

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**

**August 31, 2021**

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**In the Matter of  
Environmental Testing and Research  
Laboratories, Inc.**

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**Docket No. 2018-006**  
MassDEP LAB CIN MA923

**RECOMMENDED RULING AND ORDER  
DENYING PETITIONER'S MOTION TO RE-OPEN  
EVIDENTIARY ADJUDICATORY HEARING**

**INTRODUCTION**

The principal question presented by this appeal is this: do the Massachusetts Department of Environmental Protection's ("MassDEP" or "the Department") regulations at 310 CMR 42.00 governing the Certification and Operation of Environmental Analysis Laboratories ("the ELC Regulations") govern a certified laboratory's testing of private drinking water samples and reporting of the test results? The Department contends that the answer to this question is "yes" in seeking to revoke the Petitioner Environmental Testing and Research Laboratories, Inc.'s ("ETR") certification as a certified laboratory under the ELC Regulations for having repeatedly failed to test private drinking water samples for contaminants such as Total Coliforms and E. coli bacteria and report the test results for its clients in accordance with the requirements of its certification and the ELC Regulations. The Department also seeks to revoke ETR's certification

because of its failure to pass the Department's "double-blind" study of ETR's laboratory testing and test results reporting practices in which ETR failed to test five sets of simulated private well water samples for contaminants such as Total Coliforms and E. coli bacteria and report the test results in accordance with the requirements of its certification and the ELC Regulations.<sup>1</sup>

ETR opposes the Department's revocation of its certification, contending that the ELC Regulations do not govern a certified laboratory's testing of private drinking water samples and reporting of the test results, because under ETR's reading of the ELC Regulations, they only govern a certified laboratory's testing of public drinking water samples and reporting of the test results. Recently, I rejected ETR's claim as being without merit in my detailed Recommended Final Decision ("RFD") recommending that the Department's Commissioner issue a Final Decision affirming the Department's revocation of ETR's certification.<sup>2</sup> I rejected ETR's claim after conducting a detailed legal analysis of the statutory and regulatory scheme governing the

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<sup>1</sup> As I recently explained in my Recommended Final Decision upholding the Department's Revocation Order revoking ETR's certification, to obtain and maintain its certification under the ELC Regulations, a certified laboratory is required to perform satisfactorily in proficiency testing ("PT") studies administered by the Department which measure the certified laboratory's ability to properly test and analyze specific types of environmental samples ("analytes"). 310 CMR 42.07(1); Pre-filed Direct Testimony of Oscar Pancorbo, Ph.D. ("Dr. Pancorbo's Direct PFT"), ¶ 7 (p. 5). Analytes used in PT studies are PT samples that "contain known amounts of analytes and are obtained from the Department or from a third party acceptable to the Department. The composition of the sample is unknown to the [certified] laboratory performing the analysis [in the PT study]. The PT sample is used to evaluate the ability of the [certified] laboratory and of the individual analyst to produce accurate and precise results within specified acceptance criteria." 310 CMR 42.03 (definition of "Proficiency Test (PT) Samples"). "PT samples may be single-blind," where "the [certified] laboratory [and/or] analyst knows that the sample is a PT sample," or "double-blind," where "the PT sample appears to be a routine sample so the [certified] laboratory [and/or] analyst is unaware that the sample is a PT sample." *Id.*

<sup>2</sup> In accordance with the Adjudicatory Proceeding Rules at 310 CMR 1.01(14)(a) and 14(b), I forwarded my Recommended Final Decision to the Department's Commissioner for his review. Under 310 CMR 1.01(14)(b), the Department's Commissioner is the Final Decision-Maker in this appeal, and as such, he may issue a "[F]inal [D]ecision . . . adopt[ing], modify[ing], or reject[ing] [my] [R]ecommended [Final] [D]ecision, with a statement of reasons." The Department's Commissioner put his review of my Recommended Final Decision on hold after ETR filed its Motion to Re-Open the evidentiary Adjudicatory Hearing ("Hearing") that I conducted in the appeal, which is the subject of this Recommended Ruling and Order denying the Motion. The Department's Commissioner will resume his review of my Recommended Final Decision after receiving this Recommended Ruling and Order denying ETR's Motion to Re-Open Hearing for his review as well, and then will issue a Final Decision in the appeal.

ELC Regulations and concluding that the ELC Regulations also govern a certified laboratory's testing of private drinking water samples and reporting of the test results because the ELC Regulations established a standardized laboratory certification system for proper laboratory testing of environmental samples, including private and public drinking water samples to ensure safe drinking water for the Commonwealth's inhabitants. RFD, at pp. 15-32. I reached this conclusion for the following reasons.

First, the ELC Regulations do not expressly provide that they only govern a certified laboratory's testing of public drinking water samples and reporting of the test results. RFD, at pp. 15-18.

Second, the ELC Regulations were promulgated by the Department pursuant to the following Massachusetts environmental protection statutes which authorize the Department to adopt regulations protecting private and public drinking water supplies in various contexts:

- (1) the Massachusetts Clean Waters Act, G.L. c. 21, §§ 26-53;<sup>3</sup>
- (2) G.L. c. 111, § 160, a statute governing "[the] [e]xamination of water supply" from inland waters for domestic use;<sup>4</sup>
- (3) the Massachusetts Solid Waste Management Act, G.L. c. 111, §§ 150A, 150A1/2;<sup>5</sup>
- (4) the Massachusetts Hazardous Waste Management Act, G.L. c. 21C;<sup>6</sup> and

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<sup>3</sup> RFD, at pp. 18-20.

<sup>4</sup> RFD, at pp. 18, 21.

<sup>5</sup> RFD, at pp. 18, 21-25.

<sup>6</sup> RFD, at pp. 18, 25-30.

- (5) Massachusetts Oil and Hazardous Material Release Prevention and Response Act, G.L. c. 21E.<sup>7</sup>

RFD, at pp. 18-32.

Lastly, the ELC Regulations at 310 CMR 42.17(1) make clear that the ELC Regulations are a vehicle “to aid in the implementation and enforcement of [the five environmental protection statutes set forth above]” by authorizing the Department to “[w]ithout limitation, . . . issue orders or downgrade or revoke a [laboratory’s] certification as necessary to aid in the implementation and enforcement of [these statutes].” RFD, at pp. 18-19. Hence, since these statutes authorize the Department to adopt regulatory measures to protect private and public drinking water supplies, it is only logical to conclude that the ELC Regulations further the statutes’ mission through a standardized laboratory certification system designed for proper testing of private and public drinking water samples to ensure safe drinking water for the Commonwealth’s inhabitants. Id.

As a result of my determination that the ELC Regulations govern a certified laboratory’s testing of private drinking water samples and its reporting of the test results, I also determined that the Department’s five witnesses<sup>8</sup> at the Hearing presented highly persuasive testimony

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<sup>7</sup> RFD, at pp. 18, 30-32.

<sup>8</sup> The professional backgrounds of the Department’s five witnesses are set forth at pp. 5-7 of my Recommended Final Decision. These witnesses include three Department staff members (Stephen Spencer, Jennifer Macionus, and Timothy Dame) who are highly experienced environmental investigators and members of the Environmental Strike Force (“ESF”), an interagency environmental law enforcement unit of the Commonwealth comprised of Department scientists and engineers; environmental police officers from the Massachusetts Department of Fish & Game; State Police investigators; and staff members of Massachusetts Attorney General’s Office, who collectively investigate environmental violations and pursue legal action against environmental violators. <https://www.mass.gov/how-to/report-environmental-violations>. These three Department staff members/ESF investigators worked with two high level management personnel of the Department’s ELC Program in investigating ETR’s violations and seeking revocation of its certification in this case: (1) Dr. Oscar Pancorbo, a highly experienced expert in the fields of environmental microbiology and chemistry and for nearly 30 years, the Director of the Massachusetts State Environmental Laboratory (DELS/WES), which has direct oversight of the Department’s ELC Program; and

supported by voluminous documentary evidence, including ETR's laboratory testing reports, demonstrating that ETR's certification should be revoked because of: (1) ETR's repeated failure to test private drinking water samples and report the test results for a number of its clients in accordance with the requirements of its certification and the ELC Regulations; and (2) ETR's failure to test five sets of simulated private well water samples and report the test results in accordance with the requirements of its certification and the ELC Regulations in the Department's double-blind proficiency testing study of ETR's laboratory testing and test results reporting practices. RFD, at pp. 38-93. I found that this overwhelming evidence more than demonstrated that ETR's violations were not minor infractions but rather were serious in nature, including failing to properly test for Total Coliforms and E. coli bacteria on at least 14 occasions,<sup>9</sup> warranting revocation of its certification for:

- (1) careless and inaccurate reporting of analytical measurements in violation of 310 CMR 42.12(3)(a)6;
- (2) fraudulent or deceptive practices in violation of 310 CMR 42.12(3)(a)9;
- (3) performing and reporting drinking water analyses in a manner so as to threaten public health or welfare in violation of 310 CMR 42.12(3)(a)13; and
- (4) inaccurate, incomplete, or misleading statements in laboratory reports

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(2) Lisa Touet, the Acting Director of the Department's ELC Program, who for more than 20 years has been responsible for certifying laboratories pursuant to the Program. RFD, at pp. 5-7. Dr. Pancorbo and Ms. Touet also testified for the Department at the Hearing. Id.

<sup>9</sup> These 14 occasions were: (1) nine occasions involving ETR's testing of private drinking water samples for private clients (RFD, at pp. 38-75) and (2) five occasions involving ETR's testing of private drinking water samples for Department staff who posed as private clients in the Department's double-blind proficiency testing study of ETR's laboratory testing and test results reporting practices (RFD, at pp. 75-93).

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setting forth test results in violation of 310 CMR 42.12(3)(a)17 and 310 CMR 42.17(2)(d).

Id.

In response to my Recommended Final Decision, ETR seeks to overturn my rulings in favor of the Department through a Motion to Re-open the Hearing that I conducted in this appeal.<sup>10</sup> In its Motion, ETR contends that the Hearing should be re-opened and a Recommended Final Decision should be entered in ETR's favor because of purported "new material evidence" that recently came to light supporting ETR's claim that the Department lacks authority under the ELC Regulations to regulate a certified laboratory's testing of private drinking samples and reporting of the test results.<sup>11</sup> ETR's Motion to Re-open the Hearing, at pp. 2-3. As discussed in detail below, at pp. 8-26, ETR's claims are without merit, and are

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<sup>10</sup> See n. 2, at p. 2 above. ETR has brought its Motion to Re-Open the Hearing pursuant to the Adjudicatory Proceeding Rules at 310 CMR 1.01(14)(e) which provides that:

[o]n the motion of any party, or on his or her own initiative, the Presiding Officer may at any time before a final decision is issued [in administrative appeal] reopen the hearing for the purpose of receiving new evidence. A moving party shall show that the evidence to be introduced was not reasonably available for presentation at the hearing. The [Department's] Commissioner may remand a case to the Presiding Officer for the purpose of receiving new evidence or for additional recommended findings of fact or conclusions of law based upon the record or new evidence.

<sup>11</sup> ETR's purported "new material evidence" against the Department consists of the Department's:

- (1) written response of March 18, 2021 to a public comment concerning its proposed issuance of a Final Water Withdrawal Permit Renewal to the Town of Sudbury Water District pursuant to the Massachusetts Water Management Act, G.L. c. 21G, Exhibit A to ETR's Motion to Re-open the Hearing;
- (2) two documents of April 23, 2021 concerning its Private Wells PFAS Sampling Program, Exhibits B and C to ETR's Motion to Re-open the Hearing; and
- (3) PFAS Public Drinking Water Regulations Quick Reference Guide, Exhibit D to ETR's Motion to Re-open the Hearing.

Contrary to ETR's assertions, these four Department documents do not support ETR's claims in this appeal, but do the opposite. See below, at pp. 13-22.

intended to improperly delay final resolution of this appeal and the Department's revocation of its certification for the following reasons.

First, ETR's Motion to Re-open the Hearing should be denied because in bringing the Motion, ETR misrepresented the basis for my ruling that the ELC Regulations govern a certified laboratory's testing of private drinking samples and reporting of the test results. See below, at pp. 8-13. Contrary to ETR's assertions, the basis for my ruling "was [not] based on [my] belief that [the Department] has authority to regulate [*all*] private well water testing . . . ." ETR's Motion to Re-Open the Hearing, at p. 2. Instead, as my Recommended Final Decision made clear, my ruling was that the Department, through its ELC Regulations, has the authority to regulate *a certified laboratory's* testing of private drinking water samples and reporting of the test results for the reasons I summarized above, at pp. 2-4 and discussed in detail in the Recommended Final Decision (RFD, at pp. 15-32).

Second, the four recent Department documents<sup>12</sup> that ETR claims are "new material evidence" warranting a re-opening of the Hearing and a Recommended Final Decision in its favor are not a "game-changer" that tips the scale in ETR's favor,<sup>13</sup> but instead, support the Department's position that the ELC Regulations govern a certified laboratory's testing of private drinking samples and reporting of the test results. See below, at pp. 13-22.

Lastly, at a minimum, ETR's certification should be revoked for failing to test private drinking water samples from private wells in the City of Framingham ("Framingham"), the

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<sup>12</sup> See n. 11, at p. 6 above.

<sup>13</sup> A "game-changer" is "a newly introduced element or factor that changes an existing situation or activity in a significant way." <https://www.merriam-webster.com/dictionary/game%20changer>.

Town of Medway (“Medway”), and the Town Norton (“Norton”) and report the test results in accordance with the requirements of its certification and the ELC Regulations. See below, at pp. 22-25; RFD, at pp. 38-53. Undisputedly, Framingham, Medway, and Norton have local municipal private well regulations authorizing only Department certified laboratories to perform private well water testing in those communities. Id. At the Hearing, the Department presented undisputed evidence that ETR, as a Department certified laboratory, failed to test private drinking water samples from private wells in those communities and report the test results in accordance with the requirements of its certification and the ELC Regulations. Id. The Department’s undisputed evidence revealed that ETR’s failure to perform the required testing and reporting of the test results was particularly egregious warranting revocation of ETR’s certification. Id.

In sum, I recommend that the Department’s Commissioner issue a Final Decision: (1) denying ETR’s Motion to Re-open the Hearing; (2) adopting my Recommended Final Decision; and (3) revoking ETR’s certification under the ELC Regulations.

## **DISCUSSION**

### **I. ETR’S MOTION TO RE-OPEN THE HEARING SHOULD BE SUMMARILY DENIED BECAUSE ETR MISREPRESENTED THE BASIS OF THE RECOMMENDED FINAL DECISION’S RULING THAT THE ELC REGULATIONS GOVERN A CERTIFIED LABORATORY’S TESTING OF PRIVATE DRINKING WATER SAMPLES AND REPORTING OF THE TEST RESULTS**

The Adjudicatory Proceeding Rules at 310 CMR 1.01(4)(b) and 10 bar parties to an administrative appeal from filing any motions in the appeal “interposed [to improperly] delay” or “demonstrat[ing] an intention to [improperly] delay the proceeding or resolution of the proceedings.” The remedies available to the Presiding Officer (and the Department’s



Commissioner) to address such improper motions “include, without limitation . . . denying summarily . . . [such] motions . . . .”<sup>14</sup> 310 CMR 1.01(10)(c). Here, ETR’s Motion to Re-open the Hearing should be summarily denied because it has been interposed to improperly delay final resolution of this appeal and the Department’s revocation of ETR’s certification. The impropriety of the Motion is evidenced by ETR’s misrepresentation in the Motion of the basis for my ruling that the ELC Regulations govern a certified laboratory’s testing of private drinking samples and reporting of the test results.

In its Motion to Re-open the Hearing, ETR states that my Recommended Final Decision’s ruling that the ELC Regulations govern a certified laboratory’s testing of private drinking water samples and reporting of the test results is erroneous and should be vacated because it “was based on [my] belief that [the Department] has authority to regulate [*all*] private well water testing . . . .” ETR’s Motion to Re-Open the Hearing, at p. 2. ETR’s statement is not true because I did not rule that the Department has authority to regulate all private well water testing. RFD, at pp. 15-32. Instead, I ruled that the Department, through its ELC Regulations, has the authority to regulate *a certified laboratory’s* testing of private drinking water samples and reporting of the test results for the reasons I summarized above, at pp. 2-4 and discussed in detail in the Recommended Final Decision (RFD, at pp. 15-32). Indeed, throughout the course of this appeal, it has been undisputed that local Boards of Health (“BOHs”) have primary jurisdiction over the regulation of private wells, including testing well water for its potability, and that unless local BOH by-laws or regulations provide otherwise, private well owners are not required, but are “strongly encourage[d] . . . to use a MassDEP-certified laboratory for any water

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<sup>14</sup> The Adjudicatory Proceeding Rules at 310 CMR 1.01(1)(a) authorize “[t]he [Department’s] Commissioner [to] take any action that a Presiding Officer is authorized to take under [the Rules].”

quality analysis.”<sup>15</sup> The Department has made this clear in several of its publications, including its internet publication entitled “Private Drinking Water Testing and the Use of MassDEP Certified Laboratories,”<sup>16</sup> which ETR’s President and sole witness at the Hearing, Eric Koslowski (“Mr. Koslowski”), selectively cited in his Hearing testimony in opposing the Department’s revocation of ETR’s certification.<sup>17</sup> Specifically, Mr. Koslowski failed to disclose the following important information that this Department internet publication (hereinafter referred to as “the Department’s Private Drinking Water Testing Advisory”) provides the public and supports my finding that the ELC Regulations govern a certified laboratory’s testing of private drinking water samples and reporting of the test results.

First, the Department’s Private Drinking Water Testing Advisory “recommends the use of MassDEP-certified laboratories for the testing of private drinking water [samples]” from private wells because “MassDEP[’s] certification [of a laboratory under the ELC Regulations] means that the laboratory has been deemed capable of producing valid data for tests of specified contaminants, such as nitrate, volatile organic compounds (VOC’s), fecal coliform bacteria, etc.”<sup>18</sup> The Advisory further explains that a laboratory’s certification under the ELC Regulations also “means that a laboratory’s facilities, personnel, equipment, analytical methods and quality control procedures have been evaluated and found to meet the Department’s minimum requirements,” which is in stark contrast to “[a] non-certified laboratory[,] [which] does not have

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<sup>15</sup> <https://www.mass.gov/service-details/private-drinking-water-testing-and-the-use-of-massdep-certified-laboratories>.

<sup>16</sup> *Id.*

<sup>17</sup> Pre-filed Rebuttal Testimony of Eric Koslowski (“Mr. Koslowski’s Rebuttal PFT”), at p. 4.

<sup>18</sup> <https://www.mass.gov/service-details/private-drinking-water-testing-and-the-use-of-massdep-certified-laboratories>.

to use any particular method in testing, is not regulated by any governmental agency, and, as a result, the test results might not meet standards for accuracy required of MassDEP-certified laboratories.”<sup>19</sup>

The Department’s Private Drinking Water Testing Advisory also informs the public that “[i]n order to obtain certification by MassDEP [under the ELC Regulations], the laboratory has demonstrated it is able to perform accurate testing using scientific methods which have been approved by the United States Environmental Protection Agency.”<sup>20</sup> It also states that “MassDEP-certified laboratories in Massachusetts are periodically inspected by MassDEP [and] . . . [a]ll certified laboratories must also successfully analyze proficiency test samples [] [which] are special samples with concentrations known to the providers of the test samples, but not known to the laboratories.”<sup>21</sup>

The Department’s Private Drinking Water Testing Advisory also informs the public that “[a] local Board of Health may have by-laws requiring testing of private wells [such as] . . . requir[ing] testing to determine if a well meets drinking water standards prior to initial use for drinking water,” and that these by-laws “[may] require . . . testing by a MassDEP certified laboratory . . . .” Another Department internet publication entitled “FAQs – Private Wells” informs the public that a local BOH may require such testing because “[t]he local BOH is empowered to adopt a Private Well Regulation that establishes criteria for private well siting,

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<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Id. As previously noted above, the Department’s grounds for seeking revocation of ETR’s certification includes ETR’s serious failure to test five sets of simulated private well water samples and report the test results in accordance with the requirements of its certification and the ELC Regulations in a double-blind proficiency testing study that the Department conducted of ETR’s laboratory testing and test results reporting practices.

construction, water quality[,] and quantity,” including requiring that testing of the private well’s water be performed by a MassDEP certified laboratory.<sup>22</sup> This internet publication also repeats the recommendation of the Department’s Private Drinking Water Testing Advisory that a private well owner use a Department certified laboratory “for all water quality testing” and that “[l]ocal Private well Regulations may specify the use of a state certified lab.”<sup>23</sup> Id. This internet publication also provides the public with an internet link containing “[a] searchable list of MassDEP certified labs . . . .”<sup>24</sup> Id.

Other important information that the Department’s Private Drinking Water Testing Advisory provides the public is that the Department has published Private Well Guidelines to assist local BOHs in regulating private wells and provides the public with an internet link to the Guidelines.<sup>25</sup> The Guidelines, in turn, inform the public that while “[the] Guidelines and accompanying Model Board of Health Regulations for Private Wells<sup>26</sup> were written primarily

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<sup>22</sup> <https://www.mass.gov/service-details/faqs-private-wells>.

<sup>23</sup> Id.

<sup>24</sup> As previously noted above, Framingham, Medway, and Norton have local municipal private well regulations authorizing only Department certified laboratories to perform private well water testing in those communities. At the Hearing, the Department presented undisputed evidence that ETR, as a Department certified laboratory, failed to test private drinking water samples from those communities and report the test results in accordance with the requirements of its certification and the ELC Regulations. See below, at pp. 22-25; RFD, at pp. 38-53.

<sup>25</sup> The Department’s Private Well Guidelines can be viewed at <https://www.mass.gov/doc/private-well-guidelines/download>.

<sup>26</sup> The Department’s Model Board of Health Regulations for Private Wells can be viewed at <https://www.mass.gov/doc/model-board-of-health-regulations-for-private-wells/download>. Section VIII, at pp. 9-11 of these Model BOH Regulations set forth “Water Quality Testing Requirements” which provide that “[w]ater quality testing, utilizing the applicable US EPA approved method for drinking water testing, shall be conducted by a Massachusetts or EPA certified laboratory and shall include analysis for” certain contaminants, including Total Coliform bacteria and E. coli bacteria. Id., at p. 10, ¶ (3). These Water Quality Requirements also provide that:

[t]he owner of every well used for drinking water including those serving a property which is rented or leased shall have its water tested at a Massachusetts certified laboratory for the following chemical and bacteriological parameters at a minimum of once a year: total coliform bacteria, e. coli bacteria, nitrate,

[by the Department] to assist Boards of Health[,] . . . [t]he . . . Guidelines also provid[e] information useful to private well owners, developers, and interested local officials.”<sup>27</sup> This information includes the Department’s “stron[g] recommend[ation] that local Boards of Health and homeowners require the use of MassDEP certified labs for private well testing.”<sup>28</sup> It also includes a detailed description of the type of testing that certified laboratories should perform for newly constructed private wells and existing wells, and prior to the sale, conveyance, or transfer of real property containing a private well.<sup>29</sup>

In sum, no consideration should be given to ETR’s Motion to Re-open the Hearing because ETR misrepresented the basis for my ruling that the ELC Regulations govern a certified laboratory’s testing of private drinking samples and reporting of the test results. As discussed in the next section, the impropriety of ETR’s Motion to Re-open the Hearing is further evidenced by its wrongful assertion that four recent Department documents warrant a re-opening of the Hearing and a Recommended Final Decision in its favor.

## **II. The Four Recent Department Documents That ETR Claims Constitute “New Material Evidence” Against the Department Do Not Conclusively Prove ETR’s Claims, But Instead, Support The Department’s Claims in the Appeal**

In its Motion to Re-open the Hearing, ETR contends that “while arguing in this case that

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nitrite, pH, conductivity, sodium, and iron. All other required chemical parameters should be tested at a minimum of every ten (10) years. The Board of Health may require more frequent testing, or testing for additional parameters, where other water quality problems are known or suspected to exist.

Id., at p. 10, ¶ (6). The Water Quality Requirements also provide that “[p]rior to selling, conveying, or transferring title to real property, the owner shall have tested the water of every private drinking water well serving that property . . . [utilizing] a Massachusetts certified laboratory for testing” of certain contaminants including Total coliform bacteria and E. coli bacteria. Id., at p. 10, ¶ (8).

<sup>27</sup> <https://www.mass.gov/doc/private-well-guidelines/download>, at p. 1.

<sup>28</sup> Id., at pp. 3, 81-90.

<sup>29</sup> Id., at pp. 81-83, 88-90.

it possesse[s] the authority” through the ELC Regulations to regulate a certified laboratory’s testing of private drinking water samples and reporting of the test results, “the [Department has] simultaneously conveyed to the public that it lack[s] this authority.” ETR’s Motion to Re-open the Hearing, at p. 2. In support of its claim, ETR points to four recent Department documents which ETR claims constitute admissions by the Department that it lacks authority under the ELC Regulations to regulate a certified laboratory’s testing of private drinking samples and reporting of the test results. As discussed below, at pp. 14-22, ETR’s claims about these four documents are without merit.

**A. The First Document Proffered by ETR As “New Material Evidence”:  
The Department’s March 18, 2021 Response to A Public Comment on  
The Sudbury MWMA Permit**

The Massachusetts Water Management Act, G.L. c. 21G (“MWMA”) is “a Statewide regulatory program [administered by the Department] for water withdrawals, prohibiting withdrawal of more than 100,000 gallons per day from any water source without a registration or permit” issued by the Department. Concord v. Water Department of Littleton, 487 Mass. 56, 57, (2021). The MWMA is intended to promote water conservation in the Commonwealth. Water Department of Fairhaven v. Department of Environmental Protection, 455 Mass. 740, 748-50 (2010).

On March 18, 2021, the Department issued written Findings of Fact supporting the Department’s issuance of a Final Water Withdrawal Permit Renewal to the Town of Sudbury Water District (“Sudbury”) pursuant to the MWMA (“the Sudbury MWMA Permit”) governing Sudbury’s water withdrawals from the Concord River Basin to supply water to its residents. ETR’s Motion to Re-Open the Hearing, at p. 2; Exhibit A to ETR’s Motion to Re-open the

Hearing.<sup>30</sup> At p. 7 of its Findings of Fact, the Department noted that OARS, an environmental advocacy group,<sup>31</sup> submitted a public comment on the Sudbury MWMA Permit before it became final on “the regulation of private wells and their impact.”<sup>32</sup> The Department responded to OARS’ public comment by stating that:

While MassDEP has no authority to regulate private wells, the Department does encourage regulation by providing minimization and mitigation opportunities via private well bylaws credit [and] . . . encourage[d] Sudbury to review the [public] comments submitted regarding private well bylaws to determine their feasibility and impact . . . .<sup>33</sup>

Contrary to ETR’s claims, the Department’s response to OARS’ public comment on “the regulation of private wells and their impact” did not constitute an admission by the Department that it lacks authority under the ELC Regulations to regulate a certified laboratory’s testing of private drinking water samples and reporting of the test results for the following reasons.

First, the Department’s response neither concerned the testing of private well water nor the scope of the Department’s authority under the ELC Regulations to regulate a certified laboratory’s testing of private well water and reporting of the test results. Instead, the Department’s response concerned the scope of the Department’s authority under another environmental program, the MWMA, to regulate water withdrawals from water sources. This is reflected in the Department’s response that although “[the Department] has no authority [under

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<sup>30</sup> This document can be viewed at <https://www.mass.gov/doc/final-water-management-act-permit-for-sudbury-water-district-3182021/download>.

<sup>31</sup> OARS is a “non-profit organization whose mission is to protect, improve and preserve the Assabet, Sudbury, and Concord Rivers, their tributaries and watersheds, for public recreation, water supply, and wildlife habitat.” <https://oars3rivers.org/about>.

<sup>32</sup> <https://www.mass.gov/doc/final-water-management-act-permit-for-sudbury-water-district-3182021/download>, at p. 7.

<sup>33</sup> *Id.*, at p. 7.

the MWMA] to regulate private wells,” it nevertheless “encourage[s] [such] regulation [at the local municipal level] by providing [municipalities] minimization and mitigation opportunities via private well bylaws credit” in the MWMA water withdrawal permitting process and as such, “encourage[d] Sudbury to review the [public] comments submitted [on its MWMA Permit] regarding private well bylaws to determine their feasibility and impact . . . .”<sup>34</sup> The Department’s response was fully consistent with its position as set forth in its Private Drinking Water Testing Advisory, “FAQs- Private Wells,” Private Well Guidelines, and Model Board of Health Regulations discussed above in the previous section that local BOHs have primary jurisdiction over the regulation of private wells.

**B.     The Second and Third Documents Proffered by ETR As “New Material Evidence: The Department’s Two Documents of April 23, 2021 Associated With the Department’s Private Wells PFAS Sampling Program**

“PFAS” is the acronym for Per- and Polyfluoroalkyl Substances which are manufactured chemicals that “[are] used in a variety of consumer products and industries throughout the world.”<sup>35</sup> PFAS:

have been used in some firefighting foams, a number of industrial processes, and to make materials that are resistant to water, grease and stains for use in carpets, clothing, fabrics for furniture, paper packaging for food, cookware, leather goods, ski waxes, and more. Because [PFAS] have been used in many consumer products over the past 50 years, most people have been exposed to them.<sup>36</sup>

PFAS have contaminated both private and public drinking water supplies as a result of “seep[ing] into surface soils, groundwater[,] and surface water . . . [and] have been linked to a

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<sup>34</sup> Id.

<sup>35</sup> <https://www.mass.gov/doc/frequently-asked-questions-about-the-massdep-private-wells-pfas-sampling-program/download>; Exhibit C to ETR’s Motion to Re-open the Hearing, at p. 1.

<sup>36</sup> Id.



variety of health risks, particularly in people who are immune-compromised, women who are pregnant or nursing, and in infants.”<sup>37</sup>

There are no federal drinking water standards for any PFAS notwithstanding their “toxicity, presence in drinking water systems, [and] persistence in the human body when ingested.”<sup>38</sup> However, in October 2020, the Department established a PFAS public drinking water standard of 20 parts per trillion (“ppt”) “individually or for the sum of the concentrations of six specific PFAS compounds [known] . . . as PFAS6.”<sup>39</sup> The Department established “[t]his drinking water standard . . . to be protective against adverse health effects for all people consuming . . . water” containing PFAS6.<sup>40</sup>

As a result of PFAS having contaminated private well water supplies, the Department has established a Private Wells PFAS Sampling Program pursuant to which “[it] will be conducting PFAS testing[,] [utilizing Department certified laboratories,] for a limited number of private wells, [in particular] focusing on the 84 Massachusetts towns where 60% or more of residents are served by private wells”<sup>41</sup> at no charge to private well owners. On April 23, 2021, the Department issued two documents in connection with its Private Wells PFAS Sampling Program (collectively “the PFAS Private Wells Testing Documents”). ETR’s Motion to Re-open the Hearing, at pp. 2-3; Exhibits B-C to ETR’s Motion to Re-open the Hearing. As discussed below, contrary to ETR’s assertions these two PFAS Private Wells Testing Documents do not constitute

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<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Id.

admissions by the Department that it lacks authority under the ELC Regulations to regulate a certified laboratory's testing of private drinking water samples and reporting of the test results. Instead, they support the Department's position as set forth in its Private Drinking Water Testing Advisory, "FAQs- Private Wells," Private Well Guidelines, and Model Board of Health Regulations that local BOHs have primary jurisdiction over the regulation of private wells, including testing well water for its potability, and that unless local BOH by-laws or regulations provide otherwise, private well owners are not required, but are "strongly encourage[d] . . . to use a MassDEP-certified laboratory for any water quality analysis."<sup>42</sup>

**(1) The First PFAS Private Wells Testing Document**

The First PFAS Private Wells Testing Document is entitled "MassDEP Private Wells PFAS Sampling Program[:] Questions and Answers Regarding the Management of PFAS6 In Your Groundwater Under the Massachusetts Oil And Hazardous Material Release Prevention And Response Act."<sup>43</sup> Exhibit B to ETR's Motion to Re-open the Hearing, at p. 2.<sup>44</sup> "The purpose of this [D]ocument is to provide owners of private wells who are considering participating in the MassDEP Private Wells PFAS Sampling Program with basic information

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<sup>42</sup> <https://www.mass.gov/service-details/private-drinking-water-testing-and-the-use-of-massdep-certified-laboratories>.

<sup>43</sup> As discussed above, at pp. 3-4 and in the Recommended Final Decision, at pp. 18-19 and 30-32, the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, G.L. c. 21E, is one of the five Massachusetts environmental protection statutes which authorize the Department to adopt regulations protecting private and public drinking water supplies in various contexts and pursuant to which the Department promulgated the ELC Regulations.

<sup>44</sup> This document can be viewed at <https://www.mass.gov/doc/private-wells-pfas-sampling-program-21e-questions-and-answers/download>.

about dealing with the presence of PFAS in their well.”<sup>45</sup>

In this Document, the Department states that although “[it] does not directly regulate private drinking water wells under State law” because “local Boards of Health (BOHs) have primary jurisdiction over the regulation of private wells” it nevertheless “provides Drinking Water Guidelines for BOH consideration . . . .”<sup>46</sup> The Department also recommends in this Document that private well owners “consult with [their] local board of health about any questions [they] have with [their] private well water if [test] results [detected] PFAS6 contamination.”<sup>47</sup> In doing so, the Department provides the public with a link to an internet website entitled “Private Wells”<sup>48</sup> which “provide[s] . . . resources to help [private] well owners learn about proper practices for safe water” in their private wells.<sup>49</sup> These resources include internet links to the Department’s Database of Department certified laboratories and the Department’s publication entitled “Protect Your Family: A Guide to Water Quality Testing for Private Wells,” which informs private well owners that “[w]hile there is no state requirement to have [private] well water tested (although there [might] be from [a] mortgage lender or local Board of Health), the . . . Department . . . recommends that all homeowners with private wells do so, and use a state certified laboratory” to test private well water for a number of contaminants,

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<sup>45</sup> Exhibit to B to ETR’s Motion to Re-open the Hearing, at p. 2; <https://www.mass.gov/doc/private-wells-pfas-sampling-program-21e-questions-and-answers/download>, at p. 1.

<sup>46</sup> Id.

<sup>47</sup> Id.

<sup>48</sup> <https://www.mass.gov/private-wells>.

<sup>49</sup> Id.

including Coliform Bacteria.

## **(2) The Second PFAS Private Wells Testing Document**

The Second PFAS Private Wells Testing Document which the Department issued on April 23, 2021 and recently updated on August 25, 2021 is entitled “Frequently Asked Questions about the MassDEP Private Wells PFAS Sampling Program.” Exhibit C to ETR’s Motion to Re-open Hearing.<sup>50</sup> This Document “provides answers to questions about [the] . . . Department[’s] . . . free sampling and analysis program for [PFAS] substances . . . in private drinking water wells.”<sup>51</sup> This includes providing an internet link to another Department document entitled “Per- and Polyfluoroalkyl Substances (PFAS) in Private Well Drinking Water Supplies FAQ,” which “describes what private well owners need to know about the possibility of PFAS in [private] well water.”<sup>52</sup> This latter document explains what PFAS are, the health effects of PFAS exposure, how PFAS can contaminate private well water supplies, the Department’s PFAS Public Drinking Water Standard, and whether a private well owner should test his or her well water for PFAS.<sup>53</sup> It also provides an internet link to an Online Searchable Laboratory Certification Listing for private well owners to locate a qualified Department certified laboratory to test private well water for PFAS.<sup>54</sup>

The Second PFAS Private Wells Testing Document also informs the public that “[the

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<sup>50</sup> This document can be viewed at <https://www.mass.gov/doc/frequently-asked-questions-about-the-massdep-private-wells-pfas-sampling-program/download>.

<sup>51</sup> *Id.*, at p. 1.

<sup>52</sup> *Id.*

<sup>53</sup> <https://www.mass.gov/info-details/per-and-polyfluoroalkyl-substances-pfas-in-private-well-drinking-water-supplies-faq>

<sup>54</sup> *Id.*

Department] will be conducting PFAS testing for a limited number of private wells, focusing on the 84 Massachusetts towns where 60% or more of residents are served by private wells.”<sup>55</sup> This Document further explains that “[p]rivate wells are regulated by local Boards of Health, which are overseen by the Massachusetts Department of Public Health” and that “MassDEP will work with these entities, other local partners, and MassDEP’s contractor, the University of Massachusetts (UMass), to select and provide for free sampling and analysis of selected private wells.”<sup>56</sup> This Document also explains that “the owner of a private well is generally responsible for ensuring the quality of the [well’s] drinking water and addressing any contaminants” and that the Department’s “Drinking Water Program and its UMass contractor can provide technical assistance [to private well owners] on ways to reduce exposure to PFAS in drinking water, including the use of bottled water and installation of treatment systems.”<sup>57</sup>

**C. The Fourth Document Proffered by ETR As “New Material Evidence: The Department’s PFAS Public Drinking Water Regulations Quick Reference Guide**

The fourth recent Department document that ETR contends warrants a re-opening of the Hearing and a Recommended Final Decision in its favor is the Department’s PFAS Public Drinking Water Regulations Quick Reference Guide. ETR’s Motion to Re-open the Hearing at p. 3; Exhibit D to ETR’s Motion to Re-open the Hearing.<sup>58</sup> ETR’s claim is without merit because this Guide neither concerns the testing of private well water nor the scope of the

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<sup>55</sup> <https://www.mass.gov/doc/frequently-asked-questions-about-the-massdep-private-wells-pfas-sampling-program/download>, at p. 2.

<sup>56</sup> *Id.*, at pp. 2, 6.

<sup>57</sup> *Id.*, at p. 6.

<sup>58</sup> This document can be viewed at <https://www.mass.gov/doc/per-and-polyfluoroalkyl-substances-pfas-drinking-water-regulations-quick-reference-guide/download>.

Department's authority under the ELC Regulations to regulate a certified laboratory's testing of private well water and reporting of the test results. Instead, this Guide deals exclusively with the obligation of public drinking water systems to conduct PFAS testing of their public drinking water supplies in accordance with the Department's Public Drinking Water Regulations at 310 CMR 22.07G.

**III. AT A MINIMUM, ETR'S CERTIFICATION SHOULD BE REVOKED BECAUSE THE DEPARTMENT PRESENTED UNDISPUTED EVIDENCE AT THE HEARING THAT ETR FAILED TO TEST PRIVATE DRINKING WATER SAMPLES FROM PRIVATE WELLS IN FRAMINGHAM, MEDWAY, AND NORTON IN ACCORDANCE WITH THE REQUIREMENTS OF ITS CERTIFICATION AND THE ELC REGULATIONS**

As previously noted above and as discussed in detail in my Recommended Final Decision, the Department presented very compelling evidence against ETR at the Hearing warranting revocation of its certification for failing to test private drinking water samples and report the test results in accordance with the requirements of its certification and the ELC Regulations on multiple occasions. RFD, at pp. 38-93. This very compelling evidence included 14 instances where ETR failed to properly test the samples for Total Coliforms and E. coli bacteria. *Id.*<sup>59</sup> It also included undisputed evidence that ETR failed to test private drinking water samples from private wells in Framingham, Medway, and Norton and report the test results in accordance with the requirements of its certification and the ELC Regulations notwithstanding local municipal private well regulations in each of those communities authorizing only Department certified laboratories to perform private well water testing in those communities.<sup>60</sup>

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<sup>59</sup> See n. 9, at p. 5 above.

<sup>60</sup> This evidence was undisputed because Mr. Koslowski, ETR's principal and sole witness at the Hearing, offered no testimony disputing the requirements of Framingham's, Medway's, and Norton's Private Well Regulations and that the Regulations required ETR to test private drinking water samples in those communities and report the test

RFD, at pp. 38-53. The import of that undisputed evidence is simple: because Framingham's, Medway's, and Norton's respective local municipal private well regulations only allow Department certified laboratories to test private drinking water samples from private wells in those communities, ETR, as a Department certified laboratory, was required to test private drinking water samples from private wells in those communities and report the test results in accordance with the requirements of its certification and the ELC Regulations. Id.

Simply stated, ETR has no good faith basis for having failed to test private drinking water samples from private wells in Framingham, Medway, and Norton and report the test results in accordance with the requirements of its certification and the ELC Regulations. Id. ETR's position therefore in this appeal that it has no legal obligation under any circumstances to test private drinking water samples and report the test results in accordance with the requirements of its certification and the ELC Regulations is not only groundless but also smacks of chutzpah.<sup>61, 62</sup> Moreover, the Department's undisputed evidence at the Hearing revealed that ETR's failure to perform the required testing and reporting of the test results of private drinking water samples

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results in accordance with the requirements of its certification and the ELC Regulations. RFD, at pp. 38-53. His lack of testimony is evidence of his lack of credibility in disputing the Department's grounds for seeking revocation of ETR's certification. Id.

<sup>61</sup> "Chutzpah" is a Yiddish word meaning gall, audacity, nerve, brazenness.  
<http://www.yiddishdictionaryonline.com/>

<sup>62</sup> Compare, Evans v. Lorillard Tobacco Co., 465 Mass. 411, 442 (2013) (defendant cigarette manufacturer exhibited "a bit of chutzpah" by claiming "that it was obvious to the general public by 1960 [when plaintiff's decedent began smoking cigarettes] that cigarettes were addictive and caused cancer when, in 1994, during sworn testimony before a congressional subcommittee, [defendant's] chairman and chief executive officer, declared that he did not believe that cigarette smoking was addictive or caused cancer"); In the Matter of Kane Built, Inc., OADR Docket No. 2017-037, Recommended Final Decision (December 18, 2018), 2017 MA ENV LEXIS 77, at 88-89, adopted as Final Decision (January 17, 2019), 2019 MA ENV LEXIS 8 (sophisticated real estate developer who knowingly committed serious asbestos removal violations in demolishing a Maynard home containing asbestos material "exhibited 'a bit of chutzpah' by more than intimating that [it] did the residents of Maynard a favor by demolishing" the home "and add[ing] to the value of the Town" by "replacing it with two new homes, which [the developer] claim[ed] constituted affordable housing for Maynard residents").

from private wells in Framingham, Medway, and Norton was particularly egregious justifying revocation of ETR's certification. Id.

In Framingham, ETR violated its certification, the ELC Regulations, and Framingham's private well regulations in failing to properly test private drinking water samples and report the test results for a client who had constructed a private well at a residential property. Id., at pp. 38-46. ETR's violations included failing to properly test the samples for the presence of Total Coliforms and E. coli bacteria and providing misleading information to its client that more than suggested ETR had properly tested the samples for those contaminants when in fact it had not. Id.

In Medway, not only did ETR violate its certification, the ELC Regulations, and Medway's private well regulations in failing to properly test private drinking water samples and report the test results for a client who had constructed a private well at a residential property, ETR also lied about its actions to Medway's Board of Health agent. Id., at pp. 46-51. Just as in Framingham, ETR's violations also included failing to properly test the samples for its Medway client for the presence of Total Coliforms and E. coli bacteria and providing misleading information that it had properly tested the samples for those contaminants when in fact it had not. Id.

And in Norton, ETR, by its own admission, failed to test private drinking water samples and report the test results in accordance with the requirements of its certification and the ELC Regulations for a client who was purchasing a home with a private well. RFD, at pp. 51-53. ETR made this admission in a disclaimer in its lab report to the client stating that "[n]ot all analyses [of the samples] were conducted [by ETR] in accordance with [MassDEP]



certification standards.” Id. ETR did this notwithstanding that it was required to conduct all its analyses of the samples in accordance with its certification and the ELC Regulations because Norton’s private well regulations mandate that a water quality test of a real property’s private well water be performed “[a]t the time of [the] real [property’s] transfer [to a new owner of the real property]” by “[a] Mass. State Certified Laboratory . . . .” Id.

In sum, ETR’s failure to test private drinking water samples from private wells in Framingham, Medway, and Norton and report the test results in accordance with the requirements of its certification and the ELC Regulations are very troubling incidents, which individually or collectively, alone warrant revocation of ETR’s certification for:

- (1) careless and inaccurate reporting of analytical measurements in violation of 310 CMR 42.12(3)(a)6;
- (2) fraudulent or deceptive practices in violation of 310 CMR 42.12(3)(a)9;
- (3) performing and reporting drinking water analyses in a manner so as to threaten public health or welfare in violation of 310 CMR 42.12(3)(a)13; and
- (4) inaccurate, incomplete, or misleading statements in laboratory reports setting forth test results in violation of 310 CMR 42.12(3)(a)17 and 310 CMR 42.17(2)(d).

Id.

### **CONCLUSION**

Based on the foregoing, ETR’s Motion to Re-open the Hearing should be denied because ETR has failed to present any good faith grounds warranting a re-opening of the Hearing and vacating my Recommended Final Decision. Accordingly, I affirm all my rulings in the Recommended Final Decision, including that the ELC Regulations govern a certified laboratory’s testing of private drinking water samples and reporting of the test results. In doing

so, it is important to re-iterate that the Department's ELC Regulations establish a voluntary program through which laboratories may voluntarily apply for and obtain Department certification as being qualified to perform certain environmental testing. Here, ETR voluntarily applied for and obtained the status of a Department certified laboratory pursuant to the ELC Regulations. Having done so, ETR, as a Department certified laboratory, is required to test private drinking water samples and report the test results in accordance with the requirements of its certification and the ELC Regulations, and its serious, repeated failure to do so as proven by the Department at the Hearing, warrants revocation of ETR's certification.

In conclusion, I recommend that the Department's Commissioner issue a Final Decision: (1) denying ETR's Motion to Re-open the Hearing; (2) adopting my Recommended Final Decision; and (3) revoking ETR's certification under the ELC Regulations.



Date: August 31, 2021

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Salvatore M. Giorlandino  
Chief Presiding Officer

**NOTICE- RECOMMENDED RULING AND ORDER DENYING PETITIONER'S  
MOTION TO RE-OPEN EVIDENTIARY ADJUDICATORY HEARING**

This decision is a Recommended Ruling and Order Denying the Petitioner's Motion to Re-open the Evidentiary Adjudicatory Hearing that the Chief Presiding Officer has issued in this appeal. It has been transmitted to the Department's Commissioner for his Final Decision in this matter after his review of this decision and the Chief Presiding Officer's Recommended Final Decision. Neither this decision nor the Recommended Final Decision constitute a Final Decision

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subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain notice to that effect. Once the Final Decision is issued "a party may file a motion for reconsideration setting forth specifically the grounds relied on to sustain the motion" if "a finding of fact or ruling of law on which a final decision is based is clearly erroneous." 310 CMR 1.01(14)(d). "Where the motion repeats matters adequately considered in the final decision, renews claims or arguments that were previously raised, considered and denied, or where it attempts to raise new claims or arguments, it may be summarily denied. . . . The filing of a motion for reconsideration is not required to exhaust administrative remedies." Id.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this decision and/or the Recommended Final Decision or any part of them, and no party shall communicate with the Commissioner's office regarding this decision and/or the Recommended Final Decision unless the Commissioner, in his sole discretion, directs otherwise.

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