

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

**July 2, 2021**

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In the Matter of  
ROGJEF, Inc.

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OADR Docket No. 2021-011  
Uxbridge, MA

**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

The Petitioner, ROGJEF, Inc., filed a written statement, otherwise known as a Notice of Claim, to appeal the Notice of Intent to Assess a Civil Administrative Penalty Assessment Notice (“PAN”)<sup>1</sup> issued by the Massachusetts Department of Environmental Protection’s Central Regional Office (“MassDEP”) pursuant to MassDEP’s Civil Penalty Statute, G.L. c. 21A § 16, Massachusetts Oil and Hazardous Material Release Prevention and Response Act, G.L. c. 21E, Massachusetts Contingency Plan (“MCP”), 310 CMR 40.000, and MassDEP’s Administrative Penalty Regulations, 310 CMR 5.00.

The PAN concerns ROGJEF’s alleged violations of Massachusetts laws pertaining to the remediation of hazardous materials in the environment, specifically trichloroethylene (“TCE”), at 35 Mountainview Road, Uxbridge, Massachusetts (“the Property”), a property owned by ROGJEF for residential development purposes.

Shortly after ROGJEF filed its Notice of Claim, MassDEP filed a motion to dismiss, arguing that ROGJEF’s appeal was untimely, leaving this tribunal, the Office of Appeals and

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<sup>1</sup> Enforcement Document No.: 00007245.

Dispute Resolution (“OADR”), without jurisdiction to adjudicate the appeal pursuant to 310 CMR 1.01. After reviewing the administrative record and applicable law, I recommend that MassDEP’s Commissioner issue a Final Decision allowing the Motion to Dismiss and dismissing the appeal. ROGJEF indisputably received the PAN with at least seventeen days left to file its appeal and clear notice on how to file an appeal, but it failed to do so until several days after the appeal period had lapsed. That is a clear jurisdictional defect that warrants dismissal.

### **BACKGROUND**

ROGJEF is a Massachusetts Corporation with its principal office located at 110 Freeman Street, Bellingham, MA. The PAN alleges that ROGJEF obtained title to the Property in July 2017. PAN, ¶ 5. ROGJEF then began constructing a single-family residence on the Property with the intention of selling it. *Id.* at ¶ 6.

On September 11, 2017, Richardson Wells & Pumps (“Richardson”), working on behalf of and under the direction of ROGJEF, collected a groundwater sample from the newly installed private water supply well at the Property. The well is located within 500 feet of other private water supply wells. Richardson sent the sample to a laboratory for analysis. PAN, ¶ 7.

On September 14, 2017, Richardson notified MassDEP that the testing results included 8.26 micrograms per liter (µg/l) of TCE. That concentration exceeds the applicable Reportable Concentration threshold of 5 µg/l of TCE. Consequently, the MCP required ROGJEF, as the Property owner, to notify MassDEP of the TCE concentration within 72 hours. PAN, ¶ 8; see 310 CMR 40.0313(3)(b) and 310 CMR 40.0331(1)(a). Although it was unnecessary, MassDEP instructed Richardson to notify ROGJEF to contact MassDEP. PAN, ¶ 8.

The PAN alleges that on September 15, 2017, Richardson emailed a copy of the laboratory report to MassDEP along with contact information for Roger Gagnon, an officer and director of ROGJEF. MassDEP's attempts to contact Gagnon were unsuccessful. PAN, ¶ 9.

In about October 2017, ROGJEF installed a water treatment system with the intent of removing TCE from water that would be pumped from the well for the new residence. PAN, ¶ 10. The PAN alleges ROGJEF did not notify MassDEP of its intent to install the treatment system and it did not seek MassDEP approval of the system or an Immediate Response Action to mitigate a Critical Exposure Pathway, i.e., treatment for a private residential well—all of which were in violation of 310 CMR 40.014 and 310 CMR 40.0420. PAN, ¶ 10.

In addition, to date, ROGJEF has not notified MassDEP of the excessive TCE concentration in the groundwater that was sampled within 500 feet of other private water supply wells, in violation of the requirement to notify MassDEP within 72 hours of obtaining knowledge of a release to the environment, in violation of 310 CMR 40.0313(3). PAN, ¶ 11. The distance of 500 feet to other private water wells has enhanced reporting requirements because of the potential for contamination to the other wells. 310 CMR 40.0313(3)

As a consequence of the above conduct, on March 26, 2021, MassDEP issued the PAN to ROGJEF pursuant to G.L. c. 21A § 16 and 310 CMR 5.25 in the amount of \$10,000. PAN, ¶¶ 13-14.

The PAN clearly notified ROGJEF of its appeal rights, stating that MassDEP must receive the appeal within 21 days of the PAN's issuance. The PAN set forth in detail: to whom the appeal was to be sent (OADR), how to appeal, and relevant regulations. PAN, ¶¶ 15-20. The PAN also stated that the failure to file a timely appeal would constitute a waiver of ROGJEF's appellate rights, resulting in the requirement that it "pay the full amount of the civil

administrative penalty no later than twenty-one (21) days after the date of issuance of the [PAN].” PAN, ¶ 17. The PAN also specified that failure to timely appeal the PAN and pay the full penalty within 21 days, would render ROGJEF liable for up to three times the amount of the penalty. PAN, ¶ 18. Last, the PAN notified ROGJEF of the name, telephone number, and address of the person to contact at MassDEP if it had questions concerning the PAN. PAN, ¶ 20.

On April 20, 2021, ROGJEF attempted to appeal the PAN by mailing its Notice of Claim addressed to OADR.

MassDEP responded to ROGJEF’s Notice of Claim by filing a Motion to Dismiss pursuant to 310 CMR 1.01(11)(d)(1) and 310 CMR 5.25. The Motion to Dismiss was accompanied by the Affidavit of Robert Adler, an Environmental Analyst in the Emergency Response Section of MassDEP’s Bureau of Waste Site Cleanup at MassDEP’s Central Regional Office.<sup>2</sup> When MassDEP issued the PAN it was sent to Roger M. Gagnon, President and Registered Agent of ROGJEF, Inc. Adler sent a total of three copies of the PAN, one by certified mail and two by priority mail, to ROGJEF, Inc. (to Mr. Gagnon’s attention) at two addresses listed in ROGJEF’s filings with the Massachusetts Secretary of State Corporations Division. Pursuant to 310 CMR 5.08(2), the PAN is deemed issued on the date these copies were postmarked, which is March 26, 2021. See Adler Affidavit.

### **DISCUSSION**

Consistent with the clear notice provided to ROGJEF in the PAN (as discussed above), MassDEP’s penalty regulations provide:

Whenever the Department seeks to assess a Penalty on any person, such person shall be deemed, effective 21 days after the date of issuance of the Penalty Assessment Notice [see 310 CMR 5.08], to

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<sup>2</sup> A motion to dismiss an appeal for lack of subject matter jurisdiction can be supported by an affidavit. Matter of SEMASS Partnership, Docket No. 2021-015, Recommended Final Decision (June 18, 2013), adopted by Final Decision (June 24, 2013).

have waived the right to an adjudicatory hearing unless, within 21 days of the date of issuance of the Penalty Assessment Notice, such person files with the Department (i.e. the Department receives) a written statement that does either or both of the following, and does so subject to and in compliance with applicable provisions of 310 CMR 1.00: Adjudicatory Proceedings (1) denies the occurrence of the act(s) or omission(s) alleged by the Department in the Penalty Assessment Notice. (2) asserts that the money amount of the proposed Penalty is excessive.

ROGJEF's Notice of Claim concedes that ROGJEF received the PAN on March 30, 2021, which was four days after the March 26, 2021, issuance date. That left ROGJEF with 17 days in the 21-day appeal period to timely file its Notice of Claim with OADR, i.e., by the due date of April 16, 2021 (21 days after March 26, 2021). See Adler Affidavit. The Notice of Claim is postmarked April 20, 2021, four days after it was to be filed, or *received* by OADR. The Notice of Claim was received and date-stamped in MassDEP's Boston Office on April 27, 2021. See Adler Affidavit. ROGJEF's Notice of Claim was clearly untimely, even assuming that the operable date was the date it was postmarked, and not received.

In ROGJEF's June 2, 2021, opposition to the Motion to Dismiss its President, Robert Gagnon, admits that the Notice of Claim was filed late, but he asserts the following reasons to excuse the late filing: (1) he had to gather information from Richardson, which "caused delays"; (2) two extended family members (aunt and nephew) were ill during the 21 day appeal period, which "caused delays"; (3) he was under the "mistaken" impression that the 21 day appeal period "started when [he] received" the PAN; and (4) the "mail system" was delayed "due to the pandemic." While the last reason—delay with the United States mail caused delay in OADR receiving the appeal—may have some validity, the point is moot because ROGJEF conceded in its opposition to the Motion to Dismiss that it did not mail the Notice of Claim until April 20, 2021, the same day it was postmarked, which was four days after OADR was supposed to have

*received* the appeal. When ROGJEF mailed it on that day it mistakenly believed the “appeal period was in effect.” Unfortunately for ROGJEF, none of the above reasons provide a justification for excusing the late appeal.

MassDEP’s Motion to Dismiss correctly points out that the timeliness of an appeal has been construed for many years as a jurisdictional requirement that has been strictly applied. Late filing due to mistakes, negligence, or inadvertence has not been considered to excuse parties from this strict jurisdictional requirement. See e.g. Matter of Anza, Docket No. 2018-026, Recommended Final Decision 3 (Jan. 29, 2019), adopted by Final Decision (March 6, 2019) (dismissing appeal of Unilateral Administrative Order not received within ten days of issuance of the UAO as required by 310 CMR 7.51(3)(e)); Matter of Sherrill Gould, Docket No. 2014-012, Recommended Final Decision (July 14, 2014), adopted by Final Decision (August 18, 2014) (dismissing appeal of \$17,455.00 PAN for violations of G.L. c. 21E and MCP when appeal was filed 10 days late); Matter of Erkkinen, Docket No. 2011-006, Recommended Final Decision (May 13, 2011), adopted by Final Decision (May 23, 2011) (appeal of \$35,100.00 PAN was dismissed for being three days late); Matter of Berkshire Housing Authority, Docket No. 2010-007, Recommended Final Decision (March 16, 2010) (dismissing c. 91 appeal as untimely by one day), adopted by Final Decision (March 19, 2010); Matter of Stanley E. Bogaty and Frances Bogaty, Docket No. 2001-005, Final Decision (September 19, 2001) (dismissing c. 91 appeal as untimely by one day); Matter of Joseph Demaio, Docket No. 97-063, Final Decision (April 9, 1998) (dismissing wetlands appeal as untimely by two days); see also Matter of Xarras, Docket No. 2008-059, Recommended Final Decision (June 26, 2008), adopted by Final Decision (June 27, 2008); Matter of Bay Park Development Trust, Docket No. 88-291, Final Decision – Order of Dismissal (March 31, 1989); Matter of Treasure Island Condominium Association, Docket

No. 93-009, Final Decision (May 13, 1993); Matter of Cross Point Limited Partnership, Docket No. 95-088, Final Decision (April 30, 1996).

For all the above reasons, ROGJEF's appeal was not timely filed and MassDEP's Motion to Dismiss for untimeliness should therefore be allowed.

**NOTICE- RECOMMENDED FINAL DECISION**

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

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

Date: July 2, 2021



Timothy M. Jones  
Presiding Officer

## SERVICE LIST

In The Matter Of:

ROGJEF, Inc.

Docket No. 2021-011

File No. 00007245  
Uxbridge, MA

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