

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**

**July 25, 2019**

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In the Matter of  
  
Dennis Arsenault

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OADR Docket No. WET-2019-010  
DEP File No. SE44-1311  
Mattapoisett, MA

**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

This is an appeal of a Superseding Order of Conditions (SOC) issued by the Department of Environmental Protection's Southeast Regional Office to Dennis Arsenault ("the Applicant") on April 5, 2019 pursuant to the Massachusetts Wetlands Protection Act, M.G.L. c. 131, § 40 ("MWPA"), and the Wetlands Regulations, 310 CMR 10.00 et seq. ("the Wetlands Regulations") for a proposed project at Snow Fields Road, Map 28, Lot 26 in Mattapoisett. The SOC affirmed an Order of Conditions ("OOC") issued by the Mattapoisett Conservation Commission ("MCC") on March 19, 2018 approving the construction of a driveway crossing an area of Bordering Vegetated Wetlands of approximately 9,614 square feet, plus an area of 3,560 square feet of Bordering Land Subject to Flooding. The SOC also approved wetlands replication in the amount of 19,300 square feet and flood plain compensation volume of approximately 5,000 cubic feet. Ten Residents of Mattapoisett ("the Petitioners") filed this appeal challenging the SOC. For the reasons discussed below, I recommend that the Department's Commissioner issue a Final Decision dismissing the Petitioners' appeal of the SOC and affirming the SOC because they have

failed to respond to two orders that I issued to facilitate the appeal's resolution and have demonstrated a clear intent not to proceed with the appeal.

### **BACKGROUND**

The Petitioners' appeal was filed on April 18, 2019. After reviewing the appeal notice, I determined that it was deficient in that it did not meet the pleading requirements of the applicable regulations governing administrative appeals of SOC's. See 310 CMR 1.01(6)(b) and 310 CMR 10.05(7)(j)2.b.v. The Petitioners' appeal notice asserted two opinions, but no foundational facts. First, the Petitioners opined that the SOC is inconsistent with the wetlands regulations and does not contribute to the protection of the interests of the MWPA because the project approved by the SOC differs from the project approved by the Mattapoisett Planning Board. Second, the Petitioners opined that "the original 'Snow Field Estates' project approved by the Mattapoisett Planning Board has been modified to such a great extent that it is wholly unrecognizable in regard to engineering and planning and environmental impact." Appeal Notice at 1. They seek relief in the nature of a remand to the MCC for review and a new Order of Conditions that is "reflective of the project in its current form as approved by the Mattapoisett Planning Board and reflective of the true environmental impacts." Id. at 2. I determined that the appeal notice did not provide adequate notice of the issues to be addressed and did not contain a clear and concise statement of the errors in the SOC and how those errors were inconsistent with the wetlands regulations, as required by the appeal regulations. It merely stated the opinions noted above.

On April 24, 2019, pursuant to 310 CMR 1.01(6)(b) and 310 CMR 1.01(11)(b), I issued an Order for a More Definite Statement to the Petitioners giving them the opportunity to correct the deficiencies in the appeal notice. "Where an Appeal Notice does not meet the requirements of 310 CMR 1.01 and other applicable regulations, 310 CMR 1.01(6)(b) provides that the

Presiding Officer “shall dismiss the appeal or require a more definite statement.” The Order, at p. 3, directed the Petitioners to file an Amended Appeal Notice/More Definite Statement which:

(a) contains "a clear and concise statement of the alleged errors contained in the [SOC] and how each alleged error [was] inconsistent with [the Wetlands Regulations at] 310 CMR 10.00 and [did] not contribute to the protection of the interests identified in the [MWPA]" in accordance with 310 CMR 10.05(7)(j)2.b.v; and

(b) "includ[e] reference[s] to the statutory or regulatory provisions [that the Petitioners contend were] violated by the [SOC], and the relief sought, including specific changes desired in the [SOC] ..." in accordance with 310 CMR 10.05(7)(j)2.b.v.

The Order for a More Definite Statement further stated that “[i]n the event the Petitioners fail to file a more definite statement within the required time, the appeal “shall be dismissed.” Id.; see 310 CMR 10.05(7)(j)2.c. (An Appeal Notice that does not contain all of the information required in 310 CMR 10.05(7)(j)1.b. may be dismissed). I set a deadline of May 3, 2019 for the Petitioners’ response, but none was filed.

As a result, on May 30, 2019 I issued an Order to Show Cause pursuant to 310 CMR 1.01(6)(d) and 310 CMR 1.01(10) directing the Petitioners to show cause why this appeal should not be dismissed for: (a) failure to comply with the Order for a More Definite Statement and/or (b) failure to prosecute the adjudicatory appeal. The Order to Show Cause clearly stated that failure to respond to the Order would result in dismissal of the appeal. The Petitioners’ response was due no later than June 12, 2019; no response was filed. The Department has requested that the appeal be dismissed.

### **DISCUSSION**

A sanction of dismissal may be imposed when "a party fails to file documents as required, . . . comply with orders issued and schedules established in orders or otherwise fails to

prosecute the adjudicatory appeal; . . . demonstrates an intention not to proceed; . . . or fails to comply with any of the requirements set forth in 310 CMR 1.01 . . ." 310 CMR 1.01(10)(e) and (g); see Matter of Mangano, Docket No. 94-109, Final Decision (March 1, 1996); Matter of Town of Brookline Department of Public Works, Docket No. 99-165, Final Decision (June 26, 2000); Matter of Bergeron, Docket No. 2001-071, Recommended Final Decision (February 5, 2002), adopted by Final Decision (February 25, 2002).

Based on the facts stated above, I have determined that there are two bases for imposing a sanction of dismissal: (1) the Petitioners' failure to comply with the two orders discussed above and (2) the Petitioners' demonstration that they do not intend to prosecute the appeal. Therefore, I recommend that the Department's Commissioner issue a Final Decision dismissing the appeal and affirming the SOC.

Date: 7/25/2019



Jane A Rothchild  
Presiding Officer

#### **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.

## SERVICE LIST

**IN THE MATTER OF:**

**DENNIS ARSENAULT**

**Docket No. WET-2019-010**

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DEPARTMENT

**In the Matter of Dennis Arsenault**

OADR Docket No. WET-2019-010

Recommended Final Decision

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CONSERVATION COMMISSION