

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

June 11, 2021

In the Matter of
Jerry Marone

OADR Docket Nos. WET-2021-025
DEP File No. 109-1414
Billerica, MA

RECOMMENDED FINAL DECISION

On April 20, 2021, Robert Batchelder (“Petitioner”) filed this appeal concerning the real property at 7 Munroe Way, Billerica, Massachusetts (“the Property”). The Petitioner challenges a Superseding Order of Conditions (“SOC”) that the Massachusetts Department of Environmental Protection’s Northeast Regional Office (“MassDEP”) issued to the Applicant, Jerry Marone, pursuant to the Wetlands Act, G.L. c. 131 §40, and the Wetlands Regulations, 310 CMR 10.00.

Shortly after the Petitioner filed his Notice of Claim to initiate this appeal, MassDEP and the Applicant recognized that the Notice of Claim was fatally defective and filed a Joint Motion to Dismiss (“Joint Motion”) the appeal on May 11, 2021, pursuant to 310 CMR 10.05(7)(j)2.c, arguing that the Notice of Claim failed to comply with 310 CMR 10.05(7)(j)2. On May 20, 2021, the Petitioner filed his Opposition to Motion to Dismiss (“Opposition”).

In response to the Opposition, on May 26, 2021, I issued the Order Requiring Petitioner to Demonstrate Standing and File a More Definite Statement (“Order”). In the Order, I stated

that the Joint Motion is meritorious because the Notice of Claim has, among others, the following deficiencies:

1. It fails to provide the specificity required by 310 CMR 10.05(7)(j)2.b and 310 CMR 1.01(6)(b), particularly §10.05(7)(j)2.b.v;
2. It fails to cite a single wetlands regulation that is allegedly violated by the SOC and articulate specifically the nature of the alleged violation as required by 310 CMR 10.05(7)(j)2.b.v;
3. It cites the inapplicable waterways regulations at 310 CMR 9.17;
4. It attempts to allege how the Order of Conditions issued by the Billerica Conservation Commission is allegedly in noncompliance with the Wetlands Regulations (310 CMR 10.00), even though this is a *de novo* proceeding where the SOC is being challenged; and
5. It does not show aggrievement as required by 310 CMR 10.05(7)(j)2.a, 10.05(7)(j)2.b.iii, and 310 CMR 10.04 (definition of aggrieved person).

In the Order I explained how the Petitioner failed to take advantage of the opportunity in response to the Joint Motion to correct the fatal defects with his appeal. I could have dismissed the appeal at that stage, but I nevertheless offered the Petitioner a third opportunity to cure the fatal flaws with his appeal: first with standing, and then if he established standing, I would allow him an opportunity to meet his burden of going forward. See Order.

Despite giving the Petitioner a third opportunity to show standing and citing in the Order prior adjudicatory decisions to use as a guide to establish standing, the Petitioner has failed to demonstrate standing.¹ As I explained in the Order, standing is an important jurisdictional

¹I cited the following cases in the Order: Matter of George Collins, Docket No. WET 2016-008, Recommended Final Decision (July 28, 2016), adopted by Final Decision (August 9, 2016); Matter of Digital Realty Trust, Docket No. WET 2013-018, Recommended Final Decision (October 9, 2013), adopted by Final Decision (October 28,

requirement. The adjudicatory decisions I cited in the Order clearly articulated the legal elements and proof necessary to show standing.

To sum up, the Petitioner was required to demonstrate: (1) that the Applicant's project might possibly adversely impact the *interests of the Act*; and (2) *those* adverse impacts would or could generate identifiable impacts on "a private right, a private property interest, or a private legal interest" of the Petitioner. Matter of Digital Realty Trust, Docket No. WET-2013-018, Recommended Final Decision (October 9, 2013), adopted by Final Decision (October 28, 2013); Matter of Plum Island, LLC, Docket No. WET 2019-012, Recommended Final Decision (July 25, 2019), adopted by Final Decision (August 12, 2019). The impact to the asserted right or interest must be one that the Wetlands Protection Act is designed to protect. Id.

"[A]n allegation of abstract, conjectural or hypothetical injury is insufficient to show aggrievement." Id. (quoting Matter of Doe, Doe Family Trust, Docket No. 97-097, Final Decision (April 15, 1998)). It is not necessary to prove the claim of particularized injury by a preponderance of the evidence. Matter of Collins, supra. "Rather, [when standing is challenged] the plaintiff must put forth credible *evidence* to substantiate his allegations. In this context, standing becomes, then, essentially a question of fact for the trial judge." Id. (quoting Marashlian v. Zoning Bd. Of Appeals of Newburyport, 421 Mass. 719, 721, 660 N.E.2d 369 (1996) (emphasis added)).

The Petitioner failed to meet the above standing requirements for several reasons. First, the Petitioner was required to substantiate his allegations with some credible evidence. Instead of presenting any evidence, the Petitioner put forth general, abstract *allegations* that the construction of the Applicant's driveway without a culvert to divert water runoff away from

2013); Matter of Plum Island, LLC, Docket No. WET 2019-012, Recommended Final Decision (July 25, 2019), adopted by Final Decision (August 12, 2019).

Petitioner's property will result in injury to Petitioner's property. This is deficient because allegations are not evidence, and the claim is simply too abstract and conclusory.

Second, while the Petitioner contends that these allegations are based upon the analysis and opinion of a competent source, the Petitioner failed to establish that the alleged competent source has any background (education, experience, or training) in wetlands science to substantiate the alleged standing claim.²

The third flaw dovetails with the preceding point; the Petitioner failed to present any evidence that the SOC's approval of the Applicant's project somehow contravenes the interests of the Wetlands Act or Wetlands Regulations and that *the noncompliance with the Act or the Regulations* would result in injury to the Petitioner's property. The alleged failure to install a culvert under a driveway that may affect runoff onto the Petitioner's property does not necessarily implicate the Wetlands Act or the Wetlands Regulations. And not every matter involving water runoff from one property to another implicates the Wetlands Act or Wetlands Regulations. Quite simply, the Petitioner has failed to establish with some credible evidence from a competent source: (1) how the SOC's approval of the project without the culvert somehow contravenes the Wetlands Act or Wetlands Regulations and (2) how that noncompliance could result in injury to the Petitioner's property interests. That is the third fatal flaw in the Petitioner's claim of standing. This appeal should therefore be dismissed for failure to demonstrate standing, a jurisdictional requirement.

For all the above reasons, I recommend that MassDEP's Commissioner issue a Final Decision adopting this Recommended Final Decision and dismissing the appeal.

² "A 'competent source' is a witness who has sufficient expertise to render testimony on the technical issues on appeal." Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), adopted by Final Decision (August 19, 2010). Whether the witness has such expertise depends "[on] whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony." Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted).

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: June 11, 2021



Timothy M. Jones
Presiding Officer

SERVICE LIST

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**File No. 109-1414
Billerica, MA**

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