

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

**June 12, 2023**

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In the Matter of  
George Thibeault

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OADR Docket No. WET-2021-035  
DEP File No. SE 056-1072  
Pembroke, MA

**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

The Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) is responsible for enforcing the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 (“MWPA”), and the Wetlands Regulations, 310 CMR 10.00 et seq. (“the Wetlands Regulations”), which protect wetlands areas in the Commonwealth through a regulatory system with local municipal conservation commissions designed to delineate protected wetlands areas and regulate proposed activities in those areas by requiring permits from the commissions and/or MassDEP authorizing those activities. Under this regulatory system, a local conservation commission’s approval of proposed activities in protected wetlands areas is through a permit known as an Order of Conditions (“OOC”). A local conservation commission’s issuance of an OOC approving or denying approval for proposed activities in protected wetlands areas can be appealed to MassDEP. After reviewing such an appeal, MassDEP issues a Superseding Order of

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Conditions (“SOC”) affirming or reversing the local conservation commission’s OOC approving or denying approval for proposed activities in protected wetlands areas. MassDEP’s SOC, in turn, can be appealed to MassDEP’s Office of Appeals and Dispute Resolution (“OADR”), an independent, neutral, quasi-judicial office within MassDEP responsible for advising MassDEP’s Commissioner in the adjudication of such an appeal.<sup>1</sup> MassDEP’s Commissioner is the final decision-maker in the appeal unless she designates another final decision-maker in the appeal pursuant to 310 CMR 1.01(14)(b).

The Wetlands Regulations and the Adjudicatory Proceeding Rules at 310 CMR 1.01 governing the adjudication of appeals before OADR provide a meaningful opportunity to an individual or entity having the right to challenge an SOC, to file an appeal with OADR challenging the SOC as being detrimental to wetlands in violation of the MWPA and the Wetlands Regulations. In the Matter of Garnet Brown, OADR Docket No. WET-2022-009, Recommended Final Decision on Reconsideration (December 16, 2022), at pp. 8-9, adopted as Final Decision on Reconsideration (December 28, 2022). The purpose of these rules and regulations is to ensure that rights of all parties are heard in this forum. Id. Such an appeal must have a good faith basis to challenge the SOC’s validity under the MWPA and the Wetlands Regulations. Id. Any appeal that lacks such a good faith basis, is an improper appeal that does not further the noble cause of wetlands protection. Id. Such an appeal also results in the unnecessary expenditure of OADR’s limited, publicly funded resources to adjudicate the appeal when such resources could have been utilized in adjudicating an appeal having a good faith basis. Id. Unfortunately, as discussed below, these rules were not followed by the Petitioner

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<sup>1</sup> A description of OADR appears in Addendum No. 1 at p. 13 of this Recommended Final Decision.

James Smith (“the Petitioner”) in bringing this appeal. Consequently, I recommend that MassDEP’s Commissioner issue a Final Decision dismissing this appeal.

### **BACKGROUND**

In September 2021, the Petitioner, represented by legal counsel, filed this appeal with OADR challenging an SOC that had been issued by MassDEP’s Southeast Regional Office to the Applicant George Thibeault (“the Applicant”) affirming an OOC issued by the Town of Pembroke’s Conservation Commission (“PCC”) approving the Applicant’s proposed Project at his real property at 715 Washington Street in Pembroke, Massachusetts (“the Property”). Specifically, the SOC affirmed the OOC’s approval of the following proposed activities at the Property: (1) construction a 5,000 square foot light industrial building, (2) two cord wood staging areas, (3) a kiln, (4) an enclosure, and (5) associated construction of a driveway, parking lot, stormwater management systems and utilities. The proposed work would be located within buffer zone of Bordering Vegetated Wetlands (“BVW”) at the Property. BVW are wetlands protected by MWPA and the Wetlands Regulations.

The delineation of wetland resource areas at the Property as set forth in the SOC, including the classification of a stream at the Property known as McFarland Brook (the “Stream”) as intermittent, was based upon an Order of Resource Area Delineation (“ORAD”) that had been issued by the PCC on March 29, 2017. Unless appealed, ORADS, including the wetlands delineations they contain, are valid and binding for three years and can be extended by a local conservation commission for an additional three-year term. Here, the PCC’s ORAD was not appealed to MassDEP. On March 9, 2020 and prior to the ORAD’s expiration, the PCC extended the ORAD for an additional three

years from March 29, 2020 to March 29, 2023. This extension was not appealed to MassDEP.

It was clearly established prior to the Petitioner's filing of this appeal of the SOC in September 2021 that wetlands delineations established by a local conservation commission in an ORAD that had not been appealed and had not expired were binding for three years after the ORAD's issuance (unless the period was extended by the commission) and could not be challenged in an appeal of an SOC authorizing activities in protected wetlands areas. See e.g. In the Matter of Williams Street Residents Group, Requestor, OADR Docket No. WET-2011-002, Recommended Final Decision (May 6, 2011), 2011 MA ENV LEXIS 74, at 9-21. The very narrow exception to this rule barring a challenge to the ORAD's wetlands delineations is where fraud or mutual mistake of fact resulted in the wetlands delineations. Id.

Here, it is undisputable the PCC's ORAD delineating the wetlands areas at the Property that formed the basis for the wetlands delineations in the SOC authorizing the proposed Project at the Property had not been appealed and had not expired. As a result, the wetlands delineations were binding and could not be challenged by the Petitioner by appealing the SOC unless, the Petitioner, the party with the burden of proof in the appeal, presented sufficient evidence demonstrating that delineations were invalid due to fraud or mutual mistake of fact. Nevertheless, the Petitioner, represented by legal counsel, brought this appeal challenging the wetlands delineations in the SOC, claiming that they were invalid. When pressed by the prior Presiding Officer in the appeal to substantiate his claim by directing him to present evidence demonstrating that the wetlands

delineations were the product of fraud or mutual mistake, the Petitioner failed to present any such evidence and then attempted to unilaterally withdraw his appeal.

### **DISCUSSION**

Under the Adjudicatory Proceeding Rules at 310 CMR 1.01(6)(e), the Petitioner cannot unilaterally withdraw his appeal because this Rule provides in relevant part that “the Presiding Officer [in the appeal] *may . . . permit* any party to . . . withdraw its notice of claim or other pleading *upon conditions just to all parties.*” (emphasis supplied). “The allowance of an appeal’s withdrawal is therefore discretionary” by the Presiding Officer. In the Matter of Robert Busby Requester, OADR Docket No. 96-039, Final Decision (January 7, 1997), 1997 MA ENV LEXIS 132, at 6. Accordingly, I am treating the Petitioner’s attempt to unilaterally withdraw his appeal as a request to withdraw his appeal pursuant to 310 CMR 1.01(6)(e). As such and as a matter of discretion, I am recommending that MassDEP’s Commissioner issue a Final Decision denying the Petitioner’s request to withdraw his appeal and instead dismiss the appeal as being a frivolous appeal in violation of the good faith filing requirement of 310 CMR 1.01(4)(b) for the reasons discussed below. However, for the reasons discussed below, I also recommend that MassDEP’s Commissioner’s Final Decision deny the Applicant’s request that the Petitioner be ordered to pay the Applicant’s reasonable costs and attorney’s fees incurred in defending against the Petitioner’s frivolous appeal because neither OADR nor the Commissioner have the authority to do so.

#### **I. THE PETITIONER’S APPEAL IS FRIVOLOUS IN VIOLATION OF 310 CMR 1.01(4)(b) WARRANTING THE APPEAL’S DISMISSAL**

The proceedings before OADR are quasi-judicial in nature in which OADR’s Presiding Officers, senior environmental attorneys serving as neutral, environmental administrative law

judges, advise MassDEP's Commissioner in the resolution of all administrative appeals filed with OADR challenging MassDEP agency action, including MassDEP's issuance of an SOC to a party. These Rules, which are patterned after the Massachusetts Rules of Civil Procedure ("Mass. R. Civ. P.") governing the adjudication of civil suits in Massachusetts trial courts,<sup>2</sup> include the good faith filing requirement of 310 CMR 1.01(4)(b).

The good faith filing requirement of 310 CMR 1.01(4)(b) mandates that:

*[all] [p]apers filed [by a litigant in an administrative appeal before OADR] shall be signed and dated by the party on whose behalf the filing is made or by the party's authorized representative [and] [t]his signature shall constitute a certification that the signer has read the document and believes the content of the document is true and accurate, and that the document is not interposed for delay. . . .*

(emphasis supplied).<sup>3</sup> The Adjudicatory Proceeding Rules at 310 CMR 1.01(10) authorize the Presiding Officer in an appeal before OADR to "impose sanctions [on a party in the appeal]" for "fail[ing] to comply with any of the [Rules'] requirements," including the good faith filing requirement of 310 CMR 1.01(4)(b). The range of sanctions authorized by 310 CMR 1.01(10) that the Presiding Officer may assess against a party for having violated the good faith filing requirement of 310 CMR 1.01(4)(b) include:

- (1) taking designated facts or issues as established against the sanctioned party;<sup>4</sup>

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<sup>2</sup> See Mass. R. Civ. P. 1. The Massachusetts Rules of Civil Procedure govern adjudication of civil suits or proceedings in Massachusetts trial courts such the Superior Court, the Housing Court, the Probate and Family Court in proceedings seeking equitable relief, the Juvenile Court in proceedings seeking equitable relief, the Land Court, the Boston Municipal Court, and District Courts in Boston and other Massachusetts municipalities.

<sup>3</sup> By comparison, Mass. R. Civ. P. 11(a)(1) provides that:

Every pleading of a party represented by an attorney [filed in a Massachusetts Trial Court governed by the Mass. R. Civ. P.] shall be signed by at least one attorney who is admitted to practice in this Commonwealth in the attorney's name. . . . Parties who are not represented by an attorney shall sign their pleadings . . . . The signature of any attorney to a pleading constitutes a certificate that the attorney has read the pleading; that to the best of the attorney's knowledge, information, and belief there is a good ground to support it; and that it is not interposed for delay. . . .

<sup>4</sup> 310 CMR 1.01(10)(a).

- (2) prohibiting the sanctioned party from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;<sup>5</sup>
- (3) striking the sanctioned party's pleadings in whole or in part;<sup>6</sup>
- (4) dismissing the sanctioned party from the appeal;<sup>7</sup> and
- (5) issuing a Recommended Final Decision recommending that MassDEP's Commissioner issue Final Decision against the sanctioned party.<sup>8</sup>

**II. NEITHER OADR NOR MassDEP'S COMMISSIONER HAVE THE AUTHORITY TO ORDER PARTIES WHO HAVE FILED FRIVOLOUS ADMINISTRATIVE APPEALS TO PAY THE REASONABLE COSTS AND ATTORNEY'S FEES OF THE OTHER PARTIES IN THE APPEAL**

However, 310 CMR 1.01(10) does not expressly authorize the issuance of a sanction ordering the sanctioned party and/or its legal counsel to pay the reasonable costs and attorney's fees incurred by the other parties in the appeal litigating against the sanctioned party's claims violating the good faith filing requirement of 310 CMR 1.01(4)(b). Although Mass. R. Civ. P. 11(a) upon which 310 CMR 1.01(4)(b) is based, also does not expressly authorize a sanction ordering payment of reasonable costs and attorney's fees, Massachusetts Courts have interpreted the rule as authorizing such a sanction against a court litigant's attorney under certain circumstances,<sup>9</sup> I decline to interpret 310 CMR 1.01(4)(b) and (10) as authorizing such a

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<sup>5</sup> 310 CMR 1.01(10)(b).

<sup>6</sup> 310 CMR 1.01(10)(d).

<sup>7</sup> 310 CMR 1.01(10)(f).

<sup>8</sup> 310 CMR 1.01(10)(g).

<sup>9</sup> The Massachusetts Supreme Judicial Court has interpreted Mass. R. Civ. P. 11(a) as authorizing Massachusetts trial court judges to order a court litigant's attorney to pay the reasonable costs and attorney's fees incurred by the other parties litigating against claims that the attorney pursued on behalf of their client where the attorney "[lacked] subjective good faith belief that [their client's] pleading was supported in both fact and law." Millennium Equity

sanction in administrative appeals before OADR for several reasons.

First, the administrative appeals process at OADR is governed by the Massachusetts Administrative Procedure Act, G.L. c. 30A, which does not expressly authorize quasi-judicial entities of State agencies such as OADR and the State final agency decision-maker in administrative appeals such as MassDEP's Commissioner to order a party in an administrative appeal and/or their legal counsel to pay the reasonable costs and attorney's fees incurred by the other parties in the appeal litigating against frivolous claims. The same holds true in G.L. c. 21A, § 18, which authorizes MassDEP "[to] establish fees applicable to the regulatory programs administered by [MassDEP], in the manner set forth in [the statute]." The statute only authorizes MassDEP to "establish by regulation a reasonable filing fee to be payable by all persons requesting adjudicatory hearings before [MassDEP]; provided, that the fee may be waived by [MassDEP] upon a showing of undue financial hardship" and "[the] fee shall not be disproportionately large compared to fees required to file an action in the [Massachusetts] superior court." G.L. c. 21A, § 18(e). Lastly, the Massachusetts Legislature has established in its enactment of G.L. c. 231, §§ 6E-6G that only certain Massachusetts courts, specifically "the supreme judicial court, the appeals court, the superior court, the land court, any probate court[,] and any housing court" can order a party "who was represented by [legal] counsel during most or all of [a] proceeding [before the court] . . . to "[pay] the reasonable counsel fees and other costs and expenses incurred in defending against [] claims" that "were wholly insubstantial, frivolous and not advanced in good faith." If the Massachusetts Legislature wanted to grant such attorney's fees and costs awarding authority to quasi-judicial entities of State agencies such as

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Holdings, LLC v. Mahlowitz, 456 Mass. 627, 650-51 (2010), citing, Van Christo Advertising, Inc. v. M/A-COM/LCS, 426 Mass. 410, 415-16 (1998).



OADR and the State final agency decision-maker in administrative appeals such as MassDEP's Commissioner, the Legislature would have stated as such in G.L. c. 231, §§ 6E-6G.

### **CONCLUSION**

For the reasons discussed above, I recommend that MassDEP's Commissioner issue a Final Decision: (1) denying the Petitioner's request to withdraw his appeal and instead dismiss the appeal as being a frivolous appeal in violation of the good faith filing requirement of 310 CMR 1.01(4)(b); and (2) denying the Applicant's request that the Petitioner be ordered to pay the Applicant's reasonable costs and attorney's fees incurred in defending against the Petitioner's frivolous appeal because neither OADR nor the Commissioner have the authority to do so.

### **NOTICE-RECOMMENDED FINAL DECISION**

This decision is a Recommended Final Decision of the Chief Presiding Officer. It has been transmitted to MassDEP's Commissioner for her 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 G.L. c. 30A. The MassDEP 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 MassDEP's Commissioner, no Party to this appeal shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the MassDEP Commissioner's office regarding this decision unless MassDEP's Commissioner, in her sole discretion, directs otherwise.



Date: June 12, 2023

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Salvatore M. Giorlandino  
Chief Presiding Officer

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**Legal representative:** None set forth in SOC and  
Petitioner's Appeal Notice;

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<sup>10</sup> From the inception of this appeal in September 2021 to February 14, 2023, the Petitioner was represented by legal counsel. On February 14, 2023, the Petitioner's legal counsel withdrew from the case after I had ordered further briefing from the Parties on January 27, 2023 on the issue of whether the Petitioner's appeal was filed in violation of the good faith filing requirement of 310 CMR 1.01(4)(b). The deadline for the Petitioner to file its brief on that issue was February 10, 2023, while he was still represented by legal counsel. The Petitioner never filed his brief nor requested an extension of time to file it after his attorney withdrew from the case on February 14, 2023.

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## **ADDENDUM NO. 1**

### **OADR DESCRIPTION**

The Office of Appeals and Dispute Resolution (“OADR”) is an independent quasi-judicial office within the Massachusetts Department of Environmental Protection (“MassDEP”) responsible for advising MassDEP’s Commissioner in resolving all administrative appeals of MassDEP Permit Decisions, Environmental Jurisdiction Determinations, and Enforcement Orders in a neutral, fair, timely, and sound manner based on the governing law and the facts of the case. In the Matter of Tennessee Gas Pipeline Company, LLC, OADR Docket No. 2016-020 (“TGP”), Recommended Final Decision (March 22, 2017), 2017 MA ENV LEXIS 34, at 9, adopted as Final Decision (March 27, 2017), 2017 MA ENV LEXIS 38, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7); See also Mass. R. Prof. C. 1.0(p) (definition of “tribunal”). MassDEP’s Commissioner is the final agency decision-maker in these appeals. TGP, 2017 MA ENV LEXIS 34, at 9, citing, 310 CMR 1.01(14)(b). To ensure its objective review of MassDEP Permit decisions and enforcement orders, OADR reports directly to MassDEP’s Commissioner and is separate and independent of MassDEP’s program offices, Regional Offices, and Office of General Counsel (“OGC”). TGP, 2017 MA ENV LEXIS 34, at 9.

OADR staff who advise MassDEP’s Commissioner in resolving administrative appeals are Presiding Officers. Id. Presiding Officers are senior environmental attorneys at MassDEP appointed by MassDEP’s Commissioner to serve as neutral hearing officers in administrative appeals. Presiding Officers are the equivalent of environmental administrative law judges who have significant authority under the Adjudicatory Proceeding Rules at 310 CMR 1.01 to adjudicate appeals, including the authority to issue Orders “to secure [the] just and speedy determination of every [administrative] appeal.” 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(13)(d)-(13)(f). This authority includes fostering settlement discussions between the parties in administrative appeals and resolving appeals by conducting pre-hearing conferences with the parties; ruling on dispositive motions; conducting evidentiary Adjudicatory Hearings (quasi-judicial/civil courtroom trial type proceedings), which includes the authority to establish prior to the Hearings, the number of witnesses that the parties may offer at the Hearings and to exclude witnesses whose testimony would be duplicative, irrelevant, or otherwise unnecessary; and issuing Recommended Final Decisions on appeals to MassDEP’s Commissioner. TGP, 2017 MA ENV LEXIS 34, at 9-10, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(13)(d)-(13)(f), 1.01(14)(a), 1.03(7). MassDEP’s Commissioner, as the agency’s final decision-maker, may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision issued by a Presiding Officer in an appeal. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(b). Unless there is a statutory directive to the contrary, the Commissioner’s Final Decision can be appealed to Massachusetts Superior Court pursuant to G.L. c. 30A, § 14. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(f).