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

## THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

**March 17, 2021**

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| In the Matter of the<br>City of Boston Public Works Department | OADR Docket Nos. WET-2019-021 & 022<br>Quincy and Boston, MA |

## RECOMMENDED FINAL DECISION

## INTRODUCTION

The City of Quincy and the Quincy Conservation Commission ("Quincy") filed these appeals concerning the City of Boston Public Works Department's ("Boston") project to reconstruct Long Island Bridge between Moon Island and Long Island in Quincy Bay and Boston, Massachusetts ("the Project"). The appeals arise out of Boston's requested approval of the Project pursuant to the Wetlands Act, G.L. c. 131 §40, and the Wetlands Regulations, 310 CMR 10.00, through two Notices of Intent ("NOI") filed by Boston: one that was filed with the Conservation Commission for the City of Quincy ("Quincy Commission"), DEP File No. 059-1416, for the work proposed within the jurisdiction of the Quincy Conservation Commission; and one filed with the City of Boston Conservation Commission ("Boston Commission"), DEP File No. 006-1593, for the work proposed within the jurisdiction of the Boston Commission. The Boston Commission issued an Order of Conditions ("OOC") approving the Boston-based NOI and the Quincy Commission issued an OOC denying the Quincy-based NOI pursuant to the Wetlands Act and to the City of Quincy Wetland Ordinance.

Quincy and Boston, respectively, appealed those portions of the Boston-based and Quincy-based OOCs issued pursuant to the Wetlands Act (as opposed to the Quincy ordinance) to MassDEP seeking Superseding Orders of Conditions. See 310 CMR 10.05(7).

On June 6, 2019, MassDEP issued a combined SOC approving the Project under the Wetlands Act and Wetlands Regulations in both Quincy ("Quincy SOC") and Boston ("Boston SOC"). Quincy appealed, filing Notices of Claim ("NOC") for both the Quincy SOC (WET-2019-022; DEP file no. 059-1416) and the Boston SOC (WET-2019-021; DEP file no. 006-1593) here, to the Office of Appeals and Dispute Resolution ("OADR"), where the two appeals were consolidated. See 310 CMR 1.01.

On September 6, 2019, Boston filed a Motion to Dismiss both of Quincy's appeals, which was later joined by MassDEP. After holding a Pre-Hearing Conference, I issued a ruling and order staying the Quincy-based appeal, as required by 310 CMR 1.01(6)(h) and requested by Quincy, because of Boston's pending Superior Court bylaw appeal. That provision provides that the Presiding Officer "shall stay administratively [the] appeal . . . of [an SOC] . . . issued under M.G.L. c. 131, § 40 when the determination or order is denied under a local wetlands bylaw and the denial is appealed to court." 310 CMR 1.01(6)(h).

On October 25, 2019, I issued the Ruling and Order Allowing Boston's and MassDEP's Motions to Dismiss Appeal of Boston-Based SOC ("Ruling and Order") for lack of standing and failure to state a claim upon which relief could be granted. See 310 CMR 1.01(11)(d). In footnote 1 of my Ruling and Order, I informed the parties that I did not issue my Ruling and Order as a Recommended Final Decision for consideration by MassDEP's Commissioner "because the companion, consolidated Quincy based [SOC] appeal remain[ed] pending and [] stayed while the Superior Court resolve[d] [Boston's appeal of the Quincy] bylaw [denial of the Project]." However, I indicated to the parties that "I [would] . . . entertain a motion to issue a

Recommended Final Decision for the Boston-based [SOC] appeal if the motion [was] supported by a showing of good cause, which [was] a relatively high burden [to satisfy] under th[e] circumstances [of the case]." See e.g. Mass. R. Civ. P. 54(b) (governing the standard of entry of final and separate on one or more claims in a civil action; Dattoli v. Hale Hospital, 400 Mass. 175, 177, 508 N.E.2d 100 (1987); Paris v. Snappy Car Rental, 18 Mass. App. Ct. 968, 968-69, 469 N.E.2d 1293 (1984). Neither Boston nor MassDEP filed a motion requesting that I issue my October 25, 2019 Ruling and Order as a Recommended Final Decision.

On December 11, 2020, Boston filed a Motion to Proceed, requesting that I vacate the stay of the Quincy-based SOC appeal because Boston had prevailed in Superior Court on its appeal of the Quincy bylaw denial of the Project. See Memorandum of Decision and Order on City of Boston's Partial Motion for Judgment on the Pleadings and Defendants' Cross-Motion for Judgment on the Pleadings, Massachusetts Superior Court, Docket No. SUCV-2018-03440, dated December 2, 2020 (Pasquale, J.) ("Superior Court Order").

The Superior Court Order: (1) granted Boston's Partial Motion for Judgment on the Pleadings, (2) denied Quincy's Cross Motion for Judgment on the Pleadings, (3) held that the Quincy Denial OOC is largely preempted by MassDEP's June 6, 2019 Superseding Order of Conditions, and (4) further annulled the Quincy Denial OOC to the limited extent that the Quincy Commission relied on the more protective terms of the Quincy Wetlands Protection Ordinance.

MassDEP joined Boston's motion to proceed, and Quincy opposed it. After considering the parties' positions, I allowed the Motion to Proceed and issued a Ruling and Order Vacating Stay of Quincy-Based appeal. The parties then filed additional briefs concerning whether I should allow Boston's and MassDEP's motions to dismiss the Quincy-based appeal. After

considering the administrative record, the applicable law, and the parties' pleadings I recommend that MassDEP's Commissioner issue a Final Decision allowing Boston's and MassDEP's motions to dismiss both the Boston-based and Quincy-based appeals and affirming the SOC, with the exception of standing for Quincy in the Quincy-based appeal.

In sum, Quincy failed to establish standing for the Boston-based appeal and failed to state a claim upon which relief can be granted for both the Boston-based and Quincy-based appeals. Quincy failed to establish standing for the Boston-based appeal because it did not present any credible evidence of a possibility of an injury in fact from the Project. For the Quincy-based appeal, the Quincy Commission has standing as of right under the Wetlands Regulations because the appeal arose out of its order of conditions, for which it has a regulatory right to be a party in the appeal. However, with respect to both appeals, Quincy failed to state a claim upon which relief can be granted because it failed to allege facts that would establish how any aspect of the Project would be inconsistent with the performance standards for a specific wetlands resource area. See 310 CMR 10.00.

## BACKGROUND

Long Island Bridge was built in 1951, spanning from Moon Island in the City of Quincy to Long Island in the City of Boston. Boston's Notices of Intent focus primarily on Boston's proposal to reconstruct the Long Island Bridge superstructure, which is that portion of the bridge that spans and directly receives the vehicular traffic load. In contrast, the abutments, piers, and other support structures are called the substructure.

The superstructure was demolished in 2015 for public safety reasons, but the bridge's substructure and original supporting piers were left mostly intact. Boston has proposed to reconstruct the Long Island Bridge to reestablish vehicular travel with a large public health

campus that exists on Long Island, which will be modified to provide substance abuse and addiction recovery services.

The Project involves building a new superstructure on the existing piers, which Boston has stated will be repaired and strengthened to the extent necessary. The SOC determined that there would be no permanent impacts to the wetland resource area of Land Under Ocean ("LUO"). 310 CMR 10.25 (regulation for LUO).

The only permanent impacts identified in the NOI to wetland resource areas for the Boston-based appeal result from improvements to the Long Island Bridge's abutment to make roadway and stormwater improvements. See SOC. The permanent impacts in Quincy are limited to roadway and lighting improvements to the Long Island Bridge abutment on Moon Island. The permanent impacts are limited to the 100-foot buffer zone associated with Coastal Bank on Long Island in the City of Boston and Moon Island in the City of Quincy. See SOC.

## PRIOR DECISION VACATING THE STAY

The decision whether to vacate the stay presented several conflicting considerations: (1) Quincy stated it will file an appeal of the Superior Court decision to the Massachusetts Appeals Court[1]; (2) the Superior Court determined that the part of the Quincy bylaw allowing consideration of cumulative impacts was more stringent than the Wetlands Regulations and the Wetlands Act[2]; (3) there remains a related declaratory judgment claim pending in the Superior Court; and (4) there are ambiguous and conflicting prior adjudicatory decisions addressing similar but materially different factual circumstances: see e.g. and compare Matter of Noyes,

[1] Quincy previously filed an appeal with the Massachusetts Appeals Court. That was withdrawn on January 13, 2021, when Quincy and Boston filed a joint motion in the Superior Court for entry of separate and final judgment. If and when that judgment is entered, Quincy has stated that it will appeal the Superior Court decision to the Court of Appeals.

[2] The Court determined, however, after analyzing in detail Quincy's OOC denial, that the OOC was not based on the more stringent cumulative impact provision.

Trustee, Blueberry Pond Realty Trust, Docket No. 2002-084, Decision and Order on Motion to Stay Appeal, at 4-5 (August 12, 2002) (appeal of a wetlands bylaw denial must be "unquestionably final" before the stay can be lifted); Matter of Kayo Bigelow, Docket No. 94-098, Final Decision (November 19, 1997) (after two unsuccessful appeals by the conservation commission to the superior court the administrative law judge determined there was no grounds to continue the stay because with the superior court's decision there was no bylaw denial even though the conservation commission filed appeal with appeals court); see also Matter of John Walsh & Walsh Brothers Bldg. Co., Docket No. WET-2012-025, Recommended Remand Decision (April 23, 2015); Matter of Scott Glass, Tr. of Hill and Dale Nominee Tr., Docket No. WET-2009-040, Recommended Final Decision (April 1, 2011).

MassDEP regulatory and policy provisions, specifically its Adjudicatory Proceeding Rules, 310 CMR 1.01(6)(h), and its Wetlands and Waterways Program Policy 89-1 ("Policy 89-1"), address when to vacate a stay based upon an appeal of a bylaw denial. Adjudicatory rule 310 CMR 1.01(6)(h) provides: "Upon a motion to proceed, the Department will proceed with the adjudicatory hearing upon proof of the approval under the relevant local, state or federal law or other ruling providing a basis for lifting the stay, or a certification by the Department or another public agency that immediate resolution of the appeal may be necessary to protect public health and safety." (emphasis added)

Policy 89-1, which preceded and appears to have been the impetus for the enactment of 310 CMR 1.01(6)(h), provides that: "Upon proof of the project's approval under the local bylaw, the Department will go forward with the adjudicatory proceeding."

Both provisions are equally ambiguous concerning the extent of judicial review that would constitute an "approval" that would be "a basis for lifting the stay." 310 CMR 1.01(6)(h).

MassDEP and Boston asserted that the stay should be vacated, relying upon no clear rationale, including: (1) prior adjudicatory decisions, which are distinguishable; (2) their argument that Policy 89-1 has been superseded or rescinded to dispense with agency stringency rulings[3], which Quincy legitimately disputes because there is no *clear* basis to conclude that Policy 89-1 was superseded or rescinded; (3) Boston's desire to move swiftly with the project to address serious public health and policy issues, which Quincy claims Boston cannot do until it receives other approvals; and (4) the Adjudicatory Proceeding requirements to construe 310 CMR 1.01 "to secure a just and speedy determination of every appeal." 310 CMR 1.01(1)(b); 310 CMR 1.01(5)(a).

To reconcile the conflicting and ambiguous considerations I look to principles of interpretation. An agency regulation or policy must be interpreted in the same manner as a statute, and according to traditional rules of construction. Warcewicz v. Department of Environmental Protection, 410 Mass. 548, 574 N.E.2d 364 (1991). Thus, the words of the regulation or policy are accorded their usual and ordinary meaning. An agency's interpretation of its own regulation in a final decision or other formal agency authority is generally afforded considerable deference. "However, this principle is deference, not abdication, and courts will not hesitate to overrule agency interpretations when those interpretations are arbitrary, unreasonable, or inconsistent with the plain terms of the regulation itself." Id. When a regulation is ambiguous, rules of construction generally require deference to a reasonable agency interpretation that coincides with the regulation's purpose and intent. Springfield Pres. Trust, Inc. v. Springfield Library & Museums Ass'n, 447 Mass. 408 (2006).

[3] Generally, MassDEP does not have authority or jurisdiction to make stringency decisions. See Matter of Jeffrey Collins, Docket No. WET 2008-064, Recommended Final Decision (February 19, 2009) ("Generally, MassDEP is without authority to review local bylaws or local decision making under local bylaws."), adopted by Final Decision (March 18, 2009).

Here, given the ambiguous policy and regulatory language and adjudicatory decisions, I turn to the underlying intent of the mandatory stay requirements. It is apparent from the original Policy 89-1 and prior adjudicatory decisions that the primary intent for staying administrative appeals while an appeal of a bylaw denial is pending is to avoid the unnecessary expenditure of MassDEP agency resources in an appeal of an SOC approving a project that may be rendered futile by the project applicant's failure to receive "approval" under the local bylaw. See Policy 89-1 ("In order to conserve and better utilize administrative resources, the Department will stay administrative action on any Request for an Adjudicatory Hearing in a wetlands permit case when the project has been denied under a local wetlands bylaw, . . . ."); Matter of Noyes, Trustee, Blueberry Pond Realty Trust, Docket No. 2002-084, Decision and Order on Motion to Stay Appeal, at 4-5 (August 12, 2002) (summarizing adjudicatory decisions).[4]

MassDEP, the agency whose resources would be further conserved by continuing the stay, has argued that the stay should be vacated, and the appeal proceed. I accord that position, i.e. the agency's assessment that it desires to proceed with its limited resources, considerable deference.

MassDEP's position coincides with the ambiguous regulatory language. That language only states that there must be an "approval" that would be "a basis for lifting the stay." 310 CMR 1.01(6)(h). Given the procedural context, the Superior Court Order is an approval that is a

[4] Although Policy 89-1 may have been superseded or rescinded, as argued by MassDEP and Boston, the underlying policy rationale remains and is embodied in 310 CMR 1.01(6)(h). Moreover, there is no clear manifestation of MassDEP's intent to supersede or rescind Policy 89-1. In any event, it is not necessary for purposes of this decision to resolve whether Policy 89-1 was rescinded or superseded because either outcome would not materially affect the resolution of the issue here. Indeed, Policy 89-1 contains no provisions that clearly prohibit lifting the stay under the circumstances here. I agree that it has been firmly established that the decision whether a bylaw is more stringent than the Wetlands Act or Regulations is a decision for the Superior Court, and not MassDEP; but that in itself is not indicative that Policy 89-1 was superseded because nothing in that policy requires MassDEP to make stringency determinations.

basis for lifting the stay. Quincy has not raised a compelling reason why I should not accept MassDEP's stated desire to proceed with using its resources to litigate this appeal.

Moreover, I am obligated in this appeal to construe 310 CMR 1.01 to provide a just and speedy result, particularly when, as here, further significant delay to allow additional appeals could compromise Boston's desire to move forward expeditiously to protect the public health and safety. Quincy admits that it intends to pursue further appeals, and Boston correctly contends that additional appeals could last for years into the future, undermining the project and its purpose, especially when, as Boston points out, opioid related deaths are on the rise locally.

Quincy's argument that all appeals must be exhausted for there to be sufficient approval to vacate the stay lacks merit. The regulatory language certainly does not support that interpretation. Had that been the intent, MassDEP could have easily articulated that as the standard, but it did not. Instead, it chose a more open-ended standard that afforded discretion for the Presiding Officer to consider a motion to vacate a stay and proceed with litigation on a case-by-case basis after considering the surrounding circumstances.

In light of this procedural context and the detailed, well-reasoned Superior Court Order, I previously ruled that the Superior Court Order constitutes sufficient "approval" under 310 CMR 1.01(6)(h) to lift the stay. I therefore allowed Boston's Motion to Proceed and vacated the stay of the Quincy-based appeal.[5]

[5] I have not followed the statement in Matter of Noyes, Trustee, Blueberry Pond Realty Trust, supra., that the "approval" must be "unquestionably final" before the stay can be lifted because it is dicta and it does not sufficiently address situations like the present where a project that is in the public interest can be held up for years by appeals, even though it has been approved in a soundly reasoned Superior Court decision and MassDEP desires to move forward with the administrative appeal. Moreover, a party could seek injunctive relief under appropriate circumstances to prevent a project from moving forward if that is warranted.

## DISCUSSION

### I. The Motions To Dismiss Are Allowed For The Boston-Based Appeal

#### A. Quincy Failed to Demonstrate Standing In The Boston-Based Appeal

Boston and MassDEP have both moved for dismissal on the grounds that Quincy failed to demonstrate standing because it has not shown it is aggrieved by the SOC affirming the Boston Commission's approval of the Project. They generally assert that Quincy failed specifically to demonstrate aggrievement within the scope of the Wetlands Act and Wetlands Regulations and that Quincy's allegations are vague and based upon speculation and conjecture. I agree with Boston's and MassDEP's contentions.

Standing "is not simply a procedural technicality." Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975). Rather, it "is a jurisdictional prerequisite to being allowed to press the merits of any legal claim." R.J.A. v. K.A.V., 34 Mass. App. Ct. 369, 373 n.8 (1993); Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998) ("[w]e treat standing as an issue of subject matter jurisdiction [and] ... of critical significance"); see also United States v. Hays, 515 U.S. 737, 115 S.Ct. 2431, 2435 (1995) ("[s]tanding is perhaps the most important of the jurisdictional doctrines").

In Save the Bay, the court emphasized the practical importance of standing:

> Whether a party is properly before a tribunal to invoke its judicial powers affects the good order and efficiency with which the matter proceeds. We emphasize that the Department in these hearings was engaged in adjudicatory proceedings wherein the legal rights and duties were to be determined and that therefore appropriate limitations could properly be placed on those persons to intervene . . . . The multiplicity of parties and the increased participation by persons whose rights are at best obscure will, in the absence of exact adherence to requirements as to standing, seriously erode the efficacy of the administrative process. We do not say that increased citizen participation is bad. On the contrary, such interest ensures full review of all issues. However, to preserve

> orderly administrative processes and judicial review thereof, a party must meet the legal requirements necessary to confer standing.

Save the Bay, 366 Mass. at 672.

To have standing as an aggrieved party in a wetlands permit appeal, one must be:

> any person who, because of an act or failure to act by the issuing authority, may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in M.G.L. c. 131, 40.

310 CMR 10.05(7)(j)2.b.iii.; 310 CMR 10.04.[6] The Notice of Claim is required to include sufficient facts to demonstrate status as a person aggrieved. 310 CMR 10.05(7)(j)2.b.iii.

For standing, it is not necessary to prove the claim of particularized injury by a preponderance of the evidence. Matter of Gordon, Docket WET No. 2009-048, Recommended Final Decision, (March 3, 2010), adopted by Final Decision (March 5, 2010). "Rather, the plaintiff must put forth credible evidence to substantiate his allegations. In this context, standing becomes, then, essentially a question of fact for the trial judge." Marashlian v. Zoning Bd. Of Appeals of Newburyport, 421 Mass. 719, 721, 660 N.E.2d 369 (1996); accord Butler v. City of Waltham, 827 N.E.2d 216, 221, 63 Mass. App. Ct. 435, 440 (2005) (supporting evidence must only be credible on its face); Cent. St., LLC v. Zoning Bd. of Appeals, 868 N.E.2d 1245, 1251, 69 Mass. App. Ct. 487, 493 (2007) (emphasis added; appeals court reversed trial judge's finding that there was no standing because the plaintiff's evidence was credible on its face, regardless whether there was other evidence that detracted from its weight).

To show aggrievement one must only set forth evidence demonstrating a possibility that the injury alleged could result from the allowed activity. Matter of Gordon, supra.; see also Matter of Town of Hull, Docket No. 88-022, Decision on Motion for Reconsideration of

[6] As a political subdivision of Massachusetts, Quincy is a "person" for purposes of standing. G.L. c. 131 § 40.

Dismissal (July 19, 1988); compare Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20, 37 (2006) (plaintiff's case appealing zoning decision cannot consist of "unfounded speculation to support their claims of injury"). But the possibility of injury must be more than an "allegation of abstract, conjectural, or hypothetical injury." Matter of Crane, Docket No. 2008-100, Recommended Final Decision, (March 30, 2009), adopted by Final Decision (April 18, 2009) (petitioners opposing draft license for applicant's proposed pier were granted standing based on allegation of injury to navigation and water-based activities).

Here, for purposes of standing Quincy must demonstrate with credible evidence that the Project could: (a) possibly adversely impact the interests of the Wetlands Act for specific wetlands Resource Areas; and (b) the adverse impacts would or could possibly generate identifiable impacts on Quincy's property. See Matter of Andover, WET 2011-036 &-037, Recommended Final Decision (January 10, 2012), adopted by Final Decision (January 19, 2012); Matter of Lepore, Recommended Final Decision (September 2, 2004), adopted by Final Decision (December 3, 2004); Matter of Whoulev, Docket No. 99-087, Final Decision (May 16, 2000). See Matter of Doe, Doe Family Trust, Docket No. 97-097, Final Decision (April 15, 1998) ("[A]n allegation of abstract, conjectural or hypothetical injury is insufficient to show aggrievement."); see also Matter of Marblehead Harbors and Waters Board, Docket No. WET 2012-009, Recommended Final Decision (June 29, 2012), adopted by Final Decision (July 3, 2012) (failure to show possibility of injury with evidence from competent source); Matter of Kittansett Club, Docket No. WET-2007- 009, Recommended Final Decision (April 10, 2008), adopted by Final Decision (April 16, 2008) (no standing when Petitioner could not demonstrate any flooding impact to abutting property because it was not downgradient from project site, even assuming the project did not comply with the stormwater standards); Matter of Town of

Andover, Docket Nos. WET 2011-036 and WET 2011-039, Recommended Final Decision (January 10, 2012), adopted by Final Decision (January 19, 2012) (dismissal for failure to show standing); Matter of Digital Realty Trust, Docket No. WET 2013-018, Recommended Final Decision (October 9, 2013), adopted by Final Decision (October 28, 2013) (dismissal for failure to show standing).

Quincy has failed to demonstrate standing because: (1) it has not put forth credible evidence (or even a substantiated theory) of the possibility of an injury to its property within the scope of the Wetlands Act and Regulations and (2) its standing claims are too speculative and conjectural. In the NOC, Quincy alleges only that it will be "injured in fact by the Applicant's understated impacts to wetland resources and wetlands interests from work to repair or replace concrete piers damaged by ASR[7] and Freeze-Thaw conditions adjacent to the Quincy Bay." NOC, pp. 3-4. It believes it will suffer "injury in fact" to "wetland resources and wetland interests in Quincy Bay and Wollaston Beach from work to repair or replace concrete piers…." NOC p. 3.

Quincy's theory, however, is flawed because the alleged "work or repair" that will purportedly result in injury to Quincy is not derived from the construction methodology in the NOI that Boston filed for the Project. Instead, Quincy faults Boston's construction methodology, asserting that it understates the degradation of the existing concrete piers and that once Boston commences construction it will encounter pier degradation that will require more substantial work not included in the NOI that *may* disturb the ocean floor and *may* result in the spread of contaminated sediment, which *may* ultimately be washed onto shore.

These are insufficient assertions for standing because they are based upon hypothetical injuries unsupported by any credible evidence, or sound argument for that matter, showing any

[7] ASR is an acronym for "Alkali-Silica Reaction," a process that causes deterioration.

(1) possible adverse impacts to wetlands interests; (2) the mechanism of injury that would purportedly harm those wetlands interests; and (3) the mechanism of injury to Quincy. The alleged injury is too conjectural and speculative and derived from how Quincy envisions the project, instead of the actual project proposed by Boston.

The allegations are also insufficient because the land under Quincy Bay is Commonwealth Tidelands pursuant to MGL c. 91, and thus there is no standing for Quincy for these purported LUO impacts because they lie outside of Quincy's own property. And Quincy has not shown any ownership interest for Wollaston Beach, which, according to MassDEP's unchallenged assertions, is owned and operated by the Massachusetts Department of Conservation and Recreation ("DCR").

Quincy's opposition memoranda to Boston's and MassDEP's motions to dismiss do not bolster Quincy's standing claim, and instead generally repeat the same sort of general grievances that do not include the possibility of a specific injury in fact that can be addressed through this appeal. See Opposition to Boston's Motion to Dismiss, pp. 7-8. Instead, Quincy repeats speculative claims that are based upon a project design that Quincy would prefer, not the actual design put forward by Boston. Id.

Quincy claims that Boston should use coffer dams instead of the proposed limpets for the project; Quincy contends that the coffer dams would allow more work on the substructure and have the net beneficial effect of restricting the flow of construction related debris in the harbor, onto the harbor bottom, and carried by tidal action to wetland resources and other areas in Quincy. Quincy adds that the use of limpets will not enable Boston to do all the necessary work and instead will result in avoidable impacts to wetlands resources when Boston discovers severe pier degradation and the need to conduct more invasive repairs. Id. at p. 8. Opposition to

Boston's Motion to Dismiss, p. 9; Opposition to MassDEP's Motion to Dismiss, p. 4. Quincy also adds that from Boston's purportedly incorrect construction methodology, Quincy's municipally owned beaches, including Orchard Beach, Perry Beach, and Nickerson Beach, which allegedly face the proposed bridge location, "will receive impacts from the exposure and resettlement of contaminated sediments, which will travel through Quincy Bay and impact the interests of prevention of pollution, protection of land containing shellfish, and protection of fisheries."[8] Opposition to Boston's Motion to Dismiss, p. 9; Opposition to MassDEP Motion to Dismiss, p. 4. Further, it asserts that it owns Squantum Marsh, which would be "impacted by the construction activity and operation of the Long Island Bridge." Id. at pp. 10-11.

Even assuming Quincy owns the preceding properties, its standing claim continues to suffer from the same defects discussed above with respect to its Notice of Claim. There is no supporting credible evidence and the assertions are based upon hypothetical injuries unsupported by any credible evidence: quite simply, Quincy believes that the Project will not proceed as planned, and instead *may* result in disturbance to the ocean floor, which *may* have contaminated sediment, which *may* eventually float to the identified Quincy beaches and *may* be of sufficient quantity and composition to adversely affect Wetlands Interests for those beaches. This is simply too speculative and conjectural. For example, Quincy has not identified specifically what resource area harm would occur in the vicinity of the project and how such harm would affect

[8] These allegations concerning the movement of contaminated sediment to Quincy property do not appear in the Notice of Claim, but I have nevertheless considered them in this analysis to consider Quincy's claims in their most favorable light. Given this consideration of allegations outside the Notice of Claim, Quincy's delay in requesting leave, and the reasons asserted by MassDEP and Boston in their opposition memoranda, Quincy's motion within its opposition to Boston's motion to dismiss to file a more definite statement under 310 CMR 1.01(11)(b) is denied. In any event, Quincy's reply to MassDEP's motion to dismiss suggests that in its opposition to Boston's motion to dismiss Quincy in fact has already included the information it sought to include through its motion for more definite statement. See Quincy's Opposition to MassDEP's Motion to Dismiss, pp. 4-5. Moreover, Quincy's claim does not suffer from vagueness or ambiguity, it suffers because the alleged causal connection and injury are unsupported by any basis to conclude that there is even a possibility of the alleged harm occurring, i.e., a plausible causal mechanism or theory that would lead to the purported harm to Quincy within the confines of the Wetlands Regulations and Wetlands Act. Quincy speculates that the Project will not proceed as planned by Boston, and instead will result in more work than planned, which will purportedly lead to the alleged injuries.

Quincy's interests under the Wetlands Regulations and Wetlands Act. Quincy's argument assumes that impacts from the project would somehow reach its beaches via waves and currents, but it has not specifically articulated what those impacts are, what the source of the impacts would be, what the specific harm would be relative to the Wetlands Regulations and the Wetlands Act, and what performance standard in the Wetlands Regulations would be compromised.

There is no alleged factual or evidentiary basis for Quincy to conclude that there would be contaminated sediments in the vicinity of the work area which be released under the Project as currently proposed by Boston. The alleged injury continues to be too conjectural and speculative and derived from how Quincy envisions the project, not on the actual project proposed by Boston. In addition, general claims of some sort of "representational standing" for purported injury to the general public is not a valid basis for standing. See Mass. Highway and MDC, Docket 96-079 (1997), Summary Decision, adopted by Final Decision (No representative standing for a municipality, must show injury in fact.); Matter of William Horne, OADR Docket No. WET-2011-015, Recommended Final Decision (September 23, 2011), adopted by Final Decision (November 2, 2011) ("Petitioners seem to allege a general and collective assertion of injury on behalf of those living near the Fore River basin, but that is a generalized concern that is not specific to them."); see also Board of Health of Sturbridge v. Board of Health of Southbridge, 461 Mass. 548 (2012); Matter of Town of Nantucket Marine Dept., Docket No. 96-023, Decision and Order re Standing (August 20, 1996). Ownership of property in the vicinity, even property abutting a project, is not necessarily sufficient to establish personal aggrievement. Id.

Quincy's assertions of standing are similar to those that were rejected by the OADR Chief Presiding Officer in Matter of Webster Ventures, LLC, Docket No. WET 2014-016, OADR Docket WET-2014-016, Recommended Final Decision (February 27, 2015), adopted by Final Decision (March 26, 2015). In Webster, the petitioners challenged an SOC that approved the proposed construction of a marina and berth for a 75-foot vessel on Webster Lake in the Town of Webster. One of the petitioners lived approximately 25 feet away from the site of the proposed project. To support her standing argument the petitioner alleged that oil from a prior oil spill was present on the lakebed; that the project proponent's installation of pilings in the lakebed would release oil from the spill; and that the oil would migrate to her property and damage the property itself differently from other residents in the area. However, the petitioner failed to demonstrate standing because the aggrievement claim was based upon a hypothetical that was unsupported by any evidentiary support for the allegations that oil contamination existed in the subject area; that the oil would be released into the water column; and that water flow patterns would cause the movement of oil to the Petitioner's property and affect the petitioner differently than the other residents on the lake.[9]

Importantly, and in contrast to Quincy's unsupported allegations, the Boston SOC includes several conditions to address the category of concerns raised by Quincy. Quincy has not demonstrated how the SOC conditions are insufficient to address the alleged harm. The SOC conditions that address the alleged harm include the following:

[9] Quincy's claims regarding the management of purported contaminated sediments may be more appropriately investigated and managed under G.L. c. 21E and the Massachusetts Contingency Plan, 310 CMR 40.0000, instead of the Wetlands Act and Wetlands Regulations. See Matter of Massachusetts Bay Transportation Authority, Docket No. WET 2017-024, Recommended Final Decision (February 16, 2018); adopted by Final Decision (February 27, 2018) (any authority the Department may have over a project under M. G. L. c. 21E cannot be adjudicated in an appeal arising under the Wetlands Protection Act).

General Condition 18 provides in pertinent part: "At no time shall sediments be deposited in a wetland or water body. During construction, the applicant or his/her designee shall inspect the erosion controls on a daily basis and shall remove accumulated sediments as needed. The applicant shall immediately control any erosion problems that occur at the site and shall also immediately notify the Department, which reserves the right to require additional erosion and/or damage prevention controls it may deem necessary."

If during the course of the Project, Boston's proposed construction methodology requires changes, Special Condition 26 provides in pertinent part: "Any proposed or executed change in the plans approved under this Superseding Order shall require the applicant to file a new Notice of Intent with the conservation commission or to inquire of MassDEP in writing whether the change is substantial enough to require a new filing. . . . Any errors in the plans or information submitted by the applicant shall be considered changes and the above procedures shall be followed."

Special Condition 28 provides in pertinent part: "Prior to the start of work, the applicant shall submit final construction plans stamped by a Massachusetts registered professional engineer to MassDEP and the commission. Any deviations from the plans referenced in the SOC must be noted."

Special Condition 38 provides in pertinent part: "The contractor shall have a boat available at all times for the collection and removal of any project-related trash or debris that falls on the watersheet, and shall collect debris on a daily basis or more frequently if needed."

Special Condition 46 provides: "During work on this project, there shall be no discharge or spillage of fuel, oil or other pollutants, including sediments, onto any part of the site. The

applicant shall take all reasonable precautions to prevent the release of pollutants by ignorance, accident, or vandalism."

For all the above reasons, MassDEP's and Boston's motions to dismiss the Boston-based appeal for lack of standing are allowed.

### B. Quincy Failed To State A Claim Upon Which Relief Can Be Granted In The Boston-Based Appeal

In addition to moving to dismiss for failure to demonstrate standing, MassDEP and Boston both moved to dismiss Quincy's Boston-based appeal for failure to state a claim upon which relief can be granted. In sum, they contend that Quincy has not asserted a claim that is cognizable under the Wetlands Regulations or Wetland Act, and instead is based upon a general theory of perceived future harm that is derived from Quincy's preference as to how the project should be constructed, not upon the actual project specifications. I agree with MassDEP and Quincy.

The Wetlands Regulations clearly set forth the standard for filing a Notice of Claim to pursue an appeal with OADR, stating that the Notice of Claim shall provide:

> a clear and concise statement of the alleged errors contained in the Reviewable Decision and how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c. 131, § 40, including reference to the statutory or regulatory provisions the Party alleges has been violated by the Reviewable Decision, and the relief sought, including specific changes desired in the Reviewable Decision.

310 CMR 10.05(7)(j)2.b.v.; see also 310 CMR 1.01(6)(b) ("The notice of claim for adjudicatory appeal shall state specifically, clearly and concisely the facts which are grounds for the appeal, the relief sought, and any additional information required by applicable law or regulation.").

In adjudicatory proceedings to review a motion to dismiss, presiding officers have applied rules similar to those applied in the Massachusetts courts under Mass. R. Civ. P. 12(b). A petitioner's well-pleaded factual allegations are taken as true, and petitioners should be given the benefit of all inferences. 310 CMR 1.01 (11)(d)2; see Matter of SEMASS Partnership, Docket No. 2010-051, Recommended Final Decision (December 20, 2010), adopted by Final Decision (January 18, 2011) (setting forth standard of review for failure to state a claim); Ginther v. Commissioner of Insurance, 427 Mass. 319, 322, n. 6 (1998); Callahan v. First Congregational Church of Haverhill, 441 Mass. 699, 709-710 (2004); Matter of Town of Falmouth Dept. of Public Works, Docket No. 93-032, Decision and Order on Motion to Dismiss, 1 DEPR 217 (Sept. 2, 1994).

In its Notice of Claim, Quincy articulated its claim as being based upon "allegations about the integrity of the concrete piers, the need for more in-depth evaluation of the concrete piers, and the increase in wetlands impacts from repairs and replacement of piers . . . ." NOC, p. 3. Quincy contends that the structural integrity of the piers is inadequate and could deteriorate in the future. Quincy disagrees with Boston's plan to repair and strengthen the substructure because it would prefer that it be done differently using coffer dams, instead of limpets, as Boston plans to do. Quincy claims that impacts on LUO, marine fisheries, land containing shellfish, and "other wetlands resource areas" in proximity to the piers have not been considered because Boston's proposed construction methodology is deficient. NOC, p. 6; Opposition to Boston's Motion to Dismiss, pp. 3-4.

I recognize that Quincy has concerns related to how Boston's Project will proceed. But none of those concerns arise to a claim under the Wetlands Regulations or the Wetlands Act. They constitute generalized grievances that Quincy would prefer that the project be completed

differently and that the Project might not transpire as Boston has forecasted. But Quincy has failed to base any of the above assertions upon a particular cognizable claim under the Wetland Regulations or the Wetlands Act. There is no articulation of how the project as proposed and projected by Boston is inconsistent with a specific provision in the Wetlands Regulations or the Wetlands Act for which Quincy would also have standing. See Mater of First Parish Road Co., Inc., 14 DEPR 178 (2007) (allegations concerning design feasibility not sufficient to state a claim under the Act).

Quincy also claims that the SOC does not address the impacts of predicted sea level rise and that there was an insufficient alternatives analysis. Neither of those claims is based upon an enforceable legal foundation, including the Wetlands Regulations or the Wetlands Act, and thus they fail to state a claim upon which relief can be granted.

For all the above reasons, the Petitioners failed to state a claim upon which relief can be granted and failed to demonstrate standing, and thus MassDEP's and Boston's motions to dismiss should be allowed for the Boston-based appeal.

## II. Quincy Has Standing In The Quincy-Based Appeal But The Motions To Dismiss Are Allowed Because Quincy Failed To State A Claim On Which Relief Can Be Granted

### A. Quincy Has Standing In The Quincy-Based Appeal

Boston stated that MassDEP joined it in sections III-VII of its reply to Quincy's opposition to their motions to dismiss the Quincy-based appeal for Quincy's alleged lack of standing. Boston's and MassDEP's Reply to Quincy's Opposition to Motion to Dismiss, p. (March 2, 2021). Boston and MassDEP argue that Quincy failed to show that it is aggrieved to have standing. Id. at pp. 12-15.

Quincy responded that it has standing as an aggrieved party and as an abutter. Quincy Opposition to Motion to Dismiss, p. 5. It also added that that its Conservation Commission,

which is one of the entities that lodged this appeal, has standing as a party pursuant to 310 CMR 10.04 (definition of "party") to "defend its Denial OOC and the reasons provided therein, and to challenge the SOC which ignored the [Quincy Conservation Commission's] informational and substantive concerns." Quincy Opposition, p. 5.

I agree with Quincy that it has standing as a matter of law in this appeal that arose out of its OOC denying the Quincy-based components of the Project. The Wetlands Regulations include several provisions that specifically identify conservation commissions as parties to appeals arising out of their own orders of conditions or determinations of applicability.[10]

For appeals of OOCs and determinations of applicability that are filed with MassDEP, the Wetlands Regulations specifically provide: "Where the Department is requested to issue a Superseding Determination or Order of Conditions, the conservation commission shall be a party to all agency proceedings and hearings before the Department." 310 CMR 10.05(7)(b). Although this provision relates to SOC proceedings before MassDEP, as opposed to SOC appeals to OADR, the language is broad, referring to all "agency proceedings and hearings before the Department." OADR adjudicatory proceedings arguably satisfy this broad language.

That interpretation is confirmed by the Wetlands Regulations' more specific provision relating to appeals for adjudicatory proceedings before OADR, which states: "Any applicant, landowner, aggrieved person if previously a participant in the permit proceedings, conservation commission, or any ten residents of the city or town where the land is located, if at least one resident was previously a participant in the permit proceeding may request review of a

[10] Although Quincy cites to 310 CMR 10.04 (definition of party), none of the parties, most notably MassDEP, address Quincy's standing pursuant to 310 CMR 10.04 or the other provisions that *clearly* grant conservation commissions party status in appeals before MassDEP and OADR when their underlying order of conditions or determination of applicability is at issue. Given these provisions I do not address the arguments relating to whether Quincy has standing as an aggrieved party or as an abutter.

Reviewable Decision by filing an Appeal Notice no later than ten business days after the issuance of the Reviewable Decision." 310 CMR 10.05(7)(j)(2).

The Wetlands Regulations also provide: "The Department, the conservation commission, the petitioner, the applicant, and any interveners pursuant to 310 CMR 10.05(7)(j) shall be deemed to be parties to the [adjudicatory proceeding before OADR] and are entitled to service of all documents filed in the proceeding, and shall be included in a certificate of service to accompany all filings in accordance with 310 CMR 1.01(4)(f)." 310 CMR 10.05(7)(j)(2)f.

Last, as Quincy points out, the definition of party "means the applicant, the conservation commission and the Department, and pursuant to 310 CMR 10.05(7)(a) may include the owner of the site, any abutter, any person aggrieved, any ten residents of the city or town where the land is located and any ten persons pursuant to M.G.L. c. 30A, § 10A." 310 CMR 10.04.

The preceding provisions specifically identify conservation commissions as parties in adjudicatory proceedings arising out of their determinations of applicability and orders of conditions, without reference to and regardless of whether they are aggrieved.[11] For these reasons, Boston's and MassDEP's motions to dismiss for lack of standing are denied in the Quincy-based appeal.

### A. Quincy Failed To State A Claim Upon Which Relief Can Be Granted In The Quincy-Based Appeal

I approach Quincy's alleged claims in the Quincy-based appeal with Quincy's foundational representation that the Quincy-based appeal "raises identical substantive issues" in the Boston-based appeal. NOC, p. 4.

Quincy asserts that some of the alleged roadwork will be done on Moon Island Road in the "vicinity" of wetlands resource areas (coastal beach, coastal bank, and land containing

[11] It is noteworthy, however, that the Wetlands Regulations do not provide automatic standing by virtue of being an "abutter." See 310 CMR 10.05(7)(j)2.a.

shellfish), specifically in the buffer zone, and in LSCSF. Quincy's Opposition[12], pp. 5-7. Quincy does not specifically allege how any component of the Project will adversely impact resource areas, only that "Moon Island Road . . . is in desperate need of repair, and that significant portions of Moon Island Road are very proximate to these same resource areas." Quincy Opposition, p. 8. These allegations are inadequate because they fail specifically to allege what aspect of the project will contravene a specific wetlands performance standard.

Quincy repeats several of the allegations that are either identical to or similar to those that were fatally defective for the Boston-based SOC, and remain defective for the same reasons in this appeal. The allegations include Quincy's belief that: (1) Boston is improperly engineering the Project and that the piers will be inadequate for the superstructure; (2) some roadwork should be included as part of the Project; (3) the Project should be engineered using coffer dams instead of limpets; and (4) the "water transport analysis" is inadequate because Quincy believes that the use of existing docks could help to minimize impacts to wetlands resource areas. Quincy Opposition, pp. 8-9. Again, these are generalized grievances that fail specifically to allege facts that show how a particular component of the project will be in noncompliance with a specific provision of the wetlands performance standards.

Quincy also contends that the SOC "erroneously approved the stormwater management system for a 'redevelopment project,'" because the superstructure has not existed for over four years and is not eligible for approval as a redevelopment project. Quincy Opposition, p. 9. This allegation is without merit. The Wetlands Regulations define a redevelopment project for the purpose of compliance with the stormwater management standards as: (a) "maintenance and improvement of existing roadways including widening less than a single lane, adding shoulders,

[12] Many of the allegations that I address in this section were raised for the first time in Quincy's opposition to the motion to dismiss, and not in it Notice of Claim. Nevertheless, I have considered those allegations in the interest of liberally construing Quincy's pleadings at this early pleading stage on the motion to dismiss.

correcting substandard intersections, improving existing drainage systems, and repaving" . . . . 310 Code Mass. Regs. 10.04 (defining Redevelopment). A redevelopment project must meet stormwater management standards two and three and the pre-treatment and structural stormwater best management practice requirements of standards four, five, and six, to the maximum extent practicable. 310 Code Mass. Regs. 10.05(6)(k)7.

Quincy's argument concerning the stormwater management system fails for several reasons. The Project is clearly a redevelopment project because it involves the maintenance and improvement of existing roadways. The roadways leading to the proposed bridge within Quincy will be improved resulting in alteration of 126 square feet in the buffer zone. NOI, Attachment A, p. 8. In addition, as part of the project, the existing roadway was partially modified by removing the superstructure to address safety and environmental issues but leaving the roadway's substructure, which will be improved upon with a new superstructure. Id.; NOI, Attachment C, Figure 7.

Quincy contends that the Project has not "properly addressed the potential impacts from sea level rise and alternative bridge heights," which Quincy contends will result in damage to the superstructure and "greater distribution of pollution from the bridge deck" and difficulties for "watercraft navigation." Quincy Opposition, p. 10. As noted with respect to the Boston-based appeal, these allegations are not based upon an enforceable legal foundation in the Wetlands Regulations or Wetlands Act, and thus they fail to state a claim upon which relief can be granted.

## CONCLUSION

For all the above reasons, I recommend that MassDEP's Commissioner issue a Final Decision affirming the SOC. In sum, Quincy failed to establish standing for the Boston-based appeal and failed to state a claim upon which relief can be granted for both the Boston-based and

Quincy-based appeals. Quincy failed to establish standing for the Boston-based appeal because it did not present any credible evidence of a possibility of an injury-in-fact from the Project. For the Quincy-based appeal, the Quincy Commission has standing as-of-right under the Wetlands Regulations because the appeal arose out of its order of conditions, for which it has a regulatory right to be a party in the appeal. With respect to both appeals, Quincy failed to state a claim upon which relief can be granted because it failed specifically to allege facts that would establish how any aspect of the Project would be inconsistent with the performance standards for a specific wetlands resource area.

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision 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 M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

Date: _March 17, 2021_

Timothy M. Jones
Presiding Officer

## SERVICE LIST

In The Matter Of: City of Boston Public Works Department

Docket No. WET-2019-021 & 022 File Nos. 006-1593(Boston) and 059-1416(Quincy)
Quincy and Boston

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