

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**

March 21, 2017

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In the Matter of  
Marco Tammaro

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OADR Docket No. WET-2016-029  
Lynnfield, MA

**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

This appeal was initiated by Stephanie Rauseo, as the representative of a ten citizens group under 310 CMR 10.05(7)(j)2. The appeal challenges the Superseding Order of Conditions ("SOC") issued by the Massachusetts Department of Environmental Protection's Northeast Regional Office ("DEP") pursuant to the Wetlands Protection Act, G.L. c. 131 § 40, and the Wetlands Regulations, 310 CMR 10.00. The SOC approved the Applicant's, Marco Tammaro, proposed project to construct a cul de sac and roadway to accommodate two residential building lots on the Applicant's property at 15 Apple Hill Lane, Lynnfield ("Property"). The SOC states that the project will impact 25 linear feet of Buffer Zone to Bordering Vegetated Wetlands. The SOC was issued after the Petitioners appealed to DEP the Lynnfield Conservation Commission's Order of Conditions approving the project. The Order of Conditions was issued after detailed and extensive review of the Property. See Order of Conditions. For the reasons discussed below, I recommend that DEP's Commissioner issue a Final Decision dismissing this appeal and affirming the SOC.

## DISCUSSION

The Petitioners' Notice of Claim included approximately 20 separate claims of error. See October 11, 2016, Notice of Claim. The claims were asserted very ambiguously, without the specificity required by the Wetlands Regulations and Adjudicatory Proceeding Rules.<sup>1</sup> The claims included but were not limited to the following: failure to recognize two alleged streams on the Property; violation of the Clean Water Act; unlawful filling of wetlands; unlawful septic system design; inaccurate wetlands delineations; failure to include a rain garden as a "drinking spot for deer"; failure to include appropriate wildlife remediation measures; failure to include appropriate erosion control measures; and allegations that the "current plans will make the water problems suffered by . . . neighbors even worse."

Shortly after the appeal was filed, the Applicant filed a detailed Motion to Dismiss the appeal. See November 8, 2016, Motion to Dismiss. The Applicant argued that the Petitioners allegedly: failed to show standing; failed to comply with regulatory requirements for service of the appeal on the Conservation Commission and the Applicant; failed to state a claim upon which relief can be granted; and failed to plead claims with sufficient specificity.

In light of the Petitioners' ambiguous Notice of Claim and the Applicant's Motion to Dismiss, I issued an Order Staying Appeal and Requiring Response to Motion to Dismiss and More Definite Statement (November 14, 2016) ("Order"). The Petitioners responded to that Order. Both DEP and the Applicant later moved to dismiss this appeal for failure to comply with

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<sup>1</sup>See 310 CMR 1.01(6)(b) ("shall state specifically, clearly and concisely the facts which are grounds for the appeal, the relief sought, and any additional information required by applicable law or regulation"); 310 CMR 10.05(7)(j)2.b. ("clear and concise statement of the alleged errors contained in the Reviewable Decision and how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c. 131, § 40, including reference to the statutory or regulatory provisions the Party alleges has been violated by the Reviewable Decision, and the relief sought").



the Order. I agree that the appeal should be dismissed for the Petitioners' failure to comply with the Order and failure to meet their burden of going forward. 310 CMR 1.01(11)(b) and (d).

In the Order, I required the Petitioners to:

(1) file with OADR a written, signed statement, pursuant to 310 CMR 1.01(6)(b), that specifically, clearly and concisely sets forth the facts and claims which are grounds for the appeal, and the relief sought, and (2) file with OADR written credible evidence from a "competent source" in support of the Petitioner's claims and alleged standing, pursuant to 310 CMR 1.01(11)(b).

See 310 CMR 1.01(11)(b) ("A motion or order for a more definite statement also may seek or require the Petitioner to file sufficient evidence to meet the burden of going forward by producing at least some credible evidence from a competent source in support of the position taken.").

I required that the evidence from the competent source be signed under the penalties of perjury and shall indicate the witness' qualifications and background. See Matter of Pittsfield Airport Commission, Docket No. 2010-041, Recommended Final Decision (August 11, 2010), adopted by Final Decision (August 19, 2010) (describing what constitutes evidence from a competent source under 310 CMR 1.01(11)(b), such as the need for an expert).

In the Order, I explained that a "competent source" is a "witness who has sufficient expertise to render testimony on the technical issues on appeal." I added that "[t]he crucial issue, in determining whether a witness is qualified to give an expert opinion, is 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). Finally, I stated that "failure to comply with this order will result in dismissal of this appeal, absent a showing of good cause."

The Petitioners failed in a number of respects to comply with the Order and to meet their burden of going forward. 310 CMR 1.01(11)(b) and (d). Most important, they did not “file sufficient evidence to meet the burden of going forward by producing at least some credible evidence from a competent source in support of the position taken.” 310 CMR 1.01(11)(b). Instead, they incorrectly assert that a competent source is not necessary because their claims “require only common knowledge and percipient witness testimony, for they primarily assert legal insufficiencies.” See Petitioners’ More Definite Statement. That assertion is faulty for two reasons: the Order required evidence from a competent source and the asserted issues require expert testimony. There is no showing that the Petitioners have sufficient qualifications to testify to the alleged wetlands issues. Matter of Webster Ventures, LLC, OADR Docket No. WET-2014-016, Recommended Final Decision (February 27, 2015), adopted by Final Decision (March 26, 2015). By way of example, expert testimony is necessary here regarding: (1) whether there are streams on the property, (2) whether the streams flow, “within, into, or out of an Area Subject to Protection under M.G.L. c. 131 § 40”, (2) whether the streams are intermittent or perennial, (3) the extent to which an accurate delineation of the alleged streams and the buffer zones to the stream banks would preclude development of the proposed project, and (4) whether the project will alter the wetlands and lead to the alleged “water pollution.” See 310 CMR 10.04 (defining river and stream); 310 CMR 10.54 (performance standards for banks); 310 CMR 10.58 (regulations pertaining intermittent and perennial streams); see e.g. Matter of Pittsfield Airport Commission, supra.; 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); 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); 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).<sup>2</sup>

### **CONCLUSION**

For the above reasons I recommend that the DEP Commissioner issue a Final Decision dismissing this appeal and affirming the SOC.

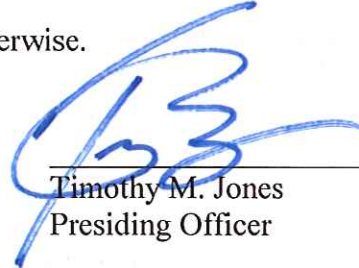
### **NOTICE-RECOMMENDED FINAL DECISION**

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain 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.

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<sup>2</sup> The Petitioners and the Applicant filed numerous other motions. I do not reach the motions regarding standing because they are mooted by the dismissal of this appeal on other grounds. All other motions are denied, for the reasons asserted in opposition to them. In addition, the Petitioners make numerous claims related to the Applicant's alleged wrongful filling of wetlands. That is a claim that relates to DEP's exercise of enforcement discretion. It has long been established, however, that there is no jurisdiction over DEP's exercise of enforcement discretion in administrative appeals. See Matter of City of Lowell, Docket No. WET 2012-002, Recommended Final Decision (May 11, 2012), adopted by Final Decision (May 16, 2012).

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

 3/21/17  
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Timothy M. Jones  
Presiding Officer

## SERVICE LIST

In The Matter Of:

Marco Tammaro

Docket No. WET-2016-029

File No. 209-0579  
Lynnfield

### Representative

### Party

John H. Kimball III, Esq.  
618 Main Street  
Lynnfield, MA 01940  
[johnhkimball3rd@gmail.com](mailto:johnhkimball3rd@gmail.com)

APPLICANT  
Marco Tammaro

Michael C. Walsh  
Walsh & Walsh  
PO Box 9  
Lynnfield, MA 01940  
[Walsh.lynnfield@gmail.com](mailto:Walsh.lynnfield@gmail.com)

PETITIONER

Stephanie Rauseo  
15 Russett Lane  
Lynnfield, MA 01940  
[stephanierauseo@msn.com](mailto:stephanierauseo@msn.com)

Elizabeth Kimball  
Mass DEP Office of General Counsel  
One Winter Street  
Boston, MA 02108  
[Elizabeth.Kimball@state.ma.us](mailto:Elizabeth.Kimball@state.ma.us)

DEPARTMENT

Cc:  
Wayne Lozzi  
MassDEP Northeast Regional Office  
205B Lowell Street  
Wilmington, MA 01887  
[Wayne.Lozzi@state.ma.us](mailto:Wayne.Lozzi@state.ma.us)

DEPARTMENT

Lynnfield Conservation Commission  
c/o Betty Adelson  
55 Summer Street  
Lynnfield, MA 01940  
[badelson@town.lynnfield.ma.us](mailto:badelson@town.lynnfield.ma.us)

CONCOM

