



Commonwealth of Massachusetts
Executive Office of Energy & Environmental Affairs

Department of Environmental Protection

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Lieutenant Governor

Rebecca L. Tepper
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Bonnie Heiple
Commissioner

May 31, 2023

In the Matter of
Michael Carrigan,
Carrigan Development, LLC

OADR Docket No. WET-2021-027
DEP File No. 028-2602
Gloucester, MA

FINAL DECISION

In accordance with her authority under the Adjudicatory Proceeding Rules at 310 CMR 1.01(14)(b), Bonnie Heiple, Commissioner of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”), has designated me the Final Decision-Maker in this administrative appeal.¹

I adopt the Recommended Final Decision of the Presiding Officer as my Final Decision in this appeal and in doing so I: (1) affirm the Superseding Order of Conditions (“SOC”) that was at issue in this appeal; and (2) direct MassDEP to issue the Applicant a Final Order of Conditions approving the proposed Project, that adopts Alternative Plan 2 in place of the SOC Plan, as recommended by MassDEP. In issuing this Final Decision, I also note the following.

The review of a Presiding Officer’s Recommended Final Decision in an appeal and its adoption as a Final Decision by MassDEP’s Commissioner or another Final Decision-Maker

¹ 310 CMR 1.01(14)(b) provides in relevant part that “[e]very final decision” in an administrative appeal “shall be in writing and shall be signed by the [Department’s] Commissioner or a designee of the Commissioner.”

designated pursuant to 310 CMR 1.01(14)(b) is not a perfunctory or “rubber stamp” exercise but rather a serious endeavor to ensure that the appeal has been properly adjudicated by the Presiding Officer. This is what is required by the Massachusetts Administrative Procedure Act, G.L.

c. 30A, § 14(7), and Due Process Principles.² Here, as the Final Decision-Maker in this appeal, I have reviewed the appeal record and have concluded that in issuing her Recommended Final Decision and before that her Tentative Decision, the Presiding Officer properly adjudicated this

² Under G.L. c. 30A, § 14(7), Final Decisions issued by MassDEP’s Commissioner or another Final Decision-Maker designated pursuant to 310 CMR 1.01(14)(b) in an administrative appeal are subject to judicial review in Superior Court. The statute provides that based on its “consideration of the [administrative appeal’s] entire record, or [those] portions of the record as may be cited by the parties [to the appeal]” and after “[according] due weight to the experience, technical competence, and specialized knowledge of [MassDEP], as well as to the discretionary authority conferred upon it,” the court:

may affirm the [Final] [D]ecision[,] . . . or remand the matter for further proceedings before [MassDEP]; or the court may set aside or modify the [Final] [D]ecision, or compel any action unlawfully withheld or unreasonably delayed, if it determines that the substantial rights of any party may have been prejudiced because the [Final] [D]ecision is—

- (a) In violation of constitutional provisions; or
- (b) In excess of [MassDEP’s] statutory authority or jurisdiction . . . ; or
- (c) Based upon an error of law; or
- (d) Made upon unlawful procedure; or
- (e) Unsupported by substantial evidence; or
- (f) Unwarranted by facts found by the court on the record [of the administrative appeal] as submitted or as amplified under paragraph (6) of [G.L. c. 30A, § 14], in those instances where the court is constitutionally required to make independent findings of fact; or
- (g) Arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. . . .

The Massachusetts Supreme Judicial Court has also stated that:

[Administrative] hearing officers, like judges, are held to “high standards [which] are reflective of the constitutional rights of litigants to a fair hearing, as established in art. 29 of the Declaration of Rights of the Constitution of this Commonwealth ‘It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.’” . . . Moreover, . . . “actual impartiality alone is not enough [because of] . . . the importance of maintaining not only fairness but also the appearance of fairness in every judicial proceeding. In order to preserve and protect the integrity of the judiciary and the judicial process, and the necessary public confidence in both, even the appearance of partiality must be avoided.”

Doe v. Sex Offender Registry Board, 84 Mass. App. Ct. 537, 541-42 (2013), citing, Police Commissioner of Boston v. Municipal Court of the West Roxbury District, 368 Mass. 501, 507 (1975).

appeal for the following reasons.

First, the Presiding Officer is a highly experienced environmental attorney (30 plus years) in MassDEP's Office of Appeals and Dispute Resolution ("OADR"), an independent quasi-judicial office within MassDEP responsible for advising MassDEP's Commissioner in resolving all administrative appeals of MassDEP Permit Decisions, Environmental Jurisdiction Determinations, and Enforcement Orders in a neutral, fair, timely, and sound manner based on the governing law and the facts of the case. In the Matter of Tennessee Gas Pipeline Company, LLC, OADR Docket No. 2016-020 ("TGP"), Recommended Final Decision (March 22, 2017), 2017 MA ENV LEXIS 34, at 9, adopted as Final Decision (March 27, 2017), 2017 MA ENV LEXIS 38, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7); See also Mass. R. Prof. C. 1.0(p) (definition of "tribunal"). Unless another Final Decision-Maker is designated in an appeal, MassDEP's Commissioner is the final agency decision-maker in these appeals. TGP, 2017 MA ENV LEXIS 34, at 9, citing, 310 CMR 1.01(14)(b). To ensure its objective review of MassDEP Permit Decisions, Environmental Jurisdiction Determinations, and Enforcement Orders, OADR reports directly to MassDEP's Commissioner and is separate and independent of MassDEP's program offices, Regional Offices, and Office of General Counsel ("OGC"). TGP, 2017 MA ENV LEXIS 34, at 9.

OADR staff who advise MassDEP's Commissioner in resolving administrative appeals are Presiding Officers, senior environmental attorneys at MassDEP appointed by MassDEP's Commissioner to serve as neutral hearing officers in administrative appeals. Presiding Officers are the equivalent of environmental administrative law judges who have significant authority under the Adjudicatory Proceeding Rules at 310 CMR 1.01 to adjudicate appeals, including fostering settlement discussions between the parties in administrative appeals and resolving appeals by conducting pre-hearing conferences with the parties; ruling on dispositive motions;

conducting evidentiary Adjudicatory Hearings (quasi-judicial/civil courtroom trial type proceedings), which includes the authority to establish prior to the Hearings, the number of witnesses that the parties may offer at the Hearings and to exclude witnesses whose testimony would be duplicative, irrelevant, or otherwise unnecessary; and issuing Recommended Final Decisions on appeals to MassDEP's Commissioner or another Final Decision-Maker designated in an appeal. TGP, 2017 MA ENV LEXIS 34, at 9-10, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(13)(d)-(13)(f), 1.01(14)(a), 1.03(7).

MassDEP's Commissioner or another Final Decision-Maker designated in an appeal may issue a Final Decision in an appeal adopting, modifying, or rejecting a Presiding Officer's Recommended Final Decision. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(b). Unless there is a statutory directive to the contrary, the Final Decision issued by MassDEP's Commissioner or another Final Decision-Maker designated in the appeal can be appealed to Massachusetts Superior Court pursuant to G.L. c. 30A, § 14(7). TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(f).³

I have been a member of the Massachusetts Bar for more than 36 years (since December 1986) with significant administrative and environmental law experience and trial and appellate court experience. I have served as MassDEP's Chief Presiding Officer for 16 years (since July 2007). As Chief Presiding Officer, I am the head of OADR and directly supervise the work of all OADR Presiding Officers, including the Presiding Officer who issued the Recommended Final Decision in this appeal that followed her Tentative Decision in the appeal as discussed below. As the Presiding Officer's direct supervisor, I am aware that the Presiding Officer thoroughly and properly reviewed the evidentiary record in the appeal prior to making her sound

³ See note 2, at p. 2 above.

and detailed findings in the appeal as set forth in her Tentative Decision and then Recommended Final Decision. I conducted extensive reviews of the Presiding Officer's Tentative Decision and Recommended Final Decision prior to their issuance by the Presiding Officer, including discussing with the Presiding Officer her findings as set forth in the Tentative Decision and Recommended Final Decision.

The Presiding Officer's thorough and proper review of the evidentiary record in the appeal included her viewing the five (5) hour plus long Zoom video and audio recording ("Zoom recording") of the evidentiary Adjudicatory Hearing ("Hearing") that the former OADR Presiding Officer conducted in appeal prior to leaving OADR.⁴ The Presiding Officer's viewing of the Zoom recording of the Hearing enabled the Presiding Officer to thoroughly and properly assess the credibility and the weight of the testimonial evidence presented by the Parties' respective Wetlands Expert Witnesses at the Hearing.

The Presiding Officer's thorough and proper review of the evidentiary record is reflected

⁴ As the Zoom recording will confirm, the Hearing lasted 5 hours, 16 minutes, and 8 seconds. The Adjudicatory Proceeding Rules at 310 CMR 1.01(14)(a) provide that:

Tentative decisions . . . shall be issued . . . [if] the hearing was conducted by a Presiding Officer other than the one who will write the recommended decision and the recommended decision will be adverse to a party other than the Department Every tentative decision shall be in writing and shall contain a statement of the reasons, including a determination of every issue of fact or law necessary to the decision. The parties shall have seven [business] days from the receipt of the tentative decision to file objections to the decision and supporting arguments with [OADR].

310 CMR 1.01(14)(c) provides that:

[w]hen a Presiding Officer becomes . . . unavailable to make a decision, a tentative decision shall be issued by a substitute Presiding Officer upon the record. When the substitute Presiding Officer determines that the credibility of a material witness is an issue necessary to the decision, a new hearing may be held, and may be limited to the examination of that witness.

Here, a new hearing was not necessary for the Presiding Officer to assess the credibility of the Parties' respective Wetlands Expert Witnesses because as discussed above in the text, the Zoom recording of the Hearing enabled the Presiding Officer to thoroughly and properly assess the credibility and the weight of the testimonial evidence presented by the Parties' respective Wetlands Expert Witnesses at the Hearing.

by her sound and detailed findings in her Tentative Decision and Recommended Final Decision. The Presiding Officer issued her Recommended Final Decision after thoroughly reviewing the Parties' respective responses to her Tentative Decision, including the Petitioners' objections to her findings in the Tentative Decision. The Petitioners' objections consisted of the Petitioners' re-argument of claims that the Presiding Officer had previously rejected in her Tentative Decision and claiming without merit that she had not comprehended the testimony of the Petitioners' Wetlands Expert Witness. However, in objecting to the Presiding Officer's findings, the Petitioners did not assert that the Presiding Officer's findings were invalid because she had not conducted the Hearing. Having failed to raise such an objection in responding to the Tentative Decision, the Petitioners waived the objection. Assuming for the sake of argument that the Petitioners did not waive the objection, their objection lacks merit because the Presiding Officer properly adjudicated this appeal for the reasons discussed above.

The Parties to this appeal are notified of their right to file a motion for reconsideration of this Final Decision, pursuant to 310 CMR 1.01(14)(d). The motion must be filed with the Case Administrator and served on all Parties within seven business days of the postmark date of this Final Decision. A person who has the right to seek judicial review of this Final Decision may appeal this Final decision to the Superior Court pursuant to G.L. c. 30A, §14(1). The complaint must be filed in the Court within thirty days of receipt of this decision.



Salvatore M. Giorlandino
Chief Presiding Officer

SERVICE LIST

In the Matter of:

Docket No. WET-2021-027

**Michael Carrigan, Carrigan
Development, LLC
File No. 028-2602
Gloucester, MA**

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