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EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

December 2, 2024

**In the Matter of
Massachusetts Natural Fertilizer
Company, Inc., and Otter Farm, Inc.**

**Docket No. 2022-012
DEP File No.:
Enforcement Document No. 00013644**

RECOMMENDED FINAL DECISION

INTRODUCTION

This appeal involves PFAS¹ contamination of private drinking water wells caused by a composting business operated by Massachusetts Natural Fertilizer Company, Inc. (“MNFC”) on real property owned by Otter Farm, Inc. (“Otter Farm”) at 65 Bean Porridge Road in Westminister, Massachusetts (“the Site”) and the actions of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) to address that contamination. In the appeal, MNFC and Otter Farm (collectively “the Petitioners”) challenge a Unilateral Administrative Order and Permit Suspension that MassDEP’s Central Regional Office (“CERO Office”) issued to the Petitioners on July 20, 2022 (“the July 2022 UAO”) suspending the Recycling, Composting, or Conversion Operations Permit (“RCC Permit”) that MassDEP had

¹ “PFAS” is the acronym for per- and polyfluoroalkyl substances that can be harmful to human health and the environment. See below, at pp. 4-5.

previously issued to MNFC authorizing MNFC's operation of the compost business on the Site.² July 2022 UAO, ¶¶ 4-12, 16. MassDEP issued the RCC Permit to MNFC pursuant to MassDEP's authority under the Solid Waste Act, G.L. c. 111, §§ 150A, 150A1/2, and the Site Assignment Regulations at 310 CMR 16.00.³ The RCC Permit authorized MNFC "to accept and utilize [at the Site] source-separated organics and other compostable materials to produce marketable compost materials" subject to the condition in ¶ VI.B.4 of the RCC Permit that the compost operation "not accumulate or store or handle materials of a nature or in quantities so as to cause or pose a threat to the public health, safety, welfare[,] or the environment." July 2022 UAO, ¶¶ 4-12, 16. MassDEP contends that MNFC violated that condition of the RCC Permit because PFAS in compostable materials on the Site seeped through the soil on the Site into groundwater causing PFAS contamination of the private drinking water well at the Site and more than 100 private drinking water wells near the Site. Id.

In response, the Petitioners seek rescission of the July 2022 UAO claiming that:

(1) MassDEP improperly applied MCP Soil Standards in determining that compostable materials on the Site contained PFAS;⁴ and (2) MassDEP's "Regulations concerning PFAS are evolving

² The Petitioners' appeal is pending before MassDEP's Office of Appeals and Dispute Resolution ("OADR"). OADR is an independent, neutral, quasi-judicial office within MassDEP whose Presiding Officers (senior environmental attorneys) are responsible for advising MassDEP's Commissioner in the adjudication of appeals filed with OADR. A more detailed description of OADR appears in Addendum No. 1, at p. 56 below.

³ The provisions of the Solid Waste Act, G.L. c. 111, §§ 150A, 150A1/2, and the Site Assignment Regulations at 310 CMR 16.00, are discussed below, at pp. 5-8.

⁴ [Petitioners' Pre-Hearing] Memorandum of Law, Opposition to [MassDEP's] Motion for Summary Decision [on Issue No. 1 for Adjudication], and [Petitioners'] Cross-Motion for Summary Decision ("Petitioners' Pre-Hearing Memorandum"), at pp. 1, 6, 12-15. "MCP" is the acronym for the Massachusetts Contingency Plan which is a set of regulations in 310 CMR 40.0000 that MassDEP has promulgated pursuant to its authority under Massachusetts Oil

and should not be used until further study is conducted.”⁵ However, as discussed in detail below, at pp. 20-22, these claims are barred by the doctrine of res judicata as a result of the Petitioners’ failure to appeal a UAO that MassDEP issued to MNFC on May 17, 2022 (“the May 2022 UAO”), several months prior to its issuance of the July 2022 UAO, to address the Petitioners’ then violation of ¶ VI.B.4 of the RCC Permit caused by PFAS in compostable materials on the Site that seeped through the soil on the Site into the groundwater causing PFAS contamination of the private drinking well at the Site and at least 25 private drinking water wells near the Site.

The Petitioners’ failure to appeal the May 2022 UAO conclusively established all the UAO’s claims, including that PFAS in compostable containing materials on the Site caused or posed a threat to public health, safety, welfare, or the environment in violation of ¶ VI.B.4 of the RCC Permit, specifically, the PFAS contamination of numerous private drinking water wells. It also conclusively established the validity of the use of MCP Soil Standards in determining the existence of PFAS in compostable materials on the Site. As such, the Petitioners are barred from questioning the validity of the use of those Standards in their appeal of the July 2022 UAO.

The July 2022 UAO incorporated the conclusively established claims of the May 2022 UAO and set forth additional material facts not disputed by the Petitioners: (1) detailing the sampling and testing and results collected between February 2022 and May 2022 supporting MassDEP’s issuance of the May 2022 UAO; and (2) detailing the sampling and testing and

and Hazardous Material Release Prevention and Response Act (“Chapter 21E”), G.L. c. 21E. I further discuss Chapter 21E and the MCP below, at pp. 8-13.

⁵ Petitioners’ Pre-Hearing Memorandum, at pp. 16-17. The Petitioners also contend that the remedial measures in the July 2022 UAO that MassDEP ordered the Petitioners to perform are unreasonable because they are purportedly excessive. *Id.*, at pp. 17-19.

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resulting data collected between the issuance of the May 2022 UAO and the July 2022 UAO further demonstrating that PFAS in compostable materials on Site was the source of the PFAS contamination of the numerous private drinking water wells. See below, at pp. 30-38. For these reasons and also because the remedial measures in the July 2022 UAO that MassDEP ordered the Petitioners to perform to correct their violation of ¶ VI.B.4 of the RCC Permit are reasonable,⁶ I recommend that MassDEP’s Commissioner issue a Final Decision in this appeal affirming the July 2022 UAO.⁷

THE HARMFUL NATURE OF PFAS

PFAS are part of a group of manufactured chemicals “used since the 1950’s to manufacture stain-resistant, water-resistant, and non-stick products.”⁸ PFAS “are widely used in common consumer products as coatings, on food packaging, outdoor clothing, carpets, leather goods, ski and snowboard waxes, and more[,] [including] [c]ertain types of firefighting foam—historically used by the U.S. military, local fire departments, and airports to fight oil and gasoline fires”⁹ PFAS contamination of drinking water:

is an important emerging [environmental] issue nationwide [b]ecause PFAS are water soluble, [and] over time PFAS from some firefighting foam, manufacturing

⁶ I discuss the remedial measures below, at pp. 38-53.

⁷ MassDEP’s Commissioner or her designee is the Final Decision-Maker in all appeals adjudicated by OADR Presiding Officers. 310 CMR 1.01(14)(b); In the Matter of The Prysmian Group and Prysmian Cables & Systems USA, LLC, OADR Docket No. 2024-006, Recommended Final Decision (August 26, 2024), at p. 8, adopted as Final Decision (September 26, 2024).

⁸ <https://www.mass.gov/info-details/per-and-polyfluoroalkyl-substances-pfas#what-are-pfas-and-why-are-they-a-problem>.

⁹ Id.

sites, landfills, spills, air deposition from factories[,] and other releases can seep into surface soils[,] [and] [f]rom there, PFAS can leach into groundwater or surface water, and can contaminate drinking water.¹⁰

Studies have shown that:

exposure to sufficiently elevated levels of certain PFAS may cause a variety of health effects including developmental effects in fetuses and infants, effects on the thyroid, liver, kidneys, certain hormones[,] and the immune system. Some studies [also] suggest a cancer risk may also exist in people exposed to higher levels of some PFAS. Scientists and regulators are still working to study and better understand the health risks posed by exposures to PFAS¹¹

STATUTORY AND REGULATORY FRAMEWORK

I. THE SOLID WASTE ACT AND THE SITE ASSIGNMENT REGULATIONS

The Solid Waste Act, G.L. c. 111, §§ 150A, 150A1/2, governs the disposal of solid waste¹² and the establishment, expansion, and operation of solid waste facilities in the Commonwealth. G.L. c. 111, § 150A. The statute’s definition of what constitutes a solid waste facility includes a “refuse composting plant” and a “dumping ground for refuse or any other works for treating, storing, or disposing of refuse.” Id.

The Solid Waste Act provides that no solid waste facility can be operated “[on any site] in any city or town [of the Commonwealth] . . . unless, after a public hearing, [the site has been

¹⁰ Id.

¹¹ Id.

¹² The Solid Waste Act defines solid waste as:

all solid or liquid waste materials [in the Commonwealth], including garbage and rubbish, and sludge, but not including sewage, and those materials defined as hazardous wastes in [G.L. c. 21C, § 2] and those materials defined as source, special nuclear or by-product material under the provisions of the Atomic Energy Act of 1954.

G.L. c. 111, § 150A.

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approved] . . . by the [local municipal] board of health . . . in accordance with the provisions of [the statute], or, in the case of a facility owned or operated by an agency of the commonwealth, [the site] has been [approved]” by MassDEP. *Id.* Generally, a proposed solid waste facility may require both site assignment approval from the local Board of Health and a permit or permits from MassDEP. However, a solid waste facility that conducts recycling, composting or conversion operations (“RCC Operations”) only needs an RCC Permit from MassDEP.

MassDEP issues RCC Permits pursuant to its Site Assignment Regulations at 310 CMR 16.00 which it has promulgated pursuant to the Solid Waste Act.¹³ The Site Assignment Regulations are intended “to protect public health, safety, and the environment by comprehensively regulating: (a) the siting of solid waste facilities; and (b) operations which recycle, *compost*, or convert recyclable or organic materials.” 310 CMR 16.01(1)(a)-16.01(1)(b) (emphasis supplied). Under the Site Assignment Regulations at 310 CMR 16.05, an RCC Operation that has an RCC Permit from MassDEP does not require a site assignment from a local Board of Health or a solid waste management facility permit from MassDEP pursuant to 310 CMR 19.000.

¹³ The Solid Waste Act authorizes MassDEP to adopt rules and regulations governing solid waste facilities and to issue orders to enforce the statute. G.L c. 111, § 150A. This authorization also appears in G.L c. 111, § 150A1/2, which directs MassDEP, “in cooperation with the [Commonwealth’s] department of public health, [to] promulgate rules and regulations [which] . . . establish site suitability standards and criteria [for solid waste facilities, which] shall include, but not be limited to, . . . considerations [of]: (1) the location, nature[,] and extent of any existing or potential sources of public or private drinking water supplies in relation to the site, including the recharge area of a sole source aquifer; (2) the relationship of the site to groundwater elevations; (3) the proximity of wetlands, . . . [and] (4) the proximity of surface water bodies” In addition to the Site Assignment Regulations discussed above in the text, MassDEP has also promulgated the Solid Waste Management Regulations at 310 CMR 19.000 which are intended to protect public health, safety, and the environment by regulating a solid waste facility’s operation through permits setting forth detailed operational requirements for the facility.

“[T]he failure [of any person] to comply fully with the [requirements]” of an RCC Permit also constitutes a violation of the Site Assignment Regulations. 310 CMR 16.01(8)(a)8. The Site Assignment Regulations define a “person” as including “any individual, partnership, association, firm, company, corporation, . . . or any other entity responsible in any way for any activity, facility or operation subject to [the Regulations].” 310 CMR 16.02 (definition of “person”). This definition includes the owner of the real property on which the RCC Operation is located (“the owner”)¹⁴ and the operator of the RCC Operation (“the operator”).¹⁵ Under the Site Assignment Regulations at 310 CMR 16.01(6), the owner and operator are jointly and severally liable for the violation any regulatory, statutory, *and/or permit requirement* governing the RCC Operation and as such MassDEP “may take action for any violation against the owner, the operator[,], or both.” (emphasis supplied). Specifically, the Site Assignment Regulations authorize MassDEP to:

- (1) “rescind, suspend, revoke, or modify . . . [the RCC] [P]ermit” governing the RCC Operation when MassDEP “has cause to believe that a violation [of the RCC Permit] has occurred”;¹⁶

¹⁴ The Site Assignment Regulations at 310 CMR 16.02 define an “owner” as:

any person who alone or in conjunction with others has legal ownership, a leasehold interest, or effective control over the real property upon which a facility or operation is located, or the airspace above said real property

The definition of “‘owner’ does not [include] persons holding bare legal title for the purpose of providing security for financing.” 310 CMR 16.02.

¹⁵ The Site Assignment Regulations at 310 CMR 16.02 define an “operator” as:

any person who has care, charge or control of a facility, operation or activity subject to [the Regulations] including, without limitation, an agent or lessee of the owner or an independent contractor.

¹⁶ 310 CMR 16.01(8)(b)2.

- (2) “order the owner or operator, or any other person responsible for the violation, to . . . cease [the RCC Operations] until the violation is corrected to [MassDEP’s] satisfaction”;¹⁷ and
- (3) “order the owner or operator, or any other person responsible for the violation, to . . . take appropriate remedial measures immediately or by a specified date to bring the site into compliance or to protect public health, safety[,] or the environment”¹⁸

These actions are authorized by the Solid Waste Act which authorizes MassDEP to “rescind, suspend[,] or modify [a] permit [it has issued authorizing a solid waste facility] upon [MassDEP’s] determination that the operation or maintenance of the facility results in a threat to the public health and safety or to the environment.” G.L. c. 111, § 150A.

II. CHAPTER 21E AND THE MCP

The Massachusetts Oil and Hazardous Material Release Prevention and Response Act (“Chapter 21E”), G.L. c. 21E, and MassDEP’s Chapter 21E Regulations at 310 CMR 40.0000 known as the Massachusetts Contingency Plan (“MCP”) is a semi-privatized environmental cleanup program supervised by MassDEP that “requires owners and operators of real property (among others) with *releases of oil or hazardous materials* on their properties [to retain a Licensed Site Professional (“LSP”)]¹⁹ to assess and remediate those releases *to protect* health,

¹⁷ 310 CMR 16.01(8)(b)1.a.

¹⁸ 310 CMR 16.01(8)(b)1.c.

¹⁹ Under Chapter 21E, a party responsible for cleaning up a real property that has been contaminated by the release of oil or hazardous materials retains an LSP to oversee assessment and cleanup of contamination, and to ensure these actions are performed in compliance with Chapter 21E and the MCP. Massachusetts’ Approach to Waste Site Cleanup: Chapter 21E and the Massachusetts Contingency Plan (November 2012), at p. 1 (<https://www.mass.gov/doc/massachusetts-approach-to-waste-site-cleanup-chapter-21e-and-the-massachusetts-contingency-plan-0/download>). “An LSP is an environmental scientist or engineer experienced in cleaning up oil

safety, public welfare and *the environment*.” In the Matter of Environmental Testing and Research Laboratories, Inc., OADR Docket No. 2018-006 (“ETR”), Recommended Final Decision (May 28, 2021), at p. 30 (emphasis supplied), adopted as Final Decision (September 28, 2021); In the Matter of James M. Knott, OADR Docket No. 2011-011, Recommended Final Decision (January 31, 2012), 2012 WL 920529, at *3, 2012 MA ENV LEXIS 52, at 7, citing, G.L. c. 21E, §§ 1, 2, 3, 4, and 5, adopted as Final Decision (March 12, 2012), 2012 WL 920528, 2012 MA ENV LEXIS 51. Chapter 21E defines the terms “the environment”, “hazardous material”, and “release” as follows.

“The environment” is defined by Chapter 21E as “[the] waters, land, surface or subsurface strata, or ambient air of the Commonwealth.”²⁰ This definition would include groundwater, surface water, and private and public drinking water supplies.²¹

“Hazardous material” is defined by Chapter 21E as “material, in whatever form, which, because of its quantity, concentration, chemical, . . . [or] toxic . . . characteristics, either

and hazardous material contamination [who is] licensed by the [Commonwealth’s] Board of Registration of Hazardous Waste Site Cleanup Professionals (usually referred to as the LSP Board), based on education, experience, and passing an examination on applicable regulations and technical issues.” Id.

²⁰ G.L. c. 21E, § 2.

²¹ Private drinking water supplies consist of private drinking water wells on real property. Public drinking water supplies consist of Public Water Systems which MassDEP’s Drinking Water Regulations at 310 CMR 22.02 define as:

a system for the provision to the public of water for human consumption, through pipes or other constructed conveyances, if such system has at least 15 service connections or regularly serves an average of at least 25 individuals daily at least 60 days of the year. [The definition of] Public Water System includes any collection, treatment, storage, and distribution facilities under control of the operator of such a system and used primarily in connection with such system, and any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system

310 CMR 22.02 (definition of “Public Water System”).

separately or in combination with any substance or substances, constitutes a present or potential threat to human health, safety, welfare, or to the environment, when improperly stored, treated, transported, disposed of, used, or otherwise managed.²² This definition would include PFAS, which as discussed above poses a threat to public health and safety and the environment because of its characteristics.

Lastly, “release” is defined by Chapter 21E as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment.”²³ This definition would include PFAS contamination of private and public drinking water supplies caused by PFAS in materials stored, spilled, or disposed on the ground of a compost facility authorized by MassDEP pursuant to an RCC Permit that seep into the soil and groundwater. Such contamination would constitute a threat to the public health and safety or

²² G.L. c. 21E, § 2. The definition of hazardous material “[does not] include oil” which is defined by Chapter 21E as any:

insoluble or partially soluble oils of any kind or origin or in any form, including, without limitation, crude or fuel oils, lube oil or sludge, asphalt, insoluble or partially insoluble derivatives of mineral, animal or vegetable oils. [However,] [t]he term [neither] . . . include[s] waste oil [nor] . . . those substances which are included in 42 USC § 9601(14).

Id.

²³ Under G.L. c. 21E, § 2 excluded from the definition of release are:

- (1) emissions from the exhaust of an engine;
- (2) release of source, by product, or special nuclear material from a nuclear incident, as those terms are defined in 42 USC Sec. 2014, if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under 42 USC § 2210;
- (3) the normal application of fertilizer; and
- (4) the application of pesticides consistent with their labelling.

to the environment justifying MassDEP taking action pursuant to the Solid Waste Act and the Site Assignment Regulations at 310 CMR 16.01(8)(b)2 and 310 CMR 16.01(8)(b)1.c, to address the contamination by rescinding, suspending, or modifying the RCC Permit and ordering the compost facility's operator and the owner of the real property on which the compost facility is located to "take appropriate remedial measures immediately or by a specified date to bring the [facility] into compliance or to protect public health, safety[,], or the environment." This course of action pursuant to the Solid Waste Act and the Site Assignment Regulations would be further supported by the MCP's specific provisions relating to the protection of private and public drinking water supplies and policies that MassDEP has adopted to protect those supplies.

First, the MCP at 310 CMR 40.0311(6) requires a party "[to] notify [MassDEP] as soon as possible but not more than two hours after obtaining knowledge that . . . a release . . . of oil and/or hazardous material in a private drinking water supply well [reaches certain] . . . concentrations [as specified by the MCP]."

Second, the MCP at 310 CMR 40.0483(1)(a)8.b requires the submittal of a Phase I Report to MassDEP which lists and describes all private and public drinking water supplies within 500 feet of an oil and/or hazardous material disposal site.²⁴

Third, the MCP at 310 CMR 40.0520(2)(a) requires that a disposal site be classified as a Tier 1 site if there is evidence of groundwater contamination with oil and/or hazardous material

²⁴ A Phase 1 Report provides the Department with important information about the disposal site to assess its environmental impact at the site and surrounding areas, the effectiveness of any cleanup actions taken at the site, and the appropriateness of any further cleanup actions. 310 CMR 40.0483(1)(a) through 40.0483(1)(h); 310 CMR 40.0483(2).

at concentrations equal to or exceeding the concentrations specified in the MCP and “[the] groundwater is located within an Interim Wellhead Protection Area [or] Zone II [of a public drinking water system], or within 500 feet of a Private Water Supply Well.”²⁵

Fourth, to protect against adverse health effects for all persons consuming water containing PFAS, on December 27, 2019, MassDEP’s Bureau of Waste Site Cleanup (“BWSC”) which oversees MassDEP’s enforcement of Chapter 21E and the MCP, promulgated, as set forth in the MCP at 310 CMR 40.0974(2) and 40.1600, a Reportable Concentrations of Oil and Hazardous Waste in Groundwater (“RCGW-1”) and a Method 1 Risk Characterization GW-1 standard (“GW-1”) of 20 nanograms per liter (“ng/L”) in drinking water for the sum of six (6) PFAS chemicals collectively known as the PFAS6: perfluorodecanoic acid (“PFDA”), perfluoroheptanoic acid (“PFHpA”), perfluorohexanesulfonic acid (“PFHxS”), perfluorononanoic acid (“PFNA”), perfluorooctanesulfonic acid (“PFOS”), and perfluorooctanoic acid (“PFOA”).²⁶ Individual Reportable Concentrations and Method 1 Risk Characterization standards were also established for PFDA, PFHpA, PFHxS, PFNA, PFOS and

²⁵ Under the MCP, Chapter 21E contaminated sites are ranked by complexity, the number of sources, and how serious a potential threat the contamination poses. Massachusetts’ Approach to Waste Site Cleanup: Chapter 21E and the Massachusetts Contingency Plan (November 2012), at pp. 2-3 (<https://www.mass.gov/doc/massachusetts-approach-to-waste-site-cleanup-chapter-21e-and-the-massachusetts-contingency-plan-0/download>).

Historically, the more seriously contaminated sites are Tier I (with Tier IA, Tier IB, and Tier IC deemed as the most contaminated sites) or Tier II (less contaminated). *Id.* MassDEP maintains a searchable online (internet) database to track the cleanup progress of reported 21E sites. <http://www.mass.gov/eea/agencies/massdep/cleanup/sites>.

²⁶ Department’s Pre-filed Testimony of Mark Baldi (“Mr. Baldi’s Direct PFT”), ¶ 6. Mr. Baldi is the Deputy Regional Director of MassDEP’s Central Regional Office in charge of the Office’s Bureau of Waste Site Cleanup (“BWSC”) which enforces Chapter 21E and the MCP. His credentials are set forth below, at p. 48. He testified at the evidentiary Adjudicatory Hearing that I conducted in the appeal to adjudicate the issue of whether the remedial measures in the July 2022 UAO that MassDEP ordered the Petitioners to perform were reasonable to address the Petitioners’ violation of ¶ VI.B.4 of the RCC Permit. *See* below, at pp. 50-52.

PFOA in soil.²⁷ MassDEP's BWSC adopted these standards after conducting four public hearings and one public meeting, and reviewing and responding to 51 sets of public comments.²⁸

Fifth, MassDEP's Office of Research and Standards ("ORS") has determined that a concentration of PFAS6 greater than 90 ng/L detected in a private drinking water well poses an Imminent Hazard within the meaning of the MCP at 310 CMR 40.0950.²⁹ As defined in the MCP, an Imminent Hazard means a hazard which would pose a significant risk of harm to health, safety, public welfare or the environment if it were present for even a short period of time, as further described in 310 CMR 40.0950.³⁰

Lastly, as a result of PFAS having contaminated private well water supplies, MassDEP also established a Private Wells PFAS Sampling Program pursuant to which "[it would] conduc[t] PFAS testing[,] [utilizing Department certified laboratories,] for a limited number of private wells, [in particular] focusing on the 84 Massachusetts towns where 60% or more of residents are served by private wells" at no charge to private well owners.³¹

²⁷ Mr. Baldi's Direct PFT, ¶ 6.

²⁸ Id.

²⁹ Id., ¶ 11.

³⁰ Id. The MCP at 310 CMR 40.0321(2)(a) provides that releases that "[can] pose an Imminent Hazard to human health [include] a release to the environment indicated by the measurement of oil and/or hazardous material in a private drinking water supply well at a concentration equal to or greater than ten times the Category RCGW-1 Reportable Concentration, as described in 310 CMR 40.0360 through 40.0369 and listed at 310 CMR 40.1600."

³¹ <https://www.mass.gov/doc/frequently-asked-questions-about-the-massdep-private-wells-pfas-sampling-program/download>.

DISCUSSION

MassDEP'S JULY 2022 UAO TO THE PETITIONERS SHOULD BE AFFIRMED BECAUSE MassDEP PROPERLY ISSUED IT TO ADDRESS THE PETITIONERS' VIOLATION OF ¶ VI.B.4 OF THE RCC PERMIT THAT CAUSED OR POSED A THREAT TO PUBLIC HEALTH, SAFETY, WELFARE, AND THE ENVIRONMENT, SPECIFICALLY, THE PFAS CONTAMINATION OF NUMEROUS PRIVATE DRINKING WATER WELLS

I. ISSUES FOR ADJUDICATION IN APPEAL

The Issues for Adjudication in the Petitioners' appeal of the July 2022 UAO as established at the outset of the appeal,³² are two-fold:

- (1) Did the Petitioners commit the environmental violations as alleged by MassDEP in the July 2022 UAO?
- (2) If so, are the remedial measures in the July 2022 UAO that MassDEP ordered the Petitioners to perform to correct the violations reasonable?

These two Issues for Adjudication are consistent with the long-standing practice that the Issues for Adjudication in an administrative appeal of a UAO issued by MassDEP are: (1) whether the appellant committed the environmental violations as alleged by MassDEP in the UAO; and (2) if so, whether the remedial measures in the UAO that MassDEP ordered the appellant to perform to correct the violations are reasonable.³³ As discussed in detail below, MassDEP, the party with the burden of proof in the appeal, prevails on both these Issues.

³² See Orders on September 21, 2022 (Appeal Adjudication Schedule Order) and on October 27, 2022 (Post Pre-Hearing Conference Report and Orders).

³³ In the Matter of West Meadow Homes, Docket Nos. 2009-023 & 024, Recommended Final Decision (June 20, 2011), 2011 WL 3882193, *1 and 8, adopted as Final Decision (August 18, 2011), 2011 WL 3882192 (MassDEP demonstrated that appellant committed wetlands violations alleged in UAO and remedial measures ordered by UAO were reasonable to correct the violations); In the Matter of Ferry Street Partners Investment Trust and Daniel Messier, Trustee, OADR Docket No. 2015-008, Recommended Final Decision (October 11, 2016), 2016 WL 7493838, *8-17, adopted as Final Decision (December 14, 2016), 2016 WL 7493837 (MassDEP demonstrated that

II. MassDEP IS ENTITLED TO SUMMARY DECISION ON ISSUE NO. 1 FOR ADJUDICATION

Issue No. 1 for Adjudication in the appeal (“Issue No. 1”) as set forth above poses the question of whether the Petitioners committed the environmental violations as alleged by MassDEP in the July 2022 UAO. As such, the adjudication of Issue No. 1 requires a determination of whether MassDEP correctly determined that MNFC accumulated, stored, and/or handled compostable materials on the Site containing PFAS that caused or posed a threat to the public health, safety, welfare, or the environment in violation of ¶ VI.B.4 of the RCC Permit. MassDEP contends that MNFC violated ¶ VI.B.4 of the RCC Permit because PFAS in compostable materials on the Site seeped through the soil on the Site into groundwater causing the PFAS contamination of the private drinking water well at the Site and more than 100 private drinking water wells near the Site.³⁴ If MassDEP’s determination is correct then, as a matter of law, under the Site Assignment Regulations at 310 CMR 16.01(6), MNFC, as the operator of the compost operation on the Site, and Otter Farm, as the owner of the real property at the Site, are jointly and severally liable for any violation of ¶ VI.B.4 of the RCC Permit. Also, as a matter of law, the Solid Waste Act and the Site Assignment Regulations at 310 CMR 16.01(8)(b)2 and 310 CMR 16.01(8)(b)1.c, respectively, would have authorized MassDEP to “rescind, suspend[,] or modify” the RCC Permit and order the Petitioners to “cease operations [of the facility] until the

appellant committed asbestos and solid and hazardous waste violations alleged in UAO and remedial measures ordered by UAO were reasonable to correct the violations); In the Matter of Edwin Mroz, OADR Docket No. 2017-021, Recommended Final Decision (June 07, 2019), 2019 WL 4735471, *2 and 18-24, adopted as Final Decision (June 18, 2019), 2019 WL 4735469 (MassDEP demonstrated that appellant committed wetlands violations alleged in UAO and remedial measures ordered by UAO were reasonable to correct the violations).

³⁴ May 2022 UAO, ¶¶ 8-9; July 2022 UAO, ¶¶ 12-14.

violation is corrected to [MassDEP’s] satisfaction,” 310 CMR 16.01(6), 16.01(8)(b)1.a, and “take appropriate remedial measures immediately or by a specified date to bring the [S]ite into compliance or to protect public health, safety[,] or the environment.” 310 CMR 16.01(6), 16.01(8)(b)1.

Prior to the evidentiary adjudicatory hearing (“Hearing”) that I conducted to adjudicate the appeal, MassDEP moved for Summary Decision in its favor on Issue No. 1³⁵ contending that based on the undisputed material facts and as a matter of law, MNFC violated ¶ VI.B.4 of the RCC Permit because PFAS in compostable materials on the Site seeped through the soil on the Site into groundwater causing “PFAS [contamination] exceeding Imminent Hazard values [under the MCP] in [the private] drinking water [well] at the Site and in [more than 100] private [drinking water] wells off-site” and “PFAS contamination in incoming, intermediate, and finished materials at the Site.”³⁶ MassDEP asserted that the Petitioners’ failure to appeal the May 2022 UAO had conclusively established all the UAO’s claims, including that PFAS in compostable materials on the Site caused the PFAS contamination of the numerous private drinking water wells at issue in violation of ¶ VI.B.4 of the RCC Permit, and as such, they were barred by doctrine of res judicata doctrine from contending otherwise in their appeal of the July 2022 UAO.³⁷

³⁵ As discussed below, at pp. 18-20, a Motion for Summary Decision in an administrative appeal such as this appeal is the administrative version of a Motion for Summary Judgment in a civil suit in Court.

³⁶ May 2022 UAO, ¶ 8; July 2022 UAO, ¶ 12.

³⁷ MassDEP’s Memorandum of Law and Motion for Summary Decision on Issue No. 1 (October 28, 2022) (collectively “MassDEP’s Summary Decision Motion”), at pp. 1-15.

In addition, the July 2022 UAO incorporated the conclusively established claims of the May 2022 UAO and set forth additional material facts not disputed by the Petitioners:

(1) detailing the sampling and testing and results collected between February 2022 and May 2022 supporting MassDEP's issuance of the May 2022 UAO; and (2) detailing the sampling and testing and resulting data collected between the issuance of the May 2022 UAO and the July 2022 UAO further demonstrating that PFAS in compostable materials on Site was the source of PFAS contamination of numerous private drinking water wells. These additional material facts were supported by the sworn pre-filed testimony ("PFT") of two senior managers in MassDEP's CERO Office: (1) Mr. Baldi, the DRD of MassDEP's Central Regional Office in charge of the Office's Bureau of Waste Site Cleanup ("BWSC") which is responsible for enforcing Chapter 21E and the MCP; and (2) Douglas Fine ("Mr. Fine"), the then DRD of the Office's Bureau of Air and Waste ("BAW") which enforces the Solid Waste Act and the Site Assignment Regulations and issued the RCC Permit to MNFC.³⁸

In response, the Petitioners opposed MassDEP's Motion for Summary Decision and filed a Cross-Motion for Summary Decision on Issue No. 1 contending that their claims against the July 2022 UAO were not barred by the doctrine of res judicata and repeating their claim that they did not violate ¶ VI.B.4 of the RCC Permit because in their view: (1) MassDEP improperly applied MCP Soil Standards in determining that compostable materials on the Site contained

³⁸ Department's Pre-filed Direct Testimony of Douglas E. Fine ("Mr. Fine's Direct PFT"). Mr. Fine retired from MassDEP in October 2023.

PFAS;³⁹ and (2) MassDEP’s “Regulations concerning PFAS are evolving and should not be used until further study is conducted.”⁴⁰ As discussed below, I rejected the Petitioners’ claims and agreed with MassDEP that it was entitled to Summary Decision on Issue No. 1.

A. The Summary Decision Standard of 310 CMR 1.01(11)(f)

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 affidavits⁴¹ for a summary decision in the moving party's favor upon all or any of

³⁹ [Petitioners’ Pre-Hearing] Memorandum of Law, Opposition to [MassDEP’s] Motion for Summary Decision [on Issue No. 1 for Adjudication], and [Petitioners’] Cross-Motion for Summary Decision (“Petitioners’ Pre-Hearing Memorandum”), at pp. 1, 6, 12-15.

⁴⁰ Petitioners’ Pre-Hearing Memorandum, at pp. 16-17. The Petitioners also contend that the remedial measures in the July 2022 UAO that MassDEP ordered the Petitioners to perform are unreasonable because they are purportedly excessive. Id., at pp. 17-19.

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.

In sum, “[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)

⁴¹ 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 Salisbury, 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).

(summary judgment properly awarded to defendant); Cabot Corp. v. AVX Corp., 448 Mass. 629, 636-37 (2007) (same).

**B. The Res Judicata Effect of the Petitioners’ Failure to Appeal the
May 2022 UAO**

“The doctrine of res judicata is based on ‘[c]onsiderations of fairness and the requirements of efficient judicial administration,’ which ‘dictate that an opposing party in a particular action as well as the court is entitled to be free from attempts to relitigate the same claim.’” DeGiacomo v. Quincy, 476 Mass. 38, 41 (2016). The doctrine of res judicata encompasses two types of preclusion: (1) claim preclusion and (2) issue preclusion. Id. “Claim preclusion makes a valid, final judgment conclusive *on the parties [to the litigation] and their privies*, and prevents re-litigation of all matters that were or could have been adjudicated in the action.” Id. (emphasis supplied).⁴² “Issue preclusion ‘prevents re-litigation of an issue determined in an earlier action where the same issue arises in a later action, based on a different claim, between the same parties or [their privies].’” Id., at 42.

Massachusetts appellate courts have held that the “[res judicata] principles of claim and issue preclusion . . . appl[y] . . . to the decisions of administrative agencies and cove[r] un-appealed agency final orders.” Conservation Commission of Falmouth v. Robert B. Pacheco, 49 Mass. App. Ct. 737, 742 n.5 (2000) (defendant barred from challenging in court local

⁴² For res judicata purposes, “privity . . . represents a legal conclusion that the relationship between the one who [was] a party on the record [in the prior litigation] and the non-party is sufficiently close to afford application of the principle of preclusion [on the non-party].” DeGiacomo, 476 Mass. at 43. Here, based on the undisputed material facts and as a matter of law, Otter Farm is MNFC’s privy because their relationship is sufficiently close warranting Otter Farm to be res judicata bound by the un-appealed May 2022 UAO. The closeness of their relationship is evidenced by their commercial landlord-tenant relationship involving the Site and their joint and several liability under the Site Assignment Regulations at 310 CMR 16.01(6) for the violation of any regulatory, statutory, and/or permit requirement of the RCC Permit governing the Compost Operation at the Site.

conservation commission's authority to take enforcement action against party for wetlands violations where party failed to appeal commission's prior order rejecting the defendant's claim); GreenRoots, Inc. v. Energy Facilities Siting Board, 490 Mass. 747, 755-56 (2022) (plaintiff barred from challenging in court Energy Facilities Siting Board's decision to conduct public hearing in Chelsea on private electric company's plan to adjust the boundaries of an electric substation to be located in East Boston "because no appeal was taken from the [Board's] decision" to hold the public hearing in Chelsea). Massachusetts appellate courts have also held that "[a party] challenging the validity of an order before an agency or a court is bound by an unappealed adverse ruling, not only as to the grounds [the party] raised, but [also] as to those [the party] might have raised but elected to forgo." Giuffrida v. Zoning Board of Appeals of Falmouth, 68 Mass. App. Ct. 396, 401 (2007). These res judicata preclusion principles govern here because undisputedly neither MNFC nor Otter Farm appealed the May 2022 UAO, and as a result, all MassDEP's claims in the May 2022 UAO, which were incorporated in the July 2022 UAO, were conclusively established by the lack of an appeal and cannot be challenged by the Petitioners here in their appeal of the July 2022 UAO. Pacheco, 49 Mass. App. Ct. at 742 n.5; Falmouth, 68 Mass. App. Ct. at 401. These conclusively established claims include that MNFC accumulated, stored, and/or handled compostable materials on the Site containing PFAS that caused the PFAS contamination of the numerous private drinking water wells in violation of ¶ VI.B.4 of the RCC Permit. Additionally, the res judicata doctrine bars the Petitioners from asserting here claims against the July 2022 UAO that "[they] might have raised but elected to forgo" by not appealing the May 2022 UAO. Giuffrida, 68 Mass. App. Ct. at 401.

C. The Conclusively Established Claims of the May 2022 UAO

1. MassDEP’S October 2020 Issuance of the RCC Permit To MNFC

On October 6, 2020, MassDEP issued the RCC Permit to MNFC pursuant to MassDEP’s authority under the Solid Waste Act, G.L. c. 111, §§ 150A, 150A1/2, and the Site Assignment Regulations at 310 CMR 16.00.⁴³ The RCC Permit authorized MNFC to conduct the compost operation at the Site, specifically to accept and utilize source-separated organics and other compostable materials to produce marketable compost materials.⁴⁴ Paragraph VI.B.4 of the RCC Permit required MNFC to “ensure that the [compost] operation [at the Site], at all times, [did] not accumulate or store or handle materials of a nature or in quantities so as to cause or pose a threat to the public health, safety, welfare or the environment.”⁴⁵

2. The Sampling and Testing and Results Collected Between February 2022 and May 2022 that Led to MassDEP’s Issuance of the May 2022 UAO

Mr. Baldi, the BWSC DRD of MassDEP’s Central Regional Office, provided sworn pre-filed testimony (“PFT”) for the Hearing not disputed by the Petitioners detailing the sampling and testing and results collected between February 2022 and May 2022 that led to MassDEP’s issuance of the May 2022 UAO. This undisputed PFT, which I treat as affidavit testimony in support of MassDEP’s Motion for Summary Decision on Issue No. 1, is as follows.

On February 18, 2022, the owner of residential real property at 67 Bean Porridge Hill

⁴³ May 2022 UAO, ¶ 4; July 2022 UAO, ¶ 5.

⁴⁴ May 2022 UAO, ¶ 5; July 2022 UAO, ¶ 6.

⁴⁵ May 2022 UAO, ¶ 8; July 2022 UAO, ¶ 7.

Road, Westminster, Massachusetts (“67 Bean Porridge Hill Road”) which abuts the Site provided MassDEP with a laboratory analytical report, dated February 17, 2022, for a sample of drinking water that the owner had collected on January 31, 2022 from the private drinking water well at 67 Bean Porridge Hill Road.⁴⁶ The laboratory analytical report identified the detection of 1,334.64 ng/L PFAS6 in the well’s drinking water, which was beyond the 90 ng/L Imminent Hazard standard of the MCP at 310 CMR 40.0950 as discussed above.⁴⁷

On February 24, 2022, MassDEP’s contractor, Environmental Strategies & Management (“ES&M”), re-sampled water from the private drinking water well at 67 Bean Porridge Hill Road to confirm the PFAS6 concentrations detected by the sampling conducted by the owner of the property.⁴⁸ A concentration of 1,021 ng/L PFAS6 was detected in the drinking water, also beyond the 90 ng/L Imminent Hazard standard of the MCP at 310 CMR 40.0950 as discussed above.⁴⁹

On February 24 and March 15, 2022, MassDEP’s contractor, ES&M, sampled five (5) other private drinking water wells within 500 feet of 67 Bean Porridge Hill Road, specifically at 64, 66, 68, 70, and 72 Bean Porridge Hill Road to identify and mitigate any other Imminent Hazards posed by concentrations of PFAS6 greater than 90 ng/L in the drinking water in those wells.⁵⁰ Laboratory analysis of drinking water samples detected PFAS6 concentrations ranging

⁴⁶ Mr. Baldi’s Direct PFT, ¶ 9; Exhibit 8 to Mr. Baldi’s Direct PFT.

⁴⁷ Id.

⁴⁸ Mr. Baldi’s Direct PFT, ¶ 10; Exhibit 10 to Mr. Baldi’s Direct PFT.

⁴⁹ Id.

⁵⁰ Mr. Baldi’s Direct PFT, ¶ 12; Exhibit 10 to Mr. Baldi’s Direct PFT.

from 333 ng/L to 1,815 ng/L, in excess of the RCGW-1 of 20 ng/L.⁵¹

On or about March 30, 2022, the Petitioners retained Lawrence Lessard (“Mr. Lessard”), an LSP and the principal of Lessard Environmental Inc. (“LEI”), an environmental consulting firm, to perform a series of environmental sampling concerning the Site. This included sampling the private drinking water well at the Site on March 30, 2022, which detected a PFAS6 concentration of 5,736.9 ng/L in the well.⁵² This PFAS6 concentration posed an Imminent Hazard under the MCP.⁵³ Mr. Lessard included this sample result in his Immediate Response Action (“IRA”) Update Letter of April 21, 2022, to MassDEP.⁵⁴

On March 30, 2022, LEI also sampled surface water in a pond on the Site located at the headwaters of an unnamed stream that flows south from the Site through a residential

⁵¹ Id.

⁵² Mr. Baldi’s Direct PFT, ¶ 14.

⁵³ Id.

⁵⁴ Id.; Exhibit 13 to Mr. Baldi’s Direct PFT. An IRA is submitted to MassDEP pursuant to the MCP at 310 CMR 40.0410-40.0429. Under 310 CMR 40.0411(1), an IRA:

[must] assess [the] release, threat of release and/or site conditions and, where appropriate, contain, isolate, remove or secure a release or threat of release of oil and/or hazardous material in order to:

- (a) abate, prevent or eliminate an Imminent Hazard to health, safety, public welfare or the environment; and/or
- (b) respond to other time-critical release, threat of release and/or site conditions.

The MCP requires an IRA be conducted for certain sites, including “sites where a release of oil and/or hazardous material has resulted in conditions which have been determined to pose an Imminent Hazard pursuant to 310 CMR 40.0950” 310 CMR 40.0412(3). “At a minimum, [an IRA must] involve the assessment of the release or threat of release and/or site conditions The nature and extent of assessment actions taken as an [IRA] [must] be commensurate with the type and amount of oil and/or hazardous material released or threatening to be released, site complexity, and the sensitivity of site and surrounding human and environmental receptors. . . .” 310 CMR 40.0414(1).

neighborhood on Amber Road and into Crocker Pond, which is used by the Town of Westminster for swimming as a public beach.⁵⁵ The surface water sample from the pond on the Site was taken approximately 300 feet from stockpiles of compost material on the Site and approximately 3,600 feet from where the pond flows into Crocker Pond.⁵⁶ The sampling detected a PFAS6 concentration of 570.8 ng/L in the surface water which constituted a Condition of Substantial Release Migration (“SRM”) under the MCP at 310 CMR 40.0006 and 40.0313(4) requiring an IRA.⁵⁷

On March 30, 2022, LEI also arranged for the sampling of two (2) stockpiles of compost material at the Site, which were identified as the Raw Materials Stockpile (“SP”) and the Finished Product Stockpile (“FP”) respectively.⁵⁸ Although these samples were not soil samples, LEI “antidotally compared to the MCP S-1 Soil Standards of 300 [Parts per Billion (“PPB”)] for each of the PFAS 6 compounds.”⁵⁹ LEI initially erroneously reported to MassDEP that the sampling results for the SP and FP stockpiles “were below the [Method 1 S-1 Risk

⁵⁵ Mr. Baldi’s Direct PFT, ¶ 15.

⁵⁶ Id.

⁵⁷ Id. The MCP defines an SRM as “a condition at a disposal site that includes . . . releases that have resulted in the discharge of separate-phase oil and/or separate-phase hazardous material to surface waters” 310 CMR 40.0313(4)(a). The owner or operator of a real property from which there has been such a release or threat of release must notify MassDEP of the release within 72 hours after obtaining knowledge of the release. 310 CMR 40.0313(1) and 40.0331(1)(a).

⁵⁸ Mr. Baldi’s Direct PFT, ¶¶ 16-18.

⁵⁹ Mr. Baldi’s Direct PFT, ¶ 17; Exhibit 14 to Mr. Baldi’s Direct PFT.

Characterization Standards under the MCP],”⁶⁰ but later, provided correct sampling results noting that: (1) concentrations of PFOA and PFOS in the raw material stockpile (SP) at the Site exceeded their respective RCS-1 and S-1 standards; and (2) concentrations of PFHpA, PFOA, PFNA, PFOS, and PFDA in the finished product stockpile (FP) at the Site exceeded their respective RCS-1 and S-1 standards.⁶¹

On March 31, 2022, MassDEP issued Notices of Responsibility (“NORs”) pursuant to the MCP to MNF and Otter Farm, as operator and owner of the Site, respectively.⁶² These NORs referenced PFAS6 contamination in private drinking water wells near the Site exceeding 90 ng/L, the Imminent Hazard level for humans for PFAS6 in drinking water.⁶³ These NORs also required the Petitioners to conduct various response actions, including sampling of all private drinking water wells within 500 feet of any detection of PFAS6 found in a private well.⁶⁴ As a result of the NORs, MNFC “[began] providing bottled water and/or water treatment systems to private well owners with contaminated wells and continue[d] to investigate the full extent of private well contamination from the Site as part of an [IRA Plan] under [the MCP at] 310 CMR 40.0414.”⁶⁵ MNFC also began “submi[tting] weekly [reports] to MassDEP, the Westminster

⁶⁰ Id. Method 1 S-1 Risk Categorization Standards are the concentrations below which a condition of No Significant Risk exists for soil considered to have the highest potential exposure under the MCP at 310 CMR 40.0933, such as at a school, residence, or daycare facility. Id., ¶ 18.

⁶¹ Mr. Baldi’s Direct PFT, ¶ 18.

⁶² Mr. Baldi’s Direct PFT, ¶ 13; Exhibits 11 and 12 to Mr. Baldi’s Direct PFT.

⁶³ Id.

⁶⁴ Id.

⁶⁵ Id.; May 2022 UAO, ¶ 6; July 2022 UAO, ¶ 9.

Board of Health, and residents near the Site summarizing activities under the IRA Plan.”⁶⁶

As documented by MNFC’s weekly reports dated April 29 and May 5, 2022, respectively, samples taken during that time from the raw materials stockpile and the finished product stockpile from the compost operation at the Site confirmed that both stockpiles had concentrations of PFAS that exceeded Reportable Concentrations under the MCP.⁶⁷ On May 9, 2022, MassDEP’s contractor, ES&M, created a map depicting real properties where private drinking water wells had been sampled by MassDEP and LEI.⁶⁸ The map depicted 26 real properties with private drinking water wells, including the Site, where concentrations of PFAS₆ posed an Imminent Hazard.⁶⁹ The March 30, 2022 surface water sample taken from the pond on Site, where 570.8 ng/L PFAS₆ was detected, and the stream originating on the Site were also shown on the map.⁷⁰

On May 11, 2022, in response to MassDEP’s inquiry regarding the composition of the FP and SP stockpiles and other stockpiles of material in the compost operation at the Site, MNFC informed MassDEP that the SP Stockpile was composed of 80% short paper fibers, 10% sawdust, 5% leaf yard waste, and 5% biopellets.⁷¹ MNFC also described the FP stockpile as

⁶⁶ Id.

⁶⁷ May 2022 UAO, ¶ 7; July 2022 UAO, ¶ 9.

⁶⁸ Mr. Baldi’s Direct PFT, ¶ 19; Exhibit 16 to Mr. Baldi’s Direct PFT.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Mr. Baldi’s Direct PFT, ¶ 20.

“Finished Product” composed of 50% finished compost and 50% raw loam.⁷² Loam is a type of soil that is composed of sand, silt, and clay. See 310 CMR 15.243, 15.244.

On May 13, 2022, and May 16, 2022, respectively, LEI submitted to MassDEP a fifth IRA Update Letter and an IRA Plan that both:

- (1) identified the FP stockpile at the Site as topsoil product for consumer sales;⁷³
- (2) stated that “[t]he FP series of samples was distinguished from the SP series of samples, with the product represented by the FP series as topsoil ready for sale to consumers [and] [f]or purposes of the [MCP] . . . [would] be evaluated as soil”;⁷⁴ and
- (3) acknowledged that under the MCP at 310 CMR 40.0032(3), “soil with the identified concentrations is not appropriate for use in [in areas classified as Groundwater Category GW-1 (“GW-1”)].”⁷⁵

⁷² Id.

⁷³ Mr. Baldi’s Direct PFT, ¶¶ 21, 23; Exhibit 17 to Mr. Baldi’s Direct PFT.

⁷⁴ Id.

⁷⁵ Id.; May 2022 UAO, ¶ 7; July 2022 UAO, ¶ 9. Under the MCP, “[c]ategories of groundwater and soil have been established by [MassDEP] for use in the characterization of risk posed by [c. 21E] disposal sites.” 310 CMR 40.0931. A GW-1 is one of three groundwater categories that “describe the potential for three different types of exposure [and] [m]ore than one category may apply to a single disposal site.” 310 CMR 40.0932(1). The MCP requires that “[t]he appropriate groundwater category [] be identified for both: (a) groundwater currently affected by the release of oil and/or hazardous materials, and (b) any area to which the groundwater affected by the release is expected to migrate.” 310 CMR 40.0932(3). Unless an exception under MCP at 310 CMR 40.0932(5) applies, “groundwater [must] be defined as GW-1 if the groundwater is located: (a) within a Current Drinking Water Source Area; or (b) within a Potential Drinking Water Source area.” 310 CMR 40.0932(4), 40.0932(5). Groundwater is defined as GW-2:

if it is located within 30 feet of an existing or planned building or structure that is or will be occupied, and the average annual depth to groundwater in that area is 15 feet or less. Category GW-2 groundwater is considered to be a potential source of vapors of oil and/or hazardous material to indoor air. Construction of a building in an area in which the average annual depth to groundwater is 15 feet or less will change the groundwater category at the site to include GW-2; change the activities, uses and/or exposures at the disposal site; and may negate the notification exemption described at 310 CMR 40.0317(17).

LEI's IRA Plan went further by containing an Imminent Hazard Evaluation of the Site pursuant to the MCP which stated that "[t]o date, the majority of the private [drinking water] wells sampled ha[d] exhibited PFAS6 concentrations above the [Imminent Hazard] threshold of 90 ppt [and] [a]s such, [Imminent Hazard] conditions [were] present at the [Site]."⁷⁶

3. MassDEP's Issuance of the May 2022 UAO

"Based on [the sampling and testing and results discussed above documenting] PFAS concentrations exceeding Imminent Hazard value in drinking water at the Site and in [more than 25] private [drinking water] wells off-site, and PFAS contamination in stockpiled materials at the Site, MassDEP [] determined that [MNFC's] operation of the [compost operation at the] Site pose[d] a threat to public health and the environment" in violation of: (1) Paragraph VI.B.4 of the RCC Permit;⁷⁷ and (2) the Site Assignment Regulations at 310 CMR 16.01(8)(a)8 which required MNFC to "comply fully with the applicable provisions of . . . [the RCC Permit]."⁷⁸ As a result of its determination, MassDEP issued the May 2022 UAO which "direct[ed] [MNFC] to cease and desist from selling or otherwise distributing any materials containing PFAS at levels that would exceed applicable standards for PFAS in groundwater that [was] or could be used as

310 CMR 40.0932(6). Regarding the GW-3 category, the MCP provides that "[g]roundwater at all disposal sites [must] be considered a potential source of discharge to surface water and [must] be categorized, at a minimum, as category GW-3." 310 CMR 40.0932(2).

⁷⁶ Mr. Baldi's Direct PFT, ¶ 24.

⁷⁷ May 2022 UAO, ¶ 8; July 2022 UAO, ¶ 7.

⁷⁸ May 2022 UAO, ¶¶ 8-9; July 2022 UAO, ¶ 7.

drinking water, including private wells.”⁷⁹ The May 2022 UAO also required MNFC to submit a sampling plan to MassDEP “for sampling the products offered for sale or distribution at the Site”⁸⁰

4. The Petitioners’ Failure to Appeal the May 2022 UAO

The May 2022 UAO informed MNFC that “[i]f [it was] aggrieved by [the May 2022 UAO]” it could appeal it to OADR⁸¹ within 21 days after its issuance and provided detailed instructions on how to appeal.⁸² Specifically, the May 2022 UAO informed MNFC that an appeal “[had] to be made in writing and [had to be filed with OADR] within two-one (21) days from the date of [the May 2022 UAO] and “state clearly and concisely the facts that [were] the grounds for the [appeal].”⁸³ Undisputedly: (1) the date of the May 2022 UAO was May 17, 2022, (2) the 21st day thereafter was June 7, 2022, and (3) neither MNFC nor its privy, Otter Farm, appealed the May 2022 UAO to OADR by the June 7, 2022 appeal deadline.⁸⁴

D. The Petitioners’ Compliance with the May 2022 UAO and MassDEP’s Issuance of the July 2022 UAO

MassDEP is also entitled to Summary Decision on Issue No. 1 because the July 2022 UAO incorporated the conclusively established claims of the May 2022 UAO and asserted

⁷⁹ May 2022 UAO, ¶ 10.A; July 2022 UAO, ¶ 9.

⁸⁰ May 2022 UAO, ¶ 10.B; July 2022 UAO, ¶¶ 9, 11.

⁸¹ See n. 2, at p. 2 above.

⁸² May 2022 UAO, ¶¶ 14-16.

⁸³ May 2022 UAO, ¶¶ 14-16.

⁸⁴ As MNFC’s privy, Otter Farm could have appealed the May 2022 UAO. See n. 42, at p. 20 above.

additional material facts not disputed by the Petitioners detailing the sampling and testing and resulting data collected between the issuance of the May 2022 UAO and the July 2022 UAO demonstrating that PFAS in compostable materials on the Site was the source of the PFAS contamination of the numerous private drinking water wells. These additional undisputed material facts were supported by Mr. Baldi's and Mr. Fine's respective sworn PFT. These additional undisputed material facts are as follows.

As previously discussed above, the May 2022 UAO required MNFC to "cease and desist from selling or otherwise distributing any material that would exceed Reportable Concentrations of PFAS if used in an area designated as 'Groundwater Category GW-1' under [the MCP at] 310 CMR 40.0932(4)" and to submit a plan [to MassDEP] for sampling the products [that MNFC was offering] for sale identified as 'Screened Topshelf Loam,' 'screened compost,' 'Farm Mix (unscreened compost),' 'Pick-up Truck of Soil,' and 'BYO 5 gallon bucket' as advertised on MNF[C]'s website."⁸⁵ The May 2022 UAO "noted the PFAS concentrations exceeding the Imminent Hazard threshold for residential drinking water in potable wells located at the Site property and nearby residences, and PFAS contamination surface water and of stockpiled materials on the Site property."⁸⁶ Id.

In response to the May 2022 UAO, on May 23, 2022, LEI submitted to MassDEP on behalf of the Petitioners a sixth IRA Update Letter dated May 19, 2022, containing a table with laboratory analytical results of a surface water sample collected from a pond and two (2)

⁸⁵ Mr. Baldi's Direct PFT, ¶ 25.

⁸⁶ Id.

groundwater monitoring wells, MW-1 and MW-2, located approximately 150 - 200 feet from stockpiles of biopellets and paper sludge at the Site.”⁸⁷ The “[l]aboratory analysis detected a concentration of 719.8 ng/L PFAS6 in the surface water sample [and] detected concentrations of 4,914.1 ng/L PFAS6 in MW-1 and 1,601.5 ng/L PFAS6 in MW-2.”⁸⁸

On June 1, 2022, several personnel of MassDEP’s CERO Office visited the Site for “[t]he purpose of . . . making in-person Site observations that would aid in MassDEP’s review of [MNFC’s] proposed sampling plan [that the Petitioners had submitted to the Office] in response to the May [2022] UAO.”⁸⁹ The MassDEP personnel included Mr. Baldi, Mr. Fine, and several MassDEP staff who worked in the Office’s BWSC and BAW programs (collectively “the MassDEP personnel”).⁹⁰ At the Site, MNFC’s President, William Page (“Mr. Page”), “led the [MassDEP personnel] around the Site property, explaining the composting process and identifying stockpiled material.”⁹¹ During this Site tour, Mr. Baldi and Mr. Fine observed individual feedstock stockpiles identified by Mr. Page as including diatomaceous earth, tea leaves, lettuce waste, potato chips, lac beetle excrement,⁹² biopellets, cannabis waste, saw dust (consisting of furniture waste), rockwool, cow manure, brewery grain, leaf and yard

⁸⁷ Mr. Baldi’s Direct PFT, ¶ 26.

⁸⁸ Id.

⁸⁹ Mr. Fine’s Direct PFT, ¶ 21; Mr. Baldi’s Direct PFT, ¶ 27.

⁹⁰ Id.

⁹¹ Id.

⁹² “Lac insects are . . . scale insects, which produce a resinous material that forms a hard scale test over their bodies” <https://pmc.ncbi.nlm.nih.gov/articles/PMC9784800>.

waste, and short paper fiber.⁹³ They also observed various stockpiles of compost, including several large windrows of mixed compost being processed and all other stockpiles that were uncovered, open to the elements, and located directly on bare ground surface and not stored under an impervious cover.⁹⁴ The lack of an impervious cover allowed precipitation to percolate through contaminated stockpiles and leach into the underlying soil and aquifer.⁹⁵

On June 17, 2022, LEI submitted to MassDEP on behalf of the Petitioners a tenth IRA Update Letter containing laboratory analytical results for a surface water sample collected on May 27, 2022, from the Crocker Pond Recreational Area beach, located approximately 4,700 feet downhill from the Site[.]”⁹⁶ These results revealed “[a] concentration of 37.7 ng/L PFAS6 . . . in the surface water sample collected at the Crocker Pond Recreational Area beach.”⁹⁷ Id.

On June 30, 2022, several weeks after the June 7, 2022 deadline for appealing the May 2022 UAO had expired and several weeks before MassDEP issued the July 2022 UAO, the BAW Program in MassDEP’s CERO Office received a “Stockpile Sampling Results” letter from Jeffrey Arps (“Mr. Arps”), an LSP employed by Tighe & Bond who had been retained by the Petitioners.⁹⁸ This letter contained the sampling results “for 30 stockpile samples collected

⁹³ Mr. Fine’s Direct PFT, ¶ 21; Mr. Baldi’s Direct PFT, ¶ 27.

⁹⁴ Mr. Fine’s Direct PFT, ¶ 21; Mr. Baldi’s Direct PFT, ¶¶ 27, 32.

⁹⁵ Id. According to Mr. Fine, “[t]here were some rain showers during the Site visit, and [he] observed some puddles of water on the ground at the Site during the Site visit.” Mr. Fine’s Direct PFT, ¶ 21.

⁹⁶ Mr. Baldi’s Direct PFT, ¶ 28.

⁹⁷ Id.

⁹⁸ Id., ¶ 29; July 2022 UAO, ¶¶ 9-10.

[from the Site] on May 25 and June 2, 2022.”⁹⁹ These results revealed that most of the materials sampled contained one or more PFAS6 compounds at levels exceeding MCP soil standards for soils with high exposure potential, e.g., surficial soil in residential neighborhoods, which are known as Category S-1 soils under the MCP.¹⁰⁰ Specifically, the following incoming, interim product, and final product materials all had exceedances of RCS-1 standards for at least one PFAS6 compound: landfill cover; golf course material; fiber biopellets; potting soil; compost; “turkey pad” materials; Greif paper; “windrow”; and Top Shelf (loam).¹⁰¹

Per MassDEP’s directive in the May 2022 UAO, MNFC also submitted to MassDEP a sampling plan for all the materials on the Site, which MassDEP approved on June 30, 2022.¹⁰² The approved sampling took place during a five-day period from July 7 to July 13, 2022, utilizing MassDEP-approved protocols.¹⁰³ MNFC collected more than 150 samples for PFAS analysis during that time period.¹⁰⁴

On July 15, 2022, LEI submitted to MassDEP on behalf of the Petitioners a fourteenth IRA Update Letter which included drinking water well sampling results for 138 private drinking water wells.¹⁰⁵ The maximum concentration of 5,720 ng/L PFAS6 was detected in the

⁹⁹ Id.

¹⁰⁰ Mr. Fine’s Direct PFT, ¶ 23; Mr. Baldi’s Direct PFT, ¶ 29.

¹⁰¹ Id.

¹⁰² July 2022 UAO, ¶ 11.

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ Mr. Baldi’s Direct PFT, ¶ 31.

private drinking water well at the Site and of the 139 potable water wells sampled (including the well at the Site), 91 private drinking wells contained PFAS6 exceeding 90 ng/L, posing an Imminent Hazard and 22 private drinking wells and one public water supply well exceeded the drinking water standard of 20 ng/L but were below the Imminent Hazard threshold.¹⁰⁶

On July 19, 2022, LEI provided MassDEP on behalf of the Petitioners the sample results from surface water it had sampled on July 1, 2022 in five (5) tributary inlets into Crocker Pond, downhill from the Site.¹⁰⁷ The sample results revealed that concentrations of PFAS6 were detected in four of the five samples (samples CS-1 through CS-4) and that the maximum concentration of 367 ng/L PFAS6 was detected in surface water sample CS-1, located closest to the Site on the north shore of Crocker Pond.¹⁰⁸ Sample CS-1 was collected approximately 3,800 feet downhill from the Site from a tributary stream that originates on the Site.¹⁰⁹

As of July 20, 2022, the date when MassDEP issued the July 2022 UAO, “[t]he private drinking water well at the Site and more than 100 private drinking water wells near the Site [were] contaminated with high levels of certain [PFAS] substances.”¹¹⁰ “The PFAS levels in most of those private [drinking water] wells (83) exceed[ed] Imminent Hazard Levels as

¹⁰⁶ Id.

¹⁰⁷ Id., ¶ 30.

¹⁰⁸ Id.

¹⁰⁹ Id.

¹¹⁰ July 2022 UAO, ¶ 8.

described in [the MCP at] 310 CMR 40.0321(2)(a).”¹¹¹ Additionally, the PFAS6 levels measured in incoming, intermediate, and finished materials at the Site indicated the likelihood that PFAS6 concentrations in on-Site materials and/or on-Site materials handling activities were a source of the PFAS6 concentrations in the area private drinking water wells.¹¹² As a result, MassDEP further identified the Petitioners as PRPs for the private well contamination under the MCP.¹¹³ As PRPs, the Petitioners “provid[ed] bottled water and/or water treatment systems to private well owners with contaminated wells and continue[d] to investigate the full extent of private well contamination from the Site as part of an [IRA Plan] under [the MCP at] 310 CMR 40.0414.”¹¹⁴

Based on the additional sampling data that MassDEP received from MNFC “[showing] PFAS concentrations exceeding Imminent Hazard values in drinking water at the Site and in [more than 100] private [drinking water] wells off-site, and PFAS contamination in incoming, intermediate, and finished materials at the Site, MassDEP [] determined that operation of the Site [had] caused or posed a threat to public health and the environment” in violation of: ¶ VI.B.4 of the RCC Permit;¹¹⁵ and (2) the Site Assignment Regulations at 310 CMR 16.01(8)(a)8 for which

¹¹¹ July 2022 UAO, ¶ 8.

¹¹² July 2022 UAO, ¶ 10.

¹¹³ July 2022 UAO, ¶ 8.

¹¹⁴ July 2022 UAO, ¶ 8.

¹¹⁵ May 2022 UAO, ¶ 8; July 2022 UAO, ¶ 12.

the Petitioners were jointly and severally liable pursuant to 310 CMR 16.01(6).¹¹⁶

In sum, MassDEP correctly determined that MNFC violated ¶ VI.B.4 of the RCC Permit by accumulating, storing, and/or handling compostable materials on the Site containing PFAS that caused or posed a threat to the public health, safety, welfare, or the environment. Specifically, MassDEP correctly determined that PFAS in compostable materials on the Site seeped through the through the soil on the Site into groundwater causing the PFAS contamination of the private drinking water well at the Site and more than 100 private drinking water wells near the Site.¹¹⁷ Because MassDEP correctly made this determination, as a matter of law, under the Site Assignment Regulations at 310 CMR 16.01(6), MNFC, as the operator of the compost operation on the Site, and Otter Farm, as the owner of the real property at the Site, are jointly and severally liable for the violation of ¶ VI.B.4 of the RCC Permit. Also, as a matter of law, the Solid Waste Act and the Site Assignment Regulations at 310 CMR 16.01(8)(b)2 and 310 CMR 16.01(8)(b)1.c, respectively, authorized MassDEP to “rescind, suspend[,] or modify” the RCC Permit and order the Petitioners to “take appropriate remedial measures immediately or by a specified date to bring the [S]ite into compliance or to protect public health, safety[,] or the environment.”

Here, given the serious nature of MNFC’s violation of ¶ VI.B.4 of the RCC Permit that caused the PFAS contamination of the private drinking water well at the Site and more than 100 private drinking water wells near the Site, it was more than rational for MassDEP to have

¹¹⁶ May 2022 UAO, ¶¶ 8-9; July 2022 UAO, ¶ 12.

¹¹⁷ May 2022 UAO, ¶¶ 8-9; July 2022 UAO, ¶¶ 12-14.

suspended MNFC's RCC Permit in the July 2022 UAO.¹¹⁸ Also reasonable, as discussed below, at pp. 38-53, were the remedial measures in July 2022 UAO that MassDEP ordered the Petitioners to perform to bring the Site into compliance and to protect public health and safety and the environment.

II. THE REMEDIAL MEASURES IN THE JULY 2022 UAO THAT MassDEP ORDERED THE PETITIONERS TO PERFORM ARE REASONABLE REMEDIAL MEASURES TO ADDRESS THE PFAS CONTAMINATION OF THE NUMEROUS PRIVATE DRINKING WATER WELLS CAUSED BY THE PETITIONERS' VIOLATION OF ¶ VI.B.4 OF THE RCC PERMIT

As a result of my granting Summary Decision to MassDEP on Issue No. 1, the only remaining issue for adjudication in the appeal was Issue No. 2, which, as noted above, presents the question of whether “the remedial measures in the [July 20, 2022] UAO that MassDEP ordered the Petitioners to perform to correct the [environmental] violations [alleged by MassDEP in the July 2022 UAO] reasonable?” The remedial measures that MassDEP ordered the Petitioners to perform for violating ¶ VI.B.4 of the RCC Permit were: (1) to “immediately [] cease composting operations at the Site”;¹¹⁹ and (2) “submit to MassDEP for its review and approval a plan to take appropriate remedial measures to protect public health, safety, and the environment, including but not limited to removal” of the following materials from the Site that the Petitioners' LSP, Mr. Arp, had determined through sampling contained PFAS: landfill cover, golf course material, fiber biopellets, potting soil, compost, “turkey pad” materials, Greif paper,

¹¹⁸ My determination is based on the rational basis test long used to assess the validity of State agency actions. See below, at pp. 39-43.

¹¹⁹ July 2022 UAO, ¶ 17.A.

“windrow”, and Top Shelf (loam).¹²⁰ The reasonableness of these remedial measures is at the heart of adjudicating Issue No. 2 because, as discussed previously above, the Site Assignment Regulations authorize MassDEP, in response to a violation of an RCC Permit, to “order the owner or operator [of the permitted facility], or any other person responsible for the violation, to . . . cease operations [of the facility] until the violation is corrected to [MassDEP’s] satisfaction,” 310 CMR 16.01(6), 16.01(8)(b)1.a, and “to . . . take [other] appropriate remedial measures immediately or by a specified date to bring the site into compliance or to protect public health, safety[,] or the environment.” 310 CMR 16.01(6), 16.01(8)(b)1 (emphasis supplied).

A. The Rational Basis Test

The legal standard governing my determination of whether the remedial measures in the July 2022 UAO that MassDEP ordered the Petitioners to perform are reasonable or “appropriate remedial measures” within the meaning of the Site Assignment Regulations for the Petitioners to perform to address their violation of ¶ VI.B.4 of the RCC Permit is the rational basis test which determines whether a state agency’s discretionary decisions (as is the case here with MassDEP’s remedial orders) have a rational basis, i.e. a sufficient factual and legal basis for the decisions. Mroz, 2019 WL 4735471, *15-17; In the Matter of Palmer Renewable Energy, LLC (“PRE”), OADR Docket No. 2021-010, Recommended Final Decision (September 30, 2022), 2022 WL 17479440, *23-56, adopted as Final Decision (November 28, 2022), 2022 WL 17479443 (MassDEP had a rational basis for revoking appellant’s air permit for failure to comply with permit condition requiring appellant to commence construction of biomass-fired power plant

¹²⁰ July 2022 UAO, ¶¶ 10, 17.B.

authorized by permit within two years of permit's issuance). This rational basis test is similar to the rational basis test utilized by Massachusetts courts in conducting judicial review of discretionary decisions of state agencies. Id.

As Massachusetts appellate courts have explained, under the rational basis test, a state agency's discretionary decision should be affirmed by a reviewing court unless "the decision was arbitrary and capricious such that it constituted an abuse of [the agency's] discretion." Mroz, 2019 WL 4735471, *16; PRE, 2022 WL 17479440, *23, citing, Frawley v. Police Commissioner of Cambridge, 473 Mass. 716, 728 (2016); Garrity v. Conservation Commission of Hingham, 462 Mass. 779, 792 (2012); Sierra Club v. Commissioner of Department of Environmental Management, 439 Mass. 738, 748-49 (2003); Forsyth Sch. for Dental Hygienists v. Board of Registration in Dentistry, 404 Mass. 211, 217 (1989). This is the rule regardless of whether judicial review is confined to review of the administrative evidentiary record before the agency or is de novo, where the judge makes his or her independent findings of fact based on a preponderance of the evidence presented at trial, because the legal definition of what constitutes arbitrary and capricious governmental action is the same. Id.¹²¹

¹²¹ The provisions of G.L. c. 30A, § 14(7) governing judicial review of Final Decisions of MassDEP's Commissioner in administrative appeals provide that judicial review is confined to the administrative evidentiary record before the agency and authorizes seven possible grounds for the reviewing court to overturn a Final Decision, including that the Final Decision is "[a]rbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." Mroz, 2019 WL 4735471, *16 n.18, citing, G.L. c. 30A, § 14(7)(g). For the essentially the same reasons, a reviewing court may overturn a land use decision of a municipal zoning board pursuant to G.L. c. 40A, § 17, which provides for de novo judicial review of the board's decision where the Superior or Land Court judge: (1) "makes his [or her] own findings of fact[.]" . . . (2) "'determines the content and meaning of statutes and [local zoning] by-laws [governing the board's decision] and . . . decides whether the board . . . chos[e] from those sources the proper criteria and standards . . . in [making its decision]"; (3) "accord[s] deference to a local board's reasonable interpretation of its own zoning bylaw . . . with the caveat that an 'incorrect interpretation of a statute . . . is not entitled to deference'" and (4) "determines whether the board has applied [the governing zoning] standards in an 'unreasonable, whimsical, capricious or arbitrary' manner." Mroz, 2019 WL 4735471, *16 n.18, citing, Doherty

A state agency discretionary decision “is arbitrary or capricious such that it constitutes an abuse of discretion where it ‘lacks any rational explanation that reasonable persons might support’” and “an abuse of discretion occurs when there has been a clear error of judgment in weighing relevant factors such that [the] decision falls outside [the] range of reasonable alternatives[.]” Mroz, 2019 WL 4735471, *16; PRE, 2022 WL 17479440, *24, citing, Frawley, 473 Mass. at 729-33 (Cambridge Police Chief’s decision denying retired police officer’s application for “retired [police] officer identification card” authorizing him to carry a concealed weapon lacked a rational basis); Garrity, 462 Mass. at 792-97 (Hingham Conservation Commission’s reasons for bringing enforcement action against plaintiff for wetlands violations had a rational basis); Sierra Club, 439 Mass. at 748-49 (state agency commissioner’s MEPA findings in favor of proposed project had a rational basis); Doe v. Superintendent of Schools of Stoughton, 437 Mass. 1, 6 (2002) (high school principal’s reasons for suspending student pending resolution of criminal charges against student had a rational basis); Forsyth, 404 Mass. at 217-19 (State Board of Registration in Dentistry’s reasons for denying dental hygienist school’s request to include certain course in its curriculum for dental hygienists had a rational basis); City of Brockton v. Energy Facilities Siting Board, 469 Mass. 196, 209-10 (2014) (Energy Facility Siting Board’s reliance on Boston Logan Airport meteorological data in approving proposed Brockton energy facility had a rational basis because: (1) data “[was] representative of [Brockton meteorological] conditions”, (2) “no suitable meteorological data for

v. Planning Board of Scituate, 467 Mass. 560, 566-67 (2014). “The judge . . . should overturn a board’s decision when ‘no rational view of the facts the court has found supports the board’s conclusion.’” Id., at 567.

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the Brockton site were available”, and (3) Board’s governing statute did not require Board to use on-site meteorological data). See also Doherty, 467 Mass. at 566-73 (on de novo judicial review, local planning board’s decision denying property owner’s application for special permits authorizing construction of residential dwellings on property owner’s undeveloped lots affirmed because “board did not [deny property owner’s application] in an ‘unreasonable, whimsical, capricious or arbitrary’ manner,” but due to property owner’s failure to demonstrate lots were “not subject to flooding” within the meaning of the local zoning bylaw).

A state agency’s discretionary decision, however, “is not arbitrary and capricious if ‘reasonable minds could differ’ on the proper outcome” and “[i]t is not the place of a reviewing court to substitute its own opinion for that of the [agency].” Mroz, 2019 WL 4735471, *17; PRE, 2022 WL 17479440, *24, citing, Doe, 437 Mass. at 6; Frawley, 473 Mass. at 729. Thus, if an agency’s decision has a rational basis, i.e. a sufficient factual and legal foundation, it should be affirmed by the reviewing court notwithstanding that the court might have made a different decision based on the circumstances of the case. Id. For these reasons, “[t]he deference . . . grant[ed] to an agency’s determination of questions entrusted to its expertise places a ‘heavy burden’ on parties challenging the [determination].” Mroz, 2019 WL 4735471, *17; PRE, 2022 WL 17479440, *24, citing, NSTAR Electric Co. v. Department of Public Utilities, 462 Mass. 381, 386 (2012). However, “[t]he principle of according weight to an agency’s discretion . . . is ‘one of deference, not abdication,’” meaning that “courts will not hesitate to overrule agency [determinations that are] . . . arbitrary, unreasonable, or inconsistent with the plain terms of the [governing regulatory requirements].” Mroz, 2019 WL 4735471, *17; PRE, 2022 WL

17479440, *24, citing, NSTAR, 462 Mass. at 386-87; Warcewicz v. Department of Environmental Protection, 410 Mass. 548, 550 (1992); Moot v. Department of Environmental Protection, 448 Mass. 340, 346 (2007).

B. The Evidentiary Adjudicatory Hearing

I conducted an evidentiary adjudicatory hearing (“Hearing”) to determine whether MassDEP had a rational basis, i.e. a sufficient factual and legal basis for ordering the Petitioners to perform the remedial measures in the July 2022 UAO. At the Hearing, Mr. Baldi and Mr. Fine testified on behalf of MassDEP and Mr. Lessard testified on behalf of the Petitioners. The appeal adjudication rules governing their testimony and my adjudication of Issue No. 2 are as follows.

1. MassDEP’s Burden of Proof

At the Hearing, MassDEP had the burden of proof, specifically proving based on a preponderance of the testimonial evidence presented by the witnesses’ testimony and the governing legal requirements that it had a rational basis for ordering the Petitioners’ performance of the remedial measures in the July 2022 UAO. West Meadow Homes, 2011 WL 3882193, *1-2 and 8; Ferry Street Partners, 2016 WL 7493838, *2; Mroz, 2019 WL 4735471, *2 and 14-24; PRE, 2022 WL 17479440, *6.

2. Standard of Review

My review of MassDEP’s determinations underlying its grounds for ordering the remedial measures in the July 2022 UAO is *de novo*, meaning that my review is anew irrespective of MassDEP’s prior factual and legal determinations in the matter. In the Matter of

Kane Built, Inc., OADR Docket No. 2017-037, Recommended Final Decision (December 18, 2018), 2017 WL 10924859, *5, adopted by Final Decision (January 17, 2019), 2019 WL 1122833; In the Matter of The Prysmian Group and Prysmian Cables & Systems USA, LLC, OADR Docket No. 2024-006, Recommended Final Decision (August 26, 2024), at p. 6, adopted as Final Decision (September 26, 2024).

Under *de novo* standard of review, I owe no deference to MassDEP’s prior factual findings in the matter because the Adjudicatory Proceeding Rules at 310 CMR 1.01(13)(h) governing adjudication of the appeal provide that the “[t]he weight to be attached to any evidence in the record [of the appeal] will rest within the sound discretion of the Presiding Officer” Kane Built, 2017 WL 10924859, *5; Prysmian, at pp. 6-7. This Rule also provides that “unless otherwise provided any law,” the rules of evidence that Massachusetts courts follow “need not [be] observe[d]” in an evidentiary adjudicatory hearing “[except for] the rules of privilege recognized by law.” This Rule also requires that “probative effect [be given to evidence] only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.”

My legal determinations in adjudicating Issue No. 2 are based on the governing legal requirements with deference to MassDEP’s reasonable interpretation of environmental statutes, regulations, and policies it is responsible for enforcing, including the Solid Waste Act, the Site Assignment Regulations, Chapter 21E, and the MCP. In the Matter of Pioneer Valley Energy Center, LLC (“PVEC”), OADR Docket No. 2011-010, Recommended Final Decision (September 23, 2011), 2011 WL 6019097, *8, adopted by Final Decision (November 9, 2011),

2011 WL 6019096. However, no deference is due to MassDEP’s interpretation or construction of a statutory or regulatory requirement that is arbitrary, unreasonable, or inconsistent with the plain terms of the governing statutory and regulatory requirements. Arrowood Indemnity Company v. Workers’ Compensation Trust Fund, 104 Mass. App. Ct. 419, 421 (2024); PVEC, 2011 WL 6019097, *8; Prysmian, at p. 7-8, citing, In the Matter of Brockton Power Co., LLC (“BP”), OADR Docket Nos. 2011-025 and 2011-026, Recommended Final Decision (July 29, 2016), 2016 WL 8542559, *8-10, adopted by Interlocutory Decision [of MassDEP’s Commissioner] (March 13, 2017), 2017 WL 1063662, *2 (no deference due MassDEP’s interpretation that OADR lacked jurisdiction to adjudicate federal Title VI discrimination claims in air permit appeal where MassDEP lacked a formal Title VI Grievance Policy required by Title VI Regulations of the U.S. Environmental Protection Agency (“USEPA”) to review such claims).¹²²

3. The Parties’ Respective Witnesses at the Hearing

a. MassDEP’s Witnesses

At the Hearing, Mr. Fine and Mr. Baldi testified on behalf of MassDEP supporting its

¹²² In BP, MassDEP’s then-Commissioner noted that “MassDEP [was] in the process of developing a formal Title VI Complaint Policy for the Department” and until such time the Policy was adopted, Title VI discrimination claims could be asserted in an administrative appeal before OADR. BP, 2017 WL 1063662, *2 n.8. Specifically, MassDEP’s then-Commissioner ruled that:

anyone aggrieved by the Department’s permit decisions or enforcement orders, based on purported Title VI violations [could in the absence of a formal MassDEP Title VI Grievance Policy] assert such claims in an administrative appeal with [OADR], as the Petitioners [had done] in [BP and] [a]s was also done in [that] case, the claims [would be] adjudicated by an OADR Presiding Officer based on the evidentiary record in the case, who [would] forward a Recommended Final Decision to the Department’s Commissioner.

Id.

position that the remedial measures in the July 2022 UAO that it had ordered the Petitioners to perform are reasonable measures to address the PFAS contamination of the numerous private drinking water wells caused by the compostable materials on the Site containing PFAS.

When he testified, Mr. Fine had been the BAW DRD in MassDEP's Central Regional Office since June 2019 and had worked at MassDEP for 33 years (since 1989), having served in a management position at MassDEP for 25 years (since 1997).¹²³ His management positions at MassDEP prior to becoming the BAW DRD in MassDEP's Central Regional Office had included serving in several senior management positions in MassDEP's main office in Boston ("Boston Office").¹²⁴ These positions were Assistant Commissioner for MassDEP's Bureau of Water Resources ("BWR") (2015-2019), Assistant Commissioner for MassDEP's Bureau of Planning and Evaluation ("BPE") (2004-2015), and Deputy Assistant Commissioner of BAW (1997-1999).¹²⁵ Mr. Fine holds a Bachelor of Arts Degree in Environmental Science from Antioch College (1983) and a Master of Public Administration Degree from Harvard University's John F. Kennedy School of Government (2004).¹²⁶

As the BAW DRD in MassDEP's Central Regional Office, Mr. Fine was responsible for "overseeing the solid waste management program in [MassDEP's] CERO [Office] [and was] involved in the development of all 'higher-level enforcement' ('HLE') cases for solid waste

¹²³ Mr. Fine's Direct PFT, ¶ 1.

¹²⁴ Exhibit 1 to Mr. Fine's Direct PFT.

¹²⁵ Id.

¹²⁶ Id.

related matters.”¹²⁷ He was responsible for “approving all HLE documents prior to [their] execution by the Regional Director [of MassDEP’s CERO Office, who was the Office Head].”¹²⁸ HLE enforcement actions include MassDEP’s issuance of Administrative Consent Orders (“ACOs”), Administrative Consent Orders with Penalty (“ACOPs”), Unilateral Administrative Orders (“UAOs”), Civil Administrative Penalty Assessment Notices (“PANs”), and Demands for Stipulated or Suspended Civil Administrative Penalties (collectively “Stipulated Penalties”).¹²⁹ “In [his] role as BAW DRD, [Mr. Fine was] also [responsible for] overseeing compliance and permitting activities within the solid waste management program” in MassDEP’s CERO Office.¹³⁰ “[His] oversight of compliance and permitting activities focuse[d] on matters that [were] complex, novel, cross-program, high-profile, or otherwise warrant[ed] management-level oversight.”¹³¹

When he testified, Mr. Baldi had worked in the BWSC of MassDEP’s Central Regional Office since 1993 and had served as the Office’s BWSC DRD since 2015.¹³² Mr. Baldi’s “job duties and responsibilities [as the BWSC DRD] include management of daily regional bureau operations and oversight of [BWSC’s] Emergency Response & Risk Reduction, Compliance

¹²⁷ Mr. Fine’s Direct PFT, ¶ 2.

¹²⁸ Id.

¹²⁹ Id.

¹³⁰ Id.

¹³¹ Id.

¹³² Mr. Baldi’s Direct PFT, ¶ 1; Exhibit 1 to Mr. Baldi’s Direct PFT.

Assistance & Site Management, Audit, and Data Management sections.”¹³³ He regularly participates in compliance and enforcement activities relating to Chapter 21E and the MCP, including discussing and developing BWSC enforcement cases; participating in the MassDEP CERO Office’s Regional Enforcement Review Committee; reviewing and drafting MassDEP enforcement documents including UAOs; reviewing technical reports and submittals to MassDEP; authorizing the use of state-hired contractors to perform Chapter 21E site assessments and conduct Chapter 21E response actions on behalf of MassDEP; representing MassDEP at public meetings and forums; and directing BWSC staff in MassDEP’s CERO Office and managing regional bureau priorities.¹³⁴ Since 2017, he has supervised BWSC staff in MassDEP’s CERO Office reviewing and overseeing Chapter 21E response actions at sites contaminated by PFAS.¹³⁵ He holds a Bachelor of Science Degree in Physics with a minor in Geology from the University of Massachusetts at Amherst (1985).¹³⁶

b. The Petitioners’ Witness

Mr. Lessard was the Petitioners’ sole witness at the Hearing. When he testified for the Petitioners at the Hearing, Mr. Lessard had been an environmental consultant for over 33 years, including having served as the LSP of Record for over 460 Chapter 21E/MCP Sites in the

¹³³ Mr. Baldi’s Direct PFT, ¶ 1.

¹³⁴ Id.

¹³⁵ Id.

¹³⁶ Exhibit 1 to Mr. Baldi’s Direct PFT.

Commonwealth.¹³⁷ His work as an LSP “[has] include[d] comprehensive site investigation, human health[,] and environmental risk characterization, remedial design, and remedial implementation.”¹³⁸ He holds a Bachelor of Arts Degree in Geology from Colgate University (1985) and a Master of Science Degree in Environmental Sciences from the University of Virginia (1989).¹³⁹

4. Findings

As explained in detail below, at pp. 50-53, based on: (1) a strong preponderance of the testimonial evidence presented at the Hearing by Mr. Fine, Mr. Baldi, and Mr. Lessard; and (2) the governing legal requirements, I find that the remedial measures in the July 2022 UAO that it ordered the Petitioners to perform are reasonable remedial measures to address the PFAS contamination of the private drinking well on the Site and the numerous (over 100) private drinking wells caused by compostable materials on the Site containing PFAS.

a. Mr. Fine’s and Mr. Baldi’s Persuasive Testimony on Behalf of MassDEP on Issue No. 2

On behalf of MassDEP, Mr. Fine testified that “[i]n response to the well contamination data [provided by MNFC], MassDEP included in the July [2022] UAO [the] provision ordering MNF[C] to, within 30 days of the date of the July [2022] UAO, submit to MassDEP for its review and approval a plan to take appropriate remedial measures to protect public health, safety,

¹³⁷ Petitioners’ Prefiled Direct Testimony of Lawrence Lessard (“Mr. Lessard’s Direct PFT”), ¶ 1.

¹³⁸ Id.

¹³⁹ Id.

and the environment, including but not limited to removal from the Site of all materials sampled on May 25 and June 2, 2022 which exceed[ed] MassDEP's PFAS MCP standards for S-1.”¹⁴⁰ He testified that “[f]rom the time that MassDEP issued the May [2022] UAO to the time that MassDEP issued the July [2022] UAO, MassDEP learned that the PFAS6 contamination in residential wells near the Site was more widespread” and because of this additional data, MassDEP determined that it was necessary to include in the July 2022 UAO a remedial order “requiring MNF[C] to submit a plan [to MassDEP] to take remedial measures that would include removal from the Site of all materials that had been sampled and found to contain PFAS6 standards above the RCS-1 limits.”¹⁴¹

Mr. Fine also testified that “[t]he scope of the ongoing sampling and testing and resulting data collected between the issuance of the May [2022] UAO and the July [2022] UAO serve[d] to underscore why MassDEP suspended [MNFC's RCC] [P]ermit in order to prevent the acceptance and/or manipulation of additional PFAS-contaminated materials at the Site that could cause more PFAS contamination of the groundwater and soil at the Site and in the neighboring community.”¹⁴² I agree.

Mr. Fine's testimony that suspension of MNFC's RCC Permit was appropriate is supported by Mr. Baldi's testimony discussed above detailing the sampling and testing and resulting data collected between the issuance of the May 2022 UAO and the July 2022 UAO. In

¹⁴⁰ Mr. Fine's Direct PFT, ¶ 27.

¹⁴¹ Id.

¹⁴² Id., ¶ 30.

Mr. Baldi's words:

[s]ampling of groundwater at the Site property ha[d] detected the highest PFAS6 concentrations in the Site vicinity, and sampling of surface water on the Site property and at the mouth of an unnamed stream originating on the Site property, which flows past a residential neighborhood, ha[d] detected concentrations in surface water over one-half mile from the MNF[C] property at high concentrations [and] [b]ased upon [this] . . . evidence, it [was] clear that the Site property [was the] source of groundwater contamination from on-Site composting operations, posing risk to human health and the environment.¹⁴³

Mr. Fine added in his testimony, also corroborated by Mr. Baldi's testimony, that after the July 2022 UAO was issued, "more private drinking water wells in the area around [the Site] ha[d] been confirmed to be contaminated with PFAS6" and that "PFAS6 ha[d] been confirmed at levels greater than the drinking water standard of 20 ng/L at 43 additional private wells, of which 19 wells were measured to contain PFAS6 at levels greater than the Imminent Hazard level of 90 ng/L."¹⁴⁴ He also testified that "[t]his [brought] the total number of wells at or near the Site that exceed[ed] the drinking water standard of 20 ng/L to 157, and 110 of those wells contain[ed] PFAS6 levels above the Imminent Hazard level of 90 ng/L."¹⁴⁵

I also find persuasive Mr. Fine's testimony that "[i]n issuing the July [2022] UAO, MassDEP chose to suspend rather than revoke [MNFC's] RCC Permit pending the results of the extensive sampling required under the approved sampling plan [that MNFC had] submitted under the May [2022] UAO."¹⁴⁶ He testified that "[i]t was possible that the results of that

¹⁴³ Mr. Baldi's Direct PFT, ¶ 32.

¹⁴⁴ Mr. Fine's Direct PFT, ¶ 28; Mr. Baldi's Direct PFT, ¶ 34.

¹⁴⁵ Id.

¹⁴⁶ Mr. Fine's Direct PFT, ¶ 26.

sampling could lead MNF[C] to conclude that operations limited to certain feedstocks and/or products could continue in compliance with the [RCC] Permit,” and in that situation, “[MNFC] would be required to demonstrate that it could resume operation while ensuring that, at all times, the operation [did] not accumulate or store or handle materials of a nature or in quantities so as to cause or pose a threat to the public health, safety, welfare or the environment.”¹⁴⁷ He testified that to make such a demonstration, “[MNFC] would need to show that the operation would not continue to contaminate the groundwater at the Site and in the vicinity through the release of PFAS6 from stockpiled materials and/or materials handling.”¹⁴⁸ Id.

b. Mr. Lessard’s Unpersuasive Testimony on Behalf of the Petitioners on Issue No. 2

In his testimony on behalf of the Petitioners, Mr. Lessard did not effectively refute Mr. Fine’s and Mr. Baldi’s testimony on Issue No. 2 because he only repeated the Petitioners’ res judicata barred claims that: (1) MassDEP improperly applied MCP Soil Standards in determining that the materials that MNFC accumulated, stored, and/or handled at the Site for the compost operation contained PFAS; and (2) MassDEP’s “Regulations concerning PFAS [were] evolving and should not be used until further study is conducted.”¹⁴⁹ Mr. Lessard’s testimony also is not persuasive because, as the Petitioners’ LSP and the principal of LEI, he conducted sampling and

¹⁴⁷ Id.


¹⁴⁸ Id.

¹⁴⁹ Mr. Lessard’s Direct PFT, ¶¶ 4-20.

testing from at least May 2022 to July 2022 using the same MCP Soil Standards in determining that compostable materials on the Site contained PFAS.

CONCLUSION

For these reasons set forth above, I recommend that MassDEP's Commissioner issue a Final Decision in this appeal affirming the July 2022 UAO.



Date: December 2, 2024

Salvatore M. Giorlandino
Chief Presiding Officer

NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Chief Presiding Officer. It has been transmitted to MassDEP's 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/or 14(e), and may not be appealed to Superior Court pursuant to 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 and no other person directly or indirectly involved in this administrative appeal shall neither (1) file a motion to renew or reargue this Recommended Final Decision or any part of it, nor (2) communicate with the Commissioner and any member of the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

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ADDENDUM NO. 1

OADR DESCRIPTION

The Office of Appeals and Dispute Resolution (“OADR”) is a quasi-judicial office within the Massachusetts Department of Environmental Protection (“the Department” or “MassDEP”) which is responsible for advising the Department’s Commissioner in resolving all administrative appeals of Department Permit decisions and enforcement orders in a neutral, fair, timely, and sound manner based on the governing law and the facts of the case. In the Matter of Tennessee Gas Pipeline Company, LLC, OADR Docket No. 2016-020 (“TGP”), Recommended Final Decision (March 22, 2017), 2017 MA ENV LEXIS 34, at 9, adopted as Final Decision (March 27, 2017), 2017 MA ENV LEXIS 38, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7). The Department’s Commissioner is the final agency decision-maker in these appeals. TGP, 2017 MA ENV LEXIS 34, at 9, citing, 310 CMR 1.01(14)(b). To ensure its objective review of Department Permit decisions and enforcement orders, OADR reports directly to the Department’s Commissioner and is separate and independent of the Department’s program offices, Regional Offices, and Office of General Counsel (“OGC”). TGP, 2017 MA ENV LEXIS 34, at 9.

OADR staff who advise the Department’s Commissioner in resolving administrative appeals are Presiding Officers. Id. Presiding Officers are senior environmental attorneys at the Department appointed by the Department’s Commissioner to serve as neutral hearing officers, and are responsible for fostering settlement discussions between the parties in administrative appeals, and to resolve appeals by conducting pre-hearing conferences with the parties and evidentiary Adjudicatory Hearings and issuing Recommended Final Decisions on appeals to the Commissioner. TGP, 2017 MA ENV LEXIS 34, at 9-10, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7). The Department’s Commissioner, as the agency’s final decision-maker, may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision issued by a Presiding Officer in an appeal. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(b). Unless there is a statutory directive to the contrary, the Commissioner’s Final Decision can be appealed to Massachusetts Superior Court pursuant to G.L. c. 30A, § 14. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(f).

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