

COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS

DEPARTMENT OF ENVIRONMENTAL PROTECTION

100 CAMBRIDGE STREET, BOSTON, MA 02114 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

**February 17, 2023**

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In the Matter of  
Fenix Partners Farm Road, LLC

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OADR Docket No. WET-2022-002  
DEP File No. 483-0422  
Sherborn, MA

**RECOMMENDED FINAL DECISION**

A 10 Residents Group (“Petitioners”) filed this appeal with the Office of Appeals and Dispute Resolution (“OADR”) to challenge the denial of their request for a Superseding Order of Conditions (“SOC”) by the Massachusetts Department of Environmental Protection’s Northeast Regional Office (“MassDEP”). The SOC was requested to challenge the Order of Conditions issued by the Sherborn Conservation Commission (“SCC”). The SOC request was denied as being untimely under 310 CMR 10.05(7)(c).

The Petitioners failed to file a Notice of Claim that provides the necessary specificity to explain why they believe their SOC request was timely.<sup>1</sup> The Adjudicatory Proceeding Regulation at 310 CMR 1.01(6)(b) provides that a Notice of Claim must specify each alleged violation, stating:

(b) Form and Content. The notice of claim for adjudicatory appeal shall state specifically, clearly and concisely the facts which are grounds for the appeal, the relief sought, and any additional information required by applicable law or

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<sup>1</sup> The Petitioner’s filing consisted of the filing fee and the filing fee transmittal form.

regulation.... When the contents of a notice of claim do not meet the requirements of 310 CMR 1.01 and any other applicable regulations, the Presiding Officer shall dismiss the appeal or require a more definite statement. If the person filing the notice of claim fails to file a more definite statement within the period specified, the appeal shall be dismissed.

The Wetlands Regulations at 310 CMR 10.05(7)(j)(2) require similar specificity for appealing a wetlands permit decision to the Office of Appeals and Dispute Resolution. (emphasis supplied).

On January 19, 2022 the prior Presiding Officer issued an Order For Petitioner to Provide More Definite Statement directing the Petitioners to remedy the defects by filing Notice of Claim that specifies why their request for the SOC was not untimely.<sup>2</sup> On February 3, 2022 the Petitioners submitted a response to the Order in which they stated that the basis for arguing that their appeal is timely is that one of their members was told by the Town of Sherborn's agent that the issuance date of the OOC was November 10, 2021 and that the filing deadline was November 26, 2021. They also assert that they filed their SOC request on November 24, 2021. See Petitioners February 3, 2022 letter of Definite Statement.

The facts are that the SCC issued the OOC on November 8, 2021, as evidenced by the OOC itself which indicates that it was issued by certified mail, return receipt requested on November 8, 2021. See MassDEP Motion to Dismiss, Exhibit 2 (OOC). The envelope in which the OOC was mailed to MassDEP corroborates the issuance date because it is post-marked November 8, 2021. See MassDEP Motion to Dismiss, Exhibit 3 (OOC envelope with post-mark).

While the Petitioners' SOC request is dated November 24, 2021, the post-mark on the envelope in which it was received by MassDEP indicates that it was mailed on November 26, 2021. See MassDEP Motion to Dismiss, Exhibit 4 (SOC Request) and Exhibit 5 (SOC envelope with post-mark). Further, the SOC request includes a list of residents who have consented to be represented in the group by Mary O.

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<sup>2</sup> The prior Presiding Officer is no longer available. I have been assigned to conduct adjudicatory proceedings in this matter.

Moore. The last two signatures on the list are dated November 26, 2021 which corroborates a filing date no earlier than November 26, 2021, consistent with the SOC envelope post-mark date. See MassDEP Motion to Dismiss, Exhibits 4 (SOC request), page 19.

According to 310 CMR 10.05(7)(c), “a request for a Superseding Order shall be made in writing and shall be sent by certified mail or hand delivered within ten (10) days of issuance of an Order of Conditions.” (emphasis supplied). Issuance is The law is well settled that “[t]he ten-day appeal period is jurisdictional and cannot be extended.” Matter of Cormier Homes Construction, LLC, OADR Docket No. WET-2015-002, Recommended Final Decision (June 23, 2015), adopted by Final Decision (June 25, 2015) and affirmed by the Final Decision on Reconsideration (July 14, 2015) adopting the Recommended Decision on Reconsideration (July 8, 2015). In limited circumstances, the deadline may be tolled for a person entitled to receive notice who does not receive it. Id. The facts alleged here, however, do not entitle the Petitioners to tolling.

Persons interested in requesting Department action are responsible for checking commission files for issuance of the order. To place the burden on commissions of providing actual notice upon request, and on the Department to resolve disputes over the action or inaction of commissions, is inappropriate given the clear purpose of the statute to promote efficiency in administration of the Act. In the Matter of Conroy Development, DEP Docket Nos. 2006-091, -092, -093, Final Decision (August 23, 2007). See also In the Matter of Heras, DEP Docket No. 94-103, Final Decision (July 5, 1995) (“The Commission’s official responsibilities do not include calculating appeal periods.”).

The Petitioners do not claim that they did not have notice that the OOC had been issued, much less that they were even entitled to such notice. Nor do they claim that they were unable to obtain a copy of the OOC in a timely manner. The OOC clearly states on its face that it was

issued on November 8, 2021, the OOC envelope post-mark corroborates that issuance date. As MassDEP's SOC denial letter to the Petitioners states, "MassDEP has a responsibility to apply the requirements of the law equally to all citizens." The Petitioners' SOC Request was untimely, and they have alleged no facts that would entitle them to tolling of the jurisdictional deadline.

As a result of my review of Petitioners' February 3, 2022 letter of Definite Statement and MassDEP's Motion to Dismiss, I conclude that Petitioners have failed to meet their burden and accordingly, pursuant to 310 CMR 1.01(5)(a)2, I recommend that the Department's Commissioner issue a Final Decision dismissing this appeal and affirming SOC denial.

**Date: February 17, 2023**



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Margaret R. Stolf  
Presiding Officer

## **SERVICE LIST**

**In the Matter of:**

**Fenix Partners Farm Road, LLC**

**Docket No. WET-2022-002**

**File No. 483-0422  
Sherborn, MA**

**Representative**

**Party**

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DEPARTMENT

**In the Matter of Fenix Partners Farm Road, OADR Docket No. WET-2022-002**

Recommended Final Decision

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