COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS

**DEPARTMENT OF ENVIRONMENTAL PROTECTION**

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**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

**January 7, 2026**

In the Matter of
Richard Ligols

OADR Docket Number: WET-2023-017
DEP File No. SE 004-0633
Berkley, Massachusetts

## INTERLOCUTORY DECISION ON WHETHER THE DEPARTMENT HAD JURISDICTION TO ISSUE THE SUPERSEDING ORDER OF CONDITIONS

Pamela J. Leite and Joseph S. Leite ("Petitioners"), have filed this appeal with the Office of Appeals and Dispute Resolution ("OADR")[1] of the Massachusetts Department of Environmental Protection ("Department") challenging a Superseding Order of Conditions ("SOC") issued by the Department's Southeast Regional Office ("SERO") pursuant to the Massachusetts Wetlands Protection Act, G.L c. 131, § 40 ("MWPA"), and the Wetlands Regulations, 310 CMR 10.00, *et seq*. The Department issued the SOC to Richard Ligols ("Applicant") approving partially completed work within the Buffer Zone to Bordering Vegetated Wetlands ("BVW") to install an in-ground swimming pool, paver patio, outdoor kitchen, fireplace, and retaining wall ("Project"). When he filed his request to issue the SOC ("SOC Request"), the Applicant contended that the Berkley Conservation Commission ("Commission") did not conduct its public hearing within 21 days as required under 310 CMR

[1] OADR is an independent, neutral, quasi-judicial office within the Department whose Presiding Officers are responsible for advising the Department's Commissioner in the adjudication of administrative appeals filed with OADR challenging Department Permit Decisions, Environmental Jurisdiction Determinations, and Enforcement Orders.

10.05(5)(a) ("21-Day Deadline") because it failed to obtain the Applicant's consent to continue the public hearing pursuant to 310 CMR 10.05(5)(b)2. As a result, the Commission lost jurisdiction to issue its Order of Conditions ("OOC") denying the proposed Project. The Petitioners argue the Applicant had assented to continue the Commission's public hearing, which extended the 21-Day Deadline. They contend that the Commission still had jurisdiction to issue its OOC.[2]

In preparing this Interlocutory Decision, I read the transcript of the June 20, 2024 evidentiary Adjudicatory Hearing ("Adjudicatory Hearing") that I conducted to adjudicate the appeal, and listened to the audio recording of the Adjudicatory Hearing. I also reviewed the documents that the Department produced at the outset of the appeal, the sworn Pre-Filed Testimony ("PFT") and Rebuttal Pre-Filed Testimony ("RPFT") of the Parties' respective witnesses who testified at the Adjudicatory Hearing, the Parties' legal briefing, and all appended exhibits. After reviewing these materials, I find that Petitioners did not meet their burden of proving that the Applicant waived the 21-Day Deadline because there is no intentional and voluntary writing constituting a waiver of the 21-Day Deadline in the public record. I therefore conclude that the Department was within its authority to issue the SOC, and I set a briefing schedule for the remaining Issues for Adjudication in the appeal.

## I. Issue for Adjudication.

The sole Issue for Adjudication ("Issue") addressed in this Interlocutory Decision is whether the Applicant waived his right for the Commission to hold a public hearing within the 21-Day Deadline pursuant to 310 CMR 10.05(5)(b)2. and Garrity v. Conservation Comm'n of Hingham, 462 Mass. 779 (2012).

[2] The Petitioners have substantive objections to the Project that are not part of this Interlocutory Decision.

## II. Witnesses.

The following individuals were cross-examined at the June 20, 2024, Adjudicatory Hearing that I conducted to adjudicate the appeal.

### A. Petitioners.

#### 1. Amanda Leite Matthews.

Ms. Matthews submitted an affidavit in support of the Petitioners' Motion for Summary Decision, which I treat as PFT. Ms. Matthews is the Petitioners' daughter.[3] She had interactions with the Commission relevant to the Petitioners' Motion for Summary Decision.[4]

#### 2. Caroline E. Smith, Esq.

Attorney Smith submitted an affidavit in support of the Petitioners' Motion for Summary Decision, which I treat as PFT. Attorney Smith is a member of the Massachusetts bar and an attorney for the Petitioners,[5] although she is not acting as trial counsel and no longer has an appearance in this matter. See Notice of Withdrawal (June 3, 2024). She attended the Commission's September 6, 2023, Public Hearing ("Public Hearing"), and testifies to what occurred.[6]

#### 3. Mark Horsfall.

Mr. Horsfall submitted PFT in support of the Petitioners' Motion for Summary Decision. Mr. Horsfall attended the September 6, 2023, Public Hearing.[7] He describes his observations of what occurred at the Public Hearing.[8]

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[3] Aff. Matthews, ¶ 2 (March 7, 2024).

[4] Id. at ¶¶ 5-8.

[5] Aff. Smith, ¶¶ 1-2 (March 8, 2024).

[6] Id. at ¶ 5.

[7] Horsfall PFT, ¶ 4.

[8] Id. at ¶¶ 5-12.

### B. Applicant.

#### 1. Richard Ligols.

Mr. Ligols submitted an affidavit in support of the Applicant's Opposition to the Petitioner's Motion for Summary Decision, which I treat as PFT. Mr. Ligols is the Applicant.[9] He attended the Public Hearing and testifies to what occurred at the Public Hearing.[10]

#### 2. Jeff Youngquist.

Mr. Youngquist submitted an affidavit in support of the Applicant's Opposition to the Petitioner's Motion for Summary Decision, which I treat as PFT. Mr. Youngquist is the Applicant's engineer.[11] He attended the Public Hearing and testifies to what occurred.[12]

### C. Department.

#### 1. Brandon Costa.

Mr. Costa submitted PFT in support of the Department's Cross-Motion for Summary Decision and in Opposition to the Petitioners' Motion for Summary Decision. Mr. Costa is an Environmental Analyst III in the Wetlands Protection and WMA Cranberry Programs of the Bureau of Water Resources ("BWR") of the Department.[13] He was charged with processing the Applicant's SOC Request.[14] I find him qualified "by knowledge, skill, experience, training, or education" to render expert opinion testimony in this matter. See In the Matter of Jon L. Bryan, OADR Docket No. DEP-04-767, Recommended Final Decision (July 25, 2005), 2005 WL 4124541, *3; Mass. Guide Evid. 702.

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[9] Aff. Ligols, ¶ 3 (March 27, 2024).

[10] Id. at ¶¶ 5-8.

[11] Aff. Youngquist, ¶ 2 (March 25, 2024).

[12] Id. at ¶¶ 4-11.

[13] Costa PFT, ¶ 1 (April 26, 2024).

[14] Id. at ¶ 5.

## III. Facts.

The Applicant submitted his Notice of Intent ("NOI") to the Commission on August 25, 2023, seeking approval for the proposed Project.[15] The Commission held the Public Hearing on September 6, 2023, within 21 days of the NOI's filing.[16] A video of the Public Hearing[17] and a transcript of the Public Hearing's audio[18] are part of the record in this appeal.[19]

At the Public Hearing, there was a discussion among the Commission Members and Mr. Youngquist, the Applicant's engineer and representative, regarding ongoing construction in the Buffer Zone. The Commission Members also had a number of questions about the Project and its design. Of particular concern to the Commission Members was that the Petitioners[20] had submitted a report written by Ecosystem Solutions[21] to the Commission on the day of the Public Hearing, but the Commission did not have enough time to review it prior to the commencement of the Public Hearing.[22] Nevertheless, Commission Member Patrick believed that the Ecosystems report brought up "a lot of questions" and that those "questions have a right to be answered."[23] He suggested deferring a decision on the NOI "until we can have these questions

[15] See NOI, p. 1 (produced by the Department at the outset of the appeal); Aff. Youngquist, ¶ 2.

[16] Aff. Smith, ¶ 4; Aff. Youngquist, ¶ 4.

[17] Aff. Smith Ex. B, Pubic Hearing Video.

[18] Aff. Smith Ex. C, Public Hearing Transcript.

[19] There is no evidence that either the transcript or the video of the Public Hearing are part of the Commission's public record.

[20] The Petitioners' objection to the work stems from what they believe is an increase in water infiltration on their property caused by work that has taken place on the Applicant's property as far back as 2001.

[21] This report is not part of the record of this appeal.

[22] Aff. Smith Ex. C, at 12:6-14.

[23] Id. at 11:13-23.

answered that are presented in this report."[24] Attorney Smith on behalf of the Petitioners "strongly" urged the Commission to request a peer review of the Ecosystem Solutions report.[25]

Mr. Youngquist took offense that the Petitioners' expert disagreed with his company's wetlands delineation.[26] Mr. Ligols in particular was upset at the prospect of having to provide additional information in support of the proposed Project.[27] Attorney Smith, on behalf of the Petitioners, requested that the Applicant's NOI include a mitigation plan for existing impacts to the wetlands.[28]

After these discussions, Commission Member Patrick suggested giving the Applicant the opportunity to respond to the questions raised in the Ecosystems report.[29] Commission Member Patrick made a motion stating, in relevant part, "We continue this for two weeks. We give 1 Crystal Drive and Outback a chance to respond to the questions that are on [the Petitioners' report] . . . . So I would hold off on a peer review for now until you're able to come back and devise a plan."[30] The Commission voted unanimously in favor of Commission Member Patrick's

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[24] Id. at 11:24-12:1.

[25] Id. at 16:3-6.

[26] Id. 23:18-24:15.

[27] Mr. Ligols stated the following to the Commission Members:

> So I know you've got all these questions. I've done everything you guys asked. You guys had 30 days, and you guys had enough data that you made a decision on it. None of us have ever seen what she handed you at the end of last meeting. Now we've got this that none of us have ever seen. I don't want to keep continuing on things that come in last minute. I mean, I don't think that that's fair or right. There's questions on here that you can answer these after the fact. This is not going to interfere with anything that's being done. I'm not doing the pavers this year, I'm not doing the fireplace. I want to finish the outdoor kitchen because (indiscernible). Pool is in the ground. You want to know where the pool -- where it's going to get drained. It's going to close in three weeks. The drain can go right in the front yard if you'd like. It's flexible. It's kind of getting out of control for a pool, I believe. And very expensive, on top of it.

Aff. Smith Ex. C, 25:16-26:8.

[28] Id. at 33:1-7.

[29] Id. at 33:12-20.

[30] Id. at 33:12-20, 34:5-6.

motion.[31] The Applicant argues that Commission Member Patrick's motion was to require the Applicant to submit an updated plan addressing the issues raised in the Petitioners' report. The Petitioners and the Department argue that the motion was to continue the Public Hearing. I agree with the Applicant and the Department, for the reasons discussed below starting on page 20.

The Petitioners contend that during the Public Hearing, "Mr. Youngquist, on behalf of the Applicant, consented to the continuation of the [Public Hearing] multiple times explicitly and implicitly . . . ,"[32] including by not objecting to Commission Member Patrick's motion. The Applicant and Mr. Youngquist testify that they "did not consent, verbally or in writing, to the continuance of the public hearing on September 6, 2023, to September 20, 2023."[33] Mr. Youngquist testified that his understanding was that the Commission was asking him to revise the project plans, but not asking for his consent to continue the Public Hearing.[34] The Applicant also spoke to the Commission on several occasions during the Public Hearing.[35] He did not object to or otherwise try to prevent Mr. Youngquist from speaking to the Commission, and he did not object to Commission Member Patrick's motion.[36] Neither Mr. Youngquist nor the Applicant was asked to execute anything in writing at the Public Hearing affirming that the Applicant consented to continuing the Public Hearing. There is also no evidence in the record of this appeal that there is a writing in the Commission's public record constituting the Applicant's consent to continue the Public Hearing.

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[31] Id. at 36:1-13. The Applicant contends that "it is unclear whether the Commission actually made a motion to continue the public hearing." Applicant Opposition to Summary Decision Motion, p. 5. I conclude otherwise; it is clear from the transcript and the video that the Commission was voting to continue the Public Hearing.

[32] Petitioners' Motion for Summary Decision, p. 3; Aff. Smith, Ex. C, 33:1-36:3.

[33] Aff. Ligols, ¶ 8; Aff. Youngquist, ¶ 9.

[34] Tr. 57:12-17.

[35] Tr. 61:14-16.

[36] Tr. 61:10-13.

The Commission scheduled the Project for additional discussion at the September 20, 2023, Public Hearing.[37] However, on September 20, 2023, the Commission unilaterally postponed the Public Hearing to October 4, 2023, because it lacked a quorum.[38] The Commission informed the Applicant of this postponement in a phone call.[39] During that phone call, the Applicant told the Commission's secretary that he did not consent to the continuance and "that in seven days the [] Commission would exceed the twenty-one day period [to issue an SOC] and that the [] Commission needed to have a meeting by September 27, 2023."[40] The Applicant's engineer also did not consent to this continuance.[41]

On September 28, 2023, 22 days after the September 6, 2023, Public Hearing, the Applicant filed his SOC Request with the Department.[42] In requesting the SOC, the Applicant contended that the Commission no longer had jurisdiction over the matter because the Commission had failed to issue the OOC within 21 days after the Public Hearing under the Wetlands Regulations.[43] Mr. Costa was assigned to analyze the SOC Request.[44]

On October 4, 2023, the Commission met again, although neither the Applicant nor his representatives appeared.[45] There is no evidence in the record that the Commission had knowledge of the SOC Request at this time.[46] The Commission voted to close the Public Hearing

[37] See Motion to Dismiss, Exhibit D, September 20, 2023, Meeting Notice.

[38] Aff. Smith Ex. E, E-mail from Conservation Commission to Caroline Smith.

[39] Aff. Ligols, ¶ 10.

[40] Id. at ¶¶ 11-12.

[41] Aff. Youngquist, ¶ 11.

[42] See SOC Request (produced by the Department at the outset of the appeal); Aff. Youngquist, ¶ 12.

[43] Id.

[44] Costa PFT, ¶ 5.

[45] Aff. Smith, ¶ 20.

[46] Amended Aff. Smith, ¶ 6 (April 12, 2024).

on the NOI at that hearing.[47] One week later, on October 11, 2023, the Commission issued the OOC denying the proposed Project.[48] The OOC was not appealed. On December 8, 2023, the Department issued the SOC approving the proposed Project.[49]

## IV. Procedural History.

The Petitioners filed their Appeal Notice of the SOC on December 22, 2023. On March 1, 2024, the Petitioners filed a Motion to Dismiss requesting that I "dismiss this action and nullify the underlying Superseding Order of Conditions for lack of jurisdiction pursuant to 310 CMR 1.01(11)(d)7 and 310 CMR 10.05(7)(j)d." That same day, I issued an Order informing the Parties that I was treating the Petitioners' Motion to Dismiss as a Motion for Summary Decision on the narrow issue of whether the Applicant waived the 21-Day Deadline, and I established a briefing schedule on the Motion for Summary Decision.

In accordance with my March 1, 2024 Order, the Petitioners filed a Motion for Summary Decision with supporting affidavits and exhibits on March 8, 2024. The Petitioners' Motion for Summary Decision argued that I should recommend that the Commissioner vacate the SOC because the Applicant waived the 21-Day Deadline by agreeing to continue the Public Hearing. The Applicant filed his Opposition to the Motion for Summary Decision on March 29, 2024, arguing that he had not agreed to continue the Public Hearing and therefore had not waived the 21-Day Deadline. The Department also filed an Opposition and Cross-Motion for Summary Decision but did not include supporting affidavits. The Department argued that the Applicant had not waived the 21-Day Deadline. The Petitioners filed an Opposition to the Department's Cross-Motion for Summary Decision on April 12, 2024, essentially restating its earlier argument that

[47] Aff. Smith, ¶ 21.

[48] Aff. Smith Ex. G, OOC.

[49] See SOC (produced by the Department at the outset of the appeal); Aff. Youngquist, ¶ 14.

the Applicant had waived the 21-Day Deadline by agreeing to the continuance of the Public Hearing.

After reviewing the Parties' filings, on April 16, 2024, I issued an Order Denying Cross-Motions for Summary Decision ("Summary Decision Order") in which I determined that there was a genuine issue of material fact whether the Applicant consented to the Commission continuing the September 6, 2023 Public Hearing on the Applicant's NOI. I scheduled the Adjudicatory Hearing for June 20, 2024, on the narrow Issue for Adjudication of whether the Applicant waived the 21-Day Deadline by agreeing to continue the Commission's September 6, 2023, Public Hearing on the NOI.[50] To facilitate the Adjudicatory Hearing, I treated the Summary Decision affidavits of the Petitioners and the Applicant as sworn PFT and RPFT, and treated their Summary Decision briefs as Memoranda of Law setting forth their respective positions on the Issue for Adjudication of whether the Applicant consented to continuing the Commission's September 6, 2023, Public Hearing on the NOI. See 310 CMR 1.01(5)(b)3.; 310 CMR 1.01(9)(b)1.c.; 310 CMR 1.01(12)(f).

The Summary Decision Order allowed the Parties to file supplemental briefings and PFT on the issue of whether the Applicant consented to the continuance of the Public Hearing.[51] Each of the Parties filed supplemental briefing PFT, RPFT, and Memoranda of Law in accordance with the briefing schedule established in the Order.

On May 5, 2024, the Applicant filed a Motion to Dismiss alleging that the Petitioners lacked standing as an aggrieved person to challenge the SOC. The Petitioners opposed, and I issued an Order requiring the Petitioners to file a More Definite Statement to more specifically describe the basis of their standing. The Petitioners did so, and on May 30, 2024, I held that

[50] Order Denying Cross-Motions for Summary Decision, pp. 21-22.

[51] Id. at pp. 24-25.

because the More Definite Statement was now the operative pleading, the Motion to Dismiss was moot. The Applicant did not move to dismiss the More Definite Statement.

On May 29, 2024, the Applicant filed a Motion to Disqualify Petitioner's Attorney Caroline Smith as a witness and to strike her PFT. The Applicant objected to Attorney Smith serving as both a witness and as trial counsel for the Petitioners.[52] The Department did not file a brief in support of or in opposition to the Motion to Disqualify. The Petitioners filed an Opposition on June 3, 2024. That Opposition included a withdrawal of appearance for Attorney Smith as counsel for the Petitioners so that she could testify at the Adjudicatory Hearing. Based on her withdrawal, I issued an Order the same day denying the Motion to Disqualify.

The Adjudicatory Hearing was held in SERO on June 20, 2024, in person and was stenographically transcribed. The Parties filed their Post-Hearing Briefs on July 29, 2024. The Applicant filed with their Post-Hearing Brief, as an exhibit, an email chain from September 20, 2023, among Outback Engineering, the Berkley Conservation Commission, and the Applicant. This E-mail had not been introduced as evidence at the Adjudicatory Hearing despite the Applicant having had the opportunity to introduce it into evidence as part of his PFT. The Petitioners moved to strike that exhibit on July 31, 2024. I granted that Motion on August 5, 2024, because the Applicant failed to offer it into evidence at the Adjudicatory Hearing.

On June 26, 2024, I issued a Request for Clarification of the Department's Legal Position in this matter and another matter, In re Vincent Grasso, OADR Docket No. WET-2024-001. I requested that the Department explain what appeared to be inconsistent legal positions taken in the two matters in interpreting 310 CMR 10.05(5) and Garrity v. Conservation Comm'n of Hingham, 462 Mass. 779 (2012). The Department filed a response on July 15, 2024.

[52] See Mass. R. Prof. Cond. 3.7(a) ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless" the testimony relates to exceptions not applicable here.).

## V. Statutory and Regulatory Framework.

### A. The Massachusetts Wetlands Protection Act.

The MWPA and the Wetlands Regulations "do not prohibit development in wetlands areas[,] [but rather,] 'create[e] a procedure requiring the [D]epartment to condition activities in certain [wetlands] areas so as to protect [the MWPA's] statutory mandate.'" In the Matter of Kristen Kazokas, OADR Docket No. WET-2017-022, Recommended Final Decision (August 29, 2018), 2018 WL 9847851, *3, adopted as Final Decision (September 18, 2019), 2019 WL 5209254, quoting Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 224 (2010). The MWPA protects several categories of land and bodies of water ("Areas Subject to Protection"),[53] which the Department implements through the Wetlands Regulations at 310 CMR 10.00, *et seq.* The Wetlands Regulations impose restrictions on most activities that will "remove, fill, dredge or alter" Areas Subject to Protection.[54] 310 CMR 10.02(2)(a). The regulations also restrict activities within defined "Buffer Zones"[55] that "will alter an Area Subject to Protection." 310 CMR 10.02(2)(b).

If an applicant wishes to perform regulated activities in an Area Subject to Protection, it must first file an NOI with the local conservation commission. See 310 CMR 10.05(4). Upon receiving an NOI, the conservation commission must hold a public hearing on the NOI within 21 days after its filing. 310 CMR 10.05(5)(a). Under 310 CMR 10.05(5)(b),

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[53] The MWPA pertains to "any bank, riverfront area, freshwater wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean or on any estuary, creek, river, stream, pond, or lake, or any land under said waters or any land subject to tidal action, coastal storm flowage, or flooding . . . ." G.L. 131, § 40; see also 310 CMR 10.02(1).

[54] "Areas Subject to Protection" are also referred to as "Resource Areas." See 310 CMR 10.02.

[55] A "Buffer Zone" is defined as "that area of land extending one hundred (100) feet horizontally outward from the boundary of any area specified in 310 CMR 10.02(1)(a)." "The provision for a 'buffer zone' does not appear in G. L. c. 131, § 40, and is a creation of the [D]epartment in aid of its administrative implementation of the Wetlands Protection Act." Southern New England Conference Assoc. of Seventh-Day Adventists v. Burlington, 21 Mass. App. Ct. 701, 704 n. 3 (1986). When referring to this definition, I capitalize the phrase "Buffer Zone."

> Public hearings may be continued as follows:
>
> 1. without the consent of the applicant to a date, announced at the hearing, within 21 days, of receipt of the Notice of Intent;
>
> 2. with the consent of the applicant, to an agreed-upon date, which shall be announced at the hearing; or
>
> 3. with the consent of the applicant for a period not to exceed 21 days after the submission of a specified piece of information or the occurrence of a specified action . . . .

The MWPA's timing provisions are obligatory; a conservation commission is not free to expand or ignore the timing provisions. Boston Clear Water Company, LLC v. Town of Lynnfield, 100 Mass App. Ct. 657, 661-62 (2021), citing Oyster Creek Preservation, Inc. v. Conservation Comm'n of Harwich, 449 Mass. 859, 866 (2007). In this appeal, the Petitioners contend that the Applicant consented to the continuance pursuant to 310 CMR 10.05(5)(b)2.

Within 21 days after the close of the public hearing on the NOI, if the conservation commission determines that the activities proposed will affect an area significant to one or more of the interests identified in the MWPA, then the conservation commission must issue an OOC approving or denying the proposed project. 310 CMR 10.05(6)(a)2. If an entity identified in 310 CMR 10.05(7)(a)[56] disagrees with the conservation commission's determination, it may request that the Department issue an SOC, as the Petitioners did here. 310 CMR 10.05(7)(a) and (b). The Department must then issue an SOC, after which any "applicant, landowner, aggrieved person if previously a participant in the permit proceedings, conservation commission," or ten-residents group can appeal the SOC to OADR. 310 CMR 10.05(7)(j)2.a.

[56] "The following persons may request the Department to act: 1. the applicant; 2. the owner, if not the applicant; 3. any person aggrieved by a Determination or an Order; 4. any owner of land abutting the land on which the work is to be done; 5. any ten residents of the city or town where the land is located; and 6. the Department."

**B. The burden of proof.**

As the parties challenging the Department's issuance of the SOC, the Petitioners have the burden of proof in this *de novo* appeal to produce credible evidence from a competent source to support its positions. 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 10.05(7)(j)3.a.; 310 CMR 10.05(7)(j)3.b. Specifically, the Petitioners are required to present "credible evidence from a competent source in support of each claim of factual error [made against the Department], including any relevant expert report(s), plan(s), or photograph(s)." 310 CMR 10.05(7)(j)3.c.ii. "A 'competent source' is a witness who has sufficient expertise to render testimony on the technical issues on appeal." In the Matter of Pittsfield Airport Comm'n, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 WL 3427461, *11, adopted as Final Decision (August 19, 2010), 2010 WL 3427460. 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." Comm. v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted); see, e.g. In the Matter of Carl Carulli, OADR Docket No. DEP-06-071, Recommended Final Decision (August 10, 2006), 2006 WL 4211673, *4-*7, adopted as Final Decision (October 25, 2006) (dismissing claims regarding flood control, wetlands replication, and vernal pools for failure to provide supporting evidence from competent source); In the Matter of Indian Summer Trust, Docket No. 2001-142, Recommended Final Decision (May 4, 2004), 2004 WL 3973695, *2 (insufficient evidence from competent source showing that interests under MWPA were not protected), adopted as Final Decision (June 23, 2004).

**C. Standard of review.**

My review of the evidence presented by the Parties at the Adjudicatory Hearing is *de novo*, meaning that my review is anew, irrespective of any prior determination of the Department

in issuing the SOC. In the Matter of Brian Corey, OADR Docket No. WET-2016-023, Recommended Final Decision (February 28, 2018), 2018 WL 2002973, *19, adopted as Final Decision (March 15, 2018), 2018 WL 2002972. The relevancy, admissibility, and weight of evidence that all parties sought to introduce at the Adjudicatory Hearing was governed by G.L. c. 30A, § 11(2), and 310 CMR 1.01(13)(h). Under G.L. c. 30A, § 11(2):

> [u]nless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

Under 310 CMR 1.01(13)(h), "[t]he weight to be attached to any evidence . . . rest[ed] within the discretion of the Presiding Officer." Speculative evidence was accorded no weight given its lack of probative value in resolving the issues in the case. See In the Matter of Sawmill Dev. Corp., OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), 2015 WL 5758252, *29, adopted as Final Decision (July 7, 2015), 2015 WL 5758285 (petitioners' expert testimony "that pharmaceuticals, toxins, and other potentially hazardous material would be discharged from effluent generated by . . . proposed [privately owned wastewater treatment facility] . . . was speculative in nature and not reliable").

G.L. c. 30A, § 10, "guarantees a party certain procedural rights in adjudicatory hearings at the administrative level, before the case reaches the judicial branch." Space Bldg. Corp. v. Comm'r of Revenue, 413 Mass. 445, 450 (1992). Among these is the right to a "full and fair" adjudicatory proceeding. G.L. c. 30A, § 10. OADR must conduct all adjudicatory proceedings in a neutral, fair, and timely manner based on the governing law and the facts of the case. Matter of Tennessee Gas Pipeline Co., LLC, OADR Docket No. 2016-020, Recommended Final Decision (March 22, 2017), 2017 WL 1656461, adopted as Final Decision (March 27, 2017), 2017 WL

1656460 (citing 310 CMR 1.01(1)(a), 310 CMR 1.01(1)(b), 310 CMR 1.01(5)(a), 310 CMR 1.01(14)(a), 310 CMR 1.03(7).

As the Presiding Officer, I am "responsible . . . for independently adjudicating [this] appea[l] and [issuing a Recommended Final Decision] to MassDEP's Commissioner that is consistent with and in the best interest of the [MWPA, the Wetlands] Regulations, and MassDEP's policies and practices." Matter of Francis P. and Debra A. Zarette, Trustees of Farm View Realty Trust, OADR Docket No. WET-2016-030, Recommended Final Decision (February 20, 2018), 2018 WL 2002978, *4, adopted as Final Decision (March 1, 2018), 2018 WL 2002977. As a corollary, it is well settled that "if during the pendency of an administrative appeal, '[the Department] becomes convinced' based on a different legal interpretation of applicable regulatory standards, new evidence, or error in its prior determination, 'that the interests of [the MWPA] require it to take a different position from one that it had adopted previously [in issuing the SOC],' the Department is authorized to, and should change its position." Matter of Algonquin Gas Transmission, LLC, OADR Docket No. WET-2016-025, Recommended Final Decision (October 16, 2019), 2019 WL 5693699, *7, adopted as Final Decision (October 24, 2019), 2019 WL 5693698. Additionally, "[t]he Presiding Officer [responsible for adjudicating the administrative appeal] is not bound by MassDEP's prior orders or statements [in the case] . . . ." Id. (citations omitted).

## VI. Analysis.

There is no dispute that the Applicant filed his NOI with the Commission on August 25, 2023,[57] and the Commission opened the Public Hearing on the NOI within 21 days thereafter on September 6, 2023, in compliance with 310 CMR 10.05(5)(a).[58] The Parties hotly dispute,

[57] See NOI, p. 1

[58] Aff. Smith Ex. C, p. 1.

however, whether the Applicant consented to the Commission continuing the Public Hearing on the NOI from September 6, 2023, to September 20, 2023, pursuant to 310 CMR 10.05(5)(b)2. If the Applicant did not consent to the continuance, as the Applicant and the Department contend, then the Commission was required to issue its decision on the NOI by September 27, 2023, 21-days after the September 6, 2023, Public Hearing, thus making its subsequent October 11, 2023, OOC denying the proposed Project untimely. In that circumstance, the Department would have had jurisdiction to issue the SOC approving the proposed Project. 310 CMR 10.05(6)(a). Conversely, if the Applicant consented to continuing the Commission's Public Hearing on the NOI, as the Petitioners contend, then the Commission would have had until October 11, 2023, 21 days after September 20, 2023, to issue its decision on the NOI (which it did), depriving the Department of jurisdiction to issue the SOC. I conclude that the Applicant did not waive his right to a Public Hearing within the 21-Day Deadline because there is no intentional and voluntary writing in the public record evidencing the Applicant's consent to continue the Public Hearing. I therefore instruct the Parties to jointly propose a schedule to address the remaining issues in this appeal as set forth below.

### A. ***Garrity*** **sets the standard for whether the Applicant waived his right to a public hearing within 21 days.**

The Petitioners contend that the Applicant waived the 21-Day Deadline in 310 CMR 10.05(5)(a) for the Commission to hold the Public Hearing within 21 days of the Applicant filing his NOI.[59] In order to determine whether the Applicant waived the 21-Day Deadline, I must first determine how to analyze whether the Applicant's conduct constituted a waiver of the 21-Day Deadline.

[59] Petitioner Motion for Summary Decision, p. 1.

Under 310 CMR 10.05(5)(b), a conservation commission may continue a public hearing "with the consent of the applicant, to an agreed-upon date, which shall be announced at the hearing . . . ." Neither the MWPA nor the Wetlands Regulations define what it means for an applicant to "consent." Because the 21-Day Deadline is imposed by the MWPA at G.L. c. 131, § 40, ¶ 17, I look to case law to determine what is required for an Applicant to give his "consent" to waive his statutory rights.

The Applicant and the Department argue that Garrity v. Conservation Comm'n of Hingham, 462 Mass 779 (2012), provides the rule for assessing whether the Applicant's conduct constituted a waiver of the 21-Day Deadline.[60] The Petitioners contend that it does not.[61] The Petitioners argue that Garrity does not apply because Garrity "dealt with a situation where the [conservation commission] failed to issue its decision **within 21 days after the close of the public hearing**"[62] under 310 CMR 10.05(6)(a). This appeal, they argue, deals with the separate 21-Day Deadline to hold a public hearing under 310 CMR 10.05(5)(a).[63] The Department responds that "[l]ike the deadlines prescribed by the [M]WPA and 310 CMR 10.05(6) for issuing [OOCs] after the close of public conservation commission hearings, the continuance provisions of 310 CMR 10.05(5) 'confer[] a right on an applicant to a prompt ruling from a conservation commission within a defined time frame.'"[64] The Applicant agrees with the Department that "[t]he principles espoused in Garrity are not limited to the 21-day period in which a decision must be issued after the close of hearing."[65] I agree with the Department and the Applicant.

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[60] See Applicant Opposition to Motion for Summary Decision, pp. 4-5; Department Supplemental Brief, p. 3.

[61] Petitioners Opposition to Cross-Motion for Summary Decision, pp. 2-3.

[62] Id. at p. 2 (emphasis in original).

[63] Id.

[64] Department Supplemental Brief, p. 3, quoting Garrity, 464 Mass. at 788.

[65] Applicant Supplemental Brief, p. 1.

In Garrity, the Supreme Judicial Court considered whether an applicant could waive the statutory requirement under G.L. c. 131, § 40, ¶ 18, that a conservation commission issue an OOC within 21 days of a pubic hearing, a requirement that is incorporated into the Wetlands Regulations at 310 CMR 10.05(6)(a).[66] Garrity, 462 Mass. at 780. The court in Garrity ruled that the applicant could waive the 21-day requirement. Id. at 786. As the court explained:

> Construing the [MWPA] to permit an applicant to waive the twenty-one day decision deadline with respect to a local conservation commission's review of a proposed project does not interfere with the [MWPA's] purposes, but may be seen to advance them by providing the commission with sufficient time to conduct a careful, locally informed evaluation of the project and, where appropriate, to prescribe suitable protective conditions for it.

Id. The court therefore held that the applicant could waive the 21-day period so long as the waiver was voluntary, intentional, of a reasonable and definite duration, in writing, and made a matter of public record. Id. at 788 (citations omitted). The same analysis applies to the other specific time limitations within the MWPA, which the court acknowledged as support for the existence and importance of the statutory purpose of timely review and decisions. Id. at 788, n. 12. Accordingly, an applicant can waive the 21-Day Deadline under G.L. c. 131, § 40, ¶ 17, (which is incorporated into the Wetlands Regulations as the 21-Day Deadline at 310 CMR 10.05(5)(a)) so long as the waiver is voluntary, intentional, of a reasonable and definite duration, in writing, and made a matter of public record. Id., at 788 (citations omitted).

To prevail, therefore, the Petitioners must demonstrate that the Applicant's consent to continue the Public Hearing was of a reasonable and definite duration and memorialized in a voluntary and intentional writing in the public record. However, I find that the Petitioners have

[66] The "conservation commission, board of selectmen or mayor shall by written order within twenty-one days of such [public] hearing impose such conditions as will contribute to the protection of the interests described herein, and all work shall be done in accordance therewith. If the conservation commission, selectmen or mayor, as the case may be, make a determination that the proposed activity does not require the imposition of such conditions, the applicant shall be notified of such determination within twenty-one days after said hearing."

failed to show that the public record contains a voluntary and intentional written waiver of the 21-Day Deadline.

### B. The public record does not evidence a voluntary and intentional written waiver by the Applicant of the 21-Day Deadline.

Garrity is clear that an intentional and voluntary writing[67] is essential to provide objective evidence of an applicant's waiver of its statutory right to a prompt hearing from a conservation commission:[68] "the need to respect the purposes and policies of the [MWPA] also requires that any waiver and resulting deadline extension agreed to by an applicant be of reasonable and definite duration, in writing, and made a matter of public record." Garrity, 462 Mass. at 788. The Applicant argues that "[t]he Petitioners cannot produce such a writing as it does not exist."[69] The Department similarly observes that "[t]here is no suggestion that the [Commission] obtained the Applicant's, or his representative's, consent to this continuance in writing."[70] I agree with the Department and the Applicant that in this case, there is no intentional and voluntary writing in the public record evidencing the Applicant's consent to continue the Public Hearing.

The Petitioners have not pointed to any writing signed by the Applicant or Mr. Youngquist agreeing to continue the Public Hearing. They instead argue that written consent is not required under the MWPA or the Wetlands Regulations.[71] They assert that:

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[67] An intentional and voluntary writing does not necessarily include the applicant's signature, but must include an authorizing mark, even if by the hand of another. Com. v. Joyce Johnson, 79 Mass. App. Ct. 903, 905 (2011).

[68] See Applicant Supplemental Brief, p. 1 ("The Supreme Judicial Court made clear that an intentional and voluntary waiver of the 21-day period must be in writing.").

[69] Applicant Opposition to Petitioners' Motion for Summary Decision, p. 5.

[70] Department Supplemental Memorandum, p. 3.

[71] Petitioners Supplemental Memorandum, p. 5.

> written consent is not usually possible when consent to a continuance is sought during a live public hearing because a lot of conservation commissions are meeting virtually or in a hybrid format. The majority of applicants are appearing before conservation commissions virtually and no written consent is possible. In general, conservation commissions do not seek written consent for a continuance when commissions seek a continuance during a live public hearing.[72]

The Applicant and the Department do not address this argument directly, though I nevertheless disagree with the Petitioners. While the MWPA and the Wetlands Regulations may not explicitly require written consent in the public record, Garrity does, for the reasons given above.

The Petitioners next contend that an audiovisual recording of a public hearing can serve as evidence of an applicant's intent to waive his rights. This argument simply does not satisfy the standard set in Garrity.[73] Even if the Petitioner's contention was correct that at the Public Hearing the Applicant verbally agreed to continue the Public Hearing, neither the video recording nor the written transcript[74] of the Public Hearing are part of the public record.[75] A transcript of the Public Hearing was prepared for this appeal by the Petitioners but also does not meet Garrity's requirement for a voluntary and intentional writing by the Applicant.[76]

The Petitioners have not met their burden to show that the Applicant or his agent voluntarily or intentionally agreed in writing to continue the Public Hearing. The record in fact shows that they affirmatively did not intend to do so. First, the Applicant and Mr. Youngquist

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[72] Id. (citations omitted).

[73] See also Commonwealth v. Osborne, 445 Mass 776, 781 n. 9 (2006) in reviewing a statute with an express waiver provision, the court concluded that there was no waiver to jury trial because plaintiff did not sign a written waiver, a requirement the court deemed a procedural safe-guard "in aid of sound judicial administration."

[74] Aff. Smith, Ex. C.

[75] I note that the minutes of the September 6, 2023, meeting, are not part of the record on appeal here. I therefore cannot conclude what the Commission itself intended in passing Commission Member Patrick's motion. The Agenda for the September 20, 2023, Commission meeting, included as Smith Ex. D, is not a record of what occurred at the September 6, 2023, hearing, and I do not find it to be a sufficient writing.

[76] Further, a person accessing the Commission's record of the September 6, 2023, Public Hearing would have no indication that the Applicant agreed to continue the Public Hearing Aff. Smith, Ex. B.

both testified that they "did not consent, verbally or in writing, to the continuance of the public hearing on September 6, 2023[,] to September 20, 2023."[77] Mr. Youngquist testified that his understanding was that the Commission was asking him to submit a revised plan within two weeks,[78] which he did.[79] Mr. Ligols had a similar understanding.[80] In accordance with their understanding, the revised plan is identified as a "Revision per Conservation Commission comments."[81] There is no writing in the record from the Applicant or Mr. Youngquist contradicting their testimony.

Second, at no time did the Commission ask the Applicant or Mr. Youngquist explicitly whether they consented to continuing the Public Hearing, or more importantly to provide the required written consent.[82] During the Public Hearing, there was discussion about the Applicant responding to the Petitioners' report.[83] Immediately after that discussion, Commission Chairman Petty asked for a motion,[84] and Commission Member Patrick stated the following:

> Look, this is my suggestion. All right? We continue this for two weeks. We give 1 Crystal Drive and Outback a chance to respond to the questions that are on here. Because I think, you know, some of them are legitimate. All right? And we did ask for a mitigation plan. In other words, you know, how are we going -- how can we be assured that the drainage that's going into the wetlands there -- and we all know it's wetlands, all right -- is, you know, to standards . . . . So I would hold off on a peer review for now until you're able to come back and devise a plan.[85]

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[77] Aff. Ligols, ¶ 8; Aff. Youngquist, ¶ 9.

[78] Id. at ¶ 7.

[79] Tr. 54:4-6.

[80] Tr. 61:18-21.

[81] Aff. Leite, Ex. A; Tr. 53:6-18.

[82] Aff. Ligols, ¶ 7; Aff. Youngquist, ¶ 8; Tr. 58:15-18.

[83] Aff. Smith Ex. C, 14:23-33:7.

[84] Id. at 33:8-11.

[85] Id. at 33:12-20, 34:5-6.

Commission Member Maxwell then asked, "Can we get the report, though, before the two weeks, if possible?"[86] Mr. Youngquist agreed with Commission Member Maxwell's request.[87] Commission Member Patrick's statement was adopted as a motion and passed by the Commission.[88]

Commission Member Patrick's statement makes no explicit reference to continuing the Public Hearing, and at no point while discussing Commission Members Patrick's motion was there an explanation that the motion was to continue the Public Hearing, or to request that the Applicant provide written consent to a continuance. Based on the conversation immediately prior to the motion, the Applicant and Mr. Youngquist testified that they thought that when Commission Member Patrick suggested "continu[ing] this for two weeks,"[89] the word "this" referred to extending the time for the Applicant to respond to the Commission's additional questions and "devise a plan," and was not referring to continuing the Public Hearing. The Commission is correct that it could not accept any new information if the Public Hearing was closed, which the Commission points to as evidence of its intent to continue the Public Hearing.[90] However, the Commission's intent is not the issue. Absent a voluntary and intentional writing in the public record from the Applicant agreeing to a continuance, the standard of Garrity is not met and this argument is therefore unavailing.

[86] Id. at 34:15-16.

[87] Id. at 34:25-35:1.

[88] Id. at 35:18-25.

[89] Id. at 33:12-20, 34:5-6.

[90] Petitioners Post-Hearing Brief, pp. 6-8. Written information submitted during the public hearing is made a part of the record by operation of law. See G.L. c. 30A, § 22(d) ("Documents and other exhibits, such as photographs, recordings or maps, used by the body at an open or executive session shall, along with the minutes, be part of the official record of the session.").

The Applicant's statement when the Commission informed him that the September 20, 2023, hearing was postponed due to a lack of quorum is consistent with his understanding of Commission Member Patrick's motion.[91] The Applicant told the Commission's secretary over the phone that he did not consent to the continuance and "that in seven days the [] Commission would exceed the twenty-one day period and that the [] Commission needed to have a meeting by September 27, 2023."[92] In absence of the required voluntary, written consent to a continuance the Commission had the option to approve or deny the application within 21-days of the Public Hearing, or by September 27, 2023. 310 CMR 10.05(6)(a).

The Petitioners also argue that "the nature of the revisions to the plan dated September 15, 2023, that Mr. Youngquist submitted to the Commission after September 6 and before September 20 was extensive and required explanation by the Applicant to the Commission."[93] The Applicant and the Department do not address this argument. Regardless, neither the MWPA, the Wetlands Regulations, nor Garrity suggest that a waiver is determined based on the complexity of changes to be made to a proposed project.

In sum, the Petitioners have not demonstrated that a writing exists in the public record where the Applicant intentionally and voluntarily agreed to continue the Public Hearing and waived his rights under the 21-Day Deadline.[94] Accordingly, the elements of a waiver under Garrity are not met, and the Department therefore had jurisdiction to issue the SOC.[95]

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[91] Aff. Ligols, ¶ 10.

[92] Id. at ¶¶ 11-12.

[93] Petitioners Post-Hearing Brief, p. 8.

[94] The Petitioners also attempt to make a distinction between a "public hearing" and a "public meeting." Petitioners Post-Hearing Brief, p. 13. In the Petitioners' telling, a "public meeting" is a single meeting of a conservation commission, while "A public hearing may occur over the course of days, weeks, months, or years" at multiple public meetings Id. This distinction, if it even exists, is not relevant here, where there was no effective consent to continue the Public Hearing.

[95] The Department argues that its decision to issue the SOC was reasonable because it was not "aware of any orders issued by the [Commission] relative to the Applicant's NOI, which the [Commission] would have been required to

## VII. Briefing and Adjudicatory Hearing on the merits.

Given my finding that the Department had jurisdiction to issue the SOC, this appeal will proceed to a Second Adjudicatory Hearing on the merits of the Petitioners' claims. Within 21 days, by January 28, 2026, the Parties are to prepare and file an updated Joint Proposed Appeal Resolution Schedule, which must include:

a. a Joint Statement of the remaining Issues for Adjudication in the Appeal ("the Issues");

b. the names of the Parties' respective witnesses, including expert witnesses, who will be filing sworn Pre-filed Testimony, including documentary evidence in support of the Parties' respective positions on the Issues and who will appear at the evidentiary Second Adjudicatory Hearing for cross-examination on their PFT;

c. three proposed dates within 30 days of the Joint Status Report for a Pre-Hearing Conference at which the Issues for Adjudication and the appeal resolution schedule will be established;

d. a proposed deadline prior to the Second Adjudicatory Hearing for the Petitioners, who have the burden of proof in this appeal, to file the sworn PFT of their witnesses, including expert witnesses, and their Pre-Hearing Memorandum of Law on the Issues;

e. Five days prior to the Pre-Hearing Conference, the Parties must file updated Pre-Hearing Statements summarizing their respective positions on the Issues (including citation to legal authorities supporting their positions) and setting forth the names of the witnesses, including expert witnesses, who will be testifying in support of their positions on the Issues.

f. a proposed deadline prior to the Second Adjudicatory Hearing for the Applicant to file the sworn PFT of his witnesses, including expert witnesses, and his Pre-Hearing Memorandum of Law on the Issues;

g. a proposed deadline prior to the Second Adjudicatory Hearing for the Department to file the sworn PFT of its witnesses, including expert witnesses, and its Pre-Hearing Memorandum of Law on the Issues;

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send to the Department pursuant to 310 CMR 10.05(6)(e)." Department Supplemental Brief, p. 4. I do not address whether the Department is required to conduct any further inquiry to determine whether an Applicant has waived any of its rights before a conservation commission. I also do not address the arguments made by the Department and the Applicant that, even if the Applicant had waived his rights to the 21-day deadline, the SOC should nevertheless be accepted as controlling for purposes of administrative economy and efficiency. Id. at pp. 5-6; Applicant Post-Hearing Brief, p. 8.

h. the filing deadline for the Petitioners to file, prior to the Second Adjudicatory Hearing, the sworn Pre-filed Rebuttal Testimony of their witnesses, including expert witnesses, and their Rebuttal Memorandum of Law;

i. three alternative dates for the Second Adjudicatory Hearing; and

j. the manner in which the Presiding Officer should conduct the Second Adjudicatory Hearing: via Zoom or at the Department's Boston office at 100 Cambridge Street.

**Date:** January 7, 2026

Patrick M. Groulx
Presiding Officer

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