

310 CMR 5.00: ADMINISTRATIVE PENALTY

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5.01: Authority

310 CMR 5.00 is promulgated by the Commissioner of the Department pursuant to the authority granted by M.G.L. c. 21A, §§ 2(28) and 16; by M.G.L. c. 30A, §§ 2 and 3; and by St. 1985, c. 95, §§ 2 and 3. 310 CMR 5.00 should be read together with M.G.L. c. 21A, § 16, which has many important substantive requirements not repeated in 310 CMR 5.00.

5.02: Purpose

310 CMR 5.00 is intended to:

- (1) promote protection of public health, safety, and welfare, and the environment, by promoting compliance, and deterring and penalizing noncompliance, with laws, regulations, orders, licenses, and approvals to which 310 CMR 5.00 apply.
- (2) assure that the Department assesses civil administrative penalties, and otherwise implements M.G.L. c. 21A, § 16, lawfully, fairly, and consistently.
- (3) enhance the Department's ability and effectively:
  - (a) administer its present and future programs.
  - (b) enforce laws, regulations, orders, licenses, and approvals to which 310 CMR 5.00 apply.

5.03: Applicability

310 CMR 5.00 applies to every law the Department has the authority or the responsibility to enforce, and to every regulation, order, license, and approval issued or adopted by the Department. This includes laws, regulations, orders, licenses and approvals now in effect or enacted, issued, or adopted, or otherwise put into effect, in the future.

5.04: Severability

It is hereby declared that the provisions of 310 CMR 5.00 are severable, and if any provision hereof or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions hereof or applications thereof which can be given effect without the invalid provision or application.

5.05: Definitions

As used throughout 310 CMR 5.00, the following terms shall have the following meanings, unless the context clearly indicates otherwise.

Civil Administrative Penalty and Penalty each mean a civil administrative penalty that the Department seeks to assess pursuant to M.G.L. c. 21A, § 16 and 310 CMR 5.00.

Department means the Massachusetts Department of Environmental Protection.

Facility means a site, works, installation, establishment, structure, equipment, or any other thing for activity that is regulated, or that is subject to being regulated, pursuant to any Requirement to which 310 CMR 5.00 apply.

License and Approval each mean any license, permit, certificate, registration, charter, authority, approval, or other form of permission required by law or by regulation or order of the Department.

Noncompliance and Failure to Comply and Violation each mean any act or failure to act which constitutes or results in one or more of the following:

- (a) engaging in any business or other activity without a license or approval whenever engaging in such business or activity requires such license or approval.
- (b) engaging in any activity prohibited by, or not in compliance with, any Requirement.
- (c) not fully doing, or not doing in timely fashion, anything required by any Requirement.

Notice of Intent to Assess a Civil Administrative Penalty and Penalty Assessment Notice each mean a written notice that the Department is seeking to assess a Penalty pursuant to M.G.L. c. 21A, § 16 and 310 CMR 5.00.

Notice of Noncompliance and Noncompliance Notice each mean a written notice given to a person by the Department and which says that said person has failed to comply on any specified occasion with any described Requirement(s).

Person means any agency or political subdivision of the Commonwealth, any state, public or private corporation or authority, individual, trust, firm, joint stock company, partnership, association, or other entity, or any group thereof, or any officer, employee, or agent thereof. Without limiting the generality of the foregoing, the term Person shall also include:

- (a) any city, town, district, or body politic of the Commonwealth, and
- (b) any agency or authority of the Federal government whenever, as a matter of Federal law, that Federal agency or authority is required to comply with State law, and is subject to State-imposed penalties for noncompliance.

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Requirement means any regulation, order, license, or approval issued or adopted by the Department, or any law which the Department has the authority or responsibility to enforce.

Right-to-Know Requirements means Requirements enforced by the Department governing disclosure of information regarding the use of toxic or hazardous substances in the workplace [see M.G.L. c. 111F, §§ 1 through 3 and 16 through 19, and 310 CMR 33.00].

Same Requirement(s) means Requirement(s) that require, or prohibit, the same action or activity.

Site means the same or geographically contiguous property owned, operated, or controlled by the same person. A site may be divided by a public or private right-of-way. Non-contiguous properties owned by the same person but connected by a right-of-way which that person controls, and to which the public does not have access, are considered on-site property.

5.06: Effective Date

310 CMR 5.00 shall be effective on and after September 2, 1986.

5.07: Computation of Time

Unless otherwise specifically provided by statute, 310 CMR 5.00, or any determination issued pursuant to 310 CMR 5.00, any time period prescribed or referred to in 310 CMR 5.00 or in any determination issued pursuant to 310 CMR 5.00 shall begin with the first day following the act which initiates the running of the time period, and shall include every calendar day, including the last day of the time period so computed. If the last day is a Saturday, Sunday, legal holiday, or any other day in which the Department's offices are closed, the deadline shall run until the end of the next business day. If the time period prescribed or referred to is six days or less, only days when the offices of the Department are open shall be included in the computation.

5.08: Issuance of Notices

Each notice given by the Department to a person pursuant to M.G.L. c. 21A, § 16 and 310 CMR 5.00 shall be deemed to be issued by the Department as follows:

- (1) If served in hand, the notice shall be deemed to be issued on the date when delivered:
  - (a) personally to the person, or
  - (b) personally to any officer, employee, or agent of the person authorized by appointment of the person or by law to accept service, or
  - (c) at the person's last known address in the Commonwealth, or
  - (d) 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) If given by mail (either regular mail or certified mail, return receipt requested) the notice shall be deemed to be issued when postmarked by the U.S. Postal Service.

5.09: Receipt of Notices

Each notice given by the Department to a person pursuant to M.G.L. c. 21A, § 16 and 310 CMR 5.00 shall be deemed to be received by said person as follows:

- (1) If served in hand, the notice shall be deemed to be received when delivered:
  - (a) personally to the person, or
  - (b) personally to any officer, employee, or agent of the person authorized by appointment of the person or by law to accept service, or
  - (c) at the person's last known address in the Commonwealth of Massachusetts, or
  - (d) 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.

5.09: continued

- (2) If given by certified mail, return receipt requested, the notice shall be deemed to be received either:
- (a) when signed for by:
    - 1. the person, or
    - 2. the person's officer, employee, or agent, including, without limitation, any officer, employee, or agent authorized by appointment of the person or by law to accept service, or
  - (b) when returned by the U.S. Postal Service to the Department as unclaimed, unless the Department is persuaded that the notice was not claimed for reasons beyond the control of the person to whom the notice was sent.
- (3) If given by regular mail, the notice shall be deemed to be received no later than the third business day after it is mailed to the person, unless the Department is persuaded otherwise by the person to whom the notice was mailed.

5.10: 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 310 CMR 5.11, and
- (2) was any of the following:
  - (a) the subject of a previous Noncompliance Notice, as set forth in 310 CMR 5.12.
  - (b) part of a pattern of noncompliance, as set forth in 310 CMR 5.13.
  - (c) willful and not the result of error, as set forth in 310 CMR 5.14.
  - (d) a failure to comply that resulted in significant impact on public health, safety, or welfare, or the environment, as set forth in 310 CMR 5.15.
  - (e) a failure to comply that consisted of failure to promptly report to the Department any unauthorized disposal of hazardous waste or any unauthorized release or discharge of oil or hazardous material into the environment, as set forth in 310 CMR 5.16.
  - (f) a failure to comply that consisted of a failure to maintain a permanent solution or a remedy operation status pursuant to M.G.L. c. 21E and 310 CMR 40.0000 and as set forth in 310 CMR 5.17.
  - (g) a failure to comply with the terms of an activity and use limitation pursuant to M.G.L. c. 21E, § 6 and 310 CMR 40.0000 and as set forth in 310 CMR 5.18.
  - (h) a failure to comply that consisted of knowingly making, or causing any person to make, a false, inaccurate, incomplete or misleading statement in a document submitted to or required to be kept by the department as set forth in 310 CMR 5.19

5.11: Noncompliance with a Law, Regulation, Order, License, or Approval

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

- (1) at the time it occurred constituted noncompliance with a Requirement:
  - (a) which was then in effect; and
  - (b) to which that person was then subject; and
  - (c) to which 310 CMR 5.00 apply; and
- (2) occurred on or after September 2, 1986.

5.12: 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 Noncompliance Notice has been given to that person as set forth in 310 CMR 5.12, or
  - (b) a Noncompliance Notice has not been given to that person but the failure to comply was as set forth in 310 CMR 5.10(2)(b) through (h).

5.12: continued

- (2) Content of a Notice of Noncompliance. A Noncompliance Notice shall:
- (a) describe one or more Requirement(s) in effect when the Noncompliance Notice was given, and for each such Requirement, the occasion(s) that the Department asserts said person was not in compliance therewith; and
  - (b) specify a reasonable deadline or deadlines by which the person shall either
    1. come into compliance with the Requirement(s) described in the Noncompliance Notice, or
    2. submit to the Department a written proposal setting forth how and when that person proposes to come into compliance with the Requirement(s) described in the Noncompliance Notice.
- (3) Criteria to be Considered in Determining Whether a Civil Administrative Penalty May Be Assessed After a Notice of Noncompliance Has Been Given. The Department may assess a Penalty on any person when the criteria set forth in 310 CMR 5.11 are met, and the following criteria are met:
- (a) The Department has previously given that person a Noncompliance Notice. Solely for purposes of implementing 310 CMR 5.12(3), the violation(s) described in the Noncompliance Notice must have occurred on or after September 18, 1985.
  - (b) That person did not:
    1. come into compliance, within the deadline specified in the Noncompliance Notice, with the Requirement(s) described in the Noncompliance Notice, or
    2. submit, within the deadline specified in the Noncompliance Notice, a written proposal setting forth how and when that person proposed to come into compliance with the Requirement(s) described in the Noncompliance Notice.
  - (c) Noncompliance with the Requirement(s) described in the Noncompliance Notice continued or was repeated on or after the deadline(s) specified in the Noncompliance Notice.
- (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 Department may consider, but shall not be limited to considering, the following criteria:
- (a) Whether or not five years or less have elapsed between the date of the most recent notice of noncompliance with the Requirement(s) for which a Penalty would be assessed and the date of the Penalty Assessment Notice.
  - (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 Noncompliance Notice(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 Noncompliance Notice(s).
  - (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 Noncompliance Notice(s).
  - (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 Noncompliance Notice(s).

5.13: 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 Noncompliance Notice if the criteria set forth in 310 CMR 5.11 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 Department shall consider, but shall not be limited to considering, the following criteria:

5.13: continued

(a) Whether the person who would be assessed the Penalty was given by the Department, on at least one previous occasion during the five-year period prior to the date of the Penalty Assessment Notice, a Noncompliance Notice asserting violation(s) of the Same Requirement(s) as the Requirement(s) for violation of which the person would be assessed the Penalty. Solely for purposes of implementing 310 CMR 5.13(1)(a), violations occurring prior to September 18, 1985 shall not be considered.

(b) Whether the person who would be assessed the Penalty was given by the Department, on at least two previous occasions during the four-year period prior to the date of the Penalty Assessment Notice, a Noncompliance Notice asserting violation(s) of Requirement(s) different from the Requirement(s) for violation of which the person would be assessed the Penalty. Solely for purposes of implementing 310 CMR 5.13(1)(b), violations occurring prior to June 26, 1986 shall not be considered.

(c) Whether the violation for which the person would be assessed the Penalty and the other violation(s) described in the prior Noncompliance Notice(s) occurred at the same facility.

(d) Whether the violation for which the person would be assessed the Penalty and the other violation(s) described in the prior Noncompliance Notice(s), considered together, indicate:

1. a potential threat to public health, safety, or welfare, or the environment; or
2. an interference with the Department's ability to efficiently and effectively administer its programs; or
3. an interference with the Department's ability to efficiently and effectively enforce any Requirement to which 310 CMR 5.00 apply.

(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 Department 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 Noncompliance Notice(s).

(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 Noncompliance Notice(s).

(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 Noncompliance Notice(s).

(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 Noncompliance Notice(s).

5.14: Willful Noncompliance

A Penalty may be assessed without the prior issuance of a Noncompliance Notice if the criteria set forth in 310 CMR 5.11 are met and the violation thus being penalized was willful and not the result of error.

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

A Penalty may be assessed without the prior issuance of a Noncompliance Notice if the criteria set forth in 310 CMR 5.11 are met and the violation thus being penalized resulted in significant impact on public health, safety, or welfare, or the environment.

5.16: Noncompliance Consisting of Failure to Promptly Report Any Unauthorized Disposal of Hazardous Waste or Unauthorized Release or Discharge of Oil or Hazardous Material Into the Environment

A Penalty may be assessed without the prior issuance of a Noncompliance Notice if the criteria set forth in 310 CMR 5.11 are met and the violation thus being penalized consisted of failure to promptly report to the Department:

- (1) any unauthorized disposal of oil or hazardous waste, as is defined by M.G.L. c. 21C, or
- (2) any unauthorized release or discharge of oil or hazardous material into the environment, as are defined by M.G.L. c. 21E.

5.17: Noncompliance Consisting of Failure to Maintain a Permanent Solution or Remedy Operation Status

A Penalty may be assessed without the prior issuance of a Noncompliance Notice if the criteria set forth in 310 CMR 5.11 are met and the violation thus being penalized consisted of a failure to maintain a permanent solution or remedy operation status, as are defined by M.G.L. c. 21E and 310 CMR 40.0000.

5.18: Noncompliance Consisting of Failure to Comply with Terms of Activity and Use Limitation

A Penalty may be assessed without the prior issuance of a Noncompliance Notice if the criteria set forth in 310 CMR 5.11 are met and the violation thus being penalized consisted of a failure to comply with the terms of an activity and use limitation, as is defined by M.G.L. c. 21E and 310 CMR 40.0000.

5.19: Noncompliance Consisting of Knowingly Making, or Causing any Person to Make, a False, Inaccurate, Incomplete or Misleading Statement In Document

A Penalty may be assessed without the prior issuance of a Noncompliance Notice if the criteria set forth in 310 CMR 5.11 are met and the violation thus being penalized consisted of knowingly making, or causing any person to make, a false, inaccurate, incomplete or misleading statement in a document submitted to or required to be kept by the department.

5.20: 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 310 CMR 5.20 through 5.29.

5.21: Minimum Permissible Penalty

No Penalty assessed shall be less than \$100.00.

5.22: Maximum Permissible Penalty

Subject to the provisions of 310 CMR 5.23 and 5.24, for each noncompliance, the Penalty assessed shall not exceed the amounts set forth in 310 CMR 5.22(1) or (2):

- (1) \$25,000 for each of the following:
  - (a) each release, discharge, or disposal of material into the environment without the approval of the Department, or in a manner not approved by the Department, whenever such release, discharge, or disposal requires the approval of the Department.
  - (b) engaging in any business or activity without a license or other approval from the Department whenever engaging in such business or activity requires such license or approval by the Department.
  - (c) failure to promptly report to the Department each unauthorized disposal of hazardous waste, as defined by M.G.L. c. 21C.
  - (d) failure to promptly report to the Department each unauthorized release or discharge of hazardous materials into the environment, as defined by M.G.L. c. 21E.

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- (e) failure to comply that is part of a pattern of noncompliance and not an isolated instance.
  - (f) knowingly making, or causing any person to make, any false, inaccurate, incomplete or misleading statement in any document submitted to or required to be kept by the department.
  - (g) failure to comply with or otherwise violate M.G.L. c. 21E or any regulation adopted thereunder.
- (2) \$250.00 for each failure to comply with Right-to-Know Requirements.
  - (3) \$1,000.00 for each noncompliance which is not described in 310 CMR 5.22(1) or (2).
  - (4) Notwithstanding the foregoing, the maximum permissible penalty amount may exceed the economic benefit realized by a person for noncompliance.

5.23: Penalizing Continued and/or Repeated Noncompliance

Subject to the provisions of 310 CMR 5.24, each day during which each noncompliance occurs or continues shall constitute a separate offense and shall be subject to a separate Penalty.

5.24: Calculating the Duration of Continued and/or Repeated Noncompliance

The number of days which shall constitute a separate offense and shall be subject to a separate Penalty shall be calculated as in 310 CMR 5.24(1) through (3). If noncompliance occurs or continues during any part of a day, that day shall be included in the calculation.

- (1) When a Noncompliance Notice Has Previously Been Given. If the Penalty would be assessed in accordance with 310 CMR 5.12(1)(a) the Department may assess a Penalty for:
  - (a) each day during which noncompliance occurred or continued,
    - 1. commencing with the day on which the Noncompliance Notice was received by the person on whom the Penalty would be assessed [see 310 CMR 5.09], and
    - 2. ending on the date of the Penalty Assessment Notice, and
  - (b) each day calculated pursuant to 310 CMR 5.24(3).
- (2) When a Noncompliance Notice Has Not Previously Been Given. If the Penalty would be assessed in accordance with 310 CMR 5.13, 5.14, 5.15, 5.16, 5.17, 5.18 or 5.19, the Department may assess a Penalty for:
  - (a) one day, and
  - (b) each day calculated pursuant to 310 CMR 5.24(3).
- (3) After a Penalty Assessment Notice Has Been Issued. If, after receiving a Penalty Assessment Notice, the person who would be assessed the Penalty does not come into compliance with any Requirement(s) described in said Penalty Assessment Notice, and does not make reasonable efforts to come into compliance with said Requirement(s), the Department may, subject to the provisions of 310 CMR 5.36, assess a Penalty for each day during which such noncompliance occurs or continues,
  - (a) commencing with the day on which the Penalty Assessment Notice was issued by the Department [see 310 CMR 5.08], and
  - (b) ending on the earliest of the following days:
    - 1. the day when the Person comes into compliance with said Requirement(s), or
    - 2. the day when the adjudicatory proceeding on the Penalty Assessment Notice is ended [see 310 CMR 5.36(5)] after the filing of the statement described in 310 CMR 5.35.

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

In determining the amount of each Penalty, the Department 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.

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- (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.
- (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, license, or approval issued or adopted by the Department, or any law which the Department 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.
- (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.

5.30: Procedures for Assessment of a Civil Administrative Penalty

Each Penalty assessed shall be assessed in accordance with the procedures set forth in 310 CMR 5.30 through 5.39. For each noncompliance with Right-to-Know Requirements, each Penalty assessed shall be assessed in accordance with the procedures set forth in the Right-to-Know Requirements to the extent said procedures are more stringent than the procedures set forth in 310 CMR 5.30 through 5.39.

5.31: Notice of Intent to Assess a Civil Administrative Penalty

Whenever the Department seeks to assess a Penalty, the Department 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 310 CMR 5.32, and which shall be served as set forth in 310 CMR 5.33.

5.32: 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, license, or approval 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 Department in determining this amount.

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- (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.
- (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.

5.33: 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 Department seeks to assess the Penalty:

- (1) Service in hand at the person's last known address in the Commonwealth 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 last known address in the Commonwealth, 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.

5.34: Right to Adjudicatory Hearing

Subject to the provisions of 310 CMR 5.35, whenever the Department seeks to assess a Penalty on any person, such person shall have the right to an adjudicatory hearing.

5.35: Waiver of Right to Adjudicatory Hearing

Whenever the Department 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 [*see* 310 CMR 5.08], to have waived the right to an adjudicatory hearing unless, within 21 days of the date of issuance of the Penalty Assessment Notice, such person files with the Department (*i.e.* the Department receives) a written statement that does either or both of the following, and does so subject to and in compliance with applicable provisions of 310 CMR 1.00: *Adjudicatory Proceedings*

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

5.36: Conducting the Adjudicatory Hearing

- (1) Every adjudicatory hearing conducted pursuant to M.G.L. c. 21A, § 16 and 310 CMR 5.00 shall be conducted in accordance with all applicable provisions of M.G.L. c. 30A and 310 CMR 1.00 (the Department's Rules for Adjudicatory Proceedings), provided that to the extent such provisions are inconsistent with M.G.L. c. 21A, § 16 and 310 CMR 5.00, the provisions of M.G.L. c. 21A, § 16 and 310 CMR 5.00 shall apply.
- (2) The Department shall not be required to prove the occurrence of the act(s) or omission(s) alleged by the Department in the Penalty Assessment Notice and not denied in the statement filed pursuant to 310 CMR 5.35 (as may be amended in accordance with 310 CMR 1.01(6)(g)).

5.36: continued

- (3) If, in the statement filed pursuant to 310 CMR 5.35, the person who would be assessed the Penalty denies the occurrence of the act(s) or omission(s) alleged by the Department in the Penalty Assessment Notice, the Department 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 310 CMR 5.35, the subsequent adjudicatory proceeding shall be ended either by:
  - (a) a written agreement, which shall take effect only upon written approval by the Commissioner of the Department, or by
  - (b) a final decision, which shall take effect only upon approval and signature by the Commissioner of the Department.

5.37: 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 310 CMR 5.37(2)(b), each Penalty shall be paid in full as follows:
    1. If the person assessed the Penalty waives the right to an adjudicatory hearing pursuant to 310 CMR 5.35, 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 [see 310 CMR 5.08].
    2. If the person assessed the Penalty files the statement required pursuant to 310 CMR 5.35, and if the subsequent adjudicatory proceeding is ended by a written agreement pursuant to 310 CMR 5.36(5)(a), the Penalty shall be due, and shall be paid in full, no later than 21 days after the date the Commissioner of the Department approves said agreement in writing.
    3. If the person assessed the Penalty files the statement required pursuant to 310 CMR 5.35, and if the subsequent adjudicatory proceeding is ended by a final decision approved and signed by the Commissioner of the Department [see 310 CMR 5.36(5)(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 Commissioner of the Department, the Penalty shall be due, and shall be paid in full, no later than 30 days after the date the Commissioner of the Department approves and signs said final decision.
    4. If the person assessed the Penalty files the statement required pursuant to 310 CMR 5.35, and if the subsequent adjudicatory proceeding is ended by a final decision approved and signed by the Commissioner of the Department [see 310 CMR 5.36(5)(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 Commissioner of the Department, 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 Court's decision, or by such other deadline as the Court may prescribe.
  - (b) The Department may authorize payment of a civil administrative penalty at a time or times later than those prescribed pursuant to 310 CMR 5.37(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 310 CMR 5.37(2)(a) shall apply. If the Department gives any such express written authorization, the civil administrative penalty shall be paid in full at the time or times specified therein.

5.37: continued

(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 310 CMR 5.37(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.

REGULATORY AUTHORITY

310 CMR 5.00: M.G.L. c. 21A, § 16; St. 1985 c. 95, §§ 2 and 3.