

DEP REPORTER

*Massachusetts Department of Environmental Protection
Administrative Law Decisions*

PUBLISHED BY LANDLAW LEGAL PUBLISHERS

**VOLUME 24
2017**

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

Martin Suuberg, Commissioner	2015		
Salvatore M. Giorlandino, Chief	2007	Timothy M. Jones, Presiding Officer	2009
Jane A. Rothchild, Presiding Officer	2015		

COMMENTARY BY:

Matthew Watsky, Esq.

*CITE BY VOLUME AND PAGE OF THE
DEP REPORTER THUS:*

In the Matter of Entergy Nuclear Operations, Inc. (Final Decision), 23 DEPR 4 (2016)



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MASSACHUSETTS DEP REPORTER (ISSN-1522-6980)

675 VFW Parkway, #354, Chestnut Hill, MA 02467

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DEP Reporter

Department of Environmental Protection—Administrative Law Decisions

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Air Quality

Civil Rights

Chief Presiding Officer Salvatore M. Giorlandino affirmed in a Recommended Decision DEP’s approval of a Major Comprehensive Plan Application for a 350-megawatt Brockton power plant, finding that the Applicant’s air quality modeling for the facility satisfied the EPA’s NAAQS standards and would therefore not have an adverse or disparate impact on the Brockton’s Environmental Justice Community. As such, it would satisfy the requirements of both Title VI and the 2002 Massachusetts Environmental Justice Policy. *In the Matter of Brockton Power Co., LLC (Recommended Final Decision)*, 24 DEPR 27 (2017).

Comprehensive Air Quality Plan Approval

Chief Presiding Officer Salvatore M. Giorlandino found that the economic benefits of a proposed Brockton power plant would significantly outweigh any environmental and social costs and that the Applicant had conducted a proper alternative site evaluation. *In the Matter of Brockton Power Co., LLC (Recommended Final Decision)*, 24 DEPR 27 (2017).

Chief Presiding Officer Salvatore M. Giorlandino affirmed in a Recommended Decision DEP’s approval of a Major Comprehensive Plan Application for a 350-megawatt Brockton power plant, finding that it would comport with federal and Massachusetts air quality regulations, noise pollution regulations, and both Title VI and the 2002 Massachusetts Environmental Justice Policy. *In the Matter of Brockton Power Co., LLC (Recommended Final Decision)*, 24 DEPR 27 (2017).

Commissioner Martin Suuberg adopted the findings of Chief Presiding Officer Salvatore M. Giorlandino’s 155-page Recommended Final Decision affirming the Department’s approval of a Comprehensive Air Quality Plan for a Brockton power plant, but remanded the matter to MassDEP under a strict timetable for an updated Environmental Justice Review and to verify compliance with the Massachusetts Global Warming Solutions Act. *In the Matter of Brockton Power Co., LLC (Interlocutory Decision—Remand to MassDEP for GWSA and Updated Environmental Justice)*, 24 DEPR 24 (2017).

Noise Pollution

A 350-megawatt Brockton power plant proposal as mitigated would comply with MassDEP Noise Pollution regulations and the Department’s Noise Policy and would require the ongoing monitoring of noise impacts. The plan called for the plant’s primary noise sources to be sited away from the closest residential receptors. *In the Matter of Brockton Power Co., LLC (Recommended Final Decision)*, 24 DEPR 27 (2017).

Penalties and Fines

– Ability to Pay

Commissioner Martin Suuberg approved a settlement agreement where a farm in Holland, found to have been burning trash, electronics, and plastics in an open pit, was able to negotiate a reduction in its fine from \$1,720 to \$500. The \$500 is to be paid in ten monthly installments. *In the Matter of Blodgett Farm @ Pashapaug, LLC (Final Decision)*, 24 DEPR 176 (2017).

Power Plant

Chief Presiding Officer Salvatore M. Giorlandino affirmed in a Recommended Decision DEP’s approval of a Major Comprehensive Plan Application for a 350-megawatt Brockton power plant, finding that it would comport with federal and Massachusetts air quality regulations, noise pollution regulations, and both Title VI and the 2002 Massachusetts Environmental Justice Policy. *In the Matter of Brockton Power Co., LLC (Recommended Final Decision)*, 24 DEPR 27 (2017).

Clean Water Act

Jurisdiction

OADR had jurisdiction to adjudicate a citizen group’s appeal from a Water Quality Certification issued by the Western Regional Office for a pipeline project and this jurisdiction was not supplanted by the Natural Gas Act since the Department acted on the permit request within one year. *In the Matter of Tennessee Gas Pipeline Company, LLC (Final Decision)*, 24 DEPR 76 (2017).

Climate Change

GWSA

Commissioner Martin Suuberg adopted the findings of Chief Presiding Officer Salvatore M. Giorlandino’s 155-page Recommended Final Decision affirming the Department’s approval of a Comprehensive Air Quality Plan for a Brockton power plant, but remanded the matter to MassDEP under a strict timetable for an updated Environmental Justice Review and to verify compliance with the Massachusetts Global Warming Solutions Act. *In the Matter of Brockton Power Co., LLC (Interlocutory Decision—Remand to MassDEP for GWSA and Updated Environmental Justice)*, 24 DEPR 24 (2017).

Hazardous Waste

Massachusetts Contingency Plan

– Notice of Responsibility

Adopting the Recommended Decision of Presiding Officer Jane A. Rothchild, Commissioner Martin Suuberg dismissed an attempted appeal of a Notice of Responsibility and Request for Information since neither is an appealable document. *In the Matter of MEZ Realty, Inc. (Final Decision)*, 24 DEPR 4 (2017).

Penalties and Fines

– Administrative Consent Order With Penalty

MassDEP affirmed a settlement agreement whereby a printing company’s fine of \$500 for failure to file a Printer Compliance Certification was reduced to \$250, with potential fines of \$1,000 a day and other penalties for any future violations. *In the Matter of Millennium Press (Final Decision)*, 24 DEPR 199 (2017).

Solid Waste

Penalties and Fines

A settlement agreement entered into by a recycling concern over a 25-acre Northbridge site was reviewed and approved by the Commissioner. The Petitioner agreed to pay the original \$68,613 fine after it failed to comply with the first settlement agreement from 2013 under which it was obligated (in lieu of the fine) to conduct remediation, cede conservation restrictions, and construct a canoe launch. *In the Matter of D & G Recycling, Inc. (Final Decision)*, 24 DEPR 200 (2017).

Water Pollution Control

Standing

– Environmental Activists

An environmental advocacy organization, BEAT (Berkshire Environmental Action Team) had standing to challenge water quality permits issued to a pipeline company since it had submitted written public comments dur-

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ing the comment period and was a private organization with a mandate to protect the environment. *In the Matter of Tennessee Gas Pipeline Company, LLC (Final Decision)*, 24 DEPR 76 (2017).

—Property Owners

Property owners whose land would be traversed by a pipeline project had standing to challenge water quality permits issued for the project notwithstanding the fact that they had executed easement agreements with the pipeline company allowing access over their properties. *In the Matter of Tennessee Gas Pipeline Company, LLC (Final Decision)*, 24 DEPR 76 (2017).

—Written Comments

A citizen group and various individuals lacked standing to challenge the water quality permits for a pipeline project where they had failed to submit written comments during the comment period. *In the Matter of Tennessee Gas Pipeline Company, LLC (Final Decision)*, 24 DEPR 76 (2017).

Water Quality Certification

MassDEP turned back a challenge from an environmental group and landowners challenging a Water Quality Certification authorizing a natural gas pipeline project after ruling that the pipeline was necessary to accommodate important social and economic development and reviewing the proponent's alternatives analysis which showed that no less environmentally damaging route was feasible. The applicant also demonstrated that it took appropriate and practicable steps to avoid and minimize potential adverse impacts to BVW, IVW, and LUW. *In the Matter of Tennessee Gas Pipeline Company, LLC (Final Decision)*, 24 DEPR 76 (2017).

Water Supply**Zone I**

Adopting without the change the Recommended Decision of Presiding Officer Timothy M. Jones, MassDEP Commissioner Martin Suuberg affirmed the Department's denial of a Public Water System permit for an Adams project based on a finding that that Zone I requirements had not been met. The Applicant claimed that the project would sufficiently protect the bedrock spring sourcing the water from noxious land uses and also that the well was grandfathered under a previous regulatory regime. However, the Applicant only controlled roughly 10% of the 14.7 acres underlying Zone I, while no less than 52% of the remaining area was dedicated to residential uses. MassDEP declined to grant a waiver to reduce the size of Zone 1. *In the Matter of Butterworth Water Company, Inc. (Final Decision)*, 24 DEPR 103 (2017).

Waterways**Navigation**

After extensive testimony from ship captains and other experts, a project to remodel and update a Woods Hole ferry terminal and three ferry slips was not found to significantly interfere with navigation. The Presiding Officer noted that the Petitioners had failed to show that the project would interfere with other boaters or that it would increase marine traffic since the number of slips would remain at three. *In the Matter of Woods Hole, Martha's Vineyard & Nantucket Steamship Authority (Final Decision)*, 24 DEPR 125 (2017).

Practice and Procedure**—Mootness**

An appeal challenging a Boston Redevelopment Authority Chapter 91 license for a mixed-use project on Long Wharf was dismissed as moot given that BRA could not proceed with the project without the approval of

the National Park Service and it had therefore withdrawn its waterways application. *In the Matter of Boston Redevelopment Authority (Final Decision on Remand)*, 24 DEPR 18 (2017).

—Motion to Dismiss

Based on the Recommended Decision of Presiding Officer Jane Rothchild, MassDEP dismissed an appeal from an environmental group, the Friends of the Malden River, for lack of standing. The group was an unincorporated association and also failed to state a claim upon which relief might be granted. The appeal generally sought additional public benefits such as improved pathways and other amenities but failed to state specifically how the Written Determination fell short of the regulations any deficiencies in the license could be corrected. *In the Matter of Suffolk Square Associates III (Final Decision)*, 24 DEPR 13 (2017).

Standing**—Associations**

Based on the Recommended Decision of Presiding Officer Jane Rothchild, MassDEP dismissed an appeal from an environmental group, the Friends of the Malden River, for lack of standing. The group was an unincorporated association and also failed to state a claim upon which relief might be granted. The appeal generally sought additional public benefits such as improved pathways and other amenities but failed to state specifically how the Written Determination fell short of the regulations any deficiencies in the license could be corrected. *In the Matter of Suffolk Square Associates III (Final Decision)*, 24 DEPR 13 (2017).

—Failure to Submit Comments

A pro se Petitioner's appeal of her neighbor's draft license for a dock on a pond in Becket was dismissed for lack of standing where she failed to submit written comments during the public comment period, failed to state precisely what her grounds of appeal were, and then submitted only ambiguous claims about title issues accompanied by an illegible sketch and undated maps. *In the Matter of Cohen (Final Decision)*, 24 DEPR 101 (2017).

—Ten Residents

MassDEP finalized a waterways license for a project updating the Woods Hole ferry terminal and dismissed a Ten Residents Group appeal asserting that the project would interfere with navigation and the public's waterfront access rights. *In the Matter of Woods Hole, Martha's Vineyard & Nantucket Steamship Authority (Final Decision)*, 24 DEPR 125 (2017).

Tidelands

A project to remodel and update a Woods Hole ferry terminal and three ferry slips was not found to significantly interfere with the public's right of free foot passage through tidelands or its fishing rights. *In the Matter of Woods Hole, Martha's Vineyard & Nantucket Steamship Authority (Final Decision)*, 24 DEPR 125 (2017).

Wetlands Appeals**Appeal****—Timeliness**

Mashpee landowners' appeal to OADR from an SOC was not barred because of their failure to appeal the project's denial under the local wetlands bylaw to the Superior Court because the Conservation Commission issued its Order of Conditions denying the project more than 21 days after closing its public hearing. As such, the landowners' were not obligated to appeal the wetland bylaw denial. *In the Matter of Gooseberry Island Trust (Final Decision)*, 24 DEPR 177 (2017).

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Coastal Bank

– General

On motion for reconsideration from a Chatham landowner whose revetment project had been denied by MassDEP, Presiding Officer Jane A. Rothchild found that she had not erred in ruling that the sediment from the coastal bank played a significant role in protecting the statutory interests of storm damage prevention and flood control. *In the Matter of McGonigle (Final Decision on Reconsideration)*, 24 DEPR 197 (2017).

Coastal Beach

Adopting without comment a Recommended Decision from Presiding Officer Jane A. Rothchild, Commissioner Martin Suuberg affirmed an SOC annulling an Order of Conditions from Chatham authorizing the construction of a 108-foot stone revetment and sacrificial sand cover to replace a deteriorated coir fiber roll bank prevention system. The project could not comply with the relevant performance standards because the revetment would prevent the coastal bank from supplying sediment to coastal beaches, coastal dunes, or barrier beaches and undermine flood control and storm damage prevention. *In the Matter of McGonigle (Final Decision)*, 24 DEPR 151 (2017).

Coastal Dune

– Revetment

Adopting without comment a Recommended Decision from Presiding Officer Jane A. Rothchild, Commissioner Martin Suuberg affirmed an SOC annulling an Order of Conditions from Chatham authorizing the construction of a 108-foot stone revetment and sacrificial sand cover to replace a deteriorated coir fiber roll bank prevention system. The project could not comply with the relevant performance standards because the revetment would prevent the coastal bank from supplying sediment to coastal beaches, coastal dunes, or barrier beaches and undermine flood control and storm damage prevention. *In the Matter of McGonigle (Final Decision)*, 24 DEPR 151 (2017).

Evidence

– Hearsay

On motion for reconsideration from a Chatham landowner whose revetment project had been denied by MassDEP, Presiding Officer Jane A. Rothchild found that she had not erred in admitting into evidence memoranda from consultants to the Chatham Conservation Commission as these were properly ruled to be reliable hearsay. *In the Matter of McGonigle (Final Decision on Reconsideration)*, 24 DEPR 197 (2017).

Expert Testimony

The appeal of a Ten Citizens Group from a Superseding Order of Conditions authorizing the development of a roadway to serve two new building lots was dismissed on the recommendation of Presiding Officer Timothy M. Jones, who found that the Petitioners had failed to plead with any specificity or supply any expert testimony when ordered to do so on the relevant wetlands issues. *In the Matter of Tamaro (Final Decision)*, 24 DEPR 122 (2017).

Isolated Land Subject to Flooding

– Expert Testimony

A *pro se* Petitioner seeking to challenge a MassDEP SOC reversing a Marshfield Conservation Commission finding that the Applicant had constructed a driveway and placed fill on an Isolated Land Subject to Flooding lacked standing to do so. The Petitioner did not submit any prefiled testimony, could not prove that he had submitted any written information to the Conservation Commission prior to the close of the hearing, and lacked any personal technical expertise. Moreover, the Petitioner was using this appeal as a means to litigate past work that occurred decades ago. *In the Matter of Vacirca (Final Decision)*, 24 DEPR 143 (2017).

Land Containing Shellfish

Ruling on an appeal from a landowner's challenge to a SOC affirming the Mashpee Conservation Commission's denial of wetland permits for a 200' bridge from the mainland to a three-acre island, MassDEP found that the revised plans that substituted a steel bridge for a wooden one were barred from consideration on this appeal because they represented a substantially different project with greater impacts on Land Containing Shellfish and a salt marsh. *In the Matter of Gooseberry Island Trust (Final Decision)*, 24 DEPR 177 (2017).

MEPA

An abutter's substantive claim that the Department issued a SOC prematurely without sufficient consultation with the Massachusetts Historic Commission over a subdivision's impact on the General Rufus Putnam House Historic Site, a national landmark, was without merit since the review by the US Army Corps of Engineers of the subdivision, with MHC input, did not find that it would have any adverse affect on historic resources. *In the Matter of Brice Estates, Inc. (Final Decision)*, 24 DEPR 168 (2017).

Order of Conditions

A 1985 final Order of Conditions that included a specific prohibition of any kind of hardened beach revetment at the locus would not bar the installation of revetment in the future since the Conservation Commission erred when failing to include this proscription as a continuing condition in the Certificate of Compliance. *In the Matter of McGonigle (Final Decision)*, 24 DEPR 151 (2017).

Order of Resource Area Delineation

An Order of Resource Area Delineation issued Habitat for Humanity by the Plymouth Conservation Commission in August 2010, which would have expired in three years, was effectively extended another four years by the Permit Extension Act. Residents opposing the project unsuccessfully asserted that, in this case, an ORAD is not the kind of permit covered by the Act because there was no other permit issued along with it authorizing a specific project. *In the Matter of Habitat for Humanity Plymouth (Final Decision)*, 24 DEPR 1 (2017).

Practice and Procedure

– Expert Testimony

A hydrologist with very limited experience in wetlands permitting under the Act and regulations who did not consider himself a wetlands expert was unable to provide effective expert testimony on behalf of a Ten Residents Group attempting to challenge a Superseding Order of Conditions approving an off-road vehicle/motocross facility in Charlton. Further dooming the Petitioners' appeal was the absence of any testimony from a professional engineer backing up its claims that the stormwater management design was flawed. *In the Matter of Sunset City, Inc. (Final Decision)*, 24 DEPR 110 (2017).

– Mootness

An appeal from a builder seeking a Superseding Order of conditions after his project was turned down by the Bridgewater Conservation Commission was dismissed as moot where the project had also been rejected under the local wetlands bylaw and the Applicant had failed to appeal to the Superior Court. The applicant's request for a stay was also turned down. The applicant's request for a stay was also turned down. *In the Matter of Brown Builders, Inc. (Final Decision)*, 24 DEPR 11 (2017).

– Motion for Directed Decision

A *pro se* Petitioner seeking to challenge a MassDEP SOC reversing a Marshfield Conservation Commission finding that the Applicant had constructed a driveway and placed fill on an Isolated Land Subject to Flooding lacked standing to do so. The Petitioner did not submit any prefiled testimony, could not prove that he had submitted any written in-

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Abdelnour, Docket No. 88-138, Final Decision: Part I, 1 DEPR 326 (November 22, 1994)

In the Matter of Woods Hole, Martha's Vineyard & Nantucket Steamship Authority (Recommended Final Decision), 24 DEPR 133 (2017)

Audette, Docket No. 09-066, Final Decision, 19 DEPR 82 (2012)

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Boston Boat Basin, Docket No. 12-008, 12-009, Final Decision, 21 DEPR 119 (2014)

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Boston Boat Basin, Docket No. 12-008, 12-009, Recommended Final Decision, 21 DEPR 119 (2014)

In the Matter of Woods Hole, Martha's Vineyard & Nantucket Steamship Authority (Recommended Final Decision), 24 DEPR 130 (2017)

Boston Environmental Corporation, Docket No. 13-041, Final Decision, 22 DEPR 3 (2015)

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In the Matter of Tennessee Gas Pipeline Co., LLC (Recommended Final Decision), 24 DEPR 78 (2017)

Boston Properties, LP, Docket No. WET-04-012, Final Decision, 19 DEPR 126 (2012)

In the Matter of Habitat for Humanity Plymouth (Recommended Final Decision), 24 DEPR 2 (2017)

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Boston Redevelopment Authority, Docket No. 08-128, Final Decision, 17 DEPR 44 (2010)

In the Matter of Boston Redevelopment Authority (Recommended Final Decision on Remand), 24 DEPR 19 (2017)

Boston Redevelopment Authority, Docket No. 08-128, Recommended Final Decision, 17 DEPR 44 (2010)

In the Matter of Boston Redevelopment Authority (Recommended Final Decision on Remand), 24 DEPR 19 (2017)

Bosworth, Docket No. WET-15-015, Final Decision (March 14, 2016)

In the Matter of Habitat for Humanity Plymouth (Recommended Final Decision), 24 DEPR 1 (2017)

Bosworth, Docket No. WET-15-015, Recommended Final Decision (February 17, 2016)

In the Matter of Habitat for Humanity Plymouth (Recommended Final Decision), 24 DEPR 1 (2017)

Brockton Power Company, LLC, Docket No. 11-025, -026, Interlocutory Decision, 24 DEPR 24 (2017)

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In the Matter of Sunset City, Inc., Recommended Final Decision, 24 DEPR 117 (2017)

In the Matter of Tennessee Gas Pipeline Co., LLC (Recommended Final Decision), 24 DEPR 90 (2017)

Brockton Power Company, LLC, Docket No. 11-025, -026, Recommended Final Decision, 24 DEPR 27 (2016)

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In the Matter of Sunset City, Inc., Recommended Final Decision, 24 DEPR 117 (2017)

In the Matter of Tennessee Gas Pipeline Co., LLC (Recommended Final Decision), 24 DEPR 90 (2017)

Campbell, Docket No. 07-099, Final Decision, 17 DEPR 220 (2010)

In the Matter of Brown Builders, Inc. (Recommended Final Decision), 24 DEPR 12 (2017)

Campbell, Docket No. 07-099, Recommended Final Decision, 17 DEPR 220 (2010)

In the Matter of Brown Builders, Inc. (Recommended Final Decision), 24 DEPR 12 (2017)

Carulli, Docket No. 05-214, Recommended Final Decision, 13 DEPR 224 (2006)

In the Matter of Tammaro (Recommended Final Decision), 24 DEPR 123 (2017)

City of Lowell, Docket No. WET-12-002, Final Decision, 19 DEPR 133 (2012)

In the Matter of Tammaro (Recommended Final Decision), 24 DEPR 124 (2017)

City of Lowell, Docket No. WET-12-002, Recommended Final Decision, 19 DEPR 133 (2012)

In the Matter of Tammaro (Recommended Final Decision), 24 DEPR 124 (2017)

Community Boating Center, Inc., Docket No. 11-005, 11-006, Recommended Final Decision, 18 DEPR 230 (2011)

In the Matter of McGonigle (Recommended Final Decision), 24 DEPR 159 (2017)

Costello, Trustee, Docket Nos. 92-047/048, Final Decision—Order of Dismissal, 2 DEPR 98 (1995)

In the Matter of FTO Realty Trust (Recommended Final Decision on Reconsideration), 24 DEPR 74 (2017)

Couillard, Docket No. WET-2008-035, Final Decision (August 8, 2008)

In the Matter of Brice Estates, Inc. (Recommended Final Decision), 24 DEPR 170 (2017)

Couillard, Docket No. WET-2008-035, Recommended Final Decision (July 11, 2008)

In the Matter of Brice Estates, Inc. (Recommended Final Decision), 24 DEPR 170 (2017)

Drohan, Docket No. 95-083, Final Decision, 3 DEPR 39 (1996)

In the Matter of Brice Estates, Inc. (Recommended Final Decision), 24 DEPR 171 (2017)

Dupras, Docket No. 12-026, Final Decision, 20 DEPR 84 (2013)

In the Matter of Gooseberry Island Trust (Recommended Final Decision), 24 DEPR 182 (2017)

In the Matter of Sunset City, Inc., Recommended Final Decision, 24 DEPR 113 (2017)

In the Matter of Vacirca (Recommended Final Decision, 24 DEPR 145 (2017)

Dupras, Docket No. 12-026, Recommended Final Decision, 20 DEPR 84 (2013)

In the Matter of Gooseberry Island Trust (Recommended Final Decision), 24 DEPR 182 (2017)

In the Matter of Sunset City, Inc., Recommended Final Decision, 24 DEPR 113 (2017)

In the Matter of Vacirca (Recommended Final Decision, 24 DEPR 145 (2017)

Elite Home Builders, LLC, Docket No. WET-15-010, Final Decision, 22 DEPR 202 (2015)

In the Matter of Brice Estates, Inc. (Recommended Final Decision), 24 DEPR (2017)

In the Matter of Gooseberry Island Trust (Recommended Final Decision), 24 DEPR 181 (2017)

In the Matter of Sunset City, Inc., Recommended Final Decision, 24 DEPR 112 (2017)

In the Matter of Vacirca (Recommended Final Decision, 24 DEPR 145 (2017)

Elite Home Builders, LLC, Docket No. WET-15-010, Recommended Final Decision, 22 DEPR 202 (2015)

In the Matter of Brice Estates, Inc. (Recommended Final Decision), 24 DEPR (2017)

In the Matter of Gooseberry Island Trust (Recommended Final Decision), 24 DEPR 181 (2017)

In the Matter of Sunset City, Inc., Recommended Final Decision, 24 DEPR 112 (2017)

CUMULATIVE DEP DECISIONS CITED—JANUARY-AUGUST 2017

- In the Matter of Vacirca (Recommended Final Decision, 24 DEPR 145 (2017))
- Enos, Docket No. 12-019, Final Decision, 20 DEPR 25 (2013)**
In the Matter of Brice Estates, Inc. (Recommended Final Decision), 24 DEPR 172 (2017)
In the Matter of Vacirca (Recommended Final Decision, 24 DEPR 148 (2017))
- Enos, Docket No. 12-019, Recommended Final Decision, 20 DEPR 25 (2013)**
In the Matter of Brice Estates, Inc. (Recommended Final Decision), 24 DEPR 172 (2017)
In the Matter of Suffolk Square Associates III (Recommended Final Decision), 24 DEPR 16 (2017)
In the Matter of Vacirca (Recommended Final Decision, 24 DEPR 148 (2017))
- Entergy Nuclear Generation Co., Docket No. 15-009, Final Decision, 23 DEPR 4 (2016)**
In the Matter of Suffolk Square Associates III (Recommended Final Decision), 24 DEPR 16 (2017)
In the Matter of Woods Hole, Martha's Vineyard & Nantucket Steamship Authority (Recommended Final Decision), 24 DEPR 131 (2017)
- Entergy Nuclear Generation Co., Docket No. 15-009, Recommended Final Decision, 23 DEPR 4 (2016)**
In the Matter of Suffolk Square Associates III (Recommended Final Decision), 24 DEPR 16 (2017)
In the Matter of Woods Hole, Martha's Vineyard & Nantucket Steamship Authority (Recommended Final Decision), 24 DEPR 131 (2017)
- Fafard, Docket No. 96-040, Final Decision, 3 DEPR 222 (1996)**
In the Matter of Gooseberry Island Trust (Recommended Final Decision), 24 DEPR 181 (2017)
- Franklin Office Park Realty Corp., Docket No. 10-016, Final Decision, 18 DEPR 61 (2011)**
In the Matter of McGonigle (Recommended Final Decision on Reconsideration), 24 DEPR 198 (2017)
- Franklin Office Park Realty Corp., Docket No. 10-016, Recommended Final Decision, 18 DEPR 61 (2011)**
In the Matter of McGonigle (Recommended Final Decision on Reconsideration), 24 DEPR 198 (2017)
- Fuhrmann, Docket No. 13-037, Final Decision, 22 DEPR 31 (2015)**
In the Matter of Woods Hole, Martha's Vineyard & Nantucket Steamship Authority (Recommended Final Decision), 24 DEPR 133 (2017)
- Fuhrmann, Docket No. 13-037, Recommended Final Decision, 22 DEPR 31 (2015)**
In the Matter of Woods Hole, Martha's Vineyard & Nantucket Steamship Authority (Recommended Final Decision), 24 DEPR 133 (2017)
- Giombetti, Docket No. 97-169, Final Decision and Commissioner's Decision to Remand, 6 DEPR 108 (May 14, 1999)**
In the Matter of Tennessee Gas Pipeline Co., LLC (Recommended Final Decision), 24 DEPR 89 (2017)
- Giombetti, Docket No. 97-169, Final Decision, 8 DEPR 29 (2001)**
In the Matter of Tennessee Gas Pipeline Co., LLC (Recommended Final Decision), 24 DEPR 89 (2017)
- Gordon, Docket No. 09-048, Final Decision, 17 DEPR 86 (2010)**
In the Matter of Brice Estates, Inc. (Recommended Final Decision), 24 DEPR 172 (2017)
In the Matter of Ryan Development, LLC (Recommended Final Decision), 24 DEPR 7 (2017)
In the Matter of Vacirca (Recommended Final Decision, 24 DEPR 148 (2017))
- Gordon, Docket No. 09-048, Recommended Final Decision, 17 DEPR 86 (2010)**
In the Matter of Brice Estates, Inc. (Recommended Final Decision), 24 DEPR 172 (2017)
In the Matter of Ryan Development, LLC (Recommended Final Decision), 24 DEPR 7 (2017)
In the Matter of Vacirca (Recommended Final Decision, 24 DEPR 148 (2017))
- Indian Summer Trust, Docket No. 01-142, Recommended Final Decision, 11 DEPR 99 (2004)**
In the Matter of Tammaro (Recommended Final Decision), 24 DEPR 123 (2017)
- Knott, DALA Docket No. 11-011, Final Decision, 19 DEPR 67 (2012)**
In the Matter of Brockton Power Company, LLC (Recommended Final Decision), 24 DEPR 48 (2017)
- Knott, DALA Docket No. 11-011, Recommended Final Decision, 19 DEPR 67 (2012)**
In the Matter of Brockton Power Company, LLC (Recommended Final Decision), 24 DEPR 48 (2017)
- Landing Group, Inc., Docket No. 14-028, Final Decision, 22 DEPR 192 (2015)**
In the Matter of Woods Hole, Martha's Vineyard & Nantucket Steamship Authority (Recommended Final Decision), 24 DEPR 130 (2017)
- Landing Group, Inc., Docket No. 14-028, Recommended Final Decision, 22 DEPR 192 (2015)**
In the Matter of Woods Hole, Martha's Vineyard & Nantucket Steamship Authority (Recommended Final Decision), 24 DEPR 130 (2017)
- LeBlanc, Docket No. 08-051, Final Decision, 16 DEPR 1 (2009)**
In the Matter of FTO Realty Trust (Recommended Final Decision on Reconsideration), 24 DEPR 75 (2017)
- LeBlanc, Docket No. 08-051, Recommended Final Decision, 16 DEPR 1 (2009)**
In the Matter of FTO Realty Trust (Recommended Final Decision on Reconsideration), 24 DEPR 75 (2017)
- Legowski, Docket No. 11-039, Final Decision, 19 DEPR 256 (2012)**
In the Matter of Cohen (Recommended Final Decision), 24 DEPR 102 (2017)
In the Matter of Woods Hole, Martha's Vineyard & Nantucket Steamship Authority (Recommended Final Decision), 24 DEPR 130 (2017)
- Legowski, Docket No. 11-039, Recommended Final Decision, 19 DEPR 256 (2012)**
In the Matter of Cohen (Recommended Final Decision), 24 DEPR 102 (2017)
In the Matter of Woods Hole, Martha's Vineyard & Nantucket Steamship Authority (Recommended Final Decision), 24 DEPR 130 (2017)
- Lipkin, Docket No. 92-043, Final Decision, 2 DEPR 249 (1995)**
In the Matter of Woods Hole, Martha's Vineyard & Nantucket Steamship Authority (Recommended Final Decision), 24 DEPR 133 (2017)
- Lowe's Home Centers, Inc., Docket No. WET-09-013, Final Decision (February 18, 2009)**
In the Matter of Habitat for Humanity Plymouth (Recommended Final Decision), 24 DEPR 2 (2017)
- Lowe's Home Centers, Inc., Docket No. WET-09-013, Final Decision, 16 DEPR 115 (2009)**
In the Matter of Brice Estates, Inc. (Recommended Final Decision), 24 DEPR 170 (2017)
- Lowe's Home Centers, Inc., Docket No. WET-09-013, Recommended Final Decision (January 23, 2009)**
In the Matter of Habitat for Humanity Plymouth (Recommended Final Decision), 24 DEPR 2 (2017)
- M. G. Hall, Docket No. WET-12-023, Final Decision, 21 DEPR 22 (2014)**
In the Matter of FTO Realty Trust (Recommended Final Decision on Reconsideration), 24 DEPR 75 (2017)
- M. G. Hall, Docket No. WET-12-023, Recommended Final Decision, 21 DEPR 22 (2014)**
In the Matter of FTO Realty Trust (Recommended Final Decision on Reconsideration), 24 DEPR 75 (2017)
- Massachusetts Department of Transportation Highway Division, Docket No. 12-013, Final Decision, 19 DEPR 134 (2012)**
In the Matter of Suffolk Square Associates III (Recommended Final Decision), 24 DEPR 15 (2017)
In the Matter of Tennessee Gas Pipeline Co., LLC (Recommended Final Decision), 24 DEPR 83 (2017)
- Massachusetts Department of Transportation Highway Division, Docket No. 12-013, Recommended Final Decision, 19 DEPR 134 (2012)**
In the Matter of Suffolk Square Associates III (Recommended Final Decision), 24 DEPR 15 (2017)
In the Matter of Tennessee Gas Pipeline Co., LLC (Recommended Final Decision), 24 DEPR 83 (2017)
- Massachusetts Refusetech, Inc., Docket No. 99-126, Final Decision, 8 DEPR 138 (2001)**
In the Matter of Brockton Power Company, LLC (Recommended Final Decision), 24 DEPR 31 (2017)

DECISIONS



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In the Matter of JAMES J. AND LISA G. MCGONIGLE

OADR Docket No. WET-2015-008
DEP File No. SE 10-2916
Chatham

August 8, 2017

Martin Suuberg, Commissioner

Wetlands Appeal—Revetment of Chatham Beach—Motion for Reconsideration—Consultants’ Memoranda—Sediment Eroded From Coastal Bank—Significant Role in Storm Damage Prevention—

On motion for reconsideration from a Chatham landowner whose revetment project had been denied by MassDEP, Presiding Officer Jane A. Rothchild found that she had not erred in admitting into evidence memoranda from consultants to the Chatham Conservation Commission as these were properly ruled to be reliable hearsay. She also rejected the Appellants’ claim that she erred in ruling that the sediment from the coastal bank played a significant role in protecting the statutory interests of storm damage prevention and flood control. The Commissioner adopted her Recommended Decision without changes.

FINAL DECISION ON RECONSIDERATION

I adopt the Recommended Decision on Reconsideration of the Presiding Officer. Any party 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.

July 25, 2017

Jane A Rothchild, Presiding Officer

RECOMMENDED FINAL DECISION ON RECONSIDERATION

INTRODUCTION

James and Lisa McGonigle filed this appeal after the Southeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) denied their proposal to construct a 108 foot long rock revetment and sacrificial sand cover on a Coastal Beach and along the toe of an eroding Coastal Bank at their property at 498 Shore Road in Chatham, Massachusetts. The Department’s denial overturned an earlier approval of the proposed Project by the Chatham Conservation Commission. After an evidentiary adjudicatory hearing (“Hearing”) at which the parties’ respective wetlands experts testified, I issued a Recommended Final Decision (“RFD”) that affirmed the Department’s denial, finding by a preponderance of the evidence that the McGonigles’ proposed project did not meet the performance standards applicable to their project. The Department’s Commissioner adopted the RFD in his Final Decision issued on June 9, 2017 [24 DEPR 151].

The McGonigles have moved for reconsideration of the Final Decision pursuant to 310 CMR 1.01(14)(d).^{1,2} In their motion, they present two claims of alleged legal error : (1) that I erred in admitting into evidence memoranda authored by Greg Berman and Ted Keon (“the memoranda”), because the memoranda were “unreliable hearsay”, and (2) that I erred in applying the term “significant” in 310 CMR 10.30. Both of these arguments were previously raised by the McGonigles at the Hearing and rejected in the RFD and Final Decision. The McGonigles also assert for the first time that the admission of hearsay evidence deprived them of their due process right to cross-examine witnesses. For the reasons below, I recommend that the Department’s Commissioner issue a Final Decision on Reconsideration denying the McGonigles’ motion for reconsideration.

STANDARD OF REVIEW

A party seeking reconsideration of a Final Decision has a heavy burden of demonstrating that the Final Decision was unjustified. 310 CMR 1.01(14)(d); *In the Matter of Gary Vecchione*, OADR Docket No. WET-2014-008, Recommended Final Decision on Reconsideration (November 4, 2014), 2014 MA ENV LEXIS 83, at 6, adopted as Final Decision on Reconsideration (November 7, 2014) [21 DEPR 116], 2014 MA ENV LEXIS 82. The party must demonstrate that the Final Decision was based upon a finding of fact or ruling of law that was “clearly erroneous.” *Id.* A Motion for Reconsideration may be summarily denied if “[it] repeats matters adequately considered in the final decision, renews claims or arguments that were previously raised, considered and denied, or where it attempts to raise new claims or arguments” *Id.*, at 6-7. Moreover, “reconsideration [of the Final Decision is not] justified by the [party’s] disagreement with the result reached in the Final Decision.” *Id.*, at 7.

HEARSAY EVIDENCE

The McGonigles assert that it was clearly erroneous to admit the memoranda because they were unreliable hearsay and by admitting the memoranda I deprived the McGonigles of their due process rights to cross-examine witnesses. They argue that none of the indicia of reliability were present. These claims are without merit.

Massachusetts General Laws c. 30A § 11(2) provides that “agencies need not observe the rules of evidence observed by courts [except where otherwise provide by law]. . . . Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.” 310 CMR 1.01(13)(h) echoes this rule. Hearsay evidence may be admissible in an adjudicatory hearing. The Supreme Judicial Court has held that “[s]ubstantial evidence may be based

1. The McGonigles have also filed a Complaint for Judicial Review of the Final Decision in Superior Court pursuant to G.L. c. 30A, § 14. *See James & Lisa McGonigle v. Department of Environmental Protection*, Civil Docket No. 1772CV00310, filed in Barnstable Superior Court on July 6, 2017. This Recommended Final Decision on Reconsideration and the Department’s Final Decision on Reconsideration will be made part of the Administrative Record that will be filed in Superior Court in connection with the McGonigles’ Complaint for Judicial Review.

2. The McGonigles attached to their motion as Exhibit B, an affidavit of James McGonigle dated June 19, 2017. The Department objected to the inclusion of this affidavit in the record after the close of the hearing. Pursuant to 310 CMR 1.01(14)(n)2, the inclusion of this affidavit with the McGonigles’ motion was improper and the affidavit should be stricken from the record.

on hearsay alone if that hearsay has ‘indicia of reliability.’” *Covell v. Dep’t of Soc. Servs.*, 439 Mass. 766, 785-86 (2003) (sufficient indicia of reliability was found where the hearsay was detailed and consistent and there was an absence of motive or reason to make false allegations); *Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n*, 401 Mass. 526, 530, 517 N.E.2d 830 (1988) (“Factors to be considered [in determining whether there is sufficient indicia of reliability] include independence or possible bias of the declarant, the type of hearsay materials submitted, whether statements are sworn to, whether statements are contradicted by direct testimony, availability of the declarant, and credibility of the declarant.”). See also *In the Matter of Franklin Office Park Realty Corp.*, Recommended Final Decision, 2011 MA ENV LEXIS 64 (February 24, 2011), adopted by Final Decision [18 DEPR 61] (March 9, 2011). The allowance of reliable hearsay in administrative proceedings is intended to increase their efficiency. *Costa v. Fall River Hous. Auth.*, 453 Mass. 614, 627 (2009).

As the Recommended Final Decision and the Final Decision make clear, I considered the memoranda reliable hearsay based on factors detailed in the Recommended Final Decision. My evaluation of the memoranda led to the conclusion that they should be admitted because they met the indicia of reliability. The memoranda were prepared by persons in their capacities as consultants to the Chatham Conservation Commission; there was no evidence of bias (and none has been asserted); and other expert witnesses who testified at the hearing agreed with and adopted the conclusions Berman and Keon expressed in their memoranda. In my judgment, this evidence was reliable and admissible despite being hearsay. The McGonigles have provided no new arguments for why this evidence should have been excluded.

As for the claim that the admission of this evidence deprived the McGonigles of their due process right to cross-examine witnesses, this claim fails as well. It was clear well before the hearing that the memoranda had been submitted by the Ten Citizens Group as part of their evidence, and witnesses who did file pre-filed testimony on behalf of the Ten Citizens Group and the Department concurred with and adopted the opinions of Berman and Keon. There was no surprise. The McGonigles could have subpoenaed Berman and Keon pursuant to 310 CMR 1.01(12)(g). They did not. They could have cross-examined both Ramsey and Mahala regarding the Berman and Keon opinions which they adopted. They did not. “The principle that hearsay evidence is admissible in administrative proceedings would be vitiated if a party could object to its admission on the ground that he was denied his [due process right to cross-examination.]” *Beauchamp v. de Abadia*, 779 F.2d 773, 775-76 (1st Cir. 1985), quoted in *Costa*, supra.

Finally, the Motion for Reconsideration mischaracterizes the Recommended Final Decision and the Final Decision as extensively and exclusively relying on or depending on this allegedly unreliable hearsay evidence. While the memoranda factored into the decision, the preponderance of the evidence at the hearing supported the decision, exclusive of the challenged memoranda. This included the testimony of Ramsey and Mahala, as well as

the effective cross-examination of the McGonigles’ expert, Leslie Fields, by the Department’s counsel.

In this case, I found the proffered evidence to be reliable. The McGonigles have not suggested why it is not, other than by asserting that it is unsworn. However, “...consistent with applicable due process requirements, hearsay evidence may form the basis [of an administrative decision] so long as that evidence contains substantial indicia of reliability.” *Costa v. Fall River Hous. Auth.*, 453 Mass. 614, 627 (2009).

WHETHER THE SEDIMENT IS “SIGNIFICANT”

The McGonigles claim that the Recommended Final Decision and the Final Decision erred in applying 310 CMR 10.30(3) by ignoring the term “significant.” This argument merely repeats the McGonigles’ main argument at the Hearing. Primarily, this was their case, and I was not persuaded by their witnesses. For this reason alone, the Motion for Reconsideration should be denied. As the RFD and the Final Decision make clear, the preponderance of the evidence demonstrated that the sediment eroded from the McGonigles’ coastal bank plays a role in protecting the statutory interests of storm damage prevention and flood control. The Department’s and the Ten Citizen Group’s witnesses, as well as the McGonigles’ own expert, Fields, testified that the eroded sediment becomes part of the fronting beach, and is transported both north and south along the beach. There was ample evidence from Ramsey and Mahala that was probative on this issue. I heard and evaluated all of the evidence from all of the parties on the issue of sediment transport and the role this coastal bank plays in protecting the statutory interest. In my judgment the McGonigles did not meet their burden of proving that the coastal bank is not “significant” in protecting the statutory interests.

Because the McGonigles have not met their “heavy burden” on this motion for reconsideration, and for the reasons stated above, I recommend that the Department’s Commissioner issue a Final Decision on Reconsideration denying the McGonigles’ motion for reconsideration.

NOTICE—RECOMMENDED FINAL DECISION ON RECONSIDERATION

This decision is a Recommended Final Decision on Reconsideration of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14) (d), and may not be appealed to Superior Court pursuant to MGL c. 30A. The Commissioner’s Final Decision may be appealed and will contain a notice to that effect.

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* * * * *

In the Matter of MILLENNIUM PRESS

Docket No. 2017-004
 DEP File Nos. MassDEP Facility ID# 312852
 RPAN-BO-17-Hm007
 Agawam

August 8, 2017
 Martin J. Suuberg, Commissioner

Hazardous Waste-Administrative Consent Order-Printer Compliance Certification—MassDEP affirmed a settlement agreement whereby a printing company's fine of \$500 for failure to file a Printer Compliance Certification was reduced to \$250, with potential fines of \$1,000 a day and other penalties for any future violations.

FINAL DECISION

In February 2017, the Petitioner Millennium Press filed this appeal challenging a \$500.00 Reporting Penalty Assessment Notice ("RPAN" or "Civil Administrative Penalty") that the Boston Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") issued to the Petitioner on January 27, 2017 for purported violations of the Department's Printer Compliance Certification Regulations at 310 CMR 71.07(2) and Environmental Results Program Certification Regulations at 310 70.03(1)(f).¹ The RPAN alleged that the Petitioner violated the Regulations by failing to submit to the Department a completed Printer Compliance Certification to confirm the Petitioners' compliance with the Regulations. RPAN, at p. 1.

Currently pending before me for review pursuant to 310 CMR 1.01(8)(c), is a proposed Settlement Agreement that the Petitioner and the Department have executed to settle the Petitioner's appeal of the RPAN. The Settlement Agreement is in the form of an Administrative Consent Order With Penalty And Notice of Non-Compliance ("Consent Order") that has been executed by: (1) the Petitioner's President, James Sullivan and (2) Geri Lambert, Deputy Division Director of the Business Compliance Division of the Department's Bureau of Air and Waste.

After reviewing the Consent Order, I find that it is reasonable and furthers the statutory and regulatory interests of the Department's Printer Compliance Certification Regulations at 310 CMR 71.07(2) and Environmental Results Program Certification Regulations at 310 70.03(1)(f).² Accordingly, I issue this Final Decision approving and incorporating the Consent Order. Pursuant to the Consent Order, I issue the following Orders:

1. The Printer Compliance Certification Regulations at 310 CMR 71.07 have been promulgated pursuant to the Massachusetts Clean Waters Act, ("MCWA") G.L. c. 21, §§ 26-53. The Environmental Results Program Certification Regulations at 310 CMR 70.03(1)(f) have been promulgated pursuant to the MCWA; the Massachusetts Hazardous Waste Management Act, G.L. c. 21A, §§ 2, 13 and 16, and G.L. c. 21C; the Massachusetts Mercury Management Act, G.L. c. 21H, §§ 6A

through 6N; the Massachusetts Operation and Removal of Underground Storage Tanks Act, G.L. c. 210, § 4; the Massachusetts Clean Air Act, G.L. c. 111, §§ 142A through 142M; and the Massachusetts Solid Waste Management Act, G.L. c. 111 § 150A.

2. See note 1 above, at p. 1.

1. In accordance with ¶ 29 of the Consent Order, the effective date of the Consent Order is the date of this Final Decision.

2. In accordance with ¶ 14 of the Consent Order, the Petitioner shall pay the sum of two hundred and fifty dollars (\$250.00) to the Commonwealth within 30 days of the date of this Final Decision.

3. In accordance with ¶ 21 of the Consent Order and in addition to the \$250.00 penalty set forth in the Consent Order, if the Petitioner violates any provision of ¶ 10 of the Consent Order, the Petitioner shall pay stipulated civil administrative penalties to the Commonwealth in the amount of one thousand dollars (\$1,000.00) per day, or a portion thereof, for as long each violation continues.³

4. In accordance with ¶ 22 of the Consent Order and G.L. c. 21A, § 16, if the Petitioner fails to pay in full any civil administrative penalty as required by the Consent Order as set forth above, the Petitioner will be liable to the Commonwealth for up to three (3) times the amount of the civil administrative penalty, together with costs, plus interest on the balance due from the time such penalty became due and attorney's fees, including all costs and attorney's fees incurred in the collection thereof. The rate of interest will be the rate set forth in G.L. c. 231, § 6C.

5. In accordance with ¶ 27 of the Consent Order, G.L. c. 30A, and 310 CMR 1.01(8)(c), this appeal 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.

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* * * * *

3. Paragraph 10 of the Consent Order provides that "[the Petitioner] shall perform the following actions: . . . remain in compliance with the requirements of 310 CMR 71.07(2) and 310 CMR 70.03(1)(f)."

In the Matter of D & G RECYCLING, INC.

Docket No. 2016-033
DEP File No. ACOP-CE-12-246-Z001-SETT-SEP-STP
Northbridge

August 16, 2017
Martin J. Suuberg, Commissioner

Solid Waste-Penalties and Fines-Settlement Agreement-25 Acre Northbridge Auto Recycling Site—A settlement agreement entered into by a recycling concern over a 25-acre Northbridge site was reviewed and approved by the Commissioner. The Petitioner agreed to pay the original \$68,613 fine after it failed to comply with the first settlement agreement from 2013 under which it was obligated (in lieu of the fine) to conduct remediation, cede conservation restrictions, and construct a canoe launch.

FINAL DECISION

In December 2016, the Petitioner D & G Recycling, Inc. filed this appeal challenging a Demand for Payment of \$68,613.00 in Stipulated Penalties ("Stipulated Penalties Demand") that the Central Regional Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") issued to the Petitioner on November 22, 2016 for purportedly violating the provisions of an Administrative Consent Order With Penalty ("ACOP") that the Petitioner signed with the Department on November 16, 2012 ("the 1st Settlement Consent Order" or "the 1st Settlement Agreement") to address the Petitioner's purported violations of the Solid Waste Management Act, G.L. c. 111, § 150A; the Solid Waste Management Regulations at 310 CMR 19.00; the Site Assignment Regulations for Solid Waste Facilities at 310 CMR 16.00; the Hazardous Waste Act, G.L. c. 21C; the Hazardous Waste Regulations at 310 CMR 30.000; the Wetlands Protection Act, G.L. c. 131, § 40; and the Wetlands Regulations at 310 CMR 10.00. *See In the Matter of Northbridge Auto Wrecking, Inc. and D & G Recycling, Inc.*, OADR Docket Nos. 2003-113, 2004-138, and 2004-154, Recommended Final Decision (May 30, 2013), adopted as Final Decision [20 DEPR 56] (June 7, 2013).

Currently pending before me for review pursuant to 310 CMR 1.01(8)(c), is a proposed Settlement Agreement that the Petitioner and the Department have executed to settle the Petitioner's appeal of the Stipulated Penalties Demand as set forth above. The Settlement Agreement is in the form of a Settlement Agreement By Administrative Consent Order With Penalty And Notice of Non-Compliance ("Consent Order") that has been executed by: (1) the Petitioner's President, Daniel Perry; (2) the Petitioner's Treasurer, Gerard Caya; and (3) Mary Jude Pigsley, Regional Director of the Department's Central Regional Office. Under the Consent Order, the Petitioner has agreed to pay the entire \$68,613.00 in Stipulated Penalties that the Department demanded in the Stipulated Penalties Demand. Consent Order, ¶¶ 7, 10.

After reviewing the Consent Order, I find that it is reasonable and furthers the statutory and regulatory interests of the Solid Waste Management Act, G.L. c. 111, § 150A; the Solid Waste Management Regulations at 310 CMR 19.00; the Site Assignment Regulations for Solid Waste Facilities at 310 CMR 16.00; the Hazardous Waste Act, G.L. c. 21C; the Hazardous Waste Regulations at 310 CMR 30.000; the Wetlands Protection Act, G.L. c. 131, § 40; and the Wetlands Regulations at 310 CMR 10.00. Accordingly, I issue this Final Decision approving and incorporating the Consent Order. Pursuant to the Consent Order, I issue the following Orders:

1. In accordance with ¶ 22 of the Consent Order, the effective date of the Consent Order is the date of this Final Decision.
2. In accordance with ¶¶ 7 and 10 of the Consent Order, the Petitioner shall pay \$68,613.00 to the Commonwealth upon the date of the issuance of this Final Decision. If payment is not made then, the Department may initiate its procedure to collect the \$68,613.00.
3. In accordance with ¶¶ 6 and 12 of the Consent Order and for purposes of G.L. c. 21A, § 16 and 310 CMR 5.00, the Consent Order shall also serve as a Notice of Non-Compliance for the Petitioner’s non-compliance with the requirements of the 1st Settlement Agreement.
4. In accordance with ¶ 3 of the Consent Order, G.L. c. 30A, and 310 CMR 1.01(8)(c), this appeal 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.

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I. Introduction

DEP has issued several decisions over the past months that relate to standing issues, including drawing distinctions between requirements for standing for an aggrieved person as compared to standing for a citizens' group. A high profile decision, *In the Matter of Tennessee Gas Pipeline Company, LLC*, 24 DEPR 76, contained careful analysis of how some, but not all, of the petitioners had standing as an aggrieved person or as a part of a citizen's group. The analysis for standing is important for every case, as standing is "not simply a procedural technicality", but a "jurisdictional prerequisite to being allowed to press the merits of any legal claim."¹ Another set of issues that have appeared repeatedly in the decisions is the importance of procedural errors by conservation commissions and the DEP affecting the outcome of appeals. These cases range from the conservation commission omitting a continuing condition in a Certificate of Compliance to issuing an Order of Conditions decision after the 21-day deadline from the close of the hearing, to DEP and OADR potentially using DEP policy to allow an SOC denial to be changed to an approval on appeal.

II. Standing Issues

In the Matter of Tennessee Gas Pipeline Company, LLC, OADR Docket No. 2016-020, DEP Wetlands File Nos. 087-0610, 278-0130, Agawam and Sandisfield, 24 DEPR 76 (2017), Bethany Card, Deputy Commissioner, Final Decision

The Petitioners, including a Citizen's Group, the Berkshire Environmental Action Team, Inc. ("BEAT"), and several individual parties, contend that the DEP improperly issued a Water Quality Certification ("WQC") because the WQC fails to comport with the Stormwater Quality Standards at 314 CMR 4.00 and the WQC standards at 314 CMR 9.00. The Applicant, Tennessee Gas Pipeline Company ("Applicant"), contends that under the federal law, the Natural Gas Act ("NGA"), the OADR lacks jurisdiction to adjudicate the appeal, and in the alternative, that if OADR has ju-

isdiction to adjudicate, that the Petitioners lack standing to challenge the WQC. The Presiding Officer ruled: 1) OADR has jurisdiction to adjudicate the Petitioners' appeal of the WQC²; 2) that some, but *not* all, of the Petitioners have standing; and 3) that the WQC is valid, except that Condition 15 of the WQC must be modified to comport with the requirements of the 314 CMR 9.09(1)(e).

Standing is a jurisdictional prerequisite to reaching the merits of any legal claim. Each regulatory program has its own criteria for a petitioner to demonstrate standing. Under 314 CMR 9.10(1), a party has a valid appeal to OADR challenging the issuance of a WQC when the party is: 1) the WQC applicant or property owner; 2) any person aggrieved by the DEP's decision who has submitted comments on the WQC application during the public comment period; 3) any 10 persons of Massachusetts of whom the group member has submitted written comments on the WQC application during the public comment period; and 4) any governmental body or private organization with a mandate to protect the environment that has submitted written comments during the public comment period.³ Under this standard, some, but not all, of the Petitioners had standing to challenge the WQC.

The Citizen's Group lacked standing to challenge the WQC as a Citizen's Group under 314 CMR 9.01(1) and G.L. c. 30A, § 10A. For the Citizen's Group to have standing to proceed in its appeal as a Ten Residents Group, the group must meet four conditions: 1) the group must have at least ten residents of Massachusetts at the time of the appeal filing; 2) at least one group member must have submitted comments on the WQC application during the public comment period; 3) group membership of at least ten residents of Massachusetts must be maintained throughout the appeal; and 4) the appeal notice challenging the WQC must allege clear and specific facts that the DEP's issuance of the WQC might or will cause damage to the environment as defined by G.L. c. 214 §7A. In the case of the Citizen's Group, the members are from Massachusetts, but the three who submitted comments did not do so in their individual capacity. One submitted comments in the capacity as

1. *Tennessee Gas Pipeline Company, LLC*, 24 DEPR 76, 81 (2017).

2. OADR's ruling that it had jurisdiction to adjudicate the WQC appeal has potentially far-reaching consequences for other pipeline projects. OADR concluded that it had jurisdiction over the WQC appeal after reviewing the Applicant's arguments against such a conclusion. OADR held that it had jurisdiction because 1) no final agency action had been rendered by the DEP on the WQC because the Petitioners appealed to OADR, and the First Circuit agreed that its review was premature until MassDEP completed its adjudicatory process at OADR; 2) although the NGA

placed time limits on adjudicating a WQC, those time limits were intended to prevent states from doing nothing on a WQC application and effectively denying it, which is not what occurred in this case; and 3) the USACE's issuance of the 404 permit to the applicant neither terminated the pending appeal of the WQC before the OADR nor divested OADR of jurisdiction to adjudicate, as nothing in the 404 permit suggests that its terminates litigation about the WQC, it merely incorporates the WQC.

3. *Tennessee Gas Pipeline*, 24 DEPR 81.

BEAT's executive director, and the other two are members of an unincorporated group that submitted comments. The unincorporated group did not identify its members in the comments, and neither Citizen's Group member signed the comments. The unincorporated group cannot itself be a party to litigation, because it lacks legal existence. Thus, although an unincorporated group of 10 citizens can have standing, it must actually consist of 10 or more named individuals.

The individual petitioner Atwater-Williams did not have standing to challenge the WQC as a person aggrieved. An aggrieved person is defined as any person who, because of the WQC, may suffer an injury in fact which is different in kind or magnitude from that suffered by the general public and which is within the scope of interests identified in the WQC regulations.⁴ Assuming that Atwater-Williams satisfies the definition of an aggrievement, she failed to satisfy the prior written comments requirement of 314 CMR 9.10(b) because she did not submit written comments during the comment period.

The individual petitioner Bernard has standing to challenge the WQC as a property owner under 314 CMR 9.10(1)(a), but not as a person aggrieved. He did not submit written comments during the public comment period, but he does own property through which the proposed project would run. Despite this, Bernard's standing runs into the issue of claim preclusion, as Bernard signed an easement agreement with the Applicant and received compensation for it. So, unless Bernard's claims are regarding unnecessary, overly intrusive or otherwise unlawful damages possibly resulting from the Applicant's use of the easement, Bernard does not have standing to appeal.⁵

The individual petitioner Morrical has a similar standing situation to Bernard. She has standing as a property owner, as she owns land through which the project will run, and she signed an Easement Agreement with the Applicant. Unlike Bernard, she has standing as a person aggrieved because she submitted written comments on the WQC during the public comment period. She retains standing as a person aggrieved because she offered the minimum of credible evidence in support of her claim that she may suffer injury in fact which would be different in kind or magnitude from any injury that the general public would suffer. Her claim is that she would suffer harm to wetlands and the water supply on her property.

Unlike the Citizen's Group and the unincorporated organization, BEAT has standing to challenge the WQC as a private organization with a mandate to protect the environment, and its executive director submitted written comments on BEAT's behalf during the public comment period.

The decision clarifies the requirements to establish standing in a WQC case as applied to an organization, a ten residents group, and to an individual, and also makes it clear that standing alone is not enough for the petitioners to prevail on their claims.

Subsequent cases issued by DEP this year also include discussions on standing, including *In the Matter of Thomas Vacirca*, 24 DEPR 148 and *In the Matter of Brice Estates*, 24 DEPR 168.

In the Matter of Thomas Vacirca, Jr., Docket No. WET-2016-017, DEP File No. SE-42-2565, Marshfield, 24 DEPR 143 (2017), Martin Suuberg, Commissioner, Final Decision

The pro se petitioner seeking to challenge the DEP SOC lacked standing to challenge the SOC. The petitioner needed to demonstrate that he had standing as “an aggrieved person who previously participated in the permit proceedings within the meaning of 310 CMR 10.04 and 10.05(7)(j)(2)(a).”⁶ 310 CMR 10.05(7)(j)(2)(a) defines previous participation as a submission of written information to the conservation commission prior to the close of the public hearing, or a request for action by the DEP that would result in an SOC, or a submission of written information to the DEP prior to the issuance of an SOC. The petitioner failed to provide evidence of any of these actions. The Applicant provided copies of the minutes of the Commission's hearings that the Petitioner claimed he had participated in, with no reference in the minutes to the Petitioner having submitted written information prior to the close of the hearing.

The Presiding Officer concludes that the petitioner failed to demonstrate that he satisfied the first condition for standing, having failed to submit written information in the prior proceedings. The Presiding Officer then also found, even assuming that the Petitioner had submitted such information, that he would still lack standing because he failed to present credible evidence from a competent source demonstrating that he is a person aggrieved by the SOC. Under 310 CMR 10.04, a person aggrieved is substantially the same definition as that under the WQC, as discussed above. Petitioner failed to show a minimum quantum of credible evidence to support his claim that he would suffer an injury in fact from the project, which would be different in kind or magnitude from any injury suffered by the general public and which is within the scope of the public interests protected by the Wetlands Protection Act and the Wetlands Regulations.

In the Matter of Brice Estates, Inc., Docket No. WET-2016-024, DEP File No. 277-0434, Rutland, 24 DEPR 168 (2017), June 16, 2017, Martin Suuberg, Commissioner, Final Decision

An abutter appealed from an SOC affirming an Order of Conditions approval claiming that she represented 30 or more other residents. However, the appeal failed for lack of standing, as the abutter's amended appeal did not state that the same, or any, of the original 30 residents who sought an SOC were a part of the administrative appeal to OADR. As such, the abutter could not demonstrate standing as a part of a Ten Residents Group. She also failed to demonstrate that she had standing as an aggrieved person, because she failed to show that she would suffer an injury in fact to her interests from the project.

4. *Id.* at 24 DEPR 83.

5. This is an unusual ruling for DEP, which usually declines to rule on private property rights, yet here interpreted and applied an easement agreement.

6. *Thomas Vacirca*, 24 DEPR 143 at 146 (2017).

III. Actions of the Conservation Commissions and the DEP

Several of the decisions issued discuss actions by the conservation commission or the DEP that complicated or contributed to litigation in the cases. Commissions must take care in issuing Orders of Conditions (“OOC”) and Certificates of Compliance (“COC”), because if a condition from the OOC is not included in the COC as a continuing condition, it is not thereafter binding on the property owner, despite what the commission may have intended when imposing the condition in the OOC. Commissions also have to carefully track the statutory deadline for issuances of Orders following the close of a hearing. As is well established in judicial appellate decisions, if a Commission issues its OOC after the 21-day deadline, only the subsequently issued SOC under the WPA and the Wetlands Regulations is valid, not the ruling issued under the local bylaw. DEP has for the first time recognized that issue in an administrative proceeding. DEP also has to use caution in issuing SOCs and other permits.

In the Matter of Tennessee Gas Pipeline Company, Inc., as previously referenced above, the DEP issued a WQC with conditions. One of the conditions, on appeal to OADR, was required to be modified to comply with 314 CMR 9.09(1)(e). The regulation states that no activity authorized by the WQC may begin prior to the expiration of the appeal period to appeal the WQC to OADR or until a final decision is issued by the DEP if such appeal is filed.

In the Matter of James J. and Lisa G. McGonigle, Docket No. WET-2015-008, DEP File No. SE 10-2916, Chatham, 24 DEPR 151 (2017), Martin Suuberg, Commissioner, Final Decision

The appeal is regarding an SOC that overturned an OOC issued by Chatham authorizing the construction of a stone revetment and sacrificial sand cover to replace a deteriorated coir fiber roll bank prevention system. Although not the reason for the SOC denial, prior OOCs and COCs issued by the Commission for the property included conditions that were supposed to prevent the construction of a stone revetment on the property.

On August 22, 1985, the local Conservation Commission issued an OOC for the construction of the house on the property, which contained a condition prohibiting the construction of a stone revetment on the property.⁷ The Commission neglected to include that condition in the COC as a continuing condition, without explanation as to why it was not included. The COC is intended to specify which conditions of the OOC are to continue in perpetuity, and if the condition is not specified, then it does not continue as a binding condition. However, this condition was also included in subsequent OOCs for the deck and septic system and for an additional deck, and the COC for the deck and septic system included the prohibition on revetments on the property. The Presiding Officer concluded that although the possibly mistaken omission of the condition in the original COC meant that the condition from the 1985 OOC was nonbinding, the subsequent OOCs and COCs included the condition prohibiting revetments, and those conditions

continued in perpetuity. In this case, that meant that the Petitioners were on notice about the prohibition on revetments, and should have known that their proposed project was not permissible.

This case illustrates how careful conservation commissions should be when issuing certificates of compliance, because if they neglect to include a condition from the order of conditions as a continuing condition, the property owner is no longer bound by that condition upon receipt of the COC. Although the applicants in this case were found to have been put on notice about the prohibitions on the construction of revetments on the property due to later OOCs and COCs, conservation commissions should not rely on the possibility of later COCs containing the intended continuing conditions, and should ensure that each OOC and COC issued for a property contains the intended continuing conditions. Commissions should also take care not to issue Orders that contradict prior Orders and COCs for the property, as in this case where the Commission approved a stone revetment on a property that had continuing conditions forbidding such construction on the property.

In the Matter of Gooseberry Island Trust and SN Trust, OADR Docket No. WET-2015-016, DEP File No. SE-43-2773, Mashpee, 24 DEPR 177 (2017), Martin Suuberg, Commissioner, Final Decision

This case brings up two issues regarding actions by the Conservation Commission and by DEP. In this case, the Conservation Commission issued an Order denying the project, but issued it more than 21 days after closing the public hearing. In doing so, the Commission lost local jurisdiction over the project, under the *Oyster Creek*⁸ and *Garrity*⁹ line of cases and the landowner was not obligated to appeal the local wetland bylaw denial. DEP sought to apply its DEP Plan Change Policy to accept a plan revision on appeal of a SOC denial in support of a change in position in the appeal process to approve the project.

The Conservation Commission lost the right to deny the proposed project under the local wetlands bylaw when the denial was untimely. “[W]here a conservation commission issues its Order after the 21 day statutory deadline...the commission loses the right to insist on the provisions of its local bylaw, and... any superseding order issued by the Department applies in its stead.”¹⁰ The Commission was aware that the hearing closed, but argued that there was a two part process to the NOI proceeding, and that the deadline begins to run after “deliberative phase” or after the Order is actually issued. The Presiding Officer, applying established law, held that the conservation commission cannot override the statutory timelines or reinterpret them to be lengthier. The deadline is clearly intended to begin to run after the close of the public hearing, so that Orders are issued in a timely manner.

DEP, on appeal of the Order, issued an SOC affirming the OOC denial of the project. The Applicant appealed the SOC denial, and in an attempt to have the project approved on appeal, submitted a revised plan for DEP consideration. DEP program staff and coun-

7. *McGonigle*, 24 DEPR 151, 159 (2017).

8. *Oyster Creek Preservation, Inc. v. Harwich*, 449 Mass. 859 (2007).

9. *Garrity v. Hingham*, 462 Mass. 779 (2012). See also, *Lippman v. Hopkinton*, 80 Mass. App. Ct. 1 (2011) (regarding declaratory judgment is available rather than certiorari when Commission has issued an Order after a lapse of 21 days).

10. *Gooseberry Island*, 24 DEPR 177 at 182 (quoting *Oyster Creek*, 449 Mass. at 862-63).

sel agreed to accept the plan revision and to support issuance of a Final Order approving the project using that plan revision. The Mashpee Conservation Commission and intervenors opposing the project contend that the proposed plan change was a substantial change from the original project plan, and as such was not permissible under DEP's Plan Change Policy. The policy allows changes to plans filed under NOIs that are before the DEP on appeal for an SOC or for an administrative appeal, but "distinguishes those plan changes which are substantial and will require a new NOI filing [with the local Conservation Commission], from those plan changes which are deemed insubstantial and thus may be considered as part of the appeal review process."¹¹ Substantial plan changes are those that significantly modify the project configuration and result in increased impacts to any wetland resource areas. The Presiding Officer found that there was a preponderance of evidence at the adjudicatory hearing that demonstrated that the proposed plan change was substantially different from the original plan and that there would be increased impacts to wetland resources.

Although such a policy is reasonable as an indication of how the agency intends to interpret its regulations, the policy is not a regulation, having not gone through the notice and comment process under c. 30A. Query: if DEP staff and counsel have chosen to interpret the informal, non-regulatory policy to allow them to accept a particular plan change, and if that plan change is not contrary to a regulation, should the Presiding Officer have discretionary authority to overrule the staff discretionary decision and apply the policy as if it has the effect of a regulation?

The fact pattern in this case—with the Commission having lost jurisdiction to issue a denial under its local Bylaw—raised the stakes for the applicant to attempt to satisfy DEP in any way possible, and thereby avoid a return to the Commission with a new application. Could the applicant have appealed to Court to challenge the OADR ruling as applying an informal policy that has not gone through the G.L. c. 30A regulatory notice and comment process? Would a Court consider that although the policy is not a regulation, if DEP staff had discretion to interpret and apply the policy, surely the DEP Commissioner had that authority as well, and exercised that discretion by adopting the OADR decision?

Another consideration is that although the attempt to avoid going back to the Commission for a new NOI failed in this case, the fact that the Plan Change Policy exists and was applied by staff in this case to enable them to accept a plan change and modify a denial to an approval in the adjudicatory hearing phase, suggests that in a future case an Applicant could appeal an SOC denial, file an appeal, provide a non-substantial plan change, and obtain DEP support for a Final Order approval. An approval in this manner could then be proof in a Superior Court certiorari action on review of the local wetlands bylaw Order, and demonstrate that DEP has approved the project and have that approval substitute for the late issued local bylaw denial. Applicants who anticipate a commission's opposition to any approval have a huge incentive to attempt to satisfy DEP and obtain the DEP approval, when a commission has acted late, as the alternative to filing a new NOI with the commission. But *Gooseberry* serves as a caution—there are definite limits on the extent to which you can change a plan while keeping the project under DEP review of an NOI on appeal. ■

11. *Gooseberry Island*, 24 DEPR at 186 (quoting Department's Plan Change Policy).