

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

June 29, 2021

**In the Matter of
Jeremy L. Ethier, Sr.
d/b/a Magic Meadow Farms**

**Docket No. 2020-025
DEP File Nos.:
Enforcement Doc. No. 00009628 (UAO)
Enforcement Doc. No. 00009709 (PAN)**

RECOMMENDED FINAL DECISION

INTRODUCTION

On July 9, 2020, the Central Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued two enforcement orders against Jeremy L. Ethier, Sr., d/b/a Magic Meadow Farms (“Mr. Ethier” or “the Petitioner”) for his purported violation of MassDEP’s Solid Waste Management Regulations at 310 CMR 19.014 in connection with his purported establishment, construction, operation, or maintenance of an illegal dumping ground on a near two-acre portion of real property (“the Site”) located at 147 Log Cabin Road in Ashby, Massachusetts (“the Property”). UAO, ¶¶ 3-7; PAN, ¶¶ 3-7. These enforcement orders, which were based on inspections that MassDEP staff members conducted of the Site on September 16, October 15, and October 21, 2019, were the following:

- (1) a Unilateral Administrative Order (“UAO”) directing Mr. Ethier to immediately cease his acceptance of any solid waste at the Site and



perform remedial actions within certain time periods to correct his violation of 310 CMR 19.014, including submitting a remediation plan to MassDEP for cleanup of the Site prepared by a Massachusetts Registered Professional Engineer with expertise in solid waste management, UAO, ¶¶ 10.A-10. F; and

- (2) a Notice of Intent to Assess a Civil Administrative Penalty (“PAN”) directing Mr. Ethier to pay a civil administrative penalty of \$9,656.00 to the Commonwealth for having violated 310 CMR 19.014. PAN, ¶¶ 11, 12.A-12.K.

Mr. Ethier appealed the UAO and PAN to MassDEP’s Office of Appeals and Dispute Resolution (“OADR”) seeking to have them overturned.¹ However, as discussed in detail below, at pp. 4-15, I recommend that MassDEP’s Commissioner issue a Final Decision dismissing Mr. Ethier’s appeals of the UAO and PAN due to his failure to correct the defects of his appeals, including failing to pay the required \$100.00 filing fee for his appeal of the UAO and failing to

¹ OADR is a quasi-judicial office within MassDEP, which is responsible for advising MassDEP’s Commissioner in resolving all administrative appeals of MassDEP Permit decisions 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). 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 the Department appointed by MassDEP’s Commissioner to serve as neutral hearing officers in administrative appeals. Presiding Officers are responsible for fostering settlement discussions between the parties in administrative appeals, and to resolve appeals by conducting pre-hearing conferences with the parties and evidentiary Adjudicatory Hearings (quasi-judicial/civil courtroom trial type proceedings) 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(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).

set forth the specific grounds for his appeals as required by regulation and/or statute. Mr. Ethier has failed to correct these defects notwithstanding my March 10 and 12, 2021 Orders directing him to correct the defects by March 26, 2021 or face dismissal of his appeals of the UAO and PAN.

Dismissal of Mr. Ethier's appeals of the UAO and PAN is also warranted because of his failure to comply with my March 10 and 12, 2021 Orders directing him to comply with the requirements of my February 9, 2021 Scheduling Order ("February 9th Scheduling Order") by March 26, 2021 or face dismissal of his appeals of the UAO and PAN. See below, at pp. 15-16. These requirements were: (1) initiating discussions with MassDEP to ascertain whether there was any reasonable possibility of his appeals of the UAO and PAN being settled by agreement of the parties; and (2) filing a Pre-Hearing Statement providing more detail regarding the grounds for his appeals of the UAO and PAN and the witnesses who would be testifying on his behalf at the evidentiary Adjudicatory Hearing ("Hearing") that I had scheduled in the case for Wednesday, May 26, 2021 if he and MassDEP did not settle the case.² Under my February 9th Scheduling Order, Mr. Ethier was to have initiated the required discussions with MassDEP and filed his Pre-Hearing Statement prior to the March 10, 2021 Pre-Hearing Conference that I conducted with the parties in the case. After he failed to do so, I ordered him on March 10 and 12, 2021 to perform these actions by March 26, 2021 or face dismissal of his appeals of the UAO and PAN. He failed to heed my warning. Accordingly, his appeals of the UAO and PAN should

² On May 11, 2021, I cancelled the Hearing as result of Mr. Ethier's failure to comply with my March 10 and 12, 2021 Orders and informed him and MassDEP that I would be issuing this Recommended Final Decision recommending that MassDEP's Commissioner issue a Final Decision dismissing Mr. Ethier's appeals of the UAO and PAN.

be dismissed.

DISCUSSION

I. MR. ETHIER'S APPEALS OF THE UAO AND PAN SHOULD BE DISMISSED BECAUSE OF HIS FAILURE TO CORRECT THE DEFECTS OF THE APPEALS WHICH HE WAS ORDERED TO CORRECT

A. The Actions Mr. Ethier Was Required to Perform to Properly Appeal the UAO

Paragraphs 14-17 of the UAO, informed Mr. Ethier that he had to do the following to properly appeal the UAO:

- (1) he had to file with OADR a “[written] request an adjudicatory hearing . . . [pursuant to the Adjudicatory Proceeding Rules at] 310 CMR 1.01,³ within twenty-one (21) days from the date [the UAO’s] issuance,” UAO, ¶¶ 14-15;
- (2) pursuant to 310 CMR 1.01(6)(b), his written request for an adjudicatory hearing had to (a) “state clearly and concisely the facts that [were] the grounds for the request,” (b) state the relief he was seeking in the appeal, and (c) explain why the UAO “[was] not consistent with applicable laws and regulations,” UAO, ¶ 15;⁴ and
- (3) he had to include a \$100.00 filing fee with his written request for an adjudicatory hearing and if he failed to pay the fee, that “[would be] grounds for [denial of his] request for [an adjudicatory] hearing” unless he demonstrated by affidavit that his payment of the fee would cause him “undue financial hardship.” UAO, ¶¶ 16, 17.⁵

³ The Adjudicatory Proceeding Rules at 310 CMR 1.01 govern OADR’s adjudication of all administrative appeals filed with OADR challenging MassDEP permit decisions or enforcement orders. See also n. 1, at p. 2 above.

⁴ The Adjudicatory Proceeding Rules at 310 CMR 1.01(4)(b) also required Mr. Ethier’s request for an adjudicatory hearing to “be signed and dated by [him] . . . or [his] authorized representative,” i.e. his attorney. Under 310 CMR 1.01(4)(b), the signature of a party or its authorized representative requesting an adjudicatory hearing “constitute[s] a certification that the signer has read the document and believes the content of the document is true and accurate, and that the document is not interposed for delay. . . .”

⁵ The provisions of 310 CMR 4.06(1)(a) impose the \$100.00 filing fee requirement and the provisions of 310 CMR 4.06(2) govern waivers of the fee based on claims of “undue financial hardship.” At no time has Mr. Ethier requested a waiver of the \$100.00 filing fee for his appeal of the UAO. In the absence of a waiver of the filing fee, “[the] [f]ailure to pay the filing fee shall be a ground for dismissal of [an administrative appeal].” 310 CMR 4.06(1)(d).

B. The Actions that Mr. Ethier Was Required to Perform to Properly Appeal the PAN

Paragraphs 13.A-13.B of the PAN, informed Mr. Ethier that he had to do the following to properly appeal the PAN.

Paragraph 13.A. of the PAN informed Mr. Ethier that “[e]ffective twenty-one (21) days after the [PAN’s] issuance date[,] [he] . . . [would] be deemed to have waived his right to any [appeal of] . . . th[e] [PAN] unless, within [the] [21] days, [he] . . . file[d] . . . [with OADR] a written [request for an adjudicatory hearing] . . . in compliance with [the] applicable provisions of . . . 310 CMR 1.01” that: (1) denied the PAN’s allegations and/or (2) asserted that the \$9,656.00 PAN amount “[was] excessive.”⁶ His request for an adjudicatory hearing also had to “clearly and concisely state every point of fact and law that [he] intend[ed] to raise in the adjudicatory proceeding” and include a \$100.00 filing fee. PAN, ¶¶ 13.A, 13.B. Just as the UAO had done, the PAN informed Mr. Ethier that his failure to pay the \$100.00 filing fee “[would be] grounds for [denial of his] request for [an adjudicatory] hearing” unless he demonstrated by affidavit that his payment of the fee would cause him “undue financial hardship.” PAN, ¶ 13.B.

C. The Defects of Mr. Ethier’s Appeals of the UAO and PAN

On August 6, 2020, OADR received an unsigned letter from Mr. Ethier dated July 26,

⁶ This statement was in accord with the Civil Administrative Penalties Act, G.L. c. 21A, § 16, which authorizes the Department to assess civil administrative penalties against parties who have “fail[ed] to comply with any provision of any regulation, order, license or approval issued or adopted by the department, or of any law which the department has the authority or responsibility to enforce” The Act provides that:

[w]henver the department seeks to assess a civil administrative penalty on any person, such person shall have the right to an adjudicatory hearing . . . [and] [s]uch person shall be deemed to have waived such right to an adjudicatory hearing unless, within twenty-one days of the date of the department’s notice that it seeks to assess a civil administrative penalty, such person files with the department a written statement denying the occurrence of any of the acts or omissions alleged by the department in such notice, or asserting that the money amount of the proposed civil administrative penalty is excessive. . . .

2020 on the letterhead of “Pink Lynx Disposal, Inc.” requesting “[an] Adjudicatory Hearing [for] Enforcement Document No[s].: 00009709 [and] 00009628.” Enforcement Document Nos. 00009709 and 00009628 are the enforcement order numbers that MassDEP has assigned for the PAN and UAO, respectively, and appear in the caption on the first page of each document. Mr. Ethier’s unsigned signed letter of July 26, 2020 did not constitute a proper request by him for an adjudicatory hearing on the UAO and PAN for the following reasons.

First, in violation of 310 CMR 1.01(4)(b),⁷ the letter was unsigned. Additionally, it did not provide any indication that it had been submitted by Mr. Ethier or his authorized representative as a request for an adjudicatory hearing on the UAO and PAN. As noted above, the unsigned letter was on the letterhead of “Pink Lynx Disposal, Inc.” At the March 10, 2021 Pre-Hearing Conference that I conducted in the case, Mr. Ethier admitted to having drafted the unsigned letter and claimed that it was on the letterhead of “Pink Lynx Disposal, Inc.” because that entity, not he, was responsible for any solid waste violations at the Site as alleged by MassDEP in the UAO and PAN. However, the unsigned letter made no such representations.

Also problematic was the fact that “Pink Lynx Disposal, Inc.” did not exist as a corporate entity in the Commonwealth according to the Massachusetts Secretary of State’s online corporate data base. When I brought this information to Mr. Ethier’s attention at the March 10, 2021 Pre-Hearing Conference, he switched course claiming that the corporate entity of CUM Disposal & Recycling, Inc. (“CDR”) was the party responsible for the solid waste violations alleged by MassDEP in the UAO and PAN. But, in making that claim, Mr. Ethier failed to disclose the following material information on file in the Massachusetts Secretary State’s online corporate data base: (1) on May 26, 2018, Mr. Ethier established CDR as a corporate entity, with him

⁷ See n. 4, at p. 4 above.

serving as its President, Treasurer, Secretary, and sole Director; and (2) on December 14, 2020, he changed CDR's name to "Magic Meadows Farm, Inc.", with him serving as its President. Treasurer, Secretary, and sole Director.

With respect to his appeal of the UAO, Mr. Ethier's unsigned letter also did not constitute a proper request for an adjudicatory hearing on the UAO because it failed to comply with 310 CMR 1.01(6)(b) by failing to specifically, clearly, and concisely state that he was requesting an adjudicatory hearing on the UAO. Nor did his unsigned letter specifically, clearly, and concisely state the grounds for his request for an adjudicatory hearing on the UAO and the relief he was seeking. His unsigned letter also neither denied the UAO's allegations nor asserted that the remedial actions the UAO ordered him to perform to correct his purported solid waste violations at the Site were unreasonable directives of MassDEP.

Mr. Ethier's unsigned letter also did not constitute a proper request by him for an adjudicatory hearing on the PAN because in violation of 310 CMR 1.01(6)(b) and the requirements of G.L. c. 21A, § 16,⁸ his unsigned letter neither denied the PAN's allegations nor asserted that the \$9,656.00 PAN amount was excessive. His unsigned letter also failed to "clearly and concisely state every point of fact and law that [Mr. Ethier] intend[ed] to raise in the adjudicatory proceeding" on the PAN. It simply requested "dismissal of [the] fine."

Lastly, in violation of 310 CMR 4.06(1)(a), Mr. Ethier's unsigned letter only included the \$100.00 filing fee for his appeal of the PAN but failed to include the \$100 filing fee for his

⁸ See n. 6, at p. 5 above.

appeal of the UAO.

D. The March 10 and 12, 2021 Orders Directing Mr. Ethier to Correct the Defects of His Appeals of the UAO and PAN By March 26, 2021

At the March 10, 2021 Pre-Hearing Conference and in my Post Pre-Hearing Conference Orders of March 12, 2021, I issued the following orders directing Mr. Ethier to correct the defects of his appeals of the UAO and PAN by March 26, 2021 or face dismissal of his appeals.

First, pursuant to 310 CMR 4.06(1)(a) and ¶ 16 of the UAO, I ordered Mr. Ethier to pay the required \$100.00 filing fee for his appeal of the UAO.

Second, pursuant to 310 CMR 1.01(6)(e) and 11(b), I ordered Mr. Ethier to file a More Definite Statement in support of his appeals of the UAO and PAN.⁹ Specifically, I ordered Mr. Ethier to file a More Definite Statement in the form of a written memorandum or letter signed by him under the pains and penalties of perjury and containing the following information.

1. Mr. Ethier's Appeal of the UAO

In accordance with the requirements of 310 CMR 1.01(6)(b), Mr. Ethier's More Definite Statement regarding his appeal of the UAO was to specifically, clearly, and concisely:

- (a) state that he was requesting an adjudicatory hearing on the UAO;
- (b) deny the UAO's allegations and/or assert that the remedial actions the

⁹ The provisions of 310 CMR 1.01(6)(e) authorize the Presiding Officer in an administrative appeal of a MassDEP permit decision or enforcement order "[to] order any party to file any pleading, reply to any pleading, or permit any party to amend or withdraw its notice of claim or other pleading upon conditions just to all parties." Under, 310 CMR 1.01(11)(b):

Where a notice of claim for adjudicatory appeal is so vague or ambiguous that it does not provide adequate notice of the issues to be addressed and the relief sought, . . . the Presiding Officer may order, a more definite statement. The motion or order shall set forth the defects complained of and the details desired. A motion or order for a more definite statement also may seek or require the Petitioner to file sufficient evidence to meet the burden of going forward by producing at least some credible evidence from a competent source in support of the position taken. The more definite statement shall be filed within ten days of the Presiding Officer's order being sent or within another time as may be ordered. If the more definite statement is not filed within the prescribed deadline, the Presiding Officer may either dismiss the adjudicatory appeal, grant the relief sought, or make another order as may be appropriate.

UAO ordered him to perform to correct his purported solid waste violations at the Site were unreasonable directives of MassDEP;

- (c) the facts that were the grounds for his request for an adjudicatory hearing on the UAO;
- (d) the relief he was seeking in the adjudicatory hearing on the UAO; and
- (e) explain why the UAO “[was] not consistent with applicable laws and regulations.”

2. Mr. Ethier’s Appeal of the PAN

In accordance with the requirements of 310 CMR 1.01(6)(b) and of G.L. c. 21A, § 16, Mr. Ethier’s More Definite Statement regarding his appeal of the PAN was to specifically, clearly, and concisely:

- (a) state that he was requesting an adjudicatory hearing on the PAN;
- (b) deny the PAN’s allegations and/or assert that the \$9,656.00 PAN amount was excessive;
- (c) set forth every point of fact and law that Mr. Ethier intended to raise in the adjudicatory proceeding on the PAN; and
- (d) the relief he was seeking in the adjudicatory hearing on the PAN.

E. Mr. Ethier’s Failure to Comply with the March 10 and 12, 2021 Orders Directing Him to Correct the Defects of His Appeals of the UAO and PAN by March 26, 2021

1. Mr. Ethier’s Failure to Pay the Required \$100.00 Filing Fee for His Appeal of the UAO

As established at the March 10, 2021 Pre-Hearing Conference and in my March 12, 2021 Post Pre-Hearing Conference Orders, the deadline for Mr. Ethier to pay the required \$100.00 filing fee for his appeal of the UAO was March 26, 2021. He failed to do so. Instead, on March 26, 2021, Mr. Ethier filed a letter with OADR “request[ing] an [unspecified and] acceptable extension of time” to file a More Definite Statement in support of his appeals of the UAO and

PAN, claiming that he needed this extension “to secure [legal counsel]” because “[he] need[ed] help [from legal counsel in] putting [his More Definite Statement] together.”¹⁰ He claimed to “have approached multiple attorneys” to assist him “and [was] waiting to hear back [from them] about retaining their services.” However, in making these claims, he failed to make any mention of the \$100.00 filing fee that he was required to pay for his appeal of the UAO by March 26, 2021. He simply ignored that requirement and my March 10 and 12, 2021 Orders directing him to comply with that requirement by March 26, 2021.

As discussed above, Mr. Ethier has known since July 2020, when MassDEP issued the UAO that he must pay a \$100.00 filing fee to appeal the UAO. He has no reasonable excuse for having failed to pay the fee by the March 26, 2021 deadline that I established in my March 10 and 12, 2021 Orders. Having failed to pay the fee, Mr. Ethier’s appeal of the UAO should be dismissed pursuant to 310 CMR 4.06(1)(a) and (1)(d).¹¹ Mr. Ethier’s failure to pay the fee also warrants dismissal of his appeal of the UAO pursuant to 310 CMR 1.01(3)(e), (10) and 11(d)1 for: (1) failure to comply with my orders; (2) failure to prosecute his appeal of the UAO; and (3) engaging in dilatory conduct to delay resolution of the appeal and prevent the UAO from becoming a final enforcement order of MassDEP.

2. Dismissal of Mr. Ethier’s Appeal of the UAO for Failure to Pay the Required \$100.00 Filing Fee Will Conclusively Establish Mr. Ethier’s Liability for the Solid Waste Violations Set Forth in the UAO and the PAN

The dismissal of Mr. Ethier’s appeal of the UAO for failure to pay the required \$100.00 filing fee for the appeal will have the effect of making the UAO an un-appealed final

¹⁰ Mr. Ethier also made the same request to comply with the requirements of my February 9, 2021 Scheduling Order. I address this request below, at pp. 15-16.

¹¹ See n. 5, at p. 4 above.

enforcement order of MassDEP. This means that Mr. Ethier's liability for the solid waste violations set forth in the UAO and PAN, specifically that he established an illegal dumping ground at the Site in violation of MassDEP's Solid Waste Management Regulations at 310 CMR 19.014 will be conclusively established, and as such, he will be barred by the doctrine of res judicata from challenging the PAN's identical allegations in his appeal of the PAN. In the Matter of Michael J. Cove, OADR Docket No. 2017-031, Recommended Final Decision (May 1, 2020), 2020 MA ENV LEXIS 49, at 26, n. 5, adopted as Final Decision (May 11, 2020) ("[a party] challenging the validity of an order before an agency or a court is bound by an unappealed adverse ruling, not only as to the grounds [the party] raised, but [also] as to those [the party] might have raised but elected to forgo"), citing, Laura Giuffrida v. Zoning Board of Appeals of Falmouth, 68 Mass. App. Ct. 396, 401 (2007). With his liability for the solid waste violations being conclusively established, the only issue for adjudication in Mr. Ethier's appeal of the PAN would have been whether the \$9,656.00 civil administrative penalty amount for his solid waste violations was a proper amount under the Civil Administrative Penalties Act, G.L. c. 21A, § 16, and MassDEP's Civil Administrative Penalty Regulations at 310 CMR 5.00. However, adjudication of this issue, should conclusively be established in MassDEP's favor, because as discussed in the next section, Mr. Ethier failed to file a More Definite Statement in support of his appeals of the UAO and PAN.

3. Mr. Ethier's Failure to File a More Definite Statement In Support of His Appeals of the UAO and PAN

As previously noted above, March 26, 2021, was also the deadline that I established in my March 10 and 12, 2021 Orders for Mr. Ethier to file a More Definite Statement in support of his appeals of the UAO and PAN. Undisputedly, he did not file that More Definite Statement by

March 26, 2021. Instead, he submitted a letter requesting an unspecified extension of time to file a More Definite Statement, claiming that he needed to retain legal counsel to assist him in preparing that document. In opposing Mr. Ethier's request, MassDEP has brought to my attention the following information demonstrating that his claim of needing legal counsel to assist him in preparing his More Definite Statement lacks a good faith basis.

First, MassDEP has brought to my attention that on November 26, 2019, eight months before issuing the UAO and the PAN to Mr. Ethier in July 2020, MassDEP staff met with him and his legal counsel at an Enforcement Conference to discuss the solid waste violations that are the subject of the UAO and PAN at issue here. See MassDEP's: (1) Opposition to Mr. Ethier's Request for An Extension of Time and (2) Renewed Motion to Dismiss Mr. Ethier's Appeals of the UAO and PAN, April 6, 2021 ("MassDEP's Opposition"), at p. 9; Exhibit B to MassDEP's Opposition. The UAO and PAN provide the following details evidencing Mr. Ethier's representation by legal counsel at the November 26, 2019 Enforcement Conference and thereafter:

1. On November 14, 2019, MassDEP issued a Notice of Enforcement Conference to Mr. Ethier describing his solid waste violations that are the subject of the UAO and PAN and setting a date for the Conference for MassDEP staff to meet with him to discuss the violations and the requirements for him to come into compliance. UAO, ¶ 8; PAN, ¶ 8.
2. On November 26, 2019, the Enforcement Conference took place with Mr. Ethier, his attorney, and MassDEP staff to discuss Mr. Ethier's solid waste violations that are the subject of the UAO and PAN, and the requirements for him to come into compliance. Id.
3. On February 28, 2020, per Mr. Ethier's request, MassDEP forwarded a proposed Administrative Consent Order with Penalty ("ACOP") to Mr. Ethier and his attorney for the purpose of attempting to resolve Mr. Ethier's solid waste violations that are the subject of the UAO and PAN. UAO, ¶ 9; PAN, ¶ 9. The proposed ACOP described the solid waste

violations at issue and the remedial actions that Mr. Ethier needed to perform to correct his violations. Id.

4. On March 13, 2020, Mr. Ethier's attorney informed MassDEP that Mr. Ethier would not execute the ACOP because he denied having committed any solid waste violations at the Site. Id.

As further evidence of Mr. Ethier having had the benefit of legal counsel in this matter, MassDEP has also brought to my attention an e-mail message that Mr. Ethier forwarded to MassDEP's counsel on March 19, 2021, one week before his More Definite Statement in support of his appeals of the UAO and PAN was due on March 26, 2021. Exhibit A to MassDEP's Opposition. In his e-mail message, Mr. Ethier informed MassDEP's counsel that "[he] ha[d] forwarded all paperwork . . . to attorneys" that he had received in this case by e-mail "and [was] . . . awaiting the[ir] response . . . and [would] forward more information [to MassDEP's counsel] as soon as possible." Id. "The paperwork" that Mr. Ethier had received by e-mail in the case included my March 12, 2021 Post Pre-Hearing Conference Orders, which confirmed my earlier March 10, 2021 Order directing him to file by March 26, 2021, his More Definite Statement in support of his appeals of the UAO and PAN.

In short, based on the information MassDEP has brought to my attention as discussed above, Mr. Ethier's claim of needing an unspecified extension of time to retain legal counsel to assist him in preparing a More Definite Statement in support of his appeals of the UAO and PAN is dubious because he has had the benefit of legal counsel to advise him in this matter for quite some time. Moreover, assuming for the sake of argument that he is not currently represented by legal counsel in his appeals of the UAO and PAN, Mr. Ethier nevertheless still must comply with the legal requirements discussed above governing the filing of his appeals of the UAO and PAN because these requirements "bind a pro se litigant as they bind other litigants." In the 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; 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). I also add that Mr. Ethier is an astute businessman and litigant cognizant of the legal requirements governing his appeals of the UAO and PAN as evidenced by his attempts, as discussed above, to use corporate entities (which he never disclosed to MassDEP prior to filing his appeals of the UAO and PAN) to shield himself from personal liability for the solid waste violations set forth in the UAO and PAN.

To sum up, Mr. Ethier has no valid excuse for having failed to file a More Definite Statement in support of his appeals of the UAO and PAN by the March 26, 2021 deadline that I established in my March 10 and 12, 2021 Orders. As a result, his appeals of the UAO and PAN should be dismissed pursuant to 310 CMR (11)(d)2 for failure to state a claim upon which relief can be granted. Dismissal of his appeals of the UAO and PAN is also warranted pursuant to 310 CMR 1.01(3)(e), (10) and 11(d)1 for: (1) failure to comply with my orders; (2) failure to prosecute his appeals of the UAO and PAN; and (3) engaging in dilatory conduct to delay resolution of the appeal and prevent the UAO and PAN from becoming final enforcement orders

of MassDEP.

II. MR. ETHIER'S APPEALS OF THE UAO AND PAN SHOULD ALSO BE DISMISSED BECAUSE OF HIS FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE FEBRUARY 9th SCHEDULING ORDER

As discussed above, my March 10 and 12, 2021 Orders also directed Mr. Ethier to comply with the requirements of the February 9th Scheduling Order by March 26, 2021, or face dismissal of his appeals of the UAO and PAN. These requirements, which the February 9th Scheduling Order required Mr. Ethier to fulfill prior to the March 10, 2021 Pre-Hearing Conference I conducted in the case, were directives requiring him to: (1) initiate discussions with MassDEP to ascertain whether there was any reasonable possibility of his appeals of the UAO and PAN being settled by agreement of the parties; and (2) file a Pre-Hearing Statement providing more detail regarding the grounds for his appeals of the UAO and PAN and the witnesses who would be testifying on his behalf at the Hearing. These requirements fully comported with the Presiding Officer's authority under the Adjudicatory Proceeding Rules at 310 CMR 1.01 to facilitate adjudication of an administrative appeal. Barstow, 2020 MA ENV LEXIS 16, at 9-13. These requirements bind all litigants in the appeal regardless of whether they are represented by legal counsel. Id.

My March 10 and 12, 2021 Orders provided Mr. Ethier with another opportunity to comply with the requirements of my February 9th Scheduling Order by directing him to comply with the requirements by March 26, 2021. Undisputedly, Mr. Ethier failed to avail himself to this opportunity. Instead, as discussed above, he submitted a letter on the March 26, 2021 deadline date requesting an unspecified extension of time to comply with the requirements of my February 9th Scheduling Order based on a highly suspect claim that he needed to retain a lawyer to assist him in complying with the requirements. Having failed to comply with the requirements

of my February 9th Scheduling Order, dismissal of his appeals of the UAO and PAN is warranted pursuant to 310 CMR 1.01(3)(e), (10) and 11(d)1 for: (1) failure to comply with my orders; (2) failure to prosecute his appeals of the UAO and PAN; and (3) engaging in dilatory conduct to delay resolution of the appeal and prevent the UAO and PAN from becoming final enforcement orders of MassDEP. Barstow, 2020 MA ENV LEXIS 16, at 9-13.

CONCLUSION

Based on the foregoing, I recommend that MassDEP's Commissioner issue a Final Decision dismissing Mr. Ethier's appeals of the UAO and PAN for the following reasons:

- (1) Mr. Ethier's failure to pay the required \$100.00 filing fee for this appeal of the UAO;
- (2) Mr. Ethier's failure to state a claim upon which can be granted in his appeal of the UAO;
- (3) Mr. Ethier's failure to comply with my Order directing him to file a More Definite Statement in support of his appeal of the UAO;
- (4) Mr. Ethier's failure to state a claim upon which can be granted in his appeal of the PAN; and
- (5) Mr. Ethier's failure to comply with my Order directing him to file a More Definite Statement in support of his appeal of the PAN.



Date: June 29, 2021

Salvatore M. Giorlandino
Chief Presiding Officer

NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Chief Presiding Officer. It has been transmitted to the Commissioner for his 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 G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain notice to that effect.

Once the Final Decision is issued "a party may file a motion for reconsideration setting forth specifically the grounds relied on to sustain the motion" if "a finding of fact or ruling of law on which a final decision is based is clearly erroneous." 310 CMR 1.01(14)(d). "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 filing of a motion for reconsideration is not required to exhaust administrative remedies." Id.

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

SERVICE LIST

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