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## RECENT COURT VICTORIES IN WETLAND CASES

A superior court judge recently upheld MassDEP's Wetlands Protection Act decision allowing the Hoosac Wind project to go forward. Around the same time, the Appeals Court rejected two Conservation Commission denials under local wetland bylaws of permits for construction of single-family homes. The cases may signal a swing in favor of developers who present winning wetlands cases despite the difficulty and unpredictability of wetland permitting in Massachusetts.

The Hoosac Wind case (*Ten Local Citizen Group v. New England Wind, LLC*) is an example of what was wrong with the permitting and appeal process under the Wetlands Protection Act. In 2003, the developer filed a Notice of Intent to construct two gravel access roads needed for the installation of 20 wind turbines in the Town of Florida. The Conservation Commission approved the project in May 2004, but two citizen groups appealed to MassDEP. The MassDEP issued a favorable superseding order of conditions; the citizen groups appealed again. After a lengthy adjudicatory hearing the hearing officer issued a recommended decision to deny the approval and send the project back to the drawing board. The MassDEP Commissioner rejected the recommended decision, however, and issued a Final Decision approving the project in 2007. The citizen groups appealed the Commissioner's decision to superior court. The delays in this case reportedly prompted Governor Patrick's permit streamlining mandate to MassDEP in 2007. New regulations governing wetlands appeals, which contain strict deadlines, took effect on October 31, 2007.

The superior court upheld MassDEP's Final Decision in the Hoosac Wind case. As is typical in appeals of MassDEP decisions, the judge deferred to the agency's reading of its regulations and found that the Final Decision was

supported by substantial evidence. The judge did not address the Commissioner's rejection of the hearing officer's recommended decision.

In *Pollard v. Conservation Commission of Norfolk* and *Conroy v. Conservation Commission of Lexington*, the Appeals Court concluded that the conservation commission decisions were not supported by the evidence. Without explanation, the Norfolk Conservation Commission had rejected uncontradicted expert opinion evidence as "not credible." It also failed to specify its reasons for denying the order of conditions. The Lexington Conservation Commission inappropriately applied a stricter burden of proof, contained in its regulations, than the wetland by-law allowed. The Appeals Court ruled for the developer in both cases, rejecting the Conservation Commissions' stated bases for denial.

These rulings may indicate a move in favor of projects. At the very least they signal to wetland permitting agencies that courts are looking closely at their actions. Specifically, the *Norfolk* and *Lexington* cases teach project proponents and conservation commissions alike to ensure that the administrative record of proceedings before commissions (and MassDEP if appeals are pursued there) contains sufficient evidence to support the project and the decision. In addition, commissions should include specific findings in their decisions, especially if they are denying a project and an appeal is likely.

For more information on these decisions or wetland permitting and appeals, please contact Michelle O'Brien.