

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

August 8, 2006

In the Matter of

Eastern Minerals, Inc.
Eastern Salt Company, Inc.

Docket No. 2005-018; DEP-05-152
File No. PAN NE-05-6001
Chelsea

Final Decision

Eastern Minerals, Inc. and Eastern Salt Company, Inc. (Eastern) own and operate a marine docking facility in Chelsea for the unloading and storage of salt prior to its use on roads during the winter. Under the authority of M.G.L. c. 21A, s. 16 and 310 CMR 5.00, the Department issued a Penalty Assessment Notice for \$9,900 for violating M.G.L. c. 85, s. 7A, alleging that the salt was not stored as required in a solid frame storage shed and that the company had failed to comply with an Administrative Consent Order. Eastern appealed. The issue initially identified for adjudication was whether the storage shed requirement applied to the Petitioner's site in Chelsea. In a Recommended Decision on procedural issues, the Administrative Magistrate identified deficiencies in the Department's Penalty Assessment Notice and vacated the penalty, based upon her conclusion that the Department violated the notice provision by failing to state a separate

penalty for each alleged violation and that the Department lacks the statutory authority to amend a Penalty Assessment Notice.¹

While I agree with some of the reasoning in the Recommended Decision, I do not adopt the conclusion that, even after a fully effective appeal has been filed, a Penalty Assessment Notice must be vacated for deficiencies because the statute is penal in nature and must be strictly construed. Instead, I look to the nature of the deficiency and whether the deficiency has prejudiced the alleged violator. I also conclude that a Penalty Assessment Notice may be amended under circumstances where an amendment would be timely and would not prejudice the alleged violator. However, an amendment cannot cure deficiencies which would deprive the recipient of the notice of an opportunity to meaningfully frame an appeal as specified in the regulations. Finally, I vacate the Penalty Assessment Notice issued to Eastern and dismiss the appeal as moot for reasons not addressed in the Recommended Decision.

Both the question of whether a Penalty Assessment Notice may be amended or is fatally flawed without all the required contents turn in large measure on the adequacy of notice and whether a party has been prejudiced by the agency's action. The Administrative Penalty statute specifies the contents of a Penalty Assessment Notice, but is silent on whether a Penalty Assessment Notice may be amended or the consequence of any defect in the Notice. M.G.L. c. 21A, s. 16. The Administrative Penalty statute specifies that the appeal provisions of M.G.L. c. 30A apply unless they are inconsistent with M.G.L. c. 21A, s. 16. M.G.L. c. 30A also has a notice provision:

Parties shall have sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument. . . . In all

¹The procedures for the issuance of Penalty Assessment Notices are described in 310 CMR 5.30 through 5.39.

cases of delayed statement, or where subsequent amendment of the issues is necessary, sufficient time shall be allowed after full statement or amendment to afford all parties reasonable opportunity to prepare and present evidence and argument respecting the issues.

M.G.L. c. 30A, s. 11 (1). The standard for judicial review of agency procedures in administrative hearings is that a court will set aside an agency decision if the substantial rights of any party may have been prejudiced because the decision is made upon unlawful procedure. M.G.L. c. 30A, s. 14. In addition to considering the various cases cited in the record, I found the Supreme Judicial Court cases decided under the notice provision of M.G.L. c. 30A, s. 11(1) to provide relevant guidance on how the Department may handle defects in and amendments to Penalty Assessment Notices.² See Cella, Mass. Practice, Administrative Law and Practice, Vol. 38, s. 388 and 389. I discuss the question of amendments, the required contents of a Penalty Assessment Notice, and the consequences of defects generally before turning to issues specific to this case.

Amendments of a Penalty Assessment Notice

A Penalty Assessment Notice serves two successive purposes by stating the acts or omissions which constitute the basis for the appeal, the penalty amount, and appeal rights and procedures. 310 CMR 5.32.³ The primary purpose is as a notice, to provide the recipient with the information necessary to decide whether to pay the penalty or to appeal. The opportunity to appeal is waived unless the recipient of the Notice denies the occurrence of the act or omission, asserts the amount of the proposed penalty is excessive, or does both. 310 CMR 5.35. A Penalty Assessment Notice also serves as the

² In a superior court challenge of a Department assessment under M.G.L. c. 21A, s. 16, the court upheld the penalty based upon the customary M.G.L. c. 30A review. Central Water District Associates v. Department of Environmental Protection, Worcester Superior No. 93-0536, 2 Mass. L. Rep. 81 (March 29, 1994). I did not find the distinction as to penal statutes or the comparison to the civil or criminal procedural rules to provide particularly helpful or controlling guidance on these issues.

³ Additionally, as required by 310 CMR 1.01(6)(c) for a notice of Department action, a Notice must cite to any statute or regulation which authorizes the Department to take the action.

touchstone in the conduct of an adjudicatory hearing after appeal, where the burden of proof of the act or omission alleged in the Notice is allocated according to whether the recipient of the Notice denies the allegations. 310 CMR 5.36(3). The amount of the penalty proposed in the Penalty Assessment Notice is similarly the amount subject to challenge by a petitioner in an administrative hearing. 310 CMR 5.35(2). See Matter of Associated Building Wreckers, Docket No. 2003-132, Final Decision (July 6, 2004)(challenges to penalty amounts).

As the Administrative Magistrate states, neither the administrative penalty statute nor the regulations expressly allow the Department to amend a Penalty Assessment Notice.⁴ I am not persuaded that the lack of express authority is conclusive.

Amendments to the statement of acts or omissions constituting the violation or the penalty amount by the Department during the twenty-one day appeal period after issuance could certainly upset the statutory scheme of M.G.L. c. 21A, s. 16 and prejudice an appeal.⁵ However, to guide the conduct of the hearing after an appeal is filed, the cases suggest a more flexible approach that would allow an amendment to a Penalty Assessment Notice as long it would not conflict with the purpose of the Notice as

⁴ The provisions governing the conduct of an adjudicatory proceeding on a Penalty Assessment Notice refer to amendments of statements filed to appeal a Penalty Assessment Notice and cite to 310 CMR 1.01(6)(g), which in the current regulations governs consolidation of hearings. However, 310 CMR 1.01(5)(g) in effect when the 310 CMR 5.00 was promulgated is entitled Amendments and Withdrawal of Pleadings and states that the agency or presiding officer may “permit either Party to amend its pleading upon condition just to all Parties.” 310 CMR 1.01(6)(g) December 31, 1986 version. This at least suggests that the Department originally envisioned the amendment of Penalty Assessment Notices, as they would have been the only pleading that could have been amended or withdrawn by the Department. The current provision on Orders to File, Amendments, and Withdrawal of Notices of Claim appears at 310 CMR 1.01(6)(g) and specifies that the presiding officer may allow a party to amend or withdraw a “pleading upon conditions just to all parties.” 310 CMR 1.01(6)(e) December 17, 2004 version, effective for claims filed after January 1, 2005.

⁵ Should the Department realize that a Penalty Assessment Notice recently issued is materially defective during the appeal period, the Department may rescind and reissue.

intended by M.G.L. c. 21A, s. 16 and the alleged violator has an adequate opportunity to respond as required by M.G.L. c. 30A, s. 11(1).⁶

The interests of administrative efficiency and justice would both appear to be better served by *not* barring amendments. See 310 CMR 1.01(1)(b). Without amendments as a procedural option for the limited occasions when appropriate circumstances arise, the Department would have no option other than to issue another Penalty Assessment Notice - likely to be followed by another appeal - additional hurdles for both the Department and the alleged violator without tangible benefit to either party. Allowing amendments could encourage the exchange of information between the parties, where an alleged violator sought to have, for example, a penalty adjusted to reflect circumstances that the Department might agree would support a reduction.

M.G.L. c. 30A, s. 11(1) allows amendment after the initial notice of issues where necessary, provided the parties have an opportunity to prepare in response. The Department's hearing rules allow amendment of notices of claim and other pleadings upon conditions just to all parties. 310 CMR 1.01(6)(e). The Administrative Magistrate notes that the notice of claim is defined as "the first pleading in an adjudicatory proceeding," filed by the petitioner, concluding that the Department's notice which precedes it cannot also be a pleading. 310 CMR 1.01(1)(c). "Pleading" is not a defined term in the regulations, but generally means the allegations of the parties, basically the complaint and answer. See Black's Law Dictionary, 5th Ed. (1979). A Penalty Assessment Notice is the functional equivalent of a complaint. The notice of claim initiates the adjudicatory appeal portion of an adjudicatory proceeding, and in that sense

⁶As an example of differing requirements between the statutes, a notice under M.G.L. c. 30A need not identify the penalty amount, but the Administrative Penalty statute does require the penalty amount in a Penalty Assessment Notice.

it is the first pleading in the record. The petitioner includes the document being appealed, so that the Penalty Assessment Notice may be technically filed second, but it may fairly be characterized as a “pleading” nonetheless. 310 CMR 1.01(6)(b).

In prior rulings, the Department has allowed amendments which reduce the amount of the penalty. The Administrative Magistrate had allowed the Department to amend a Penalty Assessment Notice by substituting a lower penalty amount based on subsequent changes to the Department’s penalty calculation guidance, but distinguished the circumstances as dissimilar to those presented here. See Matter of Geary, Docket No. 2005-023, Ruling (April 25, 2005).⁷ Recently, the Commissioner issued a final decision in a case where the Department had filed a motion to amend a penalty amount in a Penalty Assessment Notice, the Administrative Magistrate did not rule on the motion, and the Commissioner stated that he would have granted the motion and assessed the amended penalty amount. Matter of Jeffrey Murray, Individually, and The Two Seventy Three Main Street Realty Trust, Docket No. DEP-05-134 (May 26, 2006) (penalty dismissed for failure to prosecute but reduced from \$97,031.25 to \$37,187.50).

The Department might seek to amend a Penalty Assessment Notice to add or delete statements based on new information if without prejudice to the alleged violator, leading to more efficient adjudication. In a license revocation case where a physician challenged the amendment of allegations after the initial statement without going through a review committee and without good cause for exceeding a time limitation, the court

⁷The Administrative Magistrate also cited to a recent ruling which concluded that the Department lacks the requisite authority to amend a Penalty Assessment Notice, but that interlocutory ruling has not been adopted by a final decision of the agency following a review of the entire record, and therefore, I disregard it. See Matter of Papoulias Family Trust, Anthony Papoulias and Nicholas Papoulias, Turstees, Docket Nos. DEP-05-113/DEP-05-114, Ruling on the DEP’s Motion to Amend and the Petitioner’s Motion for Summary Decision (April 13, 2006).

found a violation of the agency's own rules but no prejudice to justify reversal. The court noted that the allegations added by amendment were timely so that the physician had adequate notice to prepare a defense, and that evidence related to the allegations would presumably have been introduced anyway. Fisch v. Board of Registration in Medicine, 437 Mass. 128 (2002). See Martorano v. Department of Public Utilities, 401 Mass. 257 (1987). In Matter of Salem and Beverly Water Supply Board, the Administrative Magistrate in a Department case denied a motion to amend on the grounds that the addition of allegations would be unfair to a petitioner. Matter of Salem and Beverly Water Supply Board, Docket No. 2002-066, Ruling (March 26, 2003).⁸

As discussed below, even the failure to correct or supplement an inadequate or defective notice is not necessarily fatal.⁹ Nothing in this discussion, however, is intended to suggest that the Department should rely on amendment rather than a Penalty Assessment Notice which as originally issued fully conforms to the contents specified in 310 CMR 5.32 and Department guidance. Certainly timing matters, and should the Department seek to amend a Penalty Assessment Notice it should do so as early as possible, preferably in the prescreening stage of the proceeding, so that the Penalty Assessment Notice and the issues for adjudication are consistent. Motions to amend may be filed and as appropriate granted provided the alleged violator would be not prejudiced by the amendment.

⁸ Sometimes administrative decisions implicitly amend Penalty Assessment Notices, such as the deletion of SMP Trust as a party in this case.

⁹ As to minor revisions by amendment, an agency has the inherent power to correct inadvertent or clerical errors, subject to certain restrictions. H.N. Gorin & Leeder Management Co. v. Rent Control Board of Cambridge, 18 Mass. App. Ct. 272 (1984), New Palm Gardens, Inc. v. Alcoholic Beverages Control Commission, 11 Mass. App. Ct. 785 (1981).

The Contents of a Penalty Assessment Notice

A Penalty Assessment Notice must include a statement of the act or omission for which the penalty is assessed, the legal requirements violated, the penalty amount, and appeal and payment provisions. M.G.L. c. 21A, s. 16. An act or omission may result in violation of more than one statute or regulation. Each separate requirement is amenable to the calculation of a penalty. 310 CMR 5.03. Preconditions must be met for each penalty. 310 CMR 5.10. Under limited circumstances, each day a violation continues may constitute a separate offense. 310 CMR 5.24. Not unexpectedly, the calculation of administrative penalties is often quite complex, with the Notice intended to provide a “concise” version with supporting testimony and evidence to follow at a hearing if not waived. M.G.L. c. 21A, s. 16, 310 CMR 5.36.

The Administrative Penalties statute states that the Notice “shall include . . . [the] amount which the department seeks to assess as a civil administrative penalty for each such alleged act or omission.” M.G.L. c. 21A, s. 16 (emphasis added). I agree with the Recommended Decision that the use of the term “shall” is unambiguous and signals a mandatory obligation. The Department historically has not always identified separate penalty amounts for each violation in its Notices. I attribute the source of this discrepancy to an ambiguity which lies elsewhere, specifically in whether the term “penalty” or “civil administrative penalty”¹⁰ that appears throughout the statute in the singular refers to the total penalty amount or to a separate amount for each violation.

While the use of the term “each” suggests an itemized accounting of the total penalty amount divided into separate penalties for each offense, it may also be

¹⁰ The term “penalty” is not defined in the statute, and the regulatory definition simply states that it is the penalty sought to be assessed under M.G.L. c. 21A.s. 16 and 310 CMR 5.00. 310 CMR 5.05.

understood to require a Notice with an aggregate amount for the acts or omissions which must be separately identified and separately denied to avoid waiver. The term “penalty” when referring to the amount that must be paid is clearly referring to an aggregate or total amount for the Notice, not separate payments for each violation identified. In the context of continuing violations over time, the statute specifies that each day of noncompliance constitutes a “separate offense” subject to a “separate civil administrative penalty,” suggesting that the Legislature had the term “separate” reserved for disaggregated or component penalty amounts but chose not to require a “separate” penalty for each violation in the Notice itself. M.G.L. c. 21A, s. 16.

Finally, how the penalty amount is specified in the Notice is most directly relevant to the right of the alleged violator to challenge the amount. The recipient of a Notice must assert that “the money amount of the proposed civil administrative penalty is excessive” or will waive appeal of the penalty amount. M.G.L. c. 21A, s. 16, 310 CMR 5.35. Indeed, appeals customarily include a simple declarative statement that the penalty amount is excessive, referring to the total amount regardless of whether the Notice identified separate amounts for various violations. In comparison, the acts or omissions which form the basis of the violation are separately identified and usually are separately denied to avoid waiver in an appeal. M.G.L. c. 21A, s. 16, 310 CMR 5.35(1). I have found no prior final decision which states that the penalty amount in the Notice must be allocated among offenses or which suggests that an appeal must be itemized to respond to an itemized Notice.¹¹

¹¹In fact, this appears to be the first case where an Administrative Magistrate has recommended vacating a penalty for failure to identify separate penalties for separate violations since the Department began implementing its administrative penalty authority twenty years ago.

I conclude that a Notice is legally sufficient if the Department identifies as an aggregate the money amount for the each of the alleged acts or omissions that constitute the violations. At the same time, I note that allocating the penalty amount between offenses has considerable merit. The allocation of the penalty for each violation allows the alleged violator to make more refined judgments about the relationship between violations and the money amount of the penalty. Providing additional information as to how the penalty was calculated either within the Notice, with the Notice, or at least prior to the prescreening conference would not only assist the recipient in deciding whether or how to proceed but would likely improve the efficiency of the appeals process.

In addition to the amount of the penalty, the Department's regulations, but not the statute, specify that the Notice must also include a concise statement of the factors considered in determining the penalty. 310 CMR 5.32(3). In fact, both the statute and the regulations require the Department to consider an entire list of factors. M.G.L. c. 21A, s. 16, 310 CMR 5.25. The Department may meet this requirement by including the text in the Penalty Assessment Notice or at a minimum by identifying the citation for the factors.¹² Consideration of all factors has been a prerequisite to sustaining a penalty, as penalties have been vacated for failure to consider all the factors. See Matter of William T. Matt, Docket No. 97-011, Final Decision (October 7, 1998), James E. Grant Co., Docket No. 90-057 Final Decision (October 4, 2000). As a practical matter for purposes of notice, however, neither a recitation of the list at 310 CMR 5.25 nor a citation thereto sheds much light on how the Department actually calculated the penalty. Nonetheless,

¹² The statute requires the Department to consider each of the factors, identified in 310 CMR 5.25, prior to determining the amount of the penalty, so the concise statement in the Penalty Assessment Notice would properly contain the entire list. The Department's penalty determinations are prepared on worksheets and the explanation of the derivation of the penalty is provided to the petitioner in, but no later than, the prefiled testimony of its witnesses. Matter of David Keenan, Docket No. 2002-016 (November 24, 2004).

the Department chose to impose this requirement upon itself in its regulations, so the question becomes what consequences follow for such an omission.

When a Penalty Assessment Notice Must be Vacated

A deficiency in notice does not necessarily vacate a notice. I certainly agree with the Administrative Magistrate that agencies must comply with their own regulations. Royce v. Commissioner of Correction, 390 Mass. 425 (1983), Restaurant Consultants Inc. v. Alcohol Beverages Control Comm'n, 401 Mass. 167 (1987), Northbridge v. Natick, 394 Mass. 70(1985). However, a party must demonstrate prejudice for an agency's disregard of its regulations to constitute reversible error. Lodge No. 65 v. Planning Bd. Of Lawrence, 403 Mass. 531 (1988), Martorano v. Department of Public Utilities, 401 Mass. 257 (1987), Fisch v. Board of Registration in Medicine, 437 Mass. 128 (2002). Specifically as to notice, actions by agencies have been reversed where notice by police or an agency is required and not has not been given at all. Commonwealth v. Cook, 426 Mass.174 (1997)(Office of Campaign and Political Finance failed to provide notice and opportunity for hearing prior to providing evidence to attorney general), Commonwealth v. Carapellucci, 429 Mass. 579 (1999) (failure to provide copy of citation to violator after motor vehicle violation).

While complete lack of notice cannot be excused, notice has been deemed sufficient if it apprises the recipient of the proceeding and affords the opportunity to prepare. Failure to give proper advance notice of the time and place of the hearing is required, but substantial compliance with notice requirements so as to satisfy the purpose of the statute will suffice. Landers v. Eastern Racing Association, Inc., 327 Mass. 32 (1951). Interestingly, the leading cases involve agencies that did not respond to requests

by the recipient of a notice to supplement the notice rather than agency attempts to amend. For example, a notice of the Alcoholic Beverages Control Commissions which identified only the regulations violated but contained no facts (e.g., date of violation) was insufficient and therefore “unlawful procedure,” where the agency did not respond to a motion for more definite statement other than to provide an opportunity for the violator to review the whole file. But reversal of agency action is appropriate only if the substantial rights of the party were prejudiced, and the violator was unable to make that showing because the files were available for review, the record showed the violator was prepared to meet the evidence presented, and there had been no request for a continuance.

Aristocratic Restaurant of Massachusetts, Inc. v. Alcoholic Beverages Control Commission, 374 Mass. 547 (1978), appeal dismissed 439 U.S. 803 (1978).

In a licensing case, a chiropractor claimed the board should have supplemented its order and notice to provide more detailed information. A notice need not be “drafted with the certainty of a criminal pleading” as long as persons whose rights will be affected can understand the grounds for the action and have the opportunity to request a continuance or present additional evidence. Langlitz v. Board of Registration of Chiropractors, 396 Mass. 374 (1985). In another licensing case, a pharmacist complained of defective notice where there were two months between presentation of the board’s evidence and hearing of the defense; no error was found, as any defect in notice was cured by the opportunity during those two months to prepare the defense. Strasnick v. Board of Registration in Pharmacy, 430 Mass. 317 (1990) (“Notice must be reasonably calculated to apprise an interested party of the proceeding and to afford him an opportunity to present his case,” citing other cases). Similarly, a summary notice in a

liquor license revocation was upheld where it provided sufficient opportunity to prepare for a hearing, the licensee did in fact prepare, any defect would have been cured as the record developed, and lacking even any showing of prejudice, there was no substantial prejudice. Vaspourakan, Ltd. v. Alcoholic Beverages Control Commission, 401 Mass. 347 (1987).

I conclude that a Penalty Assessment Notice must not necessarily be vacated based upon the identification of a deficiency. The Department's practice as to consideration of the factors to determine a penalty has been to support a reference in the Notice with testimony of how the factors were applied in prefiled direct testimony provided to the alleged violator prior to the hearing. See Matter of William T. Matt, Docket No. 97-011, Final Decision (October 7, 1998), James E. Grant Co., Docket No. 90-057, Final Decision (October 4, 2000). The omission of a reference to the factors would not appear to detract from the opportunity of the recipient of a Notice to lodge an effective appeal, because a simple statement that the amount is excessive is sufficient.

In fact, it is not clear how the list of factors without application to the particular case would be of sufficient utility to the alleged violator to support a claim of prejudice if it were omitted. While I do not condone omissions of information required by Department regulations, I conclude that a penalty need not be vacated over an omission which appears to have been inadvertent and without consequence to the recipient. Similarly to the allocation of penalty amounts to different violations, however, I note that there would seem to be considerable merit in providing an alleged violator with the consideration of the factors in the calculation of the penalty as early as possible in the proceedings.

The Penalty Assessment Notice to Eastern

The Administrative Magistrate concluded that the Penalty Assessment Notice issued to Eastern must be vacated as the necessary remedy for failure of the Department to identify separate penalties for each violation, which she characterizes as frustrating legislative purpose and hampering the Petitioner's appeal. I find no fatal flaw in the Department's inclusion in the Penalty Assessment Notice of two violations, of the statute and the administrative order, and a single penalty amount that was intended to apply only to one violation. On the contrary, the Department did identify the alleged act or omission as required by 310 CMR 5.32(1), both the law and the order with which it alleged noncompliance as required by 310 CMR 5.32(2), and then stated "the money amount for each alleged act or omission for which the Penalty would be assessed," as required by 310 CMR 5.32(3). I am also not persuaded, as was the Administrative Magistrate, that the Petitioner was hampered by not knowing the allocation of the penalty amount, as the appeal focused on the Petitioner's claim that the site itself is not governed by the salt storage requirement in M.G.L. c. 85, s. 7A.¹³

In the Notice to Eastern, the Department stated the money amount to be assessed, \$9,900, for the act or omission for which the penalty was assessed, the alleged failure to store the salt in a shed and also stated a violation of an Order for which it did not seek a penalty. Because the Administrative Consent Order was also a notice of noncompliance, references to it and the Department's assertion that the Petitioner had not complied in full are not irrelevant to the Department's case or impermissibly included in the Penalty

¹³ The cases discussed above on deficiencies in notice suggest that recipients of agency notices should avail themselves of the opportunity afforded by an appeal to obtain more information or clarify any ambiguities in a notice, rather than rely on claims of inadequate notice or pursue defenses based on perceived shortcoming in or misunderstandings of the notice.

Assessment Notice. The Department is instructed to comprehensively identify laws, regulations, orders, licenses, or approvals that have not been complied with as a result of the alleged actions or omissions, and is not restricted to requirements that are penalized by the Notice provided they are related to the identified actions. 310 CMR 5.32(2). The most obvious feature of the Penalty Assessment Notice which lacks any explanation is how the amount of \$9,900 was derived based on the statutory maximum of \$50 per day. However, the calculation of multiple day penalty amounts is not a required component of the notice itself. The Department's failure to identify the factors it is required to consider in the Notice does not appear to have prejudiced Eastern.

The potential for prejudice is much greater from an omission in the Penalty Assessment Notice not addressed in the Recommended Decision. Notices of Department action must state the statutory or regulatory authority for action, and the Department consistently adheres to this rule in practice. See 310 CMR 1.01(6)(c). Citation to the Administrative Penalty statute or regulations provides an alleged violator with the key to understanding the Notice itself. Although not identified as required in the contents of a Notice at 310 CMR 5.32, I doubt the Department would argue the source of its authority can be omitted or that an alleged violator should not be informed of the regulatory context within which a Notice is issued. The Penalty Assessment Notice issued to the Petitioner contains no reference to M.G.L. c. 21A, s. 16 or 310 CMR 5.00, or to the Administrative Penalty Act or regulations, most likely an inadvertent error.¹⁴

Nonetheless, it has been Department practice to cite to its legal authority in its formal documents.

¹⁴ It is quite possible that there were oral or written communications contemporaneous with the Notice itself that did refer to the Department's authority, but for purposes of the disposition of this case, I need not decide whether such notice would be sufficient.

The fact that this omission was not raised by the Petitioner, as well as the quality and quantity of its filings, demonstrates that there was no prejudice here. However, the omission, together with the other procedural issues raised thus far, clouds this decision going forward. Rather than remanding this case for further administrative proceedings, therefore, I vacate the Penalty Assessment Notice and dismiss this appeal as moot. The Department may issue a new Penalty Assessment Notice, consistent with this Decision. I need not decide the question of the status and role of the participants, so that issue will be preserved. While the issuance of a new Penalty Assessment Notice, assuming the Department pursues that course, will cause a delay of a few weeks in resolving this long-standing dispute, the interests of all parties will be served by providing an opportunity to address the central issue of salt storage at this site in Chelsea without the added encumbrance of issues raised by the Department's practices in issuing Penalty Assessment Notices.

The parties to this proceeding are notified of their right to file a motion for reconsideration of this Decision, pursuant to 310 CMR 1.01 (14)(d). The motion must be filed with the Docket Clerk 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). The complaint must be filed in the Court within thirty days of receipt of this Decision.

This final document copy is being provided to you electronically by the
Department of Environmental Protection. A signed copy of this document
is on file at the DEP office listed on the letterhead.

William Harkins¹⁵
Director of Legislative and Budgetary Affairs

¹⁵ Commissioner Robert W. Golledge, Jr. recused himself from this case, and delegated authority to me to issue this Final Decision. I note that this Decision does not reach the substantive issues raised in the appeal.