

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

July 9, 2024

In the Matter of
Helena Lake a/k/a Helena Kos

OADR Docket Number: 2022-009
DEP File No. 13288
Springfield, Massachusetts

MassDEP Complaint No.:
MassDEP-01-2024-TVI

**FINAL DECISION ON
PETITIONER'S TITLE VI DISCRIMINATION CLAIM
PURSUANT TO GRIEVANCE PROCEDURE OF
MassDEP'S CIVIL RIGHTS AND NON-DISCRIMINATION PLAN**

INTRODUCTION

“Asbestos is a naturally occurring, mostly fibrous mineral that has been used in a variety of building products and industrial settings over the years because of its resistance to heat, fire, and many caustic chemicals.” In the Matter of Kane Built, Inc., OADR Docket No. 2017-037, Recommended Final Decision (December 18, 2018), 2017 WL 10924859, at *2, 2017 MA ENV LEXIS 77, adopted by Final Decision (January 17, 2019), 2019 WL 1122833, at *1, 2019 MA ENV LEXIS 8. “The physical properties that give asbestos its resistance to heat and decay are also linked with a number of adverse human health effects. Asbestos tends to break apart into a dust of microscopic fibers that remain suspended in the air for a long time.” Id. If inhaled, “these fibers can cause [1] Asbestosis, a chronic lung condition that makes breathing

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progressively more difficult; [2] Cancer, most frequently lung cancer; or [3] Mesothelioma, an incurable Cancer of the chest and abdominal membranes.” Id. (numerical references supplied). Adverse health symptoms caused by inhaling asbestos fibers “can take up 40 years to develop, all can lead to death, and each exposure increases [a person's] risk.” Id. For these reasons, it is imperative that asbestos containing materials (“ACM”) are properly removed in order to avoid the serious health risks associated with exposure to ACM. To that end, the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) “regulates abatement, construction[,] and demolition projects that involve asbestos” through its Asbestos Regulations at 310 CMR 7.15 to ensure that ACM¹ is properly removed during the course of such projects. Id.

Here, in this appeal, Helena Lake (“the Petitioner”) challenges a Unilateral Administrative Order (“UAO”) that the Department’s Western Regional Office in Springfield, Massachusetts (“Springfield”) issued to the Petitioner on June 16, 2022, for purported violations of the Department’s Asbestos Regulations at 310 CMR 7.15 at the Petitioner’s home at 67-69

¹ The Asbestos Regulations at 310 CMR 7.15 define ACM as:

any material containing 1% or more asbestos as determined by a laboratory using protocols set forth in the *Method for the Determination of Asbestos in Bulk Building Materials* found in [the U.S. Environmental Protection Agency's (“EPA”)] report EPA/600/R-93/116, or another method as directed by the Department[,] [and]... includes, but is not limited to, sprayed-on and troweled-on materials applied to ceilings, walls, and other surfaces; insulation on pipes, boilers, tanks, ducts, and other equipment, structural and non-structural members; tiles; asphalt roofing or siding materials; or asbestos-containing paper.

310 CMR 7.15(1) (definitions); Kane Built, Inc., 2017 WL 10924859, at *2–3. ACM is “friable” when “[in a] dry [[condition], [it] can be crumbled, shattered, pulverized or reduced to powder by hand pressure . . .” Id. Non-friable ACM becomes friable ACM when it “has been subjected to sanding, grinding, cutting, or abrading or has been crumbled, shattered or pulverized by mechanical means such as, but not limited to, the use of excavators, bulldozers, heavy equipment, or power and/or hand tools.” Id.

Westford Circle in Springfield (“Property”).² The Department issued the UAO in connection with the improper removal of a boiler covered with ACM from the Property’s basement. The boiler was improperly removed by Pedro Alicea of P & P Services (“Mr. Alicea”) who at the time was licensed by the Commonwealth as an apprentice plumber but neither licensed nor certified by the Commonwealth as an asbestos-abatement contractor.

As a result of Mr. Alicea’s improper removal of the ACM covered boiler, the UAO directed the Petitioner, as the owner of the Property and, pursuant to the Department’s Asbestos Regulations at 310 CMR 7.15, to perform a number of remedial actions, including, among other things, restricting access to the Property’s basement and hiring a licensed asbestos abatement contractor, or in the alternative, allowing the Department, to inspect the basement to determine the current status of any remaining asbestos and to remediate any asbestos not in good condition. The Petitioner denies liability for any asbestos violations and requests that the UAO be revoked.

Recently, on May 13, 2024, the Petitioner filed a Pre-Hearing Memorandum in her appeal of the UAO setting forth the positions that she was going to advance at the evidentiary adjudicatory hearing (“Hearing”) that my colleague, Presiding Officer Patrick Groulx, was going to conduct on June 26, 2024 to adjudicate the appeal.³ In her Pre-Hearing Memorandum, the Petitioner asserted for the first time after the UAO’s issuance nearly two years earlier that the UAO should be vacated because it was the product of illegal race discrimination by the

² The Petitioner’s appeal is pending before the Office of Appeals and Dispute Resolution (“OADR”) which is an independent quasi-judicial office in the Department 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, at p. 33.

³ Presiding Officer Groulx postponed the Hearing to a date to be determined as a result of the Department’s recent filing of a Motion for Summary Decision in the appeal.

Department that is barred by Title VI of the federal Civil Rights Act of 1964 (“Title VI”).

Petitioner’s Pre-Hearing Memorandum in UAO Appeal, at pp. 13-15. Title VI prohibits State agencies, including the Department, that receive federal funds, from discriminating against any person on the basis of race. Among other things, the Petitioner alleged in her Pre-Hearing Memorandum that:

- (1) “It is the [Department’s] official policy . . . to discriminate and enforce compliance of its regulations based on racial preferences, as set out in its Environmental Justice Policy (EJP)⁴ and the Environmental Justice Strategy (EJS) of the Executive Office of Energy and Environmental Affairs”;⁵
- (2) the EJS “states that preferred minorities and classes, which [the Petitioner contends are] describe[d] euphemistically as ‘environmental justice populations’, are to be, ‘prioritized, protected and no longer left behind’”;⁶
- (3) the term “equity principles” as used in the EJS means illegal race discrimination “in the implementation of all EEA programs, including . . . enforcement of laws, regulations[,] and policies”;⁷
- (4) the EJS “sets out [the Department’s] intent to implement, ‘targeted compliance, enforcement, and assistance’ in favor of environmental justice populations” which according to the Petitioner is “lofty rhetoric

⁴ Petitioner’s Pre-Hearing Memorandum in UAO Appeal, at p. 13. The “EJP” that the Petitioner refers to is EEA’s 2021 EJ Policy which I discuss below, at pp. 17-26.

⁵ Petitioner’s Pre-Hearing Memorandum in UAO Appeal, at p. 13. The “EJS” that the Petitioner refers to is EEA’s recent February 2024 issuance of an Environmental Justice Strategy (“EEA’s 2024 EJS”) that sets forth “[EEA] and [EEA] agency strategies,” including the Department’s Environmental Justice Strategy (“the Department’s EJS”), “for proactively promoting environmental justice in the Commonwealth of Massachusetts.” EEA’s 2024 EJS (cover page). I discuss EEA’s 2024 EJS and the Department’s EJS below, at pp. 26-28.

⁶ Petitioner’s Pre-Hearing Memorandum in UAO Appeal, at p. 13. EEA’s 2021 EJ Policy defines a racial minority as “individuals who identify themselves Latino/Hispanic, Black/African American, Asian, Indigenous people, and people who otherwise identify as non-white.” EEA’s 2021 EJ Policy, at p. 4 (definition of “minority”).

⁷ Id.

[that] is another way of describing selective enforcement based on race, with favorable treatment given to protected classes”;⁸

- (5) “[MassDEP] and the [Massachusetts] Department of Labor [(“DOL”)] have issued a toothless citation” to the contractor, Mr. Alicea, who she had retained to remove the boiler in the basement of her home, but “[have] pursu[ed] aggressive enforcement procedures against [her], and an inten[d] to hold her solely liable for any defects in the work that Mr. Alicea performed illegally [at her home]” because he is Hispanic and she is a white, European woman;⁹ and
- (6) the Department “[has] treated [the Petitioner] much differently and far more punitively compared to how it [has] treated [Mr. Alicea]” and its “actions have the appearance of impropriety [from which] Presiding Officer [Groulx] should draw the inference of unlawful discrimination against [the Petitioner].”¹⁰

On June 26, 2024, I conducted a Simplified Hearing in accordance with the Grievance Procedure of the Department’s Civil Rights and Non-Discrimination Plan, as updated through December 2022 (“MassDEP CRND Plan”),¹¹ to investigate and resolve the Petitioner’s Title VI discrimination claim against the Department including determining whether the claim was timely under the Grievance Procedure and whether the Department’s issuance of the UAO to the Petitioner was the product of illegal race discrimination prohibited by Title VI. At the Simplified Hearing all Parties were represented by legal counsel. Additionally, the Petitioner and Joanne Flescher (“Ms. Flescher”), an Environmental Analyst III in the Asbestos Program of the

⁸ Id.

⁹ Id., at pp. 13-14.

¹⁰ Id., at pp. 14-15.

¹¹ In this Final Decision, the term “Grievance Procedure” means the Grievance Procedure of the MassDEP CRND Plan.

Department's Western Regional Office who was involved in the Office's issuance of the UAO to the Petitioner, provided sworn testimony on the Petitioner's Title VI race discrimination claim. As explained below, at pp. 6-30, based on the Petitioner's and Ms. Flescher's sworn testimony at the Simplified Hearing, the legal arguments made at the Hearing by the Parties' respective legal counsel, Title VI requirements, and the provisions of EEA's 2021 EJ Policy, EEA's EJS, and the Department's EJS, I issue this Final Decision pursuant to the Grievance Procedure making the following findings:

- (1) the Department has jurisdiction to investigate and resolve the Petitioner's Title VI discrimination claim pursuant to the Grievance Procedure;
- (2) the Petitioner's Title VI discrimination claim is untimely under the Grievance Procedure because it was made more than 180 days after the Department issued the UAO to the Petitioner; and
- (3) the Petitioner's Title VI discrimination claim fails on the merits because the Department's issuance of the UAO was not the product of illegal race discrimination barred by Title VI.

STATUTORY AND REGULATORY FRAMEWORK

The MassDEP CRND Plan provides that:

It is [MassDEP's] policy . . . that *no person shall be denied benefits or subjected to discrimination, intimidation, or retaliation in any MassDEP program, service, or activity on the basis of one's sex, race, color, religion, creed, national origin, gender identity, income, disability, age, sexual orientation, ethnicity, genetic information, ancestry, or status as a veteran. . . .*

MassDEP CRND Plan, at p. 4 (emphasis supplied). It also provides that "[t]he objectives of [the MassDEP CRND Plan] are":

- (1) "[t]o outline MassDEP's goals and principles in the areas of civil rights,

non-discrimination[,] and environmental justice, *and to provide clear procedures for filing, investigating, and resolving civil rights and non-discrimination complaints in a prompt and fair manner*”;¹²

- (2) “[t]o ensure MassDEP’s compliance with Civil Rights and Non-Discrimination laws . . . and to assign responsibilities for ensuring compliance”;¹³
- (3) “[t]o ensure that *all persons* are able to receive the benefits of MassDEP programs, services[,] and activities consistent with the notions of fair treatment, equal protection, self-determination, and the just distribution of the benefits and burdens of decisions and actions”;¹⁴ and
- (4) “[t]o ensure that *all persons*, including limited English proficiency (LEP) individuals, and individuals with disabilities, are provided meaningful access to MassDEP programs, services[,] and activities.”¹⁵

The MassDEP CRND Plan also sets forth the legal authority requiring Title VI and non-discrimination compliance, including Title VI and the U.S. Environmental Protection Agency’s (“USEPA”) Title VI Regulations at 42 CFR 7 which bar both intentional discrimination and disparate or disproportionate impact discrimination by State agencies such as MassDEP receiving federal funds from the USEPA. MassDEP CRND Plan, at pp. 4-5; In the Matter of Palmer Renewable Energy, LLC, OADR Docket No. 2021-010 (“PRE”), Recommended Final Decision (September 30, 2022), 2022 WL 17479440, *47, 2022 MA ENV LEXIS 39, *111-13, adopted as Final Decision (November 28, 2022), 2022 WL 17479443, 2022 MA ENV LEXIS 35. Specifically, Title VI and the USEPA’s Title VI Regulations “preclude any EEA agency or program from using criteria or methods of administration, which have the effect of subjecting

¹² MassDEP CRND Plan, at p. 4 (emphasis supplied).

¹³ Id.

¹⁴ Id. (emphasis supplied).

¹⁵ Id. (emphasis supplied).

individuals to discrimination because of their race, color, or national origin.”¹⁶ PRE, 2022 WL 17479440, *47, 2022 MA ENV LEXIS 39, *112. The USEPA's Title VI Regulations also prohibit intentional discrimination and disparate impact discrimination based on gender. Id., citing, 40 C.F.R. §§ 7.35(b), 7.35(c).

Under the USEPA's Title VI Regulations, parties may file administrative complaints with the USEPA asserting Title VI violations against a recipient of USEPA financial assistance, but recipients are also required to have “grievance procedures [in place] that assure the [recipient's] prompt and fair resolution of [Title VI] complaints” In the Matter of Brockton Power Co., LLC, OADR Docket Nos. 2011-025 & 026 (“BP”), Recommended Final Decision (July 29, 2016), 2016 WL 8542559, *7, 2016 MA ENV LEXIS 66, *23, citing, 40 CFR 7.90(a), adopted as Interlocutory Decision [of MassDEP Commissioner] (March 13, 2017), 2017 WL 1063662, 2017 MA ENV LEXIS 21; PRE, 2022 WL 17479440, *47, 2022 MA ENV LEXIS 39, *112. The Grievance Procedure sets forth the procedure for the filing of a Title VI discrimination claim against the Department, including the information that the claimant must provide in writing to the Department in order to enable the Department to investigate and resolve the Title VI discrimination claim. MassDEP CRND Plan, at pp. 4-5, 18-19. It also provides that the Department’s Non-Discrimination Coordinator initially reviews or performs an intake review of a Title VI discrimination claim (“grievance”) against the Department to determine whether (1) “the grievance has met the minimum requirements” for the filing of a Title VI discrimination

¹⁶ 40 C.F.R. § 7.35(b); 42 U.S.C. § 2000d.

claim against the Department; (2) “the Department has jurisdiction” over the matter; and (3) the grievance is timely.”¹⁷ Id., at p. 19.

“If the minimum requirements” for the filing of a Title VI discrimination claim against the Department pursuant to the Grievance Procedure “have not been met and the grievance is not accepted, the Non-Discrimination Coordinator will inform the Factfinder” in OADR (“the OADR Factfinder”) responsible for investigating and resolving a Title VI discrimination claim against the Department,¹⁸ who “will [then] issue a Final Decision [on the claim] based on non-compliance with the minimum requirements.” Id. If, however, the minimum requirements” for the filing of a Title VI discrimination claim against the Department pursuant to the Grievance Procedure “have been met, the Non-Discrimination Coordinator will notify the petitioner in writing within 10 calendar days of receipt of the grievance that the minimum requirements have been met” and the OADR Factfinder will then investigate and resolve the claim in accordance with the Grievance Procedure. Id., at pp. 19-20.

PROCEDURAL BACKGROUND

As OADR’s Chief Presiding Officer, I am the OADR Factfinder under the Grievance Procedure responsible for investigating and resolving Title VI discrimination claims against the Department. Accordingly, on June 13, 2024 I issued an Order (“the June 13th Order”) confirming my understanding that the Petitioner’s Title VI discrimination claim against the Department was at that time undergoing an intake review by the Department’s Non-Discrimination Coordinator in

¹⁷ The Grievance Procedure provides that a Title VI discrimination claim must be submitted to the Department “within 180 days of the of the date(s) of occurrence of the alleged discriminatory action or [the] date of discovery or the latest instance of an alleged continuing occurrence.” MassDEP CRND Plan, at p. 18.

¹⁸ MassDEP CRND Plan, at pp. 16-17, 19.

accordance with the Grievance Procedure.¹⁹ My June 13th Order noted that if the Non-Discrimination Coordinator determined that the Petitioner had met the minimum requirements under the Grievance Procedure for the filing of a Title VI discrimination claim against the Department, I would conduct a formal process in accordance with the Grievance Procedure to investigate and resolve the claim, specifically, I would conduct a Simplified Hearing. See MassDEP CRND Plan, at pp. 19-20.

My June 13th Order stated that I would conduct a Simplified Hearing on Wednesday, June 26, 2024, on the Zoom Internet Platform to investigate and resolve the following issue: was the Department's issuance of the UAO to the Petitioner the product of illegal race discrimination prohibited by Title VI? My June 13th Order also directed the Petitioner and Ms. Flescher to attend the Simplified Hearing to provide sworn testimony on this issue.

On June 17, 2024, the Department's Non-Discrimination Coordinator officially referred the Petitioner's Title VI discrimination claim to me for investigation and resolution pursuant to the Grievance Procedure after completing her intake review of the claim and determining that the Petitioner had met the minimum requirements under the Grievance Procedure for the filing the claim against the Department. However, the Department's Non-Discrimination Coordinator reported that "it [was] not clear that the Department ha[d] jurisdiction or that the [Petitioner's Title VI discrimination claim] was timely"²⁰ and "[b]ecause a determination on these questions

¹⁹ My June 13th Order was entitled "Order Scheduling Simplified Hearing to Investigate and Resolve Petitioner's Title VI Discrimination Claim."

²⁰ See n. 17, at p. 9 above.

would require additional factfinding” she referred resolution of those issues to me.

After reviewing the June 17th report of the Department’s Non-Discrimination Coordinator, I issued an Order on June 18, 2024²¹ confirming that I would be conducting the Simplified Hearing on Wednesday, June 26, 2024, on the Zoom Internet Platform and that the purpose of Simplified Hearing would be for me to investigate and resolve the Petitioner’s Title VI Discrimination claim, including the following issues related to the claim:

- (1) whether the Department has jurisdiction to investigate and resolve the Petitioner’s Title VI discrimination claim pursuant to the Grievance Procedure;
- (2) whether the Petitioner’s Title VI discrimination claim against the Department is timely under the Grievance Procedure; and
- (3) whether the Department’s issuance of the UAO to the Petitioner was the product of illegal race discrimination barred by Title VI?

My June 18th Order also directed the Petitioner and Ms. Flescher to attend the Simplified Hearing to provide sworn testimony on these issues. My June 18th Order also directed each Party (the Petitioner and MassDEP) to file a legal memorandum by June 25, 2024, setting forth their respective positions on these issues and supporting them by citing to specific legal authorities, including but not limited to statutes, regulations, policies, and judicial decisions.

Only MassDEP complied with my June 18th Order by filing a timely legal memorandum on June 25, 2024 setting forth its positions on the issues in a detailed manner and supporting them with legal authorities. The Petitioner did not file a legal memorandum setting forth her

²¹ My June 18th Order was entitled “Amended Order Scheduling Simplified Hearing to Investigate and Resolve Petitioner’s Title VI Discrimination Claim.”

positions on the issues, but instead filed a memorandum on June 24, 2024, entitled “Petitioner’s Position on Discrimination Claim.”

In her June 24th Memorandum, the Petitioner re-asserted her Title VI discrimination claim against the Department²² but indicated that she did not want me to investigate and resolve the claim pursuant to the Grievance Procedure because “[she] raised [the claim] in her [May 13, 2024] [Pre-Hearing] memorandum [in her appeal of the UAO] as part of her overall defense against what she perceives as unjust treatment at the hand of DEP, and [would] continue to do so as part of her presentation to [] Presiding Officer [Groulx]” in her appeal of the UAO.²³ For these reasons, the Petitioner added that “[she] [did] not . . . wish to pursue a separate complaint or action regarding [her Title VI] discrimination [claim against the Department]” pursuant to the Grievance Procedure and “[requested] that [I] dismiss this separate complaint” made under the Procedure.²⁴

In essence, the Petitioner’s June 24th Memorandum was a Motion to halt my investigation and resolution of the Petitioner’s Title VI discrimination claim pursuant to the Grievance Procedure and allow her to pursue the claim in her appeal of the UAO before Presiding Officer Groulx. The Department opposed the Petitioner’s Motion because, as it correctly noted in its opposition, the Grievance Procedure is the sole vehicle for an individual or entity to pursue a Title VI discrimination claim against the Department. See Department’s June 25, 2024 Legal Memorandum, at pp. 4-6. The Department’s position was further supported by the 2017

²² Petitioner’s June 24th Memorandum, at pp. 1-2.

²³ Id., at p. 2.

²⁴ Id.

Interlocutory Decision in BP, supra, of the Department's then-Commissioner adopting my Recommended Final Decision in that case that the Grievance Procedure would be the vehicle for a party to pursue a Title VI discrimination claim and not in an administrative appeal before OADR.²⁵ Accordingly, I issued an Order on June 25, 2024 denying the Petitioner's Motion to halt my investigation and resolution of the Petitioner's Title VI discrimination claim pursuant to the Grievance Procedure and proceeded to conduct the Simplified Hearing on June 26, 2024 pursuant to the Grievance Procedure to investigate and resolve her Title VI discrimination claim. Given the exclusive remedy of the Grievance Procedure, my Order also barred the Petitioner from pursuing her Title VI discrimination claim in her appeal of the UAO before Presiding Officer Groulx.

FINDINGS

I. THE DEPARTMENT HAS JURISDICTION TO INVESTIGATE AND RESOLVE THE PETITIONER'S TITLE VI DISCRIMINATION CLAIM PURSUANT TO THE GRIEVANCE PROCEDURE

As discussed above, the Petitioner asserts that the UAO the Department issued to her in June 2022 should be vacated because it was the product of illegal race discrimination by the Department barred by Title VI. Petitioner's Pre-Hearing Memorandum in UAO Appeal, at

²⁵ In BP, MassDEP's then-Commissioner noted that "MassDEP [was] in the process of developing a formal Title VI Complaint Policy for the Department" and until such time the Policy was adopted, Title VI discrimination claims could be asserted in an administrative appeal before OADR. BP, 2017 WL 1063662, *2, 2017 MA ENV LEXIS 21, at *5-6. Specifically, MassDEP's then-Commissioner ruled that:

anyone aggrieved by the Department's permit decisions or enforcement orders, based on purported Title VI violations [could] assert such claims in an administrative appeal with [OADR], as the Petitioners [had done] in BP and] [a]s was also done in [that] case, the claims [would be] adjudicated by an OADR Presiding Officer based on the evidentiary record in the case, who [would] forward a Recommended Final Decision to the Department's Commissioner.

Id.

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pp. 13-15. Specifically, the Petitioner asserts that the UAO is “[an] aggressive enforcement procedur[e] [by the Department] against [her] . . . inten[ded] to hold her solely liable for any defects in the work that Mr. Alicea performed illegally [at her home]” because she is a white, European woman and Mr. Alicea is Hispanic. *Id.*, at pp. 13-14.

The Petitioner’s racial discrimination claim is within the purview of Title VI and the USEPA’s Title VI Regulations which “preclude any EEA agency or program from using criteria or methods of administration, which have the effect of subjecting individuals to discrimination because of their race, color, or national origin.”²⁶ *PRE*, 2022 WL 17479440, *47, 2022 MA ENV LEXIS 39, *112. The USEPA’s Title VI Regulations also prohibit intentional discrimination and disparate impact discrimination based on gender. *Id.*, *citing*, 40 C.F.R. §§ 7.35(b), 7.35(c). The Petitioner’s racial discrimination claim is also within the purview of the MassDEP CRND Plan which provides “*no person shall be . . . subjected to discrimination . . . in any MassDEP program, service, or activity on the basis of* [certain characteristics that a person has including their] *sex, race, color, . . . [and] national origin . . .*” MassDEP CRND Plan, at p. 4 (emphasis supplied). In sum, I find that the Department has jurisdiction to investigate and resolve the Petitioner’s Title VI discrimination claim pursuant to the Grievance Procedure.

II. THE PETITIONER’S TITLE VI DISCRIMINATION CLAIM AGAINST THE DEPARTMENT IS BARRED AS UNTIMELY UNDER THE GRIEVANCE PROCEDURE BECAUSE THE PETITIONER FAILED TO MAKE THE CLAIM WITHIN 180 DAYS AFTER THE UAO’S ISSUANCE

As discussed above, the Grievance Procedure requires a party to file a Title VI discrimination claim with Department “within 180 days of the of the date(s) of occurrence of the

²⁶ 40 C.F.R. § 7.35(b); 42 U.S.C. § 2000d.

alleged discriminatory action or [the] date of discovery or the latest instance of an alleged continuing occurrence.” MassDEP CRND Plan, at p. 18. Here, I find that the Petitioner’s Title VI discrimination claim against the Department is barred as untimely under the Grievance Procedure because: (1) the Department’s alleged discriminatory act against the Petitioner barred by Title VI occurred on June 16, 2022, when the Department issued the UAO to the Petitioner; (2) the 180 day deadline for the Petitioner to file a Title VI discrimination claim against the Department pursuant to the Grievance Procedure expired on December 13, 2022; and (3) the Petitioner first raised her Title VI discrimination claim against the Department on May 13, 2024, in the Pre-Hearing Memorandum she filed in her appeal of the UAO, which was 697 days or nearly two years after the Department’s issuance of the UAO.

III. THE PETITIONER’S TITLE VI DISCRIMINATION CLAIM FAILS ON THE MERITS BECAUSE THE DEPARTMENT’S ISSUANCE OF THE UAO WAS NOT THE PRODUCT OF ILLEGAL RACE DISCRIMINATION BARRED BY TITLE VI

Even if her Title VI racial discrimination claim against the Department was timely pursuant to the Grievance Procedure, the claim would nevertheless fail on the merits due to the Petitioner’s failure to prove that the Department’s issuance of the UAO against her was the product of illegal race discrimination barred by Title VI. Specifically, the Petitioner failed to prove at the Simplified Hearing that the Department issued the UAO against her because she is a white, European woman and Mr. Alicea is Hispanic.

A. The Remedial Measures that the UAO Ordered the Petitioner to Perform are Race Neutral Remedial Measures to Protect Public Health and Safety

As discussed at the outset of this Final Decision, the improper removal of ACM is not safe and can lead to serious health problems for individuals exposed to ACM. There is no

dispute here that Mr. Alicea improperly removed ACM from the Petitioner's Property, specifically the boiler in the Property's basement, because he was neither licensed nor certified by the Commonwealth as an asbestos-abatement contractor. In response, the Department's UAO directed the Petitioner, as the owner of the Property and, pursuant to the Department's Asbestos Regulations at 310 CMR 7.15, to perform a number of remedial actions, including, among other things, restricting access to the Property's basement and hiring a licensed asbestos abatement contractor, or in the alternative, allowing the Department, to inspect the basement to determine the current status of any remaining asbestos and to remediate any asbestos not in good condition. These are all race neutral remedial measures to protect public health and safety. Accordingly, the Petitioner's Title VI racial discrimination claim against the Department fails.

B. The Petitioner Failed to Present any Direct Evidence Proving Her Racial Discrimination Claim Against the Department

The Petitioner's Title VI racial discrimination claim against the Department also fails because the Petitioner failed to present at the Simplified Hearing any direct evidence proving her claim that the Department issued the UAO against her because she is a white, European woman and Mr. Alicea is Hispanic. At the Simplified Hearing, Ms. Flescher, the Department staff member involved in the UAO's issuance, testified under oath that the Department did not issue the UAO against Petitioner because she is a white, European woman and Mr. Alicea is Hispanic. Her testimony was supported by the Affidavit that she filed in the Petitioner's appeal of the UAO in which she provided detailed sworn testimony that the Department issued the UAO in accordance with Department standard practice after receiving and investigating a complaint that

the ACM covered boiler in the Property's basement had been improperly removed by an unlicensed contractor.²⁷

I accord great weight to Ms. Flescher's testimony because the Petitioner did not present any evidence effectively refuting Ms. Flescher's testimony. In fact, the Petitioner testified under oath at the Simplified Hearing that she does not have any direct evidence proving her claim that the Department issued the UAO against her because she is a white, European woman and Mr. Alicea is Hispanic. Instead, as discussed below, at pp. 17-30, the Petitioner's Title VI racial discrimination claim against the Department is based solely on her serious misstatements about EEA's 2021 EJ Policy, the Department's EJS, and EEA's 2024 EJS.

C. EEA's 2021 EJ Policy, the Department's EJS, and EEA's 2024 EJS Promote Environmental Equity in the Commonwealth, Not Race Discrimination barred by Title VI

The Petitioner contends that EEA's 2021 EJ Policy, the Department's EJS, and EEA's 2024 EJS accord preferential treatment to racial minorities, including individuals who identify as Latino/Hispanic,²⁸ over white persons in violation of Title VI's prohibitions against race discrimination. Petitioner's Pre-Hearing Memorandum in UAO appeal, at pp. 13-15. Specifically, as discussed above, the Petitioner asserts that "the [Department's] official policy . . . [is] to discriminate and enforce compliance of its regulations based on racial preferences, as set out" in EEA's 2021 EJ Policy, the Department's EJS, and EEA's 2024 EJS, and based on this "official policy," the Department, in issuing the UAO against her, accorded preferential treatment to Mr. Alicea who is Hispanic over her, "a white, European woman" in violation of

²⁷ Affidavit of Joanne Flescher (December 23, 2022), ¶¶ 1-24.

²⁸ See n. 6, at p. 4.

Title VI. Id. The Petitioner also points to the Policy’s reference to “Environmental Justice Populations” as further proof of her racial discrimination claim against the Department, contending that the term is a euphemism for racist classifications barred by Title VI. Id. The Petitioner’s claims are without merit because, as discussed below, at pp. 18-30, EEA’s 2021 EJ Policy, the Department’s EJS, and EEA’s 2024 EJS are constitutionally valid measures to promote environmental equity in the Commonwealth in the making of environmental policy decisions and in the development, implementation, and enforcement of all environmental laws, regulations, and policies.

1. The Environmental Equity Mandate of EEA’s 2021 EJ Policy

a. The Policy’s Incorporation of the Environmental Equity Mandate of the 2021 Climate Act

The environmental equity mandate of EEA’s 2021 EJ Policy is reflected by the fact that EEA adopted the Policy following the Massachusetts Legislature’s 2021 enactment of Chapter 8 of the Acts of 2021 entitled “An Act Creating a Next Generation Roadmap for Massachusetts Climate Policy” (“the 2021 Climate Act”).²⁹ PRE, 2022 WL 17479440, *1, 49-56, 2022 MA ENV LEXIS 39, *1-2, 116-30. “Among other provisions, [the 2021 Climate Act], codifie[d] foundational definitions for environmental justice principles and populations, as well as environmental benefits and burdens,” which established a statutory environmental equity

²⁹ EEA’s 2021 EJ Policy replaced EEA’s previous 2017 EJ Policy, which also required the Department to promote environmental equity in the Commonwealth in making environmental policy decisions and in the development, implementation, and enforcement of environmental laws, regulations, and policies. PRE, 2022 WL 17479440, *1, 36-48, 2022 MA ENV LEXIS 39, *1-2, 80-116.

mandate that EEA incorporated in its 2021 EJ Policy. PRE, 2022 WL 17479440, *53, 2022 MA ENV LEXIS 39, *127.

**b. The Policy’s Definitions of “Environmental Justice”,
“Equal Protection”, and “Environmental Justice Principles”**

The environmental equity mandate of EEA’s 2021 EJ Policy is also reflected by the Policy’s definitions of “Environmental Justice”, “Equal Protection”, and “Environmental Justice Principles.” The Policy defines these terms as follows.

“Environmental Justice” is defined as:

- (1) “the principle that *all people have a right to be protected from environmental hazards* and to live in and enjoy a clean and healthful environment *regardless of race, color, national origin, income, or English language proficiency*”; and
- (2) “*the equal protection and meaningful involvement of all people and communities*³⁰ *with respect to the development, implementation, and enforcement of energy, climate change, and environmental laws,*

³⁰ EEA’s 2021 EJ Policy, at p. 3 (emphasis supplied). The Policy defines “meaningful involvement” as as meaning that “*all neighborhoods*” in the Commonwealth:

- (1) “*have the right and opportunity to participate in energy, climate change, and environmental decision-making including [a] needs assessment, [b] planning, [c] implementation, [d] compliance and enforcement, and [e] evaluation*”;
- (2) “are enabled and administratively assisted to participate fully through education and training”;
- (3) “are given transparency/accountability by government with regard to community input”; and
- (4) encouraged to develop environmental, energy, and climate change stewardship.³⁰

Id., at p. 4 (emphasis supplied).

*regulations, and policies and the equitable distribution of energy and environmental benefits and burdens.”*³¹

“Equal Protection” is defined as:

*[the] protection of all groups of people, including all federal and state protected classes under Title VI . . . and M.G.L. Chapter 15 1B, regardless of income, ethnicity, class, handicap, race, color, religious creed, national origin, sex, gender identity, sexual orientation, genetic information, or ancestry from an unfair burden of environmental hazard from industrial, commercial, state and municipal operations or limited access to natural resources, including green space (open space) and water resources, and energy resources, including energy efficiency and renewable energy generation.*³²

“Environmental Justice Principles” are defined as:

principles that support protection from environmental pollution and the ability to live in and enjoy a clean and healthy environment, regardless of race, color, income, class, handicap, gender identity, sexual orientation, national origin, ethnicity or ancestry, religious belief[,] or English language proficiency, which includes:

(i) the meaningful involvement of all people with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies, including climate change policies; and

³¹ EEA’s 2021 EJ Policy, at p. 3 (emphasis supplied). The Policy defines “environmental benefits” as:

the access to clean natural resources, including air, water resources, open space, constructed playgrounds and other outdoor recreational facilities and venues, clean renewable energy sources, [and] environmental enforcement

Id. (emphasis supplied). “Environmental burdens” are defined by the Policy as:

any destruction, damage[,] or impairment of natural resources that is not insignificant[,] . . . including but not limited to, . . . activities that limit access to natural resources and constructed outdoor recreational facilities and venues, . . . and damage to . . . open spaces, and playgrounds from private industrial, commercial or government operations or other activity that contaminates or alters the quality of the environment and poses a risk to public health.

Id., at p. 4 (emphasis supplied).

³² EEA’s 2021 EJ Policy, at p. 3 (emphasis supplied).

*(ii) the equitable distribution of energy and environmental benefits and environmental burdens.*³³

c. The Policy's Statement of Purpose

The environmental equity mandate of EEA's 2021 EJ Policy is also reflected by the Policy's Statement of Purpose which provides that:

*environmental justice principles shall be an integral consideration, to the extent applicable and allowable by law, [by EEA and its agencies, including, the Department,] . . . in the implementation of all EEA programs, including but not limited to . . . the promulgation, implementation[,] and enforcement of laws, regulations, and policies*³⁴

The Policy's Statement of Purpose also provides that it "is intended to reinforce and enhance EEA's efforts [and those of its agencies] to comply with the existing legal mandates" of Title VI," which the Policy acknowledges "preclude any EEA agency or program from using criteria or methods of administration, which have the effect of subjecting individuals to discrimination because of their race, color, or national origin" and which the Policy "incorporated . . . by reference."³⁵

d. The Policy's Recognition of Environmental Justice Populations

The environmental equity mandate of EEA's 2021 EJ Policy is also reflected by the Policy's recognition of communities in the Commonwealth that the Policy describes as Environmental Justice Populations ("EJ Populations"), which have been unfairly or disproportionately burdened by environmental hazards from industrial and/or commercial

³³ EEA's 2021 Policy, at p. 4 (definition of "Environmental Justice Principles") (emphasis supplied).

³⁴ EEA's 2021 EJ Policy, at p. 4 (definition of "Environmental Justice Principles"; and p. 5 (Statement of Purpose) (emphasis supplied).

³⁵ EEA's 2021 EJ Policy, at p. 6.

operations.³⁶ Contrary to the Petitioner’s claims, the term “EJ Populations” is not a euphemism for racist classifications barred by Title VI for the following reasons.

First, the Policy’s definition of an EJ Population is not based solely on racial classifications, but also other classifications, including low income and limited English proficiency.³⁷ Specifically, the Policy defines an EJ Population as “a neighborhood that meets 1 or more of the following criteria”:

- (1) the annual median household income is not more than 65 per cent of the statewide annual median household income;
- (2) minorities comprise 40 per cent or more of the population;
- (iii) 25 per cent or more of households lack English language proficiency;³⁸ *or*
- (iv) minorities comprise 25 per cent or more of the population and the annual median household income of the municipality in which the neighborhood is located does not exceed 150 per cent of the statewide annual median household income³⁹

³⁶ EEA’s 2021 Policy, at p. 5. EEA’s previous 2017 EJ Policy also properly recognized EJ Populations. PRE, 2022 WL 17479440, *36-59, 2022 MA ENV LEXIS 39, *77-143.

³⁷ EEA’s 2021 Policy, at p. 4 (definition of “Environmental Justice (EJ) Population).

³⁸ EEA’s 2021 EJ Policy, at 6. The Policy also uses the term “English Isolation” in connection with households lacking English language proficiency. Id., at p. 4 (definition of “English Isolation”). The Policy defines the term as:

households that are English Language Isolated according to federal census forms, or do not have an adult over the age of 14 that speaks only English or English very well.

Id.

³⁹ EEA’s 2021 EJ Policy, at 6. Under EEA’s 2021 EJ Policy, “a neighborhood that does not meet [one or more of the four] criteria [set forth above], but a geographic portion of that neighborhood meets at least [one] criterion, the [EEA] secretary [is authorized to] designate that geographic portion as an environmental justice population upon the petition of at least 10 residents of the geographic portion of that neighborhood meeting any such criteria” Id. However, the EEA Secretary is also authorized not to designate “a neighborhood, including any geographic portion thereof [as] . . . an environmental justice population upon [making] a finding that”:

- (A) the annual median household income of that neighborhood is greater than 125 per cent of the statewide median household income;

For those individuals in EJ Populations that are vulnerable health-wise, the Policy recognizes that group of individuals as “Vulnerable Health EJ Populations” which the Policy defines as being:

segments of the [EJ] population that have evidence of higher than average rates of environmentally-related health outcomes, including but not limited to childhood asthma, low birth weight, childhood lead poisoning, and/or heart disease morbidity.⁴⁰

Second, the Policy’s definitions of “EJ Populations” and “Vulnerable EJ Populations” recognize the unfortunate reality that “[m]any EJ Populations are located in densely populated urban neighborhoods in and around the [Commonwealth’s] oldest industrial areas . . . [and that] [t]hese high-minority/low-income neighborhoods sometimes encompass only a small portion of the land area of the Commonwealth[,] . . . but they host, or are in close proximity to, many of the [Commonwealth’s] contaminated and abandoned sites, regulated facilities, and sources of pollution.”⁴¹ Springfield, where the Property is located and the Petitioner lives, is such an EJ community.

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- (B) a majority of persons age 25 and older in that neighborhood have a college education;
 - (C) the neighborhood does not bear an unfair burden of environmental pollution; and
 - (D) the neighborhood has more than limited access to natural resources, including open spaces and water resources, playgrounds and other constructed outdoor recreational facilities and venues.

Id.

⁴⁰ EEA’s 2021 EJ Policy, at p. 5.

⁴¹ EEA’s 2021 EJ Policy, at p. 8. As was noted in PRE, this inequitable environmental socio-economic condition is not unique to Massachusetts but exists in other areas of the United States. PRE, 2022 WL 17479440, *37, n. 126, 2022 MA ENV LEXIS 39, *84-85, n. 126, citing, RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (“The Color of Law”), at pp. 48-57. In the Color of Law, Rothstein has made a compelling argument based on extensive historic and legal research that the cause for this inequitable environmental socio-economic condition is racial and economic segregation resulting from a century or more of local, state, and/or federal housing and land use (zoning) policies and laws that have made privately owned housing in many neighborhoods in the United States unaffordable for

Springfield has many residents who are low income, minority, and/or English Language Isolated within the ambit of EEA’s 2021 EJ Policy. PRE, 2022 WL 17479440, *1, 53, 2022 MA ENV LEXIS 39, *1-2, 127. Springfield also “[has] many contaminated sites and sources of air and water pollution, and high rates of respiratory illness and other diseases that [can] be caused by air and other types of pollutants.” PRE, 2022 WL 17479440, *3, 2022 MA ENV LEXIS 39, *5-6. Recent health studies performed by the Asthma and Allergy Foundation of America (“AAFA”) in 2019 and 2021 found that Springfield has higher rates of respiratory illness and other diseases than the Massachusetts state average. PRE, 2022 WL 17479440, *55, 2022 MA ENV LEXIS 39, *133-34. These studies “analyzed data from across the continental United States and ranked the 100 largest [U.S.] cities where it is challenging to live with asthma,” including Springfield. Id. They also “analyzed eight risk factors that can influence asthma outcomes: poverty, lack of health insurance, air pollution, pollen count, long-term controller medicine use, quick-relief medicine use, smoke-free laws, and access to asthma specialists.” Id.

In the AAFA’s 2019 health study, Springfield “ranked . . . as the number one asthma capital [in the U.S.] based on three health outcomes: asthma prevalence, asthma-related emergency-department visits[,], and asthma-related mortality rates.” Id. Springfield ranked better in the AAFA’s 2021 health study being ranked as the 12th city in the U.S. with the most challenging asthma issues, but the better ranking was no cause for celebration because it meant Springfield was in the top 20 municipalities in the U.S. with the most challenging asthma issues. PRE, 2022 WL 17479440, *55, 2022 MA ENV LEXIS 39, *133-34. The better ranking was

lower-income families of all races to purchase or rent and restricted them to living in areas near contaminated and abandoned sites, industrial facilities, and other sources of pollution. Id.

also overshadowed by the onset of the COVID-19 Pandemic in March 2020 which lasted until May 2023. During the Pandemic, “COVID-19 [infection] rates [were] particularly high in Springfield [causing an] increased concern, given multiple studies establishing a relationship between low-income and minority communities with elevated air pollution levels and increased severity of disease and/or mortality for COVID-19 patients in these communities.” PRE, 2022 WL 17479440, *3, 2022 MA ENV LEXIS 39, *5-6.

In sum, because EJ Populations in the Commonwealth are overburdened by compromised environmental conditions, the Commonwealth has a compelling state interest to rectify this inequitable environmental situation through EEA’s 2021 EJ Policy. The Policy provides that “[w]orking with these EJ populations, EEA [and its agencies] will take direct action as part of the [Policy’s] implementation” to achieve several goals, including “address[ing] environmental and health risks associated with existing and potential new sources of pollution.”⁴² The Policy sets forth several mechanisms for EEA and its agencies to utilize in achieving these goals, including: (1) “[e]nhancing opportunities for residents to participate in environmental, energy, and climate change decision-making”⁴³; and (2) “[e]nhancing the environmental review of new or expanding significant sources of environmental burdens in these neighborhoods,”⁴⁴ by “address[ing] health disparities [and conducting] enhance[d] . . . review of significant new or expanding facilities presenting potential adverse impacts to public health or the

⁴² EEA’s 2021 EJ Policy, at p. 5.

⁴³ Id.

⁴⁴ Id.

environment”⁴⁵

2. The Environmental Equity Mandate of the Department’s EJS and EEA’s 2024 EJS

EEA’s 2021 EJ Policy requires all EEA agencies, including the Department to “develop their own [Environmental Justice Strategy (“EJS”)] to proactively promote environmental justice in all neighborhoods in ways that are tailored to the agencies’ mission.”⁴⁶ In developing their EJS, all EEA agencies are required by the Policy:

[to] consider how to appropriately integrate environmental justice considerations into their departments through policies, programs, or other strategies. In addition[, . . . EEA agencies [are also required to] identify and promote agency-sponsored projects, funding decisions, rulemakings or other actions intended to further environmental justice throughout the Commonwealth in order to show how the fair distribution of [environmental] benefits has been measured. . . .”⁴⁷

The Policy further provides that all EEA agency Environmental Justice Strategies “will be consolidated into one [EEA] Secretariat EJ Strategy”⁴⁸

In accordance with EEA’s 2021 EJ Policy, the Department adopted an EJS tailored to the Department’s mission which EEA consolidated into its 2024 EJS.⁴⁹ EEA’s 2024 EJS, at pp. 89-104. Consistent with the environmental equity mandate of EEA’s 2021 EJ Policy, the Department’s EJS states that the Department’s agency mission is “[t]o protect and enhance the

⁴⁵ Id., at p. 8.

⁴⁶ EEA’s 2021 EJ Policy, at 10.

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ EEA’s 2024 EJS states that through its agencies, including the Department, EEA “seeks to protect, preserve, and enhance the Commonwealth’s environmental resources while ensuring a clean energy future for the state’s residents.” EEA’s 2024 EJS, at p. 2.

Commonwealth’s natural resources - air, water, and land – to provide for the health, safety, and welfare *of all people* and a clean and safe environment for future generations.”⁵⁰ The Department’s EJS also states that “[i]n carrying out this mission[,] [it] commits to address and advance environmental justice and equity *for all people of the Commonwealth*,” which includes “provid[ing] meaningful, inclusive opportunities for people to participate in agency decisions that affect their lives”⁵¹

Also consistent with the environmental equity mandate of EEA’s 2021 EJ Policy, the Department’s EJS:

outlines actions for promoting and integrating EJ considerations across MassDEP’s programs, policies, activities, and other strategies as well as meeting MassDEP’s EJ goals *to ensure the equal protection and meaningful involvement of all people residing in the Commonwealth with respect to environmental protection and the equitable development, implementation, and enforcement of environmental laws, regulations, and policies*.⁵²

The Department’s EJS identifies the actions that MassDEP will conduct to implement these EJ goals, including:

communicat[ing] with MassDEP staff, [Commonwealth] residents[,] . . . EJ population members[,] and advocacy groups about MassDEP’s EJ program, including its projects, activities, and opportunities for residents to participate in key decision-making proceedings[,] . . . [and] mak[ing] [MassDEP’s] website information accessible in multiple languages [to assist persons of limited English proficiency].⁵³

The Department’s EJS also calls for the Department “[to] collaborate with the community

⁵⁰ EEA’s 2024 EJS, at p. 91 (emphasis supplied).

⁵¹ *Id.* (emphasis supplied).

⁵² *Id.* (emphasis supplied).

⁵³ *Id.*, at p. 93.

including rural and urban residents, environmental justice/grassroots organizations, community-based organizations, regional planning organizations, and local officials to strengthen community engagement and public involvement” in the making of environmental policy decisions and in the development, implementation, and enforcement of all environmental laws, regulations, and policies.⁵⁴

Consistent with the recognition of EEA’s 2021 EJ Policy that EJ Populations in the Commonwealth are overburdened by compromised environmental conditions and to address this inequity, the Department’s EJS states that the Department:

is applying its internal Policy on Penalty Assessment for Violations Occurring in Environmental Justice (“EJ”) Populations (ENF-20-001) that provides guidance to [Department] staff to consider and assess civil administrative penalties for violations occurring in an EJ population and for violations occurring outside an EJ population that affect an EJ population.⁵⁵

The Department’s EJS also states that the Department “will [t]arget inspections and other compliance assurance activities at facilities that could impact one or more EJ populations[;] . . . [e]ncourage EJ populations to identify supplemental environmental projects (SEPs) that implement community needs for environmental benefits[;] . . . [s]eek to ensure that sufficient funding is available to fully implement MassDEP’s compliance and enforcement activities[;] [and] [d]evelop and report to EEA metrics related to enforcement activities in EJ vs non-EJ populations.”⁵⁶

⁵⁴ Id., at pp. 94-96.

⁵⁵ Id., at p. 99. EEA’s 2024 EJS also recognizes the plight of EJ Populations by stating that “[f]or far too long, low-income, racial, and ethnic minorities; indigenous and tribal communities; and English-isolated populations have borne the brunt of adverse environmental impacts and industrial pollution.” EEA’s 2024 EJS, at p. 5.

⁵⁶ Id.

3. Summary

To sum up, EEA's 2021 EJ Policy, the Department's EJS, and EEA's 2024 EJS require the Department's environmental policy decisions and development, implementation, and enforcement of all environmental laws, regulations, and policies to be performed in a manner that promotes environmental equity by:

- (1) not discriminating, either intentionally or by disparate or disproportionate impact, against any persons due to their race, color, income, class, handicap, gender identity, sexual orientation, national origin, ethnicity or ancestry, religious belief, or English language proficiency;⁵⁷
- (2) providing meaningful involvement to all people with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies, including climate change policies;⁵⁸
- (3) furthering the equitable distribution of environmental benefits;⁵⁹ and
- (4) furthering the equitable distribution of environmental burdens.⁶⁰

Moreover, as discussed in detail above at pp. 17-28 and contrary to the Petitioner's assertions, EEA's 2021 EJ Policy, the Department's EJS, and EEA's 2024 EJS are not based solely on racial classifications, but also other classifications including low income and limited English proficiency. These measures also properly recognize that EJ Populations in the Commonwealth are communities mostly low income and of color located in densely populated urban

⁵⁷ EEA's 2021 EJ Policy, at pp. 3-4 (definitions of "Environmental Justice", "Equal Protection", "Environmental Benefits", "Environmental Burdens", and "Environmental Justice Principles"); and p. 5 ("Statement of Purpose" of EEA's EJ Policy).

⁵⁸ EEA's 2021 EJ Policy, at p. 4 (definition of "Meaningful Involvement").

⁵⁹ EEA's 2021 EJ Policy, at p. 3 (definition of "environmental benefits").

⁶⁰ EEA's 2021 EJ Policy, at p. 4 (definition of "environmental burdens").

neighborhoods, that are overburdened by compromised environmental conditions as a result of being located in the vicinity of the Commonwealth's oldest industrial sites and contaminated and abandoned sites, regulated facilities, and sources of pollution.

CONCLUSION

For the reasons set forth above, the Petitioner's Title VI discrimination claim is dismissed because it is untimely under the Grievance Procedure, and even if it was timely filed pursuant to the Grievance Procedure, the claim fails on the merits because the Department's issuance of the UAO was not the product of illegal race discrimination barred by Title VI. This matter will now return to Presiding Officer Groulx for adjudication of the Petitioner's appeal of the UAO. Per my June 25, 2024 Order, the Petitioner is barred from pursuing her Title VI discrimination claim in her appeal of the UAO before Presiding Officer Groulx because the Grievance Procedure is the exclusive remedy for pursuing a Title VI discrimination claim against the Department and the Petitioner's Title VI discrimination claim here has been investigated and resolved pursuant to the Grievance Procedure as set forth in this Final Decision.



Date: July 9, 2024

Salvatore M. Giorlandino
Chief Presiding Officer

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ADDENDUM 1

OADR DESCRIPTION

The Office of Appeals and Dispute Resolution (“OADR”) is an independent quasi-judicial office within the Massachusetts Department of Environmental Protection (“MassDEP”) responsible for advising MassDEP’s Commissioner in resolving all administrative appeals of MassDEP Permit Decisions, Environmental Jurisdiction Determinations, and Enforcement Orders in a neutral, fair, timely, and sound manner based on the governing law and the facts of the case. In the Matter of Tennessee Gas Pipeline Company, LLC, OADR Docket No. 2016-020 (“TGP”), Recommended Final Decision (March 22, 2017), 2017 MA ENV LEXIS 34, at 9, adopted as Final Decision (March 27, 2017), 2017 MA ENV LEXIS 38, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7); see also Mass. R. Prof. C. 1.0(p) (definition of “tribunal”). MassDEP’s Commissioner is the final agency decision-maker in these appeals. TGP, 2017 MA ENV LEXIS 34, at 9, citing, 310 CMR 1.01(14)(b). To ensure its objective review of MassDEP Permit decisions and enforcement orders, OADR reports directly to MassDEP’s Commissioner and is separate and independent of MassDEP’s program offices, Regional Offices, and Office of General Counsel (“OGC”). TGP, 2017 MA ENV LEXIS 34, at 9.

OADR staff who advise MassDEP’s Commissioner in resolving administrative appeals are Presiding Officers. Id. Presiding Officers are senior environmental attorneys at MassDEP appointed by MassDEP’s Commissioner to serve as neutral hearing officers in administrative appeals. Presiding Officers are the equivalent of environmental administrative law judges who have significant authority under the Adjudicatory Proceeding Rules at 310 CMR 1.01 to adjudicate appeals, including the authority to issue Orders “to secure [the] just and speedy determination of every [administrative] appeal.” 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(13)(d)-(13)(f). This authority includes fostering settlement discussions between the parties in administrative appeals and resolving appeals by conducting pre-hearing conferences with the parties; ruling on dispositive motions; conducting evidentiary Adjudicatory Hearings (quasi-judicial/civil courtroom trial type proceedings), which includes the authority to establish prior to the Hearings, the number of witnesses that the parties may offer at the Hearings and to exclude witnesses whose testimony would be duplicative, irrelevant, or otherwise unnecessary; and issuing Recommended Final Decisions on appeals to MassDEP’s Commissioner. TGP, 2017 MA ENV LEXIS 34, at 9-10, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(13)(d)-(13)(f), 1.01(14)(a), 1.03(7). MassDEP’s Commissioner, as the agency’s final decision-maker, may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision issued by a Presiding Officer in an appeal. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(b). Unless there is a statutory directive to the contrary, the Commissioner’s Final Decision can be appealed to Massachusetts Superior Court pursuant to G.L. c. 30A, § 14. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(f).

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