

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

March 9, 2020

In the Matter of
John F. McMillen and
Quincy Yacht Club

Docket No. 2019-042
DEP File No.: RPAN-BO-19-U-60

RECOMMENDED FINAL DECISION

In November 2019, the Petitioners John F. McMillen and the Quincy Yacht Club filed this appeal challenging a \$500.00 Reporting Penalty Assessment Notice (“RPAN” or “Civil Administrative Penalty”) that the Boston Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to the Petitioners on September 26, 2019 for purportedly failing to file an Underground Storage Tank (“UST”) Compliance Certification with the Department by the compliance deadline in violation of the Underground Storage Tank (“UST”) Systems Regulations at 310 CMR 80.34(1). RPAN, at p. 1.

In the Transmittal Sheet (also known as “the Appeal Notice”) that the Petitioners submitted to the Office of Appeals and Dispute Resolution (“OADR”)¹ when they filed their appeal of the RPAN, the Petitioners requested a Simplified Adjudicatory Hearing (“Simplified

¹ A description of OADR appears in Addendum No. 1, at p. 6 of this Recommended Final Decision.



Hearing”) to contest the \$500.00 penalty assessment. Transmittal Sheet, ¶ 1, Option 2. The Transmittal Sheet required the Petitioners to state their grounds for contesting the \$500.00 penalty assessment: whether “[they were] appealing this penalty assessment because: [1] the acts or omissions alleged in the [RPAN] did not occur; [and/or] [2] the amount of the penalty [was] excessive.” Transmittal Sheet, ¶ 2. However, the Petitioners did not state their grounds for appealing the RPAN. As a result, the Petitioners’ Appeal Notice was deficient and their appeal of the RPAN was subject to dismissal for failure to state a claim upon which relief could be granted.

Instead of issuing a Recommended Final Decision recommending that the Department’s Commissioner issue a Final Decision dismissing the Petitioners’ appeal for failure to state a claim upon which relief could be granted, I accorded the Petitioners with the opportunity to file an Amended Appeal Notice/More Definite Statement pursuant to 310 CMR 1.01(6)(e) and 11(b)² setting forth their grounds for appealing the RPAN. Specifically, on January 16, 2020 I issued an Order directing the Petitioners to file Amended Appeal Notice/More Definite

² 310 CMR 1.01(6)(e) provides that:

Upon a Presiding Officer’s own initiative or by motion of any party, the Presiding Officer may 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.

310 CMR 1.01(11)(b), in turn, provides that:

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, any party may move for, or 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.

Statement with OADR by January 31, 2020 informing me whether they were appealing the RPAN because they contended that: (1) the acts or omissions alleged in the RPAN did not occur; and/or (2) the amount of the \$500.00 penalty was excessive.

My January 16, 2020 Order informed the Petitioners that their Amended Appeal Notice/More Definite Statement had to be in the form of a Memorandum addressed to OADR's Case Administrator and filed with OADR either by:

- (1) electronic mail ("e-mail") at Caseadmin.oadr@mass.gov; or
- (2) Certified Mail, Return Receipt Requested to OADR at the following address: MassDEP/OADR, One Winter Street, 2nd Floor Boston, MA 02108; or
- (3) hand delivery to OADR's Case Administrator at the same address.

My January 16, 2020 Order also informed the Petitioners that if they failed to file their Amended Appeal Notice/More Definite Statement by the January 31, 2020 deadline as required by the Order, I would issue a Recommended Final Decision pursuant to 310 CMR 1.01(10) and (11)(b) recommending that the Department's Commissioner issue a Final Decision dismissing the Petitioner's appeal for failure to state a claim upon which relief could be granted.³ The

³ As noted in n. 2 above, under 310 CMR 1.01(11)(b) a "Presiding Officer may either dismiss [an] adjudicatory appeal . . . or make another order as may be appropriate" in response to a party's failure to file a More Definite Statement. The provisions of 310 CMR 1.01(10) also authorize a Presiding Officer to issue sanctions against a party for failing to comply with a Presiding Officer's directives. Possible sanctions under 310 CMR 1.01(10) include, without limitation:

- (a) taking designated facts or issues as established against the party being sanctioned;
- (b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;
- (c) denying summarily late-filed motions or motions failing to comply with requirements of 310 CMR 1.01(4);
- (d) striking the party's pleadings in whole or in part;

Petitioners failed to heed that warning.

As of the date of this Recommended Final Decision, more than 30 days after expiration of the January 31, 2020 deadline for the Petitioners to file their Amended Appeal Notice/More Definite Statement with OADR, the Petitioners have neither filed that document nor requested an extension of time to file it. Accordingly, I recommend that the Department's Commissioner issue a Final Decision dismissing the Petitioners' appeal for failure to state a claim upon which relief can be granted.



Date: March 9, 2020

Salvatore M. Giorlandino
Chief Presiding Officer

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- (e) dismissing the appeal as to some or all of the disputed issues;
 - (f) dismissing the party being sanctioned from the appeal; and
 - (g) issuing a final decision against the party being sanctioned.

In addition to the dismissal authority conferred by 310 CMR 1.01(10)(e) and 11(b) above, under 310 CMR 1.01(11)(a)2.f, a "Presiding Officer may [also] summarily dismiss [an appeal] sua sponte," when the appellant fails to prosecute the appeal or fails to comply with an order issued by the Presiding Officer. For the same reasons, the Presiding Officer may also dismiss an appeal pursuant to the Officer's appellate pre-screening authority under 310 CMR 1.01(5)(a)15 which authorizes the Officer to "issu[e] orders to parties, including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending prescreening conferences and ordering parties to provide more definite statements in support of their positions."

SERVICE LIST

Petitioners: John F. McMillen and
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Legal Representative: None stated in Petitioner's Appeal Notice;

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JoAnne Kasper-Dunne, Factfinder
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ADDENDUM NO. 1

OADR DESCRIPTION

The Office of Appeals and Dispute Resolution (“OADR”) is a quasi-judicial office within the Massachusetts Department of Environmental Protection (“the Department” or “MassDEP”) which is responsible for advising the Department’s Commissioner in resolving all administrative appeals of Department 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). The Department’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 Department Permit decisions and enforcement orders, OADR reports directly to the Department’s Commissioner and is separate and independent of the Department’s program offices, Regional Offices, and Office of General Counsel (“OGC”). TGP, 2017 MA ENV LEXIS 34, at 9.

OADR staff who advise the Department’s Commissioner in resolving administrative appeals are Presiding Officers. Id. Presiding Officers are senior environmental attorneys at the Department appointed by the Department’s Commissioner to serve as neutral hearing officers, and 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 and making Recommended Final Decisions on appeals to the 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). The Department’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).