)(b). The Petitioners appealed that decision here, to OADR.

B. An ORAD Extension Is Not Appealable To MassDEP As A Matter of Law

Review of whether the Petitioners have a legal right to appeal is governed by the Wetlands Regulations and the Wetlands Protection Act. Ordinarily, and absent an ambiguity, the

plain meaning of regulations is controlling. Matter of Sullivan, Docket No. WET 2011-013, Recommended Final Decision (May 31, 2011), adopted by Final Decision (June 22, 2011); Matter of Milton, Docket No. WET 2011-030, Recommended Final Decision (March 29, 2012), adopted by Final Decision (April 6, 2012). In general, regulatory terms, like statutory terms, must be interpreted according to their plain, usual, and ordinary meaning to ascertain their intent. Language should generally not be implied if it is not present, absent a clear intent to the contrary. Courts generally accord an agency interpretation of its regulations considerable deference. However, courts will “not hesitate to overrule agency interpretations when those interpretations are arbitrary, unreasonable, or inconsistent with the plain terms of the regulation itself.” Warcewicz v. Dep't. of Environmental Protection, 410 Mass. 548, 574 N.E.2d 364, 365-66 (1991) (language should not be implied where it is not present and thus it was improper for agency to import a definition from one regulatory body into another); see also Matter of Sullivan, *supra*.; Matter of Milton, *supra*. When the meaning of a regulation is not plain from its language, I am obligated to consider “the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.” DiFiore v. American Airlines, Inc., 454 Mass. 486, 490 (2009), quoting Industrial Fin. Corp. v. State Tax Comm'r, 367 Mass. 360, 364 (1975).

Here, the regulations specify what Commission actions may be appealed to MassDEP. See 310 CMR 10.05(7)(b). They provide that persons with rights to appeal, including in this instance a ten residents group, “may request the Department to issue a Superseding Determination of Applicability or to issue a Superseding Order, whichever is appropriate, whenever a conservation commission has:

1. issued a Determination of Applicability (Form 2);

2. issued a Notification that an area is not significant to any interest identified in M.G.L. c. 131, § 40 (Form 6);
3. issued an Order of Conditions allowing, conditioning or prohibiting work (Form 5) or an Order of Resource Area Delineation; or
4. failed to hold a public hearing or issue an Order, Notification or Determination within the time period required by M.G.L. c. 131, § 40.

310 CMR 10.05(7)(b).

The plain and unambiguous language of this regulation evinces an intent to preclude appeals of ORAD extensions to MassDEP because they are not included in the list of appealable decisions. Had MassDEP intended to provide for administrative review in MassDEP for ORAD extensions it would have specified such in the regulation. Indeed, MassDEP specifically provided in 310 CMR 10.05(8) that an ORAD could be extended by the Commission and it specified the Commission's standard of review for denying extensions. MassDEP's regulations also discuss review processes for certain orders that are appealable to MassDEP. 310 CMR 10.05(7)(c)-(i). Nowhere, however, in those regulations are appellate rights for ORAD extensions mentioned. Further, the definitional section in the Wetlands Regulations (310 CMR 10.04) defines "Order"¹ and "Determination,"² terms that are used in the preceding provisions, but nowhere in those definitions is there even a remote connection to ORAD extensions.

¹ "Order" is defined as "an Order of Conditions, Order of Resource Area Delineation, Superseding, Order or Final Order, whichever is applicable." 310 CMR 10.04 (definition of "Order").

² "Determination" is defined as:

(a) a Determination of Applicability [issued] . . . by a conservation commission or the Department as to whether a site or the work proposed thereon is subject to the jurisdiction of M.G.L. c. 131, § 40 . . . [;]

(b) a Determination of Significance [issued] . . . by a conservation commission, after a public hearing, or by the Department, that the area on which the proposed work is to be done, or which the proposed work will alter, is significant to one or more of the interests identified in M.G.L. c. 131, § 40 . . . [;] [or]

(c) a Notification of Non-significance [issued] . . . by a conservation commission, after a public hearing, or by the Department, that the area on which the proposed work is to be done, or which the proposed work will alter, is not significant to any of the interests of M.G.L. c. 131, § 40 . . .

310 CMR 10.04 (definition of "Determination").

Instead, the definitions are focused on original orders, as opposed to extensions of original orders. Under these circumstances, the unambiguous failure to include ORAD extensions in the list of administratively appealable Commission decisions makes it clear that MassDEP did not intend to include such extensions in the category of administratively appealable decisions.

This conclusion is further buttressed by other regulatory provisions. The Wetlands Regulations limit the category of MassDEP decisions that are appealable to OADR to “Reviewable Decisions.” See 310 CMR 10.05(7)(j)(1) and (2). “Reviewable Decision means a MassDEP decision that is a superseding order of condition or superseding denial of an order of conditions, a superseding determination of applicability, and/or a superseding order of resource area delineation, or a variance.” 310 CMR 10.04 (Reviewable Decisions). That this provision does not include OADR jurisdiction over ORAD extensions is further proof of intent not to provide MassDEP with jurisdiction to review commissions’ ORAD extension decisions.

The Petitioners suggest that the lack of a MassDEP administrative appeal for ORAD extensions is contrary to the Wetlands Protection Act. They assert that it deprives them of MassDEP’s “statutorily required review of Conservation Commission orders.” They refer to language in paragraph 19 of the Act, which discusses MassDEP’s responsibilities for review when an *original* order of resource area delineation (and other specified original orders, such as an order of conditions) issues from a conservation commission. Nowhere does the Act discuss extensions of orders. As a consequence, the Petitioners’ statutorily based argument is without merit.

Finding that there is no avenue for administrative appeals of commissions’ ORAD decisions does not leave appealing parties without an opportunity to seek a remedy. As other decisions have stated under similar circumstances, there is a judicial remedy under the G.L. c.

249, § 4 to challenge the Commission's decision in Superior Court. See Matter of Sam Scola, Docket No. WET 2011-044, Recommended Final Decision (May 9, 2012), adopted by Final Decision (May 9, 2012). The statute provides that:

[a] civil action in the nature of certiorari to correct errors in proceedings which are not according to the course of the common law, which proceedings are not otherwise reviewable by motion or by appeal, . . . or, if the matter involves any right, title or interest in land, or arises under or involves the subdivision control law, the zoning act or municipal zoning, or subdivision ordinances, by-laws or regulations Such action shall be commenced within sixty days next after the proceeding complained of. . . .

G.L. c. 249, § 4.

The conclusion that there is no legal basis to appeal a commission's ORAD extension decision to MassDEP is consistent with prior adjudicatory decisions. In Matter of Towermarc the MassDEP Commissioner issued a Final Decision concluding that there was no legal basis to exercise jurisdiction over a commission decision to extend an order of conditions that had already lapsed before an extension was requested. That is not the precise issue at stake here because the extension was timely requested, but the Final Decision is nevertheless noteworthy because it disclosed no regulatory or statutory basis to review an extension decision regardless whether the order had already expired; instead it determined as a matter of policy that review of an extension for an already expired order was best resolved in the Superior Court. See Matter of Towermarc Boxborough Limited Partnership/Eqmarc Joint Venture, Docket No. 97-108, Final Decision (September 30, 1998); see also Matter of Jose Verissimo, *supra*. (noting that MassDEP "plays no role in the issuance of extensions by conservation commissions. Extensions are not identified as an area where a request may be filed for Department action."); Matter of Scola, *supra*. (no jurisdiction for MassDEP to review conservation commissions' revocation of an order of conditions).

CONCLUSION

For all the above reasons, I recommend that the Commissioner of MassDEP issue a Final Decision adopting this decision and dismissing the Petitioners' appeal. See 310 CMR 1.01(5)(a)2, (f)iv, and f(v).

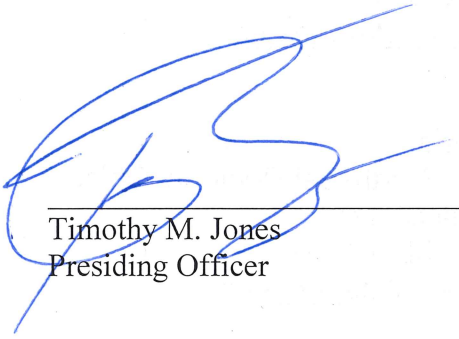
NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the 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 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 his sole discretion, directs otherwise.

Date:

1/22/19



Timothy M. Jones
Presiding Officer

SERVICE LIST

In The Matter Of:

Christopher Claussen

Docket No. WET-2018-008

File No. 301-1163
Sudbury

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Date: January 22, 2019