

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

March 13, 2019

In the Matter of

OADR Docket No. WET-2019-007

Michael Sands

Middleborough, MA

RECOMMENDED FINAL DECISION

This is an appeal of an Amended Superseding Order of Conditions (ASOC) issued by the Department of Environmental Protection's Southeast Regional Office to Michael Sands on February 12, 2019. The ASOC approved a proposed amended project based on a revised plan reflecting the new FEMA Flood Map change from the NGVD29 Datum to NAVD88 Datum; two new test pits completed on October 25, 2018; and minor changes to site grading. ASOC Cover Letter at p. 1. The appeal is brought by David and Judith Thompson of Middleborough ("the Petitioners") and was filed with the Office of Appeals and Dispute Resolution ("OADR") on February 20, 2019.

As discussed below, I recommend that the Department's Commissioner issue a Final Decision dismissing the appeal and making the ASOC final because the Petitioners (a) failed to respond to an Order for a More Definite Statement that I issued to them in the case and (b) failed to pay the required filing fee for this appeal.

A. The Petitioners Did Not Respond to an Order for a More Definite Statement.

On February 21, 2019, I issued an Order for a More Definite Statement after determining that the Petitioners' Notice of Claim did not meet the requirements of the applicable regulations governing adjudicatory appeals. The Notice of Claim consisted only of the Adjudicatory Hearing Transmittal Fee Form and a page captioned "Special Conditions for Medeiros". The Notice of Claim did not contain written facts to demonstrate that the Petitioners are aggrieved, nor did it state clearly and concisely the alleged errors in the ASOC 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. The Order required the Petitioners to file their response no later than March 7, 2019. They did not respond to the Order.

B. The Petitioners Have Failed to Pay the Required Filing Fee for their Appeal.

When the Petitioners filed their appeal on February 20, 2019, they paid the \$100.00 appellate filing fee required by 310 CMR 4.06(1) by check, but they stopped payment on their check on March 1, 2019. See Email message from Valerie Walker, Director, COM/Fiscal Management Division, Revenue, MassDEP to Bridget Munster, Case Administrator, MassDEP Office of Appeals and Dispute Resolution, Tuesday, March 12, 2019 at 1:09 PM. By stopping payment on their check, the Petitioners have failed to pay the required fee for bringing this appeal. Under 310 CMR 4.06, all administrative appeals of Department actions are subject to a \$100.00 appellate filing fee unless the appellant is exempt from paying the fee. The regulation makes clear that "[f]ailure to pay the filing fee shall be a ground for dismissal of the [appeal]." 310 CMR 4.06(1)(d). Additionally, by stopping payment on their check, the Petitioners have indicated their intent not to prosecute their appeal.

C. **Dismissal of the Appeal is an Appropriate Sanction**

310 CMR 1.01(10) provides that

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; the Presiding Officer may impose appropriate sanctions on that party. Sanctions include, without limitation... (e) dismissing the adjudicatory 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.

The Petitioners' failure to respond to the Order for a More Definite Statement and their failure to pay the required adjudicatory hearing filing fee warrant the imposition of sanctions pursuant to 310 CMR 1.01(e), (f) and (g). By these actions, it is clear that the Petitioners do not intend to pursue their claims in this forum. Dismissal of the appeal as to all issues and issuance of a Final Decision against the Petitioners are appropriate sanctions under the circumstances. Therefore I recommend that the Department's Commissioner issue a Final Decision dismissing the appeal and making the ASOC final.

Date: 3/13/2019



Jane A 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 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.

SERVICE LIST

IN THE MATTER OF:

Docket No. WET-2019-009

MICHAEL SANDS

REPRESENTATIVE

PARTY

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