

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
100 CAMBRIDGE STREET, BOSTON, MA 02114 617-292-5500

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

December 16, 2022

In the Matter of
Lorusso Corp. and
Bristol Asphalt Co., Inc.

OADR Docket No. 2021-023
File No. 19 AQ02P-000004-APP
Rochester, MA

RECOMMENDED FINAL DECISION

I. INTRODUCTION

This appeal by a Ten Citizens Group (with residents of West Wareham and Rochester), (collectively, “the Petitioners”), challenges an Air Quality Plan Approval (“Air Permit”) issued by the Southeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) on August 26, 2021 to Lorusso Corporation (“Applicant”) approving, with conditions, the construction and operation of a new hot mix asphalt drum plant to be named Bristol Asphalt, Co., Inc. (“Project” or “Facility”) on the property located at 99 Kings Highway in Rochester, Massachusetts (the “Site”). The Permit was issued pursuant to the authority of M.G.L. c.111, §§142A-142O and the Air Pollution Control Regulations at 310 CMR 7.00. MassDEP determined that Applicant’s Non-Major Comprehensive Plan Application “is in conformance with the Air Pollution Control Regulations and current air pollution control engineering practice....” Air Permit at 1.

In their appeal, the Petitioners alleged that the Air Permit is inconsistent with M.G.L. c.111, §§ 142A-142O and the Air Pollution Control Regulations because it does not adequately

address odor. Specifically, they alleged that the dispersion modeling conducted by the Applicant assessed particulate matter but not odor. They further alleged that because there was no assessment of odor emissions, there was no assessment by MassDEP or data demonstrating that the odor reduction and mitigation measures required by the Air Permit are sufficient to eliminate nuisance odors at the abutting sensitive residential receptors. Notice of Claim at 1-4.

Additionally, the Petitioners alleged that there is ambiguity in the quantity of material allowed to be delivered daily to storage piles at the proposed facility. Because the storage piles are sources of emissions, the alleged lack of clarity affects the emissions calculations. Notice of Claim at 5-6. The Petitioners seek further odor studies and corrected calculations based on daily tonnage delivered.

Motions to Dismiss were filed by the Applicant and MassDEP, and the parties filed their pre-filed testimony on the issues for adjudication. I denied the motions to dismiss without prejudice, but after the parties had filed their testimony I postponed the hearing scheduled for March 22, 2022 and issued an Order to Show Cause to the Petitioners because it appeared, based on all the evidence submitted, that they did not have a reasonable likelihood of prevailing on their claims, either on standing to bring the appeal or that the Air Permit does not adequately address issues of odor.¹

Based on my review of the administrative record and the arguments of the parties, as discussed in detail below, it is my judgment that a Directed Decision should enter against the Petitioners. I recommend that MassDEP's Commissioner issue a Final Decision (1) dismissing the appeal and (2) affirming the air permit for the following reasons: First, the Petitioners waived their right to bring this appeal because they failed to raise the issue of odor in their detailed

¹ See Orders (1) Postponing Hearing and (2) Directing Petitioners to Show Cause, March 18, 2022.

public comments on the draft permit during the public comment period, contrary to the requirement of 310 CMR 7.51(1)(i). Second, even if their comments, read generously, included concerns about odor, and thus were adequate to provide a right to appeal, the Petitioners failed to meet their burden of going forward by presenting credible evidence to demonstrate that the air permit as conditioned does not comply with the air permit regulations. Thus, even if the Petitioners did not waive their right to appeal, their failure to present evidence on the issues for adjudication provides an independent basis for dismissing their appeal and affirming the Air Permit.

II. WITNESSES

Pre-filed Testimony² was presented by the following witnesses:

For the Petitioners:

1. Suzanne L. Pisano, P.E., TURP, LLED AP. Ms. Pisano is a licensed professional engineer and Environmental, Health and Safety Practice Lead and Director of Compliance for Verdantas, with an office in Littleton, Massachusetts. She has over thirty years of experience working on air compliance matters, with a specific focus on permitting programs in Massachusetts. Her experience includes air emissions calculation and reporting. She holds a B.S. in Civil Engineering and an M.S. in Civil/Environmental Engineering.

2. Michael D'Acci. Mr. D'Acci has resided at 119 King's Highway in Rochester, Massachusetts for over fifty years where he has had the opportunity to observe conditions at his property and its vicinity. His property directly abuts the site of the proposed facility.

For the Applicant:

² The witnesses' pre-filed testimony will be referred to in this Recommended Final Decision as [witness] PFT at ____.

1. Lloyd L. Schulman, Ph.D., CCM. Dr. Schulman is a principal at Exponent, an engineering and scientific consulting firm located in Maynard, Massachusetts, and is a Certified Consulting Meteorologist. He has over forty years' experience in air quality modeling experience and analysis, including for asphalt plants. He holds a B.S. in Meteorology and Oceanography, an M.S. in Meteorology, and a Ph.D. in Meteorology.

2. Christine M. Gibbons. Ms. Gibbons is a Civil Engineer with over twenty-eight years' experience in the construction industry. Her experience includes preparing permit applications and Annual Source Registrations, managing stack testing programs and air dispersion modeling projects, and conducting visible emissions compliance tests. She holds a B.S. in Civil Engineering.

3. Wes Stearns. Mr. Stearns is the Chief Operating Officer of Lorusso Corporation. In this role, he oversees the operation of an existing bituminous concrete plant owned and operated by Lorusso. He is familiar with the operation of the plant, including the material storage piles at that plant and the planned material storage piles at the proposed plant. He has been directly involved in the planning for the proposed facility.

For MassDEP

1. Thomas Cushing. Mr. Cushing has been employed by MassDEP since 1987. Since 2012 he has served as the Air Quality Section Chief in MassDEP's Southeast Regional Office. Mr. Cushing holds a B. S. in Chemical Engineering and has taken graduate level courses in Public Administration. Additionally, he has taken technical and regulatory training courses sponsored by NESCAUM³ and the USEPA.

³ NESCAUM is the acronym for the Northeast States for Coordinated Air Use Management, a nonprofit association of air quality agencies in the northeast United States. Its members include the six New England states plus New Jersey and New York. See <https://www.nescaum.org/>

2. Glenn Pacheco. Mr. Pacheco is a Senior Air Modeling Specialist for MassDEP. He is responsible for reviewing air quality modeling analyses for permit applications and working with the MassDEP regional air permitting staff to ensure that modeling meets USEPA and MassDEP modeling requirements and guidelines. He previously worked in the private sector as an Air Quality Scientist, where his duties included preparation of air quality impact assessments, including air dispersion modeling analyses. He holds a B. S. in Meteorology and has taken training courses in air quality, air dispersion modeling, meteorological measurements, and AERMOD.

3. Peter Russell. Mr. Russell is an Environmental Analyst IV for MassDEP's Bureau of Air and Waste in the Southeast Regional Office. He has been employed as an environmental analyst for almost thirty years in air-related positions. He serves as the section lead for the New Source Review program, assigning, reviewing, and making recommendations on air quality-related plan applications. He holds a B.S. in Geography.

III. PROJECT AND PERMITTING BACKGROUND

A. The Proposed Facility

On or about November 7, 2019, Lorusso Corporation ("the Applicant") submitted a Non-Major Comprehensive Plan Application to MassDEP concerning the proposed construction and operation in Rochester, Massachusetts of a new drum mix asphalt plant to be named "Bristol Asphalt Co., Inc." The Applicant sought an air pollution control permit for its facility pursuant to the Air Pollution Control Regulations at 310 CMR 7.00. because the proposed facility will be a source of air contaminants, including Volatile Organic Compounds (VOC), Hazardous Air Pollutants (HAP), Particulate Matter (PM, PM₁₀, PM_{2.5}), odor, sound, and products of

combustion including Nitrogen Oxides (NO_x), Carbon Monoxide (CO) and Sulfur Dioxide (SO₂). Plan Approval at p. 1, MassDEP Basic Documents.

The proposed facility will consist of four emissions units, including a Drum Mix Plant, a Hot Oil Heater, Liquid Asphalt Storage Tanks, and Asphalt Product Storage Silos. Fugitive dust emissions are also possible from trucks, roadways (paves and unpaved), aggregate handling areas and aggregate storage bins. Id. at pp. 2-5.

Aggregate⁴ will be taken from onsite aggregate storage bins or transported from offsite, to cold feed bins, and from there it will be metered onto the conveyor belt systems and transferred to the Drum. Id. at p.1. The Drum Mix Plant introduces liquid asphalt into the drum mix process from one of the Liquid Asphalt Storage Tanks. After passing through the dryer drum, the hot aggregate will enter the mixing drum unit where liquid asphalt, particulate fines from the dust collectors, and recycled asphalt product (RAP) will be added. This mixture, which is bituminous concrete, will exit from the drum through a chute through an enclosed conveyor which transfers the product to one of the three storage silos. The bituminous concrete will be discharged directly from the silos into trucks for transport. The Drum Mix Plant will be a Gencor Model 400 tons per hour (TPH) Stationary Ultraplant, which can produce a maximum of 400 tons of bituminous concrete per hour with an aggregate moisture content of 5% by weight. All exhaust gases from the dryer drum will be vented through a Gencor dust control system, which includes a fabric filter baghouse. Material collected by the baghouse will be removed and recycled back into the facility's process. Id. at pp. 2-3.

Recirculation of hot oil from the Hot Oil Heater will heat the liquid asphalt storage tanks and their supply lines. Id. at pp. 2-3. The Hot Oil Heater will be a Gencor Model HYGO-200

⁴ Aggregate is sand and stone and in this facility's case, also recycled asphalt product (RAP).

helical coil thermal fluid heater equipped with a low NO_x burner with a maximum energy input rating of 2,000,000 BTU per hour. Natural gas will be the only fuel used. The heater exhaust will vent through a steel stack approximately 7 feet 2 inches above the ground. Id. at pp. 3-4.

The Liquid Asphalt Storage Tanks are two 15,000-gallon, single compartment horizontal tanks to store liquid asphalt before it is introduced into the drum mix plant and mixed with the aggregate to make bituminous concrete. Each liquid asphalt storage tank is equipped with an asphalt fume condenser to minimize odors and fumes. The facility will employ an odor removing additive to minimize odor. Id. at p. 4.

There will be three bituminous concrete storage silos at the facility to store the asphalt product produced in the drum mix plant, each with a 200-ton capacity. They will be equipped with “Top of Silo Emissions Capture System”. When a volume of bituminous concrete is dropped into a silo, an equal volume of gases contained inside the silo are displaced and are controlled by the Top of Silo Emission Capture System.

B. Air Quality Dispersion Modeling, Sound, Visible Emissions and Odor

The Applicant evaluated the potential for air pollution from criteria pollutants as well as from nuisance conditions such as noise, odor, and dust. The Applicant indicated in its application for the Air Permit that it had performed Air Quality Modeling to demonstrate the impact of the facility on air quality. The application identified the potential uncontrolled emissions from the facility and the pollution control devices that would be employed to control emissions and identified Best Available Control Technology (“BACT”) emission limits for each pollutant.

Bristol Asphalt Co. AQ02 nmCPA Application, April 14, 2021, MassDEP Basic Documents.

The Applicant stated in its application that it had performed or would perform a sound study and that the facility would employ various sound suppression equipment, including but not limited to

a stack silencer, a gas burner intake silencer and sound barrier walls. Id. The application stated that visible emissions (dust) would be controlled by sweeping the paved roadways, wetting unpaved roadways as needed, limiting the speed of vehicles to 10 mph, controlling stack emissions by using a baghouse, and performing Visolite⁵ tests to locate any leaks. Id. The application stated that “odor is not expected to be perceptible beyond plant boundaries. Ecosorb (or similar) is used in the liquid asphalt to neutralize any odors. Trucks cover their loads prior to leaving the site.” Id.

C. Permit Review, Public Comment Period and Issuance of the Air Permit

The Applicant met with MassDEP on October 24, 2018, prior to submitting its application and during the pre-application meeting, MassDEP asked the Applicant to evaluate any potential for odor with special consideration given to the adjacent residences. Russell Pre-Filed Testimony (“Russell PFT”) at p. 6, lines 151-156. The Applicant revised its application on July 28, 2020 after MassDEP issued a letter of administrative deficiency, and further revised it on April 14, 2021. Both revisions addressed MassDEP’s concerns regarding potential nuisance conditions and the need for a “bottom of the silo” emissions capture system to address nuisance visible emissions and odor. The first revised application proposed to limit facility operations to daytime hours, with limited operations on Saturday and none on Sunday to address potential nuisance conditions. The second revision added Pollution Control Device No. 6, a LDX Solutions or equivalent “bottom of the silo” Emissions Capture System. Russell PFT at pp. 8-9, lines 189-202.

After completing its review of the revised permit application, MassDEP issued a proposed plan approval (draft permit) and Notice of Public Comment on April 27, 2021. Public

⁵ Visolite tests employ a fluorescent powder to detect leaks by introducing it into the airstream.

comments were submitted by Petitioners' counsel with attached comments from Petitioner's expert witness, Suzanne L. Pisano, P.E. Russell PFT at p. 11, lines, 218-223; Response to Comments, MassDEP Basic Documents. No other public comments were received.

The Petitioners commented that the air dispersion modeling had not placed sensitive receptors at the residential homes adjacent to the edge of the Applicant's property, and specifically criticized the size of the grid used for the placement of receptors. Based on this comment, MassDEP asked the Applicant to re-run the dispersion model with a smaller grid overlaid on the existing receptor grid and positioned to have receptors on the residential adjacent properties. Response to Comments at p.2, MassDEP Basic Documents. The Applicant re-ran the model, producing the same results, i.e., compliance with applicable regulatory standards.

The Petitioners also commented that the modeling report dated 1-18-21 assumed the facility would operate 12 hours per day, while the final revised project description dated 3-29-21 limited all production and sales to 6 a.m. to 4 p.m. on weekdays and 7 a.m. to 1 p.m. on Saturday. They noted that it was not clear in the data provided in the modeling report and supporting documentation if the hourly emissions rate was adjusted to account for potentially shorter hours of operation. Response to Comments at p.3, MassDEP Basic Documents.

MassDEP responded that emission rate calculations are not based on the number of hours modeled and explained that hourly emissions rates for the facility's components were based on the design capacity of the drum mix plant, the maximum firing rate of the hot oil heater and the maximum material throughput capacity and physical dimensions of the emission source. Id. MassDEP further responded that "[t]he additional hours in the dispersion modeling provides conservatism by including additional hours of meteorological conditions that would otherwise be left out of the analysis if only the planned operational hours were accounted for in the model

runs. Additional hours added to the model include 4 PM to 6 PM weekdays, 2 PM to 6 PM on Saturdays and 6 AM to 6 PM on Sundays.” Id. Petitioners’ remaining comments similarly concerned what they identified as flaws in the air dispersion modeling performed. Notably, the Petitioners’ comments did not specifically raise any concerns about odor or any of the draft permit’s terms and conditions concerning odor and odor control.

On August 26, 2021, MassDEP issued the Final Air Permit to the Applicant. MassDEP determined that the application was administratively and technically complete and that the application conformed to the Air Pollution Control Regulations and current air pollution control engineering practice. The Air Permit included numerous conditions with which the facility must comply to be operated in compliance with the Air Permit. Final Air Quality Plan Approval, August 26, 2021, MassDEP Basic Documents. This Administrative Appeal followed, timely filed by the Petitioners on September 15, 2021.

IV. APPEAL PROCEDURAL HISTORY

A. The Prehearing Conference

On December 16, 2021, I conducted a prehearing conference with the parties and their legal counsel via the Zoom Internet platform. The Conference included a discussion of the issues that would be adjudicated if the case proceeded to an evidentiary adjudicatory hearing. Among these were the question of whether the Petitioners had waived their right to appeal because they failed to specifically comment on odor in their public comments on the draft Air Permit. The Applicant and MassDEP stated their intention to move to dismiss on this ground. As for the substance of the Air Permit as it pertains to odor, MassDEP stated that the Air Permit as issued contains the most stringent odor control technologies available, as well as numerous conditions to address odor, and that additional modeling would not result in more stringent controls, I asked

the Petitioners to consider what additional measures could be included in the Air Permit to address their concerns. After discussion, the issues for adjudication established at the Conference were the following:

1. Did the Applicant demonstrate that the emissions of odor from the project will not cause or contribute to a condition of air pollution?
2. Does the permit include conditions that will result in compliance with 310 CMR 7.09?

At the Conference the Petitioners were advised of their burden of proof in the appeal, including the burden of producing credible evidence in support of their positions. The Prehearing Conference Report and Order issued after the Conference reiterated this requirement. A date for the adjudicatory hearing and a schedule for filing motions to dismiss and pre-filed testimony and memoranda of law were set, and these dates were included in the Prehearing Conference Report and Order issued on December 17, 2021.

B. Motions to Dismiss

The Applicant and MassDEP moved to dismiss the appeal on December 23, 2021 and December 24, 2021, respectively. Both parties contended that pursuant to 310 CMR 7.51(1)(i)(2),⁶ issues relating to odor had been waived because they had not been raised by the Petitioners during the public comment period. Both parties also argued that the Petitioners'

⁶ 310 CMR 7.51(1)(i) describes the limitations on matters that can be raised in a request for an adjudicatory hearing (administrative appeal). Subsection 1 provides that the issues that may be raised in an administrative appeal are "limited to the subject matter of [MassDEP's] decision." This subsection is not at issue in this appeal. Subsection 2 further limits, in its first clause, the issues that can be raised on appeal "to the matters raised during the public comment period." The second clause of the subsection provides that a matter not raised during the public comment period may be raised on appeal "upon a showing that it was not reasonably possible with due diligence to have raised such matter during the public comment period or for good cause shown." Here, the Petitioners did not claim that their appeal fell under the second clause, which is a "safe harbor" provision; they asserted that the issues they raised in their appeal were raised during the public comment period when they commented on emissions, particularly as they would affect residents adjacent to the Site.

claim regarding the quantity of deliveries was without merit because the Air Permit clearly states that “[t]he total storage will be approximately 3000 tons, with approximately 2000 tons transported to the site daily.” Applicant’s Motion to Dismiss at p. 6, quoting Air Permit; MassDEP’s Motion to Dismiss at pp. 6-7. MassDEP further argued that contrary to the appeal regulation at 310 CMR 1.01(6)(b), the Petitioners failed to state specifically, clearly, and concisely the facts which are ground for their appeal, and that even if their appeal could proceed based on claims regarding odor, the Petitioners failed to allege how the Air Permit does not adequately address odor. MassDEP’s Motion to Dismiss at pp. 7-8.

The Petitioners opposed the motions. They contended that they did not waive the odor issue because they identified the potential impact of air pollutants at their residences as a cause of concern that the draft permit had not adequately addressed “because of the Applicant’s failure to study and model air pollutants at the two homes located immediately adjacent to the Site.” Petitioners’ Opposition to Applicant’s Motion to Dismiss at pp. 2-3. They argued that their failure to use the specific word “odor” in their public comments should not be reason to dismiss their appeal, since “odor” is an air pollutant. *Id.* at p. 4. They disputed that the Air Permit adequately addressed odor and “[u]nless odor studies and modeling are conducted, any prediction as to whether or not the Facility may be able to operate in compliance with the [air pollution control] Regulations is necessarily ill-informed.” *Id.* at p. 7. The Petitioners further contended that their Notice of Claim identified discrepancies in a technical memorandum and should be addressed in this proceeding. *Id.* at p. 8. Petitioners also disagreed with MassDEP’s argument that the appeal should be dismissed for failure to comply with the requirement of 310 CMR 1.01(6)(b), contending that their claim that the Applicant’s dispersion modeling of emissions failed to adequately assess odor because odor was not specifically assessed constitutes

“specific, clear and concise statements” of the grounds for their appeal. Petitioners’ Opposition to MassDEP’s Motion to Dismiss at p. 6.

On March 1, 2022, I denied without prejudice the Motions to Dismiss. In denying the motions I stated:

Based on the pleadings in this appeal and applying the rules governing a motion to dismiss, I find that the Petitioners have alleged sufficient facts to state a claim for relief and to demonstrate that they did not waive their right to raise issues about odor in this appeal. However, on a more developed record, perhaps with evidence to support the moving parties’ arguments regarding the applicability of 310 CMR 7.51(1)(i)2. to the facts of this case, a different conclusion may be drawn.

Order Denying Motion to Dismiss, March 1, 2022, at p. 8.

C. Order to Show Cause

Prior to my ruling on the Motions to Dismiss, the Petitioners filed their prefiled direct testimony, and after my ruling the Applicant and MassDEP each filed their prefiled direct testimony. The Petitioners did not file rebuttal testimony although they had the opportunity to do so. See Prehearing Conference Report and Order, December 17, 2021, at pp. 10-11. After reviewing the now more fully developed administrative record, I determined that the basis for my ruling on the Motions to Dismiss should be reconsidered. This included testimony from MassDEP witnesses regarding 2018 amendments to the air permit appeal regulations. Additionally, based on the evidence presented by the Petitioners, the party with the burden of proof in this appeal, I further determined that the Petitioners did not have a reasonable likelihood of prevailing on their claim of standing to bring this appeal or their claim that the Air Permit does not adequately address emissions of odor and that modeling of odor should be required. Therefore, I postponed the hearing and issued an Order to Show Cause (“Order”) that required the Petitioners to demonstrate why I should not issue a Recommended Final Decision (“RFD”)

recommending that MassDEP's Commissioner issue a Final Decision dismissing the appeal and affirming the Air Permit.

Specifically, regarding standing to bring the appeal, the Order to Show Cause stated:

Based on my review of MassDEP's PFT and my reading of the Response to Comments document, the limitation in 310 CMR 7.51(1)(i)2 was intended to prevent potential appellants from raising on appeal issues they did not raise in their public comments. The Petitioners' comments on the air dispersion modeling never mentioned odor, and as a result, on this more fully developed record, it is my judgment that as a matter of law they cannot raise it now and therefore have not sustained their claim of a right to appeal.

Order to Show Cause, March 18, 2022, at p. 9. Regarding the Petitioners' claim that the Air Permit does not adequately address odor, the Order to Show Cause stated:

[T]he Applicant and MassDEP presented detailed, credible testimony on the various ways that the Facility has been designed to address emissions of odor and the various requirements in the Air Permit to reduce and mitigate the potential for odor emissions. MassDEP's witnesses testified persuasively that if there are nuisance odors, they can and will be addressed post-construction when the causes and extent of any odors are known. This is MassDEP's practice. The Petitioners did not provide any testimony to rebut the testimony of the Applicant's and MassDEP's witnesses. Ms. Pisano opined that modeling of odor causing emissions should be required, but she presented no evidence that the Facility as designed and approved will not be in compliance with the air pollution control regulations. Accordingly, it would be appropriate for me to make findings pursuant to 310 CMR 1.01(11)(e) that the Petitioners have no reasonable likelihood of prevailing on their claim that the Air Permit is inconsistent with M.G.L. c.111, §§142A-142O and the Air Pollution Control Regulations because it does not adequately address odor, and as a result, a directed decision should be entered against the Petitioners on that claim.

Id. at pp. 9-10.

1. Response from Petitioners

The Petitioners responded to the Order with a legal memorandum and two attachments.⁷ On the question of whether the Petitioners waived their right to appeal, they assert that there is no good ground for reversing my ruling on the Motions to Dismiss. They assert that the rationale I gave in the Order to Show Cause for considering this action does not justify a reversal. First, as to standing, they assert that based on the testimony of MassDEP's witnesses, even if the Petitioners had mentioned odor in their public comments, MassDEP would not have required any odor modeling because MassDEP as a matter of practice does not require it. So, using the more specific term, i.e. odor, would not have made any practical difference in the agency's evaluation of the facility. The Petitioners maintain that they have standing to raise the issue of odors and challenge MassDEP's failure to require an odor study. Petitioners' Response to Show Cause Order at pp. 2-5. They also disagree that the additional background information about the amended air permit appeal regulations provided by MassDEP justifies reversing my ruling on the Motions to Dismiss. They assert, "[t]he question concerning Petitioners' right to maintain their appeal under [310 CMR 7.51(1)(i)(2)] is simple: did Petitioners' comments on emissions embrace odors so that the issue of odor was raised in the public comment period?" *Id.* at p. 5. They disagree that the more fully developed record justifies reversing course on the Motions to Dismiss.

Second, as to the facility's compliance with the regulations, the Petitioners assert that they have presented evidence through Ms. Pisano that the facility is not in compliance with the air pollution control regulations. While not disputing that the Air Permit contains provisions intended to reduce and mitigate the potential for odor emissions, they assert "that absent

⁷ The documents include the New Jersey Department of Environmental Protection Division of Air Quality Technical Manual 1002, Guidance on Preparing an Air Quality Modeling Protocol (May 2021) and San Joaquin Valley Air Pollution Control District Guidance for Assessing and Mitigating Air Quality Impacts (March 19, 2015).

modeling of odor emissions from the Facility, ‘it cannot be determined whether odor emissions can be sufficiently controlled so that residents in the vicinity, especially at the two adjacent homes, are not unduly impacted.’” Id. at p. 6, citing Pisano PFT at ¶ 13. The Petitioners assert that by finding in the Order to Show Cause that they failed to present evidence that the facility as designed and approved will not be in compliance with the air pollution control regulations, I reversed the burden of proof. They assert that 310 CMR 7.02(3)(j)3 prohibits MassDEP from issuing an air permit unless the emissions from a facility do not result in a violation of any provision of 310 CMR 7.00, and absent an odor study by the Applicant, the Applicant did not demonstrate that its facility would not emit odors in violation of the regulations. Id. Because there has been no odor modeling for the proposed facility, Petitioners contend that the Applicant has failed to demonstrate that the facility will not emit odors in violation of the regulations, and by focusing on what they term a “grave deficiency”, the Petitioners contend that they have shown a reasonable likelihood of prevailing on their claims that notwithstanding the permit conditions addressing odor, the Air Permit does not adequately address odor. Id. at p. 9.

2. Response from MassDEP

In its reply to the Petitioners’ response, MassDEP notes that as to standing, the Petitioners submitted very detailed comments on the draft permit but “simply failed to submit public comments challenging whether or not the Plan Approval adequately addressed odor.” MassDEP Reply to Petitioners’ Response at pp. 1-2. Rather, odor was raised by the Petitioners for the first time in the Notice of Claim in this appeal. “The Petitioners very detailed public comments on air dispersion modeling failed to specifically raise odor issues, therefore they have not sustained their claim of their right to appeal.” Id. at p. 6. The Petitioners’ comments on air dispersion modeling prompted MassDEP to require the Applicant to complete additional air

dispersion modeling to address the Petitioners' concerns. Id. at p. 9. MassDEP notes that it largely modeled its regulation to establish standing in an air permit appeal on the U.S. Environmental Protection Agency's ("USEPA") air appeal regulatory language. Id.; Cushing PFT at ¶ 28. MassDEP notes that cases interpreting the EPA's appeal regulations make clear that all reasonably ascertainable issues and all reasonably available arguments supporting those positions need to be raised during the public comment period. See e.g., In re Christian County, 13 E.A.D. 459, 457 (EAB, January 28, 2008); In re Shell Offshore, Inc., 13 E.A.D. 357, 294 n.55 (EAB 2007). MassDEP further notes that the Environmental Appeals Board requires that issues raised in public comments must be specific in order to be preserved for review and that MassDEP's air permit appeal regulations are intended to prevent potential appellants from raising issues they failed to raise in their comments." MassDEP Reply to Petitioners' Response at p. 9. MassDEP contends that the Petitioners had the opportunity to raise concerns about odor during the public comment period, failed to raise those concerns, and cannot do so in this appeal. Id.

As to the Petitioners' claim that the Air Permit does not adequately address odor, MassDEP contends that the Petitioners do not have a reasonable likelihood of prevailing on their claim. MassDEP contends that while it and the Applicant presented detailed testimony with supporting exhibits, the Petitioners failed to submit evidence to carry their burden of going forward either for purposes of standing or their case in chief. MassDEP contends that "[it] is not enough, as the Petitioners have done, to argue, conjecture, and assume that the odor modeling must be required in pre-construction permitting and that without it, the issuance of the [Air Permit] is premature...[r]ather...the Petitioners were obliged to show affirmatively with evidence from a competent source that odor modeling is required pre-construction, and without

it, the [Air Permit] is inconsistent with 310 CMR 7.00.” MassDEP Reply to Petitioners’ Response at p. 11, quoting Matter of Pioneer Valley Energy Center, LLC, OADR Docket No. 2011-010, Recommended Final Decision (September 23, 2011), adopted by Final Decision (November 9, 2011). MassDEP asserts that Ms. Pisano’s testimony is speculative, based on assumptions, not grounded in scientific fact, not the requisite expert testimony from a competent source that is necessary to support the claim that odor modeling is required prior to issuance of the Air Permit, and insufficient as a matter of law and fact. MassDEP Reply to Petitioners’ Response at pp. 11-12. “Indeed, there is no factual basis in her testimony showing that the [Air Permit] will not comply with 310 CMR 7.00”. Id. at p. 12. In sum, MassDEP contends that the Petitioners’ response to the Order to Show Cause failed to present sufficient grounds to show that a Recommended Final Decision (“RFD”) should not be issued in favor of the Applicant. Id. at p. 13.

3. Response from the Applicant

The Applicant concurs with MassDEP that the Petitioners have not sustained their burden of proof. The Applicant avers that rather than a reversal of my ruling on the Motions to Dismiss, the Order to Show Cause relied on all the evidence presented by the parties to determine that the Petitioners had failed to sustain their burden in the appeal through direct testimony, noting that the standard for a motion to dismiss differs from that for a directed decision. Applicant’s Reply Memorandum at p. 2. The Applicant rejects as irrelevant and speculative the Petitioner’s contention that raising odor in their public comments would not have made a difference. The Applicant further avers that the Petitioners presented no evidence that the facility as designed and approved will not comply with the air pollution control regulations. Id. at p. 3. Additionally, the Applicant points out that the Petitioners concede that the Air permit contains conditions to

mitigate any adverse impacts of odor emissions and that MassDEP's practice does not require pre-construction odor modeling but relies on post-construction testing and remedies if any actual odor exists. Id.

D. The Motions to Strike

As noted above at footnote 5, the Petitioners attached two policy documents from New Jersey and California to their response to the Order to Show Cause. The documents were not presented as exhibits to any witness's testimony and the Petitioners have not stated that these documents were unavailable at the time Ms. Pisano filed her testimony. MassDEP and the Applicant have moved to strike these documents as not properly presented, and prejudicial to the Applicant. MassDEP Motion to Strike at p. 1; Applicant's Motion to Strike at p. 1. They assert that the Order to Show Cause was "not an invitation to add evidence to the Administrative Record." Id.

The Petitioners oppose the Motions to Strike. They argue that the attachments "simply illustrate how other jurisdictions approach the issue of odor modeling prior to construction of certain facilities. They flesh out a topic on which ...Suzanne Pisano will, as indicated in her pre-filed testimony, testify at the adjudicatory hearing." Petitioners' Opposition to Motions to Strike at p. 1. The Petitioners also argue that I may take administrative notice of these documents pursuant to 310 CMR 1.01(13). Id.

Ruling: The Motions to Strike are granted. In addition to the reasons cited by MassDEP and the Applicant, I am striking these documents because Ms. Pisano had the opportunity to file rebuttal testimony to which she could have attached them. She opted not to use it. As the Petitioners know from the Conference and the Pre-hearing Conference Report & Order, the purpose of the hearing was for the cross-examination of witnesses on the direct testimony they

had previously filed in the appeal. See PHC Report & Order at p. 5. The PHC Report & Order also clearly stated at page 6 that:

Testimony must also include the originals or true copies of all documents cited by the Testimony as supporting the witnesses' testimony and a party's positions in the case. 310 CMR 1.01(12)(f); 310 CMR 1.01(13)(h)2. Specifically, the Pre-filed Testimony must include "all exhibits to be offered in evidence," 310 CMR 1.01(12)(f), and "[a]ll evidence, including any records, investigative reports, documents, and stipulations, which is to be relied upon in a final decision [in the appeal]. . . ." 310 CMR 1.01(13)(h)2.

The hearing would not have been an opportunity for Ms. Pisano to "flesh out" a topic that was not mentioned in her pre-filed testimony. In fact, MassDEP and the Applicant could have opted not to cross-examine Ms. Pisano. Had she wished to discuss and opine on these technical guidance manuals from other jurisdictions, the time for that would have been in her direct or rebuttal testimony. Her PFT does not include these documents among those she reviewed in preparing her testimony or mention them at all. Even if I were to allow the documents into evidence, I would exercise my discretion under 310 CMR 1.01(13)(h)⁸, and give them no weight because they were not relied on, or referred to, in any way by any witness. To sum up, the Petitioners' claims about these documents are mere unsworn allegations that have no probative value here.

V. THE EVIDENCE

The Petitioners presented testimony from two witnesses, Michael D'Acci and Suzanne L. Pisano, their expert. Mr. D'Acci' did not address the Issues for Resolution but he did express concerns about plant operations and equipment being located sixty feet from his property line and creating odor emissions at his property. D'Acci PFT at ¶¶ 8-10. Although he lacks the

⁸ Under 310 CMR 1.01(13)(h), "[t]he weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. . . ."

requisite expertise to opine on whether the Air Permit complies with 310 CMR 7.00, in his opinion it does not adequately address odor impacts from the proposed facility. Id. at ¶ 11.

Ms. Pisano reviewed all the relevant documents submitted by the Applicant to MassDEP during the permitting process and based on her review and the location of the proposed facility proximate to two residences, in her professional opinion the Air Permit was issued prematurely because not all the potential air contaminants, specifically those that cause odors, were included in the air modeling conducted by the Applicant. Pisano PFT at ¶ 5-6. In her opinion, the Applicant should be required to model those air contaminants and to demonstrate through the modeling that the nearby residents will not suffer harm from the Facility's odors. Id. at ¶ 7. She noted that the proposed facility's operations will result in the release of odor-causing compounds including Polycyclic Aromatic Hydrocarbons ("PAHs") and certain Volatile Organic Compounds ("VOCs"), such as hydrogen sulfide, which smells like rotten eggs at a very low concentration threshold. Id. at ¶ 8. She noted that no modeling was performed of PAHs or VOCs in asphalt. Id. at ¶ 9. Ms. Pisano cited the Occupational Safety and Health Administration (OSHA) and the National Institute for Occupational Safety and Health (NIOSH) as government agencies which have promulgated guidelines addressing levels of odor causing emissions. Id. at ¶ 10. She testified that such odor-causing compounds can be modeled in an air quality assessment, "and they should be modeled...." In her opinion, unless and until odor emissions from the Facility are modeled, it cannot be determined if the odor emissions can be controlled sufficiently to avoid impacts to nearby residents. Id. at ¶ 13. In her opinion, modeling emissions of odor before issuing the Air Permit would be preferable to addressing any odor complaints post-construction through implementation of mitigation measures. Id. Ms. Pisano did not cite any applicable statute or regulation which requires such modeling to be conducted.

The Applicant presented testimony from three witnesses, two of whom, Mr. Stearns and Ms. Gibbons, addressed the issue of odor emissions from the Facility. Wes Stearns, Chief Operating Officer of Applicant Lorusso Corporation, testified that he is familiar with the operation of the existing plant operated by Lorusso, including the material storage piles at that plant and the planned material storage piles at the proposed plant. Stearns PFT at ¶ 1. He testified that the Air Permit specifically addresses the subject of odor and requires “the latest best practices established by law.” Stearns PFT at ¶ 3. Mr. Stearns testified that the Air Permit requires the use of Ecosorb or an equivalent PCD-4 product in the on-site liquid asphalt to minimize potential odors, and the facility will use the best available technology and best practices to control odor. Id. In addition to Ecosorb or equivalent, these best practices include: (1) vent condensers on the asphalt storage tanks; (2) usage of a NO_x burner fueled by natural gas, with exhaust from the burner vented through a baghouse filter system; (3) usage of a top of silo capture system to capture potential hydrocarbon gases and recirculate through the combustion zone of the burner where organics will be combusted; and (4) usage of a bottom of silo emissions capture system to capture potential visible aerosol emissions and circulate through a continuous flow filtration system. Id. All of these requirements/best practices are included in the Air Permit. Id. Mr. Stearns also addressed the Petitioners’ request that the Applicant clarify the quantity of daily deliveries to the proposed site, stating that “[t]here is nothing to clarify. The Permit...clearly provides for total daily site deliveries to the proposed facility if 2,000 tons per day.” Id. at ¶ 2.

Mr. Schulman testified regarding the air dispersion modeling analysis he performed to determine whether the proposed plant would meet USEPA and Massachusetts Ambient Air Quality Standards (“NAAQS”) and whether it would exceed the Massachusetts Ambient Air

Toxics guidelines for Ambient Air Limits (“AALs”) and Threshold Effect Exposure Limits (“TELs”).⁹ His analysis indicated that the proposed facility would comply with USEPA and Massachusetts air quality standards and would not exceed AALs and TELs. Schulman PFT at ¶¶ 2-4.

Ms. Gibbons testified regarding the Best Available Control Technologies (“BACT”) that will be employed by the Facility to control emissions. Gibbons PFT at ¶¶ 5-6. She stated that the Applicant proposed “Top-Case” BACT controls and submitted BACT statements for each pollutant that would be emitted from the production of asphalt. *Id.* at ¶ 5. She described the BACT for odors as: (1) adding a neutralizing agent [Ecosorb or equivalent] to the liquid asphalt to remove a wide range of organic and inorganic contaminants; (2) installing asphalt fume condensers on the liquid asphalt storage tanks to minimize odors and fumes; and (3) requiring trucks to cover their loads of asphalt prior to leaving the site. *Id.* at ¶¶ 7-9. She described Ecosorb as “the leading purification media in multiple industries...[i]t is a multi-functional purification media that combines adsorption, filtration and ion exchange in a single product.” *Id.* at ¶ 8. She further testified that the top of silo emission capture system and bottom of silo emission capture system are both designed to abate emissions of odors. *Id.* at ¶ 10. The top of silo capture system “essentially sends the gases to the combustion zone of the dryer where the organic portion of the fume is incinerated. The bottom of silo dry filter system can aid in the abatement of asphalt fumes by the constant recirculation of air through the silo containment area during the loadout period.” *Id.*

⁹ NAAQS are National Ambient Air Quality Standards and are the ambient air quality standards for criteria pollutants adopted by the USEPA Administrator pursuant to the Clean Air Act § 109 (42 U.S.C. § 7410) and codified at 40 CFR Part 50 as in effect on November 17, 2016. AALs are Massachusetts Allowable Ambient Limits and TELs are Threshold Effects Exposure Limits. AALs and TELs are screening level guidelines indicating the maximum ambient air concentration of a toxic pollutant that may be contributed by a single source or facility.

Ms. Gibbons testified that the Applicant proposed all the afore-mentioned BACT controls, proposed the most stringent emissions rates and met all applicable State and Federal regulations and, therefore, MassDEP issued the Air Permit. Id. at ¶ 12. She also noted that the Air Permit contains provisions to ensure that the facility stays in compliance, including a requirement that once the plant is permitted, constructed, and operating, Lorusso must conduct compliance tests and demonstrate that the permitted emissions limits are met. Id. at ¶ 13.

Ms. Gibbons testified that any potential nuisance odor conditions that may occur once the Facility is operational would be investigated by MassDEP, at which point testing and modeling could be done. In her opinion, testing for odors and determining whether they are leaving the facility site can only be done after the plant is constructed and operating because a nuisance condition can only occur when there is an actual facility in operation. Id. at ¶ 14. If there is an issue with odors, MassDEP reserved the right to impose additional conditions on the Air Permit and will continue to address the issue of odor if it is an issue post-construction. Id. at ¶ 17. In her opinion, MassDEP would not have issued the Air Permit if the facility did not meet federal and state air quality standards confirmed by dispersion modeling and noise standards. Id. at ¶ 16.

MassDEP presented the direct and rebuttal testimony of three expert witnesses, including that of Glenn Pacheco who testified that since 2013 he has reviewed modeling for seven proposed or upgraded asphalt plants across Massachusetts and that odor modeling was not required as part of the permitting process for any of the projects and each received a permit. Pacheco PFT at ¶ 6. He testified that 310 CMR 7.00, the air pollution control regulations, does not require that odor be included in air quality impact assessments to demonstrate compliance with NAAQS and TELs/AALs. He testified that unlike for criteria pollutants and certain air toxics, there are no state or federal compliance standards for odors to use for comparison. Id. at ¶

7. Regarding the odor thresholds referenced by Ms. Pisano [from OSHA and NIOSH], Mr. Pacheco stated that while those thresholds are useful in studying odor in the environment, “they are not compliance standards deemed to be protective of health and that legally cannot be exceeded.” *Id.* While hydrogen sulfide is a potential odor-causing VOC for which there is an AAL and a TEL, it was not modeled because it is not a major constituent of the exhaust from the Facility’s combustion units and “[m]odeling for hydrogen sulfide alone as a surrogate for odor would not be the proper methodology for performing an odor impact assessment...because any potential odor from the plant would result from a complex mixture of organic compounds containing hydrogen, carbon and sulfates.” *Id.* at ¶ 11. Mr. Pacheco stated that the OSHA and NIOSH regulations and guideline levels for air contaminants cited by Ms. Pisano relate to workplace activities and settings and are not used in a regulatory pre-construction permitting process designed for limiting air pollution in the ambient air. *Id.* at ¶ 12. The methodology that exists for modeling odor to reduce the magnitude and frequency of odor events to avoid nuisance conditions is not suitable for a pre-construction permitting process. *Id.* at ¶ 13.

Thomas Cushing, also a witness for MassDEP, provided testimony regarding both odor modeling and the Petitioners’ public comments. Respecting odor modeling, Mr. Cushing testified that MassDEP does not have a regulatory or policy requirement to model for odor during pre-construction permitting of a proposed facility. Cushing PFT at ¶ 12. Odor samples cannot be obtained prior to the equipment being in operation. *Id.* at ¶ 14. MassDEP’s practice is to require odor mitigation strategies in an air permit. *Id.* at ¶ 15. He stated that unlike VOCs, odor is not subject to BACT, where certain control technologies can be eliminated based on their cost, whereas a nuisance odor condition must be eliminated regardless of cost. *Id.* at ¶ 10.

On the issue of whether the Petitioners waived their right to bring this appeal. Mr. Cushing testified that he reviewed the public comments submitted on behalf of the Petitioners and those comments did not discuss odor issues with the application or the draft Air Permit. Cushing PFT at ¶ 6. Mr. Cushing testified that he participated in the drafting of the Air Appeal regulations which established timelines and procedures for appealing an air permit. *Id.* at ¶ 26. Attached to his PFT as Exhibits 3 and 4, respectively, are the Background Document on Proposed Amendments to 310 CMR 7.00 and MassDEP's Response to Comments on proposed Amendments to 310 CMR 7.00. The documents support a conclusion that the amended regulations were intended, among many other things, to clarify who had a right to request an adjudicatory hearing on an air permit and to streamline the procedures for resolving appeals. Cushing Ex. 3 at p. 41. In Cushing Ex. 4, the Response to Comments document, MassDEP presented evidence that the limiting language in 310 CMR 7.51(1)(i)2 was intended to "limit the issues to be adjudicated to those raised in the comments received." Cushing Ex. 4 at pp. 53-54, Response to Comments Nos. 117 and 118. See also Cushing Ex. 4 at pp. 54-57 (discussing purpose of amendments to appeal provisions to streamline appeals process and reduce frivolous appeals).

Peter Russell also testified for MassDEP describing in detail his review of the permit application and the odor mitigation strategies required for the Facility, including equipment design and best management practices. As part of his review, MassDEP required the Applicant to include a bottom of the silo emissions capture system to address nuisance visible emissions and odor emissions. Russell PFT at p. 10, lines 193-202. In his opinion, based on the various odor mitigation strategies required by the Air Permit, emissions from the Facility will not cause or contribute to a condition of air pollution, specifically odor. *Id.* at p. 12, Lines 245-254.

DISCUSSION

THE APPLICANT AND MassDEP ARE ENTITLED TO A DIRECTED DECISION AND THE AIR PERMIT SHOULD BE AFFIRMED BECAUSE THE PETITIONERS' EVIDENTIARY SUBMISSIONS IN SUPPORT OF THEIR CLAIMS ARE DEFICIENT AS A MATTER OF LAW

I. THE DIRECTED DECISION STANDARD OF 310 CMR 1.01(11)(e)

310 CMR 1.01(11)(e) provides that:

*[u]pon the petitioner's submission of prefiled testimony, . . . any opposing party may move for the dismissal of any or all of the petitioner's claims, on the ground that upon the facts or the law the petitioner has failed to sustain its case; or **the Presiding Officer may, on the Presiding Officer's own initiative, order the petitioner to show cause why such a dismissal of claims should not issue. Decision on the motion or order to show cause may be reserved until the close of all the evidence.** . . .*

(emphasis added). "Dismissal [of an appeal pursuant to 310 CMR 1.01(11)(e)] for failure to sustain a case, also known as a directed decision, is appropriate when a party's direct case - generally, the testimony and exhibits comprising its prefiled direct testimony - presents no evidence from a credible source in support of its position on the identified issues." Matter of Thomas Vacirca, Jr., OADR Docket No. WET-2016-017, Recommended Final Decision (April 11, 2017), 2017 MA ENV LEXIS 22, at 14-15, adopted as Final Decision, (April 18, 2017), 2017 MA ENV LEXIS 28. In essence, a directed decision should be entered against the petitioner in the appeal when the petitioner does not have a reasonable likelihood of prevailing on its claims in the appeal because the petitioner's evidentiary submissions are deficient as a matter of law. Id.

II. THE PETITIONERS HAVE NOT SUSTAINED THEIR CLAIM OF A RIGHT TO BRING THIS APPEAL.

If this appeal had proceeded to the Hearing, the first issue to be addressed would have been the Petitioners' standing to maintain the appeal. Standing "is not simply a procedural

technicality.” Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975); In the Matter of Webster Ventures, LLC, OADR Docket No. 2015-014 (“Webster Ventures II”), Recommended Final Decision (June 3, 2016), 2016 MA ENV LEXIS 27, at 19-20, adopted as Final Decision (June 15, 2016), 2016 MA ENV LEXIS 32; In the Matter of Onset Bay II Corp., OADR Docket No. 2012-034 (“Onset Bay II Corp.”), Recommended Final Decision (August 28, 2020), 2020 MA ENV LEXIS 79, at 40-41, adopted as Final Decision (September 23, 2020), 2020 MA ENV LEXIS 82, affirmed, Norfolk Superior Court (June 8, 2022).¹⁰ Rather, it “is a jurisdictional prerequisite to being allowed to press the merits of any legal claim.” R.J.A. v. K.A.V., 34 Mass. App. Ct. 369, 373 n.8 (1993); Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998) (“[w]e treat standing as an issue of subject matter jurisdiction [and] . . . of critical significance”); see also United States v. Hays, 515 U.S. 737, 115 S.Ct.2431, 2435 (1995) (“[s]tanding is perhaps the most important of the jurisdictional doctrines”); Webster Ventures II, 2016 MA ENV LEXIS 27, at 19; Onset Bay II Corp., 2020 MA ENV LEXIS 79, at 41. As a jurisdictional prerequisite, a party’s standing to maintain an appeal can be raised at any time during the appeal. In the Matter of Town of Brewster, OADR Docket No. WET-2012-006, Recommended Final Decision (August 10, 2012), 2012 MA ENV LEXIS 97, at 34-35, adopted as Final Decision (August 16, 2012), 2012 MA ENV LEXIS 99 (appellant’s standing to appeal a Wetlands Permit challenged at conclusion of Hearing because of appellant’s damaging cross-examination testimony).

¹⁰ See Tramontozzi v. Massachusetts Department of Environmental Protection, Norfolk Superior Court, C.A. No. 2082CV01007.

As standing is a jurisdictional question that can be raised at any time, the Applicant and MassDEP continue to press it. The regulation providing a right to appeal an Air Permit includes the following limitation at 310 CMR 7.51(1)(i):

Limitation on Matters Raised In Request for Adjudicatory Hearing.

1. The issues that may be raised in a request for an adjudicatory hearing are limited to the subject matter of the Department's decision.
2. If the Department provided a public comment period, the issues that may be raised in a request for an adjudicatory hearing are further limited to the matters raised during the public comment period; provided, however, that a matter may be raised upon showing that it was not reasonably possible with due diligence to have raised such matter during the public comment period or for good cause shown.

As discussed in detail in the Order Denying Motions to Dismiss, the Petitioners' detailed comments during the public comment, which included a detailed critique by Ms. Pisano of the air dispersion modeling, did not raise any concerns about odor but focused solely on the air dispersion modeling conducted by the Applicant. There is no suggestion by the Petitioners that it was not reasonably possible with due diligence to have raised concerns about odor during the public comment period. In their Notice of Claim (Appeal Notice), they alleged that odor should have been studied. While on the Motions to Dismiss I gave the Petitioners the benefit of the doubt regarding their comments given the lower standard for a motion to dismiss, on the record after testimony was filed it became obvious that their concerns related only to the air dispersion modeling, not emissions of odor. Their comments on the air dispersion modeling were detailed and specific. There was no suggestion in their comments that the draft permit failed to adequately address odor.

Although MassDEP required the Applicant to conduct revised air dispersion modeling in response to the Petitioners' detailed comments, "odor was not assessed as part of the revised

modeling because there were no comments pertaining to odor....” Pacheco PFT at ¶ 16. Had odor been raised in the Petitioners’ public comments then the information presented by MassDEP’s witnesses in their PFT would have been presented as a response to any odor comments. *Id.*, citing Pacheco PFT at ¶¶ 7-14; Cushing PFT at ¶¶ 12-15; Russell PFT at p. 11, Lines 224-226. As the attachments to Mr. Cushing’s PFT make clear, MassDEP designed the air permit appeal regulations to streamline the appeals process while providing a right to appeal to certain affected parties. Based on my review of MassDEP’s PFT and my reading of the Response to Comments document, the limitation in 310 CMR 7.51(1)(i)2 was intended to prevent potential appellants from raising on appeal issues they did not raise in their public comments. The Petitioners’ detailed comments on the air dispersion modeling never mentioned odor. Had they wanted to preserve concerns about odor for appeal, 310 CMR 7.51(1)(i) required them to raise those concerns during the public comment period. On this more fully developed record, it is my judgment that as a matter of law they cannot raise those concerns now and therefore they have not sustained their claim of a right to appeal.

III. THE PETITIONERS HAVE NOT SUSTAINED THEIR CLAIM THAT THE PERMIT DOES NOT ADEQUATELY ADDRESS ODOR.

As the party challenging MassDEP’s issuance of the Air Permit, the Petitioners were required to carry their burden of going forward by presenting sufficient evidence in their direct testimony to demonstrate that the Air Permit as conditioned did not comply with the requirements of 310 CMR 7.00. Matter of Town of Freetown, Docket No. 91-103, Recommended Final Decision (February 14, 2001), adopted by Final Decision (February 26, 2001) (“the Department has consistently placed the burden of going forward in permit appeals on the parties opposing the Department’s position.”). They did not. Instead, their expert, Ms. Pisano, opinioned that it was premature to issue a permit until modeling for odor emissions was done,

without reference to any applicable legal standard. She offered no opinion on the equipment to be installed and the best practices to be employed by the Applicant to control emissions of odor, nor any factual evidence to counter MassDEP's determination that this equipment and these best practices are sufficient to demonstrate that the proposed facility's odor emissions will not cause or contribute to a condition of air pollution. She also offered no opinion on whether the permit as conditioned would result in compliance with the regulations. These were the issues to be decided in this appeal. Claiming that an odor study was required was the Petitioners' starting point, but they never went beyond that. Ms. Pisano did not include exhibits to support her opinion. The Petitioners filed no rebuttal testimony. Other than arguing that MassDEP should depart from its historical practice and make a progressive effort to prevent nuisance odors before they arise, the Petitioners did not persuasively argue why they should prevail in this appeal. In my judgment, they failed to sustain their case.

CONCLUSION

For the reasons discussed above, I recommend that MassDEP's Commissioner issue a Final Decision dismissing the appeal and affirming the Air Permit.

Date: 12/16/2022



Jane A Rothchild
Presiding Officer

SERVICE LIST

In The Matter Of:

**Lorusso Corp. and Bristol Asphalt Co.,
Inc.**

Docket No. 2021-023

**File No. 19-AQ02P-00004-APP
Rochester, MA**

Representative

Party

George F. Hailer, Esq.
Michael Rabieh, Esq.
Lawson and Weitzen, LLP
88 Black Falcon Avenue, Suite 345
Boston, MA 02210
ghailer@lawson-weitzen.com
mrabieh@lawson-weitzen.com

PETITIONER
Ten Citizens Group

Lauren C. Galvin, Esq.
Brian M. Hurley, Esq.
Rackemann, Sawyer & Brewster, P.C.
160 Federal Street
Boston, MA 02110
lgalvin@rackemann.com
bhurley@rackemann.com

APPLICANT
Lorusso Corp. and Bristol Asphalt Co., Inc.

Jeanne Argento, Senior Counsel
BAW/NERO Office of General Counsel
MassDEP – Northeast Regional Office
205B Lowell Street
Wilmington, MA 01887
Jeanne.Argento@mass.gov

DEPARTMENT

MacDara Fallon, Senior Counsel
MassDEP Office of General Counsel
One Winter Street
Boston, MA 02108
macdara.fallon@mass.gov

DEPARTMENT

Cc:
Shaun Walsh, Chief Regional Counsel
MassDEP/Southeast Regional Office
20 Riverside Drive
Lakeville, MA 0234
Shaun.Walsh@mass.gov

DEPARTMENT

In the Matter of Lorusso Corp. and Bristol Asphalt Co., Inc.

Thomas Cushing, Section Chief
MassDEP/Southeast Regional Office
20 Riverside Drive
Lakeville, MA 0234
Thomas.Cushing@mass.gov

DEPARTMENT

Peter Russell, Environmental Analyst
MassDEP/Southeast Regional Office
20 Riverside Drive
Lakeville, MA 0234
peter.russell@mass.gov

DEPARTMENT

Leslie DeFilippis, Paralegal
MassDEP/Office of General Counsel
One Winter Street
Boston, MA 02108
Leslie.Defilippis@mass.gov

DEPARTMENT