

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

100 CAMBRIDGE STREET, BOSTON, MA 02114 617-292-5500

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

September 13, 2023

In the Matter of
Bobcat Construction, Inc.

OADR Docket Number: 2022-006
DEP Enforcement Doc. No. 00012516
MassDEP CERO
Fitchburg, MA

RECOMMENDED FINAL DECISION

Bobcat Construction, Inc. ("the Petitioner"), filed this appeal with the Office of Appeals and Dispute Resolution ("OADR") challenging a Notice of Intent to Assess a Civil Administrative Penalty that the Central Regional Office of the Department of Environmental Protection ("Department") issued to the Petitioner on April 20, 2022, pursuant to the Massachusetts Clean Air Act, M.G.L. c. 111, § 142A, *et seq.*, and the Asbestos Removal Regulations at 310 CMR 7.15 ("the Regulations"). The Department issued the \$73,687.50 penalty in connection with the Petitioner's alleged willful violations of the Regulations in removing asbestos containing materials at 324 Lunenburg Street, Fitchburg, Massachusetts.

A scheduling order in this matter was issued to the Parties on June 14, 2023, requiring in part that the Petitioner initiate settlement discussions with the Department by June 28, 2023. On July 6, 2023, the Department filed a status report noting that "There have been no settlement discussions between the Parties." The Department also stated that, in a discussion with the

Petitioner, the Petitioner indicated that it needed time to hire new counsel. Accordingly, I entered an order on July 6, 2023, stating, "The Petitioner is given until July 28, 2023, to initiate settlement discussions with MassDEP and file a status report informing of the status of negotiations and proposing the dates required in paragraph 6 of the scheduling order. If the Petitioner fails to comply with this order, I will recommend entry of final decision dismissing the appeal pursuant to 310 CMR 1.01(3)(g), 1.05(5)(a)15.f., 1.01(10)."

The Petitioner did not comply with my July 6, 2023, Order. As a result, on August 7, 2023, I issued an order directing "[t]he Petitioner . . . to provide a status report describing its steps to obtain counsel and the status of those efforts on or before August 17, 2023." That order made clear that "[i]f the Petitioner fail[ed] to comply with th[e] order, it [would] be subject to sanctions including the recommendation of entry of final decision dismissing the appeal pursuant to 310 CMR 1.01(10)." On the same day, the Petitioner responded by stating "Hi I [am a] small business it [is] only me working in I trying [to] hire some one [who] can help me with this matter that I'm not responsible for." In response, I entered a further order that same day stating "I have reviewed the response from the Petitioner, Bobcat Construction, Inc. The Petitioner is ordered to provide a further status report describing its steps to obtain counsel and the status of those efforts on August 24, 2023."

The Petitioner failed to provide a status report by August 24, 2023. On August 25, 2023, I ordered that the Petitioner show cause in writing on or before September 8, 2023, why this appeal should not be dismissed for the Petitioner's failure to comply with my orders of June 14, 2023; July 6, 2023; and August 24, 2023, pursuant to 310 CMR 1.01(3)(g), 310 CMR 1.05(5)(a)15.f., and 310 CMR 1.01(10). The Petitioner did not submit a response to that order to show cause.

A party's repeated and unexcused failure to comply with the Presiding Officer's orders in an appeal warrants the appeal's dismissal pursuant to 310 CMR 1.01(5)(a)6., 1.01(5)(a)15.f.vi., and 1.01(10). In the Matter of Dan and Eva Barstow, OADR Docket No. 2019-026, Recommended Final Decision (January 22, 2020), 2020 MA ENV LEXIS 16, *8-24, adopted as Final Decision (February 19, 2020), 2020 MA ENV LEXIS 12. This holds true regardless of whether a party lacks counsel in an appeal because "[litigation] rules bind a pro se litigant as they bind other litigants." Id. at 9; In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 45-46, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77, citing, Mmoe v. Commonwealth, 393 Mass. 617, 620 (1985) (*pro se* litigants are required to file court pleadings conforming to the Massachusetts Rules of Civil Procedure); Rothman v. Trister, 450 Mass. 1034 (2008) (*pro se* litigants are required to comply with appellate litigation rules); Lawless v. Board of Registration In Pharmacy, 466 Mass. 1010, 1011 (2013) (same).

Here, as a result of the Petitioner's repeated and unexcused failure to comply with my orders in this appeal, specifically, the June 14, 2023, scheduling order; July 6, 2023, order; and August 25, 2023, order to show cause, I recommend that MassDEP's Commissioner issue a Final Decision in this appeal dismissing this appeal in accordance with 310 CMR 1.01(5)(a)6., 1.01(5)(a)15.f.vi., and 1.01(10) and affirming the \$73,687.50 civil administrative penalty that the Petitioner had appealed in this appeal.



Patrick M. Groulx
Presiding Officer

Date: September 13, 2023

NOTICE OF RECOMMENDED FINAL DECISION

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

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

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