

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO.

2084 CV 02120 -G

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

ROBERT L. MASSUCCO, JR.,

Defendant.

COMPLAINT

INTRODUCTION

1. Despite the fact that nearly all of his property was mapped as rare species habitat, defendant Robert L. Massucco, Jr. ("Massucco") failed to notify the Massachusetts Division of Fisheries and Wildlife's ("Division") Natural Heritage and Endangered Species Program until *after* he had cleared more than two and one half (2.5) acres of forested upland habitat for the rare marbled salamander, including in portions of the buffer zone for protected wetland resource areas, in violation of the Massachusetts Endangered Species Act, G.L. c. 131A ("MESA"), the Massachusetts Wetlands Protection Act, G.L. c. 130 §40 ("Wetlands Protection Act"), the Massachusetts Environmental Policy Act, G.L. c. 30, §§ 61 – 62H ("MEPA"), and the regulations implementing these statutes. After becoming aware of this clear cut, the Division informed Massucco that no further clearing activity or other physical disturbance of marbled salamander habitat could occur on his property unless permitted under MESA, including approved restoration or other measures to remedy the loss of habitat previously destroyed by Massucco. Instead of complying with the required consultation and permitting process, Massucco continued to violate MESA by clearing at least one acre of additional marbled

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salamander upland habitat without notifying the Division, obtaining the required MESA permit, or remedying his previous violations.

2. As a result of Massucco's actions, the Commonwealth of Massachusetts (the "Commonwealth") seeks civil penalties for all violations of MESA, the Wetlands Protection Act, and the regulations implementing these statutes. The Commonwealth also seeks injunctive relief under MESA and MEPA, including to remedy the harm to the local population of marbled salamanders caused by Massucco's unpermitted destruction of more than three and one half (3.5) acres of marbled salamander habitat and the resulting fragmentation and degradation of important habitat for this MESA-listed species at particular risk of decline from habitat destruction and fragmentation.

JURISDICTION AND VENUE

3. This court has jurisdiction over the subject matter of this action and the authority to grant the relief requested pursuant to G.L. c. 131A, § 6, G.L. c. 130, § 40, G.L. c. 30, § 62H, and G.L. c. 214, §§ 1 and 3(12).

4. Venue lies in Suffolk Superior Court pursuant to G.L. c. 223, § 5.

PARTIES

5. The Plaintiff is the Commonwealth, appearing by and through the Attorney General and the Division.

6. The Attorney General, with an office at One Ashburton Place, Boston, Massachusetts, is the chief legal officer of the Commonwealth and is authorized to bring this action under G.L. c. 12, §§ 3 and 11D.

7. The Division is an agency of the Commonwealth within the Massachusetts Department of Fish and Game and is charged with administering and enforcing MESA through its powers and duties set forth in G.L. c. 131A. The Division maintains its principal office in the

Department of Fish and Game's Headquarters at 251 Causeway Street, Boston, Massachusetts, and its Field Headquarters and Natural Heritage and Endangered Species Program at One Rabbit Hill Road in Westborough, Massachusetts.

8. Massucco is Massachusetts resident residing at 101 Allens Neck Road in South Dartmouth, Massachusetts.

STATUTORY AND REGULATORY BACKGROUND

The Massachusetts Endangered Species Act and Regulations

9. MESA and the regulations promulgated thereunder at 321 C.M.R. 10.00 *et seq.*, create a comprehensive regulatory program to protect and conserve all state-listed species in the Commonwealth.

10. Pursuant to G.L. c. 131A, §§ 4 through 6, and 321 C.M.R. 10.00 *et seq.*, the Division, through its Natural Heritage and Endangered Species Program, administers and enforces MESA.

11. As defined at 321 C.M.R. 10.02 and used throughout MESA and its implementing regulations, "state-listed species" means "any species on the state-list of Endangered, Threatened, and Special Concern Species found at 321 C.M.R. 10.90."

12. Pursuant to G.L. c. 131A, § 4 and 321 C.M.R. 10.03, MESA provides a system for "listing" state-listed species and establishes procedures and criteria for classifying species as either "Endangered," "Threatened," or "Species of Special Concern."

13. Pursuant to G.L. c. 131A, § 1, Endangered Species are defined as those in danger of either becoming extinct throughout all or a significant portion of their range, or those in danger of extirpation (elimination) in Massachusetts.

14. Pursuant to G.L. c. 131A, § 1, Threatened Species are defined as those likely to become Endangered Species in the foreseeable future throughout all or a significant portion of

their range.

15. Pursuant to G.L. c. 131A, § 2 and 321 C.M.R. 10.04, no person may “take” any state-listed species in Massachusetts.

16. In reference to animals, “take” is defined at G.L. c. 131A, § 1 and 321 C.M.R. 10.02 as meaning:

to harass, harm, pursue, hunt, shoot, hound, kill, trap, capture, collect, process, disrupt the nesting, breeding, feeding or migratory activity or attempt to engage in any such conduct, or to assist in such conduct.

17. In reference to animals, the definition of take at 321 C.M.R. 10.02 provides that “disruption of nesting, breeding, feeding or migratory activity may result from, but is not limited to, the modification, degradation, or destruction of habitat.”

18. Habitat is defined at 321 C.M.R. 10.02 to mean:

an area which, due to its physical or biological features, protects or provides important elements for the growth and survival of plants or animals such as food, shelter, or living space, and includes without limitation, breeding, feeding, resting, migratory, or overwintering areas. Physical or biological features include, but are not limited to: structure and composition of the vegetation; faunal community; soils; water chemistry and quality; and geologic, hydrologic, and macroclimatic factors.

19. “Priority Habitat” is defined at 321 C.M.R. 10.02 to mean the geographic extent of habitat for State-listed Species as delineated by the Division pursuant to 321 C.M.R. 10.12. The Division’s Natural Heritage and Endangered Species Program delineates Priority Habitat based on records of state-listed species observed within twenty-five (25) years prior to delineation that meet multiple criteria and are thus accepted for recording in the Natural Heritage and Endangered Species Program database.

20. The Division’s Natural Heritage and Endangered Species Program

delineates Priority Habitat based on the best scientific evidence available utilizing methodology and habitat mapping guidelines developed for each state-listed species.

Filing and review requirements for projects within Priority Habitat

21. Pursuant to 321 C.M.R. 10.12(1), Priority Habitats are used “for screening Projects and Activities” that may result in a take of state-listed species and to “provide guidance to record owners [of land] regarding a project or activity through consultation with [the Division].”

22. “Project or activity” is broadly defined at 321 C.M.R. 10.02 to mean any work or action, including the excavation or grading of land and the “destruction of plant life.”

23. Except for certain exemptions not applicable here, the regulation at 321 C.M.R. 10.18(1) prohibits the commencement or continuation of any physical work or action in Priority Habitat unless and until “the record owner of the land where such project or activity will occur submit[s] the information listed in 321 C.M.R. 10.20 to [the Division],” in accordance with the procedures and requirements set forth at 321 C.M.R. 10.18 and 321 C.M.R. 10.20.

24. The Division reviews the project information submitted pursuant to the requirements of 321 C.M.R. 10.18 and 10.20 for the purpose of determining if a take will result “from any temporary or permanent modification, degradation, or destruction of Priority Habitat occurring as a result of the proposed project or activity.”

25. To meet the project filing and information and material submission requirements of 321 C.M.R. 10.18, the record owner of a project impacting ten (10) acres or less of Priority Habitat must, in accordance with 321 C.M.R. 10.20(1), submit to the Division prior to the commencement or any work or actions in Priority Habitat, the following information: the record owner’s name, address, and ownership interest in the property; property acreage; a copy of the United States Geologic Survey topographic map in a scale 1:24,000 or 1:25,000 with the property location clearly marked; the area of proposed physical disturbance from the project,

including the area (square feet or acres) and the percent of the property impacted; the assessor's map or right-of-way plan of the site; a project description and project plans with existing and proposed conditions; and photographs representative of the site.

26. The Division reviews the information and materials submitted pursuant to the requirements of 321 C.M.R. 10.18 and 10.20 to determine if a proposed project has avoided a take and may proceed as proposed, will avoid a take with conditions and may proceed with those conditions imposed by the Division, or will result in a take and may not proceed as proposed.

27. Pursuant to 321 C.M.R. 10.19, for any project in Priority Habitat, the project proponent has the burden of demonstrating and must demonstrate that that the proposed project does not result in a take.

28. If the Division, based on its review of submitted information and material determines, pursuant to 321 C.M.R. 10.18(2), that a project in Priority Habitat will result in a take and may not proceed as proposed, the record owner may consult with the Division to discuss options or potential revisions to the project that may avoid a take.

29. For a project that will result in a take, a project proponent may apply to the Division for issuance of a conservation and management permit to allow the project to proceed as permitted in accordance with the requirements and performance standards at 321 C.M.R. 10.23.

30. The Division may issue a conservation and management permit in accordance with 321 C.M.R. 10.23 if the project proponent has avoided, minimized, and mitigated impacts to state-listed species, provided that the applicant has adequately assessed alternatives to both temporary and permanent impacts to state-listed species, an insignificant portion of the local population would be impacted by the project, and the applicant agrees to carry out a plan approved by the Division that provides a long-term net benefit to the conservation of impacted

state-listed species. If a project proponent has made every reasonable effort but is unable to meet the long-term net benefit performance standard by avoiding, minimizing, and mitigating project impacts on-site, the Division may issue a conservation and management permit designed to meet the long-term net benefit performance standard through the applicant's development and implementation of an off-site conservation recovery and protection plan for the impacted species approved by the Division.

The Rare Species Habitat Provisions of the Massachusetts Wetlands Protection Act

31. The Massachusetts Wetlands Protection Act, G.L. c. 131, § 40, and regulations promulgated thereunder at 310 C.M.R. 10.00 *et seq.*, create a comprehensive program for the protection of wetland resource areas within the Commonwealth, including wetland habitat for species listed and protected under MESA.

32. The regulation at 310 C.M.R. 10.02(2)(b) provides that any activity, with certain exceptions not applicable here, to be conducted in a "buffer zone" to wetland resource areas that will alter any area protected under the Wetlands Protection Act requires the filing of a Notice of Intent with the local conservation commission.

33. "Buffer zone" is defined by 310 C.M.R. 10.04 as "that area of land extending 100 feet horizontally outward from the boundary of any area specified in 310 C.M.R. 10.02(1)(a)."

34. As set forth at 310 C.M.R. 10.59, Estimated Habitat maps are based on the estimated geographical extent of the habitats of all state-listed vertebrate and invertebrate animal species for which a reported occurrence within the last twenty-five years has been accepted by the Division and incorporated into the Natural Heritage and Endangered Species database.

35. Pursuant to 310 C.M.R. 10.59, if a proposed project or activity is within wetland

resource areas mapped as Estimated Habitat as indicated on the most recent Estimated Habitat map of state-listed rare wetlands wildlife published by the Division's Natural Heritage and Endangered Species Program, a fully completed copy of the Notice of Intent must be submitted to the Division for review.

36. Pursuant to 310 C.M.R. 10.59, if the Division, in its review of a submitted Notice of Intent for a project or activity, determines that a state-listed species is likely to continue to be located within the area identified as Estimated Habitat for that species, and the project or action alters that area mapped as Estimated Habitat, such project or activity "shall not be permitted to have any short or long term adverse effects on the habitat of the local population of that species."

The Massachusetts Environmental Policy Act

37. MEPA, G.L. c. 30, §§ 61 – 62H, and its implementing regulations at 310 C.M.R. 11.00 *et seq.*, sets forth procedures for review by the Massachusetts Executive Office of Energy and Environmental Affairs' MEPA Office of the potential environmental impacts of projects that require action or permits from Massachusetts state agencies. MEPA project review is intended to avoid damage to the environment and to inform, assist, and facilitate coordination between project proponents and relevant state agencies.

38. Pursuant to 310 C.M.R. 11.03(2)(b)(2) and 11.05, projects proposing to disturb more than two acres of Priority Habitat that will result in a MESA take and thus require a conservation and management permit from the Division must file an Environmental Notification Form and undergo relevant MEPA project review with the Massachusetts Executive Office of Energy and Environmental Affairs' MEPA Office.

Marbled Salamander Habitat Use and Threats to the Species' Recovery in Massachusetts

39. The marbled salamander, *Ambystoma opacum*, is a state-listed species, listed and protected under MESA and at 321 C.M.R. 10.90 as a Threatened Species.

40. Marbled salamander breeding and larval development occurs in wetland resource areas with basins or depressions in forested areas that hold water from late fall to late spring or early summer, but completely or substantially dry up over the summer, including forested swamps, temporary woodland ponds, and vernal pools. Breeding occurs in late summer and female marbled salamanders deposit clutches of loose eggs in nests constructed in dried-up wetland basins and depressions. Eggs hatch shortly after fall rains fill the dried-up area with water and larval marbled salamanders remain in the water-filled wetlands until they metamorphose. Juvenile marbled salamanders then migrate into the surrounding forested uplands the following spring or early summer. Marbled salamanders reach sexual maturity after one to five years, when most return to the same wetland to breed.

41. Adult and juvenile marbled salamanders spend most of their life in forested uplands within 1,000 feet of wetland breeding and larval development habitat. Most marbled salamanders remain within 500 feet of breeding wetlands and population density decreases with increasing distance from breeding wetland habitat. Marbled salamanders depend on forested habitat for survival and use forested upland habitat for feeding, sheltering, overwintering, and migration.

42. As of 2015, only 85 local populations of marbled salamanders are known to exist in Massachusetts. In addition to road mortality, the primary threats to marbled salamander survival and recovery in Massachusetts are habitat loss, most typically from clearing of forested uplands or filling of wetland breeding areas, and habitat degradation, including habitat fragmentation resulting from upland clearing.

43. A recent report by the United Nation's Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services found that more than forty percent (40%) of amphibian species globally are at risk of extinction.

FACTS

The Site

44. Massucco owns a 12.7-acre parcel of real property located at 101 Allens Neck Road in South Dartmouth, Massachusetts (the “Site”), recorded at the Bristol County Registry of Deeds in Book 12221, Page 243. Massucco resides in a single-family house on the Site.

45. Approximately 3.3 acres of the Site is bordering vegetative wetlands protected as wetland resource areas under the Massachusetts Wetlands Protection Act, G.L. c. 130, § 40. The bordering vegetative wetlands on the Site are primarily forested wetlands, with a smaller area of forested swamp.

46. The forested swamp on the Site is typically filled with water from rain and/or snowmelt from approximately late fall through late spring or early summer. During the summer and early fall, all or most of this forested swamp dries out completely and thus provides marbled salamander breeding habitat.

47. A portion of the forested swamp on the Site is documented breeding and larval development habitat for a local population of marbled salamanders. This forested swamp is the only known marbled salamander breeding habitat for this local marbled salamander population on and in the immediate vicinity of the Site.

48. Prior to unauthorized clearing in 2017 and 2018 discussed further below, approximately nine (9) acres of the site was upland forest providing feeding, sheltering, overwintering, and migration habitat for the local marbled salamander population, including areas in the 100-foot buffer zone to bordering vegetative wetland resource areas on the Site.

49. In 1995, the Division first mapped significant portions of the Site as Priority Habitat and Estimated Habitat for the marbled salamander. Since this initial mapping, substantial portions of the Site continuously have been mapped as marbled salamander Priority Habitat and

Estimated Habitat based on multiple sightings of larval and adult marbled salamanders on or adjacent to the Site as documented on records accepted for inclusion in the Division's Natural Heritage and Endangered Species database. In the most recent, 2017 edition of the Division's Massachusetts Natural Heritage Atlas, all uplands and wetland resource areas on the Site were mapped as marbled salamander Priority Habitat and Estimated Habitat, except for the already-developed areas of the Site including Massucco's single family residence, and driveway, and the limited lawn area surrounding the house.

The Proposed Project

50. On or about October 22, 2017, Massucco filed a Notice of Intent for a proposed project with the Dartmouth Conservation Commission. In the Notice of Intent, Massucco proposed to clear nearly three acres of upland forest on the Site to create a grazing pasture for horses. As proposed, portions of the cleared uplands were in the 100-foot buffer zone around bordering vegetative wetlands on the Site protected under the Massachusetts Wetlands Protection Act, G.L. c. 131 §40.

51. All of the forested uplands proposed to be cleared pursuant to Massucco's Notice of Intent were mapped as Priority Habitat and Estimated Habitat, including portions of clearing within buffer zone for bordering vegetative wetlands.

52. When he filed his Notice of Intent with the Dartmouth Conservation Commission on or about October 22, 2017, Massucco did not provide a copy of the Notice of Intent to the Division to notify the Division of his planned clearing of forested upland mapped as marbled salamander Priority Habitat.

53. On November 1, 2017, the Division received a copy of the Notice of Intent Massucco filed on or about October 22, 2017 with the Dartmouth Conservation Commission.

54. On November 27, 2017, the Division sent Massucco a written request for additional information about his proposed project as required by 321 C.M.R. 10.18 and 10.20 so that the Division could complete its review of the project to determine if it would result in a take of a state-listed species in accordance with 321 C.M.R. 10.18. The Division's request for additional information and materials also informed Massucco that he must pay the project review filing fee required pursuant 321 C.M.R. 10.10(1).

The Violations

55. Shortly after receiving the Division's request for additional information, Massucco and his environmental consultant both separately notified the Division by telephone that Massucco had already clear cut more than two and one half (2.5) acres of upland forest in the northern portion of the Site behind his single-family residential home. Thereafter, Massucco, confirmed by letter to the Division dated December 2, 2017, that sometime prior to November 27, 2017, he had clear cut more than two and one half (2.5) acres of forested upland in the central portion of the Site up to the wetland foot buffer zone, with portions of clearing extending up to twenty-five (25) feet into the buffer zone.

56. Massucco's December 2, 2017, letter to the Division also provided a complete description of his proposed project, with project plan maps and photographs. The proposed project involved clearing a total of approximately six and one half (6.5) acres of forested upland on the Site in three separate areas, including the more than two and one half (2.5) acre area behind his residence that he had already cleared without waiting for the Division to conduct the required review to determine if the project may result in a take prohibited by MESA. Massucco did not submit the required project review filing fee with his December 2, 2017, correspondence to the Division.

57. Following telephone and email correspondence between Massucco and the Division in December 2017, the Division, by letter dated January 5, 2018, informed Massucco that by clearing forested upland on the Site he had destroyed or degraded more than two and one half (2.5) acres of marbled salamander habitat and had fragmented suitable upland habitat on the Site. The Division's January 5, 2018, letter further informed Massucco that by clearing forested uplands on the Site he had caused direct harm to individual marbled salamanders and disrupted migratory, breeding, feeding, sheltering, and overwintering activity of the local marbled salamander population, resulting in a marbled salamander take in violation of MESA. The Division's letter informed Massucco that these MESA violations are subject to civil or criminal penalties under MESA and 321 C.M.R. 10.06.

58. In the Division's January 5, 2018, letter and in telephone conversations, the Division informed Massucco that he could return to compliance with MESA by submitting for Division approval a plan to restore the more than two and one half (2.5) acres of forested upland marbled salamander habitat he had cleared. Alternatively, Massucco could apply for a MESA conservation and management permit for the more than two and one half (2.5) acres of upland forest he had already clear cut and any other planned clearing or disturbance of upland marbled salamander habitat on the Site, and that the Division may issue a conservation and management permit if Massucco met the performance standards and requirements at 321 C.M.R. 10.23. In addition, the Division informed Massucco that any project disturbing two (2) or more acres of Priority Habitat that resulted in a MESA take and thus required a conservation and management permit from the Division must file an Environmental Notification Form and undergo MEPA project review with the Massachusetts Executive Office of Energy and Environmental Affairs' MEPA Office as required by 310 C.M.R.11.03(2)(b)(2) and 11.05.

59. Finally, the Division's January 5, 2018 letter notified Massucco that any on-going work on the Site must cease immediately and that no additional land, soil, or vegetation disturbance or alteration activity may be conducted anywhere on the Site until Massucco returned to compliance with MESA.

60. In response to the Division's January 5, 2018 letter, Massucco informed the Division, by email sent on January 12, 2018, that he intended to provide the Division with additional information and further discuss his project proposal with consultants. Instead of continuing discussions with the Division or applying for a conservation and management permit to return to compliance with MESA, Massucco broke off all communication with the Division in mid-January 2018.

61. In May 2018, the Dartmouth Conservation Commission informed the Division that Massucco had clear cut at least an additional acre of upland forest in the northwest portion of the Site within four hundred (400) to seven hundred fifty (750) feet of wetland breeding habitat for the local marbled salamander population. Thereafter, Massucco had stumped and graded the one-acre clear-cut area, covering native topsoil with sand, so that area could be used as a horse-riding ring.

62. At no time before his late November 2017 clearing of nearly three (3) acres of forested upland on the Site mapped as marbled salamander Priority Habitat did Massucco complete a project review, apply for a conservation and management permit, or otherwise consult with the Division. Subsequent to his last correspondence with the Division in mid-January 2018, at no time did Massucco complete a project review, apply for a conservation and management permit, or otherwise consult with the Division prior to clearing at least an additional acre of forested upland on the Site mapped as marbled salamander Priority Habitat.

63. By the activity described in the above paragraphs 55, 57, and 61 – 62, Massucco harmed individual marbled salamanders and destroyed, degraded, or adversely impacted at least three and one half (3.5) acres, total, of forested upland habitat mapped by Division as marbled salamander Priority Habitat, further fragmenting habitat crucial for survival of the local marbled salamander population.

CAUSES OF ACTION

COUNT I:

Violations of MESA, G.L. c. 131A, §6, and its Implementing Regulations

64. The Commonwealth repeats and realleges each and every allegation contained in paragraphs 1 through 63 of this complaint as if they were restated here in full.

65. At all times relevant to this complaint, all wetland and upland areas of the Site were mapped by the Division as marbled salamander Estimated Habitat and Priority Habitat, except for previously disturbed upland areas including the footprint of Massucco’s single family residential house, the limited, surrounding lawn area, and driveway.

66. At all times relevant to this complaint, the wetland areas of the Site mapped as Estimated Habitat and Priority Habitat included breeding and larval development habitat for a local population of marbled salamanders, and all upland areas of the Site mapped as Priority Habitat were feeding, sheltering, overwintering, and migration habitat for this local population of marbled salamanders.

67. “Record owner” is defined at 321 C.M.R. 10.02 to mean “any person or entity holding a legal or equitable interest, right or title to real property, as reflected in a written instrument or recorded deed, or any person authorized in writing by such person.”

68. Massucco is a “person” as defined at 321 C.M.R. 10.02 and used throughout MESA and its implementing regulations.

69. Massucco is the record owner of the Site within the meaning of 321 C.M.R. 10.02 and as used throughout 321 C.M.R. 10.00 *et seq.*

70. The project proposal described in Massucco's Notice of Intent submitted to the Dartmouth Conservation Commission on or about October 22, 2017 and thereafter provided to the Division on November 1, 2017 is a "project or activity" as defined at 321 C.M.R. 10.02 and a "project or activity impacting less than ten acres" within the meaning of 321 C.M.R. 10.20(1).

71. The proposed project as further described in the letter dated December 2, 2017, Massucco provided to the Division along with project plans, photographs, and other information and materials, is a "project or activity" as defined at 321 C.M.R. 10.02 and a "project or activity impacting less than ten acres" within the meaning of 321 C.M.R. 10.20(1).

72. Massucco's clearing of more than two and one half (2.5) acres of forested upland at the Site, described in the above paragraphs 55 and 57, is a "project or activity" as defined at 321 C.M.R. 10.02 and used throughout 321 C.M.R. 10.00 *et seq.*

73. Massucco's clearing of at least an additional acre of forested upland at the Site, as described above in paragraph 61, is a "project or activity" as defined at 321 C.M.R. 10.02 and used throughout 321 C.M.R. 10.00 *et seq.*

74. By clearcutting more than two and one half (2.5) acres of forested upland marbled salamander habitat on the Site mapped by the Division as Priority Habit and Estimated Habitat, as described in the above paragraphs 55 and 57, without notifying and submitting to the Division the information and materials required by 321 C.M.R. 10.18 and 10.20(1) for projects or activities impacting less than ten (10) acres of Priority Habitat, Massucco violated 321 C.M.R. 10.18 and 321 C.M.R.10.20(1).

75. By clearcutting more than two and one half (2.5) acres of forested upland marbled salamander habitat on the Site mapped by the Division as Priority Habit and Estimated Habitat,

as described in the above paragraphs 55 and 57, without allowing the Division to review Massucco's project proposal and make a determination if the project avoids a take and may proceed as proposed, will avoid a take with conditions and may proceed with those conditions imposed by the Division, or will result in a take and may not proceed as proposed, and without demonstrating to the Division that this clearcutting of more than two and one half (2.5) acres of upland forested marbled salamander habitat will not result in a take, Massucco violated 321 C.M.R. 10.18 and 10.19.

76. By submitting for the Division's review the plans for his proposed project and the Notice of Intent filed with the Dartmouth Conservation Commission without paying the required MESA project review filing fee, Massucco violated 321 C.M.R. 10.10(1).

77. By clearcutting, stumping, and grading at least one additional acre of forested upland marbled salamander habitat on the Site mapped by the Division as Priority Habit, and by then layering sand over native topsoil in this area, as described in the above paragraph 61, without working with the Division to return to compliance with MESA for his prior clearcutting and without demonstrating to the Division that the additional acre of clearcutting would not result in a marbled salamander take, Massucco violated 321 C.M.R. 10.18 and 10.19.

78. By clearcutting upland forest on the Site mapped by the Division as marbled salamander Priority Habitat, Massucco harmed individual marbled salamanders on the Site, destroyed or degraded more than three and one half (3.5) acres of marbled salamander habitat on the Site which the local marbled salamander local population depends upon for breeding, feeding, sheltering, overwintering, and migration, and further fragmented marbled salamander habitat on the Site and in the vicinity of the Site. By these actions, Massucco harmed marbled salamanders and disrupted their breeding, feeding, sheltering, overwintering, and migration

activity, thereby causing a marbled salamander take and violating, and continuing to violate, G.L. c. 131A, § 2 and 321 C.M.R. 10.04(1).

79. By commencing and continuing work in marbled salamander Priority Habitat and Estimated Habitat that resulted in a marbled salamander take without applying for a conservation and management permit from the Division in accordance with the procedures and requirements of 321 C.M.R. 10.18, 10.20, and 10.23, Massucco violated 321 C.M.R. 10.23.

80. By commencing and continuing work in marbled salamander Priority Habitat and Estimated Habitat that resulted in a marbled salamander take without being granted a conservation and management Permit issued by Division in accordance with the procedures, requirements, and performance standards at 321 C.M.R. 10.23, Massucco violated and continues to violate G.L. c. 131A, § 2, and 321 C.M.R. 10.04(1).

81. Pursuant to G.L. c. 131A, § 6 (c), any person who violates MESA or 321 C.M.R. 10.00 *et seq.* shall be subject to a civil penalty of up to \$10,000 for each violation, with each statutory and regulatory violation constituting a separate offense.

COUNT II:

Violations of the Massachusetts Wetlands Protection Act, G.L. c. 130, § 40, and its Implementing Regulations.

82. The Commonwealth repeats and realleges each and every allegation contained in paragraphs 1 through 80 of this complaint as if they were restated here in full.

83. At all times relevant to this complaint, the wetland areas of the Site mapped as Estimated Habitat included breeding and larval development habitat for a local population of marbled salamanders.

84. The Site is a “project location” as defined at 310 C.M.R. 10.04, and the project proposal described in Massucco’s Notice of Intent submitted to the Dartmouth Conservation

Commission on or about October 22, 2017, and thereafter provided to the Division on November 1, 2017, is an “activity” as defined at 310 C.M.R. 10.04 and used throughout 310 C.M.R. 10.00 *et seq.*

85. The forested wetlands and forested swap on the Site, including the areas used as breeding habitat by the local marbled salamander population, are bordering vegetative wetlands as defined at 310 C.M.R. 10.04 and 10.55(2) and as used throughout 310 C.M.R. 10.00 *et seq.*

86. The portions of the Site within one hundred (100) feet of the bordering vegetative wetlands on the Site are “buffer zone” as defined at 310 C.M.R. 10.04 and used throughout 310 C.M.R. 10.00 *et seq.*

87. Massucco is a “person” under the Massachusetts Wetlands Protection Act, G.L. c. 130, § 40, and an “applicant” filing a Notice of Intent with a conservation commission, as defined at 310 C.M.R. 10.04.

88. By clearing forested upland areas within the buffer zone of bordering vegetative wetlands on the Site as described in the above paragraph 55, without first submitting the Notice of Intent filed with the Dartmouth Conservation Commission on or about October 22, 2017 to the Division for review to determine if the proposed activity would have short- or long-term adverse effects or marbled salamander habitat, Massucco violated 310 C.M.R. 10.59.

89. The Massachusetts Wetlands Protection Act provides for civil penalties up to \$25,000 per day for each violation of G.L. c.130, § 40 and 301 C.M.R. 10.00 *et seq.*, with each day a violation continues constituting a separate offense.

COUNT III:

Violations of the MEPA, G.L. c.30, §§ 61 - 621, and its Implementing Regulations.

90. The Commonwealth repeats and realleges each and every allegation contained in paragraphs 1 through 88 of this complaint as if they were restated here in full.

91. The project proposal described in Massucco's Notice of Intent submitted to the Dartmouth Conservation Commission on or about October 22, 2017, and thereafter provided to the Division on November 1, 2017, is a project that would disturb more than two acres of Priority Habitat and result in a MESA take of the marbled salamander within the meaning of 310 C.M.R. 11.03(2)(b)(2) and 11.05.

92. By clearcutting, destroying, degrading and otherwise disturbing more than two and one half (2.5) acres of forested upland marbled salamander habitat on the Site mapped by the Division as Priority Habit, as described in the above paragraphs 55 and 57, without filing an Environmental Notification Form meeting all applicable requirements of 310 C.M.R. 11.05 with Massachusetts Office of Energy and Environmental Affairs' MEPA Office, Massucco violated MEPA and 310 C.M.R. 11.05.

REQUEST FOR RELIEF

WHEREFORE, the Commonwealth requests that this Court grant the following relief:

- A. Issue a permanent injunction ordering Massucco to remedy the harm he caused to marbled salamanders and marbled salamander habitat on the Site by restoring the marbled salamander habitat he destroyed or degraded, or by implementing a marbled salamander habitat and species conservation and management plan approved by the Division that will provide a net benefit to the marbled salamander; and
- B. Order Massucco to pay to the Commonwealth of Massachusetts a civil penalty of ten thousand dollars (\$10,000) per day for each violation of MESA and its implementing regulations found at 321 C.M.R. 10.00 *et seq.*; and

- C. Order Massucco to pay to the Commonwealth of Massachusetts a civil penalty of twenty-five thousand dollars (\$25,000) per day for each violation of the Wetlands Protection Act and its implementing regulation found at 310 C.M.R. 10.59; and
- D. Issue a permanent injunction requiring that Massucco file plans with the Massachusetts Executive Office of Energy and Environmental Affairs' MEPA Office, and comply with all other applicable requirements of MEPA and the regulations at 310 C.M.R. 11.03(2) and 11.05; and
- E. Award such other or further relief as this Court deems just and proper.

Respectfully submitted,

THE COMMONWEALTH OF MASSACHUSETTS
MAURA HEALEY, ATTORNEY GENERAL

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