

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

March 19, 2014

In the Matter of
L.S. Starrett Company

OADR Docket No. WET-2009-035
DEP File No. 96-234
Athol, MA

FINAL DECISION

In July 2009, the Petitioner L.S. Starrett Company filed this appeal challenging a Superseding Order of Conditions (“SOC”) that the Western Regional Office (“WERO Office”) of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to the Petitioner in June 2009, under the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 (“MWPA”), and the Wetlands Regulations, 310 CMR 10.00 et seq. (“the Wetlands Regulations”). Subject to General and Special Conditions, the SOC approved the Petitioner’s proposed work relating to the replacement of a hydroelectric generator (“the proposed Project”) at the Petitioner’s real property at 121 Crescent Street, Athol, Massachusetts (“the Property”). The Petitioner brought this appeal contending that the “special conditions

[were] unwarranted, unreasonable, and beyond the authority of the Department”

Petitioner’s Appeal Notice, at p. 2.

The special conditions in the SOC that were the primary focus of the Petitioner’s appeal concerned the downstream passage of salmon smolts and eels in the Millers River past the Petitioner’s hydroelectric generator. On October 29, 2009, the Chief Presiding Officer granted the Department’s Assented to Motion to Stay the proceedings in this appeal (“Assented to Motion”) as the result of an October 21, 2009 order of the Federal Energy Regulatory Commission (“FERC”) finding that the Petitioner’s hydroelectric generator required a license from FERC and directing the Petitioner to file the required licensing information with FERC within 90 days of the order.

In the Assented to Motion, the parties agreed that if FERC had jurisdiction over the Petitioner’s hydroelectric generator, the fisheries issues which were the focus of this appeal would be addressed by FERC in its licensing process. The parties also agreed that the FERC licensing process would preempt the Department’s jurisdiction to regulate the facility under the MWPA and the Wetlands Regulations. *See California v. FERC*, 495 U.S. 490 (1990).

As of October 25, 2013, the proceedings in this appeal had been stayed for nearly four years, and there was no indication on the appeal docket noting whether the FERC licensing proceedings remained pending or had been resolved. As a result, the Chief Presiding Officer issued an Order directing the parties to file a Joint Status Report with MassDEP’s Office of Appeals and Dispute Resolution (“OADR”) by November 25, 2013 informing OADR of the status of the FERC licensing proceedings.

On November 25, 2013, the parties filed a Joint Status Report indicating that on March 1, 2013, FERC issued an Order exempting the Petitioner’s proposed Project from FERC licensing

proceedings but imposing numerous conditions on the project. Joint Status Report, at p. 1. The parties also indicated that FERC's Order superseded and mooted at least in part, the SOC that the Department issued to the Petitioner under the MWPA and Wetlands Regulations that is the subject of this administrative appeal. Id. The parties requested 60 days to determine whether any portion of the SOC may have survived FERC's Order and report back as to the need for this appeal to continue. The Chief Presiding Officer granted the parties' request and directed them to file a Joint Status Report by March 5, 2014.

Recently, on February 26, 2014, the parties filed a Joint Motion to vacate the SOC and to withdraw this appeal setting forth their agreement "that FERC's Order preempts, supersedes[,] and moots the SOC that is the subject of this appeal." Their Joint Motion requests that I issue a Final Decision vacating the SOC and dismissing this appeal.

The Petitioner's agreement with the Department to withdraw and dismiss this appeal constitutes a waiver by the Petitioner of any further appellate review (administrative and judicial) of the Department's grant of the SOC at issue. In the Matter of J.R. Vinagro Corporation, OADR Docket No. 2013-019, Recommended Final Decision (October 15, 2013), 2013 MA ENV LEXIS 94, at 2-3, adopted as Final Decision (October 28, 2013), 2013 MA ENV LEXIS 93. Per the parties' request, the SOC is vacated and this appeal is dismissed as moot.



Kenneth Kimmell
Commissioner

SERVICE LIST

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Petitioner: Same as Applicant;

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