

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

December 20, 2022

**In the Matter of
Pamet Harbor Yacht Club, Inc.**

**Docket No. WET-2022-026
DEP File No.: SE-75-1060**

RECOMMENDED FINAL DECISION

INTRODUCTION

More than one year ago, on July 21, 2021, the Southeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to the Pamet Harbor Yacht Club, Inc. (“the Applicant”) a Superseding Order of Conditions (“SOC”) pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 (“MWPA”), and the Wetlands Regulations, 310 CMR 10.00 et seq. (“the Wetlands Regulations”), approving the Applicant’s proposed Project at 7 Yacht Club Road in Truro, Massachusetts (“the Property”). Specifically, the SOC approved the Applicant’s proposed construction of a septic system upgrade, dune restoration, and supplemental plantings at the Property. SOC, at pp. 1-13.

MassDEP’s Southeast Regional Office (“SERO Office”) issued the SOC to the Applicant

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TTY# MassRelay Service 1-800-439-2370 MassDEP Website: www.mass.gov/dep

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after reviewing the proposed Project at the request of Mr. and Mrs. John Allen of Longmeadow, Massachusetts (“the Petitioners”) and determining that the proposed Project complied with the requirements of the MWPA and the Wetlands Regulations. See SOC Transmittal Letter. The Petitioners made their request to MassDEP’s SERO Office, contending that the proposed Project did not satisfy the requirements of the MWPA and the Wetlands Regulations. Id. MassDEP’s SERO Office rejected the Petitioners’ claim in issuing the SOC approving the proposed Project. Id.

As discussed below, the Petitioners, if dissatisfied with the SOC’s approval of the proposed Project, had 10 business days after the SOC’s issuance: by August 4, 2021, to appeal the SOC to MassDEP’s Office of Appeals and Dispute Resolution (“OADR”).¹ To date, the Petitioners have failed to provide OADR with any proof that they filed an appeal of the SOC with OADR by the August 4, 2021 deadline. The Petitioners have failed to provide such proof notwithstanding my recent December 2, 2022 Order (“December 2nd Order”) directing them to provide written proof to OADR by December 12, 2022 under the pains and penalties of perjury that they had filed a timely appeal with OADR of the SOC by the August 4, 2021 deadline. For these reasons, I recommend that MassDEP’s Commissioner issue a Final Decision finding that the Petitioners failed to file a timely appeal of the SOC with OADR prior to expiration of the August 4, 2021 appeal deadline and thus, are barred from challenging the SOC.

DISCUSSION

The Wetlands Regulations at 310 CMR 10.05(7)(j) authorize certain parties to file an

¹ OADR is an independent quasi-judicial office in MassDEP which is responsible for advising MassDEP’s Commissioner (or an alternative agency Final Decision-Maker where the Commissioner is recused) in resolving all administrative appeals of MassDEP Permit Decisions, Environmental Jurisdiction Determinations, and Enforcement Orders. A description of OADR is set forth in Addendum No. 1, at p. 11 below.

administrative appeal with OADR to challenge an SOC issued by MassDEP, including an “aggrieved person, if previously a participant in the permit proceedings.” 310 CMR

10.05(7)(j)2.a. The Regulations require these parties to file an administrative appeal with OADR within 10 business days after the SOC’s issuance and also require them to submit with their appeal an Appeal Notice that contains the following important information to prosecute the appeal:

- (1) the party’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”;
- (2) “demonstration of participation in previous permit proceedings”;
- (3) “sufficient written facts to demonstrate status as a person aggrieved”; and
- (4) “a clear and concise statement of the alleged errors contained in the [SOC] and how each alleged error is inconsistent with [the Wetlands Regulations at] 310 CMR 10.00 and does not contribute to the protection of the interests identified in the [MWPA], including reference to the statutory or regulatory provisions [that the party contends] ha[ve] been violated by the [SOC], and the relief sought, including specific changes desired in the [SOC]”

310 CMR 10.05(7)(j)2.b.iii, 2.b.v. Under the Adjudicatory Proceeding Rules at 310 CMR

1.01(4)(b), as incorporated by the Wetlands Regulations at 310 CMR 10.05(7)(j)9.b, the party bringing the appeal or its authorized representative must also sign the Appeal Notice. “This signature . . . constitute[s] a certification that the signer has read the [Appeal Notice] and believes the content of the [Appeal Notice] is true and accurate, and that the [Appeal Notice] is not interposed for delay. Signature by an authorized representative also certifies the full power and authority to represent the party.” 310 CMR 1.01(4)(b).

Here, consistent with the Wetlands Regulations as set forth above, pages 11-12 of the

SOC at issue in this case informed the Petitioners of their ability to appeal the SOC to OADR:

provided the [appeal was filed with OADR] . . . by certified mail or hand delivery to [OADR], along with the [\$100.00 appeal] filing fee and a MassDEP Fee Transmittal Form within ten (10) business days of the date of [SOC's] issuance . . . and [was] addressed to:

Case Administrator
Office of Appeals and Dispute Resolution
Department of Environmental Protection
One Winter Street, 2nd Floor
Boston, MA 02108

SOC, at pp. 11-12. The SOC also informed the Petitioners that:

[a] copy of [their appeal or] . . . Appeal Notice [was] . . . at the same time be sent by certified mail or hand delivery to the [Truro] Conservation Commission, the [A]pplicant, . . . and MassDEP[']s [SERO Office] at:

MassDEP
20 Riverside Drive
Lakeville, MA 02347.

Id., at p. 11. The SOC also informed the Petitioners of the information that their Appeal Notice appealing the SOC was to contain, including:

- (1) “sufficient written facts to demonstrate [their] status as [] person[s] aggrieved” by the SOC; and
- (2) “a clear and concise statement of the alleged errors contained in the [SOC] and how each alleged error [was] inconsistent with [the Wetlands Regulations at] 310 CMR 10.00 and [did] not contribute to the protection of the interests identified in the [MWPA], including reference to the statutory or regulatory provisions that the [Petitioners] . . . allege[d] ha[d] been violated by the [SOC], and the relief sought, including any specific desired changes to the [SOC].”

SOC, at pp. 11-12. The SOC also informed the Petitioners that:

[a] copy of [their] Appeal Notice along with a MassDEP Fee Transmittal Form and a valid check or money order payable to the Commonwealth of Massachusetts

in the amount of one hundred dollars (\$100) [to cover payment of the appeal filing fee had to] be mailed to:

Commonwealth of Massachusetts
Department of Environmental Protection
Commonwealth Master Lockbox
P.O. Box 4062
Boston, Massachusetts 02211

Id., at p. 12. Lastly, the SOC also informed the Petitioners that their appeal of the SOC “[would] be dismissed if the [\$100.00] filing fee [was] not paid, unless [MassDEP] . . . granted [them] a waiver [of] . . . [the] filing fee pursuant to 310 CMR 4.06(2) [if they demonstrated] . . . that paying the fee [would] create an undue financial hardship [to them].” Id. The SOC informed the Petitioners that if they sought a waiver of the \$100.00 filing fee, they had “[to] file an affidavit setting forth the facts believed to support the claim of undue financial hardship together with [their Appeal Notice]” Id.

The ten-business day deadline for the Petitioners to appeal the SOC to OADR expired more than one year ago on August 4, 2021. December 2nd Order, at p. 3. OADR has no record of the Petitioners having filed such an appeal with OADR by that deadline. Id.

As noted in the December 2nd Order, recently, shortly before the Thanksgiving Holiday of November 24, 2022, MassDEP’s SERO Office informed OADR for the first time that on August 2, 2021, two calendar days prior to expiration of the August 4, 2021 deadline for the Petitioners to appeal the SOC to OADR, MassDEP’s SERO Office received by certified mail from the Petitioners, a copy of a document dated July 29, 2021 (“the July 29th Document”) purporting to be a copy of an appeal of the SOC that they had purportedly mailed to OADR. Id., at pp. 3-4. However, as stated above, OADR has no record of the Petitioners having filed any

such appeal with OADR. December 2nd Order, at p. 4.

Nevertheless, the MassDEP SERO Office's submittal to OADR of the July 29th Document raised a question regarding whether the Petitioners had filed a timely appeal of the SOC with OADR by certified mail in accordance with the appeal instructions set forth at pp. 11-12 of the SOC ("the SOC Appeal Instructions") as discussed above. Id. As a result, per my directive, OADR's Interim Case Administrator docketed the July 29th Document for the purposes of OADR: (1) determining whether the Petitioners filed a timely appeal of the SOC with OADR by certified mail prior to expiration of the August 4, 2021 appeal deadline, and if they did, (2) adjudicate the appeal. Id. In that regard, the December 2nd Order directed the Petitioners to file by December 12, 2022 "an Affidavit with OADR confirming under the pains and penalties of perjury that on or before August 4, 2021, they mailed the July 29th Document to OADR by certified mail, return receipt requested in accordance with the SOC Appeal Instructions." Id. The December 2nd Order also directed the Petitioners to include with their Affidavit true copies of the following documents:

- (a) the certified mail receipt evidencing the Petitioners' mailing of the July 29th Document to OADR on or before August 4, 2021 in accordance the SOC Appeal Instructions;
- (b) the green certified mail return receipt card evidencing OADR's receipt of the July 29th Document after the Petitioners' mailing of the July 29th Document to OADR on or before August 4, 2021;
- (c) proof of the Petitioners' payment of the required \$100.00 appeal filing fee on or before August 4, 2021; and
- (d) proof of the Petitioners' mailing of the July 29th Document, \$100.00

appeal filing fee, and MassDEP Fee Transmittal Form to the Commonwealth's Master Lockbox on or before August 4, 2021.

Id., at pp. 4-5.

As of this date, eight (8) calendar days after expiration of the December 12, 2022 deadline established by the December 2nd Order for the Petitioners to provide OADR with written proof that they filed a timely appeal of the SOC with OADR prior to expiration of the August 4, 2021 appeal deadline, the Petitioners have failed to provide any such proof. Also, at no time since issuance of December 2nd Order have the Petitioners requested an extension of time to provide such proof.

The December 2nd Order informed the Petitioners that if they failed to demonstrate that they filed a timely appeal of the SOC with OADR prior to expiration of the August 4, 2021 appeal deadline, such failure would result in my issuance of a Recommended Final Decision recommending that MassDEP's Commissioner issue a Final Decision finding that the Petitioners failed to file a timely appeal of the SOC with OADR prior to expiration of the August 4, 2021 appeal deadline and thus, are barred from challenging the SOC. December 2nd Order, ¶ 5, at p. 6. As a result of failing to comply with the directive of the December 2nd Order to provide OADR with written proof that they filed a timely appeal of the SOC with OADR, the Petitioners have failed to demonstrate that they filed such a timely appeal. Accordingly, I recommend that MassDEP's Commissioner issue a Final Decision finding that the Petitioners failed to file a timely appeal of the SOC with OADR prior to expiration of the August 4, 2021 appeal deadline

and thus, are barred from challenging the SOC.

Salvatore M. Giorlandino

Date: December 20, 2022

Salvatore M. Giorlandino
Chief Presiding Officer

NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Chief 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/or 14(e), and may not be appealed to Superior Court pursuant to 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 and no other person directly or indirectly involved in this administrative appeal shall neither (1) file a motion to renew or reargue this Recommended Final Decision or any part of it, nor (2) communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

SERVICE LIST

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c/o Mark Wisotzky
e-mail: markwisotzky@gmail.com

Legal representative: None;

The Local Conservation Commission:

Town of Truro Conservation Commission
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Legal representative: None;

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ADDENDUM NO. 1

OADR DESCRIPTION

The Office of Appeals and Dispute Resolution (“OADR”) is a quasi-judicial office within the Massachusetts Department of Environmental Protection (“the Department” or “MassDEP”) which is responsible for advising the Department’s Commissioner in resolving all administrative appeals of Department Permit decisions 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). The Department’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 Department Permit decisions and enforcement orders, OADR reports directly to the Department’s Commissioner and is separate and independent of the Department’s program offices, Regional Offices, and Office of General Counsel (“OGC”). TGP, 2017 MA ENV LEXIS 34, at 9.

OADR staff who advise the Department’s Commissioner in resolving administrative appeals are Presiding Officers. Id. Presiding Officers are senior environmental attorneys at the Department appointed by the Department’s Commissioner to serve as neutral hearing officers, and are responsible for fostering settlement discussions between the parties in administrative appeals, and to resolve appeals by conducting pre-hearing conferences with the parties and evidentiary Adjudicatory Hearings and issuing Recommended Final Decisions on appeals to the Commissioner. 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(14)(a), 1.03(7). The Department’s Commissioner, as the agency’s final decision-maker, may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision issued by a Presiding Officer in an appeal. 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 Commissioner’s Final Decision can be appealed to Massachusetts Superior Court pursuant to G.L. c. 30A, § 14. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(f).