

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

February 12, 2014

In the Matter of
Town of Amesbury
Amesbury, MA

Docket No. 2010-046
DEP File No. W09-2750
Amesbury

RECOMMENDED FINAL DECISION

A Ten Resident Group (“the Petitioners”) brought this appeal challenging a Chapter 91 License that the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to the Town of Amesbury (“the Town”) pursuant to G.L. c. 91 (“Chapter 91”) and the Waterways Regulations at 310 CMR 9.00 (“the Chapter 91 Regulations”). The Chapter 91 License authorized alterations and improvements to an existing Town owned weir located in the Powwow River (“the River”) on Newton Road in Amesbury.¹

The weir is located approximately 1,000 feet downstream from the Amesbury Water Treatment Plant (“the Plant”). The River is a municipal water source for the Town. The weir and the proposed alterations and improvements (“the Project”) are intended to facilitate the continued maintenance of a sufficient water level over the Plant’s intake from the River. The Petitioners challenged the Chapter 91 License on multiple grounds, contending that the original

¹ A weir is commonly understood to be “a low dam or wall built across a stream to raise the upstream water level. . . .” 302 CMR 10.03 (Department of Conservation and Recreation Dam Safety regulations).

weir was illegally constructed, constituted a public nuisance, that the proposed weir improvements failed to meet proper engineering standards, and that the Department failed to conduct a proper review of the Town's application for the Chapter 91 License and respond to comments filed by the Petitioners.

During the pendency of this appeal, the Essex Superior Court and the Massachusetts Appeals Court upheld the Department's wetlands permit authorizing the Project under the Massachusetts Wetlands Protection Act ("MWPA"), G.L. c. 131, § 40, and the Wetlands Regulations at 310 CMR 10.00, et seq. Krusen v. Commissioner of the Department of Environmental Protection, No. 2011-P-2153, Memorandum and Order Pursuant to Rule 1:28 (November 26, 2012).² With the wetlands permit appeal concluded, this appeal of the Chapter 91 License is ripe for resolution. See 310 CMR 9.33(1)(b) ("[a]ll projects [licensed under Chapter 91] must comply with [all other] applicable environmental regulatory programs of the Commonwealth, including but not limited to . . . [the MWPA and the Wetlands Regulations]").

Recently, I issued an Order scheduling the case for a Status Conference on February 12, 2014 to put the appeal on a timetable for its resolution. On February 10, 2014, the Petitioners, through their legal counsel, filed a Notice "announc[ing] their withdrawal of [this] appeal." See Petitioners' Notice of Withdrawal of Appeal (February 10, 2014). In doing so, the Petitioners

² The Appeals Court affirmed the Essex Superior Court's earlier judgment affirming the Department's issuance of the wetlands permit. See Krusen v. Burt, ESCV-2010-00895, Memorandum of Decision and Order (June 8, 2011). The Essex Superior Court affirmed the wetlands permit following the Petitioners' unsuccessful administrative appeal of the permit before Presiding Officer Timothy Jones of the Department's Office of Appeals and Dispute Resolution ("OADR"). See In the Matter of Town of Amesbury, OADR Docket No. WET-2009-051, Recommended Final Decision (March 18, 2010), 2010 MA ENV LEXIS 209, adopted as Final Decision (April 1, 2010), 2010 MA ENV LEXIS 41. As discussed below, at pp. 3-4, the Petitioners recently made unwarranted claims against Presiding Officer Jones regarding his adjudication of the case.

stated the following:

At the outset of the wetlands [administrative] appeal conference in December of 2009, Presiding Officer Timothy Jones made a comment to petitioners' counsel, stating "you realize that an executive decision has been made." It was then clear that the presiding officer had received communication from within [the Department] that indeed this executive decision existed. The comment could only be construed to equate to the conclusion that the proceedings [in the wetlands administrative appeal] would result in an affirmation of the order of conditions regardless of what was presented. . . .

[In this Chapter 91 administrative appeal] [t]he petitioners hereby abide by [Presiding] Officer Jones' earlier statement that the "executive decision" has been made, which is, for all intensive (sic) purposes, synonymous with "don't waste your time, no matter what you submit by way of photos, documents, and so forth, it will not impact the outcome that has already been decided." . . .

The petitioners have raised many legitimate points [against the proposed Project] . . . It would be a waste of the petitioners' time to argue these points further, and a waste of the taxpayers' money to respond. The project will proceed and its efficacy will be judged in the future by what occurs and by history. . . .

Id.

The Petitioners' statements are essentially contentions that they cannot obtain a fair administrative appellate process before the Department in this Chapter 91 appeal because of alleged bias by Presiding Officer Jones, who adjudicated the Petitioners' unsuccessful administrative appeal of the Department's wetlands permit.³ My responsibilities as Chief Presiding Officer and Presiding Officer Jones' supervisor, as well as, the constitutional obligations all administrative hearing officers,⁴ required me to investigate the Petitioners'

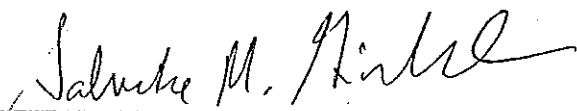
³ See note 2, at p. 2 above.

⁴ As the Appeals Court recently noted in a case involving another Massachusetts state agency:

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

contentions. After reviewing the Administrative Record of the wetlands permit appeal and this appeal, I conclude that the Petitioners' contentions of bias are devoid of merit. The lack of bias is also evidenced by the thorough Recommended Final Decision that Presiding Officer Jones issued in the Petitioners' wetlands permit appeal, and the independent and thorough review that the Essex Superior Court and Appeals Court conducted of Presiding Officer Jones' Recommended Final Decision. Krusen, supra.

In sum, I recommend that the Department's Commissioner issue a Final Decision: (1) dismissing this Chapter 91 appeal, and (2) affirming the Department's Chapter 91 License to the Town as a result of the Petitioners' withdrawal and termination of this appeal. The Petitioners' withdrawal and termination of this appeal constitutes a waiver of any further appellate review (administrative and judicial) of the Department's grant of the Chapter 91 License to the Town. In the Matter of J.R. Vinagro Corporation, OADR Docket No. 2013-019, Recommended Final Decision (October 15, 2013), 2013 MA ENV LEXIS 94, at 2-3, adopted as Final Decision (October 28, 2013), 2013 MA ENV LEXIS 93.



Salvatore M. Giorlandino
Chief Presiding Officer

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).

In the Matter of Town of Amesbury, Docket No. 2010-046
Recommended Final Decision

SERVICE LIST

In The Matter Of:

Town of Amesbury

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