

## Appeals Court Divests Conservation Commissions' Wetlands Jurisdiction After Missed Deadline

On January 26, the Massachusetts Appeals Court issued a decision in *Boston Clear Water Company, LLC v. Town of Lynnfield*, finding a Conservation Commission lost jurisdiction over a project before its' review even began. The case reaffirmed the Appeals Court's 2007 holding in *Oyster Creek Preservation Inc v. Harwich*: a commission can lose its right to apply a local bylaw to a project if the commission misses a deadline of the Wetlands Protection Act (WPA or Act).

In *Boston Clear Water*, an applicant filed a Notice of Intent (NOI) with the Lynnfield Conservation Commission under both the WPA and Lynnfield's local wetlands bylaw. The WPA requires a commission open a public hearing on an NOI within 21 days of receipt. G.L. c. 131, sec. 40. The Commission was unable to gather a quorum, and failed to conduct a hearing within the requisite 21 days. In light of the Commission's failure, the applicant sought a Superseding Order of Conditions directly from DEP, which DEP subsequently issued. The Appeals Court found that the Commission lost its ability to issue an Order of Conditions under both the WPA and the local bylaw because of its failure to hear the application within the required 21 days.

The *Oyster Creek* decision also examined the relationship between a commission and its obligations for a timely hearing under the WPA. There, the Commission failed to issue an Order of Conditions under both the local bylaw and WPA within the Act's time frame after closing the public hearing. The Appeals Court found that "the timing provisions in the [WPA] are obligatory, and a local community is not free to expand or ignore them," and by issuing the Order after the statutory deadline, the court found it appropriate that the Commission lose the right to apply the provisions of its local bylaw. The same logic applied in *Boston Clear Water*: the Commission missed its first WPA deadline to hold a public hearing within 21 days of receipt of a NOI, so the applicant went right to DEP for a Superseding Order of Conditions, and the commission lost its ability to exercise local authority over the project.

A complicated but rare exception to the rule comes from the 2017 Appeals Court decision in *Cave Corp. v. Conservation Commission of Attleboro*. The *Cave Corp.* court found that when an applicant seeks multiple Orders of Conditions over time that apply to the same parcel, and the Commission fails to act in a timely manner on a new one, the latest failure to act doesn't divest the previous Orders of Conditions of their power regarding conditions under the local bylaw. In other words, a commission's failure to act on an NOI for a parcel doesn't invalidate past valid Orders of Conditions for that same parcel. While the *Cave Corp.* decision is fact heavy, and best applies to a specific set of circumstances most often seen with a phased development, it confirms that a missed deadline doesn't result in lost jurisdiction over the land in question—just that specific permit.

While not fully discussed in *Boston Clear Water*, there are practical implications if a conservation commission misses the initial 21-day deadline to open the hearing. First, after those first 21 days, an applicant can seek a superseding order directly from DEP, completely bypassing the application of any local ordinance or bylaw to the project. This is much sooner than in *Oyster Creek*, where the Commission lost its' authority to impose local requirements after the Commission's public hearing process ended. Going right to DEP not only speeds up the permitting process by skipping a potentially lengthy local review, it also eliminates most avenues to appeal the ultimate permit decision. Potential opponents to a project lose their ability to seek initial review in the form of a Superseding Order from DEP because initial project review occurs at the DEP level. Second, since the *Boston Clear Water* decision divests a local conservation commission of its authority to enforce local rules, potential opponents also lose the ability to appeal an Order of Conditions to court under G.L. c. 249 § 4, which allows an appellant to challenge a decision issued under an ordinance or bylaw.

In addition, jumping right to DEP for project review can significantly impact the severity of potential project conditions, because an applicant who immediately seeks a superseding order from DEP will only have the project reviewed under the Wetland Protection Act's minimum performance standards, and not the potentially more strict local provisions. Often, municipalities use their local wetlands bylaw to impose more stringent performance standards, designate additional resource areas, expand buffer zones, create no-build zones, and impose storm water standards which otherwise don't exist under the WPA. In short, a review under DEP alone lowers the bar for project approval dramatically.

If a commission has a looming deadline and wants to avoid losing jurisdiction over a project like in the *Boston Clear Water* case, a little written permission can go a long way. The Appeals Court in *Boston Clear Water* noted that the Commission didn't secure a waiver from the applicant to continue the hearing beyond the statutory deadline, implying that the deadline can be missed with the written consent of the applicant. Otherwise, a commission is bound by WPA deadlines.