

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

100 CAMBRIDGE STREET, BOSTON, MA 02114 617-292-5500

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

August 2, 2023

In the Matter of
Stephen Arena,
128 Wheeler Street

OADR Docket No. WET-2022-021
DEP File No. 028-2825
Gloucester, MA

RECOMMENDED FINAL DECISION

I. Introduction

The Petitioners, James Bordinaro and Jan Bordinaro, filed this appeal challenging the Superseding Order of Conditions (“SOC”) issued by the Northeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) to Stephen Arena (“Applicant”) for the demolition and reconstruction at 128 Wheeler Street in Gloucester, MA, of a single-family house, with a driveway, patio, multiple decks, and a permanent pile supported deck associated with a seasonal ramp and floats along the Annisquam River (“the proposed Project”). MassDEP issued the SOC pursuant to the Massachusetts Wetlands Protection Act (“MWPA”), G.L. c. 131, § 40 and MassDEP’s Wetlands Regulations (“the Wetlands Regulations”) at 310 CMR 10.00 after determining that the Order of Conditions (“OOC”) issued by the Gloucester Conservation Commission (“GCC”) satisfied the Riverfront Area performance standards, as conditioned in the SOC.

After the appeal was filed, the Parties entered into settlement discussions which resulted in a Settlement Agreement and proposed Final Order of Conditions (“FOC”) agreed to by MassDEP, the Applicant, and the GCC, but that the Petitioners refused to sign. The Adjudicatory Proceeding Rules at 310 CMR 1.01(8)(c) governing adjudication of this appeal anticipate this circumstance and provide that the Party to an appeal refusing to consent to a Settlement Agreement that the Department has agreed to sign has the burden to establish why the agreement is inconsistent with governing legal requirements.¹ Notwithstanding my having accorded them with a meaningful opportunity to make that required showing, the Petitioners have failed to make that showing and, accordingly, I recommend that MassDEP’s Commissioner issue a Final Decision dismissing the Petitioners’ appeal and approving the Settlement Agreement and the proposed FOC. I have made this recommendation because the Settlement Agreement and proposed FOC are consistent with or proper under the governing environmental statute and regulations, specifically the MWPA and the Wetlands Regulations, and serve the public interest. Additionally, dismissal of the Petitioners’ appeal is also appropriate under 310 CMR 1.01(10) because as discussed below, the appeal lacked a good faith basis.

II. EVIDENCE

Property

The Applicant’s property is located at 128 Wheeler Street, Gloucester, Massachusetts (the “Property”), and consists of a 0.12 acre lot that contains an existing single-family house with a driveway, patio, multiple decks, and a permanent pile supported deck associated with a seasonal ramp and floats. The Property is located within the 200-foot Riverfront Area

¹ 310 CMR 1.01(8)(c) provides in relevant part: If a party [to an appeal] will not sign a stipulation, settlement or consent order the Department agrees to sign, the burden of going forward to establish why the agreement is inconsistent with law may be placed upon that party by the Presiding Officer or designee of the Commissioner.

associated with the Annisquam River and the 100-foot Buffer Zone to Coastal Bank. SOC cover letter, page 1; Arena Affidavit, ¶ 2; Judd PFT, ¶ 5. The Property is situated along the Annisquam River to the east, Wheeler Street to the west, and residences to the north and south. SOC cover letter, page 1. The 5,225 square foot property also constrains Rocky Intertidal Shore, Land Containing Shellfish, Land Under the Ocean, and Land Subject to Coastal Storm Flowage (as determined by FEMA at Zone AE e. 13), which are jurisdictional wetland resource areas under the MWWA. Merrill PFT, ¶ 4. The Petitioners' property abuts the Property to the southwest on Wheeler Street. Notice of Appeal.

Proposed Project

The proposed Project would demolish the existing home and reconstruct a new home at the Property using the existing 30-foot by 30-foot foundation. Approximately 1,271 square feet of Riverfront Area alteration is proposed associated with demolition activities. The proposed Project would not require any site grading and vegetation clearing would be limited to the removal of the landscape plantings along the front of the house. SOC cover letter, page 1.

Pamela Merrill, an Environmental Analyst IV in the Wetlands Program in MassDEP's Northeast Regional Office, reviewed the Applicant's Notice of Intent ("NOI") seeking the GCC's approval of the proposed Project, the GCC's Order of Conditions ("OOC") approving the proposed Project, and the Petitioners' request to MassDEP for an SOC rejecting the proposed Project. Pamela A. Merrill Affidavit, dated March 23, 2023 ("Merrill Aff.")², at ¶ 1. Ms. Merrill also conducted a site visit at the Property. Merrill Aff., ¶¶ 2-4; Merrill PFT, ¶ 5; Judd PFT, ¶ 16. Ms. Merrill determined that the proposed Project complied with the Performance Standards in the Wetlands Regulations, at 310 CMR 10.30(6) and 310 CMR

² The Merrill Aff. was filed in support of the Settlement Agreement and proposed FOC and is incorporated into Ms. Merrill's PFT. Merrill PFT, ¶ 10.

10.58(5)³ for Coastal Bank and Riverfront Area, respectively, since the new house would be constructed on the existing house foundation and would not exceed its footprint; there would be limited Property clearing, consisting solely of removal of ornamental landscape plantings; no proposed regrading; and a portion of the Riverfront Area on the Property would be planted with native, salt-tolerant species. On July 29, 2022, MassDEP issued the SOC approving the proposed Project. Merrill Aff., ¶ 5. The SOC included special conditions addressing the catch basin and multiple monitoring and reporting requirements regarding performance of erosion controls. Judd PFT, ¶19.⁴

Terms of the Settlement Agreement and proposed FOC

The Settlement Agreement and proposed FOC which the Petitioners object to includes a revised plan for the proposed Project, dated February 24, 2023 (“FOC Plan”). Merrill Aff., ¶ 12; Merrill PFT, ¶ 8. The proposed FOC includes revisions to some of the Special Conditions that further ensure that the Project would meet the Riverfront Area performance standards in 310 CMR 10.58(5) and the Coastal Bank performance standard in 310 CMR 10.30(6) and would protect the interests identified in the MWPA. Merrill Aff., ¶¶ 9-10. Minor revisions were also included in the FOC Plan. Merrill Aff., ¶ 9. On February 1, 2023, the draft settlement proposal consisting of the revised special conditions set forth in the proposed FOC were circulated to the Parties. Merrill Aff., ¶ 15. The Applicant and the GCC agreed to the changes, but the Petitioners did not. Merrill Aff., ¶ 16.

The special conditions included in the proposed FOC include the following, Merrill Aff.,

³ Due to a typographical error, this regulation was cited as 310 CMR 10.54(5) in the SOC cover letter. Merrill Aff., ¶ 9.

⁴ The SOC included Special Conditions 20-45, some of which are revised in the proposed FOC as discussed herein. See SOC, Special Conditions.

¶ 11; Judd PFT, ¶¶ 20-22:

- Special Condition 30: specifies the type of erosion control that could be used along with orange construction fencing;
- Special Condition 34: clarified to state that sediments or other debris shall not be deposited onto Coastal Bank and/or into Land Subject to Coastal Storm Flowage (100-year floodplain), Rocky Intertidal Shore, Land Under Ocean and/or Land Containing Shellfish;
- Special Condition 39: revised to state that heavy equipment, construction equipment and building materials shall be confined to the upland side of the erosion control line and that use of areas beyond the erosion control line is prohibited unless authorized by MassDEP;
- Special Condition 40: modified to require that the dumpster be emptied every two weeks or as necessary;
- Special Condition 41: added to require daily debris and trash sweeps of the Property; and
- Special Condition 43 (previously 42): modified to require any servicing and cleaning of construction equipment to be performed offsite unless prior written authorization from MassDEP is obtained.

The minor revisions included in the proposed FOC Plan are the following: Merrill Aff.,

¶ 12; Judd PFT, ¶ 23:

- relocation of the erosion control line upgradient of the Coastal Bank;
- extending the construction fence along the driveway and the Property line to ensure that debris does not go onto the Petitioner's property;

- changing the erosion control detail to snow fence and “mulch sock” instead of silt fence;
- identifying where the construction material laydown areas are proposed; and
- adding a note on the plan identifying where equipment and materials can be stored.

Witnesses:

The evidence in the administrative record includes the Pre-Filed Testimony and related exhibits submitted by Wetlands expert witnesses on behalf of the Parties.

For the Petitioners:

1. Scott Goddard: Mr. Goddard is the principal of Goddard Consulting, LLC, and is a Professional Wetland Scientist and Certified Wetlands Scientist from New Hampshire and a Massachusetts Certified Soil Evaluator and has been practicing professional consultant in wetlands science in Massachusetts since 1997. He is qualified as a Wetlands expert.

For the Applicant:

1. John Paul Judd, P.E.: Mr. Judd is the President/Principal Owner of Gateway Consultants which is a professional civil engineering and land surveying organization. Mr. Judd has been a Massachusetts Certified Soil Evaluator since 1995 and has over 35 years’ experience, including permitting work pursuant to the MHPA. He is qualified as a Wetlands expert.

For the Department:

1. Pamela A. Merrill: Ms. Merrill is employed by MassDEP as an Environmental Analyst IV. She has worked in MassDEP Wetlands and Wastewater Programs since 2007. Prior to joining MassDEP, Ms. Merrill was a conservation agent for the City of Amesbury and Town of North Andover. She has over 20 years of experience applying the MHPA and the Wetlands

Regulations. Her duties at MassDEP include evaluation of NOIs and supporting materials, including engineering plans and surveys, flood storage and stormwater drainage calculations. She conducts site evaluations to review potential effects of work in or near wetlands resource areas for the issuance of wetlands permits and water quality certifications and conducts investigations of complaints and violations of the Wetlands Regulations. She is qualified as a Wetlands expert.

Prior Proceedings:

The Applicant filed an NOI for the proposed Project with the GCC and on March 8, 2022, the GCC issued an OOC approving the proposed Project. The Petitioners requested that MassDEP issue an SOC either prohibiting the Applicant from proceeding with the proposed Project, or alternatively, adding conditions proposed by the Petitioners. Following review of the relevant documents and a site visit on July 29, 2022, MassDEP issued the SOC approving the proposed Project. Merrill PFT, ¶¶ 5-6. The Petitioners filed a timely appeal of the SOC with MassDEP’s Office of Appeals and Dispute Resolution (“OADR”).

On September 19, 2022, as the Presiding Officer responsible for adjudicating this appeal, I issued a Scheduling Order (“the “Order”) to facilitate the adjudication or resolution of this appeal. After the Order was issued, the Parties participated in an Alternative Dispute Resolution (“ADR”) Information Session before an OADR Mediator. This ADR Information Session resulted in the Parties’ October 6, 2022 request that I stay the proceedings in the appeal so that they could pursue settlement negotiations. I granted the Parties’ request and extended the stay four (4) times at the Parties’ request so that they could continue their settlement discussions. In response to the Parties’ last Joint Status Report filed on January 20, 2023, I extended the stay to Friday, February 17, 2023, and directed the Parties to participate in a Status Conference on the same day.

At the Status Conference the Department reported that it had circulated a settlement proposal, which the Applicant and GCC found acceptable, but the Petitioners did not for reasons that the Petitioners did not set forth in detail. At the Status Conference, the Department, the Applicant, and the GCC reported that they would file an executed settlement agreement without the Petitioners' participation if they continued to object to the settlement.

Based on the information provided to me by the Parties at the Status Conference, I issued Orders establishing deadlines for MassDEP, the Applicant, and the GCC to file a Joint Settlement Agreement and for the Petitioners to file a response setting forth their grounds for opposing the Agreement. Thereafter, the Department, the Applicant, and the GCC filed a Joint Settlement Agreement with the proposed FOC on March 24, 2023 ("the Settlement Agreement"), and the Petitioners filed an Opposition to the Settlement Agreement which consisted of legal argument without any expert testimony from a Wetlands expert supporting the Petitioners' claim that the Settlement Agreement should be rejected ("the Petitioners' Opposition").

On April 24, 2023, I issued an Order for Petitioners to Show Cause that the Proposed Settlement Agreement Is Inconsistent With Law pursuant to 310 CMR 1.01(8)(c). As detailed in the April 24, 2023 Order, the Petitioners, as the Parties objecting to and not signing the Settlement Agreement that the Department had agreed to with the Applicant and the GCC, had the burden to demonstrate that the Settlement Agreement was inconsistent with law, and accordingly, should be rejected. That showing required the Petitioners to present more than legal argument in objecting to the Settlement Agreement. Specifically, they were required to support their position with expert testimony from a Wetlands expert. As such, I directed the Petitioners to present sworn Pre-filed Testimony ("PFT") from a competent source such as a wetlands expert supporting the Petitioners' position that the Settlement Agreement was inconsistent with law and

therefore should be rejected.⁵ A Wetlands expert is such a competent source because they have the expertise to render an opinion on whether the Settlement Agreement is inconsistent with or in violation of the MWPA and/or the Wetlands Regulations.⁶

On May 24, 2023, the day before the PFT of Petitioners' wetlands expert witness was due to be filed, the Petitioners filed a request for a forty-five (45) day extension representing that they had procured a wetlands expert who required additional time to review the case. After some back and forth regarding what the Parties had agreed to by way of an extension,⁷ it became apparent that the Petitioners had commenced this appeal and proceeded to mediation and conducted settlement discussions without any Wetlands expert representation, including through their objections to the Settlement Agreement, notwithstanding their burden of proof in the appeal.

On the afternoon of May 25, 2023, I directed MassDEP and the GCC to respond by 10:00 a.m. on May 26, 2023 regarding the Petitioners' 45-day extension request, and for the Petitioners to identify their wetlands expert by the same time. I also directed the Petitioners to file their

⁵ See 310 CMR 10.03(2); 310 CMR 10.05(7)(j)2.b.iv; 310 CMR 10.05(7)(j)2.b.v; 310 CMR 10.05(7)(j)3.a; 310 CMR 10.05(7)(j)3.b.

⁶ See In the Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 MA ENV LEXIS 89, at 36-37, adopted by Final Decision (August 19, 2010), 2010 MA ENV LEXIS 31; see also Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006); In the Matter of Carulli, Docket No. 2005-214, Recommended Final Decision (August 10, 2006)(dismissing claims regarding flood control, wetlands replication, and vernal pools for failure to provide supporting evidence from competent source), adopted by Final Decision (October 25, 2006); In the Matter of Indian Summer Trust, Docket No. 2001-142, Recommended Final Decision (May 4, 2004) (insufficient evidence from competent source showing that interests under MWPA were not protected), adopted by Final Decision (June 23, 2004); In the Matter of Robert Siegrist, Docket No. 2002-132, Recommended Final Decision (April 30, 2003) (insufficient evidence from competent source to show wetlands delineation was incorrect and work was not properly conditioned), adopted by Final Decision (May 9, 2003).

⁷ The Petitioners represented that the Applicant and the GCC did not oppose this request, but later acknowledged that they had misunderstood the Applicant's objection to a forty-five (45) day extension and acknowledged that they then miscommunicated the Applicant's agreement to the GCC, before the GCC agreed to a forty-five (45) day extension. The Petitioners represented that they had been unable to speak with MassDEP's counsel regarding their request. MassDEP's counsel responded that she had not been contacted by the Petitioners' counsel and objected to a 45-day extension but would agree to a two (2) week extension.

expert witnesses PFT by June 8, 2023. The Applicant, GCC, and MassDEP were directed to file their responses by June 29, 2023.

The Petitioners' identified their Wetlands expert on Saturday, May 27, 2023. In response, on May 31, 2023, MassDEP filed a Request for Recommended Decision affirming the SOC and dismissing the Petitioners' appeal of the SOC because the Petitioners' late response identifying a Wetlands expert, and their failure to have a Wetlands expert throughout the previous failed settlement discussions, should result in approval of the Settlement Agreement and proposed FOC. MassDEP contended that the Petitioners knew or should have known that a Wetlands expert was necessary to opine on the matters involved in the Settlement Agreement, by February 16, 2023, at the latest. I agreed with the Department.⁸ Nonetheless, exercising my discretion as the Presiding Officer in the appeal, I accorded the Petitioners one final opportunity to file their Wetlands expert testimony supporting their objections to the Settlement Agreement. MassDEP requested a further extension which was granted to MassDEP, the Applicant, and the GCC, to file their expert witness PFT by July 13, 2023. At that time, MassDEP also filed a Request for a Recommended Final Decision or in the alternative a Directed Decision dismissing the appeal, and the Applicant filed a Motion for Directed Decision.

III. DISCUSSION

Settlement, as part of the appeal process, is encouraged and the adjudicatory appeal regulations at 310 CMR1.01(8)(c) as discussed above provide that "[i]f a party will not sign a stipulation, settlement, or consent order that the Department agrees to sign, the burden of going forward

⁸ Moreover, following my review of the Parties' PFT, I find that the Petitioners were well aware long before February 16, 2023 that they needed a Wetlands expert to substantiate their claims in the appeal because the record indicates that they had previously filed another appeal in this forum, raising claims against the same Applicant, also with legal counsel and that their challenge in that case was dismissed for a failure to demonstrate any harm that would result in standing. This history indicates that the Petitioners proceeded in this appeal, with counsel, with full knowledge of the requirements to present credible evidence from a Wetlands expert to support their claims.

to establish why the agreement is inconsistent with law may be placed on that party by the Presiding Officer or designee of the Commissioner.” Public policy favors settlement over litigation. See LePage v. Bumila, 407 Mass.163, 166 (1990), quoting Anonik v Ominsky, 261 Mass. 65, 66-68 (1927). See also Matter of Onset Bay II Corp., OADR Docket No. 2012-034, Recommended Final Decision at *56 (August 28, 2020), 2020 MA ENV LEXIS 79, (the settlement is consistent with the general rule that settlements are favored over litigation), adopted by Final Decision (Sept. 23, 2020), 2020 MA ENV LEXIS 82; Matter of National Amusements, Inc., DEP Docket No. 98-043, Ruling on Motion to Dismiss and Order to Show Cause (Dec. 11, 1998) (purpose of MassDEP policy to provide clarity, encouraging settlements and diminishing litigation).

The Petitioners, as the Parties objecting to and not signing the Settlement Agreement that the Department had agreed to sign with the Applicant and the GCC, had the burden under 310 CMR 1.01(8)(c) to demonstrate through the sworn testimony of a Wetlands expert that the Settlement Agreement was inconsistent with law, and accordingly, should be rejected. See In the Matter of Point Independence Yacht Club, Docket No. 2012-033, Recommended Final Decision (August 15, 2013), adopted by Final Decision (August 19, 2013). As discussed below, the Petitioners’ Wetlands expert failed to meet that burden.

A. The Proposed FOC is consistent with or proper under the governing statutes and regulations and is in the public interest.

1. The Proposed FOC meets the performance standards for work proposed in Riverfront Area under 310 CMR 10.58(5).

In their respective PFTs, Ms. Merrill and Mr. Judd opined that the proposed FOC meets the Riverfront Area performance standard. Merrill PFT, ¶ 13; Judd PFT, ¶ 24. In his PFT, Mr. Goddard, the Petitioners’ Wetlands expert, failed to provide any testimony asserting that the

proposed FOC did not comply with the Riverfront Area performance standards.⁹ Given the lack of Wetlands expert testimony supporting their position that the Settlement Agreement and proposed FOC are improper, the Petitioners have failed to demonstrate that the Settlement Agreement and proposed FOC do not satisfy the Riverfront Area performance standards and/or are inconsistent with law.

2. Coastal Bank will not be impacted by the Proposed Project.

a. Coastal Bank Erosion Control Line:

The Petitioners agree with the delineation of the Coastal Bank at the Property. Merrill PFT, ¶ 14; Goddard PFT, ¶ 8. Notwithstanding this agreement, Mr. Goddard testified on behalf of the Petitioners that the SOC approved “unidentified work directly on Coastal Bank.” Goddard PFT, ¶ 6. Mr. Goddard’s testimony regarding the Coastal Bank cites to the SOC Plan. Goddard PFT, ¶ 5. However, Ms. Merrill testified that the proposed FOC relocated the limit of work, the erosion control line, upgradient of the Coastal Bank. Merrill Aff., ¶ 12. The erosion control line is located within the 100-foot Buffer Zone to the Coastal Bank, and as a result the proposed Project will not occur on or alter the Coastal Bank. Merrill PFT, ¶¶13-15. Further, under the proposed FOC no debris may be deposited onto the Coastal Bank or into Land Subject to Coastal Storm Flowage. Merrill Aff., ¶¶ 11, 19; FOC, Special Conditions No. 23, 34. The proposed FOC Plan, not the SOC Plan, is incorporated into the Settlement Agreement. Mr. Goddard has not provided any testimony regarding the project as depicted on the FOC Plan and as a result the Petitioners have failed to demonstrate that the Settlement Agreement and proposed FOC are

⁹ Mr. Goddard testified: “The project is designed in partial compliance with the MA WPA and regulations. However, three items were identified as problematic with the SOC causing the project to fail the test for regulatory compliance: a) unidentified work directly on Coastal Bank; b) improper mitigation of point source discharge from driveway catch basin; and c) inability to identify property materials management during construction by placement of dumpster in access easement. Goddard PFT, ¶ 6.

inconsistent with the Coastal Bank regulatory performance standards.

b. Erosion Controls: On behalf of the Petitioners Mr. Goddard also testified regarding the potential impacts from the use of siltation fencing on the Coastal Bank. Goddard PFT, ¶ 10. However, the proposed FOC replaced the siltation fence originally proposed in the SOC with a mulch sock and snow fence. Merrill PFT, ¶16; Judd PFT, ¶ 29; FOC Special Condition, 30; FOC Plan, detail of mulch sock and snow fence. Mr. Goddard failed to provide any testimony regarding the use of a mulch sock and snow fence required in the proposed FOC, which is incorporated into the Settlement Agreement. As a result, Mr. Goddard has not provided any testimony demonstrating that the erosion controls included in the Settlement Agreement and proposed FOC are inconsistent with the Coastal Bank regulatory performance standards.

c. Driveway catch basin: Mr. Goddard testified on behalf of the Petitioners that the SOC failed the test for regulatory compliance relative to improper mitigation of a point source discharge from the driveway catch basin. Goddard PFT, ¶ 6. He further testified that the existing design of the driveway and curbing and catch basin with discharge through 4” PVC pipe out of the retention wall reflects an unprotected catch basin discharging to the Coastal Bank. Goddard PFT, ¶¶ 12-13 However, Ms. Merrill testified that the scope of the proposed Project does not include any alteration of the existing catch basin or installation of a new catch basin. Merrill PFT, ¶ 21.¹⁰ The proposed FOC does, however, include conditions to protect the catch

¹⁰ The catch basin was approved by an OOC issued by the GCC in 2005 which was not appealed to MassDEP for an SOC rejecting the catch basin. Merrill PFT, ¶ 21. The Petitioners raised issues with the existing drainage structure in their recent challenge of an SOC MassDEP issued to the Applicant for the maintenance of the existing deck, seasonal ramp and float which was dismissed for the Petitioners’ failure to demonstrate standing, having failed to demonstrate, “that the project approved in the SOC 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 Petitioners.” In the Matter of Stephen Arena, OADR Docket No. WET-2021-034. Recommended Final Decision (November 9, 2021), adopted by Final Decision (December 3, 2021). See also, Merrill PFT, ¶21.

basin during construction. Special Condition 33 in the SOC and the proposed FOC states “[t]he existing catch basin in the driveway shall be protected during construction using methods such as a silt sack or filter fabric, which must be maintained during construction.” Id.; Judd PFT, ¶ 29. Additionally, Special Condition 34 was revised in the proposed FOC to state that “[a]t no time shall sediments or other debris be deposited onto the Coastal Bank and/or into Land Subject to Coastal Storm Flowage (LSCSF), Rocky Intertidal Shore, Land Under Ocean and/or Land Containing Shellfish. MassDEP shall immediately be notified of any unauthorized deposit of debris or discharge of sediments into or onto these wetland resource areas, and the applicant shall take immediate steps to correct the problem. MassDEP reserves the right to require additional erosion controls if deemed necessary.”¹¹ Ms. Merrill testified that in her opinion, if anything washes down the driveway or runs off from the dumpster area, the installation and maintenance of a mulch sack or filter fabric placed under the catch basin grate will adequately stop dirt, debris, sediment, and trash from entering the catch basin. Merrill PFT, ¶ 22; see also Judd PFT, ¶ 29. Mr. Goddard’s testimony regarding the catch basin fails to demonstrate that the Settlement Agreement and proposed FOC are inconsistent with the governing regulatory performance standards.

3. Easement rights are not adjudicated by OADR

Mr. Goddard asserted in his testimony on behalf of the Petitioners that there is an easement right in the driveway that would prohibit the dumpster being placed there. Goddard PFT, ¶ 14. Although property disputes may arise during the permitting process, the Department has a long-standing practice of leaving property disputes for the courts to resolve. Tindley v.

¹¹ The SOC Special Condition No. 34 stated, “MassDEP shall immediately be notified of any unauthorized discharge of sediments into the wetland resource areas, and the applicant shall take immediate steps to correct the problem. MassDEP reserves the right to require additional erosion controls if deemed necessary.”

DEQE, 10 Mass. App. Ct. 623 (1980) (affirming that the Department’s role is not to adjudicate private property rights, but to determine whether the Applicant asserted a colorable claim of right sufficient to carry out the proposed work). For purposes of accepting a party’s NOI seeking approval of a proposed activity in protected wetlands areas pursuant to the MWPA and the Wetlands Regulations, a local conservation commission or the Department need only look for a colorable claim of title. Id.; see also, In the Matter of Town of Brewster, OADR Docket No. WET-2012-006, Recommended Final Decision (August 10, 2012), 2012 MA ENV LEXIS 97, at 31, n.20, adopted as Final Decision (August 16, 2012), 2012 MA ENV LEXIS 99 (to establish standing must demonstrate a colorable claim of title to real property, citing Tindley); In the Matter of Michael Gleason, OADR Docket No. WET-2017-019, Recommended Final Decision (December 4, 2019), 2019 MA ENV LEXIS 151, at 11-12, adopted as Final Decision (January 7, 2020), 2020 MA ENV LEXIS 65 (MassDEP does not resolve property ownership disputes, but rather determines whether applicant has colorable claim of title); In the Matter of John Donovan, Jr., Trustee Seagate Realty Trust, Docket No. 2000-016, Final Decision, 2000 MA ENV LEXIS 97, *8 (September 21, 2000) (applicant must present a colorable claim to the property in question for review of Chapter 91 license application; at no point will MassDEP intrude upon the prerogative of the court and entertain the merits of a property dispute).

Mr. Goddard is not a real estate attorney and does not represent that he has any expertise to interpret or determine the scope of an easement. The Petitioners failed to provide expert testimony from a real estate expert demonstrating that the Applicant does not have the necessary “colorable title” to utilize the existing driveway for this purpose. See also Judd PFT, ¶ 30; Merrill PFT, ¶ 24.

Lastly, the Petitioners’ challenge to the Settlement Agreement and proposed FOC fails because Ms. Merrill’s testimony that the temporary placement of a dumpster on a paved

driveway will have no impact to the Riverfront Area or the 100-foot Buffer Zone associated with Coastal Bank was uncontested by Mr. Goddard in his testimony. See Merrill PFT, ¶24. As a result, Mr. Goddard has failed to provide any testimony demonstrating that the erosion controls included in the Settlement Agreement and proposed FOC are inconsistent with the governing regulatory performance standards.

IV. CONCLUSION

The Wetlands Regulations and the Adjudicatory Proceeding Rules at 310 CMR 1.01 provide a meaningful opportunity to an individual or entity having the right to challenge an SOC to file an appeal with OADR challenging the SOC as being determinantal to wetlands in violation of the MWPA and the Wetlands Regulations. In the Matter of Garnet Brown, OADR Docket No. WET-2022-009, Recommended Final Decision on Reconsideration (December 16, 2022), at pp. 8-9, adopted as Final Decision on Reconsideration (December 28, 2022). The purpose of these rules and regulations is to ensure that rights of all parties are heard in this forum. Id. Such an appeal must have a good faith basis to challenge the SOC's validity under the MWPA and the Wetlands Regulations. Id. Any appeal that lacks such a good faith basis is an improper appeal that does not further the noble cause of wetland protection. Id. Such an appeal also results in the unnecessary expenditure of OADR's limited, publicly funded resources to adjudicate the appeal when such resources could have been utilized in adjudicating an appeal having a good faith basis. Id. Unfortunately, these rules were not followed by the Petitioners in bringing this appeal.

The Petitioners initiated this appeal and spent almost a year participating in "settlement discussions" with the other Parties notwithstanding that they lacked a Wetlands expert to substantiate their claim that the SOC improperly approved the proposed Project. The Petitioners' lack of a Wetlands expert was exposed when they opposed the Settlement Agreement and the proposed FOC. The Petitioners only retained a Wetlands Expert after I issued Orders discussed

above requiring them to comply with their evidentiary obligation under 310 CMR 1.01(8)(c) to prove their claim that the Settlement Agreement and proposed FOC were improper. The Petitioners compounded the problem when their Wetlands expert failed to address in his testimony whether the Settlement Agreement and proposed FOC were improper. Based on these facts, it would be reasonable for me to conclude that the Petitioners brought this appeal for the purpose of delay in violation of the good faith filing requirement of 310 CMR 1.01(4)(b).

The good faith filing requirement of 310 CMR 1.01(4)(b) mandates that:

[all] [p]apers filed [by a litigant in an administrative appeal before OADR] shall be signed and dated by the party on whose behalf the filing is made or by the party's authorized representative [and] [t]his signature shall constitute a certification that the signer has read the document and believes the content of the document is true and accurate, and that the document is not interposed for delay. . . .

(Emphasis supplied). The Adjudicatory Proceeding Rules at 310 CMR 1.01(10) authorize the Presiding Officer in an appeal before OADR to “impose sanctions [on a party in the appeal]” for “fail[ing] to comply with any of the [Rules’] requirements,” including the good faith filing requirement of 310 CMR 1.01(4)(b). The range of sanctions authorized by 310 CMR 1.01(10) that the Presiding Officer may assess against a party for having violated the good faith filing requirement of 310 CMR 1.01(4)(b) includes issuing a Recommended Final Decision recommending that MassDEP’s Commissioner issue a Final Decision against the sanctioned party.¹² Such a sanction against the Petitioners would be appropriate here for having brought this appeal.

In sum, I recommend that MassDEP’s Commissioner issue a Final Decision dismissing the Petitioners’ appeal and approving the Settlement Agreement and the proposed FOC because

¹² 310 CMR 1.01(10)(g).

contrary to the Petitioners' unsubstantiated claims, the Settlement Agreement and proposed FOC are consistent with or proper under the requirements of the MWPA and the Wetlands Regulations and serve the public interest. Additionally, dismissal of the Petitioners' appeal is also appropriate under 310 CMR 1.01(10) because the appeal lacked a good faith basis.

Date: August 2, 2023



Margaret R. Stolfa
Presiding Officer

NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to MassDEP's Commissioner for her 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 G.L. c. 30A. The MassDEP Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain notice to that effect. Once the Final Decision is issued "a party may file a motion for reconsideration setting forth specifically the grounds relied on to sustain the motion" if "a finding of fact or ruling of law on which a final decision is based is clearly erroneous." 310 CMR 1.01(14)(d). "Where the motion repeats matters adequately considered in the final decision, renews claims or arguments that were previously raised, considered and denied, or where it attempts to raise new claims or arguments, it may be summarily denied. . . . The filing of a motion for reconsideration is not required to exhaust administrative remedies." Id.

Because this matter has now been transmitted to MassDEP's Commissioner, no Party to this appeal shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the MassDEP Commissioner's office regarding this decision unless MassDEP's Commissioner, in her sole discretion, directs otherwise.

SERVICE LIST

<u>Party</u>	<u>Legal Representative</u>
<u>Petitioner</u> James and Jan Bordinaro c/o Seaside Legal Solutions P.O. Box 1172 Gloucester, MA 01930	Joel Favazza Mustafa Sidki Seaside Legal Solutions 123 Main Street, Suite 301 Gloucester, MA 01930 jfavazza@seasidelegal.com msidki@seasidelegal.com
<u>Applicant</u> Stephen Arena 128 Wheeler Street Gloucester, MA 01930	Kelly A. Jordan-Price, Esq. Tara A. Singh, Esq. Hinckley Allen & Snyder, LLP 28 State Street Boston, MA 02109 kprice@hinckleyallen.com tsingh@hinckleyallen.com
<u>Conservation Commission</u> Gloucester Conservation Commission 3 Pond Street Gloucester, MA 01930	Suzanne Egan, Esq.-City Counsel Gloucester Legal Department 9 Dale Avenue Gloucester, MA 01930 segan@gloucester-ma.gov
<u>Department</u> Jill Provencal, Wetlands Section Chief Heidi Zisch, Chief Regional Counsel Pamela Merrill, Wetlands Analyst MassDEP – Northeast Regional Office 150 Presidential Way Woburn, MA 01801 Jill.Provencal@mass.gov Heidi.Zisch@mass.gov Pamela.Merrill@mass.gov	Brett Hubbard, Counsel MassDEP, Office of General Counsel 100 Cambridge Street, 9 th Floor Boston, MA 02114 Email: Brett.Hubbard@mass.gov cc. Jakarta Childers, Program Coordinator Email: Jakarta.Childers@mass.gov