

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

**Town of Brewster, Town of Dennis,
Town of Eastham, and Town of Orleans,
Petitioners**

v.

Docket Nos. MS-16-393, 394, 395 and 396
Dated: February 23, 2017

**Department of Agricultural Resources,
Respondent**

Appearance for Petitioners:

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Appearance for Respondent:

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Administrative Magistrate:

James P. Rooney

Summary

The towns that appealed a Yearly Operating Plan issued by the Department of Agricultural Resources to a utility for right of way spraying have failed to plead sufficiently that they are aggrieved by the Department's action and, thus, the appeals are dismissed for lack of standing. While the towns assert a potential basis for standing – that the spraying will interfere with a municipal obligation to provide town residents with drinking water – the appeals do not assert facts sufficient to show actual aggrievement, including how the towns obtain water, what municipal authority is responsible for drinking water, and how the permitted spraying may impact the towns' drinking water supply.

RECOMMENDED DECISION

The Towns of Brewster, Dennis, Eastham, and Orleans have appealed from a Yearly Operating Permit the Department of Agricultural Resources issued to Eversource Energy in 2016 that allowed it to conduct “an integrated vegetation management plan that includes the use of herbicides on electric rights-of-way” on Cape Cod and Martha’s Vineyard. The Department and Eversource have each moved to dismiss the appeal for lack of standing and failure to state a claim. The towns oppose the motions.¹

Background

In 2013, the Department approved a five-year Vegetation Management Plan submitted by NSTAR (now Eversource) that included the application of herbicides in rights of way to achieve long-term vegetation control.

Department regulations require, among other things, that Eversource submit yearly operating plans for herbicide application to the Department for its approval. On April 1, 2016, Eversource submitted a plan for spraying in 2016 to the Department. In this Yearly Operational Plan, Eversource proposed to use specific herbicides in eight communities on Cape Cod, including Brewster, Dennis, and Orleans, but not Eastham. Eversource proposed that certain areas be off-limits to spraying, including Zone I areas from which public water supply wells draw water, and that in other sensitive areas,

¹ The parties are aware that the Pesticide Board has previously decided that appeals of yearly operating plans that are not resolved by the end of the year in which spraying is permitted are moot. *See Larsen v. Department of Agricultural Resources*, Docket No. MS-13-612, Final Decision (May 9, 2014). They have requested, nonetheless, that I rule on the motions as the issues are likely to recur should the towns appeal any future spraying permits granted to Eversource, particularly a five-year vegetation management plan to be issued in 2017.

including Zone II areas of public water supply wells, only sensitive area herbicides would be used.² On July 15, 2016, the Department approved the plan.

Between July 28 and August 3, 2016, the towns of Brewster, Dennis, Eastham, and Orleans filed similar appeals challenging the plan approval. Three of the appeals recited identical language describing the particular injury to the town that the appeals were meant to alleviate. Each of these appeals stated that the town:

shall suffer economic, environmental, and recreational injuries far in excess of those suffered by the general public if the spraying of herbicides is allowed as contemplated in the Eversource YOP [Yearly Operating Plan]. The [town] further contends, injuries to the town as a whole, to its citizenry as a whole and indeed to any town on Cape Cod or in Dukes or Barnstable County, is potentially devastating, especially as regards clean, potable, chemical free drinking water. Additionally, said herbicidal spraying impacts the entire ecologically sensitive balance of life and nature on all of Cape Cod in a manner far different in kind and magnitude from those unique impacts which might be suffered by the general public withing the scope of the interests identified in 333 CMR 11.00 [the Pesticide Board regulations on right of way management] and MGL 132B [the Massachusetts Pesticide Control Act].

The Department, in its motion to dismiss, argues that the towns lack standing because they have not shown that they are specifically aggrieved by the Yearly Operating Plan and instead have raised only vague, speculative claims of harm that might befall the general public. The Department also contends that the towns have failed to state a claim because the review of a Yearly Operating Plan is limited to consideration of whether it is consistent with the Vegetation Management Plan, and the towns have not described in

² The Right of Way Management regulations define Zone I and Zone II as follows:
Zone I, as identified on the most current available maps prepared by the Department of Environmental Protection and as defined at 310 CMR 22.02, the protective radius required around a public water supply well or wellfield. . . .

Zone II, as identified on the most current available maps prepared by the Department of Environmental Protection and as defined at 310 CMR 22.02, the aquifer recharge area for a public water supply well or wellfield.

what manner Eversource's approved Yearly Operating Plan is inconsistent with the approved Vegetation Management Plan.

Eversource's motion to dismiss makes similar arguments. It adds that the towns lack standing because they have not shown an injury different from that of any other towns on Cape Cod and that no claim can be made as to Eastham because Eversource did not propose spraying herbicides in that town in 2016.

The towns responded that they have suffered an injury of greater magnitude than that suffered by the general public by virtue of the townwide responsibilities of their elected officials, particularly as those responsibilities relate to the provision of clean, safe drinking water. The towns maintain that the Department "failed to attend to or consider ways in which the 2016 [Yearly Operating Plan] it approved was inadequate in relationship to the [Vegetation Management Plan] on which it is predicated thus failing or abdicating its obligations regarding public safety."

Discussion

A. *Standing*

Yearly Operating Permits allowing use of herbicides in a utility right of way may be administratively appealed by "[a]ny person aggrieved." 333 C.M.R. § 11.09. A person aggrieved for purposes of the Right of Way Management Regulations is:

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 333 CMR 11.00.

333 C.M.R. § 11.02. A person claiming aggrievement "must specify in writing sufficient facts to allow the Department to determine whether or not the person is in fact aggrieved." *Id.*

What this means is that the town petitioners must show that they are “persons,” that they may be harmed in a manner different in kind or magnitude than the general public, and that the harm they wish to address is within the scope of interests protected by the Department’s Right of Way Management Regulations. Those regulations define person to include “the Commonwealth and its political divisions.” *Id.* Hence, the towns are persons for present purposes. The towns claim that the proposed spraying will interfere with clean safe, drinking water supplies. This is an interest protected by the regulations, which bar spraying within a Zone I of a water supply well and limit spraying within recharge areas of such wells known as Zone IIs. 333 C.M.R. § 11.04(2)(a).

The issue, then, is whether the towns have shown specific facts that demonstrate that they may be harmed in a manner different in kind or magnitude than the general public. The parties have not cited any cases from the Department of Agricultural Resources on this subject. I look, thus, to adjudicatory case decisions issued by the Department of Environmental Protection that have addressed municipal standing under regulations that define aggrievement similarly.

The DEP decisions on point have held that:

Municipal standing based on aggrievement has been sustained where the project allegedly threatened to injure municipal property or compromise coextensive municipal regulatory authority, and rejected where no such allegations were made.

Matter of Massachusetts Highway Dept., Docket No. 96-079, Decision and Order on Motion to Dismiss for Lack of Standing, 3 DEPR 216, 219 (Mass. Dept. of Envtl. Prot., Dec. 2, 1996). Thus, a town had standing to challenge the grant of a waterways license to build a marina because the marina might interfere with the town harbormaster’s responsibility to license temporary moorings. *Matter of Treasure Island Marina*, Docket

No. 85-011, Final Decision, 5 MELR 1121, 1125 (Mass. Dept. of Envtl. Prot., Mar. 19, 1987). On the other hand, a city lacked standing to challenge an air quality permit because the relevant statue did not give it the power to regulate air pollution. *Matter of Brockton Wood Limited Partnership*, Docket No. 94-021, Final Decision - Order of Dismissal, 2 DEPR 166 (Mass. Dept. of Envtl. Prot., Aug. 1, 1995)

Mere assertion that a town is representing the interests of its residents is not enough, for the residents are by definition part of the general public, and collective injury to them cannot be the required personal injury that differs from an injury to the general public. *Matter of Massachusetts Highway Dept.*, 3 DEPR at 219.

An alleged injury to a town water supply can be the basis for aggrieved person standing. Thus, a town water supply board had standing to appeal a wetlands permit because the proposed project might affect a nearby public water supply that the board owned and operated. *Matter of Burnham Land Trust*, Docket No. 90-077, Decision on Applicant's Motion to Dismiss and for a More Definite Statement, 9 MELR 1373, 1376-79 (Mass. Dept. of Envtl. Prot., June 6, 1991). However, it must be noted that the party in the Burnham Land Trust case was the town water board, not the town. Close examination is required to determine whether the local body bringing an appeal is the appropriate party. For example, a town board of selectman was held not to be aggrieved by the issuance of a wetlands permit because it was the local conservation commission, not the board of selectman, that administered the Wetlands Protection Act locally.

Matter of Cahill, Docket No. 89-286, Decision on Motion to Dismiss (unreported decision) (Mass. Dept. of Envtl. Prot., Mar. 5, 1990).

Here, the town petitioners' allegations that the Yearly Operating Permit will allow herbicide spraying that will interfere with the ability of the citizens of the towns to obtain clean, potable water are lacking in sufficient specificity to demonstrate that the towns have standing. The appeals do not describe the water sources the towns rely on to obtain drinking water and do not state whether water supply is the responsibility of a town department or an independent water supply board. They also do not describe how the spraying allowed by the permit, in which Eversource agreed to abide by the regulations limiting herbicidal use in the recharge area of a water supply well, was likely to harm the water supplies of the towns. The towns contend that groundwater on Cape Cod is part of a sole source aquifer, and hence any herbicides that leach into the ground will enter groundwater from which the towns may draw water. This contention goes part way toward establishing an impact on town water supply, but without more specificity as to the locations of the spraying with respect to the town water sources and the likely direction of groundwater flow, it is not sufficient to establish a potential impact.

This is not to say that the towns cannot demonstrate aggrievement. The statute governing pesticide use by utilities require utilities to provide detailed information to the towns where they will be spraying, including the types of pesticides to be used, fact sheets concerning the particular pesticides, the timing of the spraying, and the name of the licensed contractor who will be performing the spraying. M.G.L. c. 132B, § 6B(b). This legislative recognition of general municipal interest in such spraying does not by itself establish aggrievement regarding a particular spraying program, however. That will have to be demonstrated in each instance by pleading of facts sufficient to demonstrate aggrievement as a result of injury to the town's unique interests.

B. *Claim Sufficiency*

Because I have decided that the towns failed to plead standing sufficiently, I will address the sufficiency of their claims only briefly.

Eastham's claim is insufficient because Eversource does not propose to spray in that town in 2016, and Eastham has not alleged how spraying in another town will adversely affect it.

The remaining towns claim that the Yearly Operating Permit does not conform to the requirements of the Vegetation Management Plan, but, without more detail, it is difficult to discern in what manner the towns allege the Yearly Operating Plan is inconsistent with the Vegetation Management Plan. It is clear that the towns object to the use of certain pesticides. This would seem to be a cognizable claim, as it would appear from the documents submitted with the appeal that only the Yearly Operating Plan specifies the particular pesticides to be used. Nonetheless, it is not entirely clear how the use of these pesticides is alleged to be inconsistent with the Yearly Operating Plan or with the applicable regulations. Were this appeal not likely to be considered moot by the Pesticide Board, repleading rather than dismissal would likely be the next step. But that would be pointless at this juncture.

Conclusion

For the reasons stated, I recommend that the appeals be dismissed because standing was not pled sufficiently.

DIVISION OF ADMINISTRATIVE LAW APPEALS

James P. Rooney
First Administrative Magistrate