

309 CMR: BOARD OF REGISTRATION OF
HAZARDOUS WASTE SITE CLEANUP PROFESSIONALS

309 CMR 8.00: ADMINISTRATIVE PENALTY REGULATIONS

Section

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8.01: Preconditions for Assessment of a Civil Administrative Penalty

A penalty may be assessed only for a failure to comply that:

- (1) meets the criteria set forth in 309 CMR 8.02, and
- (2) was any of the following:
 - (a) the subject of a previous Notice of Noncompliance, as set forth in 309 CMR 8.03;
 - (b) part of a pattern of noncompliance, as set forth in 309 CMR 8.04;
 - (c) willful and not the result of error, as set forth in 309 CMR 8.05; or
 - (d) a failure to comply that resulted in significant impact on public health, safety, welfare or the environment, as set forth in 309 CMR 8.06.

8.02: Noncompliance with a Law, Regulation, Order, or License

A penalty may be assessed only for a failure to comply which, at the time it occurred, constituted noncompliance with a requirement:

- (1) which was then in effect; and
- (2) to which that person was then subject.

8.03: Notice of Noncompliance

(1) Criteria for Determining Whether Prior Issuance of a Notice of Noncompliance Is Required for Assessment of a Civil Administrative Penalty. A penalty may be assessed only if either:

- (a) a Notice of Noncompliance has been given to that person as set forth in 309 CMR 8.03; or
- (b) a Notice of Noncompliance has not been given to that person but the failure to comply was as set forth in 309 CMR 8.01(2)(b), (c) or (d).

(2) Content of a Notice of Noncompliance. A Notice of Noncompliance shall:

- (a) describe one or more requirement(s) in effect when the Notice of Noncompliance was given, and for each such Requirement, the occasion(s) that the Board asserts said person was not in compliance therewith; and
- (b) specify a reasonable deadline or deadlines by which the person shall come into compliance with the requirement(s) described in the Notice of Noncompliance.

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(3) Criteria to be Considered in Determining Whether a Civil Administrative Penalty May Be Assessed After a Notice of Noncompliance Has Been Given. The Board may assess a penalty on any person when the criteria set forth in 309 CMR 8.02 and the following criteria are met:

- (a) the Board has previously given that person a Notice of Noncompliance;
- (b) that person did not:
 - 1. come into compliance, within the deadline specified in the Notice of Noncompliance, with the requirement(s) described in the Notice of Noncompliance, or
 - 2. submit, within the deadline specified in the Notice of Noncompliance, a written proposal setting forth how and when that person proposes to come into compliance with the requirement(s) described in the Notice of Noncompliance; and
- (c) noncompliance with the requirement(s) described in the Notice of Noncompliance continued or was repeated on or after the deadline(s) specified in the Notice of Noncompliance.

(4) Additional Criteria to be Considered in Determining Whether a Civil Administrative Penalty May Be Assessed After a Notice of Noncompliance Has Been Given. In determining whether to assess a penalty after a Notice of Noncompliance has been given, the Board may consider, but shall not be limited to considering, the following criteria:

- (a) whether or not other notices of non compliance have been issued to the same person within the preceding five years;
- (b) what the person did to prevent the violation for which the person would be assessed the penalty and the other violation(s) described in the prior Notice of Noncompliance(s);
- (c) what the person did, and how quickly the person acted, to come into compliance after the occurrence of the violation for which the person would be assessed the penalty and the other violation(s) described in the prior Notice(s) of Noncompliance;
- (d) what the person did, and how quickly the person acted, to remedy and mitigate whatever harm might have been done as a result of the occurrence of the violation for which the person would be assessed the penalty and the other violation(s) described in the prior Notice(s) of Noncompliance; and
- (e) the actual and potential damages suffered, and actual or potential costs incurred, by the Commonwealth, or by any other person, as a result of the occurrence of the violation for which the person would be assessed the penalty and the other violation(s) described in the prior Notice(s) of Noncompliance.

8.04: Pattern of Noncompliance

(1) Criteria to be Considered in Determining Whether Instances of Noncompliance Constitute a Pattern of Noncompliance for which a Civil Administrative Penalty May Be Assessed. A penalty may be assessed without the prior issuance of a Notice of Noncompliance if the criteria set forth in 309 CMR 8.02 are met and the violation thus being penalized is not an isolated instance but part of a pattern of noncompliance. In determining whether the violation to be thus penalized is not an isolated instance but part of a pattern of noncompliance, the Board shall consider, but shall not be limited to considering, the following criteria:

- (a) whether the person who would be assessed the penalty was given by the Board, on at least one previous occasion during the five-year period prior to the date of the Penalty Assessment Notice, a Notice of Noncompliance asserting violation(s) of the same requirement(s) as the requirement(s) for violation of which the person would be assessed the penalty;
- (b) whether the person who would be assessed the penalty was given by the Board, on at least two previous occasions during the four-year period prior to the date of the Penalty Assessment Notice, a Notice of Noncompliance asserting violation(s) of requirement(s) different from the requirement(s) for violation of which the person would be assessed the penalty;
- (c) whether the violation for which the person would be assessed the penalty and the other violation(s) described in the prior Notice(s) of Noncompliance, considered together, indicate:
 - 1. a potential threat to public health, safety, or welfare, or the environment;
 - 2. an interference with the Board's ability to efficiently and effectively administer its programs;or
 - 3. an interference with the Board's ability to efficiently and effectively enforce any requirement to which 309 CMR applies.

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(2) Additional Criteria to be Considered in Determining Whether Instances of Noncompliance Constitute a Pattern of Noncompliance for which a Civil Administrative Penalty May Be Assessed.

In determining whether the violation to be penalized is not an isolated instance but part of a pattern of noncompliance, the Board may consider, but shall not be limited to considering, the following criteria:

- (a) what the person did to prevent the violation for which the person would be assessed the penalty and the other violation(s) described in the prior Notice(s) of Noncompliance;
- (b) what the person did, and how quickly the person acted, to come into compliance after the occurrence of the violation for which the person would be assessed the penalty and the other violation(s) described in the prior Notice(s) of Noncompliance;
- (c) what the person did, and how quickly the person acted, to remedy and mitigate whatever harm might have been done as a result of the occurrence of the violation for which the person would be assessed the penalty and the other violation(s) described in the prior Notice(s) of Noncompliance; and
- (d) the actual and potential damages suffered, and actual or potential costs incurred, by the Commonwealth, or by any other person, as a result of the occurrence of the violation for which the person would be assessed the penalty and the other violation(s) described in the prior Notice(s) of Noncompliance.

8.05: Willful Noncompliance

A penalty may be assessed without the prior issuance of a Notice of Noncompliance if the criteria set forth in 309 CMR 8.02 are met and the violation was willful and not the result of error.

8.06: Noncompliance Resulting in Significant Impact on Public Health, Safety, Welfare or the Environment

A penalty may be assessed without the prior issuance of a Notice of Noncompliance if the criteria set forth in 309 CMR 8.02 are met and the violation thus being penalized resulted in significant impact on public health, safety, welfare or the environment.

8.07: Determining the Money Amount of a Civil Administrative Penalty

The money amount of each penalty assessed shall be determined in accordance with the criteria set forth in 309 CMR 8.07 through 8.09.

8.08: Minimum Permissible Penalty

No penalty assessed shall be less than \$100.00.

8.09: Maximum Permissible Penalty

For each noncompliance except unauthorized practice, the full amount of the Penalty assessed shall not exceed \$1,000. The maximum penalty for unauthorized practice shall not exceed \$1,000 for each offense.

8.10: Factors to be Applied in Determining the Money Amount of a Civil Administrative Penalty

In determining the amount of each penalty, the Board shall consider each of the following:

- (1) the actual and potential impact on public health, safety, and welfare, and the environment, of the failure(s) to comply that would be penalized;
- (2) the actual and potential damages suffered, and actual or potential costs incurred, by the Commonwealth, or by any other person, as a result of the failure(s) to comply that would be penalized;

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- (3) whether the person who would be assessed the penalty took steps to prevent the failure(s) to comply that would be penalized;
- (4) whether the person who would be assessed the penalty took steps to promptly come into compliance after the occurrence of the failure(s) to comply that would be penalized;
- (5) whether the person who would be assessed the penalty took steps to remedy and mitigate whatever harm might have been done as a result of the failure(s) to comply that would be penalized;
- (6) whether the person being assessed the penalty has previously failed to comply with any regulation, order, or license issued or adopted by the Board, or any law which the Board has the authority or responsibility to enforce;
- (7) making compliance less costly than the failure(s) to comply that would be penalized;
- (8) deterring future noncompliance by the person who would be assessed the penalty;
- (9) deterring future noncompliance by persons other than the person who would be assessed the penalty;
- (10) the financial condition of the person who would be assessed the penalty;
- (11) the public interest; and
- (12) any other factor(s) that reasonably may be considered in determining the amount of a penalty, provided that said factor(s) shall be set forth in the Penalty Assessment Notice.

8.11: Procedures for Assessment of a Civil Administrative Penalty; Remedial Education Option

- (1) Each penalty assessed shall be assessed in accordance with the procedures set forth in 309 CMR 8.11 through 8.18.
- (2) Right to Choose Remedial Education Instead of Penalty. In every proceeding involving assessment of a penalty, except a proceeding concerning unauthorized practice, the person being assessed the penalty shall have the right to choose to either pay the full amount of the penalty in accordance with 309 CMR 8.18 or attend and successfully complete a course of remedial education prescribed by the Board within reasonable deadline specified by the Board.
- (3) Waiver of Right to Choose Remedial Education. Whenever the Board seeks to assess a penalty on any person, such person shall be deemed, effective 21 days after the date of issuance of a final decision approved by the Board, to have waived his or her right to choose to attend and successfully complete a course of remedial education prescribed by the Board in lieu of paying the full amount of the penalty, unless the Board receives from that person a written statement that states he or she elects to attend the course of remedial education as prescribed, and within the deadline specified, in the Board's final decision.

8.12: Notice of Intent to Assess a Civil Administrative Penalty

- (1) Whenever the Board seeks to assess a penalty, the Board shall issue to the person on whom the penalty would be assessed a notice of intent to assess a civil administrative penalty, the content of which shall be as set forth in 309 CMR 8.13, and which shall be served as set forth in 309 CMR 8.14.
- (2) Notwithstanding 309 CMR 8.12(1), prior to issuing a notice of intent to assess a civil administrative penalty to the person on whom the penalty would be assessed, the Board shall provide such person an opportunity to discuss the alleged noncompliance with the Board at an informal conference, except where the noncompliance concerns unauthorized practice.

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8.13: Content of Notice of Intent to Assess a Civil Administrative Penalty

Each Penalty Assessment Notice shall include all of the following:

- (1) a concise statement of the alleged act or omission for which such penalty would be assessed;
- (2) each law, regulation, order, or license which has not been complied with as a result of such alleged act or omission;
- (3) the money amount which would be assessed as a penalty for each alleged act or omission for which the penalty would be assessed, and a concise statement of the factors considered by the Board in determining this amount;
- (4) a statement that the person on whom the penalty would be assessed has a right to an adjudicatory hearing on such assessment;
- (5) a statement of the requirements that must be complied with by the person on whom the penalty would be assessed in order for said person to avoid being deemed to have waived said person's right to an adjudicatory hearing; and
- (6) a statement of how and by when the penalty must be paid if the person on whom the penalty would be assessed waives said person's right to an adjudicatory hearing.

8.14: Service of Notice of Intent to Assess a Civil Administrative Penalty

Each Penalty Assessment Notice shall be served, by one or more of the following methods, on the person on whom the Board seeks to assess the penalty:

- (1) Service in hand at the person's address last known to the Board or at the last known address of any officer, employee, or agent of the person authorized by appointment of the person or by law to accept service.
- (2) Service in hand personally to the person, or to any officer, employee, or agent of the person authorized by appointment of the person or by law to accept service.
- (3) By certified mail, return receipt requested, addressed to the person's address last known to the Board or to the last known address of any officer, employee, or agent of the person authorized by appointment of the person or by law to accept service.

8.15: Right to Adjudicatory Hearing

Subject to the provisions of 309 CMR 8.16, whenever the Board seeks to assess a penalty on any person, such person shall have the right to an adjudicatory hearing.

8.16: Waiver of Right to Adjudicatory Hearing

Whenever the Board seeks to assess a penalty on any person, such person shall be deemed, effective 21 days after the date of issuance of the Penalty Assessment Notice pursuant to 309 CMR 2.10, to have waived the right to an adjudicatory hearing unless, within 21 days of the date of issuance of the Penalty Assessment Notice, the Board receives from that person a written statement that does either or both of the following, and does so subject to and in compliance with applicable provisions of 801 CMR 1.00:

- (1) denies the occurrence of the act(s) or omission(s) alleged by the Board in the Penalty Assessment Notice;
- (2) asserts that the money amount of the proposed Penalty is excessive.

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8.17: Conducting the Adjudicatory Hearing

- (1) Every adjudicatory hearing conducted pursuant to M.G.L. c. 21A, §§16 and/or 19G and 309 CMR 8.17 shall be conducted in accordance with all applicable provisions of M.G.L. c. 30A and 801 CMR 1.00, provided that to the extent such provisions are inconsistent with M.G.L. c. 21A, §§ 16 and/or 19G, and 309 CMR 8.17, the provisions of M.G.L. c. 21A, §§ 16 and/or 19G, and 309 CMR 8.17 shall apply.
- (2) The Board shall not be required to prove the occurrence of the act(s) or omission(s) alleged by the Board in the Penalty Assessment Notice and not denied in the statement filed pursuant to 309 CMR 8.16 (as may be amended in accordance with 801 CMR 1.01(6)(g)).
- (3) If, in the statement filed pursuant to 309 CMR 8.16, the person who would be assessed the penalty denies the occurrence of the act(s) or omission(s) alleged by the Board in the Penalty Assessment Notice, the Board shall, by a preponderance of the evidence, prove the occurrence of the act(s) or omission(s) denied in said statement.
- (4) If the person assessed the penalty files the statement required pursuant to 309 CMR 8.16, the subsequent adjudicatory proceeding shall be ended either by:
 - (a) a written agreement, which shall take effect only upon written approval by a majority of Board members; or
 - (b) a final decision, which shall take effect only upon written approval by a majority of Board members.

8.18: Paying a Civil Administrative Penalty

- (1) How Payment Shall Be Made. Each penalty shall be paid by certified check, cashier's check, or money order payable to the order of the Commonwealth of Massachusetts. No other form of payment shall be accepted.
- (2) When Payment Shall Be Made.
 - (a) Except as provided in 309 CMR 8.18(2)(b), each penalty assessed and for which remedial education is not elected as a substitute pursuant to 309 CMR 8.11, shall be paid in full as follows:
 1. If the person assessed the penalty waives the right to an adjudicatory hearing pursuant to 309 CMR 8.16, the penalty shall be due, and shall be paid in full, when such waiver takes effect (*i.e.* no later than 21 days after the date of issuance of the Penalty Assessment Notice pursuant to 309 CMR 2.10).
 2. If the person assessed the penalty files the statement described in 309 CMR 8.16 and if the subsequent adjudicatory proceeding is ended by a written agreement pursuant to 309 CMR 8.17(4)(a), the penalty shall be due, and shall be paid in full, no later than 21 days after the date the Board approves said agreement in writing.
 3. If the person assessed the penalty files the statement described in 309 CMR 8.16, and if the subsequent adjudicatory proceeding is ended by a final decision approved and signed by the Board pursuant to 309 CMR 8.17(4)(b), and if a penalty is assessed pursuant to said final decision, and if a civil action for judicial review is not commenced, pursuant to M.G.L. c. 30A, within 30 days of the date said final decision is approved and signed by the Board, the penalty shall be due, and shall be paid in full, no later than 30 days after the date the Board approves and signs said final decision.
 4. If the person assessed the penalty files the statement required pursuant to 309 CMR 8.16, and if the subsequent adjudicatory proceeding is ended by a final decision approved and signed by the Board pursuant to 309 CMR 8.17(4)(b), and if a penalty is assessed pursuant to said final decision, and if a civil action for judicial review is commenced, pursuant to M.G.L. c. 30A, within 30 days of the date said final decision is approved and signed by the Board, and if the Court upholds the assessment of the penalty in whole or in part, the penalty shall be due, and shall be paid in full, no later than 21 days after the date of the entry of the Court's judgment, or by such other deadline as the Court may prescribe.

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(b) The Board may authorize payment of a civil administrative penalty at a time or times later than those prescribed pursuant to 309 CMR 8.18(2)(a). No such authorization shall be valid unless made expressly and in writing. In the absence of any such express written authorization, the provisions of 309 CMR 8.18(2)(a) shall apply. If the Board gives any such express written authorization, the civil administrative penalty shall be paid in full at the time or times specified therein.

(c) If the person assessed the penalty files the statement for which the Board has provided in 309 CMR 8.11 but does not attend or does not successfully complete the course of remedial education prescribed by the Board by the deadline specified by the Board, that person shall pay the full amount of the penalty, plus interest at the rate set forth in M.G.L. c. 231, § 6C, calculated from the date such person filed such statement with the Board.

(3) Consequences of Failure to Make Payment When Due. Each person who fails to pay a penalty in full and on time in compliance with 309 CMR 8.18(2) shall be liable to the Commonwealth for up to three times the amount of the penalty, together with costs, plus interest from the time the penalty became final, and attorneys' fees, including all costs and attorneys' fees incurred directly in the collection thereof. This is in addition to any other remedy authorized by any requirement, including, but not limited to, suspension or revocation of license.

REGULATORY AUTHORITY

309 CMR 8.00: M.G.L. c. 21A, §§ 16 and 19 through 19J.

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NON-TEXT PAGE