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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

January 19, 2022

In the Matter of the
EIP Communications I, LLC

OADR Docket Nos. WET-2021-030
Westford

RECOMMENDED FINAL DECISION

INTRODUCTION

A residents group ("Petitioners") filed this appeal to challenge the Superseding Order of Conditions ("SOC") issued by the Northeast Regional Office of the Massachusetts Department of Environmental Protection ("MassDEP") to the Applicant, EIP Communications, LLC, concerning its proposed project at 11 Brookside Road, Westford, MA ("Property"). The SOC was issued pursuant to the Wetlands Protection Act, G.L. c. 131 §40, and the Wetlands Regulations, 310 CMR 10.00.

The proposed project is the construction of a 116-foot monopole, cell-tower with artificial pine needles to provide some camouflage as a pine tree (the "Project"). The Project would be located within an almost entirely degraded portion of the Riverfront Area of Stony Brook and would include 2,830 square feet ("sf") of restoration for previously degraded areas; stormwater improvements including enhanced treatment and infiltration; and removal of 6,175 sf of impervious surface (a 72% reduction). See 310 CMR 10.58 (performance standard for Riverfront Area). The Property is presently almost entirely occupied by a private social and

sports club. The Project would be in the eastern corner of the Property in the area of a former tennis court that is now used for overflow parking.

The SOC includes a condition to monitor and inspect the area three times a year and remove any fallen artificial pine needles. The opposite side of Stony Brook in the area is occupied by a railroad right of way.

The Petitioners' attempt to prosecute this appeal has followed an erratic path in search of a legitimate claim, a claim that should have existed with sufficient factual, legal, and scientific bases prior to bringing the appeal. See 310 CMR 10.05(7)(j)2; 310 CMR 1.01(6)(b). The Petitioners' endeavor has come to an abrupt halt, after having been afforded numerous opportunities to make course corrections along their journey. Ultimately, when confronted with the deadline to proffer their direct evidence the Petitioners failed to file any pre-filed testimony in support of their case. Consequently, the Applicant and MassDEP filed a Joint Motion to Dismiss for the Petitioners' failure to comply with orders and the rules of adjudicatory proceeding and present their direct case. The Joint Motion to Dismiss is persuasive, and I therefore recommend that MassDEP's Commissioner issue a Final Decision allowing the Joint Motion to Dismiss, dismissing the appeal, and affirming the SOC.

BACKGROUND

Petitioners' Initial Pleading Deficiencies. Soon after the Petitioners filed their appeal, I issued an Order For More Definite Statement And To Show Cause Why Appeal Should Not Be Dismissed ("the Order"). The Order was issued for the Petitioners' failure to comply with the pleading requirements in 310 CMR 1.01(6)(b) and 310 CMR 10.05(7)(j)2.b.v because the Petitioners' Notice of Claim lacked the required specificity and failed to give sufficient notice of the Petitioners' purported claims. In sum, without citing a single wetlands regulatory provision the Petitioners asserted that the Westford Conservation Commission's Order of Conditions ("OOC") approving the Project failed to "prevent contamination" of the wetlands. Not only did

this purported "claim" fail to articulate sufficiently the alleged regulatory violation and the underlying factual basis, it also only challenged the OOC, even though this is a de novo appeal of the SOC. The Notice of Claim also improperly purported to assert that the Conservation Commission should have denied the project for lack of information even though this is a de novo SOC appeal.

On July 23, 2021, in response to the Order, the Petitioners filed a Supplemental Notice of Claim for Adjudicatory Appeal. The Petitioners alleged that pine needle camouflage is made by Larson Camouflage, LLC. They added that the camouflage pine needles are made of different substances that contain "per- and polyfluroralkyl substances ('PFAS')," which "in sufficient concentration would cause an alteration to the resource areas at the Site." Supplemental Notice of Claim, ¶ 2. They claimed that they "ha[d] submitted a sample of the mono-pine needle 'foliage' to a lab for testing to determine which PFAS chemical compounds are present and in what amount." Id. at ¶ 3.[1]

From those sparse allegations of adverse effects to wetlands, the Petitioners made the leap in their Supplemental Notice of Claim that the SOC was inadequate because the Applicant allegedly failed to conduct a sufficient alternatives analysis under the Riverfront Area regulation, 310 CMR 10.58(4). They asserted that the Applicant failed to show there is no "practicable alternative that would have less adverse effects on the Riverfront Resource Area," citing 310 CMR 10.58(4). The Petitioners then represented that they had retained expert witness Scott Horsley, who would opine and "show that the concentration of PFAS will cause an alteration to the chemical characteristics of the resource area, including impacts to water supply, groundwater, and pollution." Supplemental Notice of Claim, ¶ 11.

[1] The Applicant contends that "[i]nformation regarding faux pine needles indicates that the faux pine needles are primarily polyvinyl chloride ("PVC") and are not known to contain PFAS." The Applicant contends that even assuming they do contain PFAS, research shows it is in trace amounts that will not leach. "Based on published results of leaching analyses of PVC, PFAS have not been identified in leachate from PVC materials." Applicant's Pre-Hearing Statement, p. 4.

The Petitioners Barely Remedied Their Pleading Deficiencies. Reviewing the Petitioners' Supplemental Notice of Claim with the assumption that the allegations were true, as I was required to do at that stage of the appeal, I concluded that the Petitioners had barely exceeded their threshold pleading requirements. I therefore issued a Scheduling Order on August 6, 2021, and held a Pre-Hearing Conference on September 29, 2021.

At The Pre-Hearing Conference The Petitioners Again Altered Their Claims. During the Pre-Hearing Conference, it was apparent that the Petitioners' claims were continuing to evolve.

For example, in the Pre-Hearing Conference Report and Order I stated in footnote 5:

> In their Pre-Hearing Statement the Petitioners asserted two new alleged claims, one for alleged insufficient information before the Conservation Commission and one for a violation of [laws governing hazardous materials, G.L. c. 21E and] 310 CMR 40.0974. The first claim cannot be adjudicated here because there has never been a denial by the Conservation Commission for insufficient information. The second claim cannot be adjudicated here because it is outside the scope of this wetlands appeal. See e.g. Matter of United States Coast Guard Baker's Island Light, Docket No. WET 2009-041, Recommended Final Decision (March 23, 2010), adopted by Final Decision (April 7, 2010) ("Any authority the Department may have over the project under M.G.L. c. 21E cannot be adjudicated in this appeal arising under the Wetlands Protection Act, as quite clearly the Department is not required by statute or regulation to implement its M.G.L. c. 21E program through its authority under the Act.").

At the Pre-Hearing Conference I informed the Petitioners that this appeal was required to be resolved on timely basis. I stated this was particularly important because this appeal had already been delayed and it was necessary to comply with certain deadlines in 310 CMR 10.05(7)(j). Given this, I declined to resolve the appeal on a bifurcated basis, as urged by the Petitioners at the Conference.

Last, footnote 9 the Pre-Hearing Conference Report and Order addressed the Petitioners' evolving appeal and desire to extend its length by handling it on a bifurcated basis, stating:

> At the Conference it was discussed that the Petitioners have been litigating their opposition to the cell tower for several years before MassDEP and other tribunals, but they still have not identified the chemical constituents of the artificial needles that could ultimately be used. What is troublesome is that their present claim in this appeal is premised upon the needles allegedly containing PFAS, even though they admitted at the Conference they do not have evidence of this and their allegation is based upon their assertion that some synthetic materials may contain PFAS. In addition to this fundamental problem, the Petitioners' alleged claims have continued to evolve significantly since they filed this appeal with their first Notice of Claim, which failed to cite a single regulatory provision that was allegedly violated by the SOC. Given these circumstances, I will have little patience for any requests for additional time that may be filed by the Petitioners. In sum, they seem to be attempting inappropriately to concoct a claim with an underlying factual basis as they go along, fishing blindly for whatever might stay on the hook. A continuation of this pattern will not be tolerated.

The Pre-Hearing Conference Report and Order framed the issues for adjudication as:

> 1. Whether the Project meets the performance standards for work within Riverfront Area with respect to the alternatives analysis required under 310 CMR 10.58(4)(c)2 and 10.58(4)(c)3.3.
>
> 2. Whether the Project meets the requirements of 310 CMR 10.58(4)(d)1 that there be no significant adverse impact in the Riverfront Area.

The Report and Order also stated: "By October 8, 2021, the parties shall file any objections to this Pre-Hearing Conference Report and Order." The Report and Order established November 5, 2021, as the date by which the Petitioners were to submit their pre-filed direct testimony, exhibits, and a memorandum of law, and January 25, 2022, as the date for the adjudicatory hearing.

The Petitioners Again Requested A Bifurcated Approach And Extension of Deadlines.

On October 8, 2021, the Petitioners filed an Objection and Request for Clarification of the Pre-Hearing Conference Report and Order ("Objection and Request"). They specifically requested: "clarification and modification of the Pre-hearing Conference Report to allow for a motion, briefing and ruling on the first issue [Issue 1] by summary decision before submitting evidence for a possible hearing on the second issue." The objection requested that the schedule include

more time for the Petitioners to file a motion for summary decision on Issue 1 "before submitting evidence for a possible hearing on the second issue" because the Petitioners believed that the first issue presented "a purely legal question that should be decided by summary decision." In sum, the Petitioners requested the type of bifurcated approach that I denied in the Pre-Hearing Conference. I had also stated in the Conference that it was highly unlikely that Issue 1 was amenable to resolution on summary decision because of many disputed facts.

On October 12, 2021, I denied the Petitioners' Objection and Request stating: "I have reviewed the Petitioners' Objection and Request for Clarification of Pre-Hearing Conference Report. This wetlands permit appeal, like all others, is required to be resolved within a certain minimum amount of time established by 310 CMR 10.05(7)(j). If the Petitioners desire to move for summary decision, they may do so pursuant to 310 CMR 1.01 on a timely basis. Given the regulatory timeframe within which to resolve the appeal and the substantial passage of time thus far, I will not extend the current deadlines for the filing of a summary decision motion. In addition, based upon the current administrative record, summary decision would seem to be unwarranted because there appear to be genuine issues of material fact that can only be resolved with an adjudicatory hearing. If the Petitioners disagree with that, they may file a timely motion for summary decision." (emphasis in original).

The Petitioners Filed An Unsuccessful Motion For Summary Decision And Failed To Meet Their Deadline For Filing Testimony. On November 4, 2021, the day before their pre-filed testimony and exhibits and a memorandum of law were due, the Petitioners filed their Motion for Summary Decision. Their motion failed to include any affidavits and argued that the Applicant "has unquestionably skirted its obligations under the alternative analysis provisions of 310 CMR 10.58(4)(c) and (d), by purposely omitting from the alternatives analysis section of its Notice of Intent the one viable and practical alternative site that it has under lease, and on which

it has designed a cell tower that would meet the Applicant's business objectives – 73 Brookside Road, Westford (also known as the "Willows Property")." (emphasis added)

The applicable regulatory provision at 310 CMR 10.58(4)(c)3 provides:

> The applicant shall demonstrate that there are no practicable and substantially equivalent economic alternatives as defined in 310 CMR 10.58(4)(c)1., within the scope of alternatives as set forth in 310 CMR 10.58(4)(c)2., with less adverse effects on the interests identified in M.G.L. c. 131 § 40. The applicant shall submit information to describe sites and the work both for the proposed location and alternative site locations and configurations sufficient for a determination by the issuing authority under 310 CMR 10.58(4)(d). The level of detail of information shall be commensurate with the scope of the project and the practicability of alternatives. Where an applicant identifies an alternative which can be summarily demonstrated to be not practicable, an evaluation is not required.
> The purpose of evaluating project alternatives is to locate activities so that impacts to the riverfront area are avoided to the extent practicable. Projects within the scope of alternatives must be evaluated to determine whether any are practicable. As much of a project as feasible shall be sited outside the riverfront area. If siting of a project entirely outside the riverfront area is not practicable, the alternatives shall be evaluated to locate the project as far as possible from the river.
> The issuing authority shall not require alternatives which result in greater or substantially equivalent adverse impacts. If an alternative would result in no identifiable difference in impact, the issuing authority shall eliminate the alternative. If there would be no less adverse effects on the interests identified in M.G.L. c. 131, § 40, the proposed project rather than a practicable alternative shall be allowed, but the criteria in 310 CMR 10.58(4)(d) for determining no significant adverse impact must still be met. If there is a practicable and substantially equivalent economic alternative with less adverse effects, the proposed work shall be denied and the applicant may either withdraw the Notice of Intent or receive an Order of Conditions for the alternative, provided the applicant submitted sufficient information on the alternative in the Notice of Intent.

MassDEP and the Applicant opposed the Motion for Summary Decision, arguing with supporting affidavits and other evidence that there were genuine issues of material fact that are capable of resolution only after an adjudicatory hearing. MassDEP's and the Applicant's arguments were overwhelmingly persuasive, identifying numerous genuine issues of material

fact, and on November 30, 2021, I denied the Motion for Summary Decision. I summed up my decision stating, "contrary to the Petitioners' bold, unsupported arguments, Issue 1 for adjudication does not come close to presenting a purely legal issue that is capable of resolution on Summary Decision." Ruling and Order Denying Petitioners' Motion for Summary Decision, p. 7.

DISCUSSION

Approximately, one week before I issued the Ruling and Order Denying Petitioners' Motion for Summary Decision, MassDEP and the Applicant filed a Joint Motion to Dismiss, asserting meritorious arguments to dismiss pursuant to pursuant to 310 CMR 1.01(10), 310 CMR 1.01(12)(f) and 310 CMR 1.01(11)(e). The Petitioners did not respond to the Joint Motion to Dismiss and they never filed their pre-filed direct testimony.

MassDEP and the Applicant contend that the Petitioners have been given multiple opportunities to prosecute their appeal and multiple warnings of the consequences that would follow for failing to do so. See Pre-Hearing Conference Report and Order (discussing consequences for failure to comply). For example, the Pre-Hearing Confence Report and Order set forth the relevant portion of 310 CMR 1.01(12)(f), which provides in relevant part that "[f]ailure to file pre-filed direct testimony within the established time, without good cause shown, shall result in summary dismissal of the party and the appeal if the party being summarily dismissed is the petitioner." Pre-Hearing Conference Report and Order, p. 4.

The Petitioners' failure to file "written direct testimony is a serious default, and the equivalent of failing to appear at a [judicial proceeding] where the testimony is to be presented live." Matter of Edwin Mroz, Docket No. 2017-021, Recommended Final Decision (June 7, 2019), adopted by Final Decision (June 18, 2019); Matter of John Anderson and Skylight, LLC, Docket No. WET-2014-030, Recommended Final Decision (July 1, 2015), adopted by Final Decision (June 7, 2015). As set forth in "310 CMR 1.01(10) a party's failure to file proper Direct

Examination or Rebuttal Testimony is subject to sanctions for 'failure to file documents as required, ... comply with orders issued and schedules established in orders[[,] ... [or] comply with any of the requirements set forth in 310 CMR 1.01.'" Mroz, supra. Therefore, the Presiding Officer may "'issu[e] a final decision against the party being sanctioned, including dismissal of the appeal if the party is the petitioner.'" Id.

In sum, the Petitioners' appeal should be dismissed for their failure to file their direct case and meet their burden of going forward; failure to sustain their direct case; failure to prosecute; and failure to comply with the Pre-Hearing Conference Report and Order. 310 CMR 1.01(5); 310 CMR 10.05(7)(j)3.a, 310 CMR 10.05(7)(j)3.b; Matter of Webster Ventures, LLC, Docket No. WET-2014-016, Recommended Final Decision (February 27, 2105) adopted by Final Decision (March 26, 2015); Matter of Thomas Vacirca, Jr., Docket No. WET-2016-017, Recommended Final Decision (April 11, 2017) adopted by Final Decision (April 18, 2017).[2]

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.

[2] The Applicant requested that I impose monetary sanctions on the Petitioners and their attorneys, including costs and attorney fees. They contend that "310 CMR 1.01(10) sets forth a number of potential sanctions (a) – (g) that the Presiding Officer may impose, but states that such list includes "without limitation" those expressly set forth therein." They argue, "[a]ccordingly, the Presiding Officer is not limited solely to those sanctions set forth in 310 CMR 1.01(10)." They argue that the "[p]etitioners conduct set forth herein has seemingly been interposed solely to create additional costs and delay for [Applicant]." Joint Motion, p. 7. "Accordingly, if and to the extent permitted, [Applicant] respectfully requests the Presiding Officer to order that Petitioners pay [Applicant's] costs for attorneys' fees, expert witnesses, and related costs in connection with defending this frivolous adjudicatory appeal that Petitioners failed to prosecute." Id. While I understand the Applicant's frustration with the Petitioners' conduct, the Applicant has not provided sufficient legal authority for me to allow the request, and therefore it is denied.

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: January 19, 2022

Timothy M. Jones
Presiding Officer

SERVICE LIST

In the Matter of:

Docket No. WET-2021-030

EIP Communications I, LLC

File No. 334-1653
Westford, MA

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