**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

 **December 8, 2014**

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In the Matter of **Docket No. 2006-154**

Ross & Marilyn Wescott DEP File No. NE-050-826

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RECOMMENDED FINAL DECISION

More than eight years ago, the Petitioners Ross and Marilyn Wescott filed this appeal challenging a Superseding Order of Conditions (“SOC”) that the Northeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to the Petitioners pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131,

§ 40 (“MWPA”), and the Massachusetts Wetlands Regulations, 310 CMR 10.00 et seq., rejecting their proposed construction of a single-family home (“the proposed Project”) on their real property at 39 Fordham Way in Newbury, Massachusetts (“the Property”). Department’s Transmittal Letter attached to SOC, at p. 1.[[1]](#footnote-1) The SOC reversed the Newbury Conservation Commission’s (“NCC”) earlier decision approving the proposed Project pursuant to the MWPA and the Wetlands Regulations. Id.

The Department rejected the proposed Project because it would be located within a Coastal Dune of a Barrier Beach (Plum Island), both protected wetlands areas, and purportedly would not satisfy the Performance Standards for work in those areas under 310 CMR 10.28(3) and 10.29(3) respectively.[[2]](#footnote-2) Id., at p. 3; Order Staying Proceedings and Ruling on Motion to Correct Administrative Record and to Correct Conference Report, January 24, 2007 (“January 2007 Stay Order”), at p. 1; Department’s [Pre-Hearing] Conference Memorandum, January 21, 2014 (“Department’s PHG Mem.”), at p. 1; Pre-Hearing Conference Report and Second Order Staying Proceedings, January 24, 2014 (“January 2014 Stay Order”), at pp. 1-2; Order Directing Petitioners to File Proper Plan of Record, July 10, 2014 (“July 2014 POR Order”), at p. 2. Jayne Cecere-Peng and David Peng (“the Pengs”), who own a home abutting the proposed Project location, also opposed the proposed Project contending that it would be detrimental to wetlands and their home. Pengs’ Pre-Hearing Statement, September 16, 2014, at p. 2.

Resolution of this appeal has been significantly delayed due to: (1) the Petitioners’ seven year delay in obtaining required MEPA review of their proposed Project;[[3]](#footnote-3) (2) the Petitioners’ five month delay in filing a proper Plan of Record (“POR”) following completion of MEPA review in March 2014; and (3) the Petitioners’ recent failure to file to file sworn Pre-filed Testimony (“PFT”) of witnesses supporting their claims prior to the scheduled Adjudicatory Hearing (“Hearing”), pursuant to the schedule that I established at the Pre-Hearing Conference (“PHC”) that I conducted with the parties on September 17, 2014. July 2014 POR Order, at

pp. 1-15; Petitioners’ Filing of Plan of Record, August 11, 2014; Second Scheduling Order, and Order Vacating Second Order Staying Proceedings, August 18, 2014 (“Second Scheduling Order”); Second PHC Rept. & Order.

Under the schedule that I established at the PHC, the Hearing was scheduled for January 21, 2015;the Petitioners, the parties with the burden of proof, were required to file the PFT of their witnesses first: by October 15, 2014; the Pengs were required to file the PFT of their witnesses by November 12, 2014; and the Department was required to file the PFT of its witnesses by December 10, 2014. Second PHC Rept. & Order, 13-15. At the PHC and in my subsequent September 29th Order, I made the parties aware that under Adjudicatory Proceeding Rule 310 CMR 1.01(12)(f), a party’s “[f]ailure to file pre-filed direct testimony within the established time, without good cause shown,” is a serious infraction requiring “summary dismissal of the party and the appeal if the party being summarily dismissed is the petitioner.” Id., at pp. 9, 13-14.

On October 2, 2014, the Petitioners filed an assented to Motion to amend the PFT filing and Hearing schedule that I had established at the September 17, 2014 PHC because they had purportedly reached a settlement in principle with the Pengs, whereby the Pengs would purchase the Property from the Petitioners. Order Granting Petitioners’ Assented to Motion to Amend Litigation Schedule, October 30, 2014 (“October 2014 Order”). The Petitioners represented that they and the Pengs were in the process of negotiating a purchase and sale agreement for the Property and hoped to finalize their settlement agreement in the near future. Id.

I granted the Petitioners’ assented to Motion and issued an Amended PFT filing and Hearing schedule that re-scheduled the Hearing from January 21, 2015 to February 18, 2015, and established the parties’ respective PFT filing deadlines as follows:

(1) Petitioners: November 10, 2014[[4]](#footnote-4);

(2) Pengs: December 8, 2014; and

(3) Department: January 5, 2015**.**

October 2014 Order, at pp. 2-4.

 To date, nearly 30 days after expiration of their November 10th deadline to file the PFT of their witnesses, the Petitioners have not filed the PFT of their witnesses nor sought an extension of the deadline. The Department has moved to dismiss the Petitioners’ appeal for failure to file the PFT of their witnesses. The seven (7) business day period under 310 CMR 1.01(11)(a) for the Petitioners to respond to the motion has expired and they have not responded to the motion.

Under 310 CMR 1.01(12)(f), a party’s “[f]ailure to file pre-filed direct testimony within

the established time, without good cause shown, [will] result in summary dismissal of the party and the appeal if the party being summarily dismissed is the petitioner.” In the Matter of Autobody Solvent Recovery Corp., OADR Docket No. 2013-046, Recommended Final Decision (May 29, 2014), 2014 MA ENV LEXIS 39, at 8, adopted as Final Decision (June 2, 2014), 2014 MA ENV LEXIS 41; In the Matter of Stephen W. Seney, OADR Docket No. 2012-019, Recommended Final Decision (March 25, 2013), 2013 MA ENV LEXIS 27, at 19, adopted as Final Decision (April 2, 2013), 2013 MA ENV LEXIS 26. Indeed, “a petitioner’s failure to file written direct testimony is a serious default,” and “the equivalent of failing to appear at a [judicial proceeding] where the testimony is to be presented live.” Id., citing In the Matter of Gerry Graves, OADR Docket No. 2007-149, Recommended Final Decision, 2007 MA ENV LEXIS 66, at pp. 2-3 (November 26, 2007), adopted as Final Decision (February 22, 2008). Under 310 CMR 1.01(10) a party’s failure to file proper Direct Examination or Rebuttal Testimony is subject to sanctions for “failure to file documents as required, . . . comply with orders issued and schedules established in orders[,] . . . [or] comply with any of the requirements set forth in 310 CMR 1.01.” Autobody, supra, 2014 MA ENV LEXIS 39, at 8-9. Under 310 CMR 1.01(10), the Presiding Officer may “issu[e] a final decision against the party being sanctioned, including dismissal of the appeal if the party is the petitioner.” Id.

 Here, as discussed above, the Petitioners’ initial deadline to file the PFT of their

witnesses was October 15, 2014 and the deadline was later extended per their request to November 10, 2014. It is undisputable that the Petitioners have not filed the PFT of any witnesses in support of their claims in the case and have offered no explanation for their failure to file the PFT.

In sum, I recommend that the Department’s Commissioner issue a Final Decision dismissing the Petitioners’ appeal and affirming the SOC due to the Petitioners’ unexcused failure to file the PFT of witnesses supporting their claims.

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

 Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this 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.

Date: \_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Salvatore M. Giorlandino

Chief Presiding Officer

**SERVICE LIST**

In the Matter of **Docket No. 2006-154**

Ross & Marilyn Wescott DEP File No. NE-050-826

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| Newbury Conservation CommissionNewbury Town Hall25 High RoadNewbury, MA 01951Jayne Cecere-Peng and David PengLegal Representative:George F. Hailer, Esq.Lawson & Weitzen, LLP88 Black Falcon AvenueBoston, MA 02210**e-mail:** ghailer@lawson-weitzen.com | **LOCAL CONSERVATION****COMMISSION****AGGRIEVED PARTIES** |
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1. This appeal was filed in October 2006, one year prior to the Department’s adoption of Wetlands Permit Appeal Regulations at 310 CMR 10.05(7)(j) requiring resolution of Wetlands Permit Appeals within six months after their filing or seven months if the case is “major or complex.” As discussed above, the age of this case is due in large part to the proceedings in the case having been stayed twice for extended periods of time so that the Petitioners could fulfill their obligations to obtain required review of their proposed Project pursuant to the Massachusetts Environmental Policy Act (“MEPA”), G.L. c. 30, §§ 61-62H. [↑](#footnote-ref-1)
2. “Performance Standards” are “th[e] requirements established by [the Wetlands Regulations] for activities in or affecting [specific wetlands areas protected by MWPA].” 310 CMR 10.04. The Performance Standards appear at 310 CMR 10.25 through 10.35 and 10.37, and 310 CMR 10.54 through 10.60. Id. [↑](#footnote-ref-2)
3. The Adjudicatory Proceeding Rules that govern resolution of this administrative appeal, specifically 310 CMR 1.01(6)(h) provide that “the Presiding Officer shall stay administratively an appeal when an applicant is required to comply with [(MEPA)] . . . .” MEPA “sets forth a broad policy of environmental protection in this Commonwealth by directing ‘[a]ll agencies, departments, boards, commissions and authorities’ to ‘review, evaluate, and determine the impact on the natural environment of all works, projects or activities conducted by them and . . . use all practicable means and measures to minimize damage to the environment.’” Allen v. Boston Redevelopment Authority, 450 Mass. 242, 245 (2007); Ten Persons of the Commonwealth v. Fellsway Development, LLC, 460 Mass. 366, 368 (2011). “[P]rivate development ‘[p]roject[s]’ that fall within the scope of MEPA’s jurisdiction [include those that] . . . require[s] the issuance of a permit by [a] [State] agency.” Fellsway Development, 460 Mass. at 369, citing, [G. L. c. 30, § 62](http://www.lexis.com/research/buttonTFLink?_m=0e0c3d5735841283f8fb94a50832f30c&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b460%20Mass.%20366%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=140&_butInline=1&_butinfo=MASS.%20ANN.%20LAWS%2030%2062&_fmtstr=FULL&docnum=3&_startdoc=1&wchp=dGLzVzB-zSkAb&_md5=2e8f33e76552f1ec2293ddd8e22fc71b).

 “[MEPA] establishes a process, supervised by the Secretary [of the Massachusetts Executive Office of Energy and Environmental Affairs (“EEA”)], for thorough consideration of the potential environmental impact of certain projects through preparation of draft and final environmental impact reports (EIRs) . . . .” Allen, 450 Mass. at 245-46; Fellsway Development, 460 Mass. at 368-69. “An EIR must ‘contain statements describing the nature and extent of the proposed project and its environmental impact; all measures being utilized to minimize environmental damage; any adverse short-term and  long-term environmental consequences which cannot be avoided should the project be undertaken; and reasonable alternatives to the proposed project and their environmental consequences.’” Fellsway Development, 460 Mass. at 368, citing, G. L. c. 30, § 62B. “After a public comment period, the [EEA] Secretary issues a written certificate indicating whether the EIR ‘adequately and properly complies’ with the provisions of MEPA.” Id., citing, G. L. c. 30, § 62C; [301 CMR § 11.08(8)](http://www.lexis.com/research/buttonTFLink?_m=0e0c3d5735841283f8fb94a50832f30c&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b460%20Mass.%20366%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=133&_butInline=1&_butinfo=301%20CODE%20MASS%20REGS%2011.08%288%29&_fmtstr=FULL&docnum=3&_startdoc=1&wchp=dGLzVzB-zSkAb&_md5=e7d28255e843a28c0daaf656eb44f58d). “It is well settled that [the] EEA [Secretary’s] approval of an [EIR] does not mean that a proposed project meets applicable permitting standards.” In the Matter of Stephen D. Peabody, Final Decision on Reconsideration (December 27, 2011), 2011 MA ENV LEXIS 141, at 47-48. “Instead, it only means that the project’s proponent has adequately described the environmental impacts and addressed mitigation.” Id. The permitting agency “retains [its] authority to fulfill its statutory and regulatory obligations in permitting or reviewing [the] Project that is subject to MEPA review . . . .” 301 CMR 11.01(1)(b). [↑](#footnote-ref-3)
4. November 10, 2014 is the end date that the Petitioners requested in their Assented to Motion to amend the PFT filing and Hearing schedule.

 [↑](#footnote-ref-4)