Date Filed 4/27/2026 12:45 PM
Superior Court - Middlesex
Docket Number

1 L2

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX COUNTY, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 2681CV01107

JACOB [redacted], EILEEN [redacted],
JACQUELYNN [redacted], HOLLY [redacted],
NANCY [redacted], STEVEN [redacted],
JOANN [redacted], RANDALL [redacted],
ALEX [redacted], and MARY [redacted],

Plaintiffs,

v.

MASSACHUSETTS DEPARTMENT OF
ENVIRONMENTAL PROTECTION and
MARKLEY GROUP LLC,

Defendants.

RECEIVED
4/27/2026

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND PETITION FOR REVIEW

I. INTRODUCTION

1. Plaintiff residents of Lowell, Massachusetts bring this action to challenge the final decision by the Massachusetts Department of Environmental Protection ("MassDEP") to approve a flawed air quality plan for the Markley Group, LLC's ("Markley") data center in the middle of a dense residential community and to authorize Markley's operation of diesel generators and cooling towers prior to final plan approval. MassDEP improperly rejected Plaintiffs' standing to appeal the air quality plan through the adjudicatory hearing process despite unrebutted record evidence that Plaintiffs, many of whom live directly at the facility fenceline, will be directly aggrieved by the plan approval and submitted timely public comments, entitling them to pursue their appeal. It rubberstamped Markley's proposed air quality plan despite its clear inconsistency with state pollution control laws and environmental justice laws and policies. And it exceeded its authority by entering into an undisclosed side agreement with Markley to allow it to proceed

under the proposed permit while Plaintiffs' administrative appeal was still pending. This Court should reverse the flawed plan approval and require MassDEP to set aside its *ultra vires* agreement.

2. Markley's data center (the "Data Center") occupies 14 acres in the center of Lowell's Sacred Heart and Back Central neighborhoods, disrupting daily life for residents with air pollution, industrial noise, dust, odor, traffic, and other impacts. The 352,000 square-foot main Data Center building looms over surrounding residences. Mist from the Data Center's cooling towers settles on homes along the facility's fenceline, and noise disrupts neighbors' sleep. At the neighborhood little league field, a row of industrial-scale diesel generators sits behind home plate. At the neighborhood public preschool, children using the playground slide face Markley's spiked black fence. The company has placed residents under constant surveillance, with clusters of cameras monitoring street travel and peering into backyards. Markley's acquisitions of residential homes have displaced long-time Lowell residents. With one decision after another, Markley has chosen to subject its neighbors to intrusion, disruption, and serious health dangers—all without transparency and meaningful community engagement, and with little oversight by State regulators charged with enforcing state air pollution control laws.

3. Markley's choice to build its Data Center inside a residential community has put it on a collision course with state law designed to protect the health and welfare of communities like Sacred Heart and Back Central. In 2016, Markey obtained site plan approval from the Lowell City Council to convert a former pasta factory into the Data Center. At the time, Markley installed seven industrial diesel generators as a backup power source. Since 2022, Markley has progressively expanded Data Center operations to capture market share for data storage and compute services spurred by the growth in artificial intelligence. With each successive expansion, Markley has also sought to increase infrastructure for on-site power generation and cooling equipment to sustain the energy intensive data services it performs at the site. Prior to doing so, Markley was required to apply for and obtain a comprehensive air plan approval from MassDEP under its air pollution control regulations, 310 CMR 7.00.

4. In April 2025, Markley submitted its latest non-major comprehensive plan application, which is the application at issue in this lawsuit. Markley's application sought an air permit to install eight new 3,000 kW generators and operate a total of 27 industrial-scale diesel generators along with 16 cooling towers to support Data Center services. Residents, including eight of the undersigned Plaintiffs, submitted written comments to MassDEP objecting to the plan, while many others participated in meetings with Markley and the City of Lowell to raise concerns about the proposed expansion. MassDEP issued a plan approval prepared by Markley in July 2025 (the "Plan Approval"), and Plaintiffs filed a timely administrative appeal with MassDEP's Office of Appeals and Dispute Resolution ("OADR").

5. In rejecting Plaintiffs' appeal on summary decision, MassDEP made clear errors of fact and law that have denied Plaintiffs due process to which they are entitled. MassDEP rejected Plaintiffs' right to pursue their appeal, both as a ten-persons group and as individual aggrieved persons, contrary to the evidence before it and based on a clear misreading of its own regulations. It invented novel limitations on the scope of issues subject to appeal in direct conflict with the text of its own regulations and black letter principles of administrative law. It improperly excluded evidence by Plaintiffs' lay and expert witnesses based on misinterpretation of the roles of these respective witnesses. It subverted the standards governing summary decision. And it arbitrarily foreclosed Plaintiffs' right to take discovery narrowly tailored to produce relevant and admissible evidence. In doing so, MassDEP and Markley thwarted Plaintiffs' ability to voice their concerns about the impacts of the Data Center on the local environment and the health and welfare of their community and infringed on their right to a just resolution of their claims on a properly developed evidentiary record.

6. Compounding these injuries, Plaintiffs discovered six months into their pending appeal, upon observing unpermitted construction activities at the Data Center, that Markley and MassDEP had entered into an undisclosed agreement to circumvent the appeal by granting Markley interim permission to operate under the challenged permit conditions. The agreement, styled as an Administrative Consent Order, exceeds MassDEP's authorities, violates the air

pollution control and permitting laws and regulations MassDEP is charged with administering, and infringes on Plaintiffs' and the public's rights to notice, comment, and appeal of air plans before they are made effective.

7. Having exhausted all available administrative remedies and all possible recourse to obtain voluntary cessation of Markley's unpermitted activities, Plaintiffs seek relief from this Court to set aside MassDEP's arbitrary, capricious, and unlawful Plan Approval and to prevent Markley and MassDEP from making an unlawful end-run around the State's air pollution control laws and permitting requirements.

II. JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this appeal from a final decision of MassDEP in an adjudicatory proceeding pursuant to M.G.L. c. 30A, § 14. Plaintiffs have the right to seek judicial review of the final decision of MassDEP on the Plan pursuant to 310 CMR 1.01(14)(f).

9. Declaratory relief is sought and authorized pursuant to M.G.L. c. 231A. This declaratory judgment procedure is properly exercised to enjoin and determine the legality of the administrative practices and procedures of MassDEP, a State agency, in violation of the laws of the Commonwealth and of rules and regulations promulgated under such laws. M.G.L. c. 231A, § 2.

10. This Court has jurisdiction over an action in the nature of mandamus under M.G.L. c. 249, § 5.

11. This Court has personal jurisdiction over this matter because all Plaintiffs are residents of the Commonwealth, Defendant MassDEP is a subdivision of the Commonwealth, and all other parties have their principal places of business within the Commonwealth.

12. Venue is proper in this Court because all Plaintiffs are residents of Lowell, MA in Middlesex County. M.G.L. c. 30A, § 14(1).

III. PARTIES

13. This action is brought by and on behalf of the following residents of the Commonwealth, in their individual capacities and as a Ten Persons Group:

a. Jacob [redacted], a Massachusetts resident domiciled at [redacted], Lowell, MA 01852;

b. Eileen [redacted], a Massachusetts resident domiciled at [redacted], Lowell, MA 01852;

c. Jacquelynn [redacted], a Massachusetts resident domiciled at [redacted], Lowell, MA 01852;

d. Holly [redacted], a Massachusetts resident domiciled at [redacted], Lowell, MA 01852;

e. Nancy [redacted], a Massachusetts resident domiciled at [redacted], Lowell, MA 01852;

f. Steven [redacted], a Massachusetts resident domiciled at [redacted], Lowell, MA 01852;

g. Joann [redacted], a Massachusetts resident domiciled at [redacted], Lowell, MA 01852;

h. Randall [redacted], a Massachusetts resident domiciled at [redacted], Lowell, MA 01852;

i. Alex [redacted], a Massachusetts resident domiciled at [redacted], Lowell, MA 01852; and

j. Mary [redacted], a Massachusetts resident domiciled at [redacted]., Lowell, MA 01851.

Plaintiffs timely appealed the July 3, 2025 Plan Approval to OADR on July 24, 2025 as a Ten Persons Group. On August 27, 2025, the OADR Presiding Officer issued an Order denying Ten Persons Group standing but permitting Plaintiffs Jacob [redacted], Eileen [redacted], Jacquelynn [redacted],

Holly [redacted], Nancy [redacted], Steven [redacted], Joann [redacted] and Alex [redacted] to proceed with the appeal in their individual capacity as aggrieved persons.

14. Defendant MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION ("MassDEP") is an administrative agency of the Commonwealth established by M.G.L. c. 21A, § 7. MassDEP has regulatory authority over air pollution control pursuant to M.G.L. c. 111, § 142A et seq. and its implementing regulations at 310 CMR 7.00. MassDEP issued a final decision approving the Plan on July 3, 2025 and issued an Administrative Consent Order on September 29, 2025 providing interim authorization for activities subject to the Plan. MassDEP's principal place of business is 100 Cambridge Street, Suite 900, Boston, MA 02114.

15. Defendant MARKLEY GROUP, LLC ("Markley") is the owner and operator of a data center at 2 Prince Avenue (1 Markley Way) in Lowell, MA. On April 28, 2025, Markley submitted the instant non-major comprehensive plan application, which MassDEP approved on July 3, 2025. On September 29, 2025, Markley entered into the Administrative Consent Order with MassDEP providing interim authorization for the plan despite the ongoing appeal. Markley's principal place of business is 1 Summer Street, Boston, MA 02110.

IV. FACTUAL ALLEGATIONS

A. The Data Center is Located in and Expanding into State-Designated Environmental Justice Communities.

16. The Data Center sits between two dense residential neighborhoods in Lowell, Massachusetts: the Sacred Heart neighborhood, on the south side of the facility, and the Back Central neighborhood on the north side.

17. Sacred Heart and Back Central are racially, ethnically, linguistically, and religiously diverse communities. The residential population in the census tract in which the Data Center sits is 65 percent minority, and 15 percent of ist households are linguistically isolated. Sacred Heart and Back Central have large populations of residents who predominately speak Portuguese or Spanish, as well as a Cambodian community whose members predominately or exclusively speak Mon-Khmer. Both neighborhoods have been designated by the

Commonwealth of Massachusetts as Environmental Justice populations due to their large minority communities.[1]

18. Sacred Heart and Back Central are disproportionately burdened by air pollution and other environmental stressors. For example, the census block group that houses the Data Center ranks in the 97th percentile in the country for nitrogen oxide emissions, the 63rd percentile for diesel particulate matter emissions, the 97th percentile for traffic proximity, and the 96th percentile for Superfund proximity, according to data published by the U.S. Environmental Protection Agency's former Environmental Justice Screening and Mapping Tool EJSCREEN.[2] The census tract that houses the Data Center also ranks is the top 90th percentile nationwide for proportion of adults with asthma.[3]

19. Among all census block groups in the Commonwealth, the block group housing the Data Center ranks in the 94th percentile for nitrogen dioxide pollution, in the 66th percentile for diesel particulate matter, in the 73rd percentile for heavy traffic proximity, and in the 89th percentile for impaired waterbodies, according to the State's environmental justice screening tool, MassEnviroScreen.[4] It is also a location that is especially vulnerable to climate risks, ranking in the 93rd percentile across the Commonwealth for extreme heat days.[5]

20. One block west of the Data Center is the public Cardinal O'Connell School, an inclusive early learning center that provides preschool for children with disabilities as young as three years old.

---

[1] *Environmental Justice Populations in Massachusetts*, MASS. OFF. OF ENV'T JUSTICE & EQUITY, https://www.mass.gov/info-details/environmental-justice-populations-in-massachusetts#environmental-justice-maps-update-2022 (last visited Apr. 24, 2026).
[2] *EJScreen*, PUB. ENV'T DATA PARTNERS, https://pedp-ejscreen.azurewebsites.net/ (last visited Apr. 24, 2026).
[3] *Id.*
[4] *MassEnviroScreen*, MASS. EXEC. OFF. OF ENERGY AND ENV'T AFFAIRS (Draft Nov. 2025), https://mass-eoeea.maps.arcgis.com/apps/instant/sidebar/index.html?appid=4be63e892a3d42d69334615a64095a39 (last visited Apr. 24, 2026).
[5] *Id.*

21. Directly abutting the Data Center to the northwest is Oliveria Park, which houses a baseball field and basketball court popular with neighborhood children.

22. Before Markley move into the neighborhood, Sacred Heart and Back Central were closely knit communities. Children played in the neighborhood's streets. Residents engaged in community social activities through church groups and advocated for the neighborhood's welfare through neighborhood associations and before the Lowell City Council.

23. From 1939 until its closure in 1997, the Prince Pasta Company factory at 2 Prince Avenue was a major employer of workers residing in Lowell and a source of pride for the community. Residents referred to their community fondly as "Prince Spaghettiville."

24. The Prince Pasta Company was responsive to the interests of the community in the quiet enjoyment of their neighborhood. For instance, the company changed its train delivery schedule to ease the noise burden on its neighbors.

25. In 2015, the Markley Group, LLC began seeking site plan approval from the City of Lowell ("City") to convert the former Prince Pasta factory into a data center to provide data processing and storage services for Markley's clients. Markley obtained site plan approval from the Lowell Planning Board in 2015, followed by approval from the Lowell City Council in 2016. In 2018, Markley obtained site plan approval to further expand the Data Center through the addition of a new 65,000 square foot facility, a parking lot, and a stormwater management system.

26. Alongside its 2016 site plan approval, Markley obtained a 20-year tax subsidy from the City, estimated to save the company $77 million on property and corporate taxes, in exchange for a commitment to fill at least 25 percent of its workforce through local hiring. As of April 2025, Markley employed seven workers from Lowell, according to its filings with MassDEP.[6]

---

[6] Markley Group, LLC, *Fact Sheet: Air Quality Comprehensive Plan Application*, Application No. 25-AQ02F-0001-APP, at 1 (Apr. 28, 2025) (stating in reference to the Data Center that "[s]even employees current reside within the city limits of Lowell").

27. Markley's entrance into the neighborhood has fractured the community, displaced residents, and profoundly damaged social cohesion. Today, a growing proportion of Sacred Heart and Back Central's residents are renters residing in apartment buildings owned by Markley through its holding companies. Long-term residents who remain are struggling to maintain the community's identity and habitability as a residential neighborhood.

28. On information and belief, in 2019, Markley began acquiring properties in the Sacred Heart neighborhood. The Markley Group acquires properties in the neighborhood through at least four State-registered business entities: Lowell Investco, LLC; Maxwell Properties Lowell, LLC; 47 Prince, LLC; and 39 Prince LLC. Markley officers and its attorney are the corporate signatories for these business entities. Markley has become the landlord of apartment buildings and single-family homes through these acquisitions.

29. On information and belief, after Markley's purchases of properties in the neighborhood, the only remaining property not owned by Markley on Prince Avenue, which runs along the western edge of the Data Center, is the home at 9 Prince Avenue. Markley's property-acquiring business entities have continued to solicit for purchase homes of other abutting neighbors.

30. On information and belief, in December 2025, Markley acquired through a business entity a retired power generation plant located at 2 Tanner Street one third of a mile west of the Data Center. According to public reports, the 85-megawatt peaker plant was powered by a natural-gas-fired turbine and could also be operated with diesel fuel stored at the site. Until it was closed in 2024, the facility was the largest fuel storage site for diesel in Lowell. Massachusetts Land Records record a quit claim deed dated December 2, 2025, through which the former owner conveyed the parcel to Tanner Street Investco, LLC, a Delaware limited liability company whose sole member is Markley Chief Executive Officer Jeffrey D. Markley. On April 6, 2026, Tanner Street Investco, LLC went before the Lowell Planning Board to obtain a preliminary subdivision approval for the property.

31. Markley's Data Center expansion has permanently blocked Back Central's pedestrian access to the Sacred Heart neighborhood. Previously, residents could walk from Newhall Street in Back Central south onto Prince Avenue. Markley closed off this pedestrian access way and severed the connection between Carter Street and Prince Avenue to construct a private road leading to the Data Center. The expansion of the Data Center has severed organic connections between residents of Sacred Heart and Back Central.

32. On information and belief, since early 2020, Markley has installed a network of surveillance cameras across the Sacred Heart and Back Central neighborhoods. Some of these cameras are on Data Center buildings or on its perimeter fenceline with direct views into backyards and homes abutting the facility. Other cameras are affixed to public and private buildings across the neighborhood. These cameras have sightlines monitoring most of the streets entering and exiting the Data Center and surrounding neighborhood.

33. In 2021, Markley repainted the main Data Center building black and surrounded the facility with a large black metal fence.

B. Markley Has Expanded Its Data Center in Piecemeal Fashion Through a Series of Permit Applications Filed Over Several Years.

34. Initially, Markley installed and operated seven diesel generators as a backup power source for the Data Center without air plan approval under the State's Environmental Results Program, 310 CMR 7.26(42). Over the past several years, with the growth in demand for artificial intelligence services, Markley has progressively expanded its energy and cooling infrastructure through successive non-major comprehensive plan approvals to support burgeoning data storage and computing services. Markley has done so despite the foreseeable limitations of siting one of the Commonwealth's largest data centers within a residential neighborhood.

35. In November 2023, Markley obtained non-major comprehensive plan approval NE-22-016 to install four additional 3,000 kW diesel generators and operate a total of 11 emergency generators at the Data Center under MassDEP's Environmental Results Program.

36. On June 27, 2024, Markley submitted an application for a superseding non-major comprehensive plan approval to MassDEP to install eight additional 3,000 kW diesel engine generators, to replace two generator units covered by the prior plan approval, to install 14 new cooling towers on the east side of the facility (in addition to two existing cooling towers), and to operate a total of 19 diesel generators and 16 cooling towers to support Data Center services. MassDEP approved the application through Plan Approval NE-24-014 on March 25, 2025, and Plaintiff [redacted] filed a timely appeal with OADR.

37. While the appeal of Plan Approval NE-24-014 was still pending, Markley filed its instant application for a superseding non-major comprehensive plan on April 28, 2025. With this plan application, Markley seeks to install an additional eight Caterpillar 3615E 3,000 kW diesel generators and to operate a total of 27 diesel generators and 16 cooling towers at the Data Center.

38. On May 15, 2025, MassDEP posted a notice for a 30-day public comment period on the proposed plan on its website.

39. On June 2, 2025, Markley held a listening session on the proposed plan at the Joseph G. Pyne Arts Elementary School in Lowell. During the meeting, Sacred Heart and Back Central residents informed Markley about their experiences and concerns with the noise, air pollution, odors, cooling tower mist, dust, and other impacts of its operations. Residents were met with dismissive and at times mocking responses by Markley representatives.

40. The question-and-answer format of the Markley listening session led residents to believe that their comments would be considered part of the record of the plan review.

41. On June 14, 2025, Plaintiff [redacted] sent an email to MassDEP employee Edward Braczyk requesting a two-week extension of the public comment period to allow residents to register their concerns directly with MassDEP, as the June 2 meeting had created confusion among residents concerning the required manner for public participation. [redacted] also informed MassDEP that, at the City Council's insistence, Markley had agreed to hold a walk-through of the Data Center for residents and City officials on June 16—just after written

comments were due—and that residents should have an opportunity to raise concerns in written comments that arose during the walk-through.

42. Mr. Braczyk did not respond to [redacted] email until June 23, 2025, a week after the scheduled close of the comment period, summarily denying the request.

43. On information and belief, MassDEP did not attend either the June 2 listening session or June 16 walk-through, nor did it hold any meetings to receive oral comments on the plan application. Both the June 2 and June 16 events were conducted only in English despite the large non-native-English speaking population in the neighborhood.

44. Despite confusion over the public comment period, 16 residents, officials, and non-profit organizations submitted written comments raising extensive concerns with the proposed plan.

45. For instance, City Councilor Kim Scott submitted a written comment explaining that the neighborhoods abutting the Data Center "are Environmental Justice Communities with higher than average asthma rates" and urged MassDEP to ensure that "a full Environmental Justice and cumulative impact review is done."

46. Sofia Owen, on behalf of Alternatives for Community & Environment ("ACE"), submitted a written comment requesting, among other things, that MassDEP "ensure that Markley is not segmenting project proposals" so as "to avoid [Massachusetts Environmental Policy Act] review" and that it require Markley to "comply with state requirements to meaningfully involve residents regarding projects in or near [environmental justice] populations" and "provide interpretation and translation at meetings with local residents who speak languages other than English."

47. Plaintiffs including [redacted] submitted written comments expressing serious concerns about air quality and noise pollution and associated health impacts of the expansion. [redacted] pointed out that already she is unable to "enjoy [her] yard or [her] own house without having to worry about [Markley] turning [the generators] on, without warning and the fumes going everywhere the longer they

run," and [redacted] informed MassDEP that the "smoke and fumes" from the generators would be "detrimental to" the health of her and the "hundreds of other families with children" that live around the Data Center. Others including Plaintiff [redacted] raised concerns with Markley's maintenance of nuisance conditions at its property, such as a large uncovered dirt pile, and with impacts of the expansion on neighbors' health. Still other Plaintiffs including [redacted] raised concerns with the possibility of Legionella bacteria in the mist emitted from the cooling towers causing outbreaks of Legionnaire's disease in the neighborhood and [redacted] with impact of the expansion on property values in the neighborhood.

48. One of [redacted] several written comments highlighted the proposed plan approval's failure "to address on-going site violations," detailed Markley's non-compliance with existing permit conditions, notified MassDEP of Markley's "submission of false documentation for this Plan," and stressed that an approval would be based "on factually inaccurate information submitted by [Markley]."

49. Other comments highlighted available alternative energy sources and asked MassDEP to require commercial and industrial developers like Markley "to develop cleaner options" than diesel generators. ACE's comments specifically notified MassDEP that its authorization for the continued expansion of diesel generation at the Data Center without any consideration of alternative cleaner power sources conflicted with State climate laws and policies intended to achieve net-zero greenhouse gas emissions.

50. MassDEP responded to each of these comments, acknowledging their timely receipt but brushing aside residents' concerns.

51. On July 3, 2025, MassDEP issued the requested Plan Approval, NE-25-002. The Plan Approval stated that it "supersedes [the March 25, 2025 and November 3, 2023] Plan Approvals . . . in their entirety" and authorizes operation of 27 diesel generators and "16 cooling towers (1000-ton each)" as "Emission Unit[s]" "subject to and regulated by this Plan Approval."

C. Markley's Data Center Construction and Operations Adveserly Impact the Environment and Residents' Health and Welfare.

52. According to Markley's Plan Approval documents, the 27 diesel generators are intended to serve as a backup power source to ensure a reliable power supply for Data Center services whenever utility-provided power is unavailable. Markley operates the diesel engines "with a level of redundancy" to ensure power reliability for the Data Center such that if one engine fails, the others can increase load or come online to accommodate the facility's backup power needs. The Plan Approval provides for eight engine groupings, with engines operating at up to between 50 and 100% load depending on the configuration. In addition to operating during outages, the diesel generators are regularly fired for routine maintenance, testing, and other non-emergency periods.

53. The industrial diesel generators operated at and proposed for the Data Center emit a variety of local air pollutants, such as Nitrogen Oxides (NOx), Carbon Monoxide (CO), Sulfur Dioxide (SO2), Particulate Matter (PM), and Hazardous Air Pollutants (HAPs), as well as greenhouse gases.

54. Markley's March 2025 plan approval, NE-24-014, limited each of the 19 permitted diesel generators to operating up to 100 hours per year. With the challenged July 2025 Plan Approval, NE-25-002, Markley requested and obtained a 70-hour annual operating limit for each diesel generator "to maintain potential NOx emissions below major source thresholds of 50 tons per year" under the Clean Air Act's Prevention of Significant Deterioration program, which would require more extensive environmental review and permitting.

55. Under the Plan Approval's paper limits, the 27 diesel generators are allowed to emit up to 42.92 tons per year of NOx, 8.60 tons per year of carbon monoxide, and significant

quantities of other local air pollutants. The Plan Approval also authorizes emissions of up to 3,276 tons per year of carbon dioxide equivalents—equal to the year-round greenhouse gas emissions of 749 U.S. households from all electricity use, according to U.S. Environmental Protection Agency estimates.

56. On information and belief, Markley operates its diesel generators outside of approved schedules and in excess of permit limits, and it has submitted incomplete and inaccurate reporting information on diesel generator operations to MassDEP in support of the Plan Approval. For instance, Markley informed MassDEP and the public in its May 7, 2025 Plan application that there were only "seven diesel emergency generators on the site," whereas drone footage and visual observations by residents documented the installation of 21 diesel generators as early as June 2025. MassDEP engineer Edward Braczyk attested to observing that Markley had installed 22 diesel generators during a September 2025 site visit, three more than authorized by then-operative plan approval NE-24-014.

57. Each of the major local air pollutants emitted by the diesel generators—including NOx, CO, PM, SO2, and HAPs—are well-documented triggers for asthma and other respiratory conditions. According to EJSCREEN, more than one in 10 adults in Sacred Heart and Back Central have asthma.[7] This is true of several of the Plaintiffs who reside along or adjacent to the Data Center fenceline, and whose underlying health conditions would be exacerbated by the further expansion of the Data Center's diesel generator capacity.

58. For instance, Plaintiff [redacted], whose home is within 100 feet of a block of Data Center diesel generators, has bronchial asthma, which is triggered by exposure to air

[7] *EJScreen*, PUB. ENV'T DATA PARTNERS, https://pedp-ejscreen.azurewebsites.net/ (last visited Apr. 24, 2026).

pollutants emitted by Markley's diesel generators. Plaintiff [redacted], who lives just 400 feet north of the Data Center fenceline where the new diesel generator banks would be located, has asthma and a COPD-like lung condition that requires her to use an inhaler. Since the expansion of the Data Center in 2025, she has had to use her inhaler daily, whereas she previously used it only about once every five months. [redacted] is uncomfortable leaving her house because of the fumes from the diesel generators, which emit a burning odor. The odors are worst at Oliveria Park, where [redacted] goes on morning walks.

59. The noise from the operation of diesel generators, air conditioning units, and other cooling infrastructure disrupts residents' quiet enjoyment of their neighborhood. The diesel generators emit uncomfortably loud sounds when operating, a problem that is exacerbated by Markley's practice of firing the diesel generators without notice to residents. The noise pollution from the diesel generators layers on top of constant noise emitted by the Data Center cooling equipment. Noise pollution from the Data Center affects residents' concentration and comfort and is loud enough to wake abutting residents from their sleep. The noise is particularly severe during warm summer months, when cooling equipment operates at its peak. During this period, nearby residents, many of whom do not have air conditioning, must choose between the risks of overheating from closing their windows and severe exposure to noise and air pollution when they are opened. According to residents, the noise from the Data Center is so loud that it can sound like a jet engine.

60. The diesel generators emit odors that disturb residents' enjoyment of the neighborhood and raise concerns about health complications arising from the unannounced generator operations.

61. A large, uncovered dirt pile sits at the northeast corner of the Data Center site, bordering an adjacent residential street. On information and belief, the dirt pile has grown with Markley's expansion activities. Dirt blows from the pile into the yards of nearby residents.

62. The Data Center's cooling towers emit mist that settles on the homes and vehicles of residents and compels them to keep windows closed. Cooling towers are a well-recognized source of Legionnaire's disease.[8] The warm water circulating through cooling towers creates ideal conditions for growth of Legionella bacteria, which is disbursed by aerosols emitted from the cooling tower mist; when inhaled, the bacteria can cause infections. On account of these risks, Plaintiff [redacted] no longer uses her pool or allows neighbors and her grandchildren to use it out of concern regarding contamination from the cooling tower emissions. The Plan Approval does not provide any mitigation to address health risks from cooling towers. On information and belief, Markley has not communicated practices or proposals to residents or regulators for cleaning and decontamination of the cooling towers.

63. The dirt, dust, and noise from Markley's construction at the Data Center, including the increased traffic of construction vehicles, contaminate the air and disturb Plaintiffs' and other residents' enjoyment of the neighborhood.

64. Markley has a well-documented history of non-compliance with MassDEP regulations in its Data Center operations. For instance, on March 4, 2020, MassDEP issued a Notice of Noncompliance to Markey for failure to submit a 2017 Source Registration Emissions Report for the Data Center in violation of 310 CMR 7.12. On September 7, 2021, MassDEP

---

[8] *See, for instance*, Anne C. Llewellyn et al., *Distribution of* Legionella *and Bacterial Commuity Composition Among Regionally Diverse US Cooling Towers*, 12 PLOS ONE 1 (2017), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0189937 ("Cooling towers (CTs) are a leading source of outbreak of Legionnaires' disease (LD), a severe form of pneumonia caused by inhalation of aerosols containing *Legionella* bacteria.").

issued another Notice of Noncompliance for Markley's continued failure to submit the emissions report. On July 12, 2023, MassDEP issued a $500 penalty based on Markley's continuing failure to comply with prior enforcement citations. Likewise, the emissions logs that Markley submits to MassDEP under its current pan approvals lack operations data on four of the installed diesel generators and omit emissions reports for periods during which residents have observed Markley's diesel generators to be operating.

E. MassDEP's Final Decision Prematurely Dismissed Plaintiffs' Appeal.

65. On July 24, 2025, eleven named residents of Lowell, Massachusetts, referred to collectively as the Ten Persons Group "Honest Future for Lowell," filed a Notice of Claim / Request for an Adjudicatory Hearing ("Appeal") with the Office of Appeals and Dispute Resolution challenging MassDEP's approval of the Plan.

66. Each of the eleven named appellants resides at an address either immediately adjacent to the facility or within approximately one mile of the facility.

67. The Appeal raised eight distinct claims for violations of governing laws and regulations by Markley and MassDEP, including: violations of State laws governing meaningful involvement of Environmental Justice populations in environmental reviews and permit approvals; MassDEP's failure to require, and Markley's failure to perform, a cumulative impact analysis for the Plan; failure to consider alternatives to diesel generation to satisfy the Data Center's energy needs, in conflict with State climate laws and policies; failure to conduct MEPA review; improper exclusion of the cooling towers from Plan Approval; failure to adequately address Data Center noise pollution; failure to impose permit conditions to address Markley's documented history of non-compliance and inadequate reporting; and issuance of a Plan Approval based on false, misleading, and incomplete information.

68. On July 30, 2025, Markley filed, and MassDEP joined, a motion to dismiss the Appeal on the sole ground that residents lacked standing to pursue the appeal as a Ten Persons Group under MassDEP Regulations.

69. In his August 27, 2025 Ruling and Order, the Presiding Officer denied the motions in part. The Presiding Officer held that residents lacked Ten-Persons-Group standing on the ground that they had not specifically identified themselves as a Ten Persons Group in comments but held that eight named Plaintiffs have standing to jointly bring the appeal as aggrieved persons under 310 CMR 7.51(1)(h)(3).

70. The Presiding Officer's August 27, 2025 Ruling and Order conditioned Plaintiffs' amendment of their Notice of Appeal on their filing of a prehearing memorandum identifying expert witnesses who would be testifuying on Plaintiffs' behalf, as well as their credentials and anticipated testimony. The Presiding Officer subsequently denied Plaintiffs' objection to the order requiring them to submit this case-in-chief information prior to setting a case scheduling conference as an unnecessary, unauthorized, and unreasonable burden on Plaintiffs that improperly prejudiced them in their ability to present their case in the appeal.

71. On October 1, 2025, Plaintiffs timely filed the Memorandum on Witnesses and Additional Evidence Production, as ordered. The Memorandum identified six expert witnesses (including well-recognized experts on public health, noise, environmental risks and cumulative exposures, demographic disparities, and energy equity), appended their CVs and credentials, and set forth anticipated scopes of testimony. The Memorandum also identified three lay witnesses who would be testifying to Data Center operations, their experiences with health and environmental impacts, and their knowledge of Markley's false Plan submittals and incomplete reports to MassDEP. Plaintiffs also detailed their plans to propound tailored discovery as authorized by 310 CMR 1.01(12) to obtain relevant and admissible evidence to support their claims.

72. On October 22, 2025, Markley and MassDEP filed separate Motions for Summary Decision. Markley failed to submit any affidavits or evidence in support of its Motion. MassDEP submitted only a single affidavit by MassDEP engineer Edward Braczyk, which attested to his review of Markley's Plan application and his observations of diesel generators

installed at the site during a September 23, 2025 site visit. MassDEP did not identify Mr. Braczyk as an expert witness.

73. On October 28, 2025, Plaintiffs moved to continue summary decision for forty-five days to permit affidavits to be taken and discovery to be held pursuant to their October 1, 2025 request to propound written discovery and conduct a site inspection and sampling. The Presiding Officer denied the request.

74. On November 26, 2025, Plaintiffs timely filed their Combined Brief in Opposition to Motions for Summary Decision, along with supporting affidavits by Plaintiff [redacted], environmental scientist Dr. Kristie Ellickson, and noise expert Dr. Jamie Banks. [redacted] affidavit attested to his personal observation of the impact of the Data Center on his and Plaintiff [redacted] health as well as the health and welfare of other residents and introduced data collected over the course of a year documenting noise pollution from the Data Center regularly in excess of regulatory limits. Dr. Ellickson's affidavit recorded her conclusions that Plan Approval improperly omitted a cumulative impacts analysis based on her review of Plan application documents. And Dr. Banks' affidavit authenticated noise readings by [redacted] and set forth her expert opinion that the noise pollution that would result from the Plan Approval "put Plaintiffs, their families, and the surrounding residential community at risk of harm to health and well-being." Through an attorney affidavit, Plaintiffs also introduced and authenticated relevant Plan documents and written comments submitted by each named Plaintiff.

75. On December 23, 2025, the Presiding Officer issued a Recommended Final Decision recommending that the MassDEP Commissioner grant the Motions for Summary Decision and dismiss the Appeal. *See* Exhibit A (Recommended Final Decision, OADR Docket No. 2025-022 (Dec. 23, 2025)). In the Recommended Final Decision, the Presiding Officer determined that every Plaintiff aside from [redacted] lacked standing because they had not submitted individual affidavits each attesting to their aggrieved status as persons who submitted public comment under 310 CMR 7.51(g)(2). This was so despite the fact that neither Markley nor MassDEP challenged Plaintiffs' status as aggrieved persons or their timely submittal of

public comments in their Motions. The Recommended Final Decision did not address [redacted]. [redacted] attestations as to his mothers' aggrieved status and submittal of comments, nor did it address the authenticated written comments and other evidence submitted through Plaintiffs' attorney affidavit. The Recommended Final Decision also determined that [redacted] was limited to raising only the issues detailed in his specific comment letter on Appeal, deemed [redacted] and Dr. Banks incompetent to testify, and rejected several claims on their merits. The Recommended Final Decision did not acknowledge or address the affidavit submitted by expert witness Dr. Kristie Ellickson.

76. On March 27, 2026, the MassDEP Commissioner issued a final decision in OAR Docket No. 2025-022 (the "Final Decision") adopting the Presiding Officer's Recommended Final Decision as the Commissioner's final decision on Plan Approval NE-25-002. *See* Exhibit B (Final Decision, OADR Docket No. 2025-022 (Mar. 27, 2026)). The Final Decision granted summary decision for MassDEP and Markley and affirmed the Plan Approval issued by MassDEP to Markley without further reasoning or analysis.

77. The Final Decision notified Plaintiffs that any appeal of the decision pursuant to M.G.L. c. 30A, § 14 "must be filed within thirty days of receipt of this decision."

78. On April 7, 2026, Plaintiffs filed a Motion for Reconsideration of Final Decision with OADR, seeking reconsideration of the Final Decision under 310 CMR 1.01(14)(d), supported by an affidavit by each named Plaintiff further attesting to their standing to bring this appeal. The Motion for Reconsideration remains pending.

F. MassDEP Granted Markley Interim Approval of the Challenged Permit Conditions Without Public Notice or Consent by Plaintiffs.

79. In January 2026, Plaintiffs observed Markley conducting construction activities on the Data Center property, which appeared to relate to installation of equipment subject to the ongoing Appeal and for which Markley therefore did not have final Plan Approval.

80. On January 30, 2026, counsel for Plaintiffs sent a letter to Markley notifying it of Plaintiffs' observation of construction and operation activities at the Data Center during the pendency of the Appeal and asking for clarification on the nature of the activities.

81. Markley's counsel responded by letter on February 6, 2026 stating that "Markley is authorized to install and operate the eight generators that are the subject of the air permit pursuant to an administrative consent order ('ACO') executed by Markley and the Massachusetts Department of Environmental Protection." The letter attached a copy of a document styled as an Administrative Consent Order ("Consent Order"), dated September 29, 2025 and signed by representatives for Markley and MassDEP. *See* Exhibit C (Michelle N. O'Brien, Letter RE Lowell: Markley Data Center, OADR Docket No. 2025-022 (Feb. 6, 2026)).

82. The Consent Order purports to authorize Markley to "proceed promptly with the" installation and operation of the same eight generators subject to the ongoing appeal. The Consent Order recognized that the Plan Approval was on appeal before OADR.

83. The Consent Order purports to authorize Markley to operate according to the identical operational, production, and emissions limits and other permit conditions set forth in the challenged Plan Approval.

84. The Consent Order was written to be "in full force and effect until a Final Decision and any Motion for Reconsideration and Decision on that Motion is issued in the Administrative Appeal OADR Docket No. 2025-022 (the 'Appeal')."

85. The only facts and allegations identified as leading to the issuance of the Consent Order relate to the existence of Plaintiffs' Appeal of the July 3, 2025 Plan Approval. The Consent Order does not cite any violation of MassDEP regulations or orders which it was intended to address or reference any open enforcement proceeding.

86. Plaintiffs were not informed of the Consent Order and were not party to it, despite its express implications for the ongoing OADR Appeal.

87. Plaintiffs had relied on MassDEP regulations governing the finality of Plan Approvals, 310 CMR 7.51(1)(f), to prevent Markley from installing the new generators and

operating under the proposed Plan Approval unless and until the Appeal was resolved in Defendants' favor. Plaintiffs are informed and believe that had they not observed and sought clarification on construction activities at the Data Center, they would be unaware of the existence of the Consent Order.

88. On February 13, 2026, Plaintiffs delivered a cease-and-desist letter to Markley and MassDEP, which demanded that (1) MassDEP immediately rescind the Consent Order; (2) Markley immediately cease and desist from all construction and operation of equipment covered by the Plan Approval that is under Appeal; and (3) Markley immediately remove any materials installed under the Consent Order.

89. Neither MassDEP nor Markley responded to Plaintiffs' Cease and Desist letter.

90. Plaintiffs submitted a Notice of Significant Developments to the Presiding Officer in the OADR Appeal on February 27, 2026. This letter alerted the Presiding Officer that Markley appeared to be in violation of MassDEP regulations by installing unpermitted diesel generators at the Data Center and undertaking other activities covered by the challenged Plan Approval. On March 2, 2026, the Presiding Officer issued an order requiring Markley and MassDEP to submit status reports justifying the legal basis for the purported Consent Order and the activities covered by it.

91. MassDEP and Markley filed Status Reports on March 11, 2026. In these filings, Defendants insisted that OADR lacks jurisdiction to consider the Consent Order. Neither Defendant denied that the purpose of the Consent Order is to authorize activities subject to the Plan Approval nor pointed to any open enforcement action or violation that the Consent Order was intended to address. Instead, MassDEP asserted that "[i]t is common practice for MassDEP to utilize an ACO, such as the ACO issued to Markley, to allow a Facility to continue operating until either an air permit is final or a pollution control device can be installed and is operational at a facility."

92. Plaintiffs filed a Combined Response to Respondents' Status Reports Regarding the Notice of Significant Developments on March 18, 2026 contending that the Consent Order is

ultra vires and directly material to the Appeal. Plaintiffs asked that the Presiding Officer issue "appropriate sanctions" to either stay or invalidate the Consent Order or to enjoin activities under the challenged Plan Approval to preserve the integrity of the Appeal.

93. In the March 27, 2026 Final Decision in OADR Docket No. 2025-022, the Commissioner determined that the Consent Order could not be challenged through OADR's permitting appeals process and labeled it a proper "interim exercise of MassDEP's enforcement discretion," which terminates only once reconsideration is resolved. The Commissioner did not identify any enforcement action the Consent Order was predicated on.

CAUSES OF ACTION

COUNT I
(APPEAL OF A FINAL AGENCY DECISION UNDER M.G.L. c. 30A, § 14)

94. Plaintiffs incorporate herein by reference the allegations contained in the foregoing paragraphs.

95. This Court may set aside a final decision that is in violation of constitutional provisions, in excess of an agency's statutory authority, based upon an error of law, made upon unlawful procedure, unsupported by substantial evidence, unwarranted by facts found by the court, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. M.G.L. c. 30A, § 14(7).

96. MassDEP's Final Decision violates Massachusetts constitutional provisions securing the People's right to a clean and healthy environment, is inconsistent with evidence in the record before the agency, constitutes an abuse of discretion, is made upon unlawful procedure, is arbitrary and capricious, and rests on numerous clear errors of law and should therefore be set aside and this case remanded for discovery, evidence development, and adjudicatory hearing on the merits of each of Plaintiffs' eight claims in the Appeal.

97. These deficiencies include, without limitation, the following:

98. The Final Decision misapplied the standard for summary decision in dismissing each of Plaintiffs' eight claims in their Appeal despite Defendants' failure to submit affidavits to

satisfy their evidentiary burden on summary decision and despite evidence in the record creating a genuine dispute of material fact.

99. The Final Decision erroneously denies Plaintiffs their right to request an adjudicatory hearing on the Plan Approval as a Ten Persons Group that submitted timely written comments, pursuant to 310 CMR 7.51(1)(g)(3).

100. The Final Decision adopts a legally and procedurally improper recommended decision by the Presiding Officer to raise and resolve the issue of standing *sua sponte*, contrary to the evidence in the record and without providing Plaintiffs an opportunity to submit evidence to resolve any questions about their standing to bring the Appeal.

101. The Final Decision therefore errs as a matter of law by concluding that Plaintiffs Eileen [redacted], Jacquelynn [redacted], Holly [redacted], Nancy [redacted] Steven [redacted], Joann [redacted], and Alex [redacted] lack standing to pursue the Appeal in their individual capacities, contrary to substantial and unrebutted evidence in the record showing that each Plaintiff has the right to request an adjudicatory hearing on the Plan Approval under 310 CMR 7.51(1)(g)(2) as aggrieved persons who submitted timely written comments.

102. The Final Decision erred as a matter of law in foreclosing Plaintiffs from raising issues on Appeal that were set forth in timely submitted written comments by other commenters.

103. The Final Decision is made upon unlawful procedure in that the Presiding Officer improperly refused to allow Plaintiffs to exercise their rights under 310 CMR 1.01(12) to take narrowly tailored discovery into relevant and non-privileged information and admissible evidence and to enter the Data Center property at a reasonable place and time to conduct surveying, sampling, and photographing relevant to issues to be decided in the adjudicatory Appeal and respond to Defendants' Motions for Summary Decision.

104. The Final Decision improperly failed to consider substantial and unrebutted evidence set forth in affidavits by competent witnesses, which created genuine disputes of material fact as to Plaintiffs' claims that: MassDEP violated its own regulations at 310 CMR 7.02(14) in failing to require a cumulative impact assessment for the Plan Approval; the Data

Center emits NOx in excess of thresholds triggering greenhouse gas emissions reporting mandates; the Plan Approval causes "unnecessary emissions" of noise harmful to the health of Plaintiffs and other surrounding residents in violation of MassDEP's regulations at 310 CMR 7.10; MassDEP violated 310 CMR 7.02(3)(C) by failing to consider or impose "reasonable conditions in a plan approval" to "ensure that the facility will be built, operated, and maintained as specified in the application" in light of Markley's documented history of non-compliance; and Markley submitted and MassDEP premised its Plan Approval on inaccurate, false, incomplete, and misleading information in violation of 310 CMR 7.01(2)(a) and 310 CMR 7.26(42).

105. The Final Decision erred as a matter of law in dismissing Plaintiffs' claim that MassDEP violated its regulations at 310 CMR 7.02(14) by failing to require a cumulative impact analysis for the Plan Approval despite the Commissioner's determination that the Data Center is a new facility for which a cumulative impact analysis is *per se* required. It also erred as a matter of law in dismissing this claim despite the fact that a cumulative impact analysis is *per se* required for any new "emission unit" in an environmental justice population, including the proposed new diesel generators. 310 CMR 7.00 (Definitions: Emission Unit).

106. The Final Decision erred as a matter of law in determining that OADR lacked jurisdiction to hear Plaintiffs' claims that MassDEP violated 310 CMR 7.02(3)(g) by issuing the Plan Approval without ensuring Markley had first complied with MEPA regulations.

107. The Final Decision erred as a matter of law in excluding lay witness testimony properly based on personal knowledge and direct observations and erred as a matter of law in deciding expert witness qualifications based on witnesses' familiarity with law rather than their expertise on factual issues within the proper purview of expert witnesses.

108. The Final Decision erred as a matter of law, ignored substantial evidence in the record, and misapplied *res judicata* principles in determining that cooling towers operations were not subject to the Plan Approval even though the Plan Approval deems each of the 16 cooling towers "Emission Unit[s] . . . subject to and regulated by the Plan Approval" and supersedes all prior plan approvals.

109. The Final Decision was arbitrary, capricious, an abuse of discretion, and contrary to law in misconstruing Plaintiffs' claims that the Plan Approval lacked adequate permit conditions to ensure the permitted facilities would be "built, operated, and maintained as specified in the application" (310 CMR 7.02(3)(c)) and that it was based on false, inaccurate, incomplete, and misleading information (310 CMR 7.01(2)(a)) as falling outside OADR's jurisdiction to hear permit appeals and dismissing the claims on this basis.

110. If installed and operated, the generators and cooling towers subject to the Plan Approval will pollute the air, cause excessive and unnecessary noise, and further destroy the natural, scenic, historic, and esthetic qualities of and in the People's environment.

111. MassDEP's Final Decision therefore deprives Plaintiffs of their right to clean air, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment and trammels on the right to a healthy environment secured to the citizens of the Commonwealth by Article 97 of the Amendments to the Massachusetts Constitution.

112. The Final Decision prejudiced the rights of Plaintiffs to a full and fair hearing on their Appeal through these violations of constitutional provisions, clear errors of law, reliance on unlawful procedures, lack of support by substantial evidence, arbitrary and capricious decisions, abuse of discretion, and failure to comply with the air pollution control statute and regulations MassDEP is charged with administering, and the Final Decision should be set aside on each of these grounds and this action remanded to MassDEP with instructions ensuring a full and fair hearing on Plaintiffs' claims in the Appeal.

COUNT II
(DECLARATORY RELIEF PURSUANT TO M.G.L. c. 231A)

113. Plaintiffs incorporate herein by reference the allegations contained in the foregoing paragraphs.

114. An actual controversy exists as to whether the Consent Order is in excess of authorities vested in MassDEP, *ultra vires*, and therefore void, as well as to whether MassDEP's

stated administrative practice and procedure of issuing administrative consent orders to provide interim authorization for plan activities subject to pending administrative appeal are in violation of the laws of the Commonwealth and MassDEP's rules and regulations governing air quality permitting.

115. The Massachusetts Clean Air Act, M.G.L. c. 111, § 142A et seq., vests in MassDEP the authority to regulate air pollution. MassDEP's implementing regulations bar persons from constructing, substantially reconstructing, altering, or operating any facility for which a plan approval is required unless a plan approval has been submitted to MassDEP and final approval has been granted. 310 CMR 7.02(3)(a), (3)(f). Where a timely request for adjudicatory hearing is filed, MassDEP's decision to issue a plan approval is not final unless and until the Commissioner enters a Final Decision on the plan. 310 CMR 7.51(1)(f)(2). MassDEP lacks authority to authorize a regulated entity to undertake construction and operational activities for which a plan approval is required except in compliance with the procedures for plan approvals and adjudicatory hearings set forth in 310 CMR 7.02, 310 CMR 7.51, 310 CMR 1.01, and other applicable rules and regulations.

116. The Consent Order exceeds MassDEP's authorities; violates Plaintiffs' due process rights to a full, fair, and just hearing of their challenges to the Plan Approval permit conditions and to be party to any settlement of their claims (310 CMR 1.01(1)(b), 8(c)); contravenes the public's right to notice and comment on a proposed decision to approve a plan application and request an adjudicatory hearing before it goes into effect (310 CMR 7.02(3)(h), (3)(k); 310 CMR 7.51(1)(d), (1)(g)); and conflicts with regulations governing review and approval of non-major comprehensive plans.

117. Issuance of the Consent Order is outside MassDEP's authority to enforce laws and regulations within its purview and is not a proper exercise of MassDEP's authority to assess civil administrative penalties for violation of regulations, orders, licenses, or approvals issued or adopted by MassDEP. M.G.L. c. 21A, § 16. The Consent Order does not settle any enforcement action or correct any alleged violation.

118. MassDEP has exceeded its authority and committed multiple violations of law by purporting to use its enforcement powers through issuance of administrative consent orders to suspend, void, or circumvent laws and regulations governing air plan approvals and permitting.

119. MassDEP and Markley have forced a dispute by entering into the Consent Order, without notice to or consent of Plaintiffs, for the purpose of providing Markley interim authorization for the challenged Plan prior to Final Decision and as an unlawful workaround to the ongoing Appeal process.

120. This Court has the power to make a declaratory determination of the rights and duties of the Parties and as to the *ultra vires* nature of the Consent Order under M.G.L. c. 231A, § 1 because the Consent Order remains in effect until a final decision on Plaintiffs' pending Motion for Reconsideration is issued in the Appeal, and an actual controversy therefore exists between the Parties.

121. Under M.G.L. c. 231A, § 2, this Court has the power to enjoin and determine the legality of MassDEP's stated administrative practice and procedure of using administrative consent orders, including the Consent Order issued to Markley, to allow a regulated entity to operate under a non-final air plan approval in violation of laws and regulations governing air plan approvals and adjudicatory hearings.

122. Plaintiffs have standing as injured and aggrieved persons directly impacted by the Data Center's noise, air pollution, cooling tower emissions, construction, and other operational impacts. Plaintiffs will be directly harmed by Markley's installation and operation of equipment subject to the Consent Order, and Plaintiffs' rights to a full and fair hearing on their Appeal will be prejudiced.

123. Plaintiffs have no adequate remedy at law. All necessary parties have been joined and all available administrative remedies exhausted.

COUNT III
(ACTION IN THE NATURE OF MANDAMUS PURSUANT TO M.G.L. c. 249, § 5)

124. Plaintiffs incorporate herein by reference the allegations contained in the foregoing paragraphs.

125. MassDEP has acted outside of its statutory authority by creating and entering into this Consent Order, which cannot reasonably be construed as an enforcement action and therefore circumvents the process required by law for review of an air plan granted by the agency.

126. MassDEP is authorized to issue plan approvals and "establish emission limitations and/or restrictions for a facility or emission unit" under 310 CMR 7.02. Residents have a right to challenge a plan approval issued under 310 CMR 7.02 subject to OADR regulations at 310 CMR 1.00 and M.G.L. c. 30A.

127. During the OADR Appeal, MassDEP claimed that the Consent Order was an "agency enforcement action" negotiated between the agency and a regulated entity "who may be obligated to comply with a statute or regulation and [the Consent Order] is thus not subject to administrative appeal."

128. For authority to enter into this Consent Order, MassDEP pointed to M.G.L. c. 21A, § 16 and its implementing regulations at 310 CMR 5.00. M.G.L. 21A, § 16 grants the agency the authority to "assess a civil administrative penalty on a person who fails to comply with any provision of any regulation, order, license or approval issued or adopted by the department."

129. Neither MassDEP nor Markley have claimed that Markley failed to comply with any regulation, order, license, or approval addressed by the Consent Order, and no such violation is cited in the Consent Order as justification for its issuance. There was no open enforcement proceeding in settlement of which the Consent Order was issued.

130. The Consent Order can only be an enforcement action if it addresses violations of law. The Consent Order addresses no such violations.

131. By allowing Markley to operate under plan conditions subject to an ongoing adjudicatory hearing, MassDEP effectively authorized a settlement of the Appeal without the required consent of all parties (310 CMR 1.01(8)(c)) and rendered a final decision on a plan approval during a pending administrative appeal in violation of 310 CMR 7.51(1)(f)(2). In doing so, MassDEP deprived Plaintiffs of their right under 310 CMR 7.51 to pursue an adjudicatory hearing on the Plan Approval.

132. By ruling that the Consent Order is not subject to appeal to OADR, MassDEP has left Plaintiffs with no option but to seek intervention from the Court.

133. Plaintiffs are entitled to a writ of mandamus directing MassDEP to withdraw and vacate the unlawful and *ultra vires* Consent Order.

134. Plaintiffs are entitled to a writ of mandamus directing MassDEP to comply with M.G.L. c. 30A and 310 CMR 7.51(1)(f)(2) and cease and desist from its practice and procedure of using administrative consent orders to allow a regulated entity to operate under a non-final air plan approval in violation of laws and regulations governing air plan approvals and adjudicatory hearings.

135. Action in the nature of mandamus is necessary to prevent a failure of justice. Plaintiffs have no adequate remedy at law to correct MassDEP's actions in exercise of its authority in issuing the Consent Order and entering into similar administrative consent orders to circumvent permitting and appeals processes.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

A. Grant a stay of the Final Decision, under M.G.L. c. 30A, § 14(3) and 310 CMR 7.51(1)(f)(2), and a preliminary injunction on activities subject to the Consent Order and authorized by the Final Decision;

B. Determine that the substantial rights of Plaintiffs have been prejudiced because the Final Decision is in violation of constitutional provisions; in excess of the

statutory authority or jurisdiction of MassDEP; based upon an error of law; made upon unlawful procedure; unsupported by substantial evidence; unwarranted by facts found by the court on the record; and arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law, under M.G.L. c. 30A, § 14(7);

C. Set aside the Final Decision, under M.G.L. c. 30A, § 14(7);

D. Remand the matter to MassDEP with instructions to allow taking of discovery and to proceed to evidentiary hearings, under M.G.L. c. 30A, § 14(7);

E. Issue a declaratory judgment, under M.G.L. c. 231A, that:

1. The Consent Order is *ultra vires*, null, and void;
2. MassDEP issued the Consent Order in excess of its authority and in violation of the air pollution control laws and regulations it administers;
3. MassDEP violated its obligations under 310 CMR 1.01(8)(c) to ensure that "all parties to the adjudicatory appeal agree" to a settlement by issuing the Consent Order without Plaintiffs' knowledge or consent;
4. Markley is in violation of its obligation under 310 CMR 7.02(3)(a) and (3)(f) to not construction, alter, or operate a facility without final plan approval;
5. Markley is not authorized to construct, alter, or operate equipment without final plan approval, including emissions units subject to the Appeal; and
6. MasDEP's practices and procedures of using administrative consent orders to allow regulated entities to operate under a non-final air plan approval exceed its authority and violate statutes and regulations governing air plan approvals and adjudicatory hearings and are permanently enjoined.

F. Issue a writ of mandate under M.G.L. c. 249, § 5 commanding MassDEP to rescind, withdraw, and vacate the Consent Order on the ground that it was issued without lawful authority;

G. Issue a writ of mandate under M.G.L. c. 249, § 5 commanding MassDEP to cease and desist from its practices and procedures of using administrative consent orders to allow regulated entities to operate under non-final air plan approvals, including those subject to ongoing adjudicatory appeals; and

H. Grant any and all other relief that this Court may deem just and proper.

Respectfully submitted,

JACOB [redacted], EILEEN [redacted],
JACQUELYNN [redacted], HOLLY [redacted],
NANCY [redacted], STEVEN [redacted],
JOANN [redacted], RANDALL [redacted], ALEX
[redacted], and MARY [redacted],

By their attorneys,

/s/ Stephanie L. Safdi
Stephanie L. Safdi (CA Bar No. 310517, Pro Hac V Vice Motion Pending)
ENVIRONMENTAL JUSTICE LAW
AND ADVOCACY CLINIC[9]
Jerome N. Frank Legal Services Organization
127 Wall Street
New Haven, CT 06511
Telephone: (203) 432-4800
Facsimile: (203) 432-1426
Stephanie.safdi@ylsclinics.org

/s/ Alexandra St. Pierre
Alexandra Enriquez St. Pierre (BBO No. 706739)
Conservation Law Foundation
62 Summer Street
Boston, MA 02110
Telephone: 617-372-9287
aestpierre@clf.org

[9] Counsel acknowledge the contributions of student practitioners Maya Nitschke Alonso, Gil Damon, Mehrdad Dariush, Ava McKallip, and Robert Treadwell.

/s/ Alessandra Wingerter
Alessandra W. Wingerter (BBO No. 698391)
Fitch Law Partners LLP
84 State Street
Boston, MA 02109
Telephone: 617-542-5542
Fax: 617-542-1542
aww@fitchlp.com

Dated: April 27, 2026

EXHIBIT A

Date Filed 4/27/2026 12:45 PM
Superior Court - Middlesex
Docket Number

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

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

December 23, 2025

In the Matter of
Markley Group, LLC

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

RECOMMENDED FINAL DECISION

INTRODUCTION

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

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

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

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

---

[2] The Air Permit is entitled "Air Quality Plan Approval." The 8 Lowell Residents challenging the Air Permit here are: (1) Holly [redacted]; (2) Jacob [redacted]; (3) Nancy [redacted]; (4) Jacquelynn [redacted]; (5) Steven [redacted]; (6) Joann [redacted]; (7) Eileen [redacted]; and (8) Alex [redacted]

[3] Petitioners' Notice of Claim/Request for An Adjudicatory Hearing, July 24, 2025 ("Petitioners' Original Appeal Notice"), at p. 4, citing, the Air Permit, at p. 3, and the Applicant's April 28, 2025 Air Quality Impact Analysis, at p. 2.

[4] Id.

[5] Id., at pp. 16-19.

[6] Id., at pp. 19-23.

[7] Id., at pp. 23-24.

[8] Id., at pp. 24-29.

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

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

[9] Id., at pp. 29-30.

[10] Id., at pp. 30-31.

[11] Id., at pp. 31-32.

[12] Id., at pp. 32-34.

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

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

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

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

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

[16] See n.14 above.

[17] Petitioners' Summary Decision Opposition Memorandum, at p. 4, 19-22.

issues";[18] and (4) "[t]here are numerous [genuine issues of material] fac[t] regarding the Petitioners' eight claims against the Air Permit."[19]

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

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

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

[19] Petitioners' Summary Decision Opposition Memorandum, at pp. 4-5, 37-39, 41-44.

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

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

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

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

---

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

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

DISCUSSION

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

I. THE SUMMARY DECISION STANDARD

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

part that:

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

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

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

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

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

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

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

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

[22] Petitioners' Summary Decision Opposition Memorandum, at pp. 11-15.

[23] See n.20, at p. 5 above.

[24] Id.

v. K.A.V., 34 Mass. App. Ct. 369, 373 n.8 (1993); Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998) ("[w]e treat standing as an issue of subject matter jurisdiction [and] . . . of critical significance"); see United States v. Hays, 515 U.S. 737, 742 (1995) ("[s]tanding is perhaps the most important of the jurisdictional doctrines"); In the Matter of Webster Ventures, LLC, OADR Docket No. 2015-014, Recommended Final Decision (June 3, 2016), 2016 WL 3632236, *6, adopted as Final Decision (June 15, 2016), 2016 WL 3632244; In the Matter of Onset Bay II Corp., OADR Docket No. 2012-034, Recommended Final Decision (August 28, 2020), 2020 WL 6115205, *17, adopted as Final Decision (September 23, 2020), 2020 WL 6115206, affirmed, sub nom Tramontozzi v. Massachusetts Department of Environmental Protection, Norfolk Superior Court, C.A. No. 2082CV01007 (June 8, 2022). As such, later in the appeal the Applicant and MassDEP could challenge the 8 Lowell Residents' standing to appeal the Air Permit pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)3. The Applicant and MassDEP did this in seeking Summary Decision against the 8 Lowell Residents.

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

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

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

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

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

> MassDEP and [the Applicant] both argue that an aggrieved person has "standing" on appeal only to assert issues the person themselves raised in a timely submitted public comment. [They] are wrong [because they] conflate the issue of standing . . . with issue exhaustion. The former, standing, is governed by 310 CMR 7.51(g), which establishes public rights to request an adjudicatory hearing on MassDEP's air quality permit decisions under chapter 7.00. Under this provision, persons who are not the applicant or a ten persons group have the right to bring an appeal so long as they are: (1) "[a]n aggrieved person" and (2) "submitted written comments in accordance with 310 CMR 7.51(1)(d), where applicable." 310 CMR 7.51(g)(2); *see also* 310 CMR 7.51(d). . . .
>
> Here, MassDEP's regulations at 310 CMR 7.51(1)(i)(2) govern issue exhaustion for air permit appeals. Under this provision, when MassDEP has provided a public comment period, "the issues that may be raised in a request for an adjudicatory hearing are . . . limited to the matters raised during the public comment period." 310 CMR. 7.51(1)(i)(2). . . . [T]he language of [this] regulation[n] . . . set[s] forth exceptions to issue exhaustion where "it was not reasonably possible with due diligence to have raised such matter during the public comment period" or simply "for good cause shown." 310 CMR 7.51(1)(i)(2). Under the plain text of the regulation, so long as a matter was raised during the public comment period, an issue arising from that matter may be reviewed on appeal [even if the matter was not raised by the appellant but instead by another commenter during the public comment period]. . . .[26]

[25] Petitioners' Summary Decision Opposition Memorandum, at pp. 11-15.

[26] Id.

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

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

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

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

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

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

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

> *the issues that may be raised in [an appeal of the Air Permit before OADR] . . . are further limited to the matters raised during the public comment period*; provided, however, that a matter may be raised upon showing that it was not reasonably possible with due diligence to have raised such matter during the public comment period or for good cause shown.

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

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

[28] 2025 WL 2249862, *1.

[29] Id.

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

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

---

[30] Id.

[31] Id.

[32] Id.

[33] Id.

[34] Id., at *2.

[35] Id.

may be raised in a later [appeal before OADR] on the decision."[36] (emphasis supplied). Although Lorusso Corp. was a Ten Residents Group appeal instead of an aggrieved person appeal, the case nevertheless supports MassDEP's interpretation that proof of having previously raised their eight appeal claims in written comments during the public comment period on MassDEP's Proposed Decision to approve the Air Permit is part of the calculus of determining whether each of the 8 Lowell Residents have standing to appeal the Air Permit pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)2.

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

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

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

[36] Id.

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

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

63 Mass. App. Ct. at 441 (emphasis supplied); Onset Bay II Corp., 2020 WL 6115205, *18. This "credible evidence" standard to demonstrate standing "has both a quantitative and a qualitative component." Id. Specifically:

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

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

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

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

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

below, at pp. 28-34.

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

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

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

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

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

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

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

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

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

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

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

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

IV. THE APPLICANT AND MASSDEP ARE ALSO ENTITLED TO SUMMARY DECISION AGAINST [redacted] ON ALL EIGHT APPEAL CLAIMS

A. The Applicant and MassDEP Are Entitled to Summary Decision Against [redacted] on Appeal Claim No. 1

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

[38] Petitioners' Original Appeal Notice, at pp. 16-19.

pursue Appeal Claim No. 1 in this appeal.

B. The Applicant and MassDEP Are Entitled to Summary Decision Against Mr. [redacted] on Appeal Claim No. 2

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

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

[39] Id., at pp. 19-23.

[40] MassDEP's Summary Decision Memorandum, at p. 14.

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

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

aggregate.[41] 310 CMR 7.02(14)(a)4 only requires such an Analysis where an air permit application:

> for an existing facility or emission unit that already has [an air permit proposes] to increase facility-wide potential emissions of criteria pollutants, hazardous air pollutants, or air toxics, excluding CO2e, individually or in the aggregate, by an amount equal to or greater than one ton per year, and the existing facility or emission unit is located in an environmental justice population or within: a. one mile of an environmental justice population if the facility or emission unit will not be a major source as defined in 310 CMR 7.00: Appendix C . . . .

C. The Applicant and MassDEP Are Entitled to Summary Decision Against [redacted] on Appeal Claim No. 3

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

---

[41] Id.

[42] Petitioners' Original Appeal Notice, at pp. 23-24.

[43] MassDEP's Summary Decision Memorandum, at p. 16.

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

I agree with MassDEP that the Applicant and MassDEP are also entitled to Summary Decision against [redacted] and the 7 Residents on Appeal Claim No. 3 because the GWSA Regulations at 310 CMR 7.71 did not require MassDEP to integrate Green House Gas ("GHG") reduction into the Air Permit. Nevertheless, pursuant to 310 CMR 7.71(4), the Air Permit restricts the Carbon Dioxide Equivalent ("CO2e") emissions to below a level that would require reporting of GHG emissions. The CO2e emissions proposed for the Air Permit are 3,365 tons per year ("TPY"), which is below the reporting threshold of 5,000 TPY of CO2e emissions.

D. The Applicant and MassDEP Are Entitled to Summary Decision Against [redacted] on Appeal Claim No. 4

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

[44] Petitioners' Original Appeal Notice, at pp. 24-29.

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

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

E. The Applicant and MassDEP Are Entitled to Summary Decision Against [redacted] on Appeal Claim No. 5

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

[45] Id., at pp. 29-30.

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

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

[46] Id.

Fertilizer Company, Inc., 2024 WL 6467343, *8-9. Res judicata principles also bar [redacted]' privies, the 7 Residents, from making the same claim. Id.

F. The Applicant and MassDEP Are Entitled to Summary Decision Against [redacted] on Appeal Claim No. 6

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

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

[47] Petitioners' Original Appeal Notice, at pp. 30-31.

[48] Applicant's Summary Decision Memorandum, at pp. 12-13; MassDEP's Summary Decision Memorandum, at pp. 24-27.

[49] The grounds set forth above in the text warranting Summary Decision against [redacted] on Appeal Claim No. 6 also constitute additional grounds to grant Summary Decision against the 7 Residents.

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

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

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

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

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

310 CMR 7.10(3).

To assist in its enforcement of 310 CMR 7.10, "[MassDEP] has established a 'Noise Policy'[50] interpreting when emissions of sound are unnecessary" resulting in prohibited noise pollution within the meaning of the APC Regulations at 310 CMR 7.10(1) discussed above. Town of Weymouth v. Massachusetts Department of Environmental Protection, 961 F.3d 34, 56 (1st Cir. 2020). Under the Policy, a source of sound will violate the APC Regulations regulating

[50] https://www.mass.gov/doc/massdep-noise-policy/download.

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

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

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

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

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

[53] Petitioners' Original Appeal Notice, at pp. 30-31.

[54] [redacted]' Affidavit, ¶¶ 45-47; Exhibit 7 to [redacted] Affidavit.

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

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

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

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

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

[55] Dr. Banks' Affidavit, ¶¶ 1-9.

[56] See p. 4 n.14 above.

[57] Dr. Banks' Affidavit, ¶¶ 9-19.

[58] Id., ¶ 24; [redacted]' Affidavit, ¶¶ 45-47; Exhibit 7 to [redacted]' Affidavit.

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

G. The Applicant and MassDEP Are Entitled to Summary Decision Against [redacted] on Appeal Claim No. 7

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

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

[59] Petitioners' Original Appeal Notice, at pp. 31-32.

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

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

H. The Applicant and MassDEP Are Entitled to Summary Decision Against [redacted] on Appeal Claim No. 8

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

CONCLUSION

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

Date: December 23, 2025

Salvatore M. Giorlandino
Chief Presiding Officer

[61] Petitioners' Original Appeal Notice, at pp. 32-34.

NOTICE OF RECOMMENDED FINAL DECISION

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

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

SERVICE LIST

PETITIONERS: 8 Lowell Residents[62]

Legal Representatives:

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

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

APPLICANT:

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

Legal Representative:

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

MassDEP:

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

[continued next page]

[62] See n.2, at p. 2 above.

[continued from preceding page]

Email: Mir.S.Waez@mass.gov
Email: Heidi.Zisch@mass.gov

Legal Representatives: Jeanne G. Argento, Counsel
Office of General Counsel
MassDEP/NERO
150 Presidential Way
Woburn, MA 01801
Email: Jeanne.Argento@mass.gov

Bruce Hopper, Deputy General Counsel
Office of General Counsel
MassDEP/Boston
100 Cambridge Street, 9th Floor
Boston, MA 02114
Email: bruce.e.hopper@mass.gov

Cc: Lowell Health Department – lgolden@lowellma.gov
Lowell City Fire Department – lfdfireprevention@lowellma.gov

EXHIBIT B

Date Filed 4/27/2026 12:45 PM
Superior Court - Middlesex
Docket Number

Commonwealth of Massachusetts
Executive Office of Energy and Environmental Affairs
Department of Environmental Protection
Address: 100 Cambridge Street, Suite 900, Boston MA 02114 | **Phone**: 617-292-5500

Maura T. Healey Governor | **Kim Driscoll** Lieutenant Governor | **Rebecca Tepper** Secretary | **Bonnie Heiple** Commissioner

March 27, 2026

_____

In the Matter of
Markley Group, LLC

OADR Docket No. 2025-022
DEP File No. 24-AQ02F-0001-APP
Approval No. NE-25-002
Air Quality Plan Approval
Lowell, MA

_____

FINAL DECISION

I adopt the Recommended Final Decision as my final decision in this matter. I therefore grant Summary Decision to the Massachusetts Department of Environmental Protection ("MassDEP" or "Department") and Markley Group, LLC ("Applicant"), and affirm the Air Permit issued by the Department to the Applicant.

I have reviewed the Petitioners' February 27, 2026 Notice of Significant Developments ("Notice") regarding an Administrative Consent Order ("ACO") between MassDEP and the Applicant. The Notice asked the Office of Appeals and Dispute Resolution ("OADR") to take notice of the ACO and the Applicant's activities pursuant to it and to "offer instructions to the Parties as appropriate to ensure a full and fair hearing of the issues subject to this Appeal." Notice at 2. I also have reviewed the status reports filed

by the Department and the Applicant, on March 11, 2026, and the Petitioners' response filed on March 18, 2026.

MassDEP is responsible for enforcing the statutes and regulations within its purview, including the Massachusetts Clean Air Act, M.G.L. c. 111, §§ 142A-142O and the Air Pollution Control Regulations at 310 CMR 7.00. MassDEP's authority includes the discretion to take enforcement action in a variety of ways, such as issuing unilateral administrative orders or entering into administrative consent orders. See DiCicco v. Department of Environmental Protection, 833 N.E.2d 654, 658 (Mass. App. 2005) ("We give substantial deference to the construction placed on a statute ... by the agency charged with its administration; and deference is especially appropriate where the Legislature has seen fit to delegate broad rulemaking authority to the [agency]. As the Superior Court judge properly observed, judicial intrusion into agency discretion in enforcement matters is particularly inappropriate." (Internal quotations and citations omitted)).

The Department's exercise of enforcement authority is distinct from its permitting authorities, and it is well settled that matters of enforcement authority may not be addressed through a permitting process, including permit appeals. See In the Matter of Stephen Arena, OADR Docket No. WET-2021-034, Recommended Final Decision (Nov. 9, 2021), adopted by Final Decision (Dec. 3, 2021) (observing that "a party may not use the Department's permitting process to compel enforcement action against another party"); In the Matter of Marco Tammaro, OADR Docket No. WET-2016-029 ("It has long been established, however, that there is no jurisdiction over DEP's exercise of enforcement

Date Filed 4/27/2026 12:45 PM
Superior Court - Middlesex
Docket Number

discretion in administrative appeals."). MassDEP's exercise of enforcement discretion is not properly challenged in the present permitting appeal.

Further, the ACO has not impacted the process or resolution of this appeal in any way. In particular, it did not dispose of the appeal, nor is it a full or partial settlement of the appeal. See 310 CMR 1.01(8)(c). It is an interim exercise of enforcement discretion that terminates, by its terms, once this appeal is resolved. See, e.g., Administrative Consent Order ¶ 8(A)-(B) (the ACO is effective only "until a Final Decision and any Motion for Reconsideration and Decision on that Motion is issued in the Administrative Appeal OADR Docket No. 2025-22.").

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). Any such 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 decision to the Superior Court pursuant to M.G.L. c. 30A, §14(1). Any such appeal must be filed with the Court within thirty days of receipt of this decision.

Bonnie Heiple
Commissioner

SERVICE LIST

PETITIONERS: 8 Lowell Residents

Legal Representatives:

Stephanie L. Safdi, Esq.
Environmental Justice Law and Advocacy Clinic
Jerome N. Frank Legal Servies Organization
Yale Law School
127 Wall Street
New Haven, CT 06511
Email: stephanie.safdi@ylsclinics.org

Suhasini Ghosh, Esq.
Alexandra Enríquez St. Pierre, Esq.
Conservation Law Foundation
62 Summer Street
Boston, MA 02110
Email: sghosh@clf.org
Email: aestpierre@clf.org

Applicant:

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

Legal Representative:

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

[continued next page]

[continued from preceding page]

MassDEP:

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

Legal Representatives:

Jeanne G. Argento, Regional Counsel
Office of General Counsel
MassDEP/NERO
150 Presidential Way
Woburn, MA 01801
Email: Jeanne.Argento@mass.gov

Bruce Hopper, Litigation Manager
MassDEP/Office of General Counsel
100 Cambridge Street, 9th Floor
Boston, MA 02114
Email: bruce.e.hopper@mass.gov

Cc:

Jakarta Childers, Program Coordinator
MassDEP/Office of General Counsel
Jakarta.Childers@mass.gov

Lowell Health Department – lgolden@lowellma.gov
Lowell City Fire Department – lfdfireprevention@lowellma.gov

EXHIBIT C

Date Filed 4/27/2026 12:45 PM
Superior Court - Middlesex
Docket Number

PIERCE ATWOOD LLP

MICHELLE N. O'BRIEN

100 Summer Street
22nd Floor
Boston, MA 02110

P 617.488.8146
F 617.824.2020
mobrien@pierceatwood.com

www.pierceatwood.com

Admitted in: MA

Via Electronic Mail

February 6, 2026

Mehrdad Dariush, Student Attorney
Environmental Justice Law and Advocacy Clinic
Jerome N. Frank Legal Services Organization
Yale Law School
128 Wall Street
New Haven, CT 06511

Re: Lowell: Markley Data Center
OADR Docket No. 2025-022

Dear Mr. Dariush:

This responds to your letter dated January 30, 2026, submitted on behalf of the residents who are parties to the adjudicatory proceeding concerning the air quality plan approval ("air permit") for the Markley Data Center facility in Lowell, Massachusetts. Your letter states that residents observed activities at the facility that appear to be related to installation of new diesel generators or cooling towers. You assert that Markley's installation of the eight generators permitted under the air permit is improper because there is no Final Decision in the adjudicatory proceeding.

Markley is authorized to install and operate the eight generators that are the subject of the air permit pursuant to an administrative consent order ("ACO") executed by Markley and the Massachusetts Department of Environmental Protection. A copy of the ACO is attached.

Sincerely,

Michelle N. O'Brien

Enclosure

cc: Stephanie L. Safdi, Clinical Associate Professor of Law
Jeanne G. Argento, Senior Regional Counsel, MassDEP
Bruce Hopper, Deputy General Counsel, MassDEP

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the matter of:
Markley Lowell, LLC
Lowell

Enforcement Document Number: 00021432
Issuing Bureau: BAW
Issuing Region/Office: NERO
Issuing Program: AQ
Primary Program Cited: AQ
Subpgm(s) Cited: N/A
Suffix(es): N/A
FMF/Program ID #573940

ADMINISTRATIVE CONSENT ORDER

I. THE PARTIES

1. The Department of Environmental Protection (the "Department" or "MassDEP") is a duly constituted agency of the Commonwealth of Massachusetts established pursuant to M.G.L. c. 21A, § 7. MassDEP maintains its principal office at 100 Cambridge Street, Boston, Massachusetts, and its Northeast Regional Office at 150 Presidential Way, Suite 300, Woburn, Massachusetts.

2. Markley Lowell, LLC. (the "Respondent") is a Foreign Limited Liability Corporation with its principal offices located at One Markley Way, Lowell, Massachusetts. Respondent's mailing address for purposes of this Consent Order is One Markley Way, Lowell, MA 01821.

II. STATEMENT OF FACTS AND LAW

3. MassDEP is responsible for the implementation and enforcement of: M.G.L. c. 111, §§ 142A-142O and the Air Pollution Control Regulations at 310 CMR 6.00, 310 CMR 7.00, and 310 CMR 8.00 (the "Air Pollution Control Regulations"). MassDEP has authority under M.G.L. c. 21A, § 16 and the Administrative Penalty Regulations at 310 CMR 5.00 to assess civil administrative penalties to persons in noncompliance with the laws and regulations set forth above.

4. Respondent owns and operates the telecommunications and data center facility located at One Markley Way, Lowell, Massachusetts (the "Facility"). The emissions produced by the Facility are regulated by the Air Pollution Control Regulations.

5. The following facts and allegations have led MassDEP to issue this Consent Order:

Date Filed 4/27/2026 12:45 PM
Superior Court - Middlesex
Docket Number

AIR QUALITY CONTROL

A. The Facility consists of seven (7) emergency diesel generators installed under the Environmental Results Program. On November 3, 2023, MassDEP issued Plan Approval NE-22-016 allowing the Respondent to install and operate four (4) additional emergency generators. Additionally, on March 25, 2025, MassDEP issued Plan Approval NE-24-014, allowing the Respondent to install and operate eight (8) additional emergency generators, which resulted in a total of nineteen (19) approved emergency generators at the Facility. In addition to two existing cooling towers, Plan Approval NE-24-014 included installation of fourteen (14) additional cooling towers on the east side of the site to support the electrical infrastructure within the Facility.

B. The Respondent, on April 28, 2025, submitted a subject Non-Major Comprehensive Plan Approval ("nmCPA") Application No. 25-AQ02F-0001-APP in accordance with 310 CMR 7.02(2)(a) for the installation and operation of eight (8) additional diesel emergency generators. With the proposed eight (8) units, Markley will operate a total of twenty-seven (27) diesel emergency generators at the Facility.

C. On July 3, 2025, MassDEP determined that the nmCPA Application was administratively and technically complete and issued Plan Approval NE-25-002 (the "Plan Approval") to the Respondent. MassDEP included a Response to Comment Document with the Plan Approval.

D. The Plan Approval was appealed on July 24, 2025.

E. On September 23, 2025, MassDEP personnel conducted a site visit of the Facility.

III. DISPOSITION AND ORDER

For the reasons set forth above, MassDEP hereby issues, and Respondent hereby consents to, this Order:

6. The parties have agreed to enter into this Administrative Consent Order ("ACO") because they agree that it is in their own interests, and in the public interest, to proceed promptly with the actions called for herein rather than to expend additional time and resources litigating the matters set forth above. Respondent enters into this Consent Order without admitting or denying the facts or allegations set forth herein. However, Respondent agrees not to contest such facts and allegations for purposes of the issuance or enforcement of this Consent Order.

Date Filed 4/27/2026 12:45 PM
Superior Court - Middlesex
Docket Number

7. MassDEP's authority to issue this Consent Order is conferred by the statutes and regulations cited in Part II of this Consent Order.

8. Respondent shall perform the following actions:

AIR QUALITY CONTROL

A. Through this ACO, MassDEP grants Respondent the following interim emission and operating limits. These interim emission and operating limits are in full force and effect and will continue to remain in full force and effect until a Final Decision and any Motion for Reconsideration and Decision on that Motion is issued in the Administrative Appeal OADR Docket No. 2025-022 (the "Appeal").

B. Respondent shall operate the emergency generators in accordance with all emission limits, operating limits, the Special Terms and Conditions and the General Conditions in the Plan Approval NE-25-002 until a Final Decision and any Motion for Reconsideration and Decision on that Motion is issued in the Appeal.

C. The interim emission and operating limits granted by this Consent Order are as follows:

1. <u>EMISSION UNIT IDENTIFICATION</u>

Each Emission Unit ("EU") identified in Table 1 is subject to and regulated by this ACO:

Table 1

EU	Description	Design Capacity (Btu/hr)	Design Capacity (Bhp)	Pollution Control Device
House	Caterpillar, Model C32, 1,000 kW	9,920,000	1474	40 dB Exhaust Silencer and 25 dBA Enclosure
1-1	Caterpillar, Model 3516C, 2,500 kW	23,943,000	3633	40 dB Exhaust Silencer and 25 dBA Enclosure
1-2				
1-3				
1-4				
1-5	Caterpillar, Model C175-16, 3,000 kW	29,559,600	4423	40 dB Exhaust Silencer and 25 dBA Enclosure + 5 dBA enhancement
1-6				
1-7				40 dB Exhaust Silencer and 35 dBA Enclosure
1-8				

Date Filed 4/27/2026 12:45 PM
Superior Court - Middlesex
Docket Number

EU	Description	Design Capacity (Btu/hr)	Design Capacity (Bhp)	Pollution Control Device
1-9	Caterpillar, Model 3516E, 3,000 kW	28,731,600	4393	PCD1-9 (ADPF) and 25 dBA Enclosure
1-10				PCD1-10 (ADPF) and 25 dBA Enclosure
1-11				PCD1-11 (ADPF) and 25 dBA Enclosure
1-12				PCD1-12 (ADPF) and 25 dBA Enclosure
1-13				PCD1-13 (ADPF) and 35 dBA Enclosure
1-14				PCD1-14 (ADPF) and 35 dBA Enclosure
1-15				PCD1-15 (ADPF) and 35 dBA Enclosure
1-16				PCD1-16 (ADPF) and 35 dBA Enclosure
1-17				PCD1-17 (ADPF) and 35 dBA Enclosure
1-18				PCD1-18 (ADPF) and 35 dBA Enclosure
1-19	Caterpillar, Model 3516E, 3,000 kW	28,731.600	4393	PCD1-19 (ADPF) and 35 dBA Enclosure
1-20				PCD1-20 (ADPF) and 35 dBA Enclosure
1-21				PCD1-21 (ADPF) and 35 dBA Enclosure

Date Filed 4/27/2026 12:45 PM
Superior Court - Middlesex
Docket Number

EU	Description	Design Capacity (Btu/hr)	Design Capacity (Bhp)	Pollution Control Device
1-22				PCD1-22 (ADPF) and 35 dBA Enclosure
1-23				PCD1-23 (ADPF) and 35 dBA Enclosure
1-24				PCD1-24 (ADPF) and 35 dBA Enclosure
1-25				PCD1-25 (ADPF) and 35 dBA Enclosure
1-26				PCD1-26 (ADPF) and 35 dBA Enclosure
CT 1 – CT 16	16 Cooling Towers (1000-ton each)	NA	NA	21 ft tall Hush Core Supreme HG[1] Acoustical Panels, Hush Core Unitary SM-SB[1] Fan Discharge Silencers,

Table 1 Key:

EU = Emission Unit
kW = Kilowatt
Btu/hr = British thermal units per hour
PCD = Pollution Control Device
dBA = A-weighted decibels
Bhp = Brake Horsepower
NA = Not Applicable
ADPF = Active Diesel Particulate Filter
CT = Cooling Tower
dB = Decibels

Table 1 Notes:

1. Control device with equivalent sound attenuating properties.

2. OPERATIONAL, PRODUCTION and EMISSION LIMITS

The Permittee (Respondent) is subject to, and shall not exceed the Operational, Production, and Emission Limits as contained in Table 2:

Date Filed 4/27/2026 12:45 PM
Superior Court - Middlesex
Docket Number

Table 2

EU[3]	Operational / Production Limit	Air Contaminant	Emission Limit[4]
House	All operation is limited to a total of 70 hours per consecutive 12-month period	NO_x	19.40 lb/hr 0.68 TPY
		CO	0.78 lb/hr 0.03 TPY
1-1	All operation is limited to a total of 70 hours per consecutive 12-month period (Each EU)	NO_x	51.10 lb/hr 1.79 TPY
		CO	6.09 lb/hr 0.085 TPY
1-2[1]		NO_x	51.10 lb/hr 1.79 TPY
		CO	6.09 lb/hr 0.085 TPY
1-3	All operation is limited to a total of 70 hours per consecutive 12-month period (Each EU)	NO_x	51.10 lb/hr 1.79 TPY
		CO	6.09 lb/hr 0.085 TPY
1-4[1]		NO_x	51.10 lb/hr 1.79 TPY
		CO	6.09 lb/hr 0.085 TPY
1-5	All operation is limited to a total of 70 hours per consecutive 12-month period (Each EU)	NO_x	70.99 lb/hr 2.48 TPY
		CO	14.31 lb/hr 0.50 TPY
1-6		NO_x	70.99 lb/hr 2.48 TPY
		CO	14.31 lb/hr 0.50 TPY
1-7		NO_x	70.99 lb/hr 2.48 TPY
		CO	14.31 lb/hr 0.50 TPY
1-8[1]		NO_x	70.99 lb/hr 2.48 TPY
		CO	14.31 lb/hr 0.50 TPY

Date Filed 4/27/2026 12:45 PM
Superior Court - Middlesex
Docket Number

EU[3]	Operational / Production Limit	Air Contaminant	Emission Limit[4]
1-9	All operation is limited to a total of 70 hours per consecutive 12-month period (Each EU)	NO_x	65.47 lb/hr 2.29 TPY
		CO	11.62 lb/hr 0.36 TPY
1-10		NO_x	65.47 lb/hr 2.29 TPY
		CO	11.62 lb/hr 0.36 TPY
1-11		NO_x	65.47 lb/hr 2.29 TPY
		CO	11.62 lb/hr 0.36 TPY
1-12		NO_x	65.47 lb/hr 2.29 TPY
		CO	11.62 lb/hr 0.36 TPY
1-13[1]		NO_x	65.47 lb/hr 2.29 TPY
		CO	11.62 lb/hr 0.36 TPY
1-14	All operation is limited to a total of 70 hours per consecutive 12-month period (Each EU)	NO_x	65.47 lb/hr 2.29 TPY
		CO	11.62 lb/hr 0.36 TPY
1-15		NO_x	65.47 lb/hr 2.29 TPY
		CO	11.62 lb/hr 0.36 TPY

Date Filed 4/27/2026 12:45 PM
Superior Court - Middlesex
Docket Number

EU[3]	Operational / Production Limit	Air Contaminant	Emission Limit[4]
1-16		NO_x	65.47 lb/hr 2.29 TPY
		CO	11.62 lb/hr 0.36 TPY
1-17		NO_x	65.47 lb/hr 2.29 TPY
		CO	11.62 lb/hr 0.36 TPY
1-18[1]		NO_x	65.47 lb/hr 2.29 TPY
		CO	11.62 lb/hr 0.36 TPY
1-19	All operation is limited to a total of 70 hours per consecutive 12-month period (Each EU)	NO_x	65.47 lb/hr 2.29 TPY
		CO	11.62 lb/hr 0.36 TPY
1-20		NO_x	65.47 lb/hr 2.29 TPY
		CO	11.62 lb/hr 0.36 TPY
1-21		NO_x	65.47 lb/hr 2.29 TPY
		CO	11.62 lb/hr 0.36 TPY
1-22[1]		NO_x	65.47 lb/hr 2.29 TPY
		CO	11.62 lb/hr 0.36 TPY
1-23	All operation is limited to a total of 70 hours per consecutive 12-month period (Each EU)	NO_x	65.47 lb/hr 2.29 TPY
		CO	11.62 lb/hr 0.36 TPY
1-24		NO_x	65.47 lb/hr 2.29 TPY
		CO	11.62 lb/hr 0.36 TPY
		NO_x	65.47 lb/hr 2.29 TPY

Date Filed 4/27/2026 12:45 PM
Superior Court - Middlesex
Docket Number

EU[3]	Operational / Production Limit	Air Contaminant	Emission Limit[4]
1-25		CO	11.62 lb/hr 0.36 TPY
1-26[1]		NO_x	65.47 lb/hr 2.29 TPY
		CO	11.62 lb/hr 0.36 TPY
Facility-wide	In addition to all other Operational/Production Limits above, each EU (House, 1-1 through 1-26) shall operate only: 1. for up to 70 hours per calendar year, or as otherwise approved by EPA, for maintenance checks and readiness testing, provided that the tests are recommended by federal, state or local government, the manufacturer, the vendor. 2. as part of the 70 hours, not to exceed 50 hours per calendar year for non-emergency situations; and 3. during an emergency, as defined in 310 CMR 7.26(41)[2]. For each EU and Parallel Grouping, <u>all</u> operating hours are counted toward Operational/Production limits.	NO_x	43.79 TPY
		CO	8.87 TPY
		VOC	0.66 TPY
		$PM_{2.5}$	0.53 TPY
		PM_{10}	0.53 TPY
		SO_2	0.032 TPY
		HAPs	0.087 TPY
		CO_2e	3365 TPY
		Sulfur (in fuel)	$\leq$0.0015 percent by weight
Facility-wide		Opacity	Shall not exceed 10% based on 40 CFR 60, Appendix A, Method 9

Table 2 Key:

EU = Emission Unit
CO = Carbon Monoxide
TPY = tons per consecutive12-month period
% = percent
VOC = Volatile Organic Compounds
SO_2 = Sulfur Dioxide
CO_2e = Greenhouse Gases expressed as Carbon Dioxide equivalent
HAPs = Hazardous Air Pollutants
EPA = United States Environmental Protection Agency

NO_x = Nitrogen Oxides
TPM = tons per month
$\leq$ = less than or equal to
lb/hr = pounds per hour
PM = Particulate Matter
$PM_{2.5}$ = Particulate Matter less than or equal to 2.5 microns in aerodynamic diameter
PM_{10} = Particulate Matter less than or equal to 10 microns in aerodynamic diameter

Date Filed 4/27/2026 12:45 PM
Superior Court - Middlesex
Docket Number

Table 2 Notes:

1. One engine from each group assumed to fail. Emissions from failed engines are not included in the total Facility-wide emissions.
2. Emergency means an electric power outage due to failure of the electrical supply, in whole or in part, on-site disaster, local equipment failure, flood, fire, or natural disaster. Emergency shall also mean when the imminent threat of a power outage is likely due to failure of the electrical supply.
3. Emission Units to be installed and operated in accordance with this Approval and 310 CMR 7.26(42).
4. Pounds per hour emission limits for NO_x and CO are based on manufacturer specifications for full load.
5. In order to allow for operational flexibility, the Facility-wide emission limits for an air contaminant may be less than the total sum of all of the EUs' emission limits for said air contaminant. However, all the Operational, Production, and Emission Limits contained in Table 2 are applicable and are made federally enforceable herein.
6. The total Facility-wide emission limits are based on failure load and typical load operations. Since the Facility will never operate under failure load and typical load operating conditions at the same time, the actual total Facility-wide emissions for an air contaminant may be less than those listed in Table 2.

D. Respondent shall monitor emergency generator and cooling tower operations to ensure that the Facility is operating in compliance with emission limits, operating limits, and conditions established in the Plan Approval NE-25-002.

E. Respondent shall maintain on site a record of all emergency generator operations to ensure the actual hours of operation, including testing, from the emission units do not exceed the emission limits, hours of operation/maintenance/testing, or the Special Terms and Conditions and the General Conditions listed in this Consent Order and the terms established in the Plan Approval. Upon request, Respondent shall provide access to these records to MassDEP.

F. Respondent shall not perform scheduled testing/maintenance on either a Federal holiday (or observed), as defined by the U.S. Office of Personnel Management, or on a Massachusetts holiday (or observed), as defined by the Secretary of the Commonwealth.

G. Respondent shall not perform weekly testing of emergency generators 1-1 through 1-4 on weekend calendar days; however, emergency generators 1-1 through 1-4 may be operated on weekend calendar days if necessary to perform maintenance activities.

H. Until Respondent completes construction of the retaining wall located along the northeastern side of the Facility, Respondent shall, in order to control fugitive dust emissions, properly control the dust emissions from the large soil stockpile located on the northeast corner along Andrews Street of the Facility. Respondent shall manage the fugitive dust emissions through the application of either an encrusting agent or water.

Date Filed 4/27/2026 12:45 PM
Superior Court - Middlesex
Docket Number

I. Notwithstanding any other provision in this Consent Order, immediately upon the effective date of this Consent Order and until such time as a Final Decision and any Motion for Reconsideration and Decision on that Motion has been issued in the Appeal, the Respondent may continue to operate the Facility within the emission and operating/testing/maintenance limits established in Paragraph 8.C.2 above, the Special Terms and Conditions and the General Conditions in the Plan Approval.

J. Until such time as a Final Decision and any Motion for Reconsideration and Decision on that Motion has been issued in the Appeal, Respondent shall operate the Facility at all times in compliance with said Plan Approval and with all applicable Air Pollution Control Regulations. After a Final Decision and any Motion for Reconsideration and Decision on that Motion has been issued in the Appeal, if the Plan Approval should require modification, then Respondent shall comply with the modified Plan Approval terms/limits required after the issuance of a Final Decision.

9. Unless submitted via eDEP or except as otherwise provided herein, all notices, submittals and other communications required by this Consent Order shall be directed to:

Edward J. Braczyk, Air Quality Section Chief
Bureau of Air and Waste
MassDEP Northeast Regional Office
150 Presidential Way, Suite 300
Woburn, MA 01801
Edward.Braczyk@mass.gov

Such notices, submittals and other communications may be transmitted by electronic mail and shall be considered delivered by Respondent upon receipt by MassDEP.

10. Actions required by this Consent Order shall be taken in accordance with all applicable federal, state, and local laws, regulations and approvals. This Consent Order shall not be construed as, nor operate as, relieving Respondent or any other person of the necessity of complying with all applicable federal, state, and local laws, regulations and approvals.

11. Respondent understands, and hereby waives, its right to an adjudicatory hearing before MassDEP on, and judicial review of, the issuance and terms of this Consent Order and to notice of any such rights of review. This waiver does not extend to any other order issued by MassDEP.

12. This Consent Order may be modified only by written agreement of the parties hereto.

13. MassDEP hereby determines, and Respondent hereby agrees, that any deadlines set forth in this Consent Order constitute reasonable periods of time for Respondent to take the actions described.

Date Filed 4/27/2026 12:45 PM
Superior Court - Middlesex
Docket Number

14. The provisions of this Consent Order are severable, and if any provision of this Consent Order or the application thereof is held invalid, such invalidity shall not affect the validity of other provisions of this Consent Order, or the application of such other provisions, which can be given effect without the invalid provision or application, provided, however, that MassDEP shall have the discretion to void this Consent Order in the event of any such invalidity.

15. Nothing in this Consent Order shall be construed or operate as barring, diminishing, adjudicating or in any way affecting (i) any legal or equitable right of MassDEP to issue any additional order or to seek any other relief with respect to the subject matter covered by this Consent Order, or (ii) any legal or equitable right of MassDEP to pursue any other claim, action, suit, cause of action, or demand which MassDEP may have with respect to the subject matter covered by this Consent Order, including, without limitation, any action to enforce this Consent Order in an administrative or judicial proceeding.

16. This Consent Order shall not be construed or operate as barring, diminishing, adjudicating, or in any way affecting, any legal or equitable right of MassDEP or Respondent with respect to any subject matter not covered by this Consent Order.

17. This Consent Order shall be binding upon Respondent and upon Respondent's successors and assigns. Respondent shall not violate this Consent Order and shall not allow or suffer Respondent's directors, officers, employees, agents, contractors, or consultants to violate this Consent Order. Until Respondent has fully complied with this Consent Order, Respondent shall provide a copy of this Consent Order to each successor or assignee at such time that any succession or assignment occurs.

18. If Respondent violates any provision of the Consent Order, Respondent shall pay stipulated civil administrative penalties to the Commonwealth in the amount of $1,000.00 per day for each day, or portion thereof, each such violation continues.

Stipulated civil administrative penalties shall begin to accrue on the day a violation occurs and shall continue to accrue until the day Respondent corrects the violation or completes performance, whichever is applicable. Stipulated civil administrative penalties shall accrue regardless of whether MassDEP has notified Respondent of a violation or act of noncompliance. All stipulated civil administrative penalties accruing under this Consent Order shall be paid within thirty (30) days of the date MassDEP issues Respondent a written demand for payment. If simultaneous violations occur, separate penalties shall accrue for separate violations of this Consent Order. The payment of stipulated civil administrative penalties shall not alter in any way Respondent's obligation to complete performance as required by this Consent Order. MassDEP reserves its right to elect to pursue alternative remedies and alternative civil and criminal penalties which may be available by reason of Respondent's failure to comply with the requirements of this Consent Order. In the event MassDEP collects alternative civil administrative penalties, Respondent shall not be required to pay stipulated civil administrative penalties pursuant to this Consent Order for the same violations.

Date Filed 4/27/2026 12:45 PM
Superior Court - Middlesex
Docket Number

Respondent reserves whatever rights it may have to contest MassDEP's determination that Respondent failed to comply with the Consent Order and/or to contest the accuracy of MassDEP's calculation of the amount of the stipulated civil administrative penalty. Upon exhaustion of such rights, if any, Respondent agrees to assent to the entry of a court judgment if such court judgment is necessary to execute a claim for stipulated penalties under this Consent Order.

19. Failure on the part of MassDEP to complain of any action or inaction on the part of Respondent shall not constitute a waiver by MassDEP of any of its rights under this Consent Order. Further, no waiver by MassDEP of any provision of this Consent Order shall be construed as a waiver of any other provision of this Consent Order.

20. To the extent authorized by the current owner, Respondent agrees to provide MassDEP, and MassDEP's employees, representatives and contractors, access at all reasonable times to the Facility for purposes of conducting any activity related to its oversight of this Consent Order. Notwithstanding any provision of this Consent Order, MassDEP retains all of its access authorities and rights under applicable state and federal law.

21. This Consent Order may be executed in one or more counterpart originals, all of which when executed shall constitute a single Consent Order.

22. The undersigned certify that they are fully authorized to enter into the terms and conditions of this Consent Order and to legally bind the party on whose behalf they are signing this Consent Order.

23. This Consent Order shall become effective on the date that it is executed by MassDEP.

SPECIAL INSTRUCTIONS:

Your two **signed copies** of the Administrative Consent Order must be delivered, for execution (signature) by MassDEP, to the following address:

John MacAuley, Deputy Regional Director
Bureau of Air and Waste
MassDEP Northeast Regional Office
150 Presidential Way, Suite 300
Woburn, MA 01801

MassDEP will return **one signed copy** of the ACO to you after MassDEP has signed, provided you have followed the above instructions.

SIGNED ACOS ARE TO BE SENT TO THE ABOVE ADDRESS.

Date Filed 4/27/2026 12:45 PM
Superior Court - Middlesex
Docket Number

Please contact Edward Braczyk, Air Quality Section Chief at Edward.Braczyk@mass.gov if you have questions regarding instructions.

Consented To:
MARKLEY LOWELL, LLC

By: _____
Jack Montanaro
Markley Group, LLC
One Markley Way
Lowell, MA 01852
Federal Employer Identification No.: 38-3693466
Date: 29 SEPTEMBER 2025

Issued By:
DEPARTMENT OF ENVIRONMENTAL PROTECTION

By: _____
Eric Worrall, Regional Director
MassDEP
150 Presidential Way, Suite 300
Woburn, Massachusetts 01801

Date: 9/29/25