

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

**July 29, 2021**

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In the Matter of  
Jeffrey and Jennifer Fitton

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OADR Docket No. WET-2021-028  
DEP File No. 080-2513  
Westport, MA

**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

On May 25, 2021, the Office of Appeals and Dispute Resolution (“OADR”) received an Adjudicatory Hearing Fee Transmittal Form and a photocopy of a check for the filing fee for a purported appeal of a Superseding Order of Resource Area Delineation (“SORAD”)<sup>1</sup> issued by the Massachusetts Department of Environmental Protection (“MassDEP”) to Jeffrey and Jennifer Fitton (“Petitioners”).<sup>2</sup> The Transmittal Form and a filing fee were mailed to OADR by Ecosystem Solutions, Inc. (“ESI”) and the check was drawn on ESI’s bank account. The Transmittal form contained a wetlands file number, indicating that this was an appeal of a wetlands permitting decision, but not included with the mailing was the Notice of Claim (Appeal

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<sup>1</sup> An Order of Resource Area Delineation (“ORAD”) is a determination of a local Conservation Commission [or MassDEP, if superseding] that the wetland resource area boundaries depicted on a plan and described in an Abbreviated Notice of Resource Area Delineation are accurate or inaccurate. When MassDEP issues a SORAD, the SORAD is a “Reviewable Decision” as defined at 310 CMR 10.04. 310 CMR 10.05(7)(j)2. sets forth the procedures and requirements for filing an administrative appeal of a Reviewable Decision.

<sup>2</sup> The OADR Assistant Case Administrator obtained a copy of the SORAD from the MassDEP wetlands program, which made it possible for me to ascertain that the SORAD is the Reviewable Decision at issue in this appeal.

Notice) or a copy of the Reviewable Decision as required by the Rules of Adjudicatory Proceedings at 310 CMR 1.01(6)(a) and the Wetlands Regulations at 310 CMR 10.05(7)(j)2.

On June 23, 2021, I issued an Order for a More Definite Statement (“Order”) to the Petitioners pursuant to 310 CMR 1.01(5)(a)15, 310 CMR 1.01(6)(b) and 310 CMR 1.01(11)(b) directing them to file a Notice of Claim that complied with 310 CMR 1.01(6)(b) and 310 CMR 10.05(7)(j). The Petitioners did not respond to the Order. As discussed below, I recommend that MassDEP’s Commissioner issue a Final Decision dismissing the appeal because the Petitioners failed to: (1) properly initiate an administrative appeal of the SORAD and (2) respond to the Order for a More Definite Statement.

### **DISCUSSION**

**Initiating an Administrative Appeal.** Generally, a person “having a right to initiate an adjudicatory appeal shall file a written notice of claim for an adjudicatory appeal.” 310 CMR 1.01(6)(a). “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 regulation... A person filing a notice of claim shall include a copy of the document being appealed.” 310 CMR 1.01(6)(b). More specifically, the wetlands appeal regulations at 310 CMR 10.05(7)(j)2.a. require that a person with a right to appeal a wetlands permit decision “may request review of a Reviewable Decision by filing an Appeal Notice no later than ten business days after the issuance of the Reviewable Decision.” The wetlands appeal regulations clearly state that an appeal that does not comply with the regulations may be dismissed. 310 CMR 10.05(7)(j)2.c. The regulatory requirements of an appeal notice are detailed below and were included in the Order. As noted above, the Petitioners

did not file an Appeal Notice. They only filed an Adjudicatory Hearing Transmittal Fee form and a check for the filing fee.

**Sanctions for Failure to Properly Initiate an Appeal or Respond to Orders.** An appeal may be dismissed when "a party fails to file documents as required, . . . comply with orders issued and schedules established in orders or otherwise fails to prosecute the adjudicatory appeal; . . . demonstrates an intention to delay the proceeding or a resolution of the proceedings; or fails to comply with any of the requirements set forth in 310 CMR 1.01 . . ." 310 CMR 1.01(10) and (11)(d)1; see Matter of Mangano, Docket No. 94-109, Final Decision (March 1, 1996); Matter of Town of Brookline Department of Public Works, Docket No. 99-165, Final Decision (June 26, 2000); Matter of Bergeron, Docket No. 2001-071, Recommended Final Decision (February 5, 2002), adopted by Final Decision (February 25, 2002).

Additionally, 310 CMR 1.01(3)(e) provides that "[p]arties who do not conform to time limits or schedules established by the Presiding Officer shall, absent good cause shown, summarily be dismissed for failure to prosecute the case." See also Matter of Tucard, LLC, OADR Docket No. 2009-076, 2010 MA ENV LEXIS 211, Recommended Final Decision (September 2, 2010), adopted by Final Decision (September 28, 2010).

310 CMR 1.01(10) authorizes the Presiding Officer to impose sanctions, including the sanction of dismissal, on a party "when a party fails to file documents as required, respond to notices, correspondence or motions, comply with orders issued and schedules established in orders or otherwise fails to prosecute the adjudicatory appeal; demonstrates an intention not to proceed; demonstrates an intention to delay the proceeding or resolution of the proceedings; or fails to comply with any of the requirements set forth in 310 CMR 1.01." Sanctions include:

- (a) taking designated facts or issues as established against the party being sanctioned;
- (b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;
- (c) denying summarily late-filed motions or motions failing to comply with requirements of 310 CMR 1.01(4);
- (d) striking the party's pleadings in whole or in part;
- (e) dismissing the appeal as to some or all of the disputed issues;
- (f) dismissing the party being sanctioned from the appeal; and
- (g) issuing a final decision against the party being sanctioned.

In addition to the dismissal authority conferred by 310 CMR 1.01(10)(e), under 310 CMR 1.01(11)(a)2.f, a "Presiding Officer may [also] summarily dismiss [an appeal] sua sponte," when the appellant fails to prosecute the appeal or fails to comply with an order issued by the Presiding Officer. For the same reasons, the Presiding Officer may also dismiss an appeal pursuant to the Presiding Officer's appellate pre-screening authority under 310 CMR 1.01(5)(a)15 which authorizes the Presiding Officer to "issu[e] orders to parties, including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending prescreening conferences and ordering parties to provide more definite statements in support of their positions." In this case the sanction of dismissal is warranted for the following reasons:

- (1) The Petitioners did not comply with the appeal regulations cited above because, among other things, they did not file a Notice of Claim; and
- (2) The Petitioners did not respond to the Order, which was their opportunity to cure their defective appeal.

**The Order for a More Definite Statement.** The Order required the Petitioners to file their More Definite Statement of their claims no later than June 30, 2021. The Order advised the Petitioners of the specific requirements in the wetland regulations for initiating an appeal and the required contents of an Appeal Notice and provided them with the provisions of 310 CMR 10.05(7)(j)(2)b. as follows:

- i. the Petitioner's complete name, address, phone number, fax number and email address and, if represented, counsel's name, address, phone number, fax number and email address, and if a ten resident group, the same information for the group's designated representative.;
- ii. the department's wetlands file number, if applicable, the name of applicant and address of the project.
- iii. if filed by an aggrieved person, demonstration of participation in previous proceedings, in accordance with 310 CMR 10.05(7)(j)3.a. and sufficient written facts to demonstrate status as a person aggrieved;
- iv. if filed by a ten resident group, demonstration of participation in previous proceedings, in accordance with 310 CMR 10.05(7)(j)(3)(a);
- v. a clear and concise statement of the alleged errors contained in the Reviewable Decision and how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c. 131, § 40, including reference to the statutory or regulatory provisions the Party alleges has been violated by the Reviewable Decision, and the relief sought, including specific changes desired in the Reviewable Decision. In the event that the Reviewable Decision is a Superseding Order of Conditions that is a Restoration Order of Conditions, the appeal is limited to a claim that the applicant did not comply with one or more of the applicable procedural requirements of 310 CMR 10.05 and/or the Department issued the Reviewable Decision in contravention of one or more of the applicable eligibility criteria. The notice of claim shall specifically identify the procedural requirements and eligibility criteria that the person requesting an adjudicatory hearing alleges have not been met;
- vi. a copy of the Reviewable Decision appealed and a copy of the underlying Conservation Commission decision if the Reviewable Decision affirms the Conservation Commission decision; and

vii. if asserting that a matter is Major or Complex, a statement requesting that the Presiding Officer make a designation of Major or Complex, with specific reasons supporting the request.

The Order further advised the Petitioners that an Appeal Notice that did not contain this information may be dismissed. 310 CMR 10.05(7)(j)2.c. The Petitioners neither filed an appeal notice in conformance with the applicable regulations nor responded to the Order. They failed to avail themselves of the opportunity to correct their defective appeal and by not responding to the Order they have indicated they do not intend to prosecute their appeal. For these reasons, their appeal should be dismissed.

### **CONCLUSION**

The Petitioners have failed to comply with 310 CMR 1.01(6)(b) and 310 CMR 10.05(7)(j), and failed to respond to the Order for a More Definite Statement. As a result, I recommend that MassDEP's Commissioner issue a Final Decision dismissing the Petitioners' appeal.

Date: 7/29/2021



Jane Rothchild  
Presiding Officer

### **NOTICE- RECOMMENDED FINAL DECISION**

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his consideration. 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.

Because this matter has now been transmitted to the Commissioner, no party shall file a

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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.

## SERVICE LIST

### IN THE MATTER OF:

**Jeffrey and Jennifer Fitton**

**OADR Docket No. WET-2021-028**

REPRESENTATIVE

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CONSERVATION COMMISSION