

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

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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

April 11, 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 ON RECONSIDERATION

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 issued a Recommended Final Decision on March 22, 2024, recommending that the Commissioner dismiss the matter for failure to file the consolidated appeals timely. The Commissioner designated the Chief Presiding Officer as the final decision maker in this matter, and he issued a Final Decision on April 5, 2024. The Petitioner filed a motion for reconsideration on April 11, 2024.

I. Motion for Reconsideration.

The Motion for Reconsideration states as follows:

I Ken Gordon is filing this motion for reconsideration of the final decision, pursuant to 310 CMR 1.01(14)(b). I intend to appeal this decision because of the following reasons:

(a) I was never served with any PAN or UAO documents. They were sent to the wrong address.

(b) The PAN and UAO were sent to the wrong Email.

(c) I never know I was in violations of anything with DEP. I was never served.

(d) I was not served with notice for conference hearing.

(e) this case was done without my knowledge.

Motion for Reconsideration (April 9, 2024).

II. Applicable Standard.

Under 310 CMR 1.01(14)(d),

Where a finding of fact or ruling of law on which a final decision is based is clearly erroneous, a party may file a motion for reconsideration setting forth specifically the grounds relied on to sustain the motion. Where the motion repeats matters adequately considered in the final decision, renews claims or arguments that were previously raised, considered and denied, or where it attempts to raise new claims or arguments, it may be summarily denied. The motion shall be filed within seven days from the date the decision is mailed to the parties by the Department. The filing of a motion for reconsideration is not required to exhaust administrative remedies.

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

III. Analysis.

The Petitioner's motion "repeats matters adequately considered in the final decision, renews clais or arguments that were previously raised, considered and denied." 310 CMR 1.01(14)(d). First, "[e]ven 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." Recommended Final Decision, p. 6. Given that the Petitioner had actual knowledge of the PAN and UAO, whether they were sent to an incorrect address is irrelevant. As to the assertion that the Petitioner did not know about this case, the Petitioner filed a response to the Order to Show Cause and those arguments were considered on their merits, and the record is clear that the Petitioner had actual notice. See Recommended Final Decision, pp. 6-7. The Petitioner makes no argument that the legal determination that the appeals were filed untimely is incorrect.

IV. Conclusion.

For the foregoing reasons, I recommend that the Commissioner's designee issue a Final Decision on Reconsideration denying the motion.

A handwritten signature in blue ink, appearing to read 'P. Groulx', is written above a horizontal line.

Patrick M. Groulx
Presiding Officer

Date: April 11, 2024

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