



Commonwealth of Massachusetts
Executive Office of Energy and Environmental Affairs

Department of Environmental Protection

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July 10, 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 ON RECONSIDERATION

Eight residents of Lowell, Massachusetts (“Petitioners”) seek reconsideration of the Final Decision issued in this matter on March 27, 2026. The Final Decision adopted the Recommended Final Decision issued on December 23, 2026 (“RFD”), by the Office of Appeals and Dispute Resolution (“OADR”). The Final Decision granted summary decision to the Markley Group, LLC (the “Applicant”) and the Massachusetts Department of Environmental Protection (“MassDEP” or the “Department”) and affirmed an Air Permit issued by the Department’s Northeast Regional Office to the Applicant, pursuant to MassDEP’s air permitting regulations at 310 CMR 7.00, authorizing and conditioning the Applicant’s construction and operation of eight emergency generators at the Applicant’s facility in Lowell (the “Facility”). For the reasons set forth below, Petitioners’ Motion for Reconsideration is denied.

Standard of Review

A party seeking reconsideration must demonstrate that the Final Decision was based upon a clearly erroneous finding of fact or ruling of law that materially impacted the Final Decision's validity. 310 CMR 1.01(14)(d); In the Matter of Energy North, Inc., OADR Docket No. 2021-003, Recommended Final Decision on Reconsideration (Sept. 26, 2025), 2025 WL 2828263, *3, adopted as Final Decision on Reconsideration (Sept. 30, 2025), 2025 WL 2828262. The moving party has the burden of showing that the Final Decision was unjustified. In the Matter of Kevin Slattery and Etchstone Properties, Inc., OADR Docket No. WET-2018-015, Recommended Final Decision on Reconsideration (December 17, 2019), 2019 WL 8883857, *5, adopted as Final Decision on Reconsideration (January 7, 2020), 2020 WL 2616493. A Motion for Reconsideration may be summarily denied if it "repeats matters adequately considered in the final decision, renews claims or arguments that were previously raised, considered and denied, or where it attempts to raise new claims or arguments" 310 CMR 1.01(14)(d).

Discussion

Petitioners assert three principal arguments in support of their motion for reconsideration. They contend that the Final Decision: (1) was based on clear error as to Petitioners' standing; (2) was based on clear error in finding there was no genuine issue as to any material fact regarding Petitioners' claims; and (3) misinterpreted Petitioners' request related to an Administrative Consent Order at the Facility. Petitioners' Motion for Reconsideration of Final Decision at 1-2 (hereinafter Pet. Mot.). Each argument fails to meet

the burden of demonstrating clear error that materially impacted the validity of the Final Decision.

A. Petitioners fail to demonstrate that the Final Decision was based upon clearly erroneous findings of fact or rulings of law as to standing.

Petitioners assert that the RFD and Final Decision were based on clearly erroneous rulings of law and findings of fact with respect to the Presiding Officer's conclusion that the failure of seven of the eight Petitioners to file affidavits with evidence of their individual standing warranted dismissal of their appeals. Pet. Mot. at 3-5. They contend that their standing "has been settled since the Presiding Officer's August 27, 2025 Ruling and Order," and, as such, the Presiding Officer raised standing *sua sponte* in the RFD. Pet. Mot. at 2-3. They argue further that neither MassDEP nor Markley contested Petitioners' "status as 'aggrieved persons' or their timely submittal of written comments on the proposed Air Permit." Pets. Mot. at 2-5. These arguments fail to demonstrate clear error in the RFD and Final Decision.

As an initial matter, standing is a jurisdictional prerequisite that may be challenged at any time. In the Matter of Town of Brewster, OADR Docket No. WET-2012-006, Recommended Final Decision 34-35 (August 10, 2012), adopted as Final Decision (August 16, 2012); RFD at 9-10. Standing was not immutably settled as of the August 27, 2025 Ruling and Order, and indeed it was raised by both MassDEP and Markley in their subsequent motions for Summary Decision. Motion of Markley Group, LLC for Summary Decision (Oct. 22, 2025), 6-8; MassDEP Motion for Summary Decision at 3 (Oct. 22, 2025), 3-4.

Moreover, the Presiding Officer did not commit clear error in addressing standing in the RFD and determining that "[t]he Summary Decision Rule and 310 CMR 7.51(1)(h)3 ...

required each of the 7 Residents [all Petitioners other than Jacob Fortes, as to certain claims] to do more to establish their standing to appeal the Air Permit pursuant to 310 CMR 7.51(1)(d) and 7.51(1)(g)2.” RFD at 18-19. The Presiding Officer’s rulings of law and findings of fact on standing were well-considered and set forth in detail. RFD at 10-20. As explained in the RFD, the conclusion that Petitioners failed to establish standing [again, with the exception of Mr. Fortes as to certain claims] is consistent with the requirement that 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.” 310 CMR 1.01(11)(f); RFD at 18.

Petitioners further argue that the RFD and Final Decision incorrectly interpret 310 CMR 7.51(1)(d) and 7.51(1)(g) to limit the claims each petitioner can raise on appeal to issues he or she individually raised in public comments. Pet. Mot. at 8-11. The Presiding Officer’s careful analysis of those regulations and Massachusetts case law contained no clear error which would render the Final Decision unjustified. See RFD at 12-15 (analyzing 310 CMR 7.51(1)(d) and 7.51(1)(g) and In the Matter of Lorusso Corp. and Bristol Asphalt Co., Inc., OADR Docket No. 2021-023, Recommended Final Decision, 2022 WL 18231928 (December 16, 2022), adopted as Final Decision, 2022 WL 18231934 (December 28, 2022), affirmed, sub nom D’Acci v. Massachusetts Department of Environmental Protection, 105 Mass. App. Ct. 1142, 2025 WL 2249862 (Unpublished Disposition 2025)). Further, the interplay of 310 CMR 7.51(1)(d) and 7.51(1)(g) and their effect on standing was fully briefed by the parties at the summary decision stage and well-considered in the RFD. A motion for reconsideration

cannot be based on renewed claims or arguments that were previously raised, considered and denied. 310 CMR 1.01(14)(d). I therefore deny Petitioners' motion to reconsider standing on these grounds.

B. Petitioners fail to show that other grounds for dismissal were clearly erroneous.

Petitioners assert that, beyond standing, the RFD and Final Decision were based on clearly erroneous rulings of law and findings of fact regarding Petitioners' various claims. Pet. Mot. at 11-15. But each of Petitioners' claims was carefully considered and addressed in the RFD, and those findings and determinations were adopted in the Final Decision. See RFD at 21-34. As explained below, Petitioners have failed to meet the burden of demonstrating clear error on any count.

Appeal Claim 1 alleged that MassDEP failed to comply with Environmental Justice Requirements in issuing the Air Permit to the Applicant. For the reasons explained in Section A, *supra*, the Presiding Officer did not commit clear error in finding that each of the eight Petitioners lack standing to pursue this claim by failing to raise the claim in their written comments during the public comment period. RFD at 21-22.

Appeal Claim 2 alleged that MassDEP failed to conduct a Cumulative Impact Analysis. For the reasons explained in Section A, *supra*, the Presiding Officer did not commit clear error in finding that each of the eight Petitioners lack standing to pursue this claim by failing to raise the claim in their written comments during the public comment period. RFD at 22. Further, Petitioners have failed to demonstrate clear error in the Presiding Officer's dismissal of Appeal Claim 2 on other grounds. See Pet. Mot. at 11-12. Petitioners refer to a previous appeal of a different air permit issued to the Facility, and issues in that appeal related to 310

CMR 7.02(8). In the Matter of the Markley Group, LLC, OADR Docket No. 2025-006, Interlocutory Decision and Order Granting the Applicant's and Department's Motions to Dismiss, 5-6 (July 14, 2025). For the purposes of 310 CMR 7.02(8) *only*, "existing facility" applies to facilities in operation on or before June 1, 1972.¹ The Facility was not in operation on or before June 1, 1972, so for the purposes of 310 CMR 7.02(8) and the subparts thereof, the Facility is not an "existing facility." That definition is expressly limited to 310 CMR 7.02(8) and is distinct from the use of the term "existing facility" in the Cumulative Impact Regulations at 310 CMR 7.02(14). At issue in this matter is 310 CMR 7.02(14)(a)4, which sets forth when "an existing facility ... that already has a comprehensive plan approval" would require a Cumulative Impact Analysis. The Facility has received multiple comprehensive plan approvals, including the approval at issue in OADR Docket No. 2025-006, the final ruling on which was not appealed. See RFD at 23. The Presiding Officer's dismissal of Appeal Claim 2 based on a finding that, for purposes of 310 CMR 7.02(14)(a)4, the Facility is an existing facility that already has a comprehensive plan approval was not based on clearly erroneous rulings of law or findings of fact that materially impacted the validity of the Final Decision.

Appeal Claim 5² alleged that the Department failed to properly consider the impacts of cooling towers at the Facility. Petitioners' claims are based on the notion that the cooling

¹ The complete definition is as follows: EXISTING FACILITY for the purposes of 310 CMR 7.02(8), means any facility that is in operation on or before June 1, 1972, or any proposed facility of which the construction, substantial reconstruction or alteration of which has been approved in writing by the Department on or before June 1, 1972. All facilities as specified in the Federal Register, Volume 36, No. 247, December 23, 1971, the construction or modification of which was initiated after August 17, 1971 shall not be defined as existing facilities. 310 CMR 7.00, Definitions.

² Petitioners do not raise Appeal Claim 3 or Appeal Claim 4 in their Motion for Reconsideration, meaning they accept the finding in the RFD, adopted by the Final Decision, that the Applicant and the Department are entitled to summary decision on those claims. As such, I do not address them here.

towers, already approved by a previous air permit, should have been evaluated under this subsequent Air Permit. Pet. Mot. at 12-13. The RFD adequately considered and denied this claim. Since Petitioners repeat matters already raised, considered and decided in the RFD and Final Decision, their request to reconsider this claim is denied. See RFD at 27-28.

Appeal Claim 6 alleged that MassDEP failed to adequately address noise and other operational impacts in the Air Permit. In their Motion for Reconsideration, Petitioners assert that the Presiding Officer's finding that neither Mr. Fortes nor Petitioners' proffered noise expert, Dr. Jamie Banks, demonstrated sufficient expertise in air permitting in Massachusetts to opine as expert witnesses was clearly erroneous. Pet. Mot. at 14-15. Petitioners fail to meet their burden on this count. The RFD reflects the Presiding Officer's careful review of the affidavits provided by Mr. Fortes and Dr. Banks and determination that neither witness demonstrated sufficient expertise in air permitting under Massachusetts' air permitting regulations to testify on the technical issues presented by Mr. Fortes' claims. RFD at 30-33. I find no clear error which would render the Final Decision unjustified, and therefore deny Petitioners' request for reconsideration of that claim.

Appeal Claims 7 and 8 each alleged failures by the Department to account for purported non-compliance by the Applicant with existing permit conditions. RFD at 33-34. Petitioners merely renew claims previously raised and repeat matters adequately considered in the RFD and Final Decision. Id. I therefore deny the Petitioners' requests for reconsideration of those claims.

C. Petitioners' claims regarding the Administrative Consent Order fail to satisfy the requirements for reconsideration of a final decision.

Petitioners also assert that the Final Decision misinterpreted their requested relief related to an Administrative Consent Order (“ACO”) between MassDEP and the Applicant. Pet. Mot. at 16. Petitioners do not specify whether they seek reconsideration pursuant to 310 CMR 1.01(14)(d) on this point, but instead ask that the Presiding Officer revive their request related to the ACO in the event their Motion for Reconsideration is granted. See id. To the extent Petitioners do seek reconsideration on this point, that request is denied for failure to satisfy the requirements for reconsideration pursuant to 310 CMR 1.01(14)(d). No ruling of law or finding of fact in my Final Decision was based on or related to the ACO. Final Decision at 3; see 310 CMR 1.01(14)(d) (requiring demonstration that a Final Decision was based upon a finding of fact or ruling of law that was clearly erroneous).

Conclusion

For the foregoing reasons, I find Petitioners have failed to demonstrate that the Final Decision was based on a finding of fact or ruling of law that was clearly erroneous, and they have otherwise renewed claims or arguments that were previously raised, considered and denied. Petitioners’ Motion for Reconsideration of Final Decision is denied. A party 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.



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Commissioner

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