

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**

**October 18, 2022**

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In the Matter of  
Pierre Coll and Lulu Tsai,  
Trustees of Colsac Trust

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OADR Docket No. WET-2022-004  
DEP File No. SE 126-603  
Carver, MA

**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

Kimberly Branch (“Ms. Branch”) has filed this appeal with MassDEP’s Office of Appeals and Dispute Resolution (“OADR”)<sup>1</sup> on behalf of a Resident Group of 34 abutters, including herself (collectively “the Petitioners”), challenging a Superseding Order of Conditions (“SOC”) that MassDEP’s Southeast Regional Office in Lakeville, Massachusetts has issued to Pierre M. Coll and Lulu Tsai, Trustees of the Colsac Trust (collectively the “Applicant”) pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 (“MWPA”), and the

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<sup>1</sup> MassDEP is the acronym for the Massachusetts Department of Environmental Protection (also referred in this Recommended Final Decision as “the Department”). OADR is an independent, neutral quasi-judicial office at MassDEP responsible for advising MassDEP’s Commissioner in resolving all administrative appeals of MassDEP Permit Decisions, Environmental Jurisdiction Determinations, and Enforcement Orders. A further description of OADR appears in Addendum No. 1 at p. 22 of this Recommended Final Decision.

Wetlands Regulations, 310 CMR 10.00 et seq. (“the Wetlands Regulations”). The SOC approved the Applicant’s proposed construction of three separate driveways to allow access from four parcels of land (“the proposed Project”) at real property located at 0 Pine Street in Carver, Massachusetts (“the Property”). SOC Cover Letter, at p. 1.

According to MassDEP, two of the driveways approved by the SOC will cross different intermittent streams and will alter the following wetlands resources protected by the MWPA and Wetlands Regulations: (1) 20 square feet of bordering vegetated wetlands (“BVW”), 310 CMR 10.55; (2) 300 square feet of land under a waterbody, 310 CMR 10.56; and (3) 29 linear feet of inland bank, 310 CMR 10.54. Id. MassDEP also states that the third driveway approved by the SOC will alter 1,690 square feet of isolated vegetated wetlands. Id.

To mitigate the alteration of 20 square feet of BVW for two of the driveways and the alteration of 1,690 square feet of isolated vegetated wetlands for the third driveway, the SOC approved a 3,480 square foot wetland replication area. Id. In addition, the SOC requires the Applicant to apply for and obtain from MassDEP a 401 Water Quality Certification pursuant to 314 CMR 9.04(3) if any discharge of dredged or fill material at the Property resulting from the creation of a real estate subdivision occurs unless: (1) there is a recorded deed restriction providing notice to subsequent purchasers of real property in the subdivision limiting the amount of fill for the single and complete project to less than 5,000 square feet cumulatively of BVW, isolated vegetated wetlands, and land under water; and (2) the discharge of dredged or fill material is not to an Outstanding Resource Water, 314 CMR 9.04(3). Id. The SOC states that discharges of dredge or fill material resulting from the creation of a real estate subdivision at the Property include but are not limited to the construction of roads, drainage, sidewalks, sewer

systems, buildings, septic systems, wells, and accessory structures. Id.

In their Appeal Notice challenging the SOC, the Petitioners asserted that MassDEP improperly issued the SOC for several reasons. Petitioners' Appeal Notice, at pp. 1-4. These reasons included the Petitioners' contention that the two different streams at the Property that two of the driveways approved by the SOC will cross are perennial streams and not intermittent streams as MassDEP had determined. Id. The Petitioners also asserted that the SOC was invalid because a portion of the Property where the proposed work authorized by the SOC will take place is Isolated Land Subject to Flooding pursuant to 310 CMR 10.57. Id. In response, the Applicant and MassDEP denied all the Petitioners' claims and requested that the SOC be affirmed in this appeal. Applicant's Pre-Hearing Statement, at pp. 1-4; MassDEP's Pre-Hearing Statement, at pp. 1-4.

To date, the Petitioners, the parties with the burden of proving in this appeal that MassDEP erred in issuing the SOC to the Applicant,<sup>2</sup> have failed to substantiate their claims in the appeal by failing to identify their expert witnesses and file sworn pre-filed testimonial and documentary evidence (collectively "pre-filed testimony") of expert witnesses supporting their claim that MassDEP improperly issued the SOC. This pre-filed testimony was necessary for the Petitioners' appeal of the SOC to go forward to the evidentiary adjudicatory hearing ("Hearing") for adjudication. Having failed to file this pre-filed testimony, the Petitioners' appeal of the SOC should no longer go forward. Accordingly, I recommend that MassDEP's Commissioner issue a

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<sup>2</sup> I further discuss the Petitioners' burden of proof below, at pp. 7-9.

Final Decision: (1) dismissing the Petitioners' appeal; and (2) affirming the SOC.

## **STATUTORY AND REGULATORY FRAMEWORK**

### **I. THE PERMITTING REQUIREMENTS OF THE MWPA AND THE WETLANDS REGULATIONS**

The purpose of the MWPA and the Wetlands Regulations is to protect wetlands and to regulate activities affecting wetlands areas in a manner that promotes the following eight statutory interests:

- (1) protection of public and private water supply;
- (2) protection of ground water supply;
- (3) flood control;
- (4) storm damage prevention;
- (5) prevention of pollution;
- (6) protection of land containing shellfish;
- (7) protection of fisheries; and
- (8) protection of wildlife habitat.

G.L. c. 131, § 40; 310 CMR 10.01(2); In the Matter of Gary Vecchione, OADR Docket No.

WET-2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 6-7, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77; In the Matter of Webster Ventures, LLC, OADR Docket No. WET-2014-016 (“Webster Ventures I”),

Recommended Final Decision (February 27, 2015), 2015 MA ENV LEXIS 14, at 10-11, adopted as Final Decision (March 26, 2015), 2015 MA ENV LEXIS 10; In the Matter of Elite Home Builders, LLC, OADR Docket No. WET-2015-010, Recommended Final Decision (November 25, 2015), adopted as Final Decision (December 17, 2015), 22 DEPR 202, 204 (2015); In the

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Matter of Sunset City, Inc., OADR Docket No. WET-2016-016, Recommended Final Decision (March 31, 2017), 2017 MA ENV LEXIS 35, at 9-10, adopted as Final Decision (April 21, 2017, 2017 MA ENV LEXIS 33.

The MWPA and the Wetlands Regulations provide that “[n]o person shall remove, fill, dredge[,] or alter<sup>3</sup> any [wetlands] area subject to protection under [the MWPA and Wetlands Regulations] without the required authorization, or cause, suffer or allow such activity . . . .” G.L. c. 131 § 40, ¶ 32; 310 CMR 10.02(2)(a); Vecchione, 2014 MA ENV LEXIS 76, at 7; Webster Ventures I, 2015 MA ENV LEXIS 14, at 11-12; Elite Home Builders, 22 DEPR at 204; Sunset City, 2017 MA ENV LEXIS 35, at 10. “Any activity proposed or undertaken within [a protected wetlands] area[,] . . . which will remove, dredge or alter that area, is subject to Regulation under [the MWPA and the Wetlands Regulations] and requires the filing of a Notice of Intent (“NOI”)” with the permit issuing authority. 310 CMR 10.02(2)(a). A party must also file an NOI for “[a]ny activity . . . proposed or undertaken within 100 feet of [any protected wetlands]” described as “the Buffer Zone” by the Regulations, “which, in the judgment of the

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<sup>3</sup> The Wetlands Regulations at 310 CMR 10.04 define “alter” as “chang[ing] the condition” of any wetlands area subject to protection under the MWPA and the Wetlands Regulations. Examples of alterations include, but are not limited to, the following:

- (a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas;
- (b) the lowering of the water level or water table;
- (c) the destruction of vegetation;(d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water.

310 CMR 10.04. “Dredge” is defined as “deepen[ing], widen[ing], or excavat[ing], either temporarily or permanently” a protected wetlands area, and “[f]ill means to deposit any material [in a protected wetlands area] so as to raise an elevation, either temporarily or permanently.” Id.

[permit] issuing authority, will alter [any protected wetlands].” 310 CMR 10.02(2)(b).

The “[permit] issuing authority” is either the local Conservation Commission when initially reviewing the applicant’s proposed work in a wetlands resource area protected by the MWPA and the Wetlands Regulations, or the Department when it assumes primary review of the proposed work or review on appeal from a local Conservation Commission decision. Healer v. Department of Environmental Protection, 73 Mass. App. Ct. 714, 717-19 (2009). Under the MWPA, a local Conservation Commission may issue an Order of Conditions authorizing or precluding proposed activities in protected wetlands areas and “[is] allowed to ‘impose such conditions as will contribute to the protection of the interests described [in the MWPA and the Wetlands Regulations]’” and to require that “‘all work shall be done in accordance’ with the conditions they might impose. . . .” Id.

Orders of Conditions, including any findings and wetlands delineations forming the basis of the Orders, are valid for three years from the date of the Orders’ issuance. 310 CMR 10.05(6)(d). However, any “order [by the Department] shall supersede the prior order of the conservation commission [issued pursuant to the MWPA and the Wetlands Regulations] . . . and all work shall be done in accordance with the [Department’s] order,” Id., unless the Commission has properly denied the proposed project pursuant to a local Wetlands Protection Bylaw that is more protective than the MWPA. Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich, 449 Mass. 859, 866 (2007). This is the case because the MWPA “establishes Statewide minimum wetlands protection standards, [but] local communities are free to impose more stringent requirements” by enacting local Wetlands Protection Bylaws. Oyster Creek, 449 Mass. at 866; Healer, 73 Mass. App. At 716. As a result, an SOC issued by MassDEP under the MWPA approving proposed work in protected wetlands areas cannot preempt a timely decision

of a local conservation commission denying approval of the proposed work based “on provisions of a local bylaw that are more protective than the [MWPA].” Oyster Creek, 449 Mass. at 866. However, this issue is not present in this appeal, because the Administrative Record of the appeal does not reveal any issues involving the Town of Carver’s local wetlands protection by-law, including not indicating that the proposed Project has been denied under the local by-law.

## **II. THE PETITIONERS’ BURDEN OF PROOF IN THE APPEAL**

Under the Wetlands Regulations at 310 CMR 10.05(7)(j)2(a), certain individuals or entities may, within 10 business days after an SOC’s issuance, file an appeal with OADR challenging the SOC, including “any ten residents of the city or town where the land is located, if at least one resident was previously a participant in the permit proceeding” leading up to the SOC’s issuance.<sup>4</sup> If such an appeal is filed with OADR, the appellant has the burden of proving by a preponderance of the evidence presented at the Hearing conducted by the Presiding Officer to adjudicate the appeal that MassDEP erred in issuing the SOC. This burden of proof requires the appellant to “produce [at the Hearing] at least some credible evidence from a competent source in support of [the appellant’s] position [that MassDEP erred in issuing the SOC.]” See 310 CMR 10.03(2); 310 CMR 10.05(7)(j)2.b.iv; 310 CMR 10.05(7)(j)2.b.v; 310 CMR

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<sup>4</sup> The other individuals or entities who may appeal an SOC are:

- (1) the applicant of the proposed project that is the subject of the SOC;
- (2) the landowner of the land on which the proposed project would take place;
- (3) a person aggrieved by the SOC (“aggrieved person”) if the person previously was a participant in the permit proceedings; and
- (4) the conservation commission that previously issued the Order of Conditions.

310 CMR 10.05(7)(j)2(a).

10.05(7)(j)3.a; 310 CMR 10.05(7)(j)3.b; 310 CMR 10.05(7)(j)3.c.

It is well settled that “[a] ‘competent source’ [of evidence includes] is a witness who has sufficient expertise to render testimony on the technical issues on appeal.” In the Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 MA ENV LEXIS 89, at 36-37, adopted by Final Decision (August 19, 2010), 2010 MA ENV LEXIS 31. Whether the witness has such expertise depends “[on] whether the witness has sufficient education, training, experience[,] and familiarity with the subject matter of the testimony.” Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted); See e.g. In the Matter of Carulli, Docket No. 2005-214, Recommended Final Decision (August 10, 2006)(dismissing claims regarding flood control, wetlands replication, and vernal pools for failure to provide supporting evidence from competent source), adopted by Final Decision (October 25, 2006); In the Matter of Indian Summer Trust, Docket No. 2001-142, Recommended Final Decision (May 4, 2004) (insufficient evidence from competent source showing that interests under MWPA were not protected), adopted by Final Decision (June 23, 2004); In the Matter of Robert Siegrist, Docket No. 2002-132, Recommended Final Decision (April 30, 2003) (insufficient evidence from competent source to show wetlands delineation was incorrect and work was not properly conditioned), adopted by Final Decision (May 9, 2003); Pittsfield Airport Commission, *supra*, 2010 MA ENV LEXIS 89, at 36-39 (petitioner’s failure to submit expert testimony in appeal challenging Department’s Commissioner’s issuance of 401 Water Quality Certification Variance to Pittsfield Airport Commission fatal to petitioner’s claims in appeal because Variance was “detailed and technical . . . requiring expert testimony on issues . . . implicated by the Variance,”



including . . . (1) wetland replication, restoration, and enhancement, (2) mitigation of environmental impacts to streams, and (3) stormwater discharge and treatment[,]  
[and (4)] . . . runway safety and design”).

Here, as noted above, the Petitioners claim in this appeal that MassDEP improperly issued the SOC because: (1) the two different streams at the Property that two of the driveways approved by the SOC will cross are perennial streams and not intermittent streams as MassDEP had determined; and (2) a portion of the Property where the proposed work authorized by the SOC will take place is Isolated Land Subject to Flooding pursuant to 310 CMR 10.57. Accordingly, at a Hearing in this appeal, the Petitioners would have had the burden of proving these claims through the pre-filed testimony of competent witnesses, specifically wetlands experts. As discussed in detail below, to date the Petitioners have failed to identify their expert witnesses and file the pre-filed testimony of expert witnesses for the Hearing supporting their claim that the SOC is invalid. They have failed to do so notwithstanding their burden of proof in the appeal and my directives requiring them to identify their expert witnesses and file pre-filed testimony of expert witnesses supporting their claim that the SOC is invalid. As a result, the Petitioners’ appeal should be dismissed and the SOC affirmed.

## **DISCUSSION**

### **I. THE PRESIDING OFFICER’S AUTHORITY TO FACILITATE THE ADJUDICATION OF ADMINISTRATIVE APPEALS OF SOCS AND REQUIRING THE PARTIES TO THE APPEAL TO SUBSTANTIATE THEIR CLAIMS IN THE APPEAL**

Adjudication of the Petitioners’ appeal of the SOC is not only governed by the substantive requirements of the MWPA and the Wetlands Regulations as discussed above, but also appeal adjudication rules set forth in the Wetlands Regulations at 310 CMR 10.05(7)(j) and

certain Adjudicatory Proceeding Rules at 310 CMR 1.01 which the Wetlands Regulations have incorporated. 310 CMR 10.05(7)(j)3-7(j)9. These appeal adjudication rules contain a number of provisions designed to facilitate the Presiding Officer's adjudication of the appeal and requiring the parties to the appeal to provide material information substantiating their claims in the appeal prior to a Hearing taking place to adjudicate those claims. These provisions, include 310 CMR 1.01(5)(a)15, as incorporated by the Wetlands Regulations at 310 CMR 10.05(7)(j)7 and (7)(j)9b, as discussed below.

The Petitioners are required to comply with these appeal adjudication rules notwithstanding their pro se status (not represented by legal counsel) in the appeal. In the Matter of Dan and Eva Barstow, OADR Docket No. 2019-026, Recommended Final Decision (January 22, 2020), 2020 MA ENV LEXIS 16, at 8-9, adopted as Final Decision (February 19, 2020), 2020 MA ENV LEXIS 12; In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 45-46, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77, citing, Mmoe v. Commonwealth, 393 Mass. 617, 620 (1985) (pro se litigants are required to file court pleadings conforming to the Massachusetts Rules of Civil Procedure); Rothman v. Trister, 450 Mass. 1034 (2008) (pro se litigants are required to comply with appellate litigation rules); Lawless v. Board of Registration In Pharmacy, 466 Mass. 1010, 1011 (2013) (same). Although their pro se status in the appeal accords them some leniency from these appeal adjudication rules, the Petitioners are not excused from complying with them because “[these] rules bind a pro se litigant as they bind other litigants.” Id.

Under 310 CMR 1.01(5)(a)15, the Presiding Officer in an administrative appeal is authorized to conduct prescreening/pre-hearing conferences (“PS/PHCs”) with the parties to the

appeal to discuss potential settlement of the appeal, identify the issues for adjudication in the appeal, and to “issu[e] orders to parties, including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending [PS/PHCs] and ordering parties to provide more definite statements in support of their positions.” This authority is incorporated in the Wetlands Regulations at 310 CMR 10.05(7)(j)7.a, which provides in relevant part that after an administrative appeal of an SOC is filed, “the Presiding Officer [shall] schedule a [PS/PHC with the parties to the appeal] to be conducted pursuant to 310 CMR 1.01(5)(a)15[.]” The Wetlands Regulations at 310 CMR 10.05(7)(j)7.g reinforce this authority by mandating that:

[a]ll parties [to the appeal] must attend [the PS/PHC] and be prepared to discuss settlement and the narrowing of issues [for adjudication in the appeal] at the [PS/PHC]. At the conclusion of the [PS/PHC] or shortly thereafter, the Presiding Officer shall prepare and circulate a [PS/PHC] report, for any appeal not resolved [at PS/PHC]. *The [PS/PHC] report shall contain a list of issues that are in dispute and which are legally relevant, and that are to be addressed in the parties’ [D]irect and [R]ebuttal cases [for the evidentiary adjudicatory hearing].*

(emphasis supplied).

The provisions of 310 CMR 10.05(7)(j)3 provide that:

*[i]n its Direct Case, the [Appellant] must establish the legal and factual basis for its position on the issues [for adjudication in the appeal] identified by the Presiding Officer [and] [f]ailure to do so will result in a waiver of [Appellant’s] Direct Case for that issue.<sup>5</sup>*

(emphasis supplied). 310 CMR 10.05(7)(j)3 also provides that “[the Appellant’s] Direct Case *at a minimum shall include . . . credible evidence from a competent source* in support of each

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<sup>5</sup> 310 CMR 10.05(7)(j)3c.

claim of factual error, *including any relevant expert report(s), plan(s), or photograph(s).*”  
(emphasis supplied)<sup>6</sup>

**II. THE PETITIONERS HAVE FAILED TO SUBSTANTIATE THEIR CLAIM THAT MassDEP IMPROPERLY ISSUED THE SOC**

**A. The Petitioners Have Failed to Identify their Expert Witnesses Supporting the Petitioners’ Claim that MassDEP Improperly Issued the SOC**

In accordance with 310 CMR 10.05(7)(j)7.a and 310 CMR 1.01(5)(a)15 as discussed above, on February 22, 2022 I issued a Scheduling Order (“the February 22<sup>nd</sup> Scheduling Order”) scheduling the Petitioners’ appeal of the SOC for a PS/PHC at 10:00 a.m., March 31, 2022, and for a Hearing at 9:30 a.m., June 29, 2022. The February 22<sup>nd</sup> Scheduling Order informed the Parties that the purpose of the PS/PHC was to establish: (1) the Issues for Adjudication in the Appeal in the event that the appeal was not settled by written agreement of the Parties and proceeded to the Hearing for adjudication of the Issues and (2) the schedule for the Parties to file pre-filed testimony of witnesses, including expert witnesses, and memoranda of law in support of their respective positions on the Issues prior to the Hearing. Scheduling Order, ¶ 3.

To facilitate my understanding of the Parties’ positions in the appeal and the evidence they would present at the Hearing supporting those positions through their respective expert witnesses, the February 22<sup>nd</sup> Scheduling Order directed the Parties to file in advance of the March 31, 2022 PS/PHC, Pre-Hearing Statements that were to include brief summaries of their positions in the appeal and set forth the names of the witnesses, including expert witnesses, who would be testifying on their behalf at the Hearing. February 22<sup>nd</sup> Scheduling Order, ¶¶ 3-4, 7. The February 22<sup>nd</sup> Scheduling Order required the Petitioners, the individuals with the burden of

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<sup>6</sup> 310 CMR 10.05(7)(j)3c.ii.

proof in the appeal as previously discussed above, at pp. 7-9, to file their Pre-Hearing Statement by Friday, March 25, 2022, three (3) business days prior to March 31, 2022 PS/PHC. *Id.*, ¶ 7.<sup>7</sup>

Instead of filing their Pre-Hearing Statement by the March 25, 2022 deadline, the Petitioners filed an unsigned Pre-Hearing Statement<sup>8</sup> by e-mail after business hours (9:36 p.m.) on March 30, 2022 and less than 24 hours prior to Pre-Hearing Conference.<sup>9</sup> Not only was the Petitioners' unsigned Pre-Hearing Statement very late but it also failed to include material information required by the February 22<sup>nd</sup> Scheduling Order, specifically the names of witnesses, including expert witnesses, who would be testifying on the Petitioners' behalf at the June 29, 2022 Hearing if the appeal was not settled. The Petitioners failed to file a timely and proper Pre-Hearing Statement notwithstanding: (1) their burden of proof in the appeal and (2) the February 22<sup>nd</sup> Scheduling Order had informed all the Parties in the appeal, including the Petitioners, that "[t]he failure of any party . . . to comply with any requirements of th[e] [February 22<sup>nd</sup>

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<sup>7</sup> The February 22<sup>nd</sup> Scheduling Order required MassDEP and the Applicant to file by March 29, 2022 their respective Pre-Hearing Statements providing more detail regarding their claims in the appeal and naming the witnesses, including expert witnesses, who would be testifying on their behalf at the June 29, 2022 Hearing. MassDEP filed its Pre-Hearing Statement on March 29, 2022 containing all the information required by the February 22<sup>nd</sup> Scheduling Order, including the name of its expert witness for the June 29, 2022 Hearing. Although the Applicant filed its Pre-Hearing Statement one day late on March 30, 2022, its Pre-Hearing Statement nevertheless contained all the information required by the February 22<sup>nd</sup> Scheduling Order, including the names of its two expert witnesses for the June 29, 2022 Hearing and was filed early enough on March 30<sup>th</sup> to allow me to review it prior to the Pre-Hearing Conference on March 31, 2022.

<sup>8</sup> The Adjudicatory Proceeding Rules at 310 CMR 1.01(4)(b) which are incorporated by the Wetlands Regulations at 310 CMR 10.05(7)(j)9, impose a good faith filing requirement which mandates that "[all] [p]apers filed [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 that "[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. . . ." The provisions of 310 CMR 1.01(10) authorize the Presiding Officer in the appeal to issue sanctions against a party for violating 310 CMR 1.01(4)(b). The range of sanctions authorized by 310 CMR 1.01(10) "include, without limitation[.]" issuing orders ranging from striking from the record of the appeal any unsigned document that has been filed in the appeal to dismissal of the appeal, depending on the circumstances of case.

<sup>9</sup> Under Adjudicatory Proceeding Rules at 310 CMR 1.01((3)(a)5, the Petitioners' late filing of their unsigned Pre-Hearing Statement by e-mail during the evening of March 30, 2022, "[is] deemed filed on the following business day," March 31, 2022, the same day as the Pre-Hearing Conference.

Scheduling] Order [could] result in the imposition of appropriate sanctions on that party pursuant to 310 CMR 1.01.” February 22<sup>nd</sup> Scheduling Order, ¶ 4. The February 22<sup>nd</sup> Scheduling Order also informed the Parties of the range of sanctions that could be imposed, which included dismissal of the Petitioners’ appeal if the Petitioners failed to comply with the Order. Id.<sup>10</sup>

On March 31, 2022, I conducted the PS/PHC with the Parties as scheduled pursuant to the February 22<sup>nd</sup> Scheduling Order. At the PS/PHC, I explained OADR’s independent quasi-judicial role at MassDEP in adjudicating administrative appeals of MassDEP Permit Decisions, Environmental Jurisdiction Determinations, and Enforcement Orders. See Addendum 1, at p. 22 below; Post Pre-Hearing Conference Report, Orders, and Appeal Adjudication Schedule, April 4, 2022 (“Post PHC Rpt.”), at pp. 3-6. I also addressed the Petitioners’ failure to file a timely and proper Pre-Hearing Statement providing more detail regarding the Petitioners’ claims in their appeal of the SOC and naming the witnesses, including expert witnesses, who would be testifying on Petitioners’ behalf at the June 29, 2022 Hearing if the appeal was not settled. Post PHC Rpt., at pp. 4-5.

At the PS/PHC, I informed the Petitioners’ representative, Ms. Branch, that I would be well within my authority as Presiding Officer to issue a Recommended Final Decision recommending that MassDEP’s Commissioner issue a Final Decision dismissing the Petitioners’

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<sup>10</sup> The Presiding Officer is authorized to dismiss an administrative appeal pursuant to the following Adjudicatory Proceeding Rules which have been incorporated by the Wetlands Regulations at 310 CMR 10.05(7)(j)9b:

- (1) 310 CMR 1.01(3)(e) which authorizes the Presiding Officer to dismiss an administrative appeal when the appellant “[fails to] conform to time limits or schedules established by the Presiding Officer . . . absent good cause shown” by the appellant for its non-compliance; and
- (2) 310 CMR 1.01(10)(e), (10)(f), and (10)(g) which authorize the Presiding Officer to dismiss an administrative appeal where the appellant (a) fails to file documents as required, (b) fails to respond to notices, correspondence or motions, (c) fails to comply with orders issued and schedules established in orders issued by the Presiding Officer, (d) fails to prosecute its appeal, (e) engages in conduct evidencing an intent not to proceed with the appeal or to delay the appeal's resolution, and/or (f) fails to comply with any of the requirements set forth in 310 CMR 1.01.

appeal due to the Petitioners' failure to file a timely and proper Pre-Hearing Statement. Post PHC Rpt., at p. 5.<sup>11</sup> However, exercising my discretion as Presiding Officer, I informed Ms. Branch that I would not go the dismissal route, but instead would accord the Petitioners with another opportunity to properly prosecute their appeal. Id. I also informed Ms. Branch that I would not be so lenient in the future if the Petitioners failed to comply with my directives in the appeal, including failing to file the pre-filed testimony of the Petitioners' witnesses, including expert witnesses, supporting the Petitioners' positions on the Issues for Adjudication in the appeal as set forth below. Id. In response, Ms. Branch apologized for the Petitioners' failure to file a timely and proper Pre-Hearing Statement and promised that the Petitioners would comply with my directives in the appeal. Id. As discussed below, the Petitioners did not honor this promise.

After addressing the Petitioners' non-compliant Pre-Hearing Statement, I allowed the Parties to present a summary of their positions in the appeal and after they made their presentations, I established the following two Issues for Adjudication in the appeal based on the Parties' positions in the appeal:

- (1) Did MassDEP properly determine that the two different streams at the Property that two of the driveways approved by the SOC will cross are intermittent streams and not perennial streams?
- (2) Did MassDEP properly determine that a portion of the Property does not constitute Isolated Land Subject to Flooding?

Id., at pp. 5-6. After establishing these Issues for Adjudication, I discussed the Petitioners' burden of proof on these Issues as set forth above, at pp. 7-9 and established the schedule for the Parties to file pre-filed testimony of their witnesses, including expert witnesses, and memoranda

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<sup>11</sup> Dismissal of the Petitioners' appeal would have been appropriate pursuant to the provisions of 310 CMR 1.01(3)(e), (10)(e), (10)(f), and 10(g). See n. 10, at p. 14 above.

of law in support of their respective positions on the Issues for Adjudication prior to the Hearing. Post PHC Rpt., at pp. 6-15. I also discussed the possible sanctions that could be imposed on a Party, including the Petitioners, for failing to file the pre-filed testimony of their witnesses in accordance with the filing schedule, with dismissal of the Petitioners' appeal of the SOC being within the range of sanctions that could be imposed if they failed to file the pre-filed testimony of their witnesses. Id., at pp. 13-15.<sup>12</sup>

Following the PS/PHC, I issued a Post PHC Rpt. to the Parties which memorialized what transpired at the PS/PHC as set forth above, including the establishment of the Issues for Adjudication and the schedule for the Parties to file the pre-filed testimony of their witnesses, including expert witnesses, and memoranda of law in support of their respective positions on the Issues for Adjudication prior to the Hearing. Id., at pp. 6-15. The Post PHC Rpt. also confirmed and warned the Parties of the ramifications of a Party's failure to file the pre-filed testimony of its witnesses in accordance with the schedule that I established at the PS/PHC, with dismissal of the Petitioners' appeal of the SOC being within the range of sanctions that could be imposed if they failed to file the pre-filed testimony of their witnesses. Id., at 13-15. However, as discussed in the next section, the Petitioners did not heed that warning.

**B. The Petitioners Have Failed to File the Pre-filed Testimony of Expert Witnesses Supporting their Claim that MassDEP improperly issued the SOC**

Under the schedule that I established at the PS/PHC and confirmed in the Post PHC Rpt. that I issued to the Parties following the PS/PHC, the filing deadline for the Petitioners to file the pre-filed testimony of their witnesses, including expert witnesses, was Thursday, April 28, 2022. To date, nearly six months after expiration of that deadline, the Petitioners have failed to file the

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<sup>12</sup> See n. 10, at p. 14 above.



pre-filed testimony of any witnesses without any justification. Also, at no time prior to and after expiration of the filing deadline have the Petitioners requested any additional time to file the pre-filed testimony of their witnesses.

Indeed, in a filing that they made with OADR on April 29, 2022 in response to my inquiry regarding the status of the pre-filed testimony of their witnesses after the April 28<sup>th</sup> filing deadline had expired, the Petitioners stated that “[they] [did] not have witnesses, nor questions for the Applicant and MassDEP’s [witnesses for] the Hearing.” As a result of this statement, I cancelled the Hearing scheduled for June 29, 2022 and informed the Parties that I intended to issue a Recommended Final Decision recommending that MassDEP’s Commissioner issue a Final Decision: (1) dismissing the Petitioners’ appeal of the SOC and (2) affirming the SOC.

The Petitioners’ April 29<sup>th</sup> statement that they did not have any witnesses for the Hearing coupled with their earlier failure to identify their expert witnesses as required by the February 22<sup>nd</sup> Scheduling Order would justify my making findings that the Petitioners never had any intention of substantiating their claims in the appeal with expert witnesses and brought the appeal for the purpose of delaying the Applicant from obtaining final MassDEP approval for the proposed Project. Whatever the Petitioners’ motive for having appealed the SOC, it is undisputable that the Petitioners have failed to satisfy their burden of proof in the appeal by failing to identify their expert witnesses and file the pre-filed testimony of expert witnesses supporting the Petitioners’ claims in the appeal. As a result, the Petitioners’ appeal of the SOC should be dismissed and the SOC affirmed.

### **CONCLUSION**

Based on the foregoing, I recommend that MassDEP’s Commissioner issue a Final Decision: (1) dismissing the Petitioners’ appeal of the SOC; and (2) affirming the SOC due to the

Petitioners' repeated failure to substantiate their claims in the appeal by failing without good cause to identify their expert witnesses and file the pre-filed testimony of expert witnesses supporting the Petitioners' claim that MassDEP improperly issued the SOC.



**Date: October 18, 2022**

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Salvatore M. Giorlandino  
Chief Presiding Officer

**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 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 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 his sole discretion, directs otherwise.

## **SERVICE LIST**

**Petitioner:** Kimberly Branch purportedly on behalf of a  
Resident Group of 34 abutters, including herself  
2 Cherry Hill Drive  
Carver, MA 02330  
**e-mail:** branchkimberly@hotmail.com

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

**Applicant:** Pierre M. Coll and Lulu Tsai, Trustees of the Colsac Trust

James V O'Brien,  
20 North Park Ave, Suite 4  
Plymouth Ma 02360  
**e-mail:** jvocorp@gmail.com

Ivo P. Coll  
20 North Park Ave, Suite 4  
Plymouth, Ma 02360  
**e-mail:** ivopcoll@gmail.com

**Legal representative:** Frederick C. Grosser, Esq.  
Frederick C. Grosser & Associates  
3180 Main Street  
P.O. Box 5  
Barnstable, MA 02630  
**e-mail:** fcg@grosserlaw.com

**Professional Consultant:** James Pavlik  
Outback Engineering, Inc.  
165 East Grove Street  
Middleborough, MA 02346  
**e-mail:** jpavlik@outback-eng.com  
info@outback-eng.com;

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**The Local Conservation Commission:**

Town of Carver Conservation Commission  
c/o Brooke Monroe, Environmental Scientist  
Carver Town Hall  
108 Main Street  
Carver, MA 02330  
**e-mail:** brooke.monroe@carverma.gov;

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

**The Department:** Millie Garcia-Serrano, Regional Director  
MassDEP/SE Regional Office  
20 Riverside Drive  
Lakeville, MA 02347  
**e-mail:** millie.garcia-serrano@mass.gov;

Gerard Martin, Deputy Regional Director  
MassDEP/SE Regional Office/Bur. of Water Resources  
20 Riverside Drive  
Lakeville, MA 02347  
**e-mail:** gerard.martin@mass.gov;

Daniel F. Gilmore, Chief, Wetlands Program  
MassDEP/SE Regional Office/Bur. of Water Resources  
20 Riverside Drive  
Lakeville, MA 02347  
**e-mail:** Daniel.Gilmore@mass.gov;

Gary Makuch, Environmental Engineer  
MassDEP/SE Regional Office/Bur. of Water Resources  
20 Riverside Drive  
Lakeville, MA 02347  
**e-mail:** gary.makuch@mass.gov@mass.gov;

**Legal Representative:** Bruce E. Hopper, Deputy General  
Counsel for Litigation  
MassDEP/Office of General Counsel  
One Winter Street  
Boston, MA 02108;  
**e-mail:** bruce.e.hopper@mass.gov;

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cc: Shaun Walsh, Chief Regional Counsel  
MassDEP/Southeast Regional Office  
Office of General Counsel  
20 Riverside Drive  
Lakeville, MA 02347  
**e-mail:** Shaun.Walsh@mass.gov;

Leslie DeFilippis, Paralegal  
MassDEP/Office of General Counsel  
One Winter Street  
Boston, MA 02108.

## **ADDENDUM NO. 1**

### **OADR DESCRIPTION**

The Office of Appeals and Dispute Resolution (“OADR”) is a quasi-judicial office within the Massachusetts Department of Environmental Protection (“the Department” or “MassDEP”) which is responsible for advising the Department’s Commissioner in resolving all administrative appeals of Department Permit decisions 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). The Department’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 Department Permit decisions and enforcement orders, OADR reports directly to the Department’s Commissioner and is separate and independent of the Department’s program offices, Regional Offices, and Office of General Counsel (“OGC”). TGP, 2017 MA ENV LEXIS 34, at 9.

OADR staff who advise the Department’s Commissioner in resolving administrative appeals are Presiding Officers. Id. Presiding Officers are senior environmental attorneys at the Department appointed by the Department’s Commissioner to serve as neutral hearing officers, and are responsible for fostering settlement discussions between the parties in administrative appeals, and to resolve appeals by conducting pre-hearing conferences with the parties and evidentiary Adjudicatory Hearings and making Recommended Final Decisions on appeals to the 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(14)(a), 1.03(7). The Department’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).