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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2681CV01107

JACOB FORTES & others¹

vs.

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION &
another²

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS'
MOTION FOR STAY

The above-named plaintiffs are residents in the city of Lowell, and they filed this action challenging a Final Decision of the Massachusetts Department of Environmental Protection (Department) to approve an Air Quality Plan Permit (Air Permit) for the Markley Group LLC (Markley), which operates a data center in the plaintiffs' residential community. The Air Permit authorizes Markley to install and operate eight diesel generators, which serve as backup generators for Markley's power source, as well as sixteen cooling towers. The plaintiffs previously objected to the project at the administrative level. Their challenge, however, was denied for various reasons but, most notably, for lack of standing. The plaintiffs subsequently filed this action for judicial review of the Department's Final Decision, pursuant to G. L. c. 30A, § 14.

After the plaintiffs instituted this action, Markley installed four of the eight diesel generators that were approved under the Air Permit. The plaintiffs now move to stay the enforcement of the Air Permit pursuant to the court's statutory authority set forth in G. L. c. 30A,

¹ Eileen Castle, Jacquelynn Coles, Holly Flynn, Nancy Fortes, Steven O'Hearn, Joann Snead, Randall Snead, Alex Solange, and Mary Wambui.

² Markley Group LLC.

§ 14(3).³ After a hearing on the motion and careful consideration of the parties' submissions, for the following reasons, the plaintiffs' motion is **ALLOWED**. Enforcement of the Air Permit is **STAYED** with respect to the installation and operation of the remaining four diesel generators that have not yet been installed.

BACKGROUND

In 2016, Markley received approval from the city to convert a former pasta factory to a data center, which includes the use of industrial diesel generators as an emergency, backup power source. The data center sits between two dense residential neighborhoods. A baseball field and basketball court abut the property, and there is also a preschool nearby.

It is well known that the neighborhoods abutting the data center are Environmental Justice populations, which are low-income neighborhoods and/or neighborhoods whose population is at least 40% minority or 25% lacking in English language proficiency. If a project is located near an Environmental Justice population and the project exceeds certain environmental impact thresholds under the Massachusetts Environmental Policy Act (MEPA)⁴ for air, solid and hazardous waste, or wastewater and sewage, then certain enhanced public participation procedures are required, such as enhanced analysis of project impacts on Environmental Justice populations, improved language access, and translation/interpretation services.

³ The plaintiffs also move for a preliminary injunction to enjoin the enforcement of an Administrative Consent Order between the Department and Markley, which authorized Markley to install and operate the eight diesel generators notwithstanding the plaintiffs' pending appeal. The plaintiffs argue that the Administrative Consent Order is void, because it was executed in excess of the Department's authority. Because the Department has issued a decision denying the plaintiffs' motion for reconsideration of the Final Decision, the Administrative Consent Order is moot, and the court need not address the plaintiffs' request for preliminary injunction pertaining thereto.

⁴ The MEPA Office reviews environmental impacts of development projects and other activities that require action by state agencies and certain municipal authorities, such as permitting, siting, or funding. MEPA review is intended to provide meaningful opportunities for public review of potential environmental impacts before agency action is taken on the project to ensure all feasible means will be taken to avoid, minimize, and mitigate environmental impacts.

Here, the plaintiffs allege that Markley has done piecemeal expansions in order to avoid full MEPA review. Specifically, in November 2023, Markley received approval from the Department to expand its diesel backup generation capacity. The November 2023 approval authorized Markley to install and operate four diesel generators on top of the seven that were approved previously. On March 25, 2025, the Department approved another air quality plan that authorized Markley to install and operate eight additional diesel generators, bringing the total up to nineteen.

On April 25, 2025, Markley submitted to the Department a non-major comprehensive air plan, which is the plan at issue in this case. This project includes the installation and operation of eight new generators, which would bring the total number of backup diesel generators to twenty-seven. The eight new generators also require the installation and operation of sixteen cooling towers. Although the generators are used as a backup power source, they are turned on weekly for routine maintenance and testing.⁵

The plaintiffs and many others objected to the April 2025 plan. Their complaints related to noise, dust, air pollution (increased diesel particulate emissions and degraded localized air quality), odor, traffic (from construction activities), surveillance cameras that point into their backyards, and dirt that blows into their yards.

On July 3, 2025, the Department approved Markley's plan, and the plaintiffs filed a timely appeal with Department's Office of Appeals and Dispute Resolution (OADR) on July 24, 2025. The Department rejected the plaintiffs' right to pursue a ten persons suit but allowed the individual plaintiffs to proceed.

⁵ Weekly maintenance runs are limited to no more than five minutes per week.

Six months into the plaintiffs' appeal, the plaintiffs noticed construction activities and discovered that the defendants had entered into an Administrative Consent Order (Consent Order) on September 29, 2025, allowing Markley to install and operate the eight generators approved under the Air Permit, in accordance with emission limits, operating limits, and conditions set forth in the permit until a final decision and any motion for reconsideration and decision on that motion issued. To date, Markley has installed four out of the eight generators.⁶

On December 23, 2025, the OADR Presiding Officer issued a Recommended Final Decision, affirming the grant of summary decision to Markley and affirming the issuance of the Air Permit. The Recommended Final Decision was transmitted to the Department's Commissioner for Final Decision. The Commissioner adopted the Recommended Final Decision on March 27, 2026.

DISCUSSION

The plaintiffs filed this action on April 27, 2026, asserting three claims: (1) judicial review of the Final Decision under G. L. c. 30A, § 14; (2) declaratory relief that the Consent Order was issued in excess of the Department's authority; and (3) seeking a writ of mandamus vacating the Consent Order. For the reasons stated above, see note 3 *supra*, only the plaintiffs' c. 30A appeal is at issue presently.

I. Standard of Review

Pursuant to G. L. c. 30A, § 14(3), the plaintiffs have moved to stay the enforcement of the Air Permit pending this action. General Laws c. 30A, § 14(3) states, "The commencement of

⁶ Pursuant to the plaintiffs' and Markley's Stipulation/Joint Motion (See Paper No. 10), Markley has agreed not to construct, install, or operate the remaining four backup generators authorized by the Air Permit until the earlier of the court's decision on the motion for preliminary injunction or October 1, 2026. On July 10, 2026, however, the Commissioner of the Department issued a decision denying the plaintiffs' motion for reconsideration of the Final Decision, affirming the issuance of the Air Permit. As a result, the plaintiffs' arguments regarding the Consent Order are moot.

an action shall not operate as a stay of enforcement of the agency decision, but the agency may stay enforcement, and the reviewing court may order a stay upon such terms as it considers proper.” A party seeking a stay pending an appeal must satisfy the well-known standard for granting a preliminary injunction. See *C.E. v. J.E.*, 472 Mass. 1016, 1017 (2015). Specifically, the plaintiffs must show that they are likely to succeed on the merits and that in the absence of a stay, they will suffer irreparable harm sufficient to outweigh the harm to the other parties if the stay issues. *Id.*; *GTE Prods. Corp. v. Stewart*, 414 Mass. 721, 722-723 (1993); *Packaging Indus. Grp., Inc. v. Cheney*, 380 Mass. 609, 617 (1980). Where, as here, the plaintiffs are seeking to stay the enforcement of an agency action, the court also must consider whether the stay promotes the public interest, or alternatively, whether the stay will not adversely affect the public. *LeClair v. Norwell*, 430, 328, 332 (1999). For the following reasons, the plaintiffs have met this burden.

II. Analysis

General Laws c. 30A, § 14 authorizes this Court to set aside an agency decision that is based on clear errors of law or is unsupported by substantial evidence. The plaintiffs argue that they are likely to succeed on this claim for a variety of reasons, most notably that the Presiding Officer concluded, *sua sponte*, that all but one plaintiff lacked standing to pursue their appeal. The Presiding Officer also did not give the plaintiffs an opportunity to submit evidence establishing standing and denied their request for an evidentiary hearing. Additionally, because the Presiding Officer found that only one plaintiff had standing, he limited the issues that individual could pursue on appeal. The plaintiffs argue, and the court agrees, that these errors deprived the plaintiffs of a meaningful review of their claims.

The Department’s regulations state that “[a]n aggrieved person who has submitted written comments” during the comment period has the right to request an adjudicatory hearing on the

Department's decision. 310 Code Mass. Regs. § 7.51(1)(g)(2). An aggrieved person is "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 [regulations]." 310 Code Mass. Regs.

§ 7.51(1)(a). During the administrative proceeding, the defendants separately moved to dismiss the plaintiffs' administrative petition on several grounds, including standing. The Presiding Officer denied the defendants' motion in this respect stating:

"[The plaintiffs have] alleged the minimum quantum of facts that qualitatively enable all 8 Lowell Residents to proceed through the standing gateway. The facts, which at this juncture of the appeal must be taken as true, demonstrate that the 8 Lowell Residents could or will be . . . uniquely injured by the Air Permit due to the proximity to the Facility to their residential and recreational activities in the area where the proposed eight diesel generators will be located at the Facility, and/or health conditions that make a number of them and their family members uniquely susceptible to air pollution from those generators and cooling tower operations attendant to generators."

(See Ruling and Order on Motions to Dismiss Petitioners' Appeal at p. 14).

This quoted language indicates that the Presiding Officer relied on the plaintiffs' representations, which were accepted as true. The Presiding Officer then described, in some detail, the particularized injuries the plaintiffs had alleged.

In the "Conclusion" section of the order, the Presiding Officer wrote:

"The Motions [to dismiss] are **denied in part** to reflect that based on the [plaintiffs'] amendment to their original Appeal Notice, eight of the Group's members, whom I refer to above as 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 as an aggrieved person who previously submitted written comments to MassDEP during the public comment period on MassDEP's Proposed Decision to approve the Air Permit."

(See Ruling and Order on Motions to Dismiss Petitioners' Appeal at p. 23).

The Presiding Officer then conditioned the allowance of the plaintiffs' Appeal Notice⁷ by ordering the plaintiffs to identify their expert witnesses and provide a summary of each expert's anticipated testimony within fourteen days. The Presiding Officer did not require the plaintiffs to file affidavits, individually, substantiating their particularized injuries. On this basis, the plaintiffs reasonably assumed that standing was a settled issue. The defendants' failure to raise the issue in their subsequent motions for summary decision also suggests that they believed the matter of the plaintiffs' standing had been decided in the plaintiffs' favor.⁸

Nevertheless, in the Recommended Final Decision, the Presiding Officer found that the defendants were entitled to summary decision against seven of the eight plaintiffs because they failed to file an affidavit evidencing their respective standing to appeal the Air Permit. The Presiding Officer stated, "They simply relied on the unsworn allegations of their Amended Appeal Notice asserting that they each have standing to appeal the Air Permit" (See Recommended Final Decision at 5-6). The Presiding Officer cited 310 Code Mass. Regs. § 1.01(11)(f), which states, in pertinent part: "[A] party opposing the motion [for summary decision] may not rest upon the mere allegations or denials of said party's pleading, but must respond, by affidavits . . . setting forth specific facts showing that there is a genuine issue for hearing on the merits." The Presiding Officer also held that his previous ruling on standing was not a final determination on the plaintiffs' standing and that each plaintiff failed to comply with

⁷ The plaintiffs previously requested an adjudicatory hearing as a Ten Persons Group under 310 Code Mass. Regs. § 7.51(1)(g)(3). The Presiding Officer, however, found that the plaintiffs lacked standing on that basis, but he permitted the plaintiffs to amend their Appeal Notice to pursue their appeal individually.

⁸ In support of their motions for summary decision, the defendants argued that the plaintiffs lacked "standing" to challenge certain issues. The plaintiffs argue, and the court agrees, that these arguments related to issue exhaustion, which is akin to a waiver challenge, rather than a dispute concerning standing. Accordingly, the court finds, based on this record, that the defendants did not challenge the plaintiffs' "standing" in the traditional sense via their motions for summary decision. Likewise, the Presiding Officer did not articulate in his Recommended Final Decision that the defendants raised the issue in their motions for summary decision. (See Recommended Final Decision at p. 3-4).

the regulations by failing to submit an affidavit containing sworn testimony establishing their aggrieved person status under 310 Code Mass. Regs. § 7.51(1)(a). (See Recommended Final Decision at p. 18-20). The Commissioner of the Department adopted the Recommended Final Decision via her Final Decision. Thereafter, the plaintiffs filed a motion for reconsideration, which was supported by affidavits from each plaintiff attesting to their status as aggrieved persons; however, the motion for reconsideration was denied.

This Court recognizes that standing is “an issue of subject matter jurisdiction,” see *Statewide Towing Ass’n. v. Lowell*, 68 Mass. App. Ct. 791, 794 (2007), which can be raised at any time. Here, however, the problem lies in the fact that the Presiding Officer’s prior decision on the defendants’ motions to dismiss reasonably led the plaintiffs to believe that standing was no longer an issue. Therefore, rejecting their status as aggrieved persons based on a technicality and without giving them an opportunity to correct the error seems unjust. It is also notable that the plaintiffs’ written comments were provided to the Presiding Officer, and those comments substantiated their status as aggrieved persons. Thus, filing affidavits likely would not have added any new information and would not have prejudiced the defendants in any way. Particularly, where, as stated above, the defendants themselves did not challenge the plaintiffs’ standing in their motions for summary decision.

Furthermore, the plaintiffs argue that the Presiding Officer erred in limiting Mr. Fortes to issues he personally detailed in his written comment letter. The Department’s regulations state:

“If the Department provided a public comment period, the issues that may be raised in a request for an adjudicatory hearing are further limited to the matters raised during the public comment period; provided, however, that a matter may be raised upon a 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.”

310 Code Mass. Regs. §7.51(1)(i).

The defendants argue that the Presiding Officer properly interpreted this regulation to mean that a petitioner can only appeal issues they personally raised during the public comment period. Ordinarily, the court accords an agency's interpretation of its own regulations considerable deference, unless the party challenging the agency's interpretation can show that the interpretation is not rational. *Genworth Life Ins. Co. v. Commissioner of Ins.*, 95 Mass. 392, 396 (2019).

Here, the court is not persuaded, at this early juncture, that the Department's interpretation is entitled to deference. The regulation is silent on *who* must raise an issue during the public comment period; rather, it requires only that an issue be raised generally. The purpose of this requirement is to ensure that the agency is placed on notice of an issue and has an opportunity to respond. Notably, the federal court takes an opposing view from the Department. The federal "regulations require that in order to preserve an issue, it must be raised by *any* party during the comment period" (emphasis added). *Adams v. United States EPA*, 38 F.3d 43 at 52 n.7 (1st Cir. 1994). Given that the gravamen of the plaintiffs' complaint in this case is that they were deprived of a meaningful opportunity to present their claims to the administrative agency below, the court is satisfied they are likely to succeed on the merits of their c. 30A claim on these two grounds—standing and waiver.

Next, the court considers the balance of harms and whether the stay will not adversely affect the public. Both considerations weigh in the plaintiffs' favor. The crux of the plaintiffs' lawsuit is to ensure compliance with the air pollution control regulations, which directly vindicates the public's interest on the matter. Additionally, the plaintiffs' alleged harm is the deprivation of due process, and because their claims were dismissed based on technicalities and without the benefit of an evidentiary hearing, this factor weighs against Markley. The plaintiffs'

alleged harm is particularly concerning given that this community is an Environmental Justice population. Communities like this are often overlooked and left out of the administrative process, hence, MEPA's requirement for enhanced public participation protections. Based on the limited information presently before the court, however, it appears that the attempts to engage with the community were lacking. There was one public meeting that was not recorded. It is also unclear what efforts were made to publicize this project and inform the community about their rights and abilities to attend the meeting and submit public comments. In totality, these harms far outweigh any harm to Markley, particularly where Markley does not utilize all of the backup generators they currently have. Markley also has not shown that it would be unable to function if the court were to preserve the status quo. Accordingly, the plaintiffs' motion to stay the enforcement of the Air Permit is ALLOWED.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the plaintiffs' motion to stay the enforcement of the Air Permit is ALLOWED but only with respect to the four backup diesel generators that have not yet been installed. Markley is permitted to operate the four generators it installed previously, subject to the special conditions the Air Permit imposes.


C William Barrett
Justice of the Superior Court

August 10, 2026