

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**

**March 21, 2024**

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In the Matter of  
CCF Quannapowitt Property  
Company, LLC

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OADR Docket Number: WET-2024-002  
DEP File No. NE 313-0608  
Wakefield, Massachusetts

**RECOMMENDED FINAL DECISION ON RECONSIDERATION**

Dennis M. Cloherty ("Petitioner"), has filed this appeal with the Office of Appeals and Dispute Resolution ("OADR")<sup>1</sup> of the Massachusetts Department of Environmental Protection ("Department") challenging the dismissal of his Request for a Superseding Order of Conditions relative to an Order of Conditions issued by the Wakefield Conservation Commission ("Commission") to perform work at 200-400 Quannapowitt Parkway, Wakefield. The Department's Northeast Regional Office ("NERO") dismissed the Petitioner's request because it determined that the Petitioner's request for Department action under 310 CMR 10.05(7)(c) was untimely. The Petitioner (timely) appealed NERO's dismissal of Petitioner's request to OADR.

**I. Facts and Procedural History.**

In August 2021, CCF Quannapowitt Property Company, LLC ("Applicant"), filed a Notice of Intent ("NOI") with the Commission seeking approval of the Applicant's project ("Project"). See Letter from NERO to Petitioner (Nov. 28, 2023). The Petitioner has not

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<sup>1</sup> OADR is an independent quasi-judicial office in the Department which is responsible for advising its Commissioner in resolving all administrative appeals of Department Permit Decisions, Environmental Jurisdiction Determinations, and Enforcement Orders. A detailed description of OADR is set forth in Addendum No. 1, below.

provided a copy of the Notice of Intent, and it was not produced with the Department's Basic Documents.<sup>2</sup> The Commission issued an Order of Conditions ("OOC") on August 1, 2022, approving the Project. Id.

On November 20, 2023, the Petitioner submitted to NERO a document titled "Notice of Appeal," which NERO interpreted as a request to issue a Superseding Order of Conditions. Id. On November 28, 2023, NERO dismissed the request because it was "approximately fifteen (15) months" past the appeal period deadline date. Id.

On December 1, 2023, the Petitioner submitted a "Request for an Adjudicatory Hearing" regarding the Project. Appeal Notice, p. 1. That document was submitted directly to NERO. OADR received the Appeal Notice around January 11, 2024.

On January 24, 2024, I issued an order stating as follows:

Even though the Petitioner is pro se (meaning not represented by an attorney), he is nevertheless required to comply with the applicable procedural rules. Matter of Dan and Eva Barstow, OADR Docket No. 2019-026, Recommended Final Decision (January 22, 2020), 2020 MA ENV LEXIS 16, at 8-9, adopted as Final Decision (February 19, 2020), 2020 MA ENV LEXIS 12; Lawless v. Bd. of Registration in Pharm., 466 Mass. 1010, 1011 n. 3 (2013). 310 CMR 1.01(6)(b) states, in relevant part, "[a] notice of claim for adjudicatory appeal shall state specifically, clearly and concisely the facts which are grounds for the appeal, the relief sought, and any additional information required by applicable law or regulation. The Department may provide forms to be used for a notice of a claim for an adjudicatory appeal, and where provided, the form shall be used." The Petitioner's "Notice of Appeal" dated November 19, 2023, and "Request for an Adjudicatory Hearing" dated December 1, 2023, do not state the facts that are grounds for the appeal nor the relief sought. The Petitioner is ordered to submit a more definite statement and the required form. In particular, as part of his more definite

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<sup>2</sup> "Basic Documents" are those documents in the official file of the Department program that was involved in the decision, order, or determination that is on appeal. Basic Documents generally include (1) all submissions used by the Department in reaching the decision, order, or determination and (2) all documents constituting the Department's decision, order, or determination. Basic Documents do not include internal deliberations of the Department. The Department's Basic Documents are admissible and probative as "the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." G.L. c. 30A, § 11(2); 310 CMR 1.01(8)(a); see also Mass. Guide Evid. 201(b)(2).

statement, the Petitioner must describe the facts that impart standing under 310 CMR 10.05(7)(a) and provide the Adjudicatory Hearing Fee Transmittal Form. The more definite statement is due February 8, 2024.

The Petitioner submitted his More Definite Statement on February 8, 2024.

On February 9, 2024, I issued an Order to Show Cause stating the following:

Given that the timeliness of a request for department action is jurisdictional, and there is a fundamental question of whether the Petitioner timely filed the request for department action, a show cause order is appropriate. The Petitioner is therefore given until **February 23, 2024**, to explain why this case should not be dismissed for failure to timely file a request for department action within ten business days under 310 CMR 10.05(7)(c).

Order to Show Cause, p. 6 (Feb. 9, 2024). The Petitioner submitted his response in several E-mails between February 17 and 20, 2024.

On February 23, 2024, at 1:34 p.m., I issued a Recommended Final Decision ("RFD") recommending that the Commissioner dismiss the Petitioner's appeal for failure to request Department action within the 10-day deadline pursuant to 310 CMR 10.05(7)(c). On that same day, at 2:43 p.m., the Petitioner sent an E-mail to OADR stating, in part,

I will reply to your premature, but not unexpected decision In the matter of CCF Quannapowitt Property Company LLC. Having not heard from you in almost three years, 4 days after mailing a motion to add a party to my complaint in Superior Court civil action 2381CV03444 then I suddenly heard from Executive Office of Energy and Environmental Affairs.

The Petitioner included with this E-mail an untitled document raising several arguments that repeat in essence the substance of the arguments made in his February 17, 2024, and February 23, 2024, filings.

In response to the Petitioner's filings, I issued the following order on February 23, 2024, at 3:42 p.m.:

I am in receipt of the Petitioner's filing of February 23, 2024, at 2:43 PM. I will treat this as a motion for reconsideration. Under 310 CMR 1.01(14)(d), a motion for reconsideration may only be brought after the issuance of a final decision by the Commissioner or her designee. As the Recommended Final Decision states, "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." This matter has not yet gone to a final decision, and it would be premature to consider any argument in reconsideration. The Petitioner may re-file any materials he wishes for the purposes of reconsideration *after* the entry of a final decision. Any motion to reconsider must be brought within seven business days from the date the final decision is mailed to the parties.

On February 26, 2024, the Petitioner submitted to OADR a document titled "Notice of Appeal" that stating as follows:

The hearing officer issued a show cause order on February 9, 2024 with a deadline of February 23, 2024. I responded to the order to show cause in list form on the 20th and in prose form on the 23rd in response to the February 9, 2024 order to show cause. I object to and appeal the decision of the hearing officer to re-label the show cause document of February 23, 2024, submitted in a timely manner, to a motion for reconsideration.

Later that day, I issued the following order in response:

I am in receipt of the Petitioner's February 26, 2024, filing. He states that he is "appealing the hearing officers decision to change the response to show cause issued on February 9th with a deadline of February 23th into a motion for reconsideration." The Petitioner argues that even though his E-mail of February 23, 2024, states that the February 23, 2024, filing is a "reply" to my Recommended Final Decision, the February 23, 2024, filing should be considered instead as supplemental briefing in response to the order to show cause. Even if I was to do so, the Recommended Final Decision would not change. First, the February 23, 2024, filing does not address the fundamental failure to file his request for Department action timely. Second, I lack any authority to require the Secretary of the Executive Office of Energy and Environmental Affairs to take any action. Third, the applicability of MEPA was addressed in the Recommended Final Decision.

As stated in my prior order, the Petitioner may file any materials he wishes for the purposes of reconsideration after the entry of a final decision by the Commissioner or her designee. Any motion to reconsider must be brought within seven business days from the date the final decision is mailed to the parties. In accordance with Department policy and to avoid any interference with the Commissioner's jurisdiction over the matter at this juncture, no further filings will be considered prior to the entry of a final decision.

In response to that order, the Petitioner sent an E-mail to OADR the same day, stating, "I still object to the hearing officer asserting that the response to the order to show cause can be renamed a motion for reconsideration. I will address the failure of the Department to take timely action separately."

On February 28, 2024, the Petitioner E-mailed OADR stating "I have appealed the decision of the hearing officer to turn my timely response to his order to show cause into a motion for reconsideration to the Middlesex Superior Court." Included with that document was a Notice of Appeal purportedly filed in Cloherly v. Commonwealth, Middlesex Superior Court Docket No. 2381CV03444.<sup>3</sup> The Petitioner purports to appeal "the decision of the hearing officer... to turn my response to his order to show cause [into] a motion for reconsideration.... The response to the hearing officer's order to show cause was submitted in the allotted time." See Notice of Appeal (Feb. 28, 2024).

The Commissioner appointed the Chief Presiding Officer as the final decision-maker in this appeal on March 7, 2024, and the Chief Presiding Officer issued a Final Decision adopting my RFD on March 8, 2024. That same day, I issued an order stating "In accordance with my February 23, 2024, order, I am treating the Petitioner's filing of February 23, 2024, at 2:43 PM as a motion for reconsideration. Any supplemental filings the Petitioner wishes for me to

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<sup>3</sup> As of March 19, 2014, that document does not appear on the superior court docket.

consider are due within seven business days pursuant to 310 CMR 1.01(14)(d)." The Petitioner filed a response on March 13, 2024. I waited until March 21, 2024, to issue this Recommended Final Decision on Remand in case the Petitioner had any further briefing to submit.

## **II. Applicable Standards.**

Under 310 CMR 1.01(14)(d),

Where a finding of fact or ruling of law on which a final decision is based is clearly erroneous, a party may file a motion for reconsideration setting forth specifically the grounds relied on to sustain the motion. 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 motion shall be filed within seven days from the date the decision is mailed to the parties by the Department. The filing of a motion for reconsideration is not required to exhaust administrative remedies.

A party seeking reconsideration of a Final Decision issued by the Department's Commissioner in an administrative appeal of a Department enforcement order or permit decision has a heavy burden of demonstrating that the Final Decision was unjustified. 310 CMR 1.01(14)(d); Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision on Reconsideration (November 4, 2014), 2014 MA ENV LEXIS 83, \*6, adopted as Final Decision on Reconsideration (November 7, 2014), 2014 MA ENV LEXIS 82. The party must demonstrate that the Final Decision was based upon a finding of fact or ruling of law that was "clearly erroneous." Id. "[R]econsideration [of the Final Decision is not] justified by the [party's] disagreement with the result reached in the Final Decision." Id. at \*7.

## **III. Analysis.**

The Petitioner's filings of February 23, February 28, and March 13 fail to address the pertinent issue in this matter: whether there is any legal basis for the Petitioner to have filed his Appeal Notice over a year late. The February 23, 2024, filing argues that the Secretary of the

Executive Office of Energy and Environmental Affairs should issue a "cease and desist order" on the project at issue. I have no authority to enter that relief.

The Petitioner's February 28, 2024, filing is a "Notice of Appeal" that states that it is objecting to my "re-label[ing] the show cause document of February 23, 2024, submitted in a timely manner, to a motion for reconsideration." This does not address the substance of the RFD: that the Petitioner has provided no legal justification for failing to timely file his appeal.

The March 13, 2024, filing fares no better. The Petitioner raises arguments about the scope of the Town of Wakefield's rights to utilize land on the shore of Lake Quannapowitt. Even assuming that this argument was relevant, I lack jurisdiction to adjudicate disputes over property rights. Tindley v. Dept. of Environmental Quality Engineering, 10 Mass. App. Ct. 623 (1980). The Petitioner does not address his failure to file his Appeal Notice timely.

#### **IV. Conclusion.**

The Petitioner has provided no basis in law to justify not having filed the Appeal Notice timely. I recommend that the Commissioner issue a Final Decision on Reconsideration denying reconsideration of the Final Decision.

**Date:** March 21, 2024



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Patrick M. Groulx  
Presiding Officer

## **NOTICE OF RECOMMENDED FINAL DECISION ON RECONSIDERATION**

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to MassDEP's 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 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.



## **SERVICE LIST**

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