

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 23, 2025

---

**In the Matter of  
Markley Group, LLC**

**OADR Docket No. 2025-022  
DEP File No. 24-AQ02F-0001-APP  
APPROVAL NO.: NE-25-002  
AIR QUALITY PLAN APPROVAL  
Lowell, Massachusetts**

---

**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

In this appeal before the Office of Appeals and Dispute Resolution (“OADR”),<sup>1</sup> eight (8) residents of Lowell, Massachusetts (“the 8 Lowell Residents” or “the Petitioners”) individually challenge an Air Permit that the Northeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued on July 3, 2025, to The Markley Group, LLC (“the Applicant”) pursuant to MassDEP’s Air Permit Regulations at 310

---

<sup>1</sup> OADR is an independent, neutral, quasi-judicial office within the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) whose Presiding Officers (senior environmental attorneys) are responsible for advising MassDEP’s Commissioner in the adjudication of administrative appeals filed with OADR challenging MassDEP Permit Decisions, Environmental Jurisdiction Determinations, and Enforcement Orders.

CMR 7.00 (“APC Regulations”).<sup>2</sup> The Air Permit authorized and conditioned the Applicant’s proposed construction and operation of eight (8) diesel powered emergency generators at the Applicant’s telecommunications and data center facility in Lowell (“the Facility”). The construction and operation of these eight emergency generators would bring the total number of such generators at the Facility to 27 as part of the Applicant’s efforts to expand the Facility’s data processing capacity to meet its clients’ increased use of Artificial Intelligence (“AI”).<sup>3</sup> These proposed additional generators will require the operation of 16 cooling towers to support the Facility’s expansive electrical infrastructure.<sup>4</sup>

In their appeal, the 8 Lowell Residents request that the Air Permit be vacated because MassDEP purportedly failed to: (1) comply with Environmental Justice requirements;<sup>5</sup> (2) require a Cumulative Impact Analysis of the proposed additional eight generators;<sup>6</sup> (3) consider alternative energy sources to power these proposed generators instead of diesel fuel;<sup>7</sup> (4) require review of these proposed generators pursuant to the Massachusetts Environmental Policy Act (“MEPA”);<sup>8</sup> (5) consider the environmental impacts of the 16 cooling

---

<sup>2</sup> The Air Permit is entitled “Air Quality Plan Approval.” The 8 Lowell Residents challenging the Air Permit here are: (1) Holly Flynn; (2) Jacob Fortes; (3) Nancy Fortes; (4) Jacquelynn Coles; (5) Steven O’Hearn; (6) Joann Snead; (7) Eileen Castle; and (8) Alex Solange.

<sup>3</sup> Petitioners’ Notice of Claim/Request for An Adjudicatory Hearing, July 24, 2025 (“Petitioners’ Original Appeal Notice”), at p. 4, citing, the Air Permit, at p. 3, and the Applicant’s April 28, 2025 Air Quality Impact Analysis, at p. 2.

<sup>4</sup> Id.

<sup>5</sup> Id., at pp. 16-19.

<sup>6</sup> Id., at pp. 19-23.

<sup>7</sup> Id., at pp. 23-24.

<sup>8</sup> Id., at pp. 24-29.

towers that would be required for the proposed generators;<sup>9</sup> (6) adequately address noise and other operational impacts that would be caused by the proposed generators;<sup>10</sup> (7) take into account the Applicant's purported failure to comply with existing permit conditions governing the operation of the existing generators at the Facility;<sup>11</sup> and (8) take into account the Applicant's purported failure to submit accurate records to MassDEP regarding the generators currently in operation at the Facility.<sup>12</sup>

The Applicant and MassDEP dispute the 8 Lowell Residents' claims and request that the Air Permit be affirmed in the appeal. Currently pending before me for ruling are the Applicant's and MassDEP's respective Motions for Summary Decision asserting that based on the undisputed material facts and as a matter of law they are entitled to a Final Decision in the appeal affirming the Air Permit on several grounds. These grounds include that all or most of the Petitioners' eight claims against the Air Permit discussed above are barred by the APC Regulations at 310 CMR 7.51(1)(d) and 7.51(1)(g)2 because each of the Petitioners purportedly failed to raise them in written comments during the public comment period on MassDEP's Proposed Decision to approve the Air Permit.<sup>13</sup> The Applicant and MassDEP also claim in the alternative that they are entitled to a Final Decision in the appeal affirming the Air Permit because even if the Petitioners properly raised their claims during the public comment period, the

---

<sup>9</sup> Id., at pp. 29-30.

<sup>10</sup> Id., at pp. 30-31.

<sup>11</sup> Id., at pp. 31-32.

<sup>12</sup> Id., at pp. 32-34.

<sup>13</sup> The provisions of 310 CMR 7.51(1)(d) and 7.51(1)(g)2 are discussed below, at pp. 10-18.

individuals who the Petitioners have identified as their expert witnesses to provide testimony in support of their claims are not qualified as a matter of law to render expert testimony on any of their claims. Lastly, the Applicant and MassDEP claim that the Petitioners' claims fail on the merits based on the undisputed material facts and as a matter of law.<sup>14</sup>

In response, the 8 Lowell Residents oppose the Applicant's and MassDEP's Motions for Summary Decision on the grounds that: (1) they properly raised all their eight claims against the Air Permit in written comments during the public comment period on MassDEP's Proposed Decision to approve the Air Permit in accordance with 310 CMR 7.51(1)(d) and 7.51(1)(g);<sup>15</sup> (2) Mr. Braczyk's affidavit supporting MassDEP's Motion for Summary Decision<sup>16</sup> "is replete with unqualified, conclusory opinion testimony" regarding the Petitioners' claims against the Air Permit;<sup>17</sup> (3) the Petitioners' "expert witnesses are qualified to testify on the [eight appeal]

---

<sup>14</sup> MassDEP's Motion for Summary Decision is supported by the affidavit of Edward J. Braczyk ("Mr. Braczyk"), a senior Environmental Engineer at MassDEP who has been with the agency for more than 40 years (since March 1985) and for the past five years (since 2020) has served as the Air Permit Chief in MassDEP's Northeast Regional Office ("MassDEP NERO Office"). Mr. Braczyk's Affidavit, ¶¶ 1-5. He is responsible for overseeing the MassDEP NERO Office's air permitting program, including air permits that have been issued to the Applicant for the Facility. Id., ¶¶ 5-26. He reviewed and approved the Applicant's application for the Air Permit that is at issue in this appeal. Id.

<sup>15</sup> Petitioners' Summary Decision Opposition Memorandum, at pp. 3-4, 11-19. The Petitioners' Summary Decision Opposition Memorandum is entitled "Residents' Combined Brief In Opposition to Motions for Summary Decision By Markley Group, LLC and Massachusetts Department of Environmental Protection."

<sup>16</sup> See n.14 above.

<sup>17</sup> Petitioners' Summary Decision Opposition Memorandum, at p. 4, 19-22.

issues”;<sup>18</sup> and (4) “[t]here are numerous [genuine issues of material] fac[t] regarding the Petitioners’ eight claims against the Air Permit.”<sup>19</sup>

I have reviewed the Parties’ respective Summary Decision filings, and based on my review as discussed below, I agree with the Applicant and MassDEP that they are entitled to Summary Decision against each of the 8 Lowell Residents, specifically a Final Decision in the appeal affirming the Air Permit for the following reasons.

First, at a minimum, the Applicant and MassDEP are entitled to Summary Decision against seven of the 8 Lowell Residents: (1) Holly Flynn; (2) Nancy Fortes; (3) Jacquelynn Coles; (4) Steven O’Hearn; (5) Joann Snead; (6) Eileen Castle; and (7) Alex Solange (collectively “the 7 Residents”) because they each failed to file an affidavit in opposition to the Applicant’s and MassDEP’s Motions for Summary Decision evidencing their respective standing to appeal the Air Permit pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)2 as an aggrieved person who previously submitted written comments during the public comment period on MassDEP’s Proposed Decision to approve the Air Permit. See below, at pp. 18-21. They simply relied on the unsworn allegations of their Amended Appeal Notice<sup>20</sup> asserting that they each have standing

---

<sup>18</sup> *Id.*, at p. 4, 22-25. In opposing the Applicant’s and MassDEP’s Motions for Summary Decision, the Petitioners submitted the affidavits of several individuals purporting to be expert witnesses qualified to render expert opinions supporting several of the Petitioners’ appeal claims against the Air Permit. These individuals are: Dr. Kristie Ellickson, an environmental health scientist from Minnesota, who the Petitioners retained to testify in support of their Cumulative Impact Analysis claims in Appeal Claim No. 2 and MEPA claims in Appeal Claim No. 4 (Petitioners’ Summary Decision Opposition Memorandum, at p. 37); and Dr. Jamie Banks, a purported noise expert who the Petitioners retained to testify in support of their noise claims in Appeal Claim No. 6 (Petitioners’ Summary Decision Opposition Memorandum, at pp. 47-48).

<sup>19</sup> Petitioners’ Summary Decision Opposition Memorandum, at pp. 4-5, 37-39, 41-44.

<sup>20</sup> The 8 Lowell Residents initially brought this appeal with three other Lowell residents jointly referring to themselves as the Honest Future for Lowell (“the HFL Group”) and contending they were a duly constituted Ten Persons Group pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)3 with standing to appeal the Air Permit. Ruling and Order on the Applicant’s and MassDEP’s Motions to Dismiss Petitioners’ Appeal, August 27, 2025 (“August 27 Ruling & Order”), at 2-14. After the Applicant and MassDEP moved to dismiss the appeal for lack of standing because the HFL Group was not a valid Ten Persons Group under 310 CMR 7.51(1)(d) and 7.51(1)(g)3, the HFL

to appeal the Air Permit pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)2 as an aggrieved person who previously submitted written comments during the public comment period on MassDEP's Proposed Decision to approve the Air Permit. See below, at pp. 18-21.

Second, the 7 Residents cannot avoid entry of Summary Decision against them for having failed to each file an affidavit evidencing their standing to appeal the Air Permit pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)2 by having their co-Petitioner and fellow Lowell Resident, Jacob Fortes ("Mr. Fortes"), assert appeal claims on their behalf in the affidavit he filed in opposition to the Applicant's and MassDEP's Motions for Summary Decision. See below, at pp. 18-21. As a matter of law, Mr. Fortes cannot assert appeal claims on behalf of any of the 7 Residents because the unique harm element of standing is personal to each of those Residents and must be demonstrated by the latter and not by Mr. Fortes. See below, at pp. 18-21.

Lastly, the Applicant and MassDEP are also entitled to Summary Decision against Mr. Fortes because he lacks standing to assert five of the eight appeal claims (Appeal Claims Nos. 1-5) against the Air Permit discussed above because he failed to raise them in written comments during the public comment period on MassDEP's Proposed Decision to approve the Air Permit. See below, at pp. 21-28. As for the three remaining appeal claims (Appeal Claims Nos. 6-8), he

---

Group in their legal memorandum opposing the Motions ("Opposition Memorandum") claimed for the first time that each of the 8 Lowell Residents had standing to appeal the air permit pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)2 as an aggrieved person who previously submitted written comments during the public comment period on MassDEP's Proposed Decision to approve the Air Permit. Id. This new claim constituted an amendment to the HFL Group's original Appeal Notice and as such I treated their Opposition Memorandum as an Amended Appeal Notice asserting the additional claim that the 8 Lowell Residents had standing to appeal the Air Permit pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)2. Id. I then granted the Motions to Dismiss as to the HFL Group because it was not a valid Ten Persons Group under 310 CMR 7.51(1)(d) and 7.51(1)(g)3 but allowed the appeal to proceed as to the 8 Lowell Residents. Id. In taking that action, I was required by appeal rules to accept as true the facts alleged in the HFL Group's Opposition Memorandum supporting each of the 8 Lowell Residents' standing to appeal the Air Permit pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)3. In the Matter of SEMASS Partnership, OADR Docket No. 2012-015, Recommended Final Decision (June 18, 2013), 2013 WL 3196118, \*3, adopted by Final Decision (June 24, 2013), 2013 WL 3243091.

cannot prevail on those appeal claims either because the individual who he and the 7 Residents retained as their expert witness to provide testimony in support of the claim presented inadmissible evidence in their affidavit supporting the claim and in opposition to the Applicant's and MassDEP's Motions for Summary Decision (Appeal Claim No. 6) or OADR lacks jurisdiction to adjudicate those claims (Appeal Claims Nos. 7 and 8). See below, at pp. 28-34.

## **DISCUSSION**

### **THE APPLICANT AND MassDEP ARE ENTITLED TO SUMMARY DECISION AGAINST THE 8 LOWELL RESIDENTS ON ALL THEIR APPEAL CLAIMS AGAINST THE AIR PERMIT**

#### **I. THE SUMMARY DECISION STANDARD**

A motion for summary decision in an administrative appeal is akin to motion for summary judgment made in court in a civil suit that “is . . . designed to avoid needless [evidentiary] adjudicatory hearings” in administrative appeals. In the Matter of Michael Gleason, OADR Docket No. WET-2017-019, Recommended Final Decision (December 4, 2019), 2019 WL 8883856, \*5, adopted as Final Decision (January 7, 2020), 2020 WL 2616480; Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, 9 Mass. App. Ct. 775, 785-86 (1980) (“administrative summary judgment procedures” are appropriate to resolve administrative appeals without an adjudicatory hearing “when the papers or pleadings filed [in the case] . . . conclusively show . . . that [a] hearing can serve no useful purpose”). The Adjudicatory Proceeding Rules at 310 CMR 1.01(11)(f) govern the bringing of motions for summary decision in administrative appeals. This summary decision rule provides in relevant

part that:

[a]ny party [to an administrative appeal] may move with or without supporting affidavits<sup>21</sup> for a summary decision in the moving party's favor upon all or any of the issues that are the subject of the . . . appeal. . . . The decision sought shall be made if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a final decision in its favor as a matter of law.

Gleason, 2019 WL 8883856, \*5. ““This standard mirrors the standard set forth in Rule 56’ . . . governing [summary judgment motions in] civil suits in Massachusetts trial courts.” Id.

To sum up, “[a] party seeking a summary decision [pursuant to 310 CMR 1.01(11)(f)] must demonstrate that there is no genuine issue of material fact and that the party is entitled to a final decision as a matter of law.” Gleason, 2019 WL 8883856, \*5. “If the moving party meets this burden, the opposing party ‘may not rest upon the mere allegations or denials of [its] pleading, but must respond, by affidavits or as otherwise provided in 310 CMR 1.01, setting forth specific facts showing that there is a genuine issue for hearing on the merits.’” Id.; 310 CMR 1.01(11)(f); cf. Mass. R. Civ. P. 56(e); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991) (summary judgment properly awarded to defendant); Cabot Corp. v. AVX Corp.,

---

<sup>21</sup> Under 310 CMR 1.01(11)(f), “[affidavits] [s]upporting [or] opposing [a motion for summary decision] shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence in Massachusetts courts, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.” This evidentiary standard is different from the “substantial evidence” standard governing the admissibility of evidence in evidentiary adjudicatory hearings (“hearings”) in administrative appeals before OADR. “Substantial evidence” is defined by G.L. c. 30A, § 1(6) as “such evidence as a reasonable mind might accept as adequate to support a conclusion” and allows the admissibility of hearsay evidence in hearings if the hearsay evidence “contains sufficient indicia of reliability and probative value.” In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision on Reconsideration (November 4, 2014), 2014 WL 6633667, \*4 n.4, adopted as Final Decision on Reconsideration (November 7, 2014), citing, School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 16-18 (1996) (un-contradicted letters written by physicians who treated female teachers during their pregnancies constituted reliable hearsay and had probative value to support teachers’ sex discrimination claims against defendant school committee); Embers of Salisburg, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 530 (1988) (transcript of minor’s sworn criminal trial testimony that she consumed alcohol at bar while as a minor constituted reliable hearsay and had probative value to support suspension of bar owner’s liquor license for serving alcohol to minors).

448 Mass. 629, 636-37 (2007) (same). As discussed below, the Applicant and MassDEP met their burden to obtain Summary Decision against all the 8 Lowell Residents.

## **II. STANDING TO PURSUE CLAIMS IN ADMINISTRATIVE APPEALS BEFORE OADR CAN BE CHALLENGED AT ANY TIME**

In their Summary Decision Opposition Memorandum, the 8 Lowell Residents contend that “[I] ha[ve] already determined that [each of them] have standing to [] [a]ppeal” the Air Permit pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)2 as an aggrieved person who previously submitted written comments during the public comment period on MassDEP’s Proposed Decision to approve the Air Permit.<sup>22</sup> The basis of their contention is my prior ruling allowing the appeal to proceed as to the 8 Lowell Residents, but not as to the HFL Group that the Residents had formed with three other Lowell residents claiming standing to appeal the Air Permit as a Ten Residents Group pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)3.<sup>23</sup>

However, contrary to the 8 Lowell Residents’ assertions, my prior ruling regarding their standing to appeal the Air Permit pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)2 was not set in stone. It was made in response to the Applicant’s and MassDEP’s respective Motions to Dismiss the HFL Group’s appeal for lack of standing pursuant to a legal standard requiring me to accept as true the facts alleged in the HFL Group’s legal memorandum opposing the Motions to Dismiss supporting each of the 8 Lowell Residents’ standing to appeal the Air Permit pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)3.<sup>24</sup> Additionally, standing “is a jurisdictional prerequisite to being allowed to press the merits of any legal claim” that can be challenged at any time. R.J.A.

---

<sup>22</sup> Petitioners’ Summary Decision Opposition Memorandum, at pp. 11-15.

<sup>23</sup> See n.20, at p. 5 above.

<sup>24</sup> Id.

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 United States v. Hays, 515 U.S. 737, 742 (1995) (“[s]tanding is perhaps the most important of the jurisdictional doctrines”); In the Matter of Webster Ventures, LLC, OADR Docket No. 2015-014, Recommended Final Decision (June 3, 2016), 2016 WL 3632236, \*6, adopted as Final Decision (June 15, 2016), 2016 WL 3632244; In the Matter of Onset Bay II Corp., OADR Docket No. 2012-034, Recommended Final Decision (August 28, 2020), 2020 WL 6115205, \*17, adopted as Final Decision (September 23, 2020), 2020 WL 6115206, affirmed, sub nom Tramontozzi v. Massachusetts Department of Environmental Protection, Norfolk Superior Court, C.A. No. 2082CV01007 (June 8, 2022). As such, later in the appeal the Applicant and MassDEP could challenge the 8 Lowell Residents’ standing to appeal the Air Permit pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)3. The Applicant and MassDEP did this in seeking Summary Decision against the 8 Lowell Residents.

### **III. THE TWO ELEMENTS OF PROOF TO ESTABLISH STANDING TO APPEAL AN AIR PERMIT PURSUANT TO 310 CMR 7.51(1)(d) AND 7.51(1)(g)2**

#### **A. The First Element of Proof to Establish Standing to Appeal An Air Permit Pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)2**

As explained below, the APC Regulations at 310 CMR 7.51(1)(d), 7.51(1)(g), and 7.51(1)(i)2 require a party claiming standing to appeal an air permit pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)2 as an aggrieved person who previously submitted written comments during the public comment period on MassDEP’s proposed decision on the air permit must demonstrate two things to establish their standing. First, in accordance with 310 CMR 7.51(1)(d) and 7.51(1)(g)2, the party must demonstrate that it previously raised its appeal claims against the air permit in written comments during the public comment period. If the party

**In the Matter of The Markley Group, LLC, OADR Docket No. 2025-022**  
Recommended Final Decision

satisfies that requirement, it then it must demonstrate in accordance with 310 CMR 7.51(1)(h)3 that it is aggrieved by the air permit, specifically that it is “an aggrieved person as defined in [310 CMR 7.51(1)(a)].”

In the Petitioners’ Summary Decision Opposition Memorandum, the 8 Lowell Residents erroneously contend that proof of having previously raised their eight appeal claims in written comments during the public comment period on MassDEP’s Proposed Decision to approve the Air Permit is not part of the calculus of determining whether each of them have standing to appeal the Air Permit pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)2.<sup>25</sup> According to the 8 Lowell Residents:

MassDEP and [the Applicant] both argue that an aggrieved person has “standing” on appeal only to assert issues the person themselves raised in a timely submitted public comment. [They] are wrong [because they] conflate the issue of standing . . . with issue exhaustion. The former, standing, is governed by 310 CMR 7.51(g), which establishes public rights to request an adjudicatory hearing on MassDEP’s air quality permit decisions under chapter 7.00. Under this provision, persons who are not the applicant or a ten persons group have the right to bring an appeal so long as they are: (1) “[a]n aggrieved person” and (2) “submitted written comments in accordance with 310 CMR 7.51(1)(d), where applicable.” 310 CMR 7.51(g)(2); *see also* 310 CMR 7.51(d). . . .

Here, MassDEP’s regulations at 310 CMR 7.51(1)(i)(2) govern issue exhaustion for air permit appeals. Under this provision, when MassDEP has provided a public comment period, “the issues that may be raised in a request for an adjudicatory hearing are . . . limited to the matters raised during the public comment period.” 310 CMR. 7.51(1)(i)(2). . . . [T]he language of [this] regulation[n] . . . set[s] forth exceptions to issue exhaustion where “it was not reasonably possible with due diligence to have raised such matter during the public comment period” or simply “for good cause shown.” 310 CMR 7.51(1)(i)(2). Under the plain text of the regulation, so long as a matter was raised during the public comment period, an issue arising from that matter may be reviewed on appeal [even if the matter was not raised by the appellant but instead by another commenter during the public comment period]. . . .<sup>26</sup>

---

<sup>25</sup> Petitioners’ Summary Decision Opposition Memorandum, at pp. 11-15.

<sup>26</sup> *Id.*

The 8 Lowell Residents have not cited any legal authority, including Massachusetts appellate court cases, interpreting 310 CMR 7.51(1)(d), 7.51(1)(g), and 7.51(1)(i)2 that support their interpretation of these regulations nor are there any such cases. Indeed, they failed to cite the Massachusetts Appeals Court’s recent decision in Lorusso Corp discussed below, at pp. 13-15, which supports MassDEP’s interpretation that proof of having previously raised each of their eight appeal claims in written comments during the public comment period on MassDEP’s Proposed Decision to approve the Air Permit is part of the calculus of determining whether each of them have standing to appeal the Air Permit pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)2. Moreover, a plain reading of the text of 310 CMR 7.51(1)(d), 7.51(1)(g), and 7.51(1)(i)2 does not support their interpretation, but rather MassDEP’s interpretation for the following reasons.

First, the provisions of 310 CMR 7.51(1)(g) establish the parties who have standing to appeal a MassDEP issued air permit to OADR, including “an aggrieved person who previously submitted written comments in accordance with 310 CMR 7.51(1)(d), where applicable,” on MassDEP’s proposed decision to approve or disapprove an air permit (“MassDEP’s Proposed Decision”).<sup>27</sup> The provisions of 310 CMR 7.51(1)(a) define an aggrieved person as “any person who, because of an act or failure to act by the Department, may suffer an injury in fact that is different either in kind or magnitude from that suffered by the general public, and that is within

---

<sup>27</sup> 310 CMR 7.51(1)(g)2. The applicant of an air permit can also appeal an adverse air permit decision to OADR. 310 CMR 7.51(1)(g)1. Also having standing to appeal an air permit to OADR is a Ten Persons Group that previously submitted written comments in accordance with 310 CMR 7.51(1)(d), where applicable, on MassDEP’s proposed decision to approve or disapprove an Air Permit. 310 CMR 7.51(1)(g)3.

the scope of the interests protected by [the APC Regulations at] 310 CMR 7.00.”

310 CMR 7.51(1)(d), which is referenced by 310 CMR 7.51(1)(g), makes clear that:

If [MassDEP] provides a public comment period on [its Proposed Decision], then any person or ten persons group may file written comments on the [P]roposed [D]ecision during the public comment period provided by 310 CMR 7.00. *Failure by an aggrieved person or ten persons group to submit [such] written comments . . . shall result in the waiver of any right to [appeal to OADR].*

(emphasis supplied). The waiver provision of 310 CMR 7.51(1)(d) is further emphasized by 310 CMR 7.51(1)(i)2 which provides that:

*the issues that may be raised in [an appeal of the Air Permit before OADR] . . . 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.*

(emphasis supplied); In the Matter of Lorusso Corp. and Bristol Asphalt Co., Inc., OADR Docket No. 2021-023, Recommended Final Decision (December 16, 2022), 2022 WL 18231928, adopted as Final Decision (December 28, 2022), 2022 WL 18231934, affirmed, sub nom D’Acci v. Massachusetts Department of Environmental Protection, 105 Mass. App. Ct. 1142, 2025 WL 2249862 (Unpublished Disposition 2025).

In Lorusso Corp., MassDEP issued an air permit authorizing the construction of a bituminous asphalt plant (“the proposed asphalt plant”) in Rochester, Massachusetts.<sup>28</sup> Opponents of the proposed asphalt plant, a Ten Residents Group, appealed the air permit to OADR seeking to vacate it on the ground that MassDEP had purportedly failed to properly assess the impact of odors to be generated by the facility.<sup>29</sup> The Presiding Officer in the appeal

---

<sup>28</sup> 2025 WL 2249862, \*1.

<sup>29</sup> Id.

agreed with the proposed project proponent and MassDEP that the Ten Residents Group was barred from making its odor claim because the Group had failed to present it during the public comment period on the proposed air permit.<sup>30</sup> “Specifically, the [P]residing [O]fficer concluded that the [Ten Residents Group’s] public comments had not adequately raised the issue of odor on which [the Group’s] claim depended.”<sup>31</sup> As a result, the Presiding Officer issued a Recommended Final Decision recommending that MassDEP’s then Commissioner issue a Final Decision in the appeal affirming the air permit.<sup>32</sup>

The Commissioner accepted the Presiding Officer’s recommendation and issued a Final Decision affirming the air permit.<sup>33</sup> The Ten Residents Group then appealed the Final Decision to Superior Court, which affirmed it because the Court determined that MassDEP “committed no error of law when it determined that the plaintiffs’ challenge to the air permit based on the defendants’ failure to adequately address odors was waived . . . .”<sup>34</sup> The Massachusetts Appeals Court affirmed the Superior Court’s judgment on the Ten Residents Group’s appeal.<sup>35</sup> Citing 310 CMR 7.51(1)(d) and 310 CMR 7.51(1)(i)2, the Court ruled that “[u]nder [MassDEP’s] regulations governing appeals from [MassDEP] air permitting decisions, when a public comment period is provided for an air permit, *only* those issues brought forward in the public comments

---

<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> Id., at \*2.

<sup>35</sup> Id.

may be raised in a later [appeal before OADR] on the decision.”<sup>36</sup> (emphasis supplied).

Although Lorusso Corp. was a Ten Residents Group appeal instead of an aggrieved person appeal, the case nevertheless supports MassDEP’s interpretation that proof of having previously raised their eight appeal claims in written comments during the public comment period on MassDEP’s Proposed Decision to approve the Air Permit is part of the calculus of determining whether each of the 8 Lowell Residents have standing to appeal the Air Permit pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)2.

**B. The Second Element of Proof to Establish Standing to Appeal An Air Permit Pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)2**

If a party claiming standing to appeal a MassDEP-issued air permit pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)2 demonstrates that it previously raised its appeal claims against the air permit in written comments during the public comment period, it must then demonstrate in accordance with 310 CMR 7.51(1)(h)3 that it is aggrieved by the air permit, specifically that it is “an aggrieved person as defined in [310 CMR 7.51(1)(a)].” As set forth above, 310 CMR 7.51(1)(a) defines an aggrieved person as “any person who, because of an act or failure to act by the Department, may suffer an injury in fact that is different either in kind or magnitude from that suffered by the general public, and that is within the scope of the interests protected by [the APC Regulations at] 310 CMR 7.00.”

To establish aggrieved person status, the party “must assert ‘a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest . . . . Of particular importance, the right or interest asserted must be one that [APC Regulations] . . . intends to protect.’” Onset Bay II Corp., 2020 WL 6115205, \*18. “To show standing,

---

<sup>36</sup> Id.

[however,] [the] party need not prove by a preponderance of the evidence that his or her claim of particularized injury is true.” Id., citing Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005).

As the Massachusetts Appeals Court explained in Butler:

[t]he “findings of fact” a judge is required to make when standing is at issue . . . differ from the “findings of fact” the judge must make in connection with a trial on the merits. Standing is the gateway through which one must pass en route to an inquiry on the merits. When the factual inquiry focuses on standing, therefore, a plaintiff is not required to prove by a preponderance of the evidence that his or her claims of particularized or special injury are true. “Rather, the plaintiff must put forth *credible evidence* to substantiate his [or her] allegations. [It is i]n this context [that] standing [is] essentially a question of fact for the trial judge.”

63 Mass. App. Ct. at 441 (emphasis supplied); Onset Bay II Corp., 2020 WL 6115205, \*18.

This “credible evidence” standard to demonstrate standing “has both a quantitative and a qualitative component.” Id. Specifically:

*[q]uantitatively*, the evidence must provide specific factual support for each of the claims of particularized injury the [party seeking to establish standing has made[,] . . . [and] *[q]ualitatively*, the evidence must be of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the [challenged governmental] action. *Conjecture, personal opinion, and hypothesis are therefore insufficient [to establish standing]* . . . [If] the judge determines that the evidence is both quantitatively and qualitatively sufficient . . . [to] establis[h] standing, the inquiry [regarding whether the party has standing] stops [and the party is not] required to persuade the judge that [the party’s] claims of particularized injury are, more likely than not, true.

63 Mass. App. Ct. at 441-42 (emphasis supplied); Onset Bay II Corp., 2020 WL 6115205, \*18-19.

To summarize, in order for a person to prove their status as an aggrieved person as defined by 310 CMR 7.51(1)(a), they are required to put forth a minimum quantum of specific factual evidence that qualitatively a reasonable person could rely upon to conclude that the proposed activity authorized by the air permit at issue will or might cause them to suffer an injury in fact, which will be different either in kind or magnitude from any injury, if any, that the

general public could suffer and which is within the scope of the public interest protected by the APC Regulations at 310 CMR 7.00. Id. If the person “[meets] that threshold, [they can] proceed through the ‘[s]tanding . . . gateway . . . to [the] inquiry on the merits’ regarding whether the Department properly issued the [air permit].” Id.

Accordingly, here, in order to demonstrate that they are each an aggrieved person as that term is defined by 310 CMR 7.51(1)(a), each of the 8 Lowell Residents is required to put forth a minimum quantum of specific factual evidence that qualitatively a reasonable person could rely upon to conclude that the proposed eight (8) additional diesel powered emergency generators authorized by the Air Permit will or might cause each of them to suffer an injury in fact, which will be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interest protected by the APC Regulations at 310 CMR 7.00. Id. If any of the 8 Lowell Residents “[meets] that threshold, [he or she can] proceed through the ‘[s]tanding . . . gateway . . . to [the] inquiry on the merits’ regarding whether the Department properly issued the [Air Permit].” Id. As discussed below, seven of the 8 Lowell Residents (the 7 Residents) failed to meet that threshold in opposing the Applicant’s and MassDEP’s respective Motions for Summary Decision, and, accordingly, Summary Decision should be entered against them on all eight appeal claims. Although the remaining Petitioner, Mr. Fortes, met the threshold regarding noise claims in Appeal Claim No. 6, Summary Decision should nevertheless be entered against him on that claim and Appeal Claims Nos. 7-8. See

below, at pp. 28-34.

**III. AT A MINIMUM, THE APPLICANT AND MASSDEP ARE ENTITLED TO SUMMARY DECISION AGAINST THE 7 RESIDENTS ON ALL EIGHT APPEAL CLAIMS THAT THEY HAVE ASSERTED AGAINST THE AIR PERMIT**

**A. Each of the 7 Residents Failed to File an Affidavit Demonstrating their Standing to Appeal the Air Permit**

As the Summary Decision Rule at 310 CMR 1.01(11)(f) discussed above makes a clear, a party opposing a Motion for Summary Decision “may not rest upon the mere allegations or denials of [its] pleading, but must respond, by affidavits or as otherwise provided in 310 CMR 1.01, setting forth specific facts showing that there is a genuine issue for hearing on the merits.”<sup>37</sup> Gleason, 2019 WL 8883856, \*5. Each of the 7 Residents failed to comply with this directive in opposing the Applicant’s and MassDEP’s respective Motions for Summary Decision challenging their standing to appeal the Air Permit pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)2 as individual aggrieved persons who previously submitted written comments during the public comment period on MassDEP’s Proposed Decision to approve the Air Permit. They failed to comply by simply: (1) relying on the unsworn allegations of their Amended Appeal Notice<sup>37</sup> asserting that they each have standing to appeal the Air Permit pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)2 and (2) my previous standing ruling discussed above, which, contrary to their assertions, was not a final determination on their standing.

The Summary Decision Rule and 310 CMR 7.51(1)(h)3 discussed above required each of the 7 Residents to do more to establish their standing to appeal the Air Permit pursuant to 310

---

<sup>37</sup> As noted previously in n.20, at pp. 5-6 above, the Amended Appeal Notice is the legal memorandum that the HFL Group filed in opposition to the Applicant’s and MassDEP’s Motions to Dismiss.

CMR 7.51(1)(d) and 7.51(1)(g)2. Specifically, each of them was required to file an affidavit containing sworn testimony providing proof that: (1) they raised their eight appeal claims in written comments during the public comment period on MassDEP's Proposed Decision to approve the Air Permit and (2) "establis[h]ing [their] status as an aggrieved person as defined [by the APC Regulations at 310 CMR 7.51(1)(a)]." The same sworn evidence would have been required of them if the appeal proceeded to an evidentiary adjudicatory hearing ("Hearing") for adjudication and their standing to appeal was challenged by the Applicant and MassDEP, and if they failed to provide that sworn evidence their appeal of the Air Permit would have been dismissed. Onset Bay II Corp., 2020 WL 6115205, \*19-20 (claims of several Intervenors challenging Draft c. 91 License dismissed for lack of standing due to their failure file sworn pre-filed testimony ("PFT") supporting their claims in appeal, including their standing to appeal); Page v. Department of Environmental Protection, 106 Mass. App. Ct. 1111 (Unpublished Disposition 2025), 2025 WL 3295561, \*3 n.15, \*4 n.17 (claims of one of the petitioners challenging Draft c. 91 License dismissed for lack of standing due to her failure to file sworn PFT supporting her claims in appeal, including her standing to appeal).

Simply stated "[w]ithout any proof demonstrating standing, [the 7 Residents] cannot proceed any further in [appealing the Air Permit], and as a result, all their claims in the appeal should be dismissed for lack of standing." Onset Bay II Corp., 2020 WL 6115205, \*19; Page, 2025 WL 3295561, \*3 n.15, \*4 n.17. Moreover, the 7 Residents cannot avoid the dismissal of their claims for lack of standing due to their failure to file affidavits demonstrating their standing by having their co-Petitioner, Mr. Fortes, assert appeal claims on their behalf in the affidavit he filed in opposition to the Applicant's and MassDEP's Motions for Summary Decision. As a

matter of law, Mr. Fortes cannot assert appeal claims on behalf any of the 7 Residents as he has attempted to do in his affidavit for several reasons.

First, as discussed above, the APC Regulations only authorize a party to assert appeal claims challenging an air permit that they, not others, previously asserted in written comments during the public comment period on MassDEP's Proposed Decision on the air permit. Second, the unique harm element of aggrievement that is part of the calculus of establishing standing is personal to each of the 7 Residents challenging the Air Permit and must be demonstrated by the latter and not by Mr. Fortes. Onset Bay II Corp., 2020 WL 6115205, \*20. Put another way, each of 7 Residents, not Mr. Fortes, must present their own sworn testimony, which alone or together with other evidence in the record, presents a minimum quantum of specific factual evidence that qualitatively a reasonable person could rely upon to conclude that the proposed eight (8) additional diesel powered emergency generators authorized by the Air Permit will or might cause each of them to suffer an injury in fact, which will be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interest protected by the APC Regulations at 310 CMR 7.00. Id. The Residents did not do that here by failing to file affidavits containing admissible evidence establishing their aggrieved person status, and consequently, all their appeals challenging the Air Permit should be dismissed for lack of standing.

**B. The Applicant and MassDEP Are Entitled to Summary Decision Against the 7 Residents On Other Grounds**

In the next section below, I will discuss how the Applicant and MassDEP are also entitled to Summary Decision against Mr. Fortes on all eight appeal claims he and the 7 Residents have asserted against the Air Permit. The grounds for Summary Decision against Mr. Fortes also

constitute additional grounds for Summary Decision against the 7 Residents on all eight appeal claims.

**IV. THE APPLICANT AND MASSDEP ARE ALSO ENTITLED TO SUMMARY DECISION AGAINST MR. FORTES ON ALL EIGHT APPEAL CLAIMS**

**A. The Applicant and MassDEP Are Entitled to Summary Decision Against Mr. Fortes on Appeal Claim No. 1**

Appeal Claim No. 1 alleges that in issuing the Air Permit to the Applicant, MassDEP did not comply with all Environmental Justice requirements for meaningful public participation during the Air Permit application review process.<sup>38</sup> Undisputedly, a non-profit environmental advocacy organization known as Alternatives for Community and Environment (“ACE”), through its attorney, submitted written comments raising this appeal claim during the public comment period on MassDEP’s Proposed Decision to approve the Air Permit. In its written comments, ACE did not state that it was also making the appeal claim on behalf of Mr. Fortes and any of the 7 Residents. Undisputedly, neither Mr. Fortes nor any of the 7 Residents submitted written comments raising this appeal claim during the public comment period. Also, Mr. Fortes does not assert in his affidavit opposing the Applicant’s and MassDEP’s respective Motions for Summary Decision that he submitted written comments raising this appeal claim during the public comment period. Accordingly, pursuant to 310 CMR 7.51(1)(d), 7.51(1)(g), and 7.51(1)(i)2 as discussed above, Mr. Fortes and the 7 Lowell Residents lack standing to

---

<sup>38</sup> Petitioners’ Original Appeal Notice, at pp. 16-19.

pursue Appeal Claim No. 1 in this appeal.

**B. The Applicant and MassDEP Are Entitled to Summary Decision Against Mr. Fortes on Appeal Claim No. 2**

Appeal Claim No. 2 alleges that in issuing the Air Permit to the Applicant, MassDEP failed to conduct a Cumulative Impact Analysis of the proposed additional eight generators authorized by the Air Permit.<sup>39</sup> Undisputedly, ACE, through its attorney, submitted written comments raising this appeal claim during the public comment period on MassDEP's Proposed Decision to approve the Air Permit. In its written comments, ACE did not state that it was also making the appeal claim on behalf of Mr. Fortes and any of the 7 Residents. Undisputedly neither Mr. Fortes nor any of the 7 Residents submitted written comments raising this appeal claim during the public comment period. Also, Mr. Fortes does not assert in his affidavit opposing the Applicant's and MassDEP's respective Motions for Summary Decision that he submitted written comments raising this appeal claim during the public comment period. Accordingly, pursuant to 310 CMR 7.51(1)(d), 7.51(1)(g), and 7.51(1)(i)2 as discussed above, Mr. Fortes and the 7 Residents lack standing to pursue Appeal Claim No. 2 in this appeal.

I agree with MassDEP that the Applicant and MassDEP are also entitled to Summary Decision against Mr. Fortes and the 7 Residents on Appeal Claim No. 2 because the APC Regulations at 310 CMR 7.02(14)(a)3 did not require MassDEP to conduct a Cumulative Impact Analysis of the proposed additional eight generators authorized by the Air Permit because the Applicant's Facility is an existing facility, not a new facility.<sup>40</sup> 310 CMR 7.02(14)(a)3 governs the construction and operation of a new facility located within an environmental justice

---

<sup>39</sup> *Id.*, at pp. 19-23.

<sup>40</sup> MassDEP's Summary Decision Memorandum, at p. 14.

neighborhood. The status of the Applicant's Facility being an existing facility was decided by MassDEP's Commissioner in Mr. Fortes' prior appeal in which he unsuccessfully challenged a previous air permit that MassDEP issued to the Applicant for its Facility. In the Matter of the Markley Group, LLC, OADR Docket No. 2025-006 ("Markley I"), Interlocutory Decision and Order Granting the Applicant's and Department's Motions to Dismiss (July 14, 2025), at pp. 5-7. Undisputedly, Mr. Fortes did not appeal the Commissioner's ruling and dismissal of his prior appeal in Markley I, and as such, he is barred by res judicata principles from contending in the present appeal that the Applicant's Facility is a new facility. In the Matter of Massachusetts Natural Fertilizer Company, Inc., and Otter Farm, Inc., OADR Docket No. 2022-012, Recommended Final Decision (December 2, 2024), citing, DeGiacomo v. Quincy, 476 Mass. 38, 41 (2016), 2024 WL 6467343, \*8-9, adopted as Final Decision (July 24, 2025), 2025 WL 2232112 (petitioners' failure to appeal MassDEP's Unilateral Administrative Order ("UAO") conclusively established the UAO's claims and could not be challenged in subsequent appeal of MassDEP's second UAO to petitioners). Res judicata principles also bar Mr. Fortes' privies, the 7 Residents, from making the same claim. Id.

The Applicant and MassDEP are also entitled to Summary Decision against Mr. Fortes and the 7 Residents on Appeal Claim No. 2 because 310 CMR 7.02(14)(a)4 did not require MassDEP to conduct a Cumulative Impact Analysis of the proposed additional eight generators authorized by the Air Permit for the additional reason that the Applicant's Air Permit Application did not propose to increase any emissions above one ton per year, individually or in the

aggregate.<sup>41</sup> 310 CMR 7.02(14)(a)4 only requires such an Analysis where an air permit application:

for an existing facility or emission unit that already has [an air permit proposes] to increase facility-wide potential emissions of criteria pollutants, hazardous air pollutants, or air toxics, excluding CO<sub>2</sub>e, individually or in the aggregate, by an amount equal to or greater than one ton per year, and the existing facility or emission unit is located in an environmental justice population or within: a. one mile of an environmental justice population if the facility or emission unit will not be a major source as defined in 310 CMR 7.00: Appendix C . . . .

**C. The Applicant and MassDEP Are Entitled to Summary Decision Against Mr. Fortes on Appeal Claim No. 3**

Appeal Claim No. 3 alleges that in issuing the Air Permit to the Applicant, MassDEP failed to consider alternative energy sources to power the proposed additional eight generators authorized by the Air Permit instead of diesel fuel and such failure constituted a violation of the Massachusetts Global Warming Solutions Act (“GWSA”), G.L. c. 21N, as amended by Chapter 8 of the Acts of 2021 entitled “An Act Creating a Next Generation Roadmap for Massachusetts Climate Policy” (“the 2021 Climate Act”).<sup>42</sup> Undisputedly, ACE, through its attorney, submitted written comments raising this appeal claim during the public comment period on MassDEP’s Proposed Decision to approve the Air Permit contending that “allowing [the Applicant] to install additional backup diesel generators contradicts Massachusetts’ climate goals.”<sup>43</sup> In its written comments, ACE did not state that it was also making the appeal claim on behalf of Mr. Fortes and any of the 7 Residents. Undisputedly neither Mr. Fortes nor any of the 7 Residents submitted written comments raising this appeal claim during the public comment period. Also,

---

<sup>41</sup> Id.

<sup>42</sup> Petitioners’ Original Appeal Notice, at pp. 23-24.

<sup>43</sup> MassDEP’s Summary Decision Memorandum, at p. 16.

Mr. Fortes does not assert in his affidavit opposing the Applicant's and MassDEP's respective Motions for Summary Decision that he submitted written comments raising this appeal claim during the public comment period. Accordingly, pursuant to 310 CMR 7.51(1)(d), 7.51(1)(g), and 7.51(1)(i)2 as discussed above, Mr. Fortes and the 7 Residents lack standing to pursue Appeal Claim No. 3 in this appeal.

I agree with MassDEP that the Applicant and MassDEP are also entitled to Summary Decision against Mr. Fortes and the 7 Residents on Appeal Claim No. 3 because the GWSA Regulations at 310 CMR 7.71 did not require MassDEP to integrate Green House Gas ("GHG") reduction into the Air Permit. Nevertheless, pursuant to 310 CMR 7.71(4), the Air Permit restricts the Carbon Dioxide Equivalent ("CO<sub>2</sub>e") emissions to below a level that would require reporting of GHG emissions. The CO<sub>2</sub>e emissions proposed for the Air Permit are 3,365 tons per year ("TPY"), which is below the reporting threshold of 5,000 TPY of CO<sub>2</sub>e emissions.

**D. The Applicant and MassDEP Are Entitled to Summary Decision Against Mr. Fortes on Appeal Claim No. 4**

Appeal Claim No. 4 alleges that in issuing the Air Permit to the Applicant, MassDEP failed to require review of the proposed additional eight generators authorized by the Air Permit pursuant to the Massachusetts Environmental Policy Act ("MEPA").<sup>44</sup> Undisputedly, ACE, through its attorney, submitted written comments raising this appeal claim during the public comment period on MassDEP's Proposed Decision to approve the Air Permit. In its written comments, ACE did not state that it was also making the appeal claim on behalf of Mr. Fortes and any of the 7 Residents. Undisputedly, neither Mr. Fortes nor any of the 7 Residents

---

<sup>44</sup> Petitioners' Original Appeal Notice, at pp. 24-29.

submitted written comments raising this appeal claim during the public comment period. Also, Mr. Fortes does not assert in his affidavit opposing the Applicant's and MassDEP's respective Motions for Summary Decision that he submitted written comments raising this appeal claim during the public comment period. Accordingly, pursuant to 310 CMR 7.51(1)(d), 7.51(1)(g), and 7.51(1)(i)2 as discussed above, Mr. Fortes and the 7 Residents lack standing to pursue Appeal Claim No. 4 in this appeal.

I agree with MassDEP that the Applicant and MassDEP are also entitled to Summary Decision against Mr. Fortes and the 7 Residents on Appeal Claim No. 4 because OADR lacks jurisdiction to adjudicate it because "challenges to a [proposed] project's status under MEPA . . . are decided by [the] MEPA [Office of the Executive Office of Energy and Environmental Affairs ("EEA")] and cannot be decided in a Department appeal." In the Matter of Covanta Springfield, OADR Docket No. 2010-059, Recommended Final Decision, (March 4, 2011), 18 DEPR 75, 2011 WL 1500352, \*5-6, adopted as Final Decision (March 28, 2011), 18 DEPR 75, 2011 WL 1500351. Simply stated, "any purported MEPA violations are not actionable in this [OADR] administrative forum." In the Matter of SEMASS Partnership, OADR Docket No. 2012-015, Recommended Final Decision (June 18, 2013), 2013 WL 3196118, \*16, adopted as Final Decision (June 24, 2013), 2013 WL 3243091.

**E. The Applicant and MassDEP Are Entitled to Summary Decision Against Mr. Fortes on Appeal Claim No. 5**

Appeal Claim No. 5 alleges that in issuing the Air Permit to the Applicant, MassDEP failed to consider the environmental impacts of the 16 cooling towers that would be required for the proposed additional eight generators authorized by the Air Permit.<sup>45</sup> The bases of this appeal

---

<sup>45</sup> Id., at pp. 29-30.

claim are that: (1) MassDEP erred in the determining that the APC Regulations at 310 CMR 7.02(2)(b)(6) exempted the cooling towers at issue from air quality air permit review; and (2) the Applicant failed to provide MassDEP the required information to establish an exemption for the cooling towers.<sup>46</sup> Undisputedly, ACE, through its attorney, submitted written comments raising cooling tower claims during the public comment period. In its written comments, ACE did not state that it was also making the appeal claim on behalf of Mr. Fortes and any of the 7 Residents. Undisputedly, neither Mr. Fortes nor any of the 7 Residents submitted written comments making these cooling hour claims during the public comment period on MassDEP's Proposed Decision to approve the Air Permit. In his affidavit opposing the Applicant's and MassDEP's respective Motions for Summary Decision, Mr. Fortes does not assert that he submitted written comments raising these cooling tower claims during the public comment period. Accordingly, pursuant to 310 CMR 7.51(1)(d), 7.51(1)(g), and 7.51(1)(i)2 as discussed above, Mr. Fortes and the 7 Residents lack standing to pursue Appeal Claim No. 5 in this appeal.

I agree with MassDEP that the Applicant and MassDEP are also entitled to Summary Decision against Mr. Fortes and the 7 Residents on Appeal Claim No. 5, because they have incorrectly asserted that the cooling towers at issue were approved by the Air Permit, when in fact they were previously approved by the air permit at issue in Mr. Fortes' prior unsuccessful appeal in Markley I that was affirmed by MassDEP's Commissioner. As previously noted above, Mr. Fortes did not appeal the Commissioner's ruling and dismissal of his prior appeal in Markley I, and as such, he is barred by res judicata principles from contending in the present appeal that the cooling towers at issue were improperly approved by MassDEP. Massachusetts Natural

---

<sup>46</sup> Id.

Fertilizer Company, Inc., 2024 WL 6467343, \*8-9. Res judicata principles also bar Mr. Fortes’ privies, the 7 Residents, from making the same claim. Id.

**F. The Applicant and MassDEP Are Entitled to Summary Decision Against Mr. Fortes on Appeal Claim No. 6**

Appeal Claim No. 6 alleges that in issuing the Air Permit to the Applicant, MassDEP failed to adequately address noise and other operational impacts that would be caused by the proposed additional eight generators authorized by the Air Permit.<sup>47</sup> In moving for Summary Decision in their favor, neither the Applicant nor MassDEP assert that Mr. Fortes lacks standing to pursue this appeal claim.<sup>48</sup> However, as discussed below, based on the undisputed material facts and as a matter of law the Applicant and MassDEP are entitled to Summary Decision against Mr. Fortes and the 7 Residents on Appeal Claim No. 6.<sup>49</sup>

The starting point for determining whether the Applicant and MassDEP have demonstrated that they are entitled to Summary Decision against Mr. Fortes on Appeal Claim No. 6 is a discussion about the APC Regulations at 310 CMR 7.10 and MassDEP’s Noise Policy that both regulate noise pollution and govern adjudication of Appeal Claim No. 6. This is critical given that the affidavit that Mr. Fortes’s purported noise expert, Dr. Jamie Banks (“Dr. Banks”), filed supporting his noise claims and in opposition to the Applicant’s and MassDEP’s Motions for Summary Decision are devoid of any discussion of what 310 CMR 7.10 and MassDEP’s

---

<sup>47</sup> Petitioners’ Original Appeal Notice, at pp. 30-31.

<sup>48</sup> Applicant’s Summary Decision Memorandum, at pp. 12-13; MassDEP’s Summary Decision Memorandum, at pp. 24-27.

<sup>49</sup> The grounds set forth above in the text warranting Summary Decision against Mr. Fortes on Appeal Claim No. 6 also constitute additional grounds to grant Summary Decision against the 7 Residents.

Noise Policy specifically require and how the Air Permit falls short of or violates those requirements.

Under 310 CMR 7.10, “noise pollution” is considered a form of air pollution. The APC Regulations define “noise” as any “means of sound of sufficient intensity and/or duration as to cause or contribute to a condition of air pollution,” 310 CMR 7.00 (definition of “Noise”), and prohibit:

[any] person owning, leasing[,] or controlling a source of *sound* [from] willfully, negligently, or through failure to provide necessary equipment, service, or maintenance or to take necessary precautions cause, suffer, allow, *or permit unnecessary* emissions from [that] source of sound that may cause *noise*.

310 CMR 7.10(1) (emphasis supplied). Excluded from the definition of noise are “sounds emitted during and associated with”:

(a) parades, public gatherings, or sporting events, for which permits have been issued provided that [the] parades, public gatherings, or sporting events in one city or town do not cause noise in another city or town; (b) emergency police, fire, and ambulance vehicles; (c) police, fire, and civil and national defense activities; (d) domestic equipment such as lawn mowers and power saws between the hours of 7:00 A.M. and 9:00 P.M.

310 CMR 7.10(3).

To assist in its enforcement of 310 CMR 7.10, “[MassDEP] has established a ‘Noise Policy’<sup>50</sup> interpreting when emissions of sound are unnecessary” resulting in prohibited noise pollution within the meaning of the APC Regulations at 310 CMR 7.10(1) discussed above.

Town of Weymouth v. Massachusetts Department of Environmental Protection, 961 F.3d 34, 56 (1st Cir. 2020). Under the Policy, a source of sound will violate the APC Regulations regulating

---

<sup>50</sup> <https://www.mass.gov/doc/massdep-noise-policy/download>.

noise pollution if the source “[i]ncreases the broadband sound level by more than 10 dB(A) above ambient” or “[p]roduces a ‘pure tone’ condition.”<sup>51</sup> *Id.* MassDEP “has a ‘long standing practice . . . not to apply the Noise Policy to temporary construction’ for purposes of air permitting and ‘instead to require appropriate noise mitigation measures.’” *Id.*, at 57.

The Petitioners’ Original Appeal Notice alleges that the Air Permit fails to appropriately address noise impacts from the cooling towers, flatbed chillers,<sup>52</sup> and the emergency engines at the Facility.<sup>53</sup> However, this allegation fails to set forth what was lacking in the Sound Monitoring and Modeling Study that the Applicant’s noise expert performed as part of Air Permit application review process. It also fails to set forth what sound mitigation controls are lacking in the Air Permit and fails to identify what in the Air Permit specifically violates 310 CMR 7.10 and what noise mitigation controls are required by 310 CMR 7.10.

Mr. Fortes’ purported noise readings in his affidavit<sup>54</sup> do not support his noise claims in Appeal Claim No. 6 because they do not constitute “facts as would be admissible in evidence in Massachusetts courts” which the Summary Decision Rule in 310 CMR 1.01(11)(f) requires for “[affidavits] [s]upporting [or] opposing [a motion for summary decision] . . . .” This Rule also requires affidavits “[to] be made on personal knowledge [and] . . . show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.” Simply stated, Mr. Fortes is

---

<sup>51</sup> The Policy defines a “pure tone” condition as when the sound pressure level at any octave band center frequency exceeds the sound pressure level in the two adjacent octave bands by 3 decibels or more. <https://www.mass.gov/doc/massdep-noise-policy/download>.

<sup>52</sup> It appears that purported noise caused by the flatbed chillers is no longer at issue because a site visit of the Facility by MassDEP staff on September 23, 2025, revealed that the flatbed chillers had been permanently removed from the Facility. MassDEP’s Summary Decision Memorandum, at p. 24 n.54.

<sup>53</sup> Petitioners’ Original Appeal Notice, at pp. 30-31.

<sup>54</sup> Mr. Fortes’ Affidavit, ¶¶ 45-47; Exhibit 7 to Mr. Fortes’ Affidavit.

not an air permitting expert and accordingly, as a matter of law his noise readings do not constitute admissible evidence in opposing the Applicant's and MassDEP's Motions for Summary Decision.

It is well settled that in an air permit appeal before OADR, the appellant has the burden of proving through an expert witness with sufficient expertise in air permitting under the APC Regulations to testify on the technical issues presented by the appellant's claims in the appeal that MassDEP improperly issued the air permit. In the Matter of The Prysmian Group and Prysmian Cables & Systems USA, LLC, OADR Docket No. 2024-006, Recommended Final Decision (August 26, 2024), 2024 WL 4920921, \*10, adopted as Final Decision (September 26, 2024), 2024 WL 4920920 (individuals purporting be appellants' expert witnesses in air permit appeal "ha[d] little or no air permitting experience" under the APC Regulations). Specifically, the expert witness must have this expertise to be deemed to have the relevant knowledge, skill, experience, training, and education sufficient to opine as an expert witness on the specific requirements of the APC Regulations and whether MassDEP complied with those requirements in approving the air permit at issue in the appeal. Id. This is what would be required of an individual purporting to be an appellant's expert witness testifying at a Hearing adjudicating an air permit appeal. Id.

Hence, an affidavit submitted by an individual purporting to be the appellant's expert witness in an air permit appeal in opposition to an air permit applicant's and/or MassDEP's Motion for Summary Decision seeking affirmance of the air permit, must set forth a minimum set of specific facts demonstrating their expertise in air permitting under the APC Regulations. This is consistent with the Summary Decision Rule in 310 CMR 1.01(11)(f) discussed above that "[affidavits] [s]upporting [or] opposing [a motion for summary decision] shall be made on

**In the Matter of The Markley Group, LLC, OADR Docket No. 2025-022**  
Recommended Final Decision

personal knowledge, shall set forth such facts as would be admissible in evidence in Massachusetts courts, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.” Therefore, an affidavit submitted by an individual purporting to be the appellant’s expert witness that fails to set forth a minimum set of specific facts demonstrating their expertise in air permitting under the APC Regulations, as a matter of law fails to contain admissible evidence concerning the air permit’s validity. Here, Dr. Banks’ affidavit on behalf of Mr. Fortes and the 7 Residents supporting their noise claims and in opposition to the Applicant’s and MassDEP’s Motions for Summary Decision on Appeal Claim No. 6 falls into that category for several reasons.

First, Dr. Banks’ affidavit fails to set forth a minimum set of specific facts demonstrating her expertise in air permitting under the APC Regulations, specifically with respect to MassDEP’s regulation of noise pollution under 310 CMR 7.10.<sup>55</sup> This lack of statement of expertise is in stark contrast to Mr. Braczyk’s affidavit supporting MassDEP’s Motion for Summary Decision.<sup>56</sup> Second, her affidavit simply criticizes in general terms the alleged deficiencies in the Sound Monitoring and Modeling Study that the Applicant’s noise expert performed as part of Air Permit application review process but did not submit any actual noise readings that she performed evidencing noise levels in violation of the 310 CMR 7.10.<sup>57</sup> Instead, she relied on Mr. Fortes’ purported noise readings,<sup>58</sup> which as discussed above, do not constitute

---

<sup>55</sup> Dr. Banks’ Affidavit, ¶¶ 1-9.

<sup>56</sup> See p. 4 n.14 above.

<sup>57</sup> Dr. Banks’ Affidavit, ¶¶ 9-19.

<sup>58</sup> *Id.*, ¶ 24; Mr. Fortes’ Affidavit, ¶¶ 45-47; Exhibit 7 to Mr. Fortes’ Affidavit.

admissible evidence supporting his noise claims and opposing the Applicant's and MassDEP's Motions for Summary Decision.

**G. The Applicant and MassDEP Are Entitled to Summary Decision Against Mr. Fortes on Appeal Claim No. 7**

Appeal Claim No. 7 alleges that in issuing the Air Permit to the Applicant, MassDEP failed to take into account the Applicant's purported failure to comply with existing permit conditions governing the operation of the existing generators at the Facility.<sup>59</sup> In moving for Summary Decision in their favor on this appeal claim, the Applicant and MassDEP assert that OADR lacks jurisdiction to adjudicate it because the issue of whether the Applicant has failed to comply with existing permit conditions governing the operation of the existing generators at the Facility is an enforcement matter falling within MassDEP's enforcement discretion that cannot be adjudicated in a permit appeal such as this case.<sup>60</sup> I agree.

It is well settled that the exercise of enforcement discretion resides with MassDEP and a party may not use MassDEP's permitting process to compel enforcement against another party. In the Matter of Diane Mercadante, OADR Docket No. WET 2009-029, Recommended Final Decision (November 12, 2009), 2009 WL 5698021, \*6-7, adopted as Final Decision (November 23, 2009), 2009 WL 5865650 (administrative appeal claims seeking enforcement in wetlands permitting appeal dismissed for lack of subject matter jurisdiction); In the Matter of Stephen Arena, OADR Docket No. WET-2021-034, Recommended Final Decision (November 9, 2021),

---

<sup>59</sup> Petitioners' Original Appeal Notice, at pp. 31-32.

<sup>60</sup> Applicant's Summary Decision Memorandum, at pp. 9-10; MassDEP's Summary Decision Memorandum, at pp. 27-28. The Applicant also contends it is entitled to Summary Decision in its favor on Appeal Claim No. 7 because neither Mr. Fortes nor the 7 Residents "have demonstrated they have standing as aggrieved persons to assert claims related to [the Applicant's] alleged noncompliance" with existing permit conditions governing the operation of the existing generators at the Facility. Applicant's Summary Decision Memorandum, at pp. 9-10. MassDEP takes no position on the Applicant's claim. MassDEP's Summary Decision Memorandum, at pp. 27-28.

2021 WL 6297695, \*4, adopted by Final Decision (December 3, 2021), 2021 WL 6297696 (“[i]n a permitting proceeding, like this appeal, [OADR] has no jurisdiction relative to MassDEP’s exercise of enforcement discretion”). Accordingly, the Applicant and MassDEP are entitled to Summary Decision against Mr. Fortes and the 7 Residents on Appeal Claim No. 7.

**H. The Applicant and MassDEP Are Entitled to Summary Decision Against Mr. Fortes on Appeal Claim No. 8**

Appeal Claim No. 8 alleges that in issuing the Air Permit to the Applicant, MassDEP failed to take into account the Applicant’s purported failure to submit accurate records to MassDEP regarding the generators currently in operation at the Facility.<sup>61</sup> This claim is also akin to an enforcement claim asserting that the Applicant has violated existing air permit requirements mandating accurate record keeping. As a result, OADR is not the forum to adjudicate the claim. Mercadante, 2009 WL 5698021, \*6-7; Arena, 2021 WL 6297695, \*4. Therefore, Summary Decision should be granted to the Applicant and MassDEP on Appeal Claim No. 8.

**CONCLUSION**

Based on the foregoing, MassDEP’s Commissioner should issue a Final Decision granting Summary Decision to the Applicant and MassDEP and affirming the Air Permit.

*Salvatore M. Giorlandino*

**Date: December 23, 2025**

\_\_\_\_\_  
Salvatore M. Giorlandino  
Chief Presiding Officer

<sup>61</sup> Petitioners’ Original Appeal Notice, at pp. 32-34.

## **NOTICE OF RECOMMENDED FINAL DECISION**

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

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

## SERVICE LIST

**PETITIONERS:** 8 Lowell Residents<sup>62</sup>

**Legal Representatives:** Sofia E. Owen, Esq.  
Alternatives for Community & Environment  
2201 Washington Street, Suite 301  
Roxbury, MA 02119  
**Email:** sofia@ace-ej.org

Stephanie L. Safdi, Esq.  
Environmental Justice Law and Advocacy Clinic  
Jerome N. Frank Legal Services Organization  
Yale Law School  
P.O. Box 209090  
New Haven, CT 06520-9090  
**Email:** stephanie.safdi@ylsclinics.org

**APPLICANT:** Jack Montanaro  
Jeff Flanagan  
Markley Group, LLC  
1 Markley Way  
Lowell, MA 01852  
**Email:** jmontanaro@makleygroup.com  
**Email:** jflanagan@markleygroup.com

**Legal Representative:** Michelle N. O'Brien, Esq.  
Pierce Atwood LLP  
100 Summer Street  
Boston, MA 02110  
**Email:** mobrien@pierceatwood.com

**MassDEP:** Edward J. Braczyk, Permit Chief  
Dr. Mir S. Waez, Environmental Engineer  
Heidi Zisch, Regional Counsel  
MassDEP/NERO  
150 Presidential Way  
Woburn, MA 01801  
**Email:** Edward.Braczyk@mass.gov

**[continued next page]**

---

<sup>62</sup> See n.2, at p. 2 above.

[continued from preceding page]

**Email:** Mir.S.Waez@mass.gov

**Email:** Heidi.Zisch@mass.gov

**Legal Representatives:**

Jeanne G. Argento, Counsel

Office of General Counsel

MassDEP/NERO

150 Presidential Way

Woburn, MA 01801

**Email:** Jeanne.Argento@mass.gov

Bruce Hopper, Deputy General Counsel

Office of General Counsel

MassDEP/Boston

100 Cambridge Street, 9<sup>th</sup> Floor

Boston, MA 02114

**Email:** bruce.e.hopper@mass.gov

Cc: Lowell Health Department – lgolden@lowellma.gov

Lowell City Fire Department – lfdfireprevention@lowellma.gov