

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 13, 2016**

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In the Matter of  
Tennessee Gas Pipeline Company, LLC

OADR Docket No. 2016-020  
USACOE Application No. NAE-2013-  
02329  
MassDEP Wetlands File Nos.  
087-0610 and 278-0130  
MassNHESP Tracking No. 13-32620  
MEPA EOEEA No. 15205  
Transmittal No. X265051  
Agawam & Sandisfield, MA

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**PRE-SCREENING/PRE-HEARING CONFERENCE REPORT AND ORDER**

**INTRODUCTION**

In this appeal, a Citizen's Group comprised of 15 citizens of the Commonwealth residing in Amherst, Ashby, Ashfield, Cummington, Dalton, Montague, Northampton, Pepperell, Pittsfield, or Sandisfield, Massachusetts;<sup>1</sup> the Berkshire Environmental Action Team, Inc. ("BEAT"); Jean Atwater-Williams; Ronald M. Bernard; and Heather Morrival (collectively "the Petitioners") challenge a Water Quality Certification ("WQC") that the Western Regional Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the

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<sup>1</sup> The names of the 15 citizens are listed in note 1, at p. 2 of the Petitioners' Appeal Notice.

Department”) issued on June 29, 2016 to Tennessee Gas Pipeline, LLC (“the Applicant”) pursuant to the Massachusetts Clean Waters Act (“MCWA”), G.L. c. 21, §§ 26-53; the Massachusetts Surface Water Quality Standards, 314 CMR 4.00 (“SWQ Standards”); the Massachusetts WQC Regulations at 314 CMR 9.00 (“WQC Regulations”); and Section 401 of the federal Clean Water Act, 33 U.S.C. § 1251, et seq. (“Section 401”). The Department issued the WQC to the Applicant in connection with the latter’s natural gas pipeline expansion project on a Site in Western, Massachusetts which encompasses parcels of land located in Agawam and Sandisfield, Massachusetts (“the proposed Project”). The parcel located in Agawam is known as “the Connecticut Loop, 300 Line” and the parcel located in Sandisfield is known as “the Massachusetts Loop, 200 Line.”

The Petitioners contend that the Department improperly issued the WQC because the WQC purportedly fails to comport with a number of the Massachusetts Surface Water Quality Standards at 314 CMR 4.00 and the WQC Regulations at 314 CMR 9.00, and as such, they request that the be WQC be vacated. Petitioners’ Appeal Notice, at pp. 7-11; Petitioners’ Pre-Hearing Statement, pp. 5-8.

In response, the Applicant contends that the Department’s Office of Appeals and Dispute Resolution (“OADR”), where the Petitioners’ appeal of the WQC is pending for resolution, lacks jurisdiction over the appeal because in the Applicant’s view, the U.S. Court of Appeals for the First Circuit (“the First Circuit”) has exclusive jurisdiction over the appeal pursuant to the U.S. Natural Gas Act (“NGA”), 15 U.S.C. § 717r(d)(1). [Applicant’s] Special Appearance and Motion for Stay, August 17, 2016 (“Applicant’s Motion to Stay”), at p. 1; Order Denying Applicant’s Motion to Stay Proceedings, September 28, 2016, at p. 4; [Applicant’s] Special

Appearance and Pre-Hearing Statement, September 28, 2016 (“Applicant’s Pre-Hearing Statement”), at pp. 2-3. In the alternative, the Applicant contends that if OADR has jurisdiction over the appeal, the Petitioners lack standing to challenge the WQC and “the WQC [should] be made final, excepting Condition 15 [of the WQC] which should be removed” because in the Applicant’s view, “it is beyond the jurisdiction of MassDEP’s authority to implement and is preempted by the NGA.” Id., at pp. 2-4.

While the Petitioners and the Department disagree regarding whether the Petitioners have standing and the WQC is valid (the Department contends the Petitioners lack standing and the WQC is valid while the Petitioners contend otherwise), they both agree that OADR has jurisdiction over the Petitioners’ appeal of the WQC because the Department’s issuance of the WQC was not a final agency action of the Department subject to appeal to the First Circuit. Petitioners’ Opposition to [Applicant’s] Motion for Stay, August 26, 2016; [Department’s] Opposition to [Applicant’s] Motion for Stay, September 2, 2016; Petitioners’ Pre-Hearing Statement, September 21, 2016; Department’s Pre-Hearing Statement, at pp. 4-5. They contend that the Department’s issuance of the WQC was not a final agency action of the Department because the Petitioners appealed the WQC to OADR, and as a result, the WQC will only become a final agency action of the Department subject to appeal to the First Circuit if the Department’s Commissioner, the final decision-maker in this appeal, issues a Final Decision affirming the WQC. Id. I agree with the Petitioners and the Department on the jurisdiction issue. See Order

Denying Applicant's Motion to Stay Proceedings, September 28, 2016 ("September 28<sup>th</sup> Order").<sup>2</sup>

### **THE PRE-SCREENING/PRE-HEARING CONFERENCE**

On October 5, 2016, I conducted a Pre-Screening/Pre-Hearing Conference ("Conference") with the parties in accordance with 310 CMR 1.01(5)(a)15, 310 CMR 1.01(9), and a Scheduling Order that I issued to the parties on August 8, 2016. The purpose of the Conference was to determine the appeal's potential amenability to settlement through alternative dispute resolution or other means, and to identify the Issues for Resolution in the Appeal. Scheduling Order, ¶ 3.

At the Conference, the parties presented summaries of their respective positions in the case, and after doing so, I concluded that the parties were not likely to settle the appeal because they are far apart in their positions. Consequently, I established the Issues for Resolution in the Appeal and established a litigation schedule to resolve the Issues through an evidentiary Adjudicatory Hearing ("Hearing") on January 18, 2017 where witnesses would appear on behalf

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<sup>2</sup> On August 16, 2016, nearly 30 days after the Petitioners filed this appeal and eight days after I issued my Scheduling Order on August 8, 2016 putting the appeal on the adjudication and resolution track by scheduling the appeal for a Pre-Screening/Pre-Hearing Conference on September 14, 2016 (subsequently re-scheduled to October 5, 2016 per agreement of the parties) and an evidentiary Adjudicatory Hearing ("Hearing") on January 18, 2017, the Applicant filed suit against the Department and the Petitioners in the U.S. District Court for the District of Massachusetts seeking to enjoin OADR's proceedings over the Petitioners' appeal of the WQC. See Tennessee Gas Pipeline Company, LLC v. Massachusetts Department of Environmental Protection, et al., C.A. No. 1:16—cv-11671-NMG. The Petitioners and the Department opposed the Applicant's Emergency Motion for a Preliminary Injunction in the U.S. District Court and the Applicant's Motion to Stay the Proceedings before OADR. Without waiving their claim that OADR has jurisdiction over their appeal of the WQC and to preserve their appellate rights before the First Circuit, the Petitioners also appealed the WQC to the First Circuit and requested that the Court stay its proceedings pending the Department's Commissioner's Final Decision on the Petitioners' appeal of the WQC before OADR. See Berkshire Environmental Action Team, Inc., et al. v. Tennessee Gas Pipeline Company, LLC and Massachusetts Department of Environmental Protection, No. 16-2100. To date, neither the U.S. District Court nor the First Circuit has issued an Order enjoining OADR's proceedings over the Petitioners' appeal of the WQC.

of the parties to be cross-examined on the sworn Pre-filed Testimony (“PFT”) that they filed prior to the Hearing. See below, at pp. 5-23.

**ISSUES FOR RESOLUTION IN THE APPEAL**

As a result of the parties’ Pre-Hearing Statements and positions at the Conference, the Issues for Resolution in the Appeal are the following:

**I. THE APPLICANT’S CHALLENGE OF OADR’S JURISDICTION**

1. Does OADR have jurisdiction over the Petitioners’ appeal of the WQC?<sup>3</sup>

**II. THE APPLICANTS’ AND THE DEPARTMENT’S CHALLENGE TO THE PETITIONERS’ STANDING TO BRING THE APPEAL**

2. Whether the Citizen’s Group comprised of 15 citizens of the Commonwealth residing in Amherst, Ashby, Ashfield, Cummington, Dalton, Montague, Northampton, Pepperell, Pittsfield, or Sandisfield, Massachusetts,<sup>4</sup> collectively, have standing to challenge the WQC as a Ten Residents Group pursuant to 314 CMR 9.10(1)(c) and G.L. c. 30A, § 10A?

- a. Is the Citizen’s Group a validly constituted Ten Residents Group pursuant to CMR 9.17(1)(c) and G.L. c. 30A, § 10A?
  - (1) Did at least one member of the Citizen’s Group submit comments on the Applicant’s WQC application during the public comment period?
  - (2) If so, has the Citizen’s Group alleged sufficient facts in the Appeal Notice that the proposed Project will cause “damage to the environment” as that term is defined by G.L. c. 214, § 7A and incorporated by reference in G.L. c. 30A, § 10A?

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<sup>3</sup> As noted above on pp. 3-4, I previously issued a ruling that OADR has jurisdiction over the Petitioners’ appeal of the WQC. Per the Applicant’s request at the Conference, I have listed the jurisdictional issue above to make clear the Applicant’s continued position that the First Circuit has exclusive jurisdiction over the appeal pursuant to NGA. The parties will brief the issue in their respective Pre-Hearing and Closing Briefs. See below, at pp. 21-23.

<sup>4</sup> The names of the 15 citizens are listed in note 1, at p. 2 of the Petitioners’ Appeal Notice.

- (3) If no member of the Citizen Group submitted comments on on the Applicant's WQC application during the public comment period, are the Group's claims in the appeal "based on new substantive issues arising from material changes to the scope or impact of the activity and not apparent at the time of public notice"?
- (4) If so, has the Citizen's Group alleged sufficient facts in the Appeal Notice that the proposed Project will cause "damage to the environment" as that term is defined by G.L. c. 214, § 7A and incorporated by reference in G.L. c. 30A, § 10A?

3. Does the Petitioner Berkshire Environmental Action Team, Inc. ("BEAT") have standing to challenge the WQC pursuant to 314 CMR 9.02 and 9.10(1)(b) as a "person aggrieved" by the WQC?

- a. Did BEAT submit comments on the Applicant's WQC application during the public comment period on the application?
- b. If not, are BEAT's claims in the appeal "based on new substantive issues arising from material changes to the scope or impact of the activity and not apparent at the time of public notice"?

4. Does BEAT have standing to challenge the WQC pursuant to 314 CMR 9.10(1)(d) as a "private organization with a mandate to protect the environment"?

- a. Did BEAT submit comments on the Applicant's WQC application during the public comment period on the application?
- b. If not, are BEAT's claims in the appeal "based on new substantive issues arising from material changes to the scope or impact of the activity and not apparent at the time of public notice"?

5. Does the Petitioner Jean Atwater-Williams ("Ms. Atwater-Williams") have standing to challenge the WQC pursuant to 314 CMR 9.02 and 9.10(1)(b) as a "person aggrieved" by the WQC?

- a. Did Ms. Atwater-Williams submit comments on the Applicant's WQC application during the public comment period on the application?

- b. If not, are Ms. Atwater-Williams' claims in the appeal "based on new substantive issues arising from material changes to the scope or impact of the activity and not apparent at the time of public notice"?

6. Does the Petitioner Ronald M. Bernard ("Mr. Bernard") have standing to challenge the WQC pursuant to 314 CMR 9.02 and 9.10(1)(b) as a "person aggrieved" by the WQC?

- a. Did Mr. Bernard submit comments on the Applicant's WQC application during the public comment period on the application?
- b. If not, are Mr. Bernard's claims in the appeal "based on new substantive issues arising from material changes to the scope or impact of the activity and not apparent at the time of public notice"?

7. Does the Petitioner Heather Morrical ("Ms. Morrical") have standing to challenge the WQC pursuant to 314 CMR 9.02 and 9.10(1)(b) as a "person aggrieved" by the WQC?

- a. Did Ms. Morrical submit comments on the Applicant's WQC application during the public comment period on the application?
- b. If not, are Ms. Morrical's claims in the appeal "based on new substantive issues arising from material changes to the scope or impact of the activity and not apparent at the time of public notice"?

### **III. THE PETITIONERS' SUBSTANTIVE CLAIMS AGAINST THE WQC**

8. Did the Department issue the WQC in compliance with the applicable provisions of 314 CMR 4.00?

- a. **314 CMR 4.04(5)(a)1:** Did the Applicant demonstrate that the discharge authorized by the WQC "is necessary to accommodate important economic or social development in the area in which the waters are located"?
- b. **314 CMR 4.04(5)(a)2:** Did the Applicant demonstrate that "[n]o less environmentally damaging alternative site for the activity, receptor for the disposal, or method of elimination of the discharge is reasonably available or feasible"?

- c. **314 CMR 4.04(5)(a)3:** Did the Applicant demonstrate that “[t]o the maximum extent feasible, the discharge and activity are designed and conducted to minimize adverse impacts on water quality, including implementation of source reduction practices”?
- d. **314 CMR 4.04(5)(a)4 and 4.05:** Did the Applicant demonstrate that “the discharge will not impair existing water uses and will not result in a level of water quality less than that specified for the Class [of surface water impacted by the WQC (Class B as set forth in 314 CMR 4.05(3)(b)<sup>5</sup>]”?
- e. **314 CMR 4.05(3)(b)2:** Did the Applicant demonstrate that the discharge authorized by the WQC will comport with the regulation’s water temperature requirements?

9. Did the Department issue the WQC in compliance with the applicable provisions of 314 CMR 9.00?

- a. Was the Applicant required to publish a public notice of its WQC application in the Environmental Monitor pursuant to **314 CMR 9.05(3)**?
  - (1) If so, did the Applicant publish the required public notice?
- b. Did the Applicant demonstrate pursuant to **314 CMR 9.06(1) and 9.07(1)** that there is no practicable alternative to the proposed discharge authorized by the WQC to Bordering Vegetated Wetlands (“BVW”), Isolated Vegetated Wetlands (“IVW”), and Land Under Water (“LUW”) that would have less adverse impact on the aquatic ecosystem?<sup>6</sup>
- c. Did the Applicant demonstrate pursuant to **314 CMR 9.06(1) and 9.07(1)** that it took appropriate and practicable steps to avoid and minimize potential adverse impacts to BVW, IVW, and LUW?
- d. Are the provisions of **314 CMR 9.06(2)(b)1 and (2)(b)2, and 9.07(1)**

<sup>5</sup> Class B governs “[inland] waters [that are] designed as a habitat for fish, other aquatic life, and wildlife, including for their reproduction, migration, growth and other critical functions, and for primary and secondary contact recreation.” 314 CMR 4.05(3)(b).

<sup>6</sup> 314 CMR 9.06(1) provides that “[n]o discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge that would have less adverse impact on the aquatic system, so long as the alternative does not have other significant adverse environmental consequences.” 314 CMR 9.07(1), in turn, provides in relevant part that “[n]o dredging shall be permitted if there is a practicable alternative that would have less impact on the aquatic ecosystem.”



requiring the development and implementation of an operations and maintenance plan and compliance with the Massachusetts Stream Crossing Standards to avoid and minimize potential adverse impacts to BVW, IVW, and LUW applicable to the proposed Project?

- (1) Does the proposed Project involve the discharge of dredged or fill material in connection with the construction, repair, replacement, or expansion of a stream crossing?
    - (a) If so, has the Applicant developed a sufficient operations and maintenance plan to ensure that the stream crossing will function as designed?
  - (2) Does the proposed Project include the construction of a new non-tidal crossing?
    - (a) If so, has the Applicant demonstrated that the crossing complies with the Massachusetts Stream Crossing Standards?
- e. Are the provisions of **314 CMR 9.06(3)** governing discharge of dredged or fill material in Outstanding Resource Waters applicable to the proposed Project?
- (1) Does the proposed Project involve the discharge of dredged or fill material in an Outstanding Resource Water?
    - (a) If so, is the discharge of dredged or fill material in an Outstanding Resource Water associated with any of the activities listed in **314 CMR 9.06(a)-9.06(k)**?
      - (i) If so, did the Department properly determine that the discharge of dredged or fill material may be permitted in accordance with **314 CMR 9.06(1), 9.06(2), 9.06(4), 9.06(5), and 9.06(7)**, and does not require a variance pursuant to **314 CMR 9.06(4)**?
- f. Are the provisions of **314 CMR 9.06(5) and 9.06(6)** governing compliance with Stormwater Management Standards applicable to the proposed Project?
- (1) If so, does the proposed Project comply with the Stormwater Management Standards?

#### **IV. THE APPLICANT'S CHALLENGE TO CONDITION 15 OF THE WQC**

10. Whether the Department had legal authority to impose Condition 15 in the WQC, which provides that “[n]o work subject to [the WQC], including the cutting of trees, may be conducted prior to the expiration of the Appeal Period set forth [in the WQC] and any appeal proceedings that may result from an appeal.”

#### **THE PETITIONERS' BURDEN OF PROOF**

##### **I. THE PETITIONERS' STANDING**

Standing “is not simply a procedural technicality.” Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975); In the Matter of Webster Ventures, LLC, OADR Docket No. 2015-014, Recommended Final Decision (June 3, 2016), 2016 MA ENV LEXIS 27, at 19, adopted as Final Decision (June 15, 2016), 2016 MA ENV LEXIS 32. Rather, it “is a jurisdictional prerequisite to being allowed to press the merits of any legal claim.” R.J.A. v. K.A.V., 34 Mass. App. Ct. 369, 373 n.8 (1993); Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998) (“[w]e treat standing as an issue of subject matter jurisdiction [and] . . . of critical significance”); see also United States v. Hays, 515 U.S. 737, 115 S.Ct.2431, 2435 (1995) (“[s]tanding is perhaps the most important of the jurisdictional doctrines”); Webster Ventures, 2016 MA ENV LEXIS 27, at 19.

##### **A. Whether the Citizen's Group Has Standing to Challenge the WQC As a Ten Residents Group Pursuant to 314 CMR 9.10(1)(c) and G.L. c. 30A, § 10A**

The provisions of 314 CMR 9.10(1)(c) state that “any ten persons of the Commonwealth pursuant to M.G.L. c. 30A where a group member has submitted written comments during the public comment period” may file an administrative appeal challenging the WQC. A Ten Residents Group “may appeal [a WQC] without having submitted comments during the public

comment period only when [the Group's] claim [challenging the WQC] is based on new substantive issues arising from material changes to the scope or impact of the activity and not apparent at the time of public notice." 314 CMR 9.10(1).

As 314 CMR 9.10(1)(c) makes clear, the right to bring a Ten Residents Group appeal to challenge a WQC is also governed by G.L. c. 30A. Under G.L. c. 30A, § 10A:

*ten persons may intervene in any adjudicatory proceeding<sup>7</sup> . . . in which damage to the environment as defined in [G.L. c. 214, § 7A], is or might be at issue; provided, however, that such intervention shall be limited to the issue of damage to the environment and the elimination or reduction thereof in order that any decision in such proceeding shall include the disposition of such issue.*

(emphasis supplied). The provisions of G.L. c. 214, § 7A define "damage to the environment" as:

*any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth, whether caused by the defendant alone or by the defendant and others acting jointly or severally. Damage to the environment shall include, but not be limited to, air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds or other water resources, destruction of seashores, dunes, wetlands, open spaces, natural areas, parks or historic districts or sites. Damage to the environment shall not include any insignificant destruction, damage or impairment to such natural resources.*

(emphasis supplied).

Hence, the regulatory grant of standing to appeal as a Ten Residents Group pursuant to 314 CMR 9.10(1)(c) and G.L. c. 30A, § 10A carries with it four conditions which are jurisdictional in nature and must be met in order for the appeal of a WQC to proceed as a Ten Residents Group appeal:

- (1) the Group must consist of at least ten residents of the Commonwealth at

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<sup>7</sup> In this case, intervention is not an issue because the WQC Regulations at 314 CMR 9.10(1)(c) accord a right of appeal to a 10 Residents Group as a party to the proceedings.

the time of the appeal's filing;

- (2) at least one Group member must have submitted comments on the WQC application during the public comment period, and if no comments were submitted, the Group's claim challenging the WQC must "[be] based on new substantive issues arising from material changes to the scope or impact of the activity and not apparent at the time of public notice";
- (3) Group membership of at least ten residents of the Commonwealth must be maintained throughout the appeal; and
- (4) the Group's Appeal Notice challenging the WQC must allege clear and specific facts that the Department's issuance of the WQC might or will cause "damage to the environment" as that term is defined by G.L. c. 214, § 7A.

Here, most of the Petitioners: the Citizen's Group comprised of 15 citizens of the Commonwealth residing in Amherst, Ashby, Ashfield, Cummington, Dalton, Montague, Northampton, Pepperell, Pittsfield, or Sandisfield, Massachusetts<sup>8</sup> contend that collectively they can challenge the WQC as a Ten Residents Group pursuant to 314 CMR 9.10(1)(c) and G.L. c. 30A, § 10A. At the Hearing, it will be the Citizen's Group's burden to demonstrate that the Group satisfies the criteria set forth above to maintain a Ten Residents Group appeal.

**B. Whether BEAT, Ms. Atwater-Williams, Mr. Bernard, and Ms. Morrival Each Have Standing to Challenge the WQC Pursuant to 314 CMR 9.02 and 9.10(1)(b) As a "Person Aggrieved" by the WQC**

Under 314 CMR 9.10(1)(b), "any person aggrieved by [a WQC] who has submitted written comments [on the WQC application] during the public comment period" may file an administrative appeal challenging the WQC. "Any person aggrieved . . . may appeal [a WQC] without having submitted comments during the public comment period only when [the person's] claim [challenging the WQC] is based on new substantive issues arising from material changes

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<sup>8</sup> The names of the 15 citizens are listed in note 1, at p. 2 of the Petitioners' Appeal Notice.

to the scope or impact of the activity and not apparent at the time of public notice.” 314 CMR 9.10(1).

The WQC Regulations at 314 CMR 9.02 define “person” as “[a]ny agency or political subdivision of the Commonwealth or the federal government, public or private corporation or authority, individual, partnership or association, or other entity, including any officer of a public or private agency or organization.” An “aggrieved person is defined as “[a]ny person who, because of [the WQC], may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of interests identified in [the WQC Regulations at] 314 CMR 9.00.” 314 CMR 9.02.

An “aggrieved person” as that term is used in 314 CMR 9.02 and 9.10(1)(b) “must assert ‘a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest. . . . Of particular importance, the right or interest asserted must be one that [the WQC Regulations at 314 CMR 9.00]. . . inten[d] to protect.” Webster Ventures, 2016 MA ENV LEXIS 27, at 39.

“To show standing, [however,] a party need not prove by a preponderance of the evidence that his or her claim of particularized injury is true.” Webster Ventures, 2016 MA ENV LEXIS 27, at 39-40, citing, Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005). As the Massachusetts Appeals Court explained in Butler:

[t]he “findings of fact” a judge is required to make when standing is at issue . . . differ from the “findings of fact” the judge must make in connection with a trial on the merits. Standing is the gateway through which one must pass en route to an inquiry on the merits. When the factual inquiry focuses on standing, therefore, a plaintiff is not required to prove by a preponderance of the evidence that his or her claims of particularized or special injury are true. “Rather, the plaintiff must

put forth credible evidence to substantiate his allegations. [It is i]n this context [that] standing [is] essentially a question of fact for the trial judge.”

63 Mass. App. Ct. at 441; Webster Ventures, 2016 MA ENV LEXIS 27, at 39-40.

Several of the Petitioners: BEAT, Ms. Atwater-Williams, Mr. Bernard, and Ms. Morrical each contend that they have standing to challenge the WQC pursuant to 314 CMR 9.02 and 9.10(1)(b) as a “person aggrieved” by the WQC.<sup>9</sup> To demonstrate such standing, BEAT, Ms. Atwater-Williams, Mr. Bernard, and Ms. Morrical must each do the following at the Hearing.

First, they must provide proof that they each “submitted written comments [on the WQC application] during the public comment period,” and if they did not submit comments, that their “claim [challenging the WQC] is based on new substantive issues arising from material changes to the scope or impact of the activity and not apparent at the time of public notice.” 314 CMR 9.10(1)(b).

Second, they must put forth a minimum quantum of credible evidence in support of their claims that the proposed activity authorized by the WQC would or might cause each of them to suffer an injury in fact, which would be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interest protected by the WQC Regulations at 314 CMR 9.00. If they each meet that threshold, they can proceed through the “[s]tanding . . . gateway . . . to [the] inquiry on the merits” regarding whether the Department properly issued the WQC to the Applicant. Butler, 63 Mass. App. Ct. at

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<sup>9</sup> Ms. Atwater-Williams and Mr. Bernard are also members of the Citizen’s Group in the appeal contending that it has standing to challenge the WQC as a Ten Residents Group pursuant to 314 CMR 9.10(1)(c) and G.L. c. 30A, § 10A.

441; Webster Ventures, 2016 MA ENV LEXIS 27, at 39-40.

**C. Whether BEAT Has Standing to Challenge the WQC Pursuant to 314 CMR 9.10(1)(d) As a “Private Organization with a Mandate to Protect the Environment”**

The provisions of 314 CMR 9.10(1)(d) might be another basis for BEAT to assert standing in the appeal to challenge the WQC. The regulation provides that “any . . . private organization with a mandate to protect the environment that has submitted written comments [on the WQC application] during the public comment period” may file an administrative appeal challenging the WQC. If the organization did not submit any written comments during the public comment period, the organization may appeal the WQC only if the organization’s “claim [challenging the WQC] is based on new substantive issues arising from material changes to the scope or impact of the activity and not apparent at the time of public notice.” 314 CMR 9.10(1). Thus, if BEAT pursues a standing claim pursuant to 314 CMR 9.10(1)(d), it must demonstrate at the Hearing that it: (1) is a “private organization with a mandate to protect the environment”; and (2) “submitted written comments [on the WQC application] during the public comment period,” and if it did not submit any comments, that its “claim [challenging the WQC] is based on new substantive issues arising from material changes to the scope or impact of the activity and not apparent at the time of public notice.” 314 CMR 9.10(1).

**II. THE PETITIONERS’ SUBSTANTIVE CHALLENGES TO THE WQC**

If any of the Petitioners have standing to challenge the WQC, they will have the burden of proving by a preponderance of the evidence at the Hearing that the Department erred in

issuing the WQC to the Applicant. 310 CMR 1.01(13)(c)1.<sup>10</sup> The relevancy, admissibility, and weight of evidence that the Petitioners, the Applicant, and the Department will seek to introduce at the Hearing is 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[s] within the discretion of the Presiding Officer. . . .” Speculative evidence will be accorded no weight given its lack of probative value in resolving the issues in the case. In the Matter of Sawmill Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), 2015 MA ENV LEXIS 63, at 84, adopted as Final Decision (July 7, 2015), 2015 MA ENV LEXIS 62 (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”).

### **THE PARTIES’ RESPECTIVE WITNESSES FOR THE HEARING**

As confirmed at the Conference, I will conduct the Hearing on **January 18, 2017** to resolve the Issues for Resolution in the Appeal. The purpose of the Hearing will be the cross-

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<sup>10</sup> 310 CMR 1.01(13)(c)1 provides in relevant part that:

[e]xcept as otherwise required by law or as determined by the Presiding Officer, in hearings initiated by the notice of claim for an adjudicatory appeal on a permit, license or similar decision, it shall be the usual practice for the petitioner to present its evidence first. . . .

There is no exception to this general rule in this case that would should shift the burden of proof to the Applicant and the Department.



examination of witnesses who have filed sworn PFT on behalf of a party in the case according to the Schedule set forth below, at **pp. 21-23**; 310 CMR 1.01(12)(f).<sup>11</sup> The PFT will be the witnesses' Direct Examination Testimony, and, perhaps, their Rebuttal Testimony at the Hearing. *Id.*

The witnesses' PFT must contain evidence that is relevant to resolution of the issues in the case. 310 CMR 1.01(13)(h)1.<sup>12</sup> The PFT must also include the originals or true copies of all documents cited by the PFT as supporting the witnesses' testimony and a party's positions in the case. 310 CMR 1.01(12)(f); 310 CMR 1.01(13)(h)2. Specifically, the PFT must include "all exhibits to be offered in evidence," 310 CMR 1.01(12)(f), and "[a]ll evidence, including any records, investigative reports, documents, and stipulations, which is to be relied upon in a final decision [in the appeal]. . . ." 310 CMR 1.01(13)(h)2. Any PFT that fails to include that documentary evidence is incomplete and untimely. 310 CMR 1.01(12)(f); 310 CMR 1.01(13)(h)2.

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

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<sup>11</sup> 310 CMR 1.01(12)(f) provides in relevant part that:

The Presiding Officer may order all parties to file within a reasonable time in advance of the hearing the full written text of the testimony of their witnesses on direct examination, including all exhibits to be offered in evidence. Failure to file pre-filed direct testimony within the established time, without good cause shown, shall result in summary dismissal of the party and the appeal if the party being summarily dismissed is the petitioner. The Presiding Officer may exclude direct testimony offered at the hearing that was not included in the pre-filed direct testimony but was reasonably available at the time it was filed. The Presiding Officer may also require the filing of written rebuttal testimony within a reasonable time after the filing of the direct testimony. All pre-filed testimony shall be subject to the penalties of perjury. . . .

<sup>12</sup> 310 CMR 1.01(13)(h)1 provides that:

[u]nless otherwise provided by any law, the Presiding Officer 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. The weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. Unduly repetitious or irrelevant evidence may be excluded.

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 Ross and Marilyn Wescott, OADR Docket No. 2006-154, Recommended Final Decision (December 8, 2014), adopted as Final Decision (December 22, 2014), 21 DEPR 150, 151 (2014); 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.” Wescott, supra, 21 DEPR at 151; 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.<sup>13</sup>

The cross-examination of witnesses at the Hearing will be subject to time limits or other

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<sup>13</sup> See note 16, at p. 21 below for the provisions of 310 CMR 1.01(10), and 310 CMR 1.01(5)(a)15 and 310 CMR 1.01(11)(a)2.f.

limits set by the Presiding Officer. 310 CMR 1.01(13)(d); 310 CMR 1.01(13)(f).<sup>14</sup> Moreover, the Adjudicatory Rules mandate that “[i]f a witness is not available for cross-examination at the hearing, the written testimony of the witness shall be excluded from the record unless the parties agree otherwise.” 310 CMR 1.01(12)(f); 310 CMR 1.01(13)(h)3.

The Adjudicatory Rules also do not permit the re-direct examination of witnesses following their cross-examination unless authorized by the Presiding Officer. 310 CMR 1.01(13)(h)3. “If redirect examination is allowed by the Presiding Officer, it shall be limited to the scope of cross-examination.” *Id.* Hence, if a party chooses not to cross-examine a witness, the witness may not provide oral Re-direct Examination Testimony at the Hearing. *Id.* There is also no requirement that a party cross-examine its opponent’s witnesses at the Hearing. *Id.*

The August 8, 2016 Scheduling Order that I issued scheduling this appeal for the Conference and Hearing required the parties to identify in their respective Pre-Hearing Statements and at the Conference the names of the witnesses who would be filing Pre-filed

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<sup>14</sup> 310 CMR 1.01(13)(d) provides in relevant part that:

1. Absent agreement of the parties to time limits for the hearing acceptable to the Presiding Officer, the Presiding Officer may establish a limit on the amount of time allotted to each party to present its case and examine witnesses. This time shall be allocated equally among opposing parties, unless the Presiding Officer orders otherwise for good cause. . . .

3. The Presiding Officer may grant a request for modification of time limits only for good cause. In determining whether to grant a request to modify time limits, the Presiding Officer may consider: whether or not the requesting party has used the time since the commencement of the hearing in a reasonable and proper way and has complied with all orders regulating the hearing; the requesting party's explanation as to how the requested added time would be used and why it is necessary to ensure a fair hearing; and any other relevant and material facts the requesting or opposing party may wish to present in support of or opposition to the request.

Under 310 CMR 1.01(13)(f), the Presiding Officer may “[limit] the number of witnesses that parties may offer [at the Adjudicatory Hearing] and may exclude the testimony of any witness which would be duplicative, irrelevant, or otherwise unnecessary.”

Testimony for the Hearing in support of the parties' respective positions in the case, including the names of their expert witnesses. The names of these witnesses are set forth below.

**A. Petitioners**

- (1) a duly authorized officer or agent of the Petitioner Beat;
- (2) the Petitioner Jean Atwater-Williams;
- (3) the Petitioner Ronald M. Bernard;
- (4) the Petitioner Heather Morrival; and
- (5) Matthew Schweisberg, PWS, Principal  
Wetland Strategies and Solutions, LLC  
16 High Street  
Merrimac, MA 01860.

**B. The Applicant**

- (1) James Flynn, Project Manager  
Tennessee Gas Pipeline Company, LLC  
1001 Louisiana Street  
Houston, TX 77002; and
- (2) Dennis Lowry  
Senior Program Manager/ Wetlands Ecologist  
AECOM  
500 Enterprise Drive, #1a  
Rocky Hill, CT 06067.

**C. The Department**

- (1) David Cameron, Section Chief  
Wetlands Program  
MassDEP/Western Regional Office; and
- (2) David Foulis, Environmental Analyst  
Wetlands Program  
MassDEP/Western Regional Office.

**SCHEDULE FOR FILING PRE-FILED TESTIMONY AND  
MEMORANDA OF LAW ON THE  
ISSUES FOR RESOLUTION IN THE APPEAL**

The schedule for the remaining proceedings in this appeal, including the deadlines for the parties to file their respective PFT and legal memoranda on the Issues for Resolution in the Appeal, is set forth below, at pp. 22-23.<sup>15</sup> The parties are advised that any party who fails to file any required materials in accordance with the schedule might be subject to sanctions pursuant to 310 CMR 1.01.<sup>16</sup>

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<sup>15</sup> Filings may be made electronically to the Case Administrator of Office of Appeals and Dispute Resolution (“OADR”) at [Caseadmin.oadr@state.ma.us](mailto:Caseadmin.oadr@state.ma.us). To ensure that color exhibits or photographs and large sized plans are included in the Administrative Record of the appeal, parties who file those materials electronically should also file hard copies of those materials with OADR by U.S. mail or hand delivery to the OADR Case Administrator, One Winter Street, 2<sup>nd</sup> Floor, Boston, MA 012108.

<sup>16</sup> Possible sanctions under 310 CMR 1.01(10) include, without limitation:

- (a) taking designated facts or issues as established against the party being sanctioned;
- (b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;
- (c) denying summarily late-filed motions or motions failing to comply with requirements of 310 CMR 1.01(4);
- (d) striking the party’s pleadings in whole or in part;
- (e) dismissing the appeal as to some or all of the disputed issues;
- (f) dismissing the party being sanctioned from the appeal; and
- (g) issuing a final decision against the party being sanctioned.

In addition to the dismissal authority conferred by 310 CMR 1.01(10)(e) above, under 310 CMR 1.01(11)(a)2.f, a “Presiding Officer may [also] summarily dismiss [an appeal] sua sponte,” when the appellant fails to prosecute the appeal or fails to comply with an order issued by the Presiding Officer. For the same reasons, the Presiding Officer may also dismiss an appeal pursuant to the Officer’s appellate pre-screening authority under 310 CMR 1.01(5)(a)15 which authorizes the Officer to “issu[e] orders to parties, including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending prescreening conferences and ordering parties to provide more definite statements in support of their positions.”

<u><b>Action</b></u>	<u><b>Deadline or Date Scheduled</b></u>
Petitioners' PFT and Memorandum of Law on the Issues for Resolution	<b>5:00 p.m., Monday, November 14, 2016;</b>
Applicant's PFT and Memorandum of Law on the Issues for Resolution	<b>5:00 p.m., Wednesday, December 14, 2016;</b>
Department's PFT and Memorandum of Law on the Issues for Resolution	<b>5:00 p.m., Wednesday, December 28, 2016;</b>
Applicant's Rebuttal PFT to Department's PFT <sup>17</sup>	<b>5:00 p.m., Friday, January 6, 2017</b>
Petitioners' Rebuttal PFT	<b>5:00 p.m., Friday, January 13, 2017;</b>
Hearing	<b>Wednesday, January 18, 2017, from 9:30 a.m. to 4:30 p.m. in the Department's Western Regional Office, 436 Dwight Street, Springfield, MA 01103;<sup>18</sup></b>
Parties' Post-Hearing Closing Briefs	<b>5:00 p.m., Wednesday, February 1, 2017<sup>19</sup></b>

**[continued next page]**

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<sup>17</sup> As discussed at the Conference, this Applicant's PFT will be limited to Issue No. 10 regarding the validity of Condition 15 of the WQC.

<sup>18</sup> As I noted at the Conference, Hearings in administrative appeals adjudicated by OADR Presiding Officers are electronically recorded unless the private parties in an appeal make arrangements to have the Hearing recorded by a certified court stenographer/reporter at the private parties' expense. Given the nature of this case, the private parties in the case are encouraged, but not required, to arrange for stenographic recording of the Hearing by a certified court stenographer/reporter at the private parties' expense.

<sup>19</sup> If the private parties arrange for a certified court stenographer/reporter to stenographically record the Hearing, all of the parties' Post-Hearing Closing Briefs will be due two weeks after the transcript of the Hearing is filed with OADR and the litigation schedule above will be adjusted accordingly.

**Action**

**Deadline or Date Scheduled**

**[continued from preceding page]**

Presiding Officer's Recommended Final Decision	<b>5:00 p.m., Friday, March 3, 2017</b>
MassDEP Commissioner's Final Decision	<b>5:00 p.m., Monday, April 3, 2017</b>

Date: 10/13/16

  
\_\_\_\_\_  
Salvatore M. Giorlandino  
Chief Presiding Officer

## SERVICE LIST

**Petitioners:** A Citizen's Group comprised of 15 citizens of the Commonwealth residing in Amherst, Ashby, Ashfield, Cummington, Dalton, Montague, Northampton, Pepperell, Pittsfield, or Sandisfield, Massachusetts;<sup>20</sup>

the Berkshire Environmental Action Team, Inc. ("BEAT");  
Jean Atwater-Williams; Ronald M. Bernard; and Heather Morrival;

**Legal representative:** Luke H. Legere, Esq.  
Gregor I. McGregor, Esq.  
McGregor & Legere, P.C.  
15 Court Square, Suite 500  
Boston, MA 02108  
**e-mail:** llegere@mcgregorlaw.com  
gimcg@mcgregorlaw.com;

**Applicant:** Tennessee Gas Pipeline Company, LLC;

**Legal representative:** James L. Messenger, Esq.  
Margaret R. Stolfa, Esq.  
Gordon & Rees  
Scully Mansukhani  
21 Custom House Street, 5<sup>th</sup> Floor  
Boston, MA 02110  
**e-mail:** jmessenger@gordonrees.com  
mstolfa@gordonrees.com;

**The Department:** David Cameron, PWS & Wetlands Program Chief  
MassDEP/Bureau of Water Resources  
436 Dwight Street  
Springfield, MA 01103  
**e-mail:** David.Cameron@state.ma.us;

[continued on next page]

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<sup>20</sup> The names of the 15 citizens are listed in note 1, at p. 2 of the Petitioners' Appeal Notice.



**[continued from preceding page]**

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Springfield, MA 01103  
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