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

April 11, 2017

In the Matter of
Thomas Vacirca, Jr.

OADR Docket No. WET-2016-017
DEP File No. SE-42-2565
Marshfield, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

In this appeal, Joseph A. Pecevich, proceeding pro se ("the Petitioner") challenges a Superseding Order of Conditions ("SOC") that the Southeast Regional Office of the Massachusetts Department of Environmental Protection ("the Department" or "MassDEP") issued to Thomas Vacirca, Jr. ("the Applicant") on July 19, 2016, 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"). The SOC approved the Applicant's "after-the-fact project" ("the Project") at 20 Wilson Road (Parcel L 10-09-02) in Marshfield, Massachusetts ("the Property"), specifically the Applicant's placement of approximately 300 square feet of loam and the construction of a bituminous driveway. SOC Transmittal Letter, July 19, 2016. The Department issued the SOC after concluding "that the subject wetland area" at the Property

where the Project is located is not subject to regulation by the MWPA and the Wetlands Regulations because the area "is isolated [and] does not meet the definition of Isolated Land Subject to Flooding [under 310 CMR 10.57(1)(b) and (2)(b)]."[1] Id. The Town of Marshfield's Conservation Commission ("MCC") had previously concluded otherwise, but did not appeal the SOC to the Office of Appeals and Dispute Resolution ("OADR") pursuant to 310 CMR 10.05(7)(j)2(a).[2]

The Petitioner contends that the Department erred in concluding that the wetland area where the Project is located is not Isolated Land Subject to Flooding within the meaning of 310 CMR 10.57(1)(b) and (2)(b), and as such, the Department's SOC approving the Project should be vacated. Petitioner's Appeal Notice, at pp. 1-2; Petitioner's Pre-Hearing Statement, at pp. 1-3. The Applicant and the Department dispute the Petitioner's claim and request that the SOC be affirmed, contending that: (1) the Petitioner has failed to demonstrate that he has standing to challenge the SOC as "an aggrieved person [who] previously [participated] in the permit proceedings" within the meaning of 310 CMR 10.04 and 10.05(7)(j)2(a); and (2) the Department

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[1] "Isolated Land Subject to Flooding is an isolated depression or a closed basin which serves as a ponding area for run-off or high ground water which has risen above the ground surface." 310 CMR 10.57(1)(b)1. It is an area "without an inlet or an outlet [and in] which at least once a year confines standing water to a volume of at least ¼ acre-feet and to an average depth of at least six inches. 310 CMR 10.57(2)(b)1. "Isolated Land Subject to Flooding may be underlain by pervious material, which in turn may be covered by a mat of organic peat or muck." Id.

> [Isolated Land Subject to Flooding is] likely to be locally significant to [the MWPA statutory interests of] flood control and storm damage prevention. In addition, where such areas are underlain by pervious material they are likely to be significant to [the MWPA statutory interests of] public or private water supply and to ground water supply. Where such areas are underlain by pervious material covered by a mat of organic peat and muck, they are also likely to be significant to the [MWPA statutory interest of] prevention of pollution. Finally, where such areas are vernal pool habitat, they are significant to the [MWPA statutory interest of] protection of wildlife habitat.

310 CMR 10.57(1)(b)1.

[2] Under 310 CMR 10.05(7)(j)2(a), certain individuals or entities may, within 10 business days after an SOC's issuance, file an appeal with OADR challenging the SOC, including a local conservation commission.

properly determined that the wetland area where the Project is located is not Isolated Land Subject to Flooding within the meaning of 310 CMR 10.57(1)(b) and (2)(b). Applicant's Pre-Hearing Statement, at pp. 1-3; Department's Pre-Hearing Statement, at pp. 1-2.

On September 12, 2016, I conducted a Pre-Screening Conference ("Pre-Hearing Conference") with the parties in accordance with 310 CMR 1.01(5)(a)15, 310 CMR 10.05(7)(j), and a Scheduling Order that I issued in the case on August 15, 2016, to establish the issues for resolution in the appeal that would be adjudicated at an evidentiary Adjudicatory Hearing scheduled for December 2, 2016.[3] Pre-Screening Conference Report and Order, September 22, 2016 ("Conf. Rept. & Order"), at pp. 3-4. Prior to the Conference, on September 9, 2016, the MCC's Conservation Agent forwarded an electronic mail ("e-mail") message to OADR's Case Administrator stating that he was planning to attend the Conference on September 12, 2016 on behalf of the MCC "to support the [P]etitioner['s] appeal of the SOC" and that he "[would] bring evidence that the 'wetland' [at issue] is jurisdictional and is protected by the [MWPA]." At the Conference, I informed the MCC's Conservation Agent that because the MCC did not appeal the SOC, it was bound by the SOC and could not collaterally attack it through the Petitioner's appeal of the SOC, but could offer relevant factual information concerning the issues for resolution in the appeal to be adjudicated at the Hearing. Conf. Rept. & Order, at p. 4, n.3.

After the Petitioner, the Applicant, and the Department presented summaries of their respective positions in the appeal at the Pre-Hearing Conference, I established the issues for resolution in the appeal as follows:

1. Whether the Petitioner has standing to challenge the SOC as "an aggrieved

[3] On November 2, 2016, I cancelled the Hearing as a result of the Petitioner's deficient evidentiary submissions in the case and the Applicant's and the Department's respective Motions for Directed Decision seeking affirmance of the SOC due to the Petitioner's deficient evidentiary submissions. See below, at pp. 8-23.

person [who] previously [participated] in the permit proceedings" within the meaning of 310 CMR 10.04 and 10.05(7)(j)2(a)?

a. Prior to the Department's issuance of the SOC, did the Petitioner participate in the permit proceedings by either:

(1) submitting written information to the MCC prior to close of its public hearing on the Applicant's NOI for the Project;

(2) requesting any action by the Department that would result in the SOC's issuance; or

(3) providing written information to the Department prior to its issuance of the SOC?

b. If the Petitioner previously participated in the permit proceedings, is he a "person aggrieved" by the SOC?

2. If the Petitioner has standing to challenge the SOC as "an aggrieved person [who] previously [participated] in the permit proceedings" within the meaning of 310 CMR 10.04 and 10.05(7)(j)2(a), did the Department, in issuing the SOC, properly determine that that the wetland area where the Project is located is not Isolated Land Subject to Flooding within the meaning of 310 CMR 10.57(1)(b) and (2)(b)?

Conf. Rept. & Order, at pp. 4-5.

At the Pre-Hearing Conference, I also established a schedule for the parties to file sworn Pre-filed Testimony ("PFT") of witnesses and memoranda of law in support their respective positions on the issues for resolution in the appeal prior to the Hearing. Conf. Rept. & Order, at pp. 5-17. My subsequent September 22, 2016 Conf. Rept. & Order confirmed the issues for resolution and the PFT filing schedule. Conf. Rept. & Order, at pp. 4-17. My Conf. Rept. & Order also confirmed what I had stated at the Pre-Hearing Conference: that the Petitioner had the burden of proof on all of the issues for resolution in the appeal, and that he had to support his claims with sworn PFT of witnesses and documentary evidence containing "credible evidence from a competent source . . . ." Conf. Rept. & Order, at pp. 5-14. At the Pre-Hearing

Conference, the Petitioner understood his burden of proof and stated that three individuals, including a wetlands expert, would be filing sworn PFT in support of his claims. Conf. Rept. & Order, at pp. 10-14.

Under the PFT filing schedule that I established at the Pre-Hearing Conference, the sworn PFT of the Petitioner's witnesses was due by October 12, 2016. Conf. Rept. & Order, at pp. 14-15. At no time prior to the October 12, 2016 deadline did the Petitioner seek an extension of time to file the sworn PFT of his witnesses.

The Petitioner did not file the sworn PFT of any witnesses by the October 12, 2016 deadline. Instead, on October 12, 2016, the Petitioner forwarded a lengthy e-mail message to the OADR's Case Administrator entitled "Petitioner's Pre-filed Direct Case and Supporting Memorandum of Law." In response, both the Applicant and the Department moved for a Directed Decision pursuant to 310 CMR 1.01(11)(e), contending that the Petitioner had failed to support his claims with any credible evidence from a competent source, including from an expert witness.[4] The Petitioner opposes their Motions for Directed Decision contending, among other things, that the Motions "are flimsy and . . . appear to [him] only having the effect of avoiding vetting and revelation of the Issues being disputed" concerning the propriety of the Department's issuance of the SOC, and is "[an attempt to obtain] . . . [d]ismissal [of this appeal of the SOC] on technicalities." Petitioner's October 25, 2016 e-mail message to OADR. As fully discussed

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[4] 310 CMR 1.01(11)(e) provides as follows:

> Upon the petitioner's submission of prefiled testimony, or at the close of its live direct testimony if not prefiled, any opposing party may move for the dismissal of any or all of the petitioner's claims, on the ground that upon the facts or the law the petitioner has failed to sustain its case . . . . Decision on the motion . . . may be reserved until the close of all the evidence. . . .

The legal standard governing motions under 310 CMR 1.01(11)(e) is discussed below, at pp. 8-9.

below, the Petitioners' contentions are without merit and, accordingly, I recommend that the Department's Commissioner issue a Final Decision granting the Applicant's and the Department's Motions for Directed Decision and affirming the SOC.

STATUTORY AND REGULATORY FRAMEWORK

The purpose of the MWPA and the Wetlands Regulations is to protect wetlands and to regulate activities affecting wetlands areas in a manner that promotes the following eight statutory interests:

(1) protection of public and private water supply;

(2) protection of ground water supply;

(3) flood control;

(4) storm damage prevention;

(5) prevention of pollution;

(6) protection of land containing shellfish;

(7) protection of fisheries; and

(8) protection of wildlife habitat.

G.L. c. 131, § 40; 310 CMR 10.01(2); In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 6-7, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77; In the Matter of Webster Ventures, LLC, OADR Docket No. WET-2014-016, Recommended Final Decision (February 27, 2015), 2015 MA ENV LEXIS 14, at 10-11, adopted as Final Decision (March 26, 2015), 2015 MA ENV LEXIS 10; In the Matter of Elite Home Builders, LLC, OADR Docket No. WET-2015-010, Recommended Final Decision (November 25, 2015), adopted as Final

Decision (December 17, 2015), 22 DEPR 202, 204 (2015).

The MWPA and the Wetlands Regulations provide that "[n]o person shall remove, fill, dredge[,] or alter[5] any [wetlands] area subject to protection under [the MWPA and Wetlands Regulations] without the required authorization, or cause, suffer or allow such activity . . . ." G.L. c. 131 § 40, ¶ 32; 310 CMR 10.02(2)(a); Vecchione, supra, 2014 MA ENV LEXIS 76, at 7; Webster Ventures, supra, 2015 MA ENV LEXIS 14, at 11-12; Elite Home Builders, supra, 22 DEPR at 204. "Any activity proposed or undertaken within [a protected wetlands] area[,] . . . which will remove, dredge or alter that area, is subject to Regulation under [the MWPA and the Wetlands Regulations] and requires the filing of a Notice of Intent ("NOI")" with the permit issuing authority. 310 CMR 10.02(2)(a). A party must also file an NOI for "[a]ny activity . . . proposed or undertaken within 100 feet of [any protected wetlands]" described as "the Buffer Zone" by the Regulations, "which, in the judgment of the [permit] issuing authority, will alter [any protected wetlands]." 310 CMR 10.02(2)(b).

The "[permit] issuing authority" is either the local Conservation Commission when

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[5] The Wetlands Regulations at 310 CMR 10.04 define "alter" as "chang[ing] the condition" of any wetlands area subject to protection under the MWPA and the Wetlands Regulations. Examples of alterations include, but are not limited to, the following:

> (a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas;
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> (b) the lowering of the water level or water table;
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> (c) the destruction of vegetation;
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> (d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water.

310 CMR 10.04. "Dredge" is defined as "deepen[ing], widen[ing], or excavat[ing], either temporarily or permanently" a protected wetlands area, and "[f]ill means to deposit any material [in a protected wetlands area] so as to raise an elevation, either temporarily or permanently." Id.

initially reviewing the applicant's proposed work in a wetlands resource area protected by the MWPA and the Wetlands Regulations, or the Department when it assumes primary review of the proposed work or review on appeal from a local Conservation Commission decision. Healer v. Department of Environmental Protection, 73 Mass. App. Ct. 714, 717-19 (2009). Under the MWPA, a local Conservation Commission may issue an Order of Conditions authorizing or precluding proposed construction activities in protected wetlands areas and "are allowed to 'impose such conditions as will contribute to the protection of the interests described [in MWPA and the Wetlands Regulations]'" and to require that "'all work shall be done in accordance' with the conditions they might impose. . . ." Id. Orders of Condition, including any findings and wetland delineations forming the basis of the Orders, are valid for three years from the date of the Order's issuance. 310 CMR 10.05(6)(d). However, any "order [by the Department] shall supersede the prior order of the conservation commission . . . and all work shall be done in accordance with the [Department's] order." Healer, supra.

DISCUSSION

THE APPLICANT AND THE DEPARTMENT ARE ENTITLED TO DIRECTED DECISION AND THE SOC SHOULD BE AFFIRMED BECAUSE THE PETITIONER'S EVIDENTIARY SUBMISSIONS IN SUPPORT OF ALL OF HIS CLAIMS ARE DEFICIENT AS A MATTER OF LAW.

I. THE DIRECTED DECISION STANDARD AND THE PETITIONER'S FAILURE TO FILE SWORN PFT OF ANY WITNESSES IN SUPPORT OF HIS CLAIMS

"Dismissal [of an appeal pursuant to 310 CMR 1.01(11)(e)] for failure to sustain a case, also known as a directed decision, is appropriate when a party's direct case - generally, the testimony and exhibits comprising its prefiled direct testimony - presents no evidence from a credible source in support of its position on the identified issues." Webster Ventures, supra, 2015 MA ENV LEXIS 14, at 32-33; In the Matter of Jodi Dupras, OADR Docket No. WET-

2012-026, Recommended Final Decision (July 3, 2013), 2013 MA ENV LEXIS 40, at 14-15, adopted as Final Decision, (July 11, 2013), 2013 MA ENV LEXIS 41, citing, In the Matter of Trammell Crow Residential, OADR Docket No. WET-2010-037, Recommended Final Decision (April 1, 2011), 2011 MA ENV LEXIS 21, at 6-8, adopted as Final Decision (April 21, 2011), 2011 MA ENV LEXIS 20; In the Matter of Town of Truro, Docket No. 94-066, Final Decision (August 21, 1995), aff'd sub nom., Worthington v. Town of Truro, Memorandum of Decision and Order on Plaintiff's Complaint for Judicial Review (Suffolk Super. Ct., May 30, 1996)).

As noted above, the Petitioner did not submit any sworn PFT in support of his claims, and only submitted an unsworn statement through an e-mail message of October 12, 2016 to OADR's Case Administrator. The Petitioner's failure to submit sworn PFT is enough for me to reject all of his claims in this appeal because the Adjudicatory Proceeding Rules at 310 CMR 1.01(12)(f) make clear that "[a]ll prefiled testimony shall be subject to the penalties of perjury" and 310 CMR 1.01(10)(e) authorizes a Presiding Officer to recommend the Department's Commissioner dismiss an appeal "[w]hen a party fails to file documents as required, . . . comply with orders issued[,] . . . demonstrates an intention to delay the . . . [the] resolution of the [appeal], . . . or fails to comply with any of the requirements set forth in 310 CMR 1.01 . . . ." The Petitioner had more than adequate prior notice of the provisions of these two Rules and the possible consequences for failing to comply with them, including the dismissal of his appeal of the SOC, because all of this information was set forth in my Conf. Rept. & Order, at pp. 10-12, and 15.[6] He was required to adhere to these orders or directives notwithstanding his pro se status

[6] On pp. 11-12 of my Conf. Rept. & Order, all of the parties, including the Petitioner, were made aware that: (1) "[u]nder 310 CMR 1.01(12)(f), a party's '[f]ailure to file pre-filed direct testimony within the established time, without good cause shown, [will] result in summary dismissal of the party and the appeal if the party being summarily dismissed is the petitioner'"; (2) "a petitioner's failure to file written direct testimony is a serious default," and "the equivalent of failing to appear at a [judicial proceeding] where the testimony is to be presented

in the case.[7] Moreover, as discussed in detail below in the next several sections of this Decision, even if the Petitioner's October 12, 2016 e-mail message to OADR's Case Administrator could be considered as evidence, he still cannot prevail as a matter of law.

II. THE PETITIONER'S EVIDENTIARY SUBMISSIONS IN SUPPORT OF HIS STANDING CLAIM ARE DEFICIENT AS A MATTER OF LAW.

The Petitioner's first hurdle in the appeal was to demonstrate he had standing to challenge the SOC as "an aggrieved person [who] previously [participated] in the permit proceedings" within the meaning of 310 CMR 10.04 and 10.05(7)(j)2(a). Conf. Rept. & Order, at pp. 4-8. As I explained at the September 12, 2016 Pre-Hearing Conference and later confirmed in my Conf. Rept. & Order of September 22, 2016, at p. 5, standing to pursue a legal claim "is not simply a procedural technicality," Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975); In the Matter of Sawmill Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), at 13, adopted as Final Decision (July 7, 2015), but rather, it "is a jurisdictional prerequisite to being allowed to press the merits of any legal claim." R.J.A. v. K.A.V., 34 Mass. App. Ct. 369, 373 n.8 (1993); Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998) ("[w]e treat standing as an issue of

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live"; (3) "[u]nder 310 CMR 1.01(10) a party's failure to file proper Direct Examination or Rebuttal Testimony is subject to sanctions for 'failure to file documents as required, . . . comply with orders issued and schedules established in orders[,] . . . [or] comply with any of the requirements set forth in 310 CMR 1.01'"; and (4) "[u]nder 310 CMR 1.01(10), the Presiding Officer may "issu[e] a final decision against the party being sanctioned, including dismissal of the appeal if the party is the petitioner."

[7] Although a party's pro se status in an appeal accords the party some leniency from the litigation rules, the party is not excused from complying with those rules because "[litigation] rules bind a pro se litigant as they bind other litigants." Vecchione, supra, 2014 MA ENV LEXIS 76, at 45-46, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77, citing, Mmoe v. Commonwealth, 393 Mass. 617, 620 (1985) (pro se litigants are required to file court pleadings conforming to the Massachusetts Rules of Civil Procedure); Rothman v. Trister, 450 Mass. 1034 (2008) (pro se litigants are required to comply with appellate litigation rules); Lawless v. Board of Registration In Pharmacy, 466 Mass. 1010, 1011 (2013) (same). I also note for the record that the Petitioner is a sophisticated litigant, because according to his October 12, 2016 e-mail message to OADR's Case Administrator, "[he] holds a Bachelor of Science Degree in Environmental Science/Geology from [the University of Massachusetts at Lowell ("U.Mass. Lowell")] and "has over 20 years of experience in the environmental consulting business."

subject matter jurisdiction [and] . . . of critical significance"); see also United States v. Hays, 515 U.S. 737, 115 S.Ct.2431, 2435 (1995) ("[s]tanding is perhaps the most important of the jurisdictional doctrines"). My Conf. Rept. & Order, at pp. 5-8, explained in detail what the Petitioner needed to do to demonstrate that he had standing to challenge the SOC as "an aggrieved person [who] previously [participated] in the permit proceedings" within the meaning of 310 CMR 10.04 and 10.05(7)(j)2(a).

A. Proof of Prior Participation in the Permit Proceedings

Pursuant to the requirements of 310 CMR 10.05(7)(j)2(a), the Petitioner had to first demonstrate that he "previously participat[ed] in the permit proceedings." 310 CMR 10.05(7)(j)2(a) defines "[p]reviously participating in the permit proceeding [as] [1] the submission of written information to the conservation commission prior to [the] close of the public hearing, [2] requesting an action by the Department that would result in [an SOC], or [3] providing written information to the Department prior to issuance of [an SOC]." Thus, as he was informed at the Pre-Hearing Conference and further informed in my Conf. Rept. & Order, at p. 6, the Petitioner had to demonstrate that prior to the Department's issuance of the SOC, he participated in the permit proceedings by either:

(1) submitting written information to the MCC prior to close of its public hearing on the Applicant's NOI for the Project;

(2) requesting any action by the Department that would result in the SOC's issuance; or

(3) providing written information to the Department prior to its issuance of the SOC.

Conf. Rept. & Order, at p. 6. The Petitioner failed to demonstrate any of these actions.

As noted above, the Petitioner did not submit any sworn PFT in support of his claims, and only submitted an unsworn statement through an e-mail message of October 12, 2016 to OADR's Case Administrator. If his e-mail message can be considered as evidence, it does not demonstrate that the Petitioner "previously participat[ed] in the permit proceedings" within the meaning of 310 CMR 10.05(7)(j)2(a). His e-mail message neither claimed that he made a request to the Department to take action that would result in the SOC's issuance nor claimed that he provided written information to the Department prior to its issuance of the SOC. Thus, the Petitioner was left with demonstrating that he "[submitted] written information to the [MCC] prior to [the] close of [its] public hearing" on the Applicant's NOI for the Project. This he did not do.

In his October 12, 2016 e-mail message to OADR's Case Administrator, the Petitioner contended that he participated in the permit proceedings when the matter was initially before the MCC because he purportedly:

> personally delivered or shared hand sketches and several documents to the MCC[, and this] was attested to by Mr. Jay Wennemer, MCC Administrator, at the [Pre-Hearing] Conference of September 12, 2016. Among these materials were copies of dated MCC documents from the 1980's pertaining to the case of the filling of wetlands in the area. Also provided to the MCC was a copy of a flyer, distributed publically at the first MCC Hearing on this Matter by one Mr. Gerard Lane, personally known to the Petitioner and the owner of lot L10-09-01. This flyer announced the desire of Mr. Lane and his family to build a house upon said lot. Copies of these documents [were] attached [to the Petitioner's October 12th e-mail

> message] along with a copy of a section of the Marshfield Assessors map panel L10 showing the positions of the referenced lots. . . . .

In response, the Department states that "[it] has no reason to dispute . . . that the Petitioner provided the [documents set forth in his October 12, 2016 e-mail message to OADR's Case Administrator] to the [MCC] during the course of . . . [its] permit] proceeding[s]," and that "although [the Petitioner did] not specifically state they were provided during the course of a public hearing [conducted by the MCC,] . . . the submission of these documents would satisfy the submission of 'written information' to the [MCC]" pursuant to 310 CMR 10.05(7)(j)2(a). Department's Motion for Directed Decision, at p. 6.

The Applicant disagrees with the Department, contending that the documents at issue do not constitute "written information" within the meaning of 310 CMR 10.05(7)(j)2(a) because the Petitioner did not submit "written comments" with the documents. Applicant's Motion for Directed Decision, at pp. 4-6. I disagree with the Applicant because as the Department aptly noted in its Motion for Directed Decision at p. 6, n.1, 310 CMR 10.05(7)(j)2(a), which governs wetlands permit appeals such as this case, requires only the submission of "written information" and not "written comments" to a local conservation commission prior to the close of its public hearing or to the Department prior to its issuance of an SOC. This requirement differs from the requirement in other Department environmental programs such as the Chapter 91 program, which under 310 CMR 9.17(1)(b), "any person aggrieved by the decision of the Department to grant [a Chapter 91] license . . . who . . . submitted ***written comments*** within the public comment period" may file an administrative appeal with OADR challenging the License within 21 days after its issuance. (emphasis supplied).

The Applicant contends in the alternative that if the documents set forth in the

Petitioner's October 12, 2016 e-mail message to OADR's Case Administrator constitute "written information" within the meaning of 310 CMR 10.05(7)(j)2(a), the minutes of the MCC's public hearing on the Applicant's NOI for the Project do not indicate that the Petitioner submitted those documents to the MCC prior to the close of its public hearing. Applicant's Motion for Directed Decision, at pp. 4-6. I agree with the Applicant based on my review of the minutes of the MCC's public hearing on the Applicant's NOI for the Project.[8]

The minutes indicate that the MCC conducted its public hearing on the Applicant's NOI for the Project on several dates from August 2015 to January 2016, specifically on:

(1) August 11, 2015;[9]

(2) October 6, 2015;[10] and

(3) January 19, 2016.[11]

The minutes of August 11, 2015 state that:

> [the Applicant] . . . presented – submitted copy of wetlands delineation and

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[8] Under the Massachusetts Open Meeting Law, G.L. c. 30A, §§ 18-25, the minutes of the MCC's public hearing on the Applicant's NOI for the Project are part of the official record of the MCC's public hearing on the Applicant's NOI. The statute requires public bodies such local conservation commissions "[to] create and maintain accurate minutes of all meetings, ... setting forth [1] the date, time and place [of the meeting], [2] the members present or absent, [3] a summary of the discussions on each subject, ***[4] a list of documents and other exhibits used at the meeting,*** and [5] the decisions made and the actions taken at each meeting, including the record of all votes. G.L. c. 30A, § 22(a) (emphasis supplied). "***Documents and other exhibits***, such as photographs, recordings or maps, ***used by the [public] body at [the meeting], shall, along with the minutes, be part of the official record of the session***." G.L. c. 30A, § 22(d) emphasis supplied). The Petitioner presented no credible evidence demonstrating that the minutes of the MCC's public hearing on the Applicant's NOI failed to comport with the requirements of the Massachusetts Open Meeting Law. If the Petitioner believed that the minutes did not accurately reflect what transpired at the MCC's public hearing on the Applicant's NOI for the Project, he had a remedy with the Massachusetts Attorney General's Office. G.L. c. 30A, § 23; http://www.mass.gov/ago/government-resources/open-meeting-law/attorney-generals-open-meeting-law-guide.html#Enforcement.

[9] http://www.marshfield-ma.gov/sites/marshfieldma/files/minutes/08-11-2015_minutes.pdf, at p. 2.

[10] http://www.marshfield-ma.gov/sites/marshfieldma/files/minutes/10-06-2015_minutes_1.pdf, at pp. 3-4.

[11] http://www.marshfield-ma.gov/sites/marshfieldma/files/minutes/01-19-2016_minutes_2.pdf, at p. 3.

> opinion of Lenore White, Wetlands Strategies. Ms. White states the wetlands line is where it is on abutting lot; her opinion is none of the [Marshfield Wetlands] Bylaw interests are impacted. . . .
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> [The Petitioner] "looked at the plan and said he is curious what the distance is from the property line to the house; has been filled since 1982. The whole area was filled with Phragmites. [The Petitioner] stated that he did not register a complaint about the activity at [the Applicant's property] with the Town." . . .[12]

The minutes of October 6, 2015 state that:

> [The MCC] asked [the Applicant] for a better plan showing the delineation, plan was submitted. . . . [The Petitioner] . . . asked to see the plan.[13]

The minutes of January 19, 2016 state that the MCC discussed the Applicant's NOI for the Project and then closed its public hearing on the NOI.[14] The minutes do not state that the Petitioner made any comments and/or presented written information to the MCC on that date.

In sum, the minutes of the MCC's public hearing on the Applicant's NOI for the Project from August 11, 2015 to January 19, 2016 as discussed above do not indicate that the Petitioner submitted any written information to the MCC prior to the close of its public hearing on the Applicant's NOI for the Project on January 19, 2016, including the documents the Petitioner mentioned in his October 12, 2016 e-mail message to OADR's Case Administrator that he claims to have submitted to the MCC. Accordingly, the Petitioner has failed to demonstrate that he "previously participat[ed] in the permit proceedings" within the meaning of 310 CMR 10.05(7)(j)2(a), and as such, he lacks standing to challenge the SOC.

B. Proof of Aggrievement

Assuming for the sake of argument that the Petitioner "previously participat[ed] in the

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[12] http://www.marshfield-ma.gov/sites/marshfieldma/files/minutes/08-11-2015_minutes.pdf, at p. 2.

[13] http://www.marshfield-ma.gov/sites/marshfieldma/files/minutes/10-06-2015_minutes_1.pdf, at pp. 3-4.

[14] http://www.marshfield-ma.gov/sites/marshfieldma/files/minutes/01-19-2016_minutes_2.pdf, at p. 3.

permit proceedings" within the meaning of 310 CMR 10.05(7)(j)2(a), he still lacks standing to challenge the SOC because he failed to present credible evidence from a competent source demonstrating that he is a "person aggrieved" by the SOC within the meaning of 310 CMR 10.04 and 10.05(7)(j)2(a).[15] The Petitioner had more than adequate prior notice that he was required to make this showing because the requirement was set forth in detail in my Conf. Rept. & Order, at pp. 6-8. Specifically, the Petitioner was informed of the following.

The Wetlands Regulations at 310 CMR 10.04 define "person aggrieved" as:

> any person who because of an act or failure to act by the issuing authority may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in [MWPA]. . . .

"A 'person aggrieved' as that term is used in the MWPA must assert 'a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest. . . . Of particular importance, the right or interest asserted must be one that the statute . . . intends to protect.'" Webster Ventures, supra, 2015 MA ENV LEXIS 14, at 15; In the Matter of Ronald and Lois Enos, OADR Docket No. WET-2012-019, 2013 MA ENV LEXIS 21, at 16-17, adopted as Final Decision, 2013 MA ENV LEXIS 20; In the Matter of Norman Rankow, OADR Docket No. WET-2012-029, 2013 MA ENV LEXIS 45, at 26-27, adopted as Final Decision, 2013 MA ENV LEXIS 79; In the Matter of Town of Southbridge Department of Public Works, OADR Docket No. WET-2009-022, Recommended Final Decision, at p. 4 (September 18, 2009), adopted as Final Decision (October 14, 2009); In the Matter of Onset Bay Marina, OADR Docket No. 2007-074, Recommended Final Decision (January 30, 2009), 16 DEPR 48, 50

[15] Both the Applicant and the Department agree that the Petitioner failed to demonstrate aggrievement, and request Directed Decision on that ground. Applicant's Motion for Directed Decision, at pp. 6-12; Department's Motion for Directed Decision, at pp. 6-10.

(2009), adopted as Final Decision (April 1, 2009); Compare, Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20, 27-28 (2006) (definition of "person aggrieved" under G.L. c. 40B).

"To show standing, a party need not prove by a preponderance of the evidence that his or her claim of particularized injury is true." Webster Ventures, supra, 2015 MA ENV LEXIS 14, at 16; In the Matter of Edward C. Gordon and 129 Racing Beach Trust, OADR Docket No. WET-2009-048, Recommended Final Decision (March 3, 2010), 2010 MA ENV LEXIS 114, at 10, adopted as Final Decision (March 5, 2010), 2010 MA ENV LEXIS 13, citing, Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005); Enos, 2013 MA ENV LEXIS 21, at 16-17; Rankow, 2013 MA ENV LEXIS 45, at 27-28. As the Massachusetts Appeals Court explained in Butler:

> [t]he "findings of fact" a judge is required to make when standing is at issue . . . differ from the "findings of fact" the judge must make in connection with a trial on the merits. Standing is the gateway through which one must pass en route to an inquiry on the merits. When the factual inquiry focuses on standing, therefore, a plaintiff is not required to prove by a preponderance of the evidence that his or her claims of particularized or special injury are true. "Rather, the plaintiff must put forth credible evidence to substantiate his allegations. [It is i]n this context [that] standing [is] essentially a question of fact for the trial judge."

63 Mass. App. Ct. at 441; Webster Ventures, supra, 2015 MA ENV LEXIS 14, at 16-17; see also In the Matter of Hull, Docket No. 88-22, Decision on Motion for Reconsideration of Dismissal, 6 MELR 1397, 1407 (July 19, 1999) (party must state sufficient facts which if taken as true demonstrate the possibility that injury alleged would result from the allowed activity); Enos, 2013 MA ENV LEXIS 21, at 17-18; Rankow, 2013 MA ENV LEXIS 45, at 28-29; compare Standerwick, 447 Mass. at 37 (plaintiffs' case appealing zoning decision cannot consist of

"unfounded speculation to support their claims of injury").

In summary, to demonstrate that he is a "person aggrieved" by the SOC, the Petitioner was required to put forth a minimum quantum of credible evidence in support of his claim that the Project would or might cause him to suffer an injury in fact, which would be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interests protected by the MWPA and the Wetlands Regulations. 310 CMR 10.04; Webster Ventures, supra, 2015 MA ENV LEXIS 14, at 17-18; Gordon, 2010 MA ENV LEXIS 114, at 11 and cases cited; Enos, 2013 MA ENV LEXIS 21, at 17-18; Rankow, 2013 MA ENV LEXIS 45, at 29. If the Petitioner met that threshold, his appeal of the SOC could proceed "to [the] inquiry on the merits" regarding whether the Department properly issued the SOC pursuant to the MWPA and the Wetlands Regulations. Butler, 63 Mass. App. Ct. at 441. The Petitioner failed to meet this threshold because his October 12, 2016 e-mail message to OADR's Case Administrator is devoid of any facts demonstrating that he is a "person aggrieved" by the SOC within the meaning of 310 CMR 10.04 and 10.05(7)(j)2(a).

The Petitioner's October 12, 2016 e-mail message to OADR's Case Administrator did not focus on the actual work authorized by the SOC: the placement of approximately 300 square feet of loam and the construction of a bituminous driveway at the Applicant's property, but rather, focused on purported past work that occurred decades ago in the 1980's, involving allegedly filled wetlands on adjacent property and blocked culverts and swales. He contended that the "actions of others through filling and encouraging filling of channels and blockage of conduits and, the lack of maintenance by the [Town of Marshfield] of the local surface flow systems" has caused what he asserts are his current problems with drainage in the area. The

Petitioner cannot use his appeal of the SOC as a means to litigate or seek redress for these purported decades-old events.

The Petitioner also claimed in his October 12, 2016 e-mail message to OADR's Case Administrator that the "newly paved areas on the [Applicant's property] . . . will shunt additional runoff — that would otherwise percolate directly into the ground — onto Wilson Road." His claim is not supported by any calculation of the pre-existing co-efficiency of permeability of the Applicant's property where the driveway was paved and the testimony of any qualified expert.

In his October 12, 2016 e-mail message to OADR's Case Administrator, the Petitioner intimated that he is qualified to render expert opinions on wetlands and stormwater issues by contending that "[he] holds a Bachelor of Science Degree in Environmental Science/Geology from [the University of Massachusetts at Lowell ("U.Mass. Lowell")] and that "[he] has over 20 years of experience in the environmental consulting business," which "includes interaction with construction crews on buildings and remediation projects." However, he neither specified the nature of his purported environmental consulting business nor gave examples of matters in which he previously rendered expert opinions on wetlands and stormwater management issues. As a result, he failed to present sufficient evidence demonstrating that he is qualified to opine on wetlands and stormwater issues. Moreover, as the Applicant pointed out in his Motion for Directed Decision, at p. 9, "at the Pre-Hearing Conference[,] [the Petitioner] described his [environmental consulting] experience as consulting overseas on nuclear power plant decommissioning . . . ." No doubt that the nuclear power field is a complex one, but it is vastly different from the wetlands and stormwater management fields. The Petitioner failed to set forth any evidence demonstrating that he has sufficient familiarity with the technical aspects of

wetlands and hydrology to be qualified to provide expert testimony on wetlands and stormwater management issues.

Lastly, the Petitioner's standing claim fails because he failed to demonstrate that he could or would be harmed by the Project in a manner different from any injury, if any, that the general public could suffer and which is within the scope of the public interest protected by the MWPA and the Wetlands Regulations. As discussed above, the Petitioner's October 12, 2016 e-mail message to OADR's Case Administrator did not focus on the actual work authorized by the SOC: the placement of approximately 300 square feet of loam and the construction of a bituminous driveway at the Applicant's property, but rather, focused on purported past work that occurred decades ago in the 1980's, involving allegedly filled wetlands on adjacent property and blocked culverts and swales. Simply stated, the Petitioner failed to present any credible evidence from a competent source demonstrating that the work authorized by the SOC at the Applicant's property has altered or could alter, or has harmed or could harm, the Petitioner's property in a manner different from that of the general public. As a result, he cannot proceed "to [the] inquiry on the merits" regarding whether the Department properly issued the SOC pursuant to the MWPA and the Wetlands Regulations. Butler, 63 Mass. App. Ct. at 441.

III. THE PETITIONER'S EVIDENTIARY SUBMISSIONS IN SUPPORT OF HIS CLAIM THAT THE DEPARTMENT ERRED IN ISSUING THE SOC ARE DEFICIENT AS A MATTER OF LAW.

Assuming for the sake of argument that the Petitioner demonstrated standing to challenge the SOC, he still does not prevail because he failed to "produce . . . credible evidence from a competent source in support of [his] position" that the Department erred in issuing the SOC. 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. The Petitioner was fully apprised of his burden of proof

at the Pre-Hearing Conference and in my subsequent Conf. Rept. & Order, at pp. 8-10. Specifically, he was informed of the following requirements with respect to his burden of proof.

The Petitioner was required to present "credible evidence from a competent source in support of each claim of factual error [made against the Department], including any relevant expert report(s), plan(s), or photograph(s)." 310 CMR 10.05(7)(j)3.c; Dupras, 2013 MA ENV LEXIS 40, at 11; Vecchione, supra, 2014 MA ENV LEXIS 76, at 10; Elite Home Builders, supra, 22 DEPR at 205. "A 'competent source' is a witness who has sufficient expertise to render testimony on the technical issues on appeal." 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 as Final Decision (August 19, 2010), 2010 MA ENV LEXIS 31; Dupras, supra, 2013 MA ENV LEXIS 40, at 11-12; Vecchione, supra, 2014 MA ENV LEXIS 76, at 10; Elite Home Builders, supra, 22 DEPR at 205. Whether the witness has such expertise depends "[on] whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony." Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted); see e.g. Pittsfield Airport Commission, supra, 2010 MA ENV LEXIS 89, at 36-39 (petitioner's failure to submit expert testimony in appeal challenging MassDEP Commissioner's issuance of 401 Water Quality Certification Variance to Pittsfield Airport Commission fatal to petitioner's claims because Variance was "detailed and technical . . . requiring expert testimony on issues . . . implicated by the Variance," including . . . (1) wetland replication, restoration, and enhancement, (2) mitigation of environmental impacts to streams, and (3) stormwater discharge and treatment[,] [and (4)] . . . runway safety and design"); Dupras, supra, 2013 MA ENV LEXIS 40, at 36-37 (petitioner not qualified to interpret technical data involving Shellfish Suitability Areas); Vecchione, supra,

2014 MA ENV LEXIS 76, at 26 (petitioner not qualified to testify as to impacts on wetlands resources areas due to his lack of expertise in wetlands protection).

Here, the substantive issue for adjudication in the appeal in the event that the Petitioner demonstrated standing to challenge the SOC was whether the Department in issuing the SOC properly determined that the wetlands area where the Project is located on the Applicant's property is not Isolated Land Subject to Flooding ("ILSF") pursuant to 310 CMR 10.57(1)(b) and (2)(b).[16] Conf. Rept. & Order, at p. 5. As discussed above, the Petitioner presented no sworn PFT from a wetlands expert establishing that the Department's determination was erroneous. Specifically, the Petitioner presented no sworn PFT from a wetlands expert that the area holds the volume of water necessary under 310 CMR 10.57(2)(b)1 to qualify as an ILSF. The regulation provides that an ILSF is an area "without an inlet or an outlet [and in] which at least once a year confines standing water to a volume of at least ¼ acre-feet and to an average depth of at least six inches." 310 CMR 10.57(2)(b)1.

In his October 12, 2016 e-mail message to OADR's Case Administrator, the Petitioner referred to a November 2015 report prepared by Ivas Environmental ("Ivas"), the MCC's wetlands consultant on the Applicant's NOI for the Project, in which the consultant opined ("the Ivas Opinion") that the "westerly driveway [at the Applicant's property] is also adjacent to an Isolated Wetland area, if not within the area." Contrary to the Petitioner's assertions, the Ivas Opinion does not demonstrate that the wetlands area at the Applicant's property where the Project is located is ILSF. First, the Ivas Opinion was rendered for the MCC and not for the Petitioner. Also, the Ivas Opinion is conclusory in that no factual basis was provided to support the opinion that the area in question is ILSF pursuant to 310 CMR 10.57(2)(b)1. The

[16] See n. 1, above, at p. 2.

Department also did not follow the Ivas Opinion after it performed its own wetlands assessment during the SOC review process. As discussed previously, the MCC did not appeal the Department's SOC, which did not follow the Ivas Opinion, and, as a result, the MCC is bound by the Department's determination and the MCC cannot collaterally attack it through the Petitioner's appeal of the SOC. To the extent that the Petitioner could rely on the Ivas Opinion in his appeal of the SOC, he was required to submit the sworn PFT of the author of the Ivas Opinion to authenticate it and be subject to cross-examination at the evidentiary Adjudicatory Hearing by the Applicant and the Department. As discussed previously, the Petitioner did not submit sworn PFT from anyone, including a wetlands expert, and his failure to submit such testimony is fatal to his appeal of the SOC.

CONCLUSION

For the foregoing reasons, proceeding to an evidentiary Adjudicatory Hearing in this matter would be pointless given the substantial deficiencies in the Petitioner's case; he presented no credible evidence from a competent source, including sworn PFT from a wetlands expert, in support of his claims in the appeal. Accordingly, I recommend that the Department's Commissioner issue a Final Decision granting the Applicant's and the Department's respective motions for Directed Decision and affirming the SOC.

Date: 04/11/17

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.

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