

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

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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

March 15, 2024

In the Matter of
Ken James Gordon

OADR Docket Nos.: 2024-004 and 2024-005
Enf. Doc. No. 00017309 and 00016603
Pittsfield, Massachusetts

RECOMMENDED FINAL DECISION

Ken James Gordon ("Petitioner"), has filed these consolidated appeals with the Office of Appeals and Dispute Resolution ("OADR")¹ of the Massachusetts Department of Environmental Protection ("Department") challenging the Department's issuance of a Penalty Assessment Notice ("PAN") (in Docket Number 2024-004) and Unilateral Administrative Order ("UAO") (in Docket Number 2024-005). Both the PAN and the UAO were issued for the alleged violations of the following statutes and regulations:

- The Wetlands Protection Act, G.L. c. 131, § 40 ("MWPA"), and the Wetlands Regulations at 310 CMR 10.00, *et seq.* In particular, the PAN and UAO allege that the Petitioner placed large pieces of fragmented concrete and other debris (e.g. bricks, glass, logs) along the Bank of the West Branch of the Housatonic River, armoring the entirety of the Bank within the property, and within Land Under Water Body,

¹ OADR is an independent quasi-judicial office in the Department which is responsible for advising its Commissioner in resolving all administrative appeals of Department Permit Decisions, Environmental Jurisdiction Determinations, and Enforcement Orders.

Bordering Land Subject to Flooding, and Riverfront Area without first filing a Notice of Intent.

- The Massachusetts Clean Waters Act, G.L. c. 21, §§ 26 – 53, and the 401 Water Quality Regulations at 314 CMR 9.00 arising out of the same alterations.
- G.L. c. 111, §§ 150A and 150A1/2; the Solid Waste Management Regulations at 310 CMR 19.000; and the Site Assignment Regulations for Solid Waste Facilities at 310 CMR 16.00 for allegedly disposing of solid waste at a location without a site assignment and operating a facility to store solid waste without the proper permits.

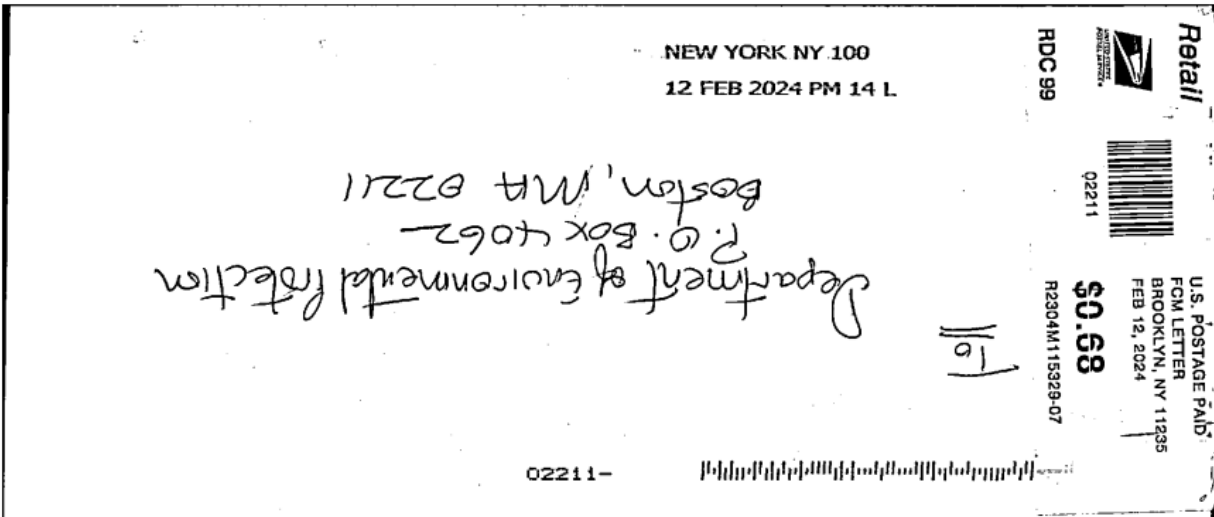
The PAN was issued in the amount of \$30,795. Among other things, the UAO requires the Petitioner to hire an environmental consultant, draft plans to remediate the affected site, and implement the plans.

I. Facts and Procedural History.

On January 17, 2024, the Department issued the PAN and the UAO. See PAN, p. 1.; UAO, p. 1. According to the Petitioner, the PAN and UAO were sent to an incorrect E-mail address and to his vacation home at an incorrect address. Petitioner Response, ¶ 1(a) and (b) (Mar. 7, 2024). The Petitioner states that he received the PAN and UAO "very late," but received them in time to speak with Michael McHugh, Chief of the Division of Wetlands and Waterways, at the Western Regional Office on January 26, 2024. Id. at ¶ 1(c) and (d).

After receiving the PAN and UAO, the Petitioner went to the Department office at 436 Dwight Street, Springfield, Massachusetts, and spoke to Michael McHugh. Id. at ¶ 1(d). According to the Petitioner, this conversation took place on January 26, 2024. Id. Mr. McHugh advised the Petitioner that his only course of action was to submit an appeal. Id.

The Petitioner's appeal was postmarked February 12, 2024, 26 days after the PAN and UAO were issued:



Both the PAN and the UAO described in detail the procedure for appealing them. See PAN; UAO. These documents each described the timeline to appeal and the filing fee associated with them.

The Petitioner purports to appeal both the PAN and the UAO, although he only submitted one filing fee, and does not indicate whether that filing fee is for the PAN or the UAO. The check is dated February 9, 2024. The Petitioner states that Mr. McHugh told him that he only needed to submit one \$100 payment with his appeals. Petitioner Response, ¶ 2. The Petitioner also did not include a written Notice of Claim with his filing.

On February 29, 2024, I issued an order to show cause stating the following:

Given that the timeliness of an appeal is jurisdictional, and there is a fundamental question of whether the Petitioner timely filed the Appeal Notice and paid the filing fees, a show cause order is appropriate. The Petitioner is therefore given until **March 14, 2024**, to explain (1) why this case should not be dismissed for failure to timely file his appeal pursuant to 310 CMR 1.01(6)(a) and (2) why one of the cases should not be dismissed for failure to pay the filing fee.

The Petitioner responded to the Order to Show Cause by letter on March 7, 2024.

II. Applicable Standards.

A. Timeliness of Filing.

Timely filing is a requirement for OADR to have jurisdiction over the appeal. Under 310 CMR 1.01(6)(a), an Appeal Notice must be filed "within 21 days from the date that the notice of Department action was sent to a person." As one case stated:

Both M.G.L. c. 21A, § 16 and 310 CMR 5.00 are explicit that a failure to appeal a PAN within 21 days of the date the PAN is issued is deemed a waiver of the right to appeal. Timely filing is a jurisdictional requirement. In the Matter of Gould, OADR Docket No. 2014-012, 2104 MA ENV LEXIS 66, Final Decision (August 18, 2014); In the Matter of Erkkinen, Docket No. 2011-006, Recommended Final Decision (May 13, 2011), adopted by Final Decision, 2011 MA ENV LEXIS 63 (May 23, 2011). The PAN [in this case] was issued on March 1, 2017. The appeal was filed on June 22, 2017. Because the appeal was not filed within 21 days after the PAN was issued, [the Petitioner] waived its right to a hearing on the PAN. Where an appeal is not timely, OADR lacks jurisdiction to hear the appeal. Matter of Peabody Truck Equipment Corporation, Hearing Officer's Decision on Request for Determination of Timeliness of Penalty Appeal, 1987 WL 228982 (Sept. 8, 1987).

Matter of Nelson, OADR Docket No. 2017-016, Recommended Final Decision (Feb. 13, 2018), 2018 MA ENV LEXIS 27, *28-*29, Final Decision on Voluntary Withdrawal (Jan. 12, 2018), 2018 MA ENV LEXIS 26.

A Presiding Officer may "on the Presiding Officer's own initiative... dismiss appeals for... lack of jurisdiction." 310 CMR 1.01(5)(a)2.; see also 310 CMR 1.01(11)(d) (Motion to Dismiss may be filed for lack of jurisdiction); Matter of Boyajian, OADR Docket No. WET-2010-030, Recommended Final Decision, 2011 MA ENV LEXIS 50 (February 23, 2011), adopted by Final Decision, 2011 MA ENV LEXIS 48 (March 9, 2011). The Presiding Officer may determine whether there is a jurisdictional defect by issuing an order to show cause. 310 CMR 1.01(6)(d); see also, e.g., Matter of Ana Duarte, OADR Docket No. 2022-015, Recommended Final Decision (Mar. 27, 2023), 2023 MA ENV LEXIS 25, *1, Adopted as Final

Decision (Jun. 27, 2023), 2023 MA ENV LEXIS 27; Matter of Emile Tayeh, Jr., OADR Docket No. WET-2019-016, Recommended Final Decision (Jun. 8, 2020), 2020 MA ENV LEXIS 63, *2-*3, Adopted as Final Decision (Jun. 22, 2020), 2020 MA ENV LEXIS 66 (dismissing for failure to file appeal of Superseding Order of Conditions timely).

B. Requirement of a Filing Fee.

Under 310 CMR 4.06(1):

(a) Any person filing a notice of claim for an adjudicatory appeal before the Department shall pay a filing fee of \$ 100.00. Exemptions from the filing fee are defined in the first sentence of Person at 310 CMR 4.02.

(b) The filing fee for a simplified hearing as described in 310 CMR 1.01(8)(a)2. is \$ 25.00 on or after November 3, 1995. Where a filing fee of \$ 100.00 has been received and the Department conducts a simplified hearing, the Department will refund \$ 75.00.

(c) The required form and manner of payment shall be specified by the Department as an element of notice of any right to request an adjudicatory hearing.

(d) Failure to pay the filing fee shall be a ground for dismissal of the request for hearing.

"The required form and manner of payment shall be specified by the Department as an element of notice of any right to request an adjudicatory hearing." 310 CMR 4.06(1)(c).

C. The Notice of Claim.

Under 310 CMR 1.01(6)(a), "Any person having a right to initiate an adjudicatory appeal shall file a written notice of claim for an adjudicatory appeal." "The notice of claim for adjudicatory appeal shall state specifically, clearly and concisely the facts which are grounds for the appeal, the relief sought, and any additional information required by applicable law or regulation.... When the contents of a notice of claim do not meet the requirements of 310 CMR 1.01 and any other applicable regulations, the Presiding Officer shall dismiss the appeal or require a more definite statement. If the person filing the notice of claim fails to file a more

definite statement within the period specified, the appeal shall be dismissed." 310 CMR 1.01(6)(b).

III. Analysis.

At the time of the order to show cause, the Petitioner's filing suffered from three deficiencies. First, the PAN and UAO were both issued on January 17, 2024. PAN, p. 1.; UAO, p. 1. Twenty-one days after January 17, 2024, was February 7, 2024. The letter was postmarked February 12, 2024 (after the expiration of the deadline), and the Department did not receive the Petitioner's filing until after that date. Moreover, the Petitioner's check is dated February 9, 2024. Even though the Petitioner states that the PAN and UAO were sent to the wrong address, he nevertheless received them in time to meet with Mr. McHugh at the WERO office on January 26, 2024, well within the timeframe to appeal. See Petitioner Response, ¶ 1(d). The Petitioner offers no justification for why he failed to file the appeals between January 26, 2024, and February 12, 2024. The Petitioner's appeals remain untimely, and this is a fatal defect that deprives me of jurisdiction to hear his appeal.

Second, the Petitioner only paid one filing fee. Both the PAN and the UAO described the filing fee and the method of payment on page 9 of the PAN and page 6 of the UAO in compliance with 310 CMR 4.06(1)(c). However, the Petitioner only paid one \$100 filing fee, and it is unclear for which appeal the fee was paid. The Petitioner proffered the second filing fee with his response to the Order to Show Cause, although this does not ameliorate that the appeals are untimely. The third deficiency, the Petitioner's failure to submit a Notice of Claim, is moot given that I do not have jurisdiction to hear his appeal.

IV. Conclusion.

Given that the timeliness of an appeal is jurisdictional, and the Petitioner failed to file timely the Appeal Notices, I recommend that the Commissioner issue a Final Decision dismissing this matter for lack of jurisdiction.

A handwritten signature in black ink, appearing to read 'P. M. Groulx', written over a horizontal line.

Patrick M. Groulx
Presiding Officer

Date: March 15, 2024

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