

AGENDA

Tuesday

March 22, 2017

**TOWN OF EASTHAM
AGENDA
BOARD OF SELECTMEN
Wednesday, March 22, 2017
3:00 p.m.**

Location: *Earle Mountain Room*

- I. Review of Warrant Articles
 - a. CPA Articles – Local Preference Condition Wording from Town Counsel
- II. Review of Annual Town Meeting Warrant
- III. Stormwater Runoff from Park Street
- IV. Request from POCCA for Eastham Town Counsel to Send a Letter Against the 2017 YOP (Yearly Operational Plan) Written by Eversource
- V. Minutes:
 - Monday, January 30, 2017 – Executive Session
 - Wednesday, February 8, 2017 – Executive Session
 - Tuesday, February 21, 2017 – Regular Meeting
 - Wednesday, February 22, 2017 – Executive Session
 - Monday, March 6, 2017 – Regular Meeting
 - Wednesday, March 8, 2017 – Work Session

Upcoming Meetings

<i>Monday, April 3, 2017</i>	<i>5:00 p.m.</i>	<i>Regular Meeting</i>
<i>Wednesday, April 5, 2017</i>	<i>3:00 p.m.</i>	<i>Work Session</i>
<i>Tuesday, April 18, 2017</i>	<i>5:00 p.m.</i>	<i>Regular Meeting</i>
<i>Wednesday, April 19, 2017</i>	<i>3:00 p.m.</i>	<i>Work Session</i>

The listing of matters includes those reasonable anticipated by the Chair which may be discussed at the meeting. Not all items listed may in fact be discussed and other items not listed may also be brought up for discussion to the extent permitted by law.

This meeting will be recorded and written minutes prepared.

Sheila Vanderhoef

From: Adele Blong <capeporter@comcast.net>
Sent: Wednesday, January 11, 2017 10:53 AM
To: Sheila Vanderhoef
Cc: Neil Andres
Subject: Stormwater runoff from Park St.

Dear Ms. Vanderhoef,

As you know the Water Management Committee has been working to identify remedial steps that can be taken to alleviate the deterioration of Minister/Schoolhouse Pond. As part of that effort our Chair, Charles Harris, identified that there was stormwater runoff from Park Street and the landing into the pond. Neil Andres then began work to design and implement changes that would cure the runoff problem.

Neil has now advised us that there is a question as to the ownership of Park Street that will need to be resolved before the Town can do any work there and that the landing is probably on school property. Neil also advised that his first step would be consultation with you and that there was a possibility that the matter could require action at Town Meeting to establish Town ownership of the road.

The Water Management Committee is hopeful that the ownership question can be resolved in time to allow consideration at the 2017 Town Meeting if such consideration is necessary. Remediation of the situation in Minister/Schoolhouse was identified as a high priority in the Town's 2011 Pond Action Plan and the pond abutters are very anxious to see some movement toward that goal as are we.

Thank you for your attention to this matter.

Respectfully,

Adele Blong
Clerk of the Water Management committee

*this is on
pos agenda
for 3/20/17*

March 10, 2017

Dear Town Selectmen throughout Cape Cod ~

Today I write to your town with a request, as I did last year and the year before. All towns joined in this effort to protect their town owned land and privately owned land, for that I personally thank you. The window of time to do that again is now.

Would your town Selectmen please write a comment against the 2017 YOP (Yearly Operational Plan) written by Eversource that was submitted to MDAR (Massachusetts Department of Agricultural Resources) that lists the use of 5 different herbicides to maintain vegetation along ROW (Rights-of-ways) to maintain access to their power lines and submit it to the three places below? The simplest alternative is for Eversource to go back to mowing but in the Fall.

It is coming increasingly clear that these herbicides are harmful to human health, our environment and our drinking water, we all should air on the side of caution, now is a chance.

The Eversource 2017 Yearly Operational Plan (YOP) lists the following ten Cape towns identified for spraying: Barnstable, Bourne, Brewster, Chatham, Dennis, Falmouth, Harwich, Orleans, Sandwich, and Yarmouth. The YOP reads:
<http://www.mass.gov/eea/docs/agr/pesticides/rightofway/yop/eversource-energy-yop-2017-cape-cod-and-islands.pdf>

It is a critical time to send MDAR fact-based reasons why your town doesn't support the 2017 YOP by Eversource. The deadline to submit a comment is March 27th at 5pm. Please :cc our State Senator Julian Cyr, as well as POCCA Cape Cod for our records, I thank you.

Feel free to contact me with any questions and I thank your town ahead of time for continuing to support this Cape-wide effort.

Respectfully,
Laura Kelley
President of POCCA Cape Cod
North Eastham, Mass

Mike McClean, Chief Pesticide Inspector, MDAR:
617-626-1781
251 Causeway St., Suite 500
Boston, MA 02114
Michael.mcclean@state.ma.us

Also :CC our Senator:
Senator Julian Cyr
Julian@juliancyr.com

And :CC POCCA:
President Laura Kelley
l.kelley@pocccapecod.org



TOWN OF EASTHAM

2500 State Highway, Eastham, MA 02642 - 2544

All departments 508 240-5900 Fax 508 240-1291

www.eastham-ma.gov

DRAFT

March 20, 2017

Massachusetts State Pesticide Bureau
Michael McClean, Chief Pesticide Inspector
251 Causeway Street; Suite 500
Boston, MA 02114-2151

RE: Eversource Yearly Operating Plan (YOP) 2017

Dear Mr. McClean,

We are writing again to restate our concern about the Eversource YOP that continues to focus on chemical vegetation management strategies.

The Eastham Board of Selectmen continues to feel strongly that vegetation control techniques in Eastham, and everywhere on the Cape, should be limited to non-chemical applications such as hand-cutting and Integrated Vegetation Management (IVM) techniques.

The Town of Eastham is in the process of installing a town wide public water supply. Currently, all properties abutting the NSTAR/EverSource transmission corridor are served by on-site wells and septic systems. We have reviewed the maps sent with the letter and wells with 50' or less separation are marked on your current maps, but we also want you to be aware of the many wells within the 100' separation. We have located all of these private drinking water wells with GPS coordinates, and will forward those files to you should you want to refine the private locations shown on the map with specific coordinates.

Eastham strongly objects to the state's acceptance of the YOP for the following reasons:

1. The chemicals used are toxins which go into the soil that is covering our sole source aquifer
2. These same toxins have potential adverse impacts on the above ground environment, bee populations and plants
3. MDAR, in continuing to support chemical vegetation control measures, shows a lack of concern for the special environment with the sole source aquifer on Cape Cod

In summary, we hope you are concerned as well, and will do everything possible to ensure that our water supply, our fragile environment, and the health of our citizens, are protected.

Thank you for your consideration.

Sincerely,

Jacqueline W. Beebe
Town Administrator
On behalf of the Board of Selectmen

cc: Eastham Board of Selectmen
Representative Sarah K. Peake
Senator Julian Cyr
POCCA, Laura Kelley, President

DRAFT

March 22. worksession

Jacqueline Beebe

From: John Kelly [jkelly@town.orleans.ma.us]
Sent: Thursday, March 09, 2017 9:57 AM
To: Michael Embury
Cc: Elizabeth Sullivan; cclark@harwich-ma.gov; Jacqueline Beebe
Subject: RE: [FWD: Town of Brewster, et al v. MDAR -]

Mike,
As we discussed, the Orleans BOS are interested in participating in the same 4-town effort as last year to move forward and challenge the 2017 YOP of Eversource.

John

John F. Kelly
Town Administrator

19 School Road
Orleans, MA 02653
508-240-3700 x 415
jkelly@town.orleans.ma.us

From: Michael Embury [mailto:membury@brewster-ma.gov]
Sent: Thursday, March 9, 2017 8:04 AM
To: John Kelly <jkelly@town.orleans.ma.us>; Elizabeth Sullivan <esullivan@town.dennis.ma.us>; cclark@harwich-ma.gov; jbeebe@eastham-ma.gov
Subject: FW: [FWD: Town of Brewster, et al v. MDAR -]

Attached is the ruling as noted by Bruce. Do any of you have an interest moving forward on 2017 YOP.

As a note: the 2017 YOP allows Eversource to go back and spray any area they did not spray under the 2016 YOP.

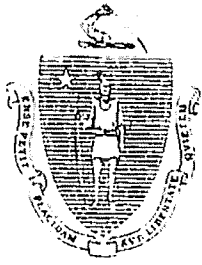
From: lawyer [mailto:lawyer@brucetaub.net]
Sent: Thursday, March 9, 2017 12:24 AM
To: Michael Embury <membury@brewster-ma.gov>
Subject: [FWD: Town of Brewster, et al v. MDAR -]

Mike - The DALA magistrate ruled that the towns did not satisfy the aggrievement requirement for standing. (Attached)

The question is whether the towns ought go at it again this year trying to correct for the "shortcomings" identified by the magistrate.

Please share with the others and advise. Naturally, I would like to go forward, but then I believed the Pat's could come back from 28 down. Thanks

Bruce



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

ONE CONGRESS STREET, 11TH FLOOR

BOSTON, MA 02114

EDWARD B. McGRATH
CHIEF ADMINISTRATIVE MAGISTRATE

Tel: 617-626-7200

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February 23, 2017

Tara Zadeh, Esq.
Department of Agricultural Resources
251 Causeway St., Suite 500
Boston, MA 02114

Bruce R. Taub, Esq.
P.O. Box 2712
Orleans, MA 02653

Nancy Kaplan, Esq.
Senior Counsel
800 Boylston Street, 17th Floor
Boston, MA 02199

Re: Town of Brewster v. Department of Agricultural Resources
DALA Docket Nos. MS-16-393, 394, 395 and 396

Dear Parties:

Enclosed is the Recommended Final Decision of the Division of Administrative Law Appeals in the above-entitled matter.

Thank you for your attention to this matter.

Sincerely,

Edward B. McGrath / JPR

Edward B. McGrath
Chief Administrative Magistrate

EBM/mbf

Enclosure

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

**Town of Brewster, Town of Dennis,
Town of Eastham, and Town of Orleans,
Petitioners**

v.

Docket Nos. MS-16-393, 394, 395 and 396
Dated: February 23, 2017

**Department of Agricultural Resources,
Respondent**

Appearance for Petitioners:

Bruce Taub, Esq.
Box 2712
Orleans, MA 02653

Appearance for Respondent:

Jessica H. Burgess, Esq.
Legal Counsel
Department of Agricultural Resources
251 Causeway Street, Suite 500
Boston, MA 02114

Appearance for Intervenor Eversource Energy:

Nancy Kaplan, Esq.
Senior Counsel
Eversource Energy
800 Boylston Street, 17th Floor
Boston, MA 02199

Administrative Magistrate:

James P. Rooney

Summary

The towns that appealed a Yearly Operating Plan issued by the Department of Agricultural Resources to a utility for right of way spraying have failed to plead sufficiently that they are aggrieved by the Department's action and, thus, the appeals are dismissed for lack of standing. While the towns assert a potential basis for standing - that the spraying will interfere with a municipal obligation to provide town residents with drinking water - the appeals do not assert facts sufficient to show actual aggrievement, including how the towns obtain water, what municipal authority is responsible for drinking water, and how the permitted spraying may impact the towns' drinking water supply.

RECOMMENDED DECISION

The Towns of Brewster, Dennis, Eastham, and Orleans have appealed from a Yearly Operating Permit the Department of Agricultural Resources issued to Eversource Energy in 2016 that allowed it to conduct “an integrated vegetation management plan that includes the use of herbicides on electric rights-of-way” on Cape Cod and Martha’s Vineyard. The Department and Eversource have each moved to dismiss the appeal for lack of standing and failure to state a claim. The towns oppose the motions.¹

Background

In 2013, the Department approved a five-year Vegetation Management Plan submitted by NSTAR (now Eversource) that included the application of herbicides in rights of way to achieve long-term vegetation control.

Department regulations require, among other things, that Eversource submit yearly operating plans for herbicide application to the Department for its approval. On April 1, 2016, Eversource submitted a plan for spraying in 2016 to the Department. In this Yearly Operational Plan, Eversource proposed to use specific herbicides in eight communities on Cape Cod, including Brewster, Dennis, and Orleans, but not Eastham. Eversource proposed that certain areas be off-limits to spraying, including Zone I areas from which public water supply wells draw water, and that in other sensitive areas,

¹ The parties are aware that the Pesticide Board has previously decided that appeals of yearly operating plans that are not resolved by the end of the year in which spraying is permitted are moot. *See Larsen v. Department of Agricultural Resources*, Docket No. MS-13-612, Final Decision (May 9, 2014). They have requested, nonetheless, that I rule on the motions as the issues are likely to recur should the towns appeal any future spraying permits granted to Eversource, particularly a five-year vegetation management plan to be issued in 2017.

including Zone II areas of public water supply wells, only sensitive area herbicides would be used.² On July 15, 2016, the Department approved the plan.

Between July 28 and August 3, 2016, the towns of Brewster, Dennis, Eastham, and Orleans filed similar appeals challenging the plan approval. Three of the appeals recited identical language describing the particular injury to the town that the appeals were meant to alleviate. Each of these appeals stated that the town:

shall suffer economic, environmental, and recreational injuries far in excess of those suffered by the general public if the spraying of herbicides is allowed as contemplated in the Eversource YOP [Yearly Operating Plan]. The [town] further contends, injuries to the town as a whole, to its citizenry as a whole and indeed to any town on Cape Cod or in Dukes or Barnstable County, is potentially devastating, especially as regards clean, potable, chemical free drinking water. Additionally, said herbicidal spraying impacts the entire ecologically sensitive balance of life and nature on all of Cape Cod in a manner far different in kind and magnitude from those unique impacts which might be suffered by the general public within the scope of the interests identified in 333 CMR 11.00 [the Pesticide Board regulations on right of way management] and MGL 132B [the Massachusetts Pesticide Control Act].

The Department, in its motion to dismiss, argues that the towns lack standing because they ~~have not shown that they are specifically aggrieved by the Yearly Operating Plan~~ and instead have raised only vague, speculative claims of harm that might befall the general public. The Department also contends that the towns have failed to state a claim because the review of a Yearly Operating Plan is limited to consideration of whether it is consistent with the Vegetation Management Plan, and the towns have not described in

² The Right of Way Management regulations define Zone I and Zone II as follows:

Zone I, as identified on the most current available maps prepared by the Department of Environmental Protection and as defined at 310 CMR 22.02, the protective radius required around a public water supply well or wellfield. . . .

Zone II, as identified on the most current available maps prepared by the Department of Environmental Protection and as defined at 310 CMR 22.02, the aquifer recharge area for a public water supply well or wellfield.

what manner Eversource's approved Yearly Operating Plan is inconsistent with the approved Vegetation Management Plan.

Eversource's motion to dismiss makes similar arguments. It adds that the towns lack standing because they have not shown an injury different from that of any other towns on Cape Cod and that no claim can be made as to Eastham because Eversource did not propose spraying herbicides in that town in 2016.

The towns responded that they have suffered an injury of greater magnitude than that suffered by the general public by virtue of the townwide responsibilities of their elected officials, particularly as those responsibilities relate to the provision of clean, safe drinking water. The towns maintain that the Department "failed to attend to or consider ways in which the 2016 [Yearly Operating Plan] it approved was inadequate in relationship to the [Vegetation Management Plan] on which it is predicated thus failing or abdicating its obligations regarding public safety."

Discussion

A. Standing

Yearly Operating Permits allowing use of herbicides in a utility right of way may be administratively appealed by "[a]ny person aggrieved." 333 C.M.R. § 11.09. A person aggrieved for purposes of the Right of Way Management Regulations is:

any person who, because of an act or failure to act by the Department 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 333 CMR 11.00.

333 C.M.R. § 11.02. A person claiming aggrievement "must specify in writing sufficient facts to allow the Department to determine whether or not the person is in fact aggrieved." *Id.*

What this means is that the town petitioners must show that they are “persons,” that they may be harmed in a manner different in kind or magnitude than the general public, and that the harm they wish to address is within the scope of interests protected by the Department’s Right of Way Management Regulations. Those regulations define person to include “the Commonwealth and its political divisions.” *Id.* Hence, the towns are persons for present purposes. The towns claim that the proposed spraying will interfere with clean safe, drinking water supplies. This is an interest protected by the regulations, which bar spraying within a Zone I of a water supply well and limit spraying within recharge areas of such wells known as Zone IIs. 333 C.M.R. § 11.04(2)(a).

The issue, then, is whether the towns have shown specific facts that demonstrate that they may be harmed in a manner different in kind or magnitude than the general public. The parties have not cited any cases from the Department of Agricultural Resources on this subject. I look, thus, to adjudicatory case decisions issued by the Department of Environmental Protection that have addressed municipal standing under regulations that define aggrievement similarly.

The DEP decisions on point have held that:

Municipal standing based on aggrievement has been sustained where the project allegedly threatened to injure municipal property or compromise coextensive municipal regulatory authority, and rejected where no such allegations were made.

Matter of Massachusetts Highway Dept., Docket No. 96-079, Decision and Order on Motion to Dismiss for Lack of Standing, 3 DEPR 216, 219 (Mass. Dept. of Env’tl. Prot., Dec. 2, 1996). Thus, a town had standing to challenge the grant of a waterways license to build a marina because the marina might interfere with the town harbormaster’s responsibility to license temporary moorings. *Matter of Treasure Island Marina*, Docket

No. 85-011, Final Decision, 5 MELR 1121, 1125 (Mass. Dept. of Env'tl. Prot., Mar. 19, 1987). On the other hand, a city lacked standing to challenge an air quality permit because the relevant statute did not give it the power to regulate air pollution. *Matter of Brockton Wood Limited Partnership*, Docket No. 94-021, Final Decision - Order of Dismissal, 2 DEPR 166 (Mass. Dept. of Env'tl. Prot., Aug. 1, 1995)

Mere assertion that a town is representing the interests of its residents is not enough, for the residents are by definition part of the general public, and collective injury to them cannot be the required personal injury that differs from an injury to the general public. *Matter of Massachusetts Highway Dept.*, 3 DEPR at 219.

An alleged injury to a town water supply can be the basis for aggrieved person standing. Thus, a town water supply board had standing to appeal a wetlands permit because the proposed project might affect a nearby public water supply that the board owned and operated. *Matter of Burnham Land Trust*, Docket No. 90-077, Decision on Applicant's Motion to Dismiss and for a More Definite Statement, 9 MELR 1373, 1376-79 (Mass. Dept. of Env'tl. Prot., June 6, 1991). However, it must be noted that the party in the Burnham Land Trust case was the town water board, not the town. Close examination is required to determine whether the local body bringing an appeal is the appropriate party. For example, a town board of selectman was held not to be aggrieved by the issuance of a wetlands permit because it was the local conservation commission, not the board of selectman, that administered the Wetlands Protection Act locally. *Matter of Cahill*, Docket No. 89-286. Decision on Motion to Dismiss (unreported decision) (Mass. Dept. of Env'tl. Prot., Mar. 5, 1990).

Here, the town petitioners' allegations that the Yearly Operating Permit will allow herbicide spraying that will interfere with the ability of the citizens of the towns to obtain clean, potable water are lacking in sufficient specificity to demonstrate that the towns have standing. The appeals do not describe the water sources the towns rely on to obtain drinking water and do not state whether water supply is the responsibility of a town department or an independent water supply board. They also do not describe how the spraying allowed by the permit, in which Eversource agreed to abide by the regulations limiting herbicidal use in the recharge area of a water supply well, was likely to harm the water supplies of the towns. The towns contend that groundwater on Cape Cod is part of a sole source aquifer, and hence any herbicides that leach into the ground will enter groundwater from which the towns may draw water. This contention goes part way toward establishing an impact on town water supply, but without more specificity as to the locations of the spraying with respect to the town water sources and the likely direction of groundwater flow, it is not sufficient to establish a potential impact.

This is not to say that the towns cannot demonstrate aggrievement. The statute governing pesticide use by utilities require utilities to provide detailed information to the towns where they will be spraying, including the types of pesticides to be used, fact sheets concerning the particular pesticides, the timing of the spraying, and the name of the licensed contractor who will be performing the spraying. M.G.L. c. 132B, § 6B(b). This legislative recognition of general municipal interest in such spraying does not by itself establish aggrievement regarding a particular spraying program, however. That will have to be demonstrated in each instance by pleading of facts sufficient to demonstrate aggrievement as a result of injury to the town's unique interests.

B. *Claim Sufficiency*

Because I have decided that the towns failed to plead standing sufficiently, I will address the sufficiency of their claims only briefly.

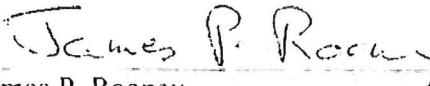
Eastham's claim is insufficient because Eversource does not propose to spray in that town in 2016, and Eastham has not alleged how spraying in another town will adversely affect it.

The remaining towns claim that the Yearly Operating Permit does not conform to the requirements of the Vegetation Management Plan, but, without more detail, it is difficult to discern in what manner the towns allege the Yearly Operating Plan is inconsistent with the Vegetation Management Plan. It is clear that the towns object to the use of certain pesticides. This would seem to be a cognizable claim, as it would appear from the documents submitted with the appeal that only the Yearly Operating Plan specifies the particular pesticides to be used. Nonetheless, it is not entirely clear how the use of these pesticides is alleged to be inconsistent with the Yearly Operating Plan or with the applicable regulations. Were this appeal not likely to be considered moot by the Pesticide Board, repleading rather than dismissal would likely be the next step. But that would be pointless at this juncture.

Conclusion

For the reasons stated, I recommend that the appeals be dismissed because standing was not pled sufficiently.

DIVISION OF ADMINISTRATIVE LAW APPEALS


James P. Rooney
First Administrative Magistrate