DEP REPORTER

Massachusetts Department of Environmental Protection
Administrative Law Decisions

PUBLISHED BY LANDLAW LEGAL PUBLISHERS

VOLUME 22
2015

Department of Environmental Protection (DEP) Presiding Officers/Year Appointed

Martin Suuberg, Commissioner 2015

Salvatore M. Giorlandino, Chief	2007	Timothy M. Jones	2009
Pamela D. Harvey	2007		

Division of Administrative Law Appeals (DALA) Administrative Magistrates (formerly DEP Administrative Law Judges) / Year Appointed

Richard C. Heidlage, Chief

Mark L. Silverstein	2004 (DEP 1986)	James P. Rooney	2004 (DEP 1994)
Francis X. Nee	2004 (DEP 1989)	Bonney Cashin	2004 (DEP 1994)

COMMENTARY BY:

Matthew Watsky, Esq.

CITE BY VOLUME AND PAGE OF THE
DEP REPORTER THUS:
In the Matter of Gator Swansea Partners, LLLP (Final Decision), 22 DEPR 1 (2015)

Landlaw's DEPR is published every other month.

MASSACHUSETTS DEP REPORTER (ISSN-1522-6980)
675 VFW Parkway, #354, Chestnut Hill, MA 02467
(800) 637-6330

Volume 22 **November-December 2015**

DEP Reporter

Department of Environmental Protection–Administrative Law Decisions

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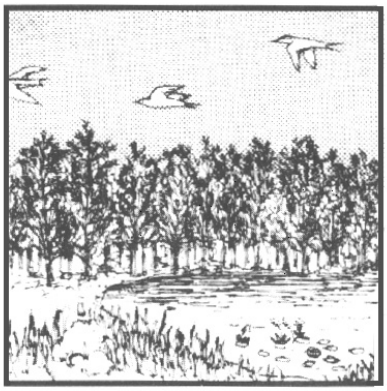
INDICES



For 2011-2014 cumulative DEP Reporter indices, please consult the Cumulative Indices Section in this Volume.

For 1994-2010 cumulative DEP Reporter indices, please consult the 17-year spiral-bound supplemental index.

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Clean Water Act

401 Waiver

Following the Superior Court's dismissal for lack of standing of the Petitioner's appeal from the issuance of a waiver to DCR from §401 water-quality certification for drainage work at a golf course, the Commissioner also dismissed this parallel administrative appeal brought by a project opponent on the grounds of mootness and lack of standing. The Petitioner had failed to comply with the order of the Chief Presiding Officer to file a memorandum demonstrating why the appeal should not be dismissed for lack of standing. *In the Matter of Massachusetts Department of Conservation and Recreation (Final Decision)*, 22 DEPR 17 (2015).

Groundwater Discharge Permit

Contamination

Commissioner Martin Suuberg affirmed the a groundwater discharge permit for a private wastewater treatment facility for a 200-unit condominium project in Plymouth against challenges that its discharges would adversely affect a neighboring septic system and cranberry bogs. The Department was found to have properly considered issues involving total nitrogen, phosphorus, bacteria, and other potential contaminants. *In the Matter of Sawmill Development Corporation (Final Decision)*, 22 DEPR 127 (2015).

Groundwater Mounding

A groundwater discharge permit for a private wastewater treatment facility for a 200-unit condominium project in Plymouth was upheld against challenges that its discharges would lead to groundwater contamination, where the Petitioners' expert incorrectly used the Hantush rather than MODFLOW method to estimate groundwater mounding thereby inflating the risk. *In the Matter of Sawmill Development Corporation (Final Decision)*, 22 DEPR 127 (2015).

Penalties and Fines

Commissioner Martin J. Suuberg accepted a settlement agreement entered into by a South Shore shopping center for alleged discharges of wastewater without a groundwater discharge permit under which the civil administrative penalty was reduced from $31,000 to $25,000. Under the agreement, the Petitioner is obligated to follow a new schedule for the construction of an onsite wastewater treatement system or connect the site to an existing nearby wastewater treatment facility. *In the Matter of Gator Swansea Partners, LLLP (Final Decision)*, 22 DEPR 1 (2015).

Settlement Discussions/Agreements

Commissioner Martin Suuberg approved a settlement agreement between the Buzzards Bay Coalition, Inc. and the Town of Falmouth after the environmental group had appealed DEP's groundwater discharge permit authorizing the discharge of 700,000 gallons of effluent per day from a sewage treatment plant. Under the terms of the settlement, Falmouth will be required to conduct periodic groundwater and water quality testing and work with the Cape Cod Commission to develop watershed reports under the Cape Cod 208 Plan Update. The Settlement Agreement also requires the parties to collaborate in designing a nutrient threshold study for Herring Brook. *In the Matter of Falmouth Department of Public Works (Final Decision)*, 22 DEPR 213 (2015).

Sole Soure Aquifer

Commissioner Martin Suuberg agreed with Chief Presiding Officer Salvatore M. Giorlandino that nothing precluded the issuance of a groundwater discharge permit for a private wastewater treatment facility serving a 200-unit condominium project over the Plymouth/Carver sole source aquifer. *In the Matter of Sawmill Development Corporation (Final Decision)*, 22 DEPR 127 (2015).

Standing

– Groundwater

Abutters to a proposed private wastewater treatment facility for a 200-unit condominium project in Plymouth had standing to challenge its groundwater discharge permit based on their concerns with its impacts on nearby cranberry bogs and potential groundwater mounding that would interfere with a septic system. *In the Matter of Sawmill Development Corporation (Final Decision)*, 22 DEPR 127 (2015).

Wastewater Treatment Plants

Commissioner Martin J. Suuberg accepted a settlement agreement entered into by a South Shore shopping center for alleged discharges of wastewater without a groundwater discharge permit under which the civil administrative penalty was reduced from $31,000 to $25,000. Under the agreement, the Petitioner is obligated to follow a new schedule for the construction of an onsite wastewater treatement system or connect the site to a nearby existing wastewater treatment facility. *In the Matter of Gator Swansea Partners, LLLP (Final Decision)*, 22 DEPR 1 (2015).

Hazardous Waste

Penalties and Fines

– Administrative Consent Order With Penalty

The Department and an Acushnet used-car business agreed to a four installment payment plan for a $7,500 penalty that was stipulated in a 2009 administrative consent order. The company had failed to honor the terms of that consent order and asserted that it would be a matter of financial hardship to require it to pay the full amount of the penalty in one lump sum. *In the Matter of Riverside Auto Sales and Salvage, Inc. (Final Decision)*, 22 DEPR 198 (2015).

Commissioner Martin Suuberg approved a proposed settlement agreement whereby a towing company found to have delivered a UST containing waste oil to a recycling facility would pay just 25% of a $53,299 penalty, with the balance to be suspended provided that the Petitioner complies with the provisions of the administrative consent order for at least one year. The order generally requires the company to label and clearly identify those of its containers that hold waste oil. *In the Matter of Arnie's 24 Hour Towing, Inc. (Final Decision)*, 22 DEPR 182 (2015).

The Commissioner ratified a proposed Settlement Agreement under which a Plymouth company charged with the surface-water discharge of VOCs agreed to a penalty of $15,000 (rather than the $26,600 originally assessed), with $20,000 of that amount to be suspended provided the Petitioner complies with the administrative consent order. *In the Matter of Rockland Industries, Inc. (Final Decision)*, 22 DEPR 181 (2015).

Rivers Protection

Intermittent Stream

MassDEP erred when finding that a 133-foot long buried clay pipe was an intermittent stream where the pipe was so clogged with soil and sediment from its inlet to its buried outlet that no body of water could possibly be found running through it in a definite channel, as required by the regulations. As such, the pipe did not contain a stream and this Isolated Vegetated Wetland could not be categorized as Bordering Vegetated Wetland. *In the Matter of Beckman (Final Decision)*, 22 DEPR 58 (2015).

Perennial Stream

Adopting a Recommended Decision from Presiding Officer Pamela D. Harvey, Commissioner Martin Suuberg agreed that Departmental regulations required the individual evaluation of streams at a site for purposes of determining watershed size. A 10 Citizens Group had argued that the three streams in question should be evaluated cumulatively and would therefore trip the watershed size to be ruled perennial. The decision allows watershed size for each stream to be determined using the Streamstats program or based on a calculation beginning at a point along each stream at the downgradient property boundary. *In the Matter of Jim Williamson-Barberry Homes, LLC (Corrected Final Decision)*, 22 DEPR 119 (2015).

Solid Waste

Landfill Closure

Adopting verbatim the Recommended Decision of Chief Presiding Officer Salvatore M. Giorlandino, Commissioner Martin Suuberg agreed with the Department that it had the legal authority to exempt from public disclosure records that it receives in the course of regulating landfills, and that the Petitioner had failed to demonstrate that information contained in its closure estimates should be considered confidential trade secrets. The case arose out of the closure of a landfill in Dartmouth. *In the Matter of Boston Environmental Corporation (Final Decision)*, 22 DEPR 3 (2015).

Practice and Procedure

– Confidentiality of Closure Estimates

Chief Presiding Officer Salvatore M. Giorlandino found that closure estimates prepared by a company bidding on closing a landfill in Dartmouth relating to information such as site preparation and assessment, cap-design elements, and post-closure monitoring were not to be considered confidential trade information since these were already within the public domain. *In the Matter of Boston Environmental Corporation (Final Decision)*, 22 DEPR 3 (2015).

Chief Presiding Officer Salvatore M. Giorlandino found that certain limited information submitted with closure estimates by a company bidding on closing a landfill in Dartmouth could be considered confidential and not in the public domain. This included financing costs, daily labor rates, and the post-closure monitoring and maintenance accrual fee to be paid to the property owner. *In the Matter of Boston Environmental Corporation (Final Decision)*, 22 DEPR 3 (2015).

Water Pollution Control

Standing

– Lack of Specific Facts

An appeal of a Water Quality Certification by an abutter was dismissed for lack of standing since the petition failed to cite any particular facts supporting aggrievement other than the Petitioner's status as an abutter. Moreover, the Petitioner had even failed to submit written comments to the Department during the comment period. *In the Matter of LeNormand (Final Decision)*, 22 DEPR 162 (2015).

Waterways

DEP Jurisdiction

A Motion for Reconsideration of a decision that had dismissed the premature appeal brought by a Rockport development group filed before any final Departmental decision was again denied for lack of jurisdiction. *In the Matter of The Landing Group, Inc. (Final Decision on Reconsideration)*, 22 DEPR 146 (2015).

A waterways appeal filed by a Rockport development group frustrated with permitting delays was dismissed for lack of jurisdiction where it was prematurely filed and there was no final Departmental decision to appeal. Soon after the appeal was filed, MassDEP issued a written determination concerning the project which was then appealed by the Petitioner and assigned a different docket number. *In the Matter of The Landing Group, Inc. (Final Decision)*, 22 DEPR 117 (2015).

Great Ponds

Commissioner Martin J. Suuberg allowed the modification of a previously issued waterways license for a private submersible water-ski slalom course on a small lake in Belchertown to eliminate the requirement that the course be removed annually and requiring instead that it be raised annually from the lake bed for inspection. *In the Matter of Fuhrmann (Final Decision on Reconsideration)*, 22 DEPR 67 (2015).

Adopting the Recommended Decision of Presiding Officer Timothy Jones, DEP issued a two-year license for a private submersible water ski slalom course on a small lake in Belchertown against intense local opposition to this privatization of public trust lands. The license is subject to conditions that limit the season of use, require videotaping of the equipment when it is removed annually, and obliges the proponent of this scheme to hold an annual public meeting to solicit public feedback. The Western Office had originally agreed to a 15-year license. *In the Matter of Fuhrmann (Final Decision)*, 22 DEPR 31 (2015).

Lateral Access

Commissioner Martin Suuberg ordered a draft waterways license for a residential pier in Harwich affirmed, rejecting the claims of two abutting pier owners that it would significantly interfere with their claimed rights of access. The parties focused their evidence on whether the new pier would interfere with the ability of seven commercial fishing vessels to travel to and from their leased slips on the neighboring town pier and also complicate the access of the individual petitioner to his private pier. *In the Matter of Maher (Final Decision)*, 22 DEPR 215 (2015).

Navigation

Overriding the documentation provided by project opponents of public navigation rights, DEP issued a two-year license for a private submersible water ski slalom course on a small lake in Belchertown to a seasonal resident. Testimony clearly established the limitations placed on other boaters when the course was in operation. *In the Matter of Fuhrmann (Final Decision)*, 22 DEPR 31 (2015).

Non Water Dependent Uses

An applicant's proposed mixed-use waterfront project that includes both water-dependent and non-water-dependent uses was properly reviewed and then rejected as a non-water-dependent project. *In the Matter of The Landing Group, Inc. (Final Decision)*, 22 DEPR 192 (2015).

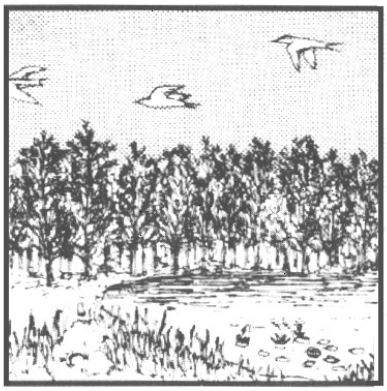
Practice and Procedure

– Motion for Reconsideration

Deputy Commissioner Gary Moran declined to reconsider a Recommended Decision of Presiding Officer Pamela D. Harvey previously adopted as final that concluded that nonwater-dependent areas of Commercial Wharf in Boston relating to parking and access were not entitled to any kind of exemption from waterways regulation based on an 1832 statute authorizing the wharf or a 1960s urban-renewal statute. The motion claimed a denial of due process because of a lack of credible evidence that the RDA was not properly authorized. The landowner also argued that it should be able to continue its reliance on DPW approvals under an Urban Renewal Plan and that the legislative grant for the redevelopment of the wharf authorized the nonwater-dependant uses. *In the Matter of Boston Boat Basin, LLC (Final Decision on Reconsideration)*, 22 DEPR 176 (2015).

Cumulative DEP Decisions Cited–January-December 2015

DECISIONS



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In the Matter of EMPIRE RECYCLING, LLC

OADR Docket No. 2015-017
Billerica

February 12, 2016
Martin Suuberg, Commissioner

Hazardous Waste-Penalties and Fines-Notice of Noncompliance-Demand for Suspended Penalties-Recycling Facility in Billerica-Consent Order-Waiver of Appeal Rights—An appeal by a Billerica recycling facility from DEP's demand that it pay a $14,420 suspended penalty after it failed to comply with the terms of a consent order was dismissed since the Appellant had waived any rights to an adjudicatory appeal from a DEP demand under the terms of the administrative consent order.

FINAL DECISION

I have reviewed the Motion for Approval of Settlement Agreement and Administrative Consent Order and Notice of Noncompliance ("ACO and NON") signed on January 5, 2016 by Eric Worrall, Regional Director for the Department (ACO-NE-15-4-Z001-SETT), and signed by Joseph Motzkin, Manager of Empire Recycling, LLC ("Empire"), on December 29, 2015. The ACO and NON include the parties' proposed resolution of Empire's appeal of the Unilateral Administrative Order ("UAO") (UAO-NE-15-4001).

The Department issues this Final Decision adopting and incorporating the ACO and NON. The petitioner is ordered to comply with all terms of the ACO and NON, particularly paragraph 11 of the Order. Under the terms of 310 CMR 1.01(8)(c), the appeal of the UAO is dismissed with the parties waiving whatever rights they may have to further administrative review before the Department as well as any appeal to court.

I have also reviewed and adopted the Recommended Final Decision ("RFD") of the Presiding Officer. The RFD recommends dismissal of Empire's appeal of the Department's Demand for Suspended Penalties arising out of an Administrative Consent Order With Penalty and Notice of Noncompliance (ACOP-NE-14-4002) that the parties previously entered on November 24, 2014. The parties are notified of their right to file a motion for reconsideration of this decision adopting the RFD pursuant to 310 CMR 1.01(14)(d). The motion must be filed with the Case Administrator and served on all parties within seven business days of the postmark date of this decision. A person who has the right to seek judicial review may appeal this decision adopting the RFD to the Superior Court pursuant to M.G.L. c. 30A, §14(1). The complaint must be filed in the Court within thirty days of receipt of this decision.

January 27, 2016
Timothy M. Jones, Presiding Officer

RECOMMENDED FINAL DECISION

INTRODUCTION

Empire Recycling, LLC, ("Empire") has appealed the Legal Notice of Violation and Demand for Payment of Suspended Penalties ("the Demand") issued by the Massachusetts Department of Environmental Protection ("DEP"). DEP moved to dismiss Empire's appeal under 310 CMR 1.01(11)(d)(2), arguing that Empire failed to state a claim upon which relief could be granted. In particular, DEP argues that the Demand arose out of Empire's undisputed violation of an Administrative Consent Order With Penalty and Notice of Noncompliance ("ACOP") that Empire entered with DEP in November 2014. The Demand is for suspended penalties that Empire had agreed in the ACOP to pay if it violated certain terms of the ACOP. DEP argues that when Empire entered that agreement it waived the right to appeal the Demand. As a consequence, DEP argues the appeal of the Demand should be dismissed. I agree with DEP, and recommend that DEP's Commissioner issue a Final Decision dismissing Empire's appeal of the Demand.[1]

BACKGROUND

Empire operates a recycling facility at 36 Sterling Road, Billerica, MA, pursuant to 310 CMR 16.04. The recyclables include paper, cardboard, and other containers that are stored at the site and prepared for sale and shipment to various end markets. In March 2009, DEP cited Empire for alleged violations of regulations pertaining to recycling, including the failure to implement appropriate management practices relating to the uncovered storage and speculative accumulation of recyclable materials. ACOP, p. 2. On February 14, 2011, DEP entered an administrative consent order with penalty to address Empire's violations concerning its recycling operation. ACOP, p. 2.

On May 30, 2013, DEP discovered additional alleged violations at Empire's facility, including the failure to enclose recyclable materials, which included food waste, soiled paper products, bagged waste, and a mattress. ACOP, p. 3. An odor of municipal solid waste was allegedly detected near the solid waste pile. Also in May 2013, the Town of Billerica took enforcement action against Empire concerning its recycling facility. *Id*.

1. This is not dispositive of the entire appeal because Empire also appealed the Unilateral Administrative Order (File No. UAO-NE-15-4001) ("UAO") that DEP issued to Empire on the same date it issued the Demand. To resolve that part of the appeal the parties entered a proposed settlement agreement and Administrative Consent Order and Notice of Noncompliance. In sum, the parties have proposed to resolve the UAO appeal by Empire agreeing to cease all operations, relinquish its general operating permit, and close the facility at issue. Simultaneously with this Recommended Final Decision, I have separately recommended that DEP's Commissioner approve the proposed settlement agreement and Administrative Consent Order and Notice of Noncompliance. In the event the Commissioner: (1) adopts this Recommended Final Decision and (2) accepts my recommendation that he approve the settlement of the UAO appeal, one Final Decision will be issued in the case resolving both appeals. The Final Decision will note that only that portion of the Final Decision dismissing Empire's appeal of the Demand is subject to a Motion for Reconsideration under 310 CMR 1.01(14) and appeal to Superior Court pursuant to G.L. c. 30A, § 14, because rights of reconsideration and appeal are waived when appeals are settled. *See* 310 CMR 1.01

(30) days of the date MassDEP issues [Empire] a written demand for payment." ACOP, p. 11. The effect of these provisions and Empire's undisputed violation of the ACOP was Empire's waiver of any right to an administrative appeal to challenge DEP's demand for suspended penalty triggered by the terms of the ACOP. This result is consistent with the Civil Administrative Penalty Statute, G.L. c. 21A § 16. It provides that if a person waives the right to an adjudicatory hearing, the "penalty shall be final immediately upon such waiver." G.L. c. 21A § 16. It is noteworthy that the ACOP does not contain any terms that would enable Empire to do what it seeks here--there are no terms that allow an appeal of a demand for suspended penalty in order to challenge DEP's discretion if Empire experiences financial or operational difficulties.

Empire argues that this result could lead to unfair consequences if, for example, DEP demanded an amount in excess of the penalty provided in the ACOP or DEP erroneously claimed that Empire had violated the terms of the ACOP. These arguments have logical merit, but they are irrelevant to the present dispute, i.e., there is no allegation that DEP incorrectly determined that the Empire violated the ACOP or calculated the amount of the suspended penalty due. DEP therefore had the right to demand the entire suspended penalty amount.

CONCLUSION

For all the foregoing reasons, I recommend that DEP's Commissioner issue a Final Decision dismissing Empire's appeal of the Demand.

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* * * * * *

In the Matter of ENTERGY NUCLEAR OPERATIONS, INC. and ENTERGY NUCLEAR GENERATION CO.

OADR Docket No. 2015-009
DEP File No. Waterways Application No. w14-4157,
Superseding Written Determination
Plymouth

February 25, 2016
Martin Suuberg, Commissioner

Waterways-Chapter 91 License-Residents Group Challenge of Nuclear Power Plant License for Moorings-Standing of Environmental Group-Standing of Residents Group-Private Tidelands— An environmental advocacy organization, the Jones River Watershed Association, and a Ten Citizens group had standing to challenge a Chapter 91 license given the Pilgrim Nuclear Plant to install a mooring system in compliance with NRC's post-Fukushima "Flex Strategy" directive to provide a backup system of seawater cooling in the event of a nuclear accident. Their challenge nevertheless failed as the project was found to comply with the relevant Massachusetts environmental regulatory requirements, Marine Fisheries Laws, the Massachusetts Clean Waters Act, and the Ocean Sanctuaries Act. The mooring proposal also was found to meet applicable standards governing Chapter 91 licensees covering water-related public rights in tidelands and the governing engineering and construction standards.

FINAL DECISION

I adopt the Recommended Final Decision of the Presiding Officer. The parties to this proceeding are notified of their right to file a motion for reconsideration of this decision, pursuant to 310 CMR 1.01(14)(d). The motion must be filed with the Case Administrator and served on all parties within seven business days of the postmark date of this decision. A person who has the right to seek judicial review may appeal this decision to the Superior Court pursuant to MGL c. 30A, §14(1). The complaint must be filed in the Court within thirty days of receipt of this decision.

February 5, 2016
Salvatore M. Giorlandino, Chief Presiding Officer

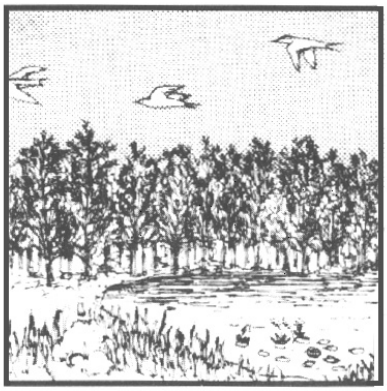
RECOMMENDED FINAL DECISION

INTRODUCTION

This appeal is brought by 12 residents of the Commonwealth proceeding jointly as a "Ten Residents Group" pursuant to 310 CMR 9.17(1)(c) "(the 12 Residents")[1] and the Jones River Watershed Association, Inc. ("JRWA"), an environmental advocacy organization based in Kingston, Massachusetts (collectively "the Petitioners"). They challenge a Written Determination and Draft License for Waterways License Application No. w14-4157 (collectively "the Chapter 91 License") that the Southeast Regional Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department")

1. The 12 residents consist of six residents of Plymouth, Massachusetts and six residents of several Cape Cod Communities. Petitioners' Appeal Notice, at p. 2. The six Plymouth residents are: (1) Christine Bostek, (2) Virginia Curcio, (3) Frances Pickett, (4) Norman Pierce, (5) David Seaverns, and (6) Karen Vale. The six Cape Cod residents are: (1) Janet Azarovitz of West Falmouth, Massachusetts; (2) Brian Boyle of Truro, Massachusetts; (3) William Maurer of Falmouth, Massachusetts; (4) John Nichols of East Orleans, Massachusetts; (5) Lee Roscoe of Brewster, Massachusetts; and (6) Margaret Stevens of Pocasset, Massachusetts. *Id*.

COMMENTARY



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Matthew Watsky *operates his Environmental Permitting and Regulatory, Land Use and Administrative Law practice out of his offices in Dedham, Massachusetts. A former Mass-DEP Deputy General Counsel, Mr. Watsky has represented a wide range of clients in private practice since 1990. His brings his experience and insight, primarily on behalf of for-profit corporations and property owners, to matters ranging from simple ANR approvals to complex matters with overlapping layers of federal, state and local environmental and land use regulation. In addition to environmental and land use, he represents clients in other areas of administrative law proceedings, such as those before OSHA, the FAA and local Airport Commissions.*

INTRODUCTION

The DEP in this period issued an unusual number of detailed decisions on permitting cases which involve multiple regulatory programs. One of the more important roles for practitioners who are involved early in the permitting process is to guide the client and consultants on the DEP precedent that establishes the best evidence to use when permit decision are challenged. Though I will not go into detail in the commentary that follows on each of these evidentiary issues, it may be well worth while to review the cases to gain insight if you have cases dealing with these programs.

As I have expressed in prior commentary, though the DEP usually gets it right in the adjudicatory hearing process, sometimes unusual fact patterns can lead to unpredictable outcomes. *Lowell C. Spring, LLC*, is one such example, which a commenter in a recent CLE noted was a case with facts you just couldn't make up. That case is also of interest due to its underlying legal issues, and common law claims that likely will ultimately govern the outcome in court.

1. Cranberry Bog Wars-All in the Family

In the Matter of Lowell C. Spring, LLC, Docket # WET-2014-019, 22 DEPR 151, the DEP found itself adjudicating a dispute regarding use of a drainage channel connecting two cranberry bogs, with the upgradient and a downgradient cranberry bog owners happening to be, respectively, the daughter and her mother. Given the facts in the case, it is clear that something very wrong has happened with the family relationship, and that this case was more about the mother acting to harm the daughter's interest than about legitimate management of cranberry bog water flowage rights. This case is a good example of the uncertainty of outcome in an administrative law proceeding when the agency relies on substantial evidence from one or more witnesses, but there is equally credible evidence from equally credible witnesses that would lead to a contrary result.

The mother in this appeal, Kathleen Mass ("Mann") has helped manage the cranberry bogs of a cranberry farmer, Lowell C. Spring, since 1964, when all the property at issue in this case was owned by Mr. Spring. That year, Mann and Spring dug a drainage channel that runs through Lot 4-6 and that lies between the upgradient bog on Lot 6 and the downgradient bog on Lot 5. They built a concrete sluice box with a valve at the downgradient edge of Lot 6 through which water could flow to a culvert under a road between the two lots. The water would then flow through the channel on Lot 4-6, and from the channel into the bog on Lot 5. From there, the water could flow along a channel within the bog on Lot 5 leading to a sluice box. By opening a gate in that sluice box one could control the water levels and allow any water passing through the bog on Lot 5 to flow through it and out the sluice box, rather than flooding the bog. Mr. Spring apparently operated the two bogs in that manner for 45 years.

Mann has personally owned Lot 5 since 2001. She also controls the LLC that owns Lot 4-6, which is not developed except by the drainage channel, and whose sole purpose is to allow water to flow from the upgradient bog to the downgradient bog. In 2007 Mann sold Lot 6 consisting of 90 acres, to her daughter, Denise Luke. Ms. Luke had been operating the bog on Lot 6 since 2004, though portions of the 90 acres are not currently productive.

This case arose following events in 2010. Ms. Luke's husband, seeking to control the water levels in the bog on Lot 6, opened the valve in the sluicebox on Lot 6 to let water flow out of the Luke bog, and opened the gate in the sluicebox at the downgradient edge of the bog on Lot 5 to let the water flow through and out of that bog. When alerted by a neighbor that water was flowing through her bog, Ms. Mann directed that neighbor to place fill in the channel to block the flow. Ms. Luke's husband removed the fill and completed flowing the water. Luke's husband attempted two more times in 2011 to flow water, each time opening the valve on Lot 6 and the gate in the sluicebox on Lot 5. The first time Luke flowed water in 2011, Mann had fill placed in the channel to block the water, and Luke removed the fill and allowed the water to flow. The second time water flowed, Mann had a larger amount of fill placed that blocked the flow along the channel. The placement of fill, blocking the flow of water out of Lot 6, resulted in flooding of the bog, destroying the vines and cranberry crop.

Luke sought enforcement by DEP against Mann, which DEP declined. Luke then filed a request for determination of applicability. The Plymouth Conservation Commission ruled that the land was in agricultural use, but that filling a channel resulted in a loss of flood storage and that filling an agricultural drainage ditch was not a specifically permitted activity under the list of agricultural activities listed in the regulations. Mann appealed and DEP issued an SDOA, which concluded the land was in agricultural use, but that filling the channel was the equivalent of adjusting the grade with the channel to maintain favorable growing condi-

tions, and was therefore exempt from DEP review. Luke appealed, asserting that the fill was not undertaken to support cranberry production, but instead was out of "spite" to her estranged daughter.

The Presiding Officer provides a detailed review of the opposing testimonies, with a qualified expert for Luke explaining that the valve and gate were designed specifically to enable the flow of water from one bog to and through the other without harming the function of the lower bog. The flows could be accommodated under Normal Maintenance, according to Luke's witness, by simply opening both devices. Witnesses and counsel for Mann, asserted that the conveyance of the bog did not include riparian rights or easements to enter Mann's land to operate the gate, and that the placement of fill was within Mann's rights to manage the land, and met the standards in 310 CMR 10.04, definition of Normal Maintenance (b)(7):

> the cleaning, clearing, grading, repairing, dredging, or restoring of existing man-made or natural water management systems such as reservoirs, farm ponds, irrigation systems, field ditches, cross ditches, canals/channels, grass waterways, dikes, sub-surface drainage systems, watering facilities, water transport systems, vents, and water storage systems, all in order to provide drainage, prevent erosion, provide more effective use of water, or provide for efficient use of equipment, and all for the purpose of maintaining favorable conditions for ongoing growing or raising of agricultural commodities

The Presiding Officer (PO) made a finding that the work did not cause erosion and was arguably for the purpose of maintaining favorable growing conditions. The PO appears to assume as true that Luke had no riparian or easement rights, even though those were issues not yet adjudicated in Superior or Land Court, and found that placing fill to block the flow of water in a drainage channel was a permissible activity as Normal Maintenance of Land in Agricultural Use. It strikes me, that the entire analysis misses the key point, however, of the definition of Normal Maintenance—that the activity must be "directly related to production or raising of the agricultural commodities."

What is clear in the fact pattern is that Mann's intent when filling the channel had little to nothing to do with the production of or raising cranberries on her own property. Luke had operated the downgradient gate to control the water levels on Mann's property, just as the system had been designed and operated for 45 years. Mann had no risk to her production, and even if Luke had not opened the gate, Mann herself had complete control over and use of the gate to control the water levels and ensure her own production. The placement of fill furthered only one purpose: to flood the upgradient bog and damage her daughter's agricultural production. There is nothing normal about placing fill to purposefully cause flooding to harm another property owner's land and agricultural production. This case, ironically, stands now for the proposition that work on land in agricultural use that is intended to harm and reduce an adjacent agricultural activity, without improving one's own, is normal maintenance.

A remarkable element of the decision is the DEP's assumption and reliance on the conclusion that Luke lacked any riparian rights to flow water through the Mann property. From discussion with counsel, I understand that a choice was made to proceed with the administrative review as an alternative to first pressing forward with litigation. But the issue was very clearly disputed and DEP was made aware that it was in litigation. DEP, in my view, should have avoided any mention of or drawn conclusions about easements, and arguably should have assumed that an easement right existed to enable water to flow, rather than the opposite. The facts as set forth in the DEP decision demonstrate that the original owner (Spring, with Mann) created the bogs and the connecting channel, designed and built the water flow control valve and gate structures, and operated the two bogs together for 45 years. Flow out of the Lot 6 bog is impossible other than by use of the valve, flowing water through the channel on Lot 4-6, through the bog on Lot 5, and out its gate and sluice box. Those structures all remained in place and were functional at the time of conveyance by Mann to Luke of the upgradient bog. There are at least three theories of law that would support an outcome enforcing Luke's rights to flow water: riparian rights under the reasonable use rule, given that water had flowed in this way for 45 years; easement by implication or necessity; and easement by estoppel via a plan reference.

Without getting into details and citing cases, the reasonable use rule bars anyone from entirely blocking the flow of water from flowing along its established course such that it floods an upgradient property. An easement by necessity will be formed where there is common ownership of the land, a transfer of part of the land, a necessity when severing the land for an easement to benefit either parcel, and a continuing necessity for an easement. An easement can be implied by quasi-easement, if there is common ownership, the common owner's continuous use of the land to benefit another part of that owners' land (creating a quasi-easement), a transfer of part of the land, and necessity at the time of severance for the pre-existing use to continue for the benefit of either parcel. *See,* Mass. Practice - Easements. The case is now pending in Superior Court, and for those with a bit of curiosity, it is *Denise Beaton Luke* v. *Mann, et al*, Plymouth Superior Court 1483CV00997.

2. Standing and Substantive Review of a Groundwater Discharge Permit

In the Matter of Sawmill Development Corporation, 22 DEPR 127, OADR Docket 2014-016, the DEP granted standing to opponents of a Groundwater Discharge Permit issued for a wastewater treatment plant to service a 200 unit 40B condominium project; but upheld the permit against the Petitioners' challenges.

The case sets out a clear distinction between the standard of review under which a party may establish standing, asserting it is aggrieved, and the standard for review of the permit issuance itself. It also may serve as a primer for those who seek such a permit, to understand the tactics, legal theories and flawed technical references and standards that sophisticated opponents of 40B permits will use in permitting proceedings. Petitioners, Indian Brook Cranberry Bogs, Inc. and Wanda Jane Warmack, each

own land adjacent to the project site. They each were also parties in the zoning permit proceeding under G.L. c. 40B, and the unsuccessful Land Court and Appeals Court litigation challenging the ZBA permit. *Id.* at 128, citing *Indian Brook Cranberry Bogs, Inc.* v. *Zoning Board of Appeals of Plymouth*, 78 Mass. App. Ct. 1111 (2010).

Petitioners were represented by counsel who regularly represents clients in opposition to 40B projects, and they used arguments and analysis to oppose the 66,000 gallon per day effluent discharge that would be typical to use against any other similar facility. The case decision is a blue print for these kinds of technical arguments, and how the Applicant's experts and counsel fended off those claims.

First, Presiding Officer Giorlandino considered Petitioners' standing. They claimed the DEP ignored a hydraulic and hydrogeological connection between the discharged effluent and the irrigation supply of the bogs, and the groundwaters beneath the septic system serving Warmack's home. (Unstated is what theory was proffered for how effluent from a treatment plant would cause an adverse effect to the groundwater under a septic system.) They also asserted that the Wastewater Treatment Plant (WWTP) would raise nutrient and other pollutant loading of the groundwaters contributing to a pond; that the system would violate Total Maximum Daily Load limitation of the Groundwater Discharge Regulatory program; that the permit lacked limitations on total phosphorous, leading to a violation of the surface water quality standards; and that the effluent discharge would cause the elevation of groundwater under Warmack's septic system to rise, and cause it to fail.

Petitioners succeeded in showing standing by testimony setting forth a "plausible claim of a definite violation of a private right, private property interest, or private legal interest that the Massachusetts Clean Water Act was intended to protect." The alleged harm "must be specific or 'particularized' to the party, meaning that it must be different in kind or magnitude from that suffered by the general public." *Id.* at 131. In considering standing, "the plaintiff must put forth credible evidence to substantiate his allegations. It is in this context that standing is essentially a question of fact for the " trier of facts. *Id.* at 132. The Petitioners put forth "evidence which if taken as true demonstrated the possibility that they will be adversely affected by the proposed [WWTP] and their injury will be different in kind or magnitude from any injury that might be suffered by the general public." *Id.*. This finding was based on a "lower standard of proof" than that necessary to sustain the merits of the substantive claims. *Id.*. The decision on the merits of the substantive claims depended on "a preponderance of the evidence introduced at the Hearing, including expert testimony from the Applicant's and the Department's respective expert witnesses." (In this respect, the decision relies more on a civil litigation standard of proof as opposed to merely selecting a credible witness and relying on that view as substantial evidence as in *Lowell Spring*.)

Without going into each technical issue, if you are faced with a challenge to a groundwater discharge, consider a close review of the issues and claims made in this case, and provide a copy of this case decision to your expert hydrogeologist so he can review it as part of his preparation. For example, to support their assertion that the discharge to groundwater would mound the elevations of groundwater and harm Petitioner Warmack's septic system, Petitioners' hydrogeologist testified that he had performed mounding calculations and presented the results of those calculations. The Applicant's expert refuted those calculations, noting that Petitioners' calculations were based on the "Hantush Method, which has a number of limitations rendering the calculations" unreliable. *Id.* at 137. The Hantush Method is particularly well suited for calculations of mounding for short duration events like groundwater flow beneath a stormwater infiltration pond, but not for calculating mounding in connection with a WWTP. For a continuous source of indefinite duration, such as a soil absorption field for a WWTP, the use of the Hantush Method will result in a prediction of a mound height "infinitely high" and as a "result it is necessary when carrying out the calculations to limit the duration for which the mound is calculated." *Id.*.

I have no doubt that Petitioners' counsel and their consultant knew fully well the limitations of the various technical methodologies they used to challenge the permit, and left it to the adversarial process to see if the DEP and the Applicant had the technical competence and advocacy skills to push back and defend the permit decision. They also had advocated the issue before the Land Court and failed there as well. See, *Indian Brook Cranberry Bogs, Inc., et al.,* v. *Board of Appeals of The Town of Plymouth* 17 LCR 646, MISC 06-322281 (2009).[1] ■

1. Judge Piper specifically found "that groundwater from the project will not move in the direction of the Warmack parcel, and thus will not bring about the untoward consequences about which she is concerned, particularly those which might affect her septic system and make its eventual replacement problematic." Note, The Applicant moved for but was denied Summary Decision on the basis of a collateral estoppel effect of this ruling. Though the issues were closely aligned, PO Giorlandino denied that motion.

This is the last page of the Commentary section.