COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS

# DEPARTMENT OF ENVIRONMENTAL PROTECTION

ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

 March 27, 2015

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In the Matter of Docket No. WET-2014-020

 No. SE 72-1376

Town of Swansea Swansea

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**RECOMMENDED FINAL DECISION**

This appeal was filed by Bruce Hodge and four other abutters, Jacalyn Hodge, Robert Pacheco, Mark Huck, and Honey Huck (the “Petitioners”), challenging the denial of their Request for a Superseding Order of Conditions (“SOC”) issued by the Massachusetts Department of Environmental Protection (“the Department”) for work on Pearse Landing and Circuit Drive, which provide access to a Town Landing in Swansea. The Notice of Intent was filed on behalf of the Town of Swansea Police Department and Harbormaster (the “Applicant”) under the Massachusetts Wetlands Protection Act, M.G.L. c. 131, § 40, and the Wetlands Regulations, 310 CMR 10.00. The project is the grubbing, grading, and deposit of crushed shells on sections of the unimproved ways. The Swansea Conservation Commission had approved the work, which had already been commenced, in an Order of Conditions. The Petitioners own land abutting the ways. The dispute centered on land ownership and whether the Town had the authority to conduct the work on the ways. The Department denied the Petitioners’ Request for an SOC because the property law and other issues raised by the Petitioners were outside the Department’s jurisdiction.

I conclude that the Department properly dismissed the Petitioners’ Request for an SOC, on the grounds that the Department lacks authority to resolve property disputes and the Petitioners’ appeal primarily raised a property law issue. Further, the Petitioners seek enforcement against the Town, which is similarly an outcome that cannot be achieved through a Request for an SOC or an appeal of a denial of a Request for an SOC. The segmentation claim, based on the Petitioners’ belief that the Town intended to pursue additional work, also lacked merit. Although the Petitioners have since raised an additional claim that relates to an issue within appellate jurisdiction, the issue was not clearly identified in the Request, the supplement filed after the Department allowed clarification of the initial Request, the Notice of Claim, or the issues identified for adjudication. Claims not timely raised must be dismissed. I recommend that the Department’s Commissioner issue a Final Decision sustaining the Department’s denial of the Request for an SOC and dismissing this appeal.

BACKGROUND

 The Swansea Conservation Commission issued an Order of Conditions to approve work, which had been at least partially completed, described in a Notice of Intent filed by Daniel Lowney for the Town of Swansea, Police Department/Harbormaster, on Pearse Landing and Circuit Drive. The Petitioners timely filed a Condensed Notice of Appeal: 1) asserting that the work was completed prior to the issuance of the Order and seeking fines; 2) disputing the ownership of the property by the Town and claiming a taking; and 3) arguing that the phasing of the work was segmentation and therefore contrary to the public interest. On the same day, the Petitioners filed a second document entitled Notice of Claim and Request for an SOC, providing further detail. The Petitioners claimed that the project was “ultra vires and void in its entirety,” arguing that the Commission should have denied the project and imposed sanctions. The Petitioners alleged “egregious abuses of procedural/administrative regularity” related to the presence of the Commission agent at the site prior to the filing of the Notice of Intent. They sought an SOC from the Department that imposed daily monetary sanctions on the Town for unpermitted work and that required a new application. They alleged that the Commission had shown favoritism toward the Town and against the abutters, demonstrating a lack of impartiality in approving the work. Finally, they stated that the Town as the applicant had not met its burden of showing that the work on Circuit Drive was outside the 100-foot jurisdiction of the regulations and therefore not subject to abutter notification, citing the burden of proof provisions of the regulations at 310 CMR 10.03(1)(a).

 The Department responded through correspondence that the Petitioners’ Request for an SOC was inadequate because it did not state how the Order issued by the Commission was inconsistent with the Wetlands Regulations or failed to contribute to the interests of the Wetlands Protection Act, as required by 310 CMR 10.05(7)(c).[[1]](#footnote-1) Nonetheless, the Department “conditionally accepted” the Request, with the condition that the Petitioners provide clarification meeting the regulatory standard within ten days.[[2]](#footnote-2) The Petitioners filed “Clarifying Objections to the Order of Conditions,” reiterating that the Town completed work without a permit and the Commission approved the work without sanctions, warranting revocation and enforcement, citing 310 CMR 10.05(6)(j) (failure to comply with Order deemed cause to revoke).[[3]](#footnote-3) The Petitioners also reiterated their dispute as to ownership rights, citing to 310 CMR 10.05(6)(i) (Order does not grant property rights) and lack of information as to ownership, citing 310 CMR 10.05(4)(a) (requiring written permission of the owner) and 310 CMR 10.05(6)(c)(allows prohibition of work where insufficient information had been submitted). Finally, they asserted that Sgt. Lowney had made misstatements as to the ownership of the property on the application warranting enforcement, citing to the Preface to 2005 revisions and to 310 CMR 10.05(8)(enforcement based on false, inaccurate or misleading statements in a certification). After reviewing the Petitioner’s supplement, the Department denied the Request for an SOC on the grounds that the appeal did not identify the impacts of the project, if any, on areas subject to protection under the Act.

 In the Notice of Claim, the Petitioners alleged in considerable detail that the denial of the Request by the Department was a violation of the regulations and an abuse of discretion. They argued that the Department should have remanded the matter to the Conservation Commission, which should have remanded to the Applicant on the basis of insufficient information, citing 310 CMR 10.06(6)(c). The Petitioners reiterated the disputed ownership of the land, specifically asserting that Mr. Hodge has right of ownership to the land under Circuit Drive, and seeking the opportunity to further develop this claim in the appeal. They sought to challenge in the appeal the standard of “colorable claim” articulated in case law as the basis of accepting a Notice of Intent, claiming that it authorized entry on private property without allowing the Petitioners to present their case.

The Petitioners further objected to the conduct of the Town in beginning the work prior to filing a Notice of Intent, alleging that their Constitutional due process rights have been violated by the lack of prior notice by the Town and by the Department’s retroactive approval by allowing the Order of Conditions to stand. They described alleged conflicts of interest by Town boards, where the Town is the Applicant and the Town’s Conservation Commission is the approval authority. They assert that the Department’s failure to impose sanctions on the Town is contrary to law. They alleged some property owners did not receive notice as required, specifically property owners on the easterly portion of Circuit Drive, and that the Conservation Commission did not verify receipt of abutter notification as required. As to the project’s adverse impacts, the Petitioners summarily state that the project is “inconsistent with the Regulations and does not contribute to the Act, because of harmful impacts on the area to be developed, citing “storm damage prevention, flood control and protection of land containing shellfish and Eelgrass.” The Petitioners did not state how the project could cause impacts affecting these interests of the Act.

**ISSUES FOR ADJUDICATION**

 After discussion at the Pre-hearing Conference, the issues raised by the Petitioners in

their Request for an SOC were distilled to two issues for adjudication:

1. In denying the request for a Superseding Order of Conditions, whether the Department abused its discretion by relying on the Town’s assertion of authority to conduct the proposed work on the ways, pursuant to 310 CMR 10.05(4)(a) and relevant case law?

1. In denying the request for a Superseding Order of Conditions, whether the Department properly determined that the Petitioners failed to meet the requirements of 310 CMR 10.05(7)(c) by not stating how the Commission’s Order of Conditions is inconsistent with 310 CMR 10.00 and does not contribute to the interests of the Wetlands Protection Act within the applicable time period?

The parties agreed that the issues were questions of law that could be addressed through motions, as typically occurs with denials of Requests for an SOC. A motion for summary decision is appropriate where the pleadings, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a final decision in its favor as a matter of law. 310 CMR 1.01(11)(f). Summary decision may, where appropriate, be made against the moving party. Id. The Department filed a Motion for Summary Decision. The Applicant filed a Motion to Dismiss. The Petitioners filed a Combined Opposition and Cross-Motion for Summary Decision. The Department filed a Motion to Strike an additional issue raised by the Petitioners: whether the work is limited to the buffer zone or Land Subject to Flooding. The Petitioners filed an Objection to the Motion to Strike and Cross-Motion to Amend Issues for Resolution seeking additional time to respond or remand to the Department for further proceedings. I find that there are no disputed issues of material fact and summary decision may be granted in favor of the Department. The Motion to Amend issues is denied, for reasons related to summary decision.

Issue 1: Town’s Authority to Conduct Work

Under the regulations, either the landowner or an applicant with the permission of the landowner may file a Notice of Intent to perform work subject to jurisdiction. 310 CMR 10.05(4)(a). Occasionally a party will contest the ownership of the land where the work is proposed, and the authority of the applicant to file a Notice of Intent. The Petitioners in this appeal contest the authority of the Town to conduct the work on the ways because they believe that the Town does not own the property. The Department has consistently stated that it will not decide property disputes or other property issues that are properly decided by courts. Tindley v. Department of Environmental Quality Engineering, 10 Mass. App. 623 (1980). See e.g., Matter of Digital Realty Trust, Docket No. WET-2013-018, Recommended Final Decision (October 9, 2013), adopted by Final Decision (October 28, 2013), Matter of City of Quincy, Docket No. WET-2011-045 and 046, Recommended Final Decision (May 18, 2012), adopted by Final Decision (May 24, 2012), Matter of City of Lowell Regional Wastewater Utility, Docket No. WET-2012-002, Recommended Final Decision (May 11, 2012), adopted by Final Decision (May 16, 2012). Accordingly, the question of property ownership of the land where the project is located may not be resolved here. Tindley v. DEQE, 10 Mass. App. Ct. 623 (1980).

An applicant must demonstrate a colorable claim of property ownership sufficient to support the filing of a Notice of Intent. 310 CMR 10.05(4)(a); Tindley v. DEQE, 10 Mass. App. Ct. 623 (1980). The Department did not abuse its discretion by relying on the town’s assertion that it has the authority to conduct work on the ways. Indeed, the Department routinely reviews projects proposed by municipalities and properly relies on assertions of municipal ownership of land by municipal authorities without further proof of ownership.[[4]](#footnote-4) Any ambiguities related to various deeds must be resolved in court and the Petitioners should seek a remedy there. The Wetlands Regulations clearly state that an Order grants no property rights, so the Petitioners need not be concerned that they are prejudiced by the Department’s long-standing position on this question. See Matter of John Schindler, Docket No. WET-2011-024 and 026, Recommended Final Decision (December 5, 2011, adopted by Final Decision (December 27, 2011). The Department properly accepted the Town’s assertion that it had the authority to conduct the work.

Issue 2: Requirements for a Valid Request for an SOC

The Wetlands Regulations require that a Request for an SOC “state clearly and concisely the objections to the Order . . . which is being appealed and . . . how the Order of Conditions . . . issued by the conservation commission is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in M.G.L. c. 131, s. 40.” 310 CMR 10.05(7)(c). The Department has the authority to issue an SOC on its own initiative, presumably when it seeks to address any deficiencies in an Order where it believes such action is warranted. 310 CMR 10.05(7)(a)6. The issue raised by a denial of a Request for an SOC is whether the Department must issue an SOC where it believes an SOC is not warranted. Here, the Department determined that the Petitioners’ initial Request was “inadequate” because it did not meet the regulatory standard, but gave the Petitioners a second chance by allowing them to correct the deficiencies. When the supplemental submission also fell short, the Department properly denied the Request.

The Petitioners misconstrue the purpose of review under the Act and Wetlands Regulations. The filing of a Notice of Intent for work in a resource area or the buffer zone leads to a consideration of the project and its impacts on wetlands resource areas. It does not provide a forum for resolving disputed property ownership or sanctioning a commission over the conduct of commission business. The regulations clearly require a person requesting an SOC to identify deficiencies in the Order issued by a Conservation Commission. The regulatory provisions identified by the Petitioners in their supplement do not relate to deficiencies in the Order. Instead, the Petitioners raise procedural issues that would not be revisited in an SOC, nor would they be revisited in an adjudicatory proceeding if an SOC were issued and the Petitioners appealed.

An SOC is intended to address wetlands protection issues raised in an Order of Conditions under the Act and Wetlands Regulations rather than any perceived procedural irregularities that may have arisen during commission review. [[5]](#footnote-5) The issues raised in the Petitioners’ Request for an SOC are not within the scope of a valid Request under the regulations, which reflect the statutory scheme. The statute allows any abutter within ten days from the issuance of an Order of Conditions to

 “request the department of environmental protection to determine whether the area on

which the proposed work is to be done is significant to public or private water supply, to

the groundwater supply, to flood control, to storm damage prevention, to prevention of

pollution, to protection of land containing shellfish, to the protection of wildlife habitat or

to the protection of fisheries or to the protection of the riverfront area consistent with the

following purposes: to protect the private or public water supply; to protect the ground

water; to provide flood control; to prevent storm damage; to prevent pollution; to protect

land containing shellfish; to protect wildlife habitat; and to protect the fisheries. The

commissioner of environmental protection or his designee also may request such a

determination within said ten days. . . . Upon receipt of such request the department shall

make the determination requested and shall by written order issued within seventy days

of receipt of such request and signed by the commissioner or his designee, impose such

conditions as will contribute to the protection of the interests described herein; provided,

however, that said department shall notify the applicant within thirty days of the receipt

of such request if his application or request is not in proper form or is lacking information

or documentation necessary to make the determination.

M.G.L. c. 131, s. 40. The focus of an SOC is squarely focused on whether the work is significant to the interests of the Act and will contribute to the protection of those interests.

The Petitioners did not identify any such deficiency in their Request for an SOC or their Clarification, and their Notice of Claim only acknowledges the requirement.[[6]](#footnote-6)

To the extent the Petitioners seek to compel the Department to undertake enforcement related to work prior to the filing of the Notice of Intent, or for the alleged impropriety of the Commission in issuing its Order, their advocacy is misplaced. The Petitioners may not request an SOC for the purposes of seeking enforcement by the Department against the Town. It is well settled that the exercise of enforcement discretion resides with the Department, and cannot be achieved through permit adjudication*.* See*,* e.g*.,* Matter of Bourne Community Boating, Docket No.WET-2009-031, Recommended Final Decision, (November 19, 2009), adopted by Final Decision (December 18, 2009), Matter of Christina Pesce, Docket No. 99-044, Final Decision (April 14, 2000); Matter of Jeffrey Buster, Trustee, 110 Beaver Street Trust, Docket No. 2000-40, Recommended Final Decision on Motion for Reconsideration (May 16, 2001), adopted by Final Decision; Matter of Town of Lexington, Docket No. 2006-184, Recommended Final Decision (March 19, 2007) (see also cases cited therein), adopted by Final Decision (March 23, 2007); Thomas M. Dicicco v. DEP, 64 Mass. App. Ct. 423 (2005). Even were an SOC to be issued and subsequently appealed, this claim would properly be dismissed for failure to state a claim upon which relief may be granted.

Either the Conservation Commission or the Department has the authority to issue an Enforcement Order to obtain compliance with the regulations in the situation where work is conducted without prior review. In such circumstances, there may be no Notice of Intent, abutter notification, or any public hearing on the project. There is no due process deprivation where a Conservation Commission or the Department pursues enforcement, nor where a commission or the Department obtains compliance through the filing of a Notice of Intent even after work has commenced. In this case, the Commission held a public hearing, providing a greater opportunity for citizens to learn about and comment on the project than if the Department or the Commission sought compliance through enforcement. In contrast to the provisions for public participation before the conservation commission, the Department may hold a site visit but is not required to provide any notice or public hearing of its decisionmaking.

Similarly, property issues may not be addressed though a Request for SOC, as discussed above. The Wetlands Regulations do not prohibit the phasing of projects, reflecting the statutory scheme where any work may be described in a Notice of Intent. Although the Petitioners suggest that there may have been a failure in abutter notification along a portion of Circuit Drive, the regulations place oversight of abutter notice on the applicant and the Commission. 310 CMR 10.05(4)(a). The Department may dismiss Requests for an SOC for failure to comply with abutter notice requirements only where the abutter not notified makes a clear showing notice was required and not provided. Id. In this situation, the abutters described by the Petitioners as not receiving notice did not request the SOC. A general allegation of a lapse in abutter notice cannot serve as grounds for a Request for an SOC. Id.

 The Petitioners raised the issue of whether the project is in the buffer zone or floodplain in their Cross-Motion for Summary Decision and Amend Issues, prompting the Department’s Motion to Strike. The issue is within the Department’s jurisdiction and would have constituted an adequate ground for a valid Request had it been included in the original Request or in the Supplement. But the Petitioners cannot cure the omission by raising the issue after a motion for summary decision.[[7]](#footnote-7) A party must file a valid Request for an SOC within ten days of the date an Order of Conditions is issued. 310 CMR 10.05(7)(a). The ten-day appeal period is a jurisdictional element that requires dismissal of the appeal if not fulfilled. Matter of R & R Home Construction Corp., Docket No. 95-009, Final Decision (Apr. 14, 1995); Matter of Treasure Island Condominium Ass’n, Docket No. 93-009, Final Decision (May 13, 1993); see also 310 CMR 10.05(7)(j)2.a (party “that fails to timely file an Appeal Notice . . . shall be deemed to have waived its right to appeal). The appeal period cannot be extended or modified. Matter of Fred Bottomley, Docket No. WET-2009-015, Recommended Final Decision (Apr. 30, 2009), adopted by Final Decision (May 5, 2009); Matter of R & R Home Construction Corp., Docket No. 95-009, Final Decision (Apr. 14, 1995).[[8]](#footnote-8) The Department conditionally accepted the Request, thus respecting the ten day period and allowed the Petitioners to supplement. Despite the opportunity, the Petitioners did not clarify their objections to the Order, how the Order is inconsistent with the regulations, or how the Order fails to contribute to the protection of the interests of the Act. 310 CMR 10.05(7)(c). The failure to file a Request meeting the regulatory standard renders the denial of the Request the correct outcome.

 CONCLUSION

I recommend that the Department’s Commissioner issue a Final Decision affirming the Department’s dismissal of the Petitioners’ Request for an SOC, for lack of jurisdiction.

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 Pamela D. Harvey

 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)(e), 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.

1. An SOC must “state clearly and concisely the objections to the Order . . . which is being appealed and . . . how the Order of Conditions . . . issued by the conservation commission is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in M.G.L. c. 131, s. 40.” 310 CMR 10.05(7)(c). [↑](#footnote-ref-1)
2. Allowing an additional period of time for clarification of a Request for an SOC appears to be quite unusual, but may be explained by the short length of the appeal period which in the context of claims in appeals has been the rationale for giving petitioners an opportunity to supplement.

 [↑](#footnote-ref-2)
3. I made corrections to citations where necessary, consistent with the narrative in the Request for an SOC. [↑](#footnote-ref-3)
4. The Town has engaged in discussions with the Petitioners. Members of the Board of Selectmen attended the Pre-Hearing Conference, which also functioned as a Selectmen’s meeting due to their presence. There is no question that the Notice of Intent filed by Sgt,.Lowney and the Order issued by the Commission have the support of the Town. Indeed, the dispute seemed most appropriately resolved between the Town and the Petitioners. [↑](#footnote-ref-4)
5. A notable exception is the failure of a Commission to timely issue an Order. 310 CMR 10.05(7)(c). [↑](#footnote-ref-5)
6. Although most denials of Requests for an SOC are based on untimeliness or lack of standing, an appeal of a denial of a Request for an SOC was recently sustained for failure to state a claim where an abutter raised the issue of flooding but the petitioner provided no explanation of how the proposed work would cause flooding and the governing regulations were not concerned with flooding impacts. Matter of Cottage Park Yacht Club, Docket No. WET-2013-014, Recommended Final Decision (August 30, 2013), Final Decision (adopting Recommended Final Decision as to failure to state a claim but making no decision on standing)(October 4, 2013). [↑](#footnote-ref-6)
7. It appears that the Petitioners are claiming that a portion of the work is within Land Subject to Coastal Storm Flowage. The Department has not established performance standards for this resource area. For this reason, the Department typically refrains from imposing any conditions, particularly where, as here, the work is limited to surficial alteration. Such SOCs are typically sustained after an appeal. See, e.g., Matter of John and Margaret Reichenbach, OADR Docket No. WET-2011-012, Recommended Final Decision (October 20, 2011), adopted by Final Decision (November 2, 2011); Matter of Margaret Reichenbach, Docket No. 2014-001, Recommended Final Decision (June 20, 2014), adopted by Final Decision (June 26, 2014), Recommended Final Decision on Reconsideration (September 30, 2014), adopted by Final Decision (October 28, 2014).

 [↑](#footnote-ref-7)
8. Tolling of the appeal period has been permitted in strictly limited circumstances. Tolling may be appropriate when: 1) a party that was entitled to receive notice of an SOC did not receive notice; and 2) the failure to receive notice caused the party to fail to file a timely appeal. See, e.g., Matter of Jose Verissimo, Docket No. WET-2008-006, Recommended Final Decision (June 5, 2008), adopted by Final Decision (July 3, 2008); Matter of Geoffrey Lenk, Docket No. 95-077, Final Decision (Feb. 6, 1996), following Matter of Bay Park Development Trust, Docket No. 88-291, Final Decision (Mar. 31, 1989). In these rare circumstances, the appeal period is tolled until the party received actual notice. Id. These circumstances were not presented here.

 [↑](#footnote-ref-8)