

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

September 11, 2012

In the Matter of
Palmer Renewable Energy, LLC

OADR Docket No. 2011-021 & -022
Springfield, MA

FINAL DECISION

I uphold the decision on the merits, and find that the permit complies with law and regulation.^{1 2} I reverse the decision on the issue of standing under G.L. c. 30A § 10A, for the reasons set forth below.

The Petitioners claim that the Citizen Group has standing based on G.L. c. 30A, § 10A, which provides that “not less than ten persons may intervene in any adjudicatory proceeding as defined in section one, in which damage to the environment as defined in section seven A of chapter two hundred and fourteen, is or might be at issue; provided, however, that such intervention shall be limited to the issue of damage to the environment and the elimination or reduction thereof ...”

The threshold question is whether this air quality permit proceeding is an adjudicatory proceeding. Chapter 30A, § 1 defines adjudicatory proceeding as “a proceeding before an

¹ My decision does not ratify—or reject—the Presiding Officer’s conclusion that an agency’s obligation to consider “reasonably foreseeable climate change impacts, including additional greenhouse gas emissions” under section 7 of the Global Warming Solutions Act is limited to permits for projects that require an EIR. I leave that question for another day, and adopt the alternate ground that MassDEP did in fact consider these issues and addressed them in the permit, as the Presiding Officer found on pp. 74-78 of the Recommended Final Decision.

² I acknowledge that after the Recommended Final Decision was issued, the Secretary of Energy and Environmental Affairs directed MassDEP to issue regulations under the Prevention of Significant Deterioration program that require a greenhouse gas BACT analysis for biomass facilities. MassDEP intends to follow this directive, which will be in place for facilities proposed in the future. However, this facility is subject to the regulations that were in place at the time of the application, and those regulations did not require that analysis, although, as the Presiding Officer notes and I concur, greenhouse gas reduction measures were considered and incorporated into the permit.

agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing.” This permit application would appear to involve the adjudication of the right or privilege of a specifically named person (the applicant) to construct and operate a facility on its property, based on specific, objective regulatory criteria. Thus, the permit proceeding is not “legislative” in nature, but rather “adjudicative.”

A more difficult question is whether a hearing is required. A hearing is not required by the governing statute; the question is whether the permit applicant has a constitutional right to a hearing. This is not an issue which the Department has technical or policymaking expertise to decide, and from my reading of the case law, the courts have taken differing stances on whether an applicant for a license or permit has a due process right to a hearing. Compare School Committee of Hudson v. Board of Education, 448 Mass. 5656 (2007) with Milligan v. Board of Registration in Pharmacy, 348 Mass. 491 (1965). However, it appears that the Department has a longstanding practice of affording an applicant (and others) a hearing, and it is a prudent course of action to assume that the applicant has that right. Hence I will assume, without deciding, that the applicant for an air quality approval of this type has a due process right to a hearing. If my assumption is correct, then this is an adjudicatory proceeding under chapter 30A. Clearly, a judicial resolution of this legal issue would be helpful.

The second question is when does the adjudicatory proceeding commence? This question is made more difficult by the fact that the Department uses a hybrid, two-step process for air quality permits (and many other permits as well). The first step is an informal notice and comment proceeding, sometimes with a public hearing, after which the Department issues a

permit decision. The second step is an adjudicatory, trial-type hearing of the kind envisioned by chapter 30A.

The Presiding Officer suggests that the first step of the process is not part of the adjudicatory proceeding; the proceeding commences only when the Department issues a permit decision and one with a constitutional or statutory right to an opportunity for an agency hearing exercises that right. While set forth persuasively in the Recommended Decision After Remand, I am persuaded by the reasoning in Matter of Riverside Steam & Electric Co., Docket No., 88-132, Decision and Order on Motions to Intervene (July 15, 1988), which implies that the adjudicatory proceeding starts when the applicant files the permit application, and encompasses both informal and formal hearing steps of the process.

I do not believe that the question of whether a proceeding is adjudicatory hinges upon whether one with a constitutional or statutory right to an opportunity for an agency hearing exercises that right after the Department issues a decision adverse to that party. Rather, what matters is whether the proceeding as a whole involves an adjudication of a specific person's rights, and whether a hearing is required. Assuming without deciding that the applicant has a constitutional right to a hearing in connection with a request for an air quality permit, I hold that the adjudicatory proceeding commenced when the applicant filed the application for an air quality permit and sought the Department's determination of its right to construct and operate a facility.

The next question is whether a ten citizen group can request a trial-type, adjudicatory hearing even when the applicant has not availed itself of that right. It is obvious that section 10A does not give a citizens group the right to *initiate* an adjudicatory proceeding; the citizens only have a right to *intervene* in an existing proceeding. However, once a citizen group has

intervened, section 10A gives the group the same procedural rights as other parties (with the important exception that the scope of the citizen group's involvement is limited to preventing damage to the environment). As section 10A states, "any such intervener shall be considered a party to the original proceeding for the purposes of notice and any other procedural rights applicable to such proceeding under the provisions of this chapter..." One of the procedural rights under chapter 30A is the right to a trial-type, adjudicatory hearing under chapter 30A, section 11. Thus, section 10A gives ten citizens who have properly intervened the same right as the applicant to request an adjudicatory hearing.

The final question is whether the Citizen Group in this case properly intervened. In order to properly intervene, section 10A requires a group to file an intervention statement which "shall clearly and specifically state the facts and grounds for intervening and the relief sought, and each intervening person shall file an affidavit stating the intent to be part of the group and to be represented by its authorized representative."

Section 10A is silent on the timing of the intervention statement, but it is obvious that the intervention must come before the proceeding is completed. As noted above, for air quality permits of this kind the Department holds a two step permitting process. Step one is an informal, public hearing/written comment proceeding that concludes with the initial permit decision. Step two is an adjudicatory hearing, which occurs only if a party with the legal right to request such a hearing does so. In order to have that legal right, the ten citizen group must already be a party to the proceeding by intervening during Step One, i.e., before the initial permit decision is finalized. If the citizens group has not intervened, it has not become a party to the proceeding and has not acquired the right under section 10A to request an adjudicatory hearing.

There are two possible ways of defining when the initial proceeding is completed: is it when the Department issues the permit decision? Or when the twenty-one day appeal period set forth in 310 CMR 1.01(6) is completed (which is the date the permit becomes final in the absence of an appeal)? Unfortunately, the Department's regulations do not answer this question. Unlike other MassDEP permitting programs, where there are specific regulations governing who may seek an adjudicatory hearing and when in the process they must do so, the air quality regulations are silent. And the general rules of adjudicatory proceedings are not informative on this issue. 301 CMR 1.01(6), which addresses the initiation of an adjudicatory appeal, establishes a deadline of filing a notice of claim within 21 days from the date that the notice of Department action was sent to a person, but this regulation does not tell a citizens group or others what they must do (or when they must do it) to intervene at the informal stage to preserve their right to request an adjudicatory hearing. Similarly, 301 CMR 1.07(7) assumes that the adjudicatory hearing has already been triggered by a valid request by a party, and the regulation allows for intervention motions at any time before a prehearing conference. And the regulations also fail to provide for a process for the Department to rule upon the motions filed during the first phase, so a would-be intervener might not even know whether it has rights as a party to request an adjudicatory hearing.

Given the lack of clarity, I cannot apply a rule that would cut off the rights of would-be interveners. See Chicoine v. Commissioner of the Department of Environmental Protection, 11-P-1005, Unpublished Memorandum and Order Pursuant to Rule 1:28 (Mass. Ct. App. 2012) (“a regulation [regarding the timing of filing an appeal] that is overly unclear or ambiguous is not enforceable”).

Therefore, I find that for purposes of this case, the Citizen Group shall be deemed to have complied with section 10A by filing a motion and supporting affidavits before the expiration of the twenty one day period, i.e., when the permit became final. Thus, the Citizen Group has established standing under chapter 30A, section 10A.³ However, on a going forward basis, I find as a matter of policy that the motion to intervene and the supporting affidavits should be filed before the Department issues its permit decision. This should also be required for persons who wish to intervene under 310 CMR 1.01(7) as being substantially and specifically affected. Otherwise, a project opponent can sit back and wait, fail to raise objections during the informal proceeding, and intervene solely for the purpose of seeking an adjudicatory hearing. That is unfair for the applicant and the Department.

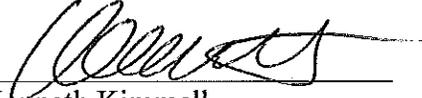
Thus, for any air quality permit application for which the Department has not issued a permit decision prior to the date of this decision, if a ten citizens group wishes to preserve the right to request an adjudicatory hearing, it must file the intervention statement and supporting affidavits before the Department issues the permit decision. This same requirement shall also apply to persons who wish to intervene as aggrieved persons. I instruct the Department to prepare regulations to implement this directive and establish a clear, rational and orderly process and timeline for the filing and decision-making for such motions.

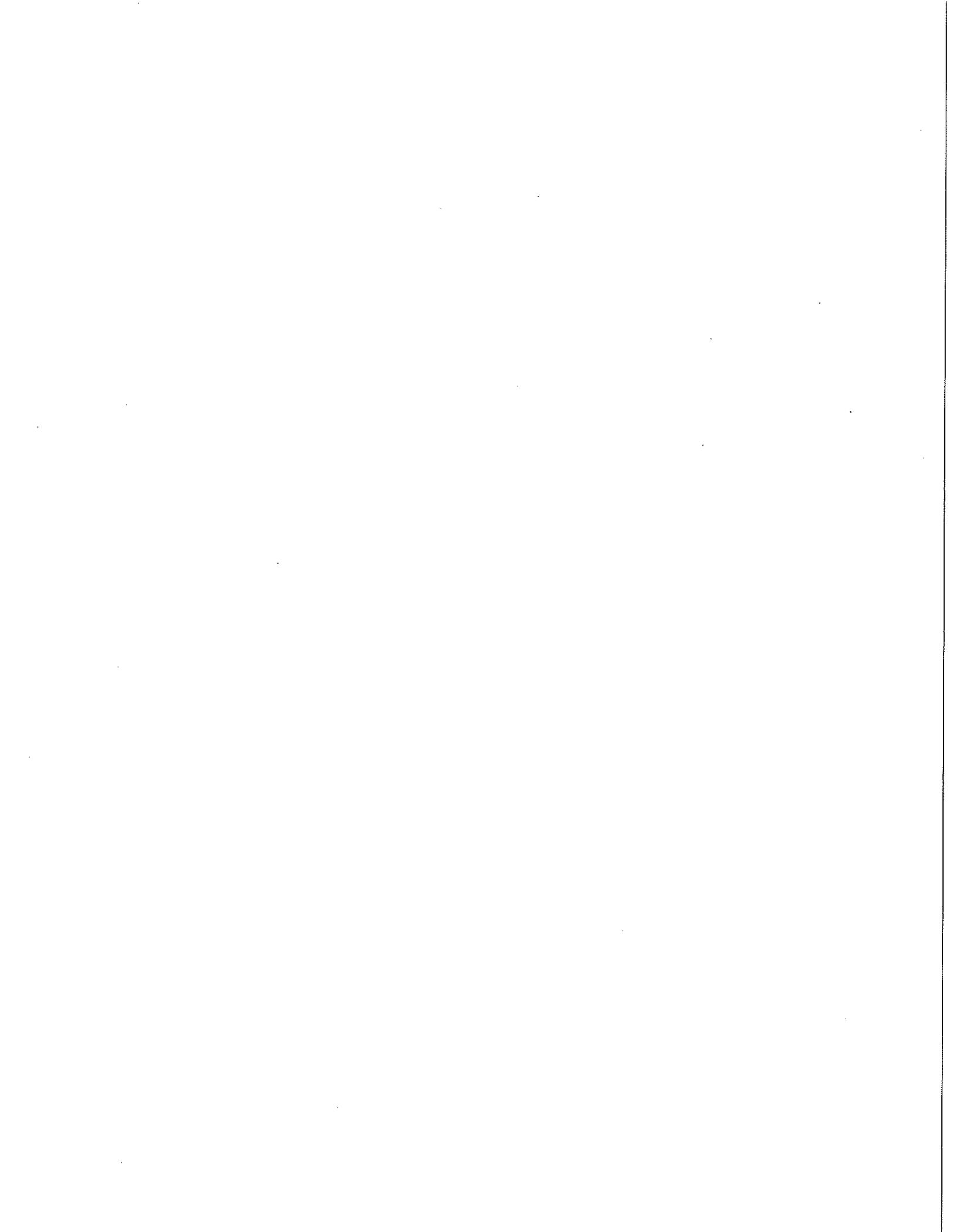
The parties to this proceeding are notified of their right to file a motion for reconsideration of this Decision, pursuant to 310 CMR 1.01(14)(d). The motion must be filed with the Case Administrator and served on all parties within seven business days of the postmark date of this Decision. A person who has the right to seek judicial review may appeal this

³ My decision on section 10A makes it unnecessary to resolve whether the petitioners also have standing as being substantially and specifically affected under 310 CMR 1.01(7) or whether CLF, Arise, and TAC have representational standing.

Decision to the Superior Court pursuant to M.G.L. c. 30A, §14(1). The complaint must be filed in the Court within thirty days of receipt of this Decision.

Date: 9/11/12


Kenneth Kimmell
Commissioner



SERVICE LIST

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Docket No. 2011-021
2011-022

File No. 1-P-08-036
Springfield

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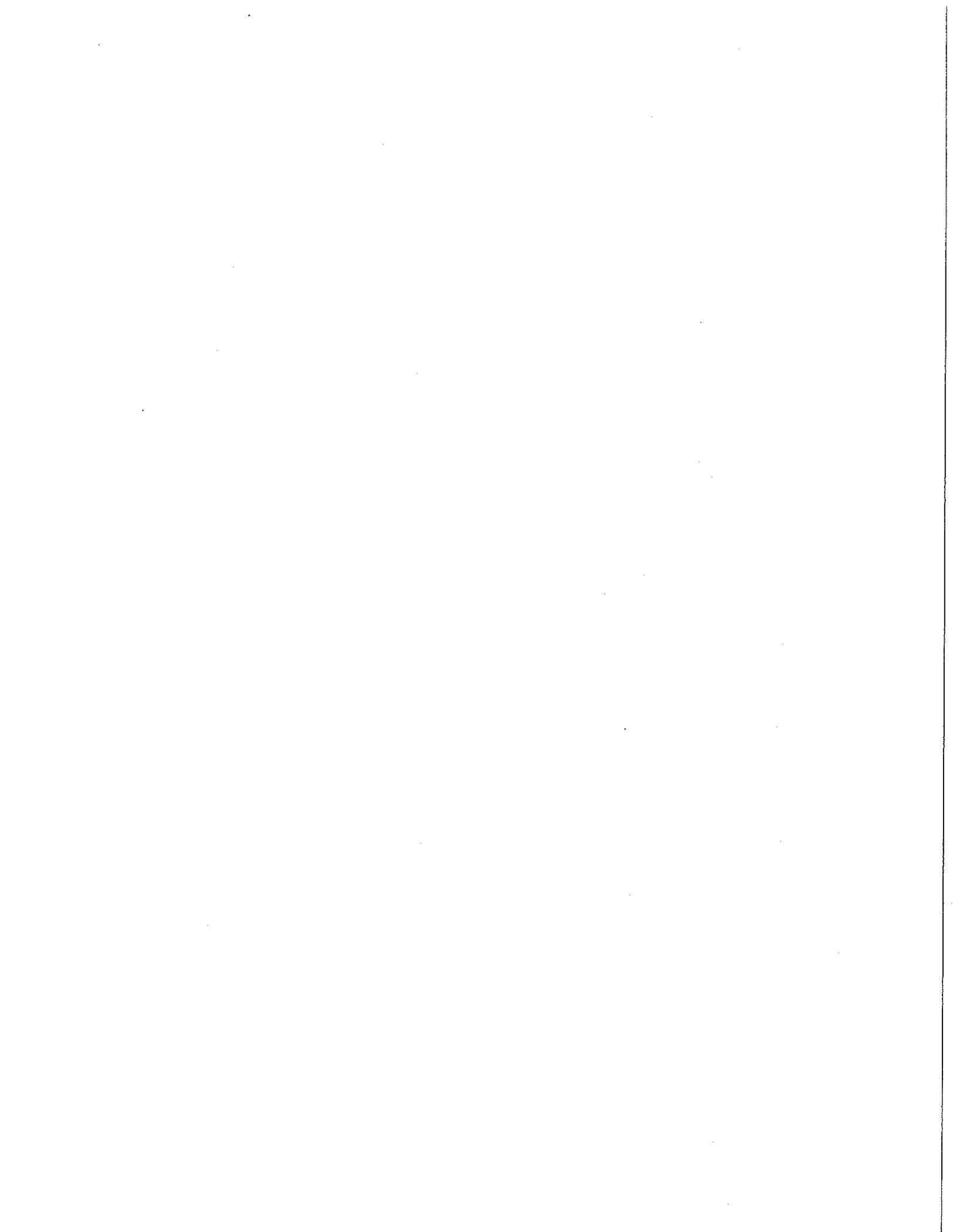
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Date: September 11, 2012

