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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 jurisdiction 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 WQC[2]; 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.

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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).