

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

**January 9, 2020**

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In the Matter of  
Vineyard Wind LLC

OADR Docket No. WET-2019-026  
Superseding Order of Conditions

Barnstable, MA

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**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

On August 1, 2019, the Petitioner, Mark Akselson, filed this appeal of a Superseding Order of Conditions (“SOC”) issued by the Massachusetts Department of Environmental Protection’s Southeast Regional Office (“MassDEP” or “the Department”) to Vineyard Wind LLC (“the Applicant”) 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 affirmed an Order of Conditions (“OOC”) issued by the Barnstable Conservation Commission (“BCC”) to the Applicant for the construction of the Vineyard Wind Connector (“the proposed Project”), a component of the larger Vineyard Wind off-shore wind project. The proposed Project includes approximately 6.6 miles of Offshore Export Cable Connector within Barnstable’s offshore waters; a landfall site at a town-owned parking lot at Covell’s Beach; and portions of the onshore transmission system located within the jurisdiction of the BCC.

The Petitioner alleges that he is an abutter to the landfall site and is aggrieved by the SOC because changes to the dune form caused by solid structures associated with the project will impact his property by preventing the natural migration of sand towards it, and will cause flooding and storm damage. Currently pending are two Motions to Dismiss filed by the Applicant. The first motion seeks dismissal of the Petitioner's appeal for lack of standing and failure to state a claim upon which relief can be granted. The second motion seeks dismissal of the Petitioner's appeal because the Petitioner failed to file his pre-filed testimony in accordance with the schedule that I established in the appeal. For the reasons discussed below, I recommend that the Department's Commissioner issue a Final Decision that dismisses the Petitioner's appeal and affirms the SOC.

### **BACKGROUND**

On April 25, 2019, the Applicant filed a Notice of Intent ("NOI") for the Vineyard Wind Connector Project with the BCC. See Notice of Intent and Order of Conditions (stating NOI was filed on 4/25/2019), MassDEP's Basic Documents. The first of the BCC's two hearings on the NOI was held on May 7, 2019. The Petitioner was present at that hearing and offered comments. Attorney Paul Revere, III, was also present and offered comments, and stated at that time that he represented "certain unidentified summer residents of the Craigville area." See Vineyard Wind's Responses to Verbal Comments Offered at the Barnstable Conservation Commission Hearing on May 7, 2019, dated May 10, 2019, MassDEP's Basic Documents. The Applicant responded in writing to the comments. Id. The BCC closed the public hearing on May 14, 2019 and issued its OOC on May 23, 2019 approving the Applicant's proposed project, with conditions, under both the MWPA and the Barnstable wetlands bylaw. Order of Conditions, MassDEP's Basic Documents.

On June 10, 2019, the Petitioner, now represented by Attorney Revere, appealed the OOC to the Department's Southeast Regional Office by filing a request for an SOC. In his request, the Petitioner asserted, among other things, that the project does not comply with the Wetlands Regulations' performance standards for Coastal Beach because it allows the Applicant to install a solid structure within a Velocity Zone which will interfere with beach form as prohibited by 310 CMR 10.27. He also asserted that the project does not comply with the Wetlands Regulations' performance standards for Coastal Dune because the solid structure will: affect the ability of waves to remove sand from the dune; cause modification of the dune that would increase the potential for storm damage; interfere with the lateral movement of the dune; and interfere with an identified bird nesting habitat. Request for SOC, MassDEP's Basic Documents. The Petitioner claimed that he, as trustee, owns property that abuts the project site and is aggrieved by the project because his property is within the same coastal beach, coastal dune and barrier beach system. Id.

The Department conducted a site visit on June 27, 2019. The Applicant and the Petitioner's attorney were present. The Petitioner's attorney provided written information to the parties at that time. See Memorandum from Paul Revere, III to Daniel Gilmore, June 27, 2019, MassDEP Basic Documents. This memorandum raised concerns regarding the Wetlands Regulations' performance standards and permitting solid structures within Coastal Beach and Coastal Dune. Id. The Applicant responded to the Petitioner's request for an SOC by letter dated July 10, 2019. Vineyard Wind correspondence to Daniel Gilmore, MassDEP Basic Documents. The Applicant disputed the Petitioner's assertions regarding the performance standards for Coastal Beach and Coastal Dune, stating that no structures are proposed in wetlands resource areas because project components will be buried beneath the beach and the parking lot, and

temporary impacts to a 70-foot long section of degraded dune are addressed in the NOI by a dune restoration plan. The Applicant asserted that the project met the performance standards for Coastal Dune because it will not have more than a negligible change in the dune that diminishes its ability to perform specified functions. Id.

MassDEP issued its SOC on July 18, 2019. The SOC affirmed the BCC's OOC, which found that the proposed Project met the performance standards for the allegedly affected wetlands resource areas. MassDEP determined that the project as proposed and conditioned adequately protects the interests of the MWPA. SOC, MassDEP Basic Documents. Additionally, in its cover letter to the SOC, MassDEP stated that it had determined that the proposed project qualifies as a limited project pursuant to 310 CMR 10.24(7)(b), but the SOC itself did not approve the proposed Project as a limited project.

The Petitioner filed this appeal on August 1, 2019 challenging the SOC. In his appeal, he claimed a right to appeal as an abutter to the project site and as a person aggrieved. His stated basis for aggrievement was his property's location within the same coastal beach, coastal dune and barrier beach system as the project site. He challenged the SOC on the basis that MassDEP improperly approved the Proposed project as a limited project when it does not meet the requirements of the limited project regulation at 310 CMR 10.24(7)(b).<sup>1</sup> Notice of Claim ("NOC") at 1-2. Notably, the Petitioner's Appeal Notice or Notice of Claim ("NOC") did not allege any failure of the SOC to comply with the Performance Standards for Coastal Beach and Coastal Dune.

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<sup>1</sup> Under certain circumstances as set forth in 310 CMR 10.24(7), MassDEP may approve as a limited project a project that may not meet the performance standards for the affected wetlands resource areas. 310 CMR 10.24(7) specifies the circumstances in which this can be done and the factors that shall be considered by MassDEP in approving a limited project.

I issued a Scheduling Order on August 9, 2019 and scheduled a Pre-Hearing Conference (“the Conference”) for August 28, 2019 in the appeal. That same day, the Applicant filed a request for Expedited Review pursuant to DEP Policy COM-00.002,<sup>2</sup> requesting that the appeal be resolved by October 1, 2019. With the cooperation and agreement of the parties, I advanced the date for the Conference to August 19, 2019. On August 15, 2019, the Applicant filed a Motion to Dismiss the appeal on two grounds: (1) the Petitioner’s lack of standing as a “person aggrieved” for failing to allege an injury in fact and (2) the Petitioner’s failure to state a claim on which relief can be granted, because the project was not approved as a limited project. Also on August 15, 2019, the Petitioner filed an objection to the request for an expedited review, asserting that the Applicant’s request did not meet the criteria of DEP Policy COM-00.002. Because of the expedited scheduling of the Conference, I waived the requirements in the Scheduling Order that prior to the Conference, the parties confer about settlement and file pre-hearing statements. They were required to be prepared to identify their witnesses, including expert witnesses. See Email message from Interim Case Administrator Doreen Kearney to counsel, 8/15/19, 9:35 AM.

On August 19, 2019, I conducted the Conference with the parties and their respective legal counsel in accordance with 310 CMR 1.01(5)(a)15, 310 CMR 1.01 (9)(a) and 310 CMR 10.05(7)(j). My review of the Petitioner’s NOC identified deficiencies in the NOC, particularly his failure to allege sufficient facts to demonstrate how he was aggrieved by the SOC. At the Conference, the parties and I discussed these deficiencies, and set a schedule for the Petitioner to

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<sup>2</sup> Policy COM-00.002 on the Expedited Review of Applications and Adjudicatory Hearings creates an exception to MassDEP’s general practice of scheduling adjudicatory hearings in the chronological order in which appeals are received. The exception applies to a project in which there is substantial public interest and the project is expected to provide a major improvement in environmental quality and may be unreasonably delayed if the hearing is scheduled in chronological order.

respond to my verbal Order for a More Definite Statement, given at the Conference, to support with facts his claim that he is aggrieved by the SOC. I also directed the Petitioner to respond to the Applicant's Motion to Dismiss. I established a date by which the parties were to identify and/or confirm their expert witnesses. The Petitioner had not retained an expert witness in support of his claims by the time of the Conference.

The majority of the Conference was devoted to a discussion of the schedule for adjudication of the appeal and the issues that would be resolved in the evidentiary adjudicatory hearing ("Hearing"), if the case was not dismissed or settled by agreement of the parties. I advised the Applicant that their requested schedule was not feasible because it would not allow sufficient time for the parties to prepare their written pre-filed testimony before the Hearing. However, I was prepared to schedule the matter on an expedited timeline, with the Hearing on October 29, 2019 and a Recommended Final Decision issued by the end of November 2019. The Applicant suggested a more expedited schedule, explaining that the Energy Facilities Siting Board ("EFSB") had scheduled an adjudicatory hearing for October 15 and 16, 2019, on the Applicant's Application for a Certificate of Environmental Impact and Public Interest ("Certificate"). The Application requested the EFSB to issue, in the form of a composite permit, several final approvals, including one that would supplant MassDEP's SOC. See EFSB Notice of Adjudication, Notice of Adjudicatory Hearing, EFSB 19-05.<sup>3</sup>

The parties and I discussed the feasibility of the Applicant's proposed schedule, and with certain adjustments that would provide the Petitioner with additional time in which to file his pre-filed direct and rebuttal testimonies; all of the parties agreed to this schedule.<sup>4</sup> After the

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<sup>3</sup> <https://www.mass.gov/files/documents/2019/08/13/Final%20Public%20Notice%208.7.19.pdf>

<sup>4</sup> The schedule established the following deadlines:  
9/10/19: Petitioner's Pre-filed direct testimony and Memorandum of Law

schedule was set, the parties and I discussed and agreed upon the issues for resolution in the appeal. Among the issues discussed and included for resolution was the claim asserted in the Petitioner's NOC and challenged by the Applicant's first Motion to Dismiss: whether the proposed Project could be approved alternatively as a limited project. The parties agreed that the other issues to be resolved if the case was not dismissed would be whether the project met the performance standards for Coastal Beach and Coastal Dune.

On August 26, 2019, the Petitioner filed his More Definite Statement and his Opposition to the Applicant's Motion to Dismiss. To support his claim of aggrievement, the Petitioner alleged that (1) his property and the project site are located on the coastal beach and in adjoining primary coastal dunes; (2) the general littoral drift is from east to west; (3) the Petitioner's property is to the west of the project site; (4) changes to the dune form caused by solid structures will impact the Petitioner's property "in that they will prevent the natural migration of sand towards it." More Definite Statement at p. 2. Additionally, he claimed that both properties (his and the Project site) will become flooded in storm events and subject to substantial wave forces, and waves will expose the solid structures and reflect off of the solid structures "towards adjacent properties causing greater damage to the adjacent property." Id.

In opposition to the Applicant's Motion to Dismiss for lack of aggrievement, the Petitioner restated the assertions made in his More Definite Statement and argued that the MWPA and the Wetlands Regulations protect the interests of storm damage prevention and flood control, and MassDEP has "consistently prohibited the introduction of new solid structures into

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9/16/19: Applicant's and MassDEP's Pre-filed direct and rebuttal testimony and Memorandum of Law

9/23/19: Petitioner's Rebuttal Testimony and Rebuttal Memorandum of Law

9/27/19: Hearing

9/30/19: Transcript to be filed with OADR

10/8/19: Closing Briefs

10/26/19: Recommended Final Decision

Matter of Vineyard Wind, LLC, OADR Docket No. WET-2019-026

Recommended Final Decision

Page 7 of 20

‘coastal beaches’ and ‘coastal dunes’ to protect those interests.” Therefore, he argued that he had demonstrated standing as a “person aggrieved.” Petitioner’s Opposition to Motion to Dismiss at 5-6. In opposition to the Motion to Dismiss for failure to state a claim, the Petitioner cited to his request for the SOC, in which he had asserted that the proposed Project did not meet the Performance Standards for Coastal Beach and Coastal Dune, and further stated that he based his appeal of the SOC on MassDEP’s statements in its cover letter to the SOC regarding its determination that the project qualified as a limited project. He averred that the Applicant’s argument that I “should ignore the cover letter and its express statements regarding limited project approval and focus solely on the attached superseding order” is incorrect because “administrative law judges have reviewed ‘cover letters’ to understand the actions of the agency in approving or disapproving orders of conditions”, citing In the Matter of Brockton Power Co., 2010 MA ENV LEXIS 197 (2010), In the Matter of Old Barn, LLC, 2010 MA ENV LEXIS 223 (2010), and In the Matter of Quackenbush, 2007 MA ENV LEXIS 13 (2007). He argues that while the BCC reviewed the applicable performance standards, MassDEP did not, but “stated that it could affirm the order of conditions on an alternative basis – namely as a ‘Limited Project.’” Id. at pp. 6-7. Recognizing that this argument might fail, the Petitioner cited to a new claim included in his More Definite Statement, i.e. that the project did not meet the Performance Standards for Coastal Dune. Id. at p. 7.

The Applicant moved for leave to file a Reply to the Petitioner’s Opposition, and to strike a portion of the Petitioner’s Opposition (the assertion of the new claim). The Applicant disputed the assertion that the Petitioner had stated a claim based on MassDEP’s cover letter, arguing that none of the decisions cited by the Petitioner support the proposition that an appeal can be taken from a cover letter. Applicant’s Reply to Petitioner’s Opposition to Applicant’s Motion to



Dismiss at p. 1. The Applicant asserted that the three decisions cited by the Petitioner make plain that statements in cover letters do not form the basis for an appeal, but rather, the operative document for an appeal is the SOC itself, with cover letters providing additional information to serve as guidance. Id. at 2-4.

I issued my Pre-hearing Conference Report and Order on September 10, 2019. The Order memorialized the schedule and issues that had been determined at the Conference on August 19, 2019, in consultation with the parties, and with their agreement. Although the Order was issued later than it ordinarily would have been, none of the information contained in the Order should have been a surprise to any of the parties, as the schedule for filing testimony and the issues to be resolved at the hearing were the primary subjects of a lengthy discussion at the Conference. Nonetheless, the Petitioner's counsel failed to make note of the operative dates for filing his testimony, and did not file his pre-filed testimony as required on September 10, 2019. Neither did he move at any point to extend any filing date.

On September 11, 2019, the Applicant moved to dismiss the appeal for the Petitioner's failure to file his testimony and memorandum of law within the required timeframe. I conducted a telephone conference with the parties' attorneys on September 13, 2019 to ascertain whether the Petitioner had good cause for failing to file his testimony. The Petitioner's counsel stated that he had failed to write down the dates for filing his testimony; he had not received the Pre-hearing Conference Report and Order until the day his testimony was due; and he wanted to wait until I had issued decisions on the pending motions. The Applicant correctly noted that the litigation schedule had been agreed upon at the Conference, and the Petitioner had filed his More Definite Statement and response to the first Motion to Dismiss per the schedule for filing those responses. The Applicant noted that the Petitioner is a sophisticated homeowner with experienced counsel,

and no leniency is warranted. The Applicant further noted that the Petitioner should have had in place already his evidence supporting the appeal, where the same claims were raised in prior proceedings before both the BCC and MassDEP. In response to my questioning, counsel for the Petitioner stated that the Petitioner had not yet formally retained an expert, nor committed to doing so, even though it was more than three weeks past the date of the Conference. If counsel had any doubt about the schedule in the absence of the Pre-hearing Conference Report and Order, based on his experience and knowing the appeal was on a fast track, he could have contacted the Office of Appeals and Dispute Resolution (“OADR”) for information and/or filed a motion to extend the schedule. He did neither. Instead, he stated that he had not filed a motion to extend the schedule because of the scheduled conference call and the Applicant’s second motion to dismiss.

Because the rules for adjudicatory proceedings afforded the Petitioner time to formally respond to the Applicant’s second motion to dismiss, I advised the parties that I would not rule on the motion until after the Petitioner’s response was filed, though under the rules I could have summarily dismissed the appeal. 310 CMR 1.01(10). In his opposition, the Petitioner noted that ordinarily, the Petitioner’s testimony would be due 30 days after the Conference (here, that would have been on September 19<sup>th</sup>). Despite agreeing at the Conference to the schedule for filing testimony on an accelerated track and to the issues to be resolved, he argued that absent a written order and a ruling on the pending motions, he did not know what he was supposed to do. The Petitioner argued that it would be inappropriate to dismiss the appeal under these circumstances. In response, the Applicant asserted that the Petitioner had demonstrated a disregard for the rules and schedule governing resolution of the appeal throughout this proceeding. Additionally, the Applicant noted that in his Opposition, the Petitioner made no

commitment to prepare and file testimony “any time soon.” Applicant’s Reply at p. 1. The Applicant reiterated that both the Petitioner and his counsel agreed to the schedule and recognized its importance, as that was the “primary subject of the parties’ three-hour August 19, 2019 conference that both [the Petitioner] and his counsel attended.” Id at pp. 1-2. As the Applicant noted, the time to object to the schedule was at the Conference or no later than the passing of any deadline. The Applicant correctly noted that while the Petitioner’s counsel admitted he did not write down the dates, he did not dispute that the dates had been set, nor claim any ambiguity about the dates; he just wasn’t reminded of the dates in a timely fashion. The Applicant also correctly noted that the primary subject of the Conference was the Applicant’s request for expedited review and its request that the proceeding be concluded expeditiously. In other words, there should have been no doubt nor any surprise regarding the appeal adjudication schedule.

The Applicant asserted that the Petitioner’s Opposition provided no valid justification for a continued failure to submit testimony and a memorandum, or seek an extension of time. The Applicant emphasized the statement by Petitioner’s counsel that no expert had been retained, nor had the Petitioner, an identified fact witness, himself submitted any testimony. In fact, the Opposition suggested that even a week after testimony was due, there was no indication that it was being prepared. The Applicant described the Petitioner’s actions as “protracted and intentional non-compliance...incompatible with a fair and orderly proceeding.” Applicant’s Reply at pp. 2-3. The Department agrees that the appeal should be dismissed based on the Petitioner’s failure to file his witnesses’ testimony. See Department’s Response to Second Motion to Dismiss.

## **DISCUSSION**

### **A. Standard of Review**

A party to an appeal “may move to dismiss where another party fails to file documents as required... [or] for lack of standing [or for] lack of jurisdiction.” 310 CMR 1.01(11)(d)1. As well, a party may move to dismiss an appeal “for failure to state a claim upon which relief can be granted.” 310 CMR 1.01(11)(d)2. “In deciding the motion, the Presiding Officer shall assume all the facts alleged in the notice of claim to be true. Such assumption shall not apply to conclusions of law.” Id. An appeal may also be dismissed when “a party fails to file documents as required, . . . comply with orders issued and schedules established in orders or otherwise fails to prosecute the adjudicatory appeal; . . . demonstrates an intention to delay the proceeding or a resolution of the proceedings; or fails to comply with any of the requirements set forth in 310 CMR 1.01 . . .” 310 CMR 1.01(10) and (11)(d)1; see Matter of Mangano, Docket No. 94-109, Final Decision (March 1, 1996); Matter of Town of Brookline Department of Public Works, Docket No. 99-165, Final Decision (June 26, 2000); Matter of Bergeron, Docket No. 2001-071, Recommended Final Decision (February 5, 2002), adopted by Final Decision (February 25, 2002).

Additionally, 310 CMR 1.01(3)(e) provides that “[p]arties who do not conform to time limits or schedules established by the Presiding Officer shall, absent good cause shown, summarily be dismissed for failure to prosecute the case.” See also Matter of Tucard, LLC, OADR Docket No. 2009-076, 2010 MA ENV LEXIS 211, Recommended Final Decision (September 2, 2010), adopted by Final Decision (September 28, 2010).

### **B. The Petitioner Has Sufficiently Alleged That He Is Aggrieved.**

310 CMR 10.05(7)(j)2.b. provides that a Petitioner’s appeal notice shall include “demonstration of participation in previous proceedings, in accordance with 310 CMR

10.05(7)(j)3.a. and sufficient written facts to demonstrate status as a person aggrieved”. A

“person aggrieved” is defined in the Wetlands regulations as:

any person who, because of an act or failure to act by the [Department], 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 [the Wetlands Protection Act]. Such person must specify in writing sufficient facts to allow the [Department] to determine whether or not the person is in fact aggrieved.

310 CMR 10.04. In his More Definite Statement, the Petitioner alleged that changes to the dune form caused by the solid structures placed within the dune will impact his property by preventing the natural migration of sand towards it. His property will become flooded during storm events and subject to substantial wave forces. The solid structures placed in the dune will become exposed and when waves hit them, the waves will be reflected towards adjacent properties causing greater damage on them. Assuming all of these facts to be true, as I am required to do on a Motion to Dismiss, the Petitioner has sufficiently demonstrated that he is a person aggrieved by the SOC. Flood control and storm damage prevention are within the scope of the interests the MWPA is designed to protect, and the Petitioner has stated that he may suffer an injury based on his proximity to the project site.

**C.     The Petitioner Has Failed to State a Claim for Relief Based on the SOC Cover Letter.**

The Petitioner alleged that the Department approved the proposed Project as a limited project pursuant to 310 CMR 10.24(7)(b). Notice of Claim at pp. 1-2. He further alleged that the Applicant did not request approval of the proposed Project as a limited project; that the proposed Project is not eligible for approval as a limited project because the Applicant is not a public utility; and the SOC does not comply with the requirements for limited project. Id. The allegations are based on a statement in the cover letter to the SOC stating that “[t]he Department

has determined that the proposed project qualifies as a limited project pursuant to 310 CMR 10.24(7)(b) which authorizes the construction, operation and maintenance of underground public utilities including electrical distribution or transmission lines.” SOC Cover Letter at p. 1. The Applicant moved to dismiss the appeal, asserting that the Department did not actually approve the proposed Project as a limited project, and the SOC, not its cover letter, is the only determination that can be appealed.

Assuming the allegations in the NOC to be true, the Petitioner has failed to state a claim for relief as a matter of law because the SOC did not approve the proposed Project as a limited project. The SOC affirmed the OOC issued by the BCC. The BCC found that the project met the performance standards for the affected wetlands resource areas. The OOC did not approve the proposed Project as a limited project and there is no mention of the limited project provision in the SOC itself; the only mention is in the cover letter. Put plainly, the NOC challenges an approval that was not given.

The Petitioner contended that while the BCC reviewed the applicable Performance Standards, the Department did not, and therefore the SOC cover letter contains the basis for the Department’s approval on alternative grounds, i.e. as a limited project. This argument is without merit for the following reasons. First, by affirming the OOC, the Department agreed that the proposed Project as conditioned met the applicable Performance Standards, which meant that approval as a limited project was unnecessary. Limited projects are generally those that cannot meet the Performance Standards. 310 CMR 10.24(7); see also N. Andover Land Corp. v. Reich, 6 LCR 185, 187 (Mass. Land Ct. 1988)( limited project provisions are designed to provided discretion to allow work that may not meet the performance standards). Second, the SOC, not the cover letter, is the operative document. It is required by 310 CMR 10.04 to “be made on Form

5.” Form 5 does not include a cover letter template or reference a cover letter. The cover letter is not a “Reviewable Decision” subject to appeal. See 310 CMR 10.04 (defining Reviewable Decision). While the cover letter may provide information or guidance about an SOC, the cover letter itself cannot be appealed. See In the Matter of Quackenbush, Recommended Final Decision, 2007 MA ENV LEXIS 13, (Feb. 27, 2007), adopted by Final Decision, Reconsideration Denied (Oct. 22, 2007); In the Matter of Brockton Power, LLC, Recommended Final Decision, 2010 MA ENV LEXIS 197, (Feb. 19, 2010), adopted by Final Decision (March 16, 2010)(suggesting SOC cover letters may state limitations of Department review and/or provide guidance). The Petitioner has failed to state a claim for relief based on the SOC cover letter, and I recommend that this claim be dismissed.

**D. The Petitioner’s Motion to Amend His NOC is Allowed.**

The Petitioner asserted a new claim in his More Definite Statement, contrary to my specific direction at the Conference not to do so, and without requesting leave to amend his NOC at the Pre-hearing conference or at any time prior to or after filing his More Definite Statement. In his More Definite Statement he added a claim, alleging that the proposed Project did not meet the performance standards for Coastal Dune at 310 CMR 10.28. After the fact, I directed him to file a motion for leave to amend his NOC, which he did.

310 CMR 1.01(6)(e) provides that a Presiding Officer may permit a party to amend his Notice of Claim on the Presiding Officer’s own initiative or in response to a motion made by a party. It is within the Presiding Officer’s discretion to allow such an amendment. In the Matter of Massachusetts Refusetech, Inc., 2001 MA ENV LEXIS 174, Recommended Final Decision, (June 26, 2001). See also Mass. R.Civ.P. 15(a)(leave to amend shall be freely given); Afarian v. Mass. Elec. Co., 449 Mass. 257, 866 N.E. 2d 901 (2007)(motions to amend should be allowed

unless some good reason appears for denying it, citing Castellucci v. United States Fid. & Guar. Co., 372 Mass. 288, 289, 361 N.E. 2d 1264 (1977); Clean Harbors Environmental Services v. Sheppard, 2018 Mass. Super. Lexis 9, Suffolk Business Litigation Section (January 8, 2018)(no prejudice to any defendant by the addition of new claims).

In exercising my discretion to allow the amendment, I consider that the amendment did not result in prejudice to another party or a delay in the proceedings. The More Definite Statement containing the additional claim was filed shortly after the Conference, and prior to the date set for any party to file their testimony. It raised a claim that was presented to the Department in the Petitioner's request for the SOC and therefore known to the Applicant and the Department as a potential issue. It was, in fact, identified at the Conference as an issue for resolution at the Hearing in the event the appeal was not settled or dismissed.

**E. The Petitioner's Failure to File Testimony Warrants Dismissal.**

Under 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." In the Matter of Ross and Marilyn Wescott, OADR Docket No. 2006-154, Recommended Final Decision (December 8, 2014), adopted as Final Decision (December 22, 2014), 21 DEPR 150, 151 (2014); In the Matter of Autobody Solvent Recovery Corp., OADR Docket No. 2013-046, Recommended Final Decision (May 29, 2014), 2014 MA ENV LEXIS 39, at 8, adopted as Final Decision (June 2, 2014), 2014 MA ENV LEXIS 41; In the Matter of Stephen W. Seney, OADR Docket No. 2012-019, Recommended Final Decision (March 25, 2013), 2013 MA ENV LEXIS 27, at 19, adopted as Final Decision (April 2, 2013), 2013 MA ENV LEXIS 26. "[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 live.” Id., citing In the Matter of Gerry Graves, OADR Docket No. 2007-149, Recommended Final Decision, 2007 MA ENV LEXIS 66, at pp. 2-3 (November 26, 2007), adopted as Final Decision (February 22, 2008). Under 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.” Wescott, supra, 21 DEPR at 151; Autobody, supra, 2014 MA ENV LEXIS 39, at 8-9. Under 310 CMR 1.01(10), the Presiding Officer may sanction a Petitioner by dismissing his appeal.

As discussed above, the Petitioner did not file his pre-filed testimony by the deadline or request an extension of the deadline either before or after it expired. Despite agreeing at the Conference to the accelerated schedule for filing testimony and to the issues to be resolved, he asserted that without a written order and a ruling on the pending motions, he was left in the dark. I do not consider his justifications to constitute good cause. Counsel for the Petitioner is an experienced attorney. Given the accelerated timeline for the appeal, which was set with the agreement of the Petitioner and his counsel on August 19, 2019, if counsel could not recall the deadlines, he easily could have made a timely inquiry and been reminded of them. More tellingly, almost three weeks after the Conference, the Petitioner had not yet retained an expert witness, nor committed to doing so, despite knowing that expert testimony would be essential to proving his claims. This more than suggests that he was not committed to pursuing his appeal. Failure to file pre-filed testimony constitutes fatal non-compliance with the rules, and warrants dismissal of the appeal.

## **CONCLUSION**

For the foregoing reasons, I recommend that the Department's Commissioner issue a Final Decision which (a) dismisses the Petitioner's claim based on a statement in the SOC cover letter that the proposed Project could be approved as a Limited Project; (b) dismisses the appeal for failure to file testimony in accordance with the established deadline; and (c) affirms the SOC.

Date: 1/9/2020

A handwritten signature in black ink, appearing to read "Jane A. Rothchild", written over a horizontal line.

Jane A Rothchild  
Presiding Officer

## SERVICE LIST

**IN THE MATTER OF:**

**Vineyard Wind LLC**

**Docket No. WET-2019-026**

**Barnstable**

REPRESENTATIVE

PARTY

Paul Revere, III, Esq.  
Law Offices of Paul Revere, III  
226 River View Lane  
Centerville, MA 02632  
[revererii@aol.com](mailto:revererii@aol.com)

PETITIONER

Adam Kahn, Esq.  
Thaddeus Heuer, Esq.  
Foley Hoag  
Seaport West, 155 Seaport Boulevard  
Boston, MA 02210-2600  
[akahn@foleyhoag.com](mailto:akahn@foleyhoag.com)  
[theuer@foleyhoag.com](mailto:theuer@foleyhoag.com)

APPLICANT

David Bragg, Esq., Senior Counsel  
MassDEP Office of General Counsel  
One Winter Street  
Boston, MA 02108  
[david.bragg@mass.gov](mailto:david.bragg@mass.gov)

DEPARTMENT

Cc:  
Daniel F. Gilmore, Biologist  
MassDEP/Southeast Regional Office  
Bureau of Water Resources  
20 Riverside Drive  
Lakeville, MA 02347  
[daniel.gilmore@mass.gov](mailto:daniel.gilmore@mass.gov)

DEPARTMENT

Shaun Walsh, Chief Regional Counsel  
MassDEP/Southeast Regional Office  
Office of General Counsel  
20 Riverside Drive  
Lakeville, MA 02347  
[shaun.walsh@mass.gov](mailto:shaun.walsh@mass.gov)

DEPARTMENT

Leslie DeFilippis, Paralegal  
MassDEP/Office of General Counsel  
One Winter Street

DEPARTMENT

Boston, MA 02108

[Leslie.defilippis@mass.gov](mailto:Leslie.defilippis@mass.gov)

Barnstable Conservation Commission

c/o Darcy Karle, Conservation

Administrator

200 Main Street

Barnstable, MA 02601

[Darcy.karle@town.barnstable.ma.us](mailto:Darcy.karle@town.barnstable.ma.us)